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# UNION SALTING—ORGANIZING AGAINST SMALL BUSINESS

## HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT & GOVERNMENT PROGRAMS

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

WASHINGTON, DC, JUNE 21, 2005

**Serial No. 109–21**

Printed for the use of the Committee on Small Business

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

23–176 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
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# UNION SALTING—ORGANIZING AGAINST SMALL BUSINESS

**TUESDAY, JUNE 21, 2005**

HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND GOVERNMENT PROGRAMS
*Washington, DC*

The Subcommittee met, pursuant to call, at 10:05 a.m. in Room 311, Cannon House Office Building, Hon. Marilyn N. Musgrave, [Chairman of the Subcommittee] presiding.

Present: Representatives Musgrave, Lipinski, Westmoreland, and Sanchez.

Chairwoman MUSGRAVE. This meeting will come to order. Good morning. Thank you all for being here today. I appreciate the witnesses taking their valuable time in appearing before this Subcommittee, and I offer special thanks to those of you who traveled great distances to be with us. I appreciate your effort.

Today's hearing is an opportunity for us to learn more about what is happening to small businesses and their employees throughout the United States when union officials direct abusive organizing campaigns toward non-organized employees in small businesses.

This practice is referred to as "salting". The term "salting" originated with the dishonest practice of placing gold in a barren mine to convince potential investors that the mine had potential.

Union salting is a practice directed by labor union bosses aimed at deliberately inserting one of their members into a non-union company. The union agent may or may not reveal their intentions on the employment application, but have a strategy for attack in either circumstance. The goal is normally to achieve a closed, exclusive union shop or to destroy the business.

Quite often small businesses are the favorite targets because they have minimal resources to defend themselves against the abusive practices.

Without disclosing union affiliation, the paid union organizer typically aims to establish a wellspring of support for the union effort within the company. Fellow employees often do not know that their new co-worker is a paid union organizer. The union-paid salt is often intentionally disruptive, antagonistic, and combative with both the employer and fellow employees during the organizing process.

Whether organization is successful or not, the agent typically employs some of the following tactics: Sabotage of equipment and work sites; deliberate work slow downs; intentionally creating unsafe working conditions; and perhaps the most crippling, filing frivolous unfair labor practice complaints or discrimination charges against the employer with the National Labor Relations Board, the Occupational Safety and Health Administration, or the Equal Employment Opportunity Commission.

The goal of salts that actually reveal their affiliation on the application, but are not hired, is to immediately notify union lawyers who, in turn, file suit against the company on the grounds of discrimination. This happens irrespective of the reason for non-employment.

Willfully deceiving an employer during the hiring process, as part of a systematic agenda to harm a business, is a deplorable tactic. I believe these acts should be exposed for what they are—fraudulent practices.

The following statement was published in the newsletter of the International Brotherhood of Electrical Workers, dated March 1995: "These [companies] know that when they are targeted with stripping, salting and market recovery funds, it is only a matter of time before their foundations begin to crumble. The NLRB charges, the attorney fees, and the loss of employees can lead to an unprofitable business."

Salting is a practice rooted in dishonesty and deception. Its focus is to make small businesses die the death of a thousand cuts.

The brutal practice is extremely harmful to an employer who, acting in good faith, wants to provide a service, make a living, create jobs, and provide wages for families in his community.

No small business owner should be threatened with expensive, protracted legal fights if they do not break under the pressure applied by union agents and ruinous lawsuits.

This hearing should reveal candid, real life experiences from employers subjected to salting. Many others were also invited to testify, but declined an invitation, out of fear their businesses would be targeted for retribution by organized labor.

In fairness, we also submitted a personal invitation to John Sweeney, president of the largest labor organization in the nation, the American Federation of Labor and Congress of Industrial Organizations. He declined to appear.

In a few minutes, we will hear from our respected colleague from Iowa, Representative Steve King. I consider him a friend and appreciate his leadership on this issue. He is also a member of the full Committee, so I extend to him the offer to join us following his testimony.

Congressman King will be explaining the need for his legislation, H.R. 1816, the "Truth in Employment Act of 2005."

While I will let Mr. King go into further detail, the bill amends section 8[a] of the National Labor Relations Act to make clear that an employer is not required to hire any person who seeks a job in order to promote interests unrelated to those of the employer.

I am proud to cosponsor his legislation and will work with him in any way possible to ensure its passage in the House.

As I stated, I am very eager to hear today's testimony, but before we get to Mr. King, I would like to yield to the distinguished gentleman from Illinois, our Ranking Member, Mr. Lipinski.

[Chairman Musgrave's opening statement may be found in the appendix.]

Mr. LIPINSKI. Thank you, Madam Chairman.

I want to thank everyone for coming today to discuss this important issue. As job creation continues to lag, we see the toll that it is taking on many workers. Jobs are being shipped overseas, wages are being slashed, and benefits such as health care and retirements are vanishing, but we should not be looking for an undeserving scapegoat for the country's economic problems.

Despite the lagging economy, the American worker has never been more productive. Unfortunately, the lack of job creation is causing some to try to weaken important labor protections rather than to focus on the real economic problems such as rising energy and health insurance prices.

The reality is that a need does exist for unions to protect and advocate for our nation's workers. Unions ensure that Americans earn a decent wage and unions help deliver a workforce committed to economic growth.

While some employers allow the opportunity to unionize, there are others who construct barriers and engage in covert campaigns to intimidate and dissuade workers from learning about the benefits of union membership.

Therefore, the only way for these non-union workers to find out about their rights and the working conditions to which they are entitled is through the practice of salting.

Salting is about the empowerment of working people. It is a practice that educates workers about what a union could do for them. This practice is especially useful in industries such as construction where workers are constantly moving from one job and one contractor to another.

Salting is the most effective way for union organizers to communicate with these workers. Unfortunately, there are a number of misconceptions surrounding salting. Salting does not disrupt the workplace. These individuals work hard to contribute to the company's overall success, and the law requires that no harm is done to the employer.

While we will hear some anecdotal stories today about salting abuses, there is simply no evidence that salting hurts small business. Many employers incorrectly believe that salting will result in frivolous charges being filed by unions. However, this is not the case.

Companies that follow the law actually benefit from salting. Many times this practice uncovers massive violations of workers' rights by employers attempting to gain unfair advantages.

While most employers truly want to do what is best for their employees, the reality is that there are bad players trying to prohibit their workers from earning fair wages and equal benefits. That is why unions are important and salting is a vital tool.

Today, as we look at H.R. 1816, it is important to pay close attention and recognize how this bill will change the current status

of workers' rights. I appreciate Representative King's work, but I think that this bill is not the right bill.

H.R. 1816 affects the basic rights of workers to form and join unions. Simply stated, this legislation allows an employer to fire or refuse to hire workers if they seek employment in order to organize on behalf of a union. This undermines the intent of the original National Labor Relations Act, which was enacted for the purpose of protecting the right of workers to form and join unions.

As recently as 1995, the U.S. Supreme Court ruled unanimously to uphold the practice of salting. We should not attempt to weaken processes that are critical in helping working families to access fair wages, health benefits and workplace protection.

By promoting workers' interests through collective bargaining, the National Labor Relations Act has been one of the most effective anti-poverty program in our country's history; In my district, it has allowed thousands of hard-working men and women to provide for their families and achieve the American dream.

This proposal is a step back from that commitment. We should be standing in support of working families, not pursuing initiatives that erode their quality of life.

I look forward to hearing the testimony here today, but I believe that this bill would not be good. It would harm the unions which are very important and have been important for many years in helping to provide good working conditions and allowing many workers to reach up into the middle class of this country.

Thank you.

Chairwoman MUSGRAVE. Thank you, Mr. Lipinski.

Again, we are honored to have Representative Steve King from the 5th District of Iowa with us today. Thank you for being here. We will adhere to the time constraints just to keep on schedule. I thank you for coming. And again, after you are done with your testimony, we would be honored if you would join us up here.

Thank you, Mr. King.

**STATEMENT OF THE HONORABLE STEVE KING (IA-05), CONGRESSMAN, U.S. HOUSE OF REPRESENTATIVES**

Mr. KING. Thank you, Madam Chairman, and I appreciate you holding this hearing today and the opportunity to be here to testify, and I will accept your offer to join on the panel afterwards to participate and listen to the rest of the testimony here this morning.

I also wish to associate with your remarks, your opening remarks, with regard to Truth in Employment Act, H.R. 1816. The presentation that you made very much mirrors the presentation that I hope to make this morning, but I would like to just deviate a little bit from maybe what is normal routine, and since this is a very short and brief bill, simply just to read the bill into the record because that is what we are considering here today, and it does amend section 8[a], and this would be exactly the quote of the bill.

"Nothing in this subsection shall be construed as requiring an employer to employ any person who seeks or who has sought employment with the employer in furtherance of other employment or agency status."

That is the bill, and so what it says is is that we are not going to require an employer to put somebody on their payroll that is working for other interests against the interests of the employer.

I would point out that the strength and the competitiveness of American, The Ranking Member, the gentleman from Illinois remarks with regard to competitiveness, I think, are appropriate here. But the strength of a nation is the competitiveness of its workforce and its people, and we do have productive workers in this country. That is why we have the largest—one of the big reasons why we have the largest economy in the world.

But we have to always be working to be more competitive, and when an employer is required to hire someone who is representing another agency or another interest, and specifically a union, and they are there for the specific purpose of putting pressure on that company to organize for a union, and I have been in that environment, and I have watched some of the pressure that has been brought to bear.

I am an employer too, and I have made out payroll every week for over 1,400 consecutive weeks, and to start a business, a highly capital-intensive business without any capital, and make that all work, you are stretched thin most of the time anyway. Small businesses in particular are stretched thin in this country in the load of regulation, taxes, all those burdens are harder on small businesses than they are on big business.

When you inject into that a union salting process that puts that employer in a position where they are looking at the actions of one or more employees out there in your industrial plant or your construction company or whatever it might be, and you start to see things go wrong, and maybe the oil did not get changed, maybe a machine did not get greased, maybe the floor does not get mopped up, all of these little things that can be explained away sometimes are intentional.

Sometimes you can look back into the history of that employee and recognize their pattern, where they have come from. The grape vine will feed you a lot of that information, and find out I have got an employee here that does not have my best interests in mind.

When you hire them and you pay them on the payroll by the hour with wages and benefits, their job is to help you make money. And if they are there making money from another agency for the very purposes of organizing a company to become union, then that is a subversive tactic.

If we have barriers in place that prevent an employer from eliminating an employee who one can draw a reasonable conclusion that they are there as subversive tactics and not to further the best interests of that company, this government should not be standing in the way of a legitimate decision by an employer.

By the way, employers are interested in making money, and many of them run union operations and merit shop operations, and many companies are out there double-breasted. They see the merits of both sides, and I have always been one who defended the right of the worker to organize. I hate to think what it would be like in this country if you would back up to the beginning of the previous century if employees had not been able to organize. We needed

that, in some degree we need that today. But it is a right in this country to market your services.

If you want to package them up and mark them as a union, fine. Be competitive that way. But if you want to undermine and subvert and take businesses out of business for the purposes of organizing a union within a merit shop company, or maybe just eliminating the competition for a union shop company, these things are wrong, they are immoral, they are unethical, they should be against the law, and certainly there should not be a federal statute in the way that puts an employer in a condition where they are subject to these kind of suits that are brought forward that bog them down, that burden them with their capital, and keep them from focusing on this thing that we all agree on is competitiveness.

We need to be promoting better and better competitiveness in this country. This bill, Truth in Employment Act, H.R. 1816, I believe does that, and that is why I brought this forward, and I appreciate the cosponsorship on your part, Madam Chair, and a number of others on this bill.

Thank you.

[Congressman King's statement may be found in the appendix.]

Chairwoman MUSGRAVE. You have a few minutes left, so I am disappointed that you did not use your entire time. No, I want to thank you for adhering to the time constraint and for your testimony today. Thank you. Come join us.

At this time I call up the second panel, if you would come to the microphones, please. Sometimes we have a hard time hearing in the back of the room. So when the second panel speaks, if you will pull the microphone toward you.

The first witness we will hear from today is Mr. Mark Mix, and he is the National Right to Work Committee President. Thank you for being here with us.

## STATEMENT OF MARK MIX, NATIONAL RIGHT TO WORK COMMITTEE

Mr. MIX. Madam Chairman, thank you so much for the opportunity to testify on an issue that is increasingly growing in awareness. The Congressional Record on this issue is growing, and this is part of the process of continuing to grow that record.

Congressman Lipinski reflected in his opening statement that the theory of salting is one that makes sense, but it is the practical reality of it that is concerning to those of us who have watched this practice grow with alarming frequency. And the record that has been created so far, and there will be testimony that reflects that this issue has come up again and again in various congresses. The record indicates that notwithstanding the fact that there are statements on the record that say no one is hurt by this, we are going to hear from some people today, and this Congress has heard from people in the past whose businesses and livelihoods have been dramatically affected by the practice of salting.

Madam Chairman, I thank you for the opportunity to speak on behalf of the 2.2 million members of the National Right to Work Committee, dedicated to fighting compulsory unionism across America.

With this in mind, the National Right to Work Committee wholeheartedly supports H.R. 1816, the Truth in Employment Act, and commends Representative Steve King and the bill's 22 cosponsors for shedding light once again on this important issue.

When a small growing company seeks to hire new employees, union officials identify that business as a target to expand their forced-unionism empire.

Union officials coordinate a stream of job applicants, both overtly and covertly, who identify themselves in one manner, either overtly as union organizers, or covertly, who will try to get a job to, frankly, unionize a small company.

Union officials call this salting, and it is an appropriate metaphor because salting, in context is preparing food, makes it unappetizing. Salting is a great metaphor. This process makes doing business unappetizing to many of those people, employees and small employers who are caught in this catch-22.

If the employer hires the union salts, who are actually paid union organizers, union officials institute quick-snap elections trying for card check recognition. Then if they cannot get that, they work to intimidate employers through job actions and intimidate employees through threats and slow downs on the job that make life miserable for both employees and employers.

If the employer does not hire the union-appointed applicant, the union plants go straight to filing unfair labor practice charges with the National Labor Relations Board, and other agencies, to make life very difficult for the employer, and in a sense their employees.

Let me just divert here for a second because as we talk about this in the context of the small business, these small business men and women employ employees who, if they want, are protected by the National Labor Relations Act to organize and to unionize.

But oftentimes these small companies are doing business, and it takes a paid union organizer coming into the plant to start this process going forward. The idea that some workers are not aware of their rights under the law I think is not really accurate in the sense of their ability to exercise their rights. The legal protections that exist under the National Labor Relations Act to protect workers who want to legitimately unionize and aid in collective bargaining and mutual association for their betterment.

This concept of salting by definition is controversial and one of intimidation, and I think I will insert into the record some quotes from a union organizing magazine and pamphlets that indicate that.

The problem is salting is currently sanctioned by law, unfortunately, thanks to a ruling by the NLRB and the Supreme Court. Federal law should not force anyone to hire union salts whose goal is to put them out of business, or force the unwanted union representation on their current employees.

Big labor salting hurts all Americans. This kind of forced unionism can cost employees their jobs, and cause businesses to close their doors.

I would refer to some testimony that was delivered last year in this same Subcommittee. An IBEW, Electrical Brotherhood of Electrical Workers pamphlet describes salting this way: "It is infiltra-

tion, confrontation, litigation, disruption, and hopefully annihilation of all non-union contractors."

Salting is kind of—as I mentioned—a "got-you" type of unionizing tactic, and if you look at some of the quotes of some of the highest officials in organized labor, I think you can see how they view this particular practice.

In fact, one of the—again another IBEW pamphlet, union officials accede to the fact that these are noble pleas for workplace fairness openly admit as much that "These companies," explains the IBEW in its organizing manual, "know that when they are targeted with stripping, salting, and market recovery funds, it is only a mater of time before their foundations begin to crumble. The NLRB charges, the attorney's fees, and the loss of employees can lead to an unprofitable business."

Tom McNutt, the International Vice President of the United Food and Commercial Workers, has stated, "If we can't organize them, the best thing to do is to erode their business as much as possible."

Richard Trumka, the AFL-CIO Secretary-Treasurer, does not mince words either. He says, "If the unions attack the company's weak points and threatens its strength, he maintains the employer will not be able to conduct business as usual because it is consumed with defending itself against the union. It is the death of a thousand cuts rather than a single blow."

I think these quotes accurately reflect the views of how salting is actually used in reality, and I think that is what we are here to talk about, and we will hear some more about that.

I wholeheartedly endorse Congressman King's bill, and I hope that the Congress will continue this debate and move this bill to the floor for passage.

Thank you, Madam Chairman.

[Mr. Mix's statement may be found in the appendix.]

Chairwoman MUSGRAVE. Thank you, Mr. Mix.

Now we will hear from Ray Isaac. Thank you, Mr. Isaac, for coming.

**STATEMENT OF RAY ISAAC, ISAAC HEATING & A/C INC.**

Mr. ISAAC. Thank you. Chairman Musgrave and members of the Subcommittee.

On behalf of the Air Conditioning Contractors of America, ACCA, I wanted to thank you for the providing me the opportunity to testify today on this very critical issue to small business.

In addition to being a member of ACCA, I am president of Isaac Heating & Air Conditioning based in Rochester, New York. We are a 60-year-old, third generation heating and air conditioning business started by my grandfather. We have over 150 employees working for the company. We provide residential, commercial industrial heating, ventilation and air conditioning refrigeration service to customers throughout Rochester and the surrounding area.

In addition, I am serving a one-year term as secretary in ACCA's Board of Directors.

In running my business, I face many complex issues and challenges ranging from the industry labor shortages to complying with federal government regulatory requirements. In addition to these

issues, I also have to contend with an abusive practice from labor unions, known as salting, that threatens to disrupt my business, as well as others in this and other industries.

Salting is a term to describe a union member who obtains, or attempts to obtain, employment from a non-union contractor. Once employed, the union member, or salt, attempts to educate non-union employees about their rights, including the right to organize.

While I have felt that union salting was not a very honest way for a union to infiltrate a unsuspecting business, I could see how salting could be viewed as a legitimate organizing tool by the unions.

You can see the systematic approach that unions take to control jurisdictions to make sure that all construction work is done by union workers. These procedures have taken many forms to include salting, controlling manpower in a geographical area, and applying economic pressure to the customers of a non-union contractor.

I would like to submit for the record, as already has been done, a manual from the International Brotherhood of Electrical Workers that provides extensive information on how to union organize, including a discussion of salting and other organizing tactics.

Recently, however, instead of educating non-union employees on their rights, union salting has become nothing more than an overt and glorified tool of harassment and intimidation designed to antagonize the non-union business. The salt enters into employment with the contractors with the purpose of making allegations of unfair labor practices under the National Labor Relations Act. In many cases these allegations are proven false but require the non-union contractor to spend financial resources defending themselves from these false accusations.

Instead of educating workers, the goal of the union is to inflict economic loss and non-union employers about using the NLRB as a shield against these practices.

In my experience, another tool that is equally prevalent is the practice by a particular union to send in applicants who are underqualified, unprofessional, and in some cases even appear to be intoxicated personally by myself. This game of cat and mouse is played by construction unions all across the country, and it is a game that can cost honest, hard-working small businesses countless hours and hundreds of thousands of dollars to play this game with unions.

The unions are allowed to behave with disingenuous intentions when sending a union salt to obtain employment with a non-union contractor. Unfortunately, the small businesses are expected to respond to these applicants with genuine business reasons for not hiring them.

In my experience, many times the union does not even wait for a response on the status of an employment application from the business before filing an unfair labor practice charge claiming union animus.

In most cases these charges are dismissed as frivolous, yet the action of filing frivolous claims against contractors before the NLRB uses up precious federal time and resources that could be better used to pursue bona fide claims against truly egregious labor law violations.

My industry is currently undergoing a tremendous labor shortage, and we have to work hard to find qualified workers to meet the demands of my customers. Because of this intense competition for qualified workers, we must competitively compensate our technicians, otherwise they will and can seek employment with another company.

I also feel it is important to compensate employees for quality work and not have to follow a predetermined time schedule or other job classifications that a union requires.

In today's economy and the employment realities of my industry, this activity is counterproductive to the stimulation of the workforce.

In some cases, honest small businesses are caught in the quagmire. Instead of hiring genuine valid applicants honestly seeking gainful employment, they spend significant time and money addressing union harassment. Defending your small business against a ULP charge can be expensive for a small business whereas the NLRB covers the cost for the union salt that files a charge.

Many small businesses subsequently find themselves taking the safest route possible to avoid litigation. They hire no one. This disruptive behavior is the last thing our economy needs. In my opinion, salting has become peppering.

Thank you for your attention and the opportunity to present our views before your Subcommittee.

[Mr. Isaac's statement may be found in the appendix.]

Chairwoman MUSGRAVE. Thank you, Mr. Isaac.

Our next witness is Mr. Larry Cohen. Welcome to the Committee.

Sir, could I ask you to pull the microphone up. It is so hard to hear in this room.

Mr. COHEN. Yes, is that better?

Chairwoman MUSGRAVE. Yes. Thank you.

**STATEMENT OF LAURENCE J. COHEN, SHERMAN, DUNN, COHEN, LEIFER & YELLIG**

Mr. COHEN. Thank you, Chairman Musgrave, and Ranking Member Lipinski, for allowing me to present the views of the Building Trades Department of the AFL-CIO.

My name is Laurence Cohen. I am a member of the Washington law firm of Sherman, Dunn, Cohen, Leifer & Yellig, which is general counsel to the Building Trades Department.

The department is comprised of 15 national and international unions, representing over a million workers in the construction industry. And I ask that the written statement of Buildings Trades Department President Edward Sullivan be admitted in the record.

Chairwoman MUSGRAVE. Without objection

Mr. COHEN. We have witnessed attempts in the last five congresses to do what this bill seeks to do; that is, allow employers to discriminate against union organizers and supporters with impunity. Those bills went nowhere, nor should this.

Our position, Madam Chairman, is simply this: Salting is about organizing, organizing construction workers and construction employers, and construction unions use skilled workers, salts, as orga-

nizers, tell them to do their work properly and to organize only within the law.

They engage in the type of activity that Congress, a unanimous Supreme Court, and the National Labor Relations Board have recognized as being a fundamental right under the NLRA.

Contractors do not, as they often claim, lose control of their jobs as a result of a salting campaign because a salt, like any other employee, is subject to the employer's direction, should do his work in a satisfactory manner, and obey all lawful work rules.

What is really at stake here is whether employers should be allowed to discriminate against the employees on the basis of their union activity.

Now, let me address a fallacy I have heard about this bill; namely, that it would not take away any legitimate rights that employees now have.

That is wrong. The United States Supreme Court has held unanimously that salts as union organizers are entitled to the protections of the NLRA and cannot be discriminated against. This bill would end those rights, and effectively hang a sign in every non-union shop saying union supporters need not apply.

Under current law, legally the situation of a salt is no different from that of an employee who is already on the job and who decides to support a union to improve his or her working conditions.

Those who resist organizing in the construction industry claim, as you have heard, that unions seek to drive up employers' costs. Well, there are two answers to that.

First, the goal of all organizing is to eliminate unfair competition based on substandard wages and working conditions. If a non-union employer is paying substandard wages, and is organized, and a resulting collective bargaining agreement reached, he may have to pay the higher wages in that agreement.

Second, many non-union contractors gain an unfair competitive advantage by violating various laws. And when they save money by violating wage and hour laws or by failing to comply with prevailing wage requirements, as I might add Mr. Isaac was found by the New York Commission of Labor last year, or with OSHA requirements designed to protect the health and safety of employees, it is fair to expose them.

Those who violate worker protective laws victimize not only their employees, but legitimate contractors, union and non-union, who abide by the law.

The same employers claim that union organizers will produce an inferior work product or engage in sabotage on the job, and that they are helpless when that occurs.

If any of those acts take place, contrary to the instruction salts receive, employers are not without a remedy. The Supreme Court said this in its Town and Country decision, "A company faced with unlawful or possibly unlawful activity can discipline or dismiss the worker, file a complaint with the board, or notify law enforcement authorities."

Finally, there is the claim about the frivolous unfair labor practice charges. We have demonstrated in our written statement that the NLRB statistics do not support that, and the most common re-

sponse to salting by unions is the commission by contractors of unfair labor practices. When that occurs we will certainly file charges.

It is interesting that the ABC itself told its members how to avoid legal problems resulting from salting. In a 1995 tape, the message was comply with the law, do not discriminate, do not interrogate or threaten, and if you union activists are the most qualified applicants, hire them. In most cases, however, that very sound advice is disregarded.

Let me repeat, Madam Chairman, our object is to organize and salts serve that purpose by seeking to convince their fellow workers of the benefits of joining a union.

I would like very briefly to mention that you are going to hear a very sad story from Mr. Aldi, but it should be noted that just 10 days ago an administrative law judge of the NLRB found him guilty of multiple violations of the National Labor Relations Act, including five unlawful discharges; that he was found in an earlier case through unlawfully repudiated a collective bargaining agreement; and that he is being sued by the Secretary of Labor for, I quote, "willful and—

Chairwoman MUSGRAVE. Your time has expired.

Mr. COHEN. "—repeated violations of the Fair Labor Standards Act."

Thank you, Madam Chairman.

[Mr. Cohen's statement may be found in the appendix on behalf of Mr. Edward Sullivan.]

Chairwoman MUSGRAVE. Our next witness, Mr. Michael Aldi. Thank you.

**STATEMENT OF MICHAEL ALDI, ALDI ELECTRIC**

Mr. ALDI. Madam Chairwoman, members of the Subcommittee.

Chairwoman MUSGRAVE. Could I ask you also to pull the microphone a little closer?

Mr. ALDI. Turn it on.

Chairwoman MUSGRAVE. Thank you.

Mr. ALDI. Madam Chairwoman, members of the Subcommittee, thank you for the opportunity to share with you today my story about the devastating effects of union salting has on me.

My name is Michael Aldi, Jr. and I am a victim of a union salting campaign. I was the owner and president of a medium-sized electrical contracting company, Aldi Electric, Inc., in upstate New York. Aldi Electric was established in 1989, and was incorporated in July of 1997.

I am the product of divorced parents and I was raised on welfare by my single mother, and with five other brothers and sisters. I was a welfare-to-work success story, building my American dream, or so I thought.

With only $2,000 in my pockets and many long hours of work, I built a company that had yearly sales of over $1 million in 2001. In retrospect, my success in the electrical contracting business would be my downfall. Soon, my business would gain the attention of the International Brotherhood of Electrical Workers, or the IBEW for short.

In 1997, Aldi Electric had its first taste of union salting and sabotage. You see, through a competitive bidding process, I was

awarded the contract to wire a new Revco Pharmacy in Niskayuna, New York. During this project, it was discovered that concrete was poured into a conduit 30 feet in the air. The cost to correct this deliberate sabotage was over $5,000.

The suspected saboteur was eventually laid off due to lack of work, leaving the IBEW to file unfair labor practice charges with the National Labor Relations Board. This case is still open and has cost well over $10,000 in legal fees to defend.

In 2000, I hired an employee to work as a foreman to manage various jobs. This foreman/employee quit within only three months of being hired, without notice, in the middle of a large job. After he left it was discovered that he had taken company tools and equipment. Additionally, I found many hidden mistakes this employee made while I was acting as foreman that would cost the company $6,000 to repair.

This same employee then filed false allegations with the New York State Department of Labor, which the company decided to settle for $800 rather than face an expensive legal battle. After the settlement was reached, I discovered that this former employee had been on the union payroll the entire time he had been working for me.

The most extensive and egregious acts of union salting against my company were perpetrated by the IBEW Local 236 from the years 2002 to 2004. These acts would eventually ruin my business and force me into bankruptcy.

Toward the end of 2001, a childhood acquaintance of mine approach me asking for a job. He expressed to me that he had a falling out with the IBEW Local 236 due to the way that he had been treated. Needing his skill sets, and knowing that he was a union electrician, I hired him to work as a foreman to run job. Unknown to me at the time though IBEW Local 236 did not have any work in the area.

Since this childhood acquaintance did not want to travel out of the area, a representative from the IBEW Local 236 gave him an ultimatum. Either salt Aldi Electric or go on unemployment. I found this out after I had fired him. During his tenure at my company, he was constantly making mistakes that would cost thousands of dollars and numerous man hours to repair, so I thought they were honest mistakes.

In July of 2003, I caught this childhood acquaintance stealing electric materials and equipment and personal equipment from my home. After firing him, several employees approached me to tell me what this former employee had been doing all along.

Employees stated that they had seen him stealing materials and equipment from job site, sabotaging work, padding his and other time sheets, and forcing other employees to pad their time sheets. He also threatened other employees with violence and black balling within the electrical trade if they disclosed his activities. He communicated false statements to customers driving a wedge between the company and its customers, and he bragged to other employees that he was helping IBEW bring Aldi down.

In addition, on the advice of this childhood acquaintance, I hired his mother as an office manager to help his family. During her four-month tenure at Aldi Electric, she helped her son salting cam-

paign by sabotaging company payroll records, altering employee payroll records, and destroying company equipment sign-out sheets. This helped cover thefts of her son and other union salts, mismanaged company office practices and equipment, and succeeded in alienating additional customers by being rude on the phone with them When the internal sabotage was brought to my attention by a newly hired bookkeeper, the office manager was subsequent fired.

Also during 2003, I hired two additional employees to work as foremen. Eventually, both of these foremen were caught sabotaging jobs, stealing equipment, and padding time sheets and were suspected of arson that burned down an Aldi Electric equipment trailer out of town. They also threatened a builder not to pay Aldi Electric or they would face union problems of their own. This led the builder to withholding over $30,000 in payments due.

Several weeks after terminating these union salts, additional employees left the company out of fear of union retaliation and ended up joining the IBEW. This left Aldi Electric extremely short staffed.

So we sought to hire new employees.

Chairwoman MUSGRAVE. Your time has expired. Thank you.

Mr. ALDI. Thank you.

[Mr. Aldi's statement may be found in the appendix.]

Chairwoman MUSGRAVE. Our next witness is Ms. Anita Drummond. Thank you for coming to the Committee today.

**STATEMENT OF ANITA DRUMMOND, DIRECTOR OF LEGAL AND REGULATORY AFFAIRS, ASSOCIATED BUILDERS AND CONTRACTORS**

Ms. DRUMMOND. Thank you, Madam Chairwoman.

I am Anita Drummond with the Associated Builders and Contractors.

I want to just point out a few things in regards to some of the comments that have been made earlier.

One of the most significant things in the construction industry is that union membership has continually plummeted in recent years. It is now down to less than 15 percent of all construction workers are in a union.

Now, you would indicate that maybe because of economic times and the struggles that that is why union membership is down. They are, in fact, struggling to recapture their market share.

However, construction, opposed to other goods-producing industries, is booming. We have put in place construction of over $1 trillion worth of construction in 2004. That is double what it was ten years ago. Construction is booming. We expect to create 1 million new jobs in the next 10 years in addition to the 7 million employees we currently have, and the 2 million people that choose to be self-employed in the construction industry.

Therefore, unions naturally are struggling to capture market share, and part of that is union organizing tactics.

The traditional use of salting is in fact organizing, and as Mr. Cohen pointed out, in a lawful activity it is an employee that is in compliance with the laws, is working under the work practices of

that employer, and working to campaign the non-union employees about the benefits of a union.

But that is not how it always goes down. Importantly, in the struggle to recapture market share, union workers often are sent in, union organizers, to shut down companies. There was a reference to the legal fees of being 10,000. I can easily think of small companies, and that would be under the Small Business Administration's definition, those with less than $7 million on annual receipts, going through a compliance hearing can easily be $100,000.

Well, obviously, the rational would be, well, if they had to go through a compliance hearing, the must have obviously been in violation. But I believe that Mr. Aldi's description is exactly the kind of stories we hear.

As a result of the Town and Country case in 1995, a prima facie case was established that if an employer knows that you are union, you can go in wearing your union label, you can indicate it on your application, there is a prima facie case that if you do not hire that person you must be discriminating against them.

There has been a tremendous patchwork of case law in the past 10 years that leaves very little guidance for a good employer to follow that assures that they are not discriminating, yet are picking the best qualified candidates.

Some of the things as openings. Is there actual opening? In the Modern Electric case, in 1998, there was no proof there was an opening. Yet failure to hire a union organizer that, you know, identified themselves, was a prima facie case of discrimination.

If there is no necessary match, meaning we do not have an opening for an electrician or a qualified electrician at this time, then that should not—that should not establish a prima facie case of discrimination, but it does.

The timing, we have put our applications in. We have flooded you with applications six months ago. Now you have openings. You should call us. Do you necessarily fill all of the paperwork properly as required by our employment practices? And it has to be both policy and practices of the employer. They cannot discriminate in their practice. That is not necessarily the way the chips fall in these cases.

Probably the most egregious things is hiding the fact that you are a union organizers or putting bad references or incomplete work history, and the Wright Electric case is one of the most egregious examples of that.

Just yesterday the U.S. Supreme Court failed to grant a petition for certiorari on that matter where we have a case where an employee lied on the application, and when it was discovered after the employee was hired, they were not in fact qualified to work, that company is now being subjected to actually a civil lawsuit in the state. But it is that type of practice that continues to go on.

The legal activity of organizing, going into a workplace, being qualified, there is a job opening, being hired, and doing the job of convincing employees, whether it is in their best interest to organize, is it a legitimate right under the law for someone who is salting.

However, the law has continued to shield individuals that go into a workplace in order to shut down a workplace. If you are looking

at $100,000 in legal fees and you have less than $7 million in annual receipts, that is essentially consumed your entire profit margin, and more, and actually reduces your ability to gainfully employ folks.

Thank you very much, and I appreciate your time.

[Ms. Drummond's statement may be found in the appendix.]

Chairwoman MUSGRAVE. Thank you for your testimony and adhering to our time constraints.

Our final witness is Mr. Michael Avakian. Thank you very much for coming before us today.

**STATEMENT OF MICHAEL AVAKIAN, GENERAL COUNSEL, CENTER ON NATIONAL LABOR POLICY, INC.**

Mr. AVAKIAN. Thank you, Madam Chairman.

I am going to provide some summary comments based upon the testimony that I have already submitted, that statement, that is,

As general counsel for the Center on National Labor Policy, which is a nonprofit legal foundation, I take a different type of view on legislation because we had a request to testify, and based upon about 30 years of experience in the labor relations field, including representing small businesses and employees in the entire area of law, we have found that many of the problems dealing with salting that the bill that is pending before the House right now is intending to answer goes directly to the heart of a problem that began with the Town and Country decision, which we all can admit that the labor act now is said to provide protections to union organizers who enter the workforce through surreptitious means, maybe through regular means as well, but get into the workforce and start to do organizing.

I would observe, first, that the issues dealing with this problem are focused primarily in the construction industry because within the construction industry there is an exception for organizing without an employee vote. Section 8[f] of the labor act permits employees, or employers and labor organizations in the construction industry to enter into collective bargaining agreements notwithstanding the wishes of the employees.

Now, having said that, the way we have heard the unions and labor organizations are attempting to organize is by getting into the workplace and organizing workers.

Well, that sounds like a correct approach to begin with, but the case law does not bear it out. What happens with these persons that enter the workplace either through normal means, a hiring procedure, or through a surreptitious means, which Ms. Drummond just outlined, which could be applications that are incomplete.

I have had cases where—in representing small employers—the applications are actually filled out in advance by union organizers, submitted with references, omissions and so forth, which are incomplete and inaccurate, but still those lead to NLRB proceedings that require the small employer to vindicate and show that these people just are not credible in their application process.

Retirees are submitting applications. If they take a job, they lose their union retirement. So it does not make sense that a lot of people who are trying to become salts do become salt, or will become effective workers.

Upon entering the workplace, what do we see? Do we see effective, good, skilled workmanship, helping the employer and all the employees to have a successful business where they all can take away from the hard work that they accomplish with continued jobs, and growth in the business?

No, we do not see that. We do not see the focus being on organizing other employees. The focus is on doing things to trip up the employer who is probably not as—especially in small business, is not as adept and knowledgeable of labor laws, to engage in unfair labor practice activity.

The end result is, in the cases I have been involved with, which have been numerous, and you could easily request information from the National Labor Relations Board, is how many of these types of cases get settled, and what do those settlements look like?

They are basically payoffs. The union organizer agrees, okay, I will stop doing it if you give me a cash money, or I will agree to leave the company if you give me $5,000. They are essentially extortion payments which end up as part of the problem with this particular type of salting.

If it could be, as Mr. Cohen indicated, purely an effort to organize workers, focused on activities of demonstrating the benefits of collective bargaining before work, after work, on lunch breaks, and on other breaks, that would be one thing. But the activities are focused on activities intending to put economic pressure on the employer to sign the workers over to the labor organization, and then collect dues and other things from the employees.

So that has been our experience, and I think if you were to take a look at the case law and just on its face just look at the fact patterns that have occurred, and how the labor board has split hairs and said, okay, the salters are allegedly engaged in section 7 activity, which is protected activity, but the burden of proof is now on the employer to show and demonstrate clear business reasons why they took certain actions.

The labor board council has a tendency to overlook certain aspects of litigation. One is the statute, section 10[b], says the Federal Rules of Evidence should apply to do these types of hearings, NLRB hearings.

One of the rules, 201[c] under the rules of evidence, says that persons cannot get paid for their testimony. If they are getting paid for their testimony, then their testimony is not going to be admitted.

Well, these salts are getting paid for testimony. They are actually getting paid for testimony, or developing fact patterns that they will then testify before the labor board on.

There are also cases where employees are actually getting paid and receive payments, and one of the cases is Brandt Construction Company, which is cited in my statement, in which some of the salters—

Chairwoman MUSGRAVE. Your time has expired.

Mr. AVAKIAN. Oh, I am sorry.

Chairwoman MUSGRAVE. Perhaps in a question asked of you you may be able to elaborate on that. Thank you so very much.

Mr. AVAKIAN. Thank you, Madam Chairman.

[Mr. Avakian's statement may be found in the appendix.]

Chairwoman MUSGRAVE. I appreciate all the witnesses' testimony. I would like to recognize Mr. Westmoreland, if you have questions, sir.

Mr. WESTMORELAND. Yes, I do.

Mr. Cohen, you are a brave man to be down here by yourself. But are you familiar with the literature that Mr. Mix and Mr. Isaac quoted from, the IBEW literature that talked about what to do with these salts, or what salts should do when they got in the company

Mr. COHEN. If the piece of literature to which he referred is what I think it is, it was written by someone who has not been employed by the IBEW for 10 years, and whose approach to salting was disavowed even before he was forced to leave.

We certainly do not subscribe to that philosophy. It does not serve the purpose of trying to gain union workers and union—new union employers.

Mr. WESTMORELAND. I believe—are you familiar with this manual?

Mr. COHEN. I cannot see it, sir.

Mr. WESTMORELAND. Okay. It is called "The Union Organization in the Construction Industry," and it says Brotherhood of—International Brotherhood of Electrical Workers. It has got their official trademark

Mr. COHEN. That may be the same document.

Mr. WESTMORELAND. I believe it is, yes. And it looks official document, that it was put out by the union itself.

On the other hand, you have got ABC, which you quoted as in a video that they sent to their members, asking their members to abide by the law, and to hire a salt if they were equally qualified or better qualified to try to go along with the spirit of the law.

It sounds to me like that from just listening to all of the testimony that the union, or at least the IBEW in the pamphlet that they have got here, their intent is to use the law that is there for disruption and to put these non-union companies out of business, whereas the people who are actually in the business, such as ABC and the people that they represent, are trying to get their members to actually abide by the spirit of the law.

Do you have any comment on that

Mr. COHEN. Well, all I can do, Mr. Westmoreland, is repeat what I just said. That the view of the IBEW today is diametrically opposed to what appears on those pages, and that the author of those pages is long gone.

I would also say that while the advice on the ABC video was very sound, it is certainly honored far more in the breach than in the observance. Most non-union contractors as soon as a salt shows up immediately begin engaging in discrimination in either refusal to hire, or if one is a covert salt, and that is, he does not advertise that he is from a union, fired when his union affiliation is discovered on the job.

Mr. WESTMORELAND. And one last question and comment if I could. Well, I do not know if you represent the IBEW or not or any of your—

Mr. COHEN. We do.

Mr. WESTMORELAND. Okay. Then you know, you might want to give them some good legal advice, and to get their official symbol or recognition, I guess, of giving this some credibility off of that if they do not agree with it, but certainly I am in business for myself. And if my name was on something I did not agree with, I would certainly want it off of that.

Then I guess my last question to you is this: Do you believe there is any place in labor for non-union companies

Mr. COHEN. I think that ultimately is a matter of choice for the employees of any particular contractor. We would obviously, representing the unionized sector of the construction industry, like to see as many union contractors as possible. That is the whole point of organizing.

But as to any given contractor, only that contractor's employees can make that choice, which is one reason we are on the job trying to proselytize.

Mr. WESTMORELAND. But it should be a choice that they make on their own free will without anybody having to be subjected to undue pressures?

Mr. COHEN. By anyone.

Mr. WESTMORELAND. Thank you, sir. Thank you, ma'am.

Chairwoman MUSGRAVE. Thank you, Mr. Westmoreland.

Mr. Lipinski, do you have questions?

Mr. LIPINSKI. Thank you, Madam Chairman.

First of all, starting out Mr. Mix had stated at the beginning about salting being bad for food. Actually, I think a lot of people like salt put on their food. It is a problem for a lot of us actually.

In regard to unions themselves, though, Ms. Drummond stated that—along the lines that union organizing is usually the purpose for salting, and Mr. Isaac had mentioned that usually what the salts do, they want to educate workers about their rights, and Mr. Mix, you had talked about in theory salting, you know, is not bad.

My question, Mr. Mix, is do you think that—is the union necessarily—does a union necessarily work against the interests of an employer? Is it necessarily an adversarial relationship? And does the presence of a union mean that they are going to be anti-business?

Because none of us want to be—none of us up here want to be anti-business. I do not want to be anti-business. But do you think a union is necessarily anti-business?

Mr. MIX. I do not think so. I think the context in which I approach this issue, and I appreciate the question, is in the context of employee rights.

You know, it is interesting that in these companies, the employees of these companies mentioned, had no interest in unionization or had not shown any until someone, an agent provocateur, if you will, had to be paid to show up and infiltrate the company, either overtly or covertly.

Now, I think, as I mentioned in my testimony, the rights to protect individual workers in their exercise of section 7 rights under the National Labor Relations Act are steadfast. The question is do workers really want these unions, and do they—can their jobs exist after an employer spends a half a million dollars on legal fees? Can we increase their wages?

If a worker has an individual choice, free of coercion to choose an organization, we are all for that. But I think there is definite coercion, and the stories we are hearing in this record are created by salting.

Mr. LIPINSKI. Do you think that workers definitely know what their rights are? Do you think that they automatically know? Where do they get this information from? Do you think that— yes, well, that is simply the question. Where do they get this information if that is the idea of salting? You said, in theory, salting is good.

Mr. MIX. Well, I think the testimony of Mr. Cohen and the testimony we have read in the record in the hearings previously have indicated that in theory salting is an idea where workers get informed of their section 7 rights, their right to organize.

You know, a worker can go to the NLRB website or to a union hiring hall to find out what their rights are. Those rights are available to them and understanding those rights.

It is when those rights are violated by compulsory unionism agreements and forced unionism, and the coercion that we are seeing in the testimony of those that have experienced salting is where we get the problem.

Mr. LIPINSKI. Now you are bringing in forced or compulsory unionism. Where are you talking about that coming in?

Mr. MIX. Well, I think just a couple weeks ago the National Labor Relations Board ruled in a case regarding 14 nurses in Missouri that because they did not pay their dues they would be fired. If that is not compulsory unionism, I do not know what it is.

Under the National Labor Relations Act, workers can be fired for failure to pay dues as a condition of employment.

Mr. LIPINSKI. Is it not required that there is a vote before there is a union?

Mr. MIX. If you want to use the idea of democracy to forfeit basic rights that should not be subject to a vote, I guess you could say that indeed they would.

But is it appropriate that a worker has to give up their rights to negotiate and to contract with an employer of their rights of employment to a union official that they neither wanted, voted for, or asked for? I do not think so, and 80 percent of Americans do not believe that either.

Mr. LIPINSKI. Mr. Cohen, what do you feel about that

Mr. COHEN. Well, the Congress decided first in 1935 and then changed the law slightly in 1947, that it is perfectly lawful for a union and an employer, which are parties to a collective bargaining agreement, to have a union security clause in that agreement that says that after a certain number of days of employment, those who are represented by the union, members and non-members alike, must pay either membership dues or an agency fee in order to support their collective bargaining representative, and that principle made sense then, it makes sense today.

Mr. LIPINSKI. One more quick question, Mr. Mix, although it is probably not an easy answer. It seems that we are talking about not salting but other things that occur, other things that are not legal right now, sabotage for example. Is that not what we are really trying to aim at, and that we should be aim at ending? Not nec-

essarily salting to educate workers, but stopping these other problems that sometimes do occur?

Mr. MIX. I would hope so, Congressman, and I think the fact is in reality that is what we are seeing, that these salting campaigns manifest themselves into.

The record on this of the people that have testified before, both the small business owners and those workers that are affected by this, indicate that, for example, in Illinois, Operating Engineers Local 150 salting of Randall Industries.

In 23 years of operation, there was not one act of vandalism. As soon as the salting campaign started, things happened that cost this particular employer and his workers, jobs, and legal fees that could have been used for improved wages, et cetera.

I would agree that we should get to the heart of it and say you have got to stop it. But when a salt comes in with a video camera rolling, a union hat on, and 16 of them come into apply for a job that perhaps does not exist according to testimony from the ABC, and then they have this prima facie evidence that you have discriminated because they are union members, and they are in there saying we are going to organize you, boy, that is pretty tough to take as a small businessman. I think the employees that work for those small businesses are really hurt by that.

Chairwoman MUSGRAVE. Time has expired. Thank you. We may come back for another round if you would like.

Mr. King, do you have questions?

Mr. KING. Thank you, Madam Chair. I do, and in five minutes I am going to try to talk to four of you if I can pull this off.

First of all, Mr. Mix, you started with a sequence of salting, and I believe the first word you used was "infiltration"?

Mr. MIX. Yeah, this quote, and I think Congressman Westmoreland had this up there, it is—let me just go back here real quick and I do it. "Infiltration, confrontation, litigation, disruption, and hopefully annihilation of non-union contractors."

Mr. KING. That is what I wanted to hear. Thank you.

And then I will go to Mr. Isaac, a couple of questions for you, Mr. Isaac.

The first one is Mr. Cohen made some remarks about your record as an employer. I want to make sure you have an opportunity to respond to that, and then I want to follow up with, as part of that response, could you give this panel some idea of about how many different incidents of salting type that you have experienced? And I do not mean just the number of employees that might have showed up, but the number of actions that have been committed in a cover fashion within your company that you suspect.

Mr. ISAAC. All right, I will try to leave you some time for your other four people.

Real quick, the one willful violation that we had the recent violation was a Department of Labor, New York State Department of Labor adjustment on a prevailing wage job where the municipalities in the towns were equally at fault in that they did not bid the jobs out properly.

I should mention that one of the wage adjustments for one of our employees was $1.76, the majority of which was benefit adjustments; not that we denied benefits to any of our employees, but

there was a difference between what our benefit value is that they gave credit for and what the union prevailing rate, which I do not know where they get prevailing rates from because it is the result of a collective bargaining agreement, but the difference between those was the adjustments. So that is one willful.

There was actually eight different locations, and they saw that there was no intentional willful act there, so they condensed it down to one willful violation. So I appreciate the opportunity to clarify that.

In our organization's, salting—there were several stages. The original salting activity was only the beginning. We suspect, we do not even know who it was, but we suspect that a salt got into our location, and they educated our workers on what the union could do for them, and they got a large portion of our workers to go with them.

You know what? Shame on us. We did not educate them properly on what we felt was the benefits of being in a merit shop, and maybe we were not providing them with everything they should have been getting. You know, sometimes after sixty years you become a little complacent. So shame on us. There was an education there.

That went to an election. We won the election. It got thrown out on a technicality. Two other elections were scheduled, and then continually postponed because of ULP charges in a whole other area of, you know, situations that were all subsequently withdrawn after the NLRB told them that there was no cause for action.

What has happened now and the reason I say salting has become peppering, it is an overt, outward harassment of our company by the unions. They walk in. Individuals that have been forbidden from entering our premises by the NLRB, the two union organizers of our local unions, the Sheet Metal Workers and the United Association, are not allowed on our property. This is by the NLRB, an agency that is there to protect them, told them do not come on our property because of their reprehensible behavior.

Furthermore, in the last case, and I will summarize it here, the last case of this organizing where what everybody has said is what happens. They come in en masse. They do not follow the proper hiring procedures. They fill out mass applications. They cannot even take the time to type in my name. They have to scratch out "Dear Sir," and write "Ray" at the top, and fill in their name on a blank. You cannot even read the resume, and then they file a ULP charge saying you did not hire them.

I do not care who they are. Union member, the best qualified person in the world, if that is the first impression that I am getting from this individual when they come in is that type of an impression, I am not going to hire them regardless of who they are affiliated with. It is improper and it is not professional, and they have been informed of that time and time again. They willfully deny or refuse to abide by our hiring procedures that every other employee that comes in abides by.

What happened in the last case, and this is Case CA-22791 of the National Labor Relations Board, where they told us we did not have to even consider for employment two organizers for the two local unions, the last comment that was written down here by San-

dra Dunbar, the regional director, was "Finally with respect to the named alleged discrimnees," and she named the people, "further proceedings would not be warranted inasmuch as you failed to present any evidence about them during the investigation."

What is a better term for harassment than something that you just throw out there. You throw as much against the wall, and see what sticks, and they do not even back it up with anything. No supporting documentation.

We encountered tens of thousands of dollars over months to defend ourselves against something that our union counterparts would not even supply any information on. And if it is hearsay, it is hearsay, but I have talked to the regional, or to the investigator. He said this was the last straw, and she informed the unions that no longer were they going to, you know, consider this type of activity.

So it is an outward—it has gone - that is why I say, it is—salting is one thing. I can see that.

Chairwoman MUSGRAVE. The time has expired.

Mr. ISAAC. But once you get to peppering—I am sorry. I did not leave you enough time, but you know.

Chairwoman MUSGRAVE. We will do another round.

Mr. KING. I will stick around for the next round. Thank you.

Chairwoman MUSGRAVE. We have been joined by Ms. Sanchez, a member of the full Committee. Do you have questions?

Ms. SANCHEZ. Thank you.

Mr. Isaac, do you think that an avenue of recourse for people to try to assert or protect their rights should be thrown out because of some abuse by a small minority of people?

Mr. ISAAC. Well, I guess "some abuse" would be the term that I would question. What is some abuse?

In my experience, it has been that 100 percent. There was one instance of the covert salting, and for six years now this game is being played.

Ms. SANCHEZ. Have you ever heard of employers who have employed harassment tactics against their employees—

Mr. ISAAC. Yes.

Ms. SANCHEZ. —to keep them from joining the union?

Mr. ISAAC. They are both sides, both sides, I agree with you.

Ms. SANCHEZ. Okay. And you did mention in your response to one of the questions that, you know, certain cases were thrown out by the NLRB; is that not correct?

Mr. ISAAC. All of the cases were thrown out.

Ms. SANCHEZ. Okay. So in fact the NLRB was doing their job then, in other words, because they threw out cases that had no merit; is that correct?

Mr. ISAAC. Yes.

Ms. SANCHEZ. Okay, thank you.

I want to get to the issue, Mr. Mix, of educating workers and salts who educate workers. It is my understanding they do it on non-company time, otherwise they can be let go; is that not correct?

Mr. MIX. I am not sure. There may be someone else who can answer that question. But it seems to me in the record that has been reflected on this particular issue as how this salting takes place—

Ms. SANCHEZ. So the answer is you do not know whether they can take company time to educate workers?

Mr. MIX. I would say that they are supposed to do it off company time, correct.

Ms. SANCHEZ. Okay. Mr. Cohen, can you edify us on that?

Mr. COHEN. Yes. Employers can legitimately enforce rules that organizing be done on non-work time, breaks, lunch time, prior to beginning work and so on.

Ms. SANCHEZ. And salts—

Mr. COHEN. And salts are instructed to do that organizing only on non-work time.

Ms. SANCHEZ. And so if a salt is in fact using company time to try to talk to employees about unionization, they can be fired for that; is that not correct

Mr. COHEN. If they violate those company rules, absolutely.

Ms. SANCHEZ. Okay, thank you.

I want to get to the issue, Mr. Mix, about people representing dual interests or employees coming in to a work site and trying to educate workers about, you know, potential better wages. If I am not mistaken, Mr. Isaac said that sometimes employers do get complacent, and sometimes they are not giving employees everything that they should be receiving. And so tell me what the harm in educating workers about potential for higher wages or better fringe benefits?

Mr. MIX. No harm.

Ms. SANCHEZ. Okay, thank you.

I am interested in the fact that this panel is comprised of folks from the air conditioning and plumbing industry, and what seem to be sort of the construction industries.

Mr. Mix, do you think that there is a lesser right to organize in these industries than other industries?

Mr. MIX. Absolutely not. Section 7 of the National Labor Relations Act protects workers equally in their exercise of their bargaining rights. It is when they violate those laws is when the issues comes, and we have heard testimony of the salting campaigns, the intimidation in fact, as Mr. Isaac just said, I mean, these cases were filed. He had spent 10 to 20 thousand dollars to defend himself, and every single case was dismissed without merit.

We have cases on the record in the hearing, if you will look back in hearings previous, where employers have been had to spend 10, 20,000, up to a half a million dollars in legal fees to defend against unfair labor practice charges that at the end of the day had no merit where those people that filed the unfair labor practice charges have the taxpayers to pay for the cost to defend the litigation on the case. That is an outrage.

Ms. SANCHEZ. I would disagree with you on that point, but I would say that, again, you know, because there is in some cases abuse, correct me if I am wrong, but we are a democratic society, we do have a court system, we do have a system set up in place to throw out unmeritorious claims.

Mr. MIX. That is right. And absolutely. Using that court system to leverage employers and their employees is outrageous, and maybe possibly we can amend the bill to apply the Equal Access to Justice provisions where if, if the NLRB loses these cases, and

these cases are withdrawn, there may be some compensation or remuneration to those who have had to defend themselves against these frivolous charges.

Ms. SANCHEZ. I am willing to look into that, but I want you to keep an open mind about not destroying the process simply because there are a few problems with it. That seems to be the overwhelming, and perhaps your experience—in your experiences perhaps that has been the case. But what I am saying is keep a broader perspective that that may not be the case in all cases, and that in fact salting may do a real service to employees in terms of creating better working conditions for them, and better wages.

Mr. MIX. I would suggest that—I would suggest those unions that exercise these salting tactics with the mindset that we have written into the record here that Congressman Westmoreland represented in the IBEW document are the ones that are abusing and using the process, and making—

Ms. SANCHEZ. And again, I can understand your point, but my point is also, you know, because there is a problem with something you do not scrap the entire thing. I think salting can be a valuable tool. I think it can be helpful for employees, and I think sometimes it can help move employers along in terms of shaking them out of their complacency, and perhaps doing the right thing by workers, and we will have to disagree on the rest.

Thank you. I yield back my time.

Chairwoman MUSGRAVE. Thank you. Mr. Westmoreland, do you have questions?

Mr. WESTMORELAND. Yes, ma'am.

Mr. Isaac, even though these complaints were thrown out, does it still not cost you time and money to defend these things, whether they are thrown out or not, and cannot just be used as a harassment tactic?

Mr. ISAAC. Oh, by all means. They call it economic pressure. It is outlined in their own operating procedures.

Mr. WESTMORELAND. Thank you.

Ms. Drummond, have any policies ever been recognized as legitimate reasons not to hire a salt? Are there any legitimate reasons out there not to?

I know that your video suggests that they give them all benefit of the doubt.

Ms. DRUMMOND. As I indicated in my oral testimony, there has been a patchwork of case law which makes it very difficult for an employer that is trying to do the right thing to follow which—which is the latest flavor of the law.

Most recently, there has been a case where an employer has done an economic analysis of all employees, and determined that if an employee was making a certain wage prior to being hired that was significantly higher than that which he is paying, let us say 30 or 40 percent, that that employee has a history of not staying on the job.

If you are looking at a legitimate application for union organizers, they can easily make $80,000 a year, and even a front-line electrician is not necessarily going to make that. So that policy has been recognized where the employer had to come back with extensive economic analysis of that policy.

The other policy that has more recently been recognized is a strict referral system where unless they absolutely have no applicants that are referrals, that has been a policy where it has been both the policy and the practice.

Mr. WESTMORELAND. Thank you.

Mr. Mix, I know that some people may see some benefit to a salt. I just wanted to ask you if they are educating the workers on wages and benefits, I wonder if the workers ever ask them why they are working there. I mean, if the wages and benefits are so much better somewhere else, why would they be working there?

And also, what kind of money—I know there was an $80,000, but what kind of money are these salts paid by the union? And if you do not know that, I would like to ask that to Mr. Cohen to see if he knows what an average salary would be paid.

Mr. MIX. Congressman, I am sorry. I cannot answer that question as far as what their payroll might be for these folks.

Mr. WESTMORELAND. Mr. Cohen, do you have any ideas?

Mr. COHEN. I cannot answer it either as a generalization. I can tell you two things though; that far more salts are volunteers, unemployed workers, than are paid organizers. And my understanding is that when salts are paid they are either paid the difference between the union contract rate and the non-union contractor's rate which is invariably lower. They are paid the difference so that that employee does not suffer, or will be paid only for the non-work time that is devoted to organizing over and above what he is getting from the contractor; one of those two.

Mr. WESTMORELAND. So let me understand this. The person who is not able to get a job that is unemployed by the union goes into a shop where people are working to tell them the benefits of being in the union

Mr. COHEN. Nicely done.

Mr. WESTMORELAND. Thank you

Mr. COHEN. However, what he will be explaining are the union wages, the benefit package, et cetera. At any given moment there may be unemployment in a given area, perhaps just in a given trade. But the purpose is to get as many workers and many—even if a union is unsuccessful in organizing a contractor, they may convince some employees of the benefits who will leave that employer and sign up with the union hiring hall in order to stand in line to get the benefits when he is referred out.

Mr. WESTMORELAND. Well, I think there is a lot of truth in the book that says you cannot serve two masters. Thank you.

Chairwoman MUSGRAVE. Mr. Lipinski?

Mr. LIPINSKI. Thank you.

Go back to Mr. Mix. Do you think this will—do you believe this bill would essentially overturn Town and Country?

Mr. MIX. I think that allowing an employer to make a distinction from folks that storm his or her place of business with video cameras and signs and posters, and applications that say we are here to do one thing, to organize your business—

Mr. LIPINSKI. So would that be yes?

Mr. MIX. I would say that if that is the context, then I would say it ought to be.

Mr. LIPINSKI. So you definitely want to get rid of it. The focus here is they should not be allowed to salt.

Mr. Cohen, why is salting important? Why is it not possible that workers can learn in other ways about the benefits of unions? Why do you think salting is necessary

Mr. COHEN. It would be wonderful if they could, but as a matter of practicality I do not think there are many non-union employees who even know there is an NLRB website to go check, and most of them either do not know there is a union or certainly if they are working for a non-union contractor, are not likely to go to the union hiring hall to get information. I wish they would.

One of the reason that salting is necessary in the construction industry in particular is because so many jobs are of short duration. Work is intermittent. Employees go back and forth to different jobs through the hiring hall. And as a result of a Supreme Court decision in 1992, the Leachmere case, non-employee organizers are not allowed on employer's private property, and as a result, the practice of having employee organizers has gained popularity since that decision.

Mr. LIPINSKI. Okay. Well, Mr. Mix or anyone else on the panel, would you favor—if the problem because they are employees and because they are employees and they can sabotage, they can do other things that employees can do, would you favor changing the law to allow non-employee individuals to go on a work site to organize?

Mr. ALDI. In fact, I would. My name is Michael Aldi again, and I was a former union member myself of the IBEW. I know many salts and I know that they are part of the—they are victimized also in this, because usually salts are the guys that are laid off by union contractors that are not the best guys in the union, and they get laid off, and have to support their families. So they are forced by union organizers to go against their grain and sabotage jobs and to weaken non-union contractors to either put them out of business or get them to sign a collective bargaining agreement.

Mr. LIPINSKI. So you would—

Mr. ALDI. But we would be more than happy to have education. We would be more than happy to post the—like we post wages, minimum wage standards and OSHA standards. I would love to post it on my wall, let my employees read it. That right there educates.

How do people get educated about the minimum wage laws? We post it. And we can post these requirements.

Also, when I went to school—

Mr. LIPINSKI. What about—

Mr. ALDI. —I learned about unions.

Mr. LIPINSKI. —allowing non-union employees onto the work site?

Mr. ALDI. During break hours and during the lunch time coming and discussing with employees their benefits and their legal rights, I see no problem in it myself at all.

Mr. MIX. One thing I might suggest is why is it not that they would knock on doors and go door to door after hours and talk with workers?

I mean, organized labor in this country collects about $19 billion a year in revenue. Unfortunately, what most—

Mr. LIPINSKI. Wait.

Mr. MIX. —most workers see—

Mr. LIPINSKI. You are talking about knocking on random doors to do this because—

Mr. MIX. Who knows?

Mr. LIPINSKI. —they cannot get the information who is working in a place.

Mr. MIX. Some of the techniques they use like getting license plates, and using friends to get license plate information, and following people home and video taping are things that I would be very, very concerned about.

But you know, they spend 19—the raised $19 billion a year in revenue. The only thing that I think American workers see now from organized labor is their campaign slogans and their political activity.

I would suggest that if they are interested—truly interested in representing workers—

Mr. LIPINSKI. Do you think—

Mr. MIX. —they would spend some of their resources on this type of educational campaign.

Mr. LIPINSKI. —this is different from businesses. This is somehow—there is an uneven playing field between unions and businesses?

Mr. MIX. I am sorry?

Mr. LIPINSKI. Do you believe that the unions have more power than businesses? Somehow there is an uneven playing field. You were talking about all this money, and advertisements, et cetera.

Mr. ISAAC. Congressman, I could probably address that real quick. The businesses are do not call lists. The union organizers have the cell phone numbers of company-provided cell phones of all of our employees, and just recently, within the last month and a half, called each one of them individually while on working hours on their cell phones.

Chairwoman MUSGRAVE. Time has expired.

Mr. Cohen, I have a question, some interesting questions from my friends on the other side of the aisle here.

Are there any salts that are bad apples?

Mr. COHEN. I am sure there are. However, they are a distinct minority compared to the number of law violators by contractors where the NLRB volumes are replete with cases finding unlawful discharges, unlawful refuses to hire and so on.

Chairwoman MUSGRAVE. What should we do with salts that are bad apples? What should happen to them?

Mr. COHEN. If we are talking about what some of these witnesses have referred to this morning of deliberate sabotage, number one, fire them; and number two, if they have really done that, have them prosecuted. No responsible union wants to have their salt do what we are hearing of some of these allegations.

Chairwoman MUSGRAVE. What should we do about the cost that these individuals such as they men before us have incurred today?

You know, it has been said that this is anecdotal. How does that feel to you, Mr. Aldi? Do you feel like your story is unique?

Mr. ALDI. No, I know for a fact my story is not unique. I know of 10 other electrical contractors in my area who have been put out of business in the past, and now just drive around in one truck doing electrical work on their own because they cannot find jobs anywhere else, like myself. I have been black balled from the industry completely because no contractor wants to touch me out of fear of union reprisals.

And even applying for a job as an electrical inspector in the State of New York, they have refused to give me a job due to the—they do not want the IBEW contractors to black ball their company from using them as an inspection agency.

But I do not feel there is a fair playing field here. I had fired union salts for sabotaging work, coming to me, stealing equipment, laughing at me, about me to my face with witnesses present, and I have spent over $60,000 in legal fees to defend against allegations with National Labor Relations Board that I fired them for legitimate union organizing activities.

Everybody says it is not—you know, then it is on for me to prove the NLRB wrong. It is my auspice to prove that they committed these crimes or that they broke the law.

I had one employee arrested, and the prosecutor prosecuted the case. They did not put on a good defense. The police refused to investigate the crime after I reported it. So it went to the jury, which found reasonable doubt because of no police investigation was the reason.

But I had other employees that stole equipment where district attorneys in other counties says this is a union matter, take it up in the civil courts. We want nothing to do with it. We are not going to prosecute anything.

So to say that we can just report crimes to the police is wrong, and the cost of going through litigation—the decision by the NLRB was—had came about because all the electric—through cost of litigation, through cost of repairing union sabotage, spent over $100,000 in repairing union sabotage over the past two years has gone bankrupt, and did not mount a defense at this NLRB hearing. We had nobody there in defense. Only partial statements from our witnesses were put into evidence. And when you hear one side of the story, it is pretty easy to get a win.

Hopefully that in the future I will have my day in court over this, and I have plenty of evidence and proof and witnesses to prove the NLRB wrong in their decision.

And furthermore, I would like to add that Don Raum, the business agent, the elected business agent of IBEW Local 236 had a—we had a private meeting at his office where he had indicated to me that he was going to make all electrical contractors in his collective bargaining area either union or put them all out of business, and he was going to use whatever means necessary he had at his disposal. That was directly to me, and that is my statement. You can believe it or not.

Also, I have proof that some of these employees were brought during working hours down to the union hall on their way out to a job on payroll and forced to sign union cards. Two of them signed them under duress, being told that they were going to get their butts kicked because the other guys wanted the union. If you do

not give us the union, we want a little bit higher pay, a little bit better benefits, or we are going to kick your butt if you do not sign these things.

They signed them all with all these people around them, intimidating them. You had union organizers there saying, oh, it does not really mean anything. It is just to give you a vote and everything like that. And I spent thousands of dollars in defending against the vote that eventually was withdrawn by the IBEW because they had no cause for the vote.

Chairwoman MUSGRAVE. Okay, the red light is telling us that the time has expired.

Mr. ALDI. Right. Exactly.

Chairwoman MUSGRAVE. Ms. Sanchez.

Ms. SANCHEZ. Mr. Aldi, I am not suggesting that forcing people to sign union cards under duress is a good idea, but there is an election that follows that process, is there not?

Mr. ALDI. Well, we hope there is an election but—

Ms. SANCHEZ. And the election would be secret ballot election, so that employees would not—nobody would know whether they voted to have the union represent them or not?

Mr. ALDI. Hopefully.

Ms. SANCHEZ. Okay, thank you.

Also, I am a little startled by your comments that salts are forced by their unions and that they are victims of this process as well.

Mr. Cohen's testimony was that the large majority of salts are volunteer, unpaid workers that choose to go into workplaces and try to educate workers about their rights. So how does that make them a victim?

Mr. ALDI. Well, like I said, I was a former union employee myself. I know some people who have done salting against other companies, and I have talked to some of the people that have salted my company and have actually gotten out of the union since their salting activities.

Ms. SANCHEZ. But you feel the were coerced into doing it?

Mr. ALDI. Yes. Well, Ann Marie Taknikas was told that she had—that she was out of work, and that if she wanted to stay with the union, because she had been laid off several times from union employers who were—I don't know, either lack of work or whatever the reason, but that the union, if you want to stay a union member, you will go salt these different—

Ms. SANCHEZ. My understanding—

Mr. ALDI. —agencies, and then they gave them a list of things to do.

Ms. SANCHEZ. My understanding is that so long as you pay your union dues you remain a union member in good standing.

Mr. ALDI. Yeah, you can remain a union member, but if you want any work, you had better do what the union boss tells you to do.

Ms. SANCHEZ. But do not hiring halls have a book that people have to sign and jobs go according to who is next on the list?

Mr. ALDI. Our local jumps the names all the time.

Ms. SANCHEZ. Well, I would suggest that that is probably not a normal procedure or normal practice. Most union halls that I know that have hiring halls have a book that members have to sign, and they—

Mr. ALDI. Yes, they do.

Ms. SANCHEZ. —go in strict order depending who is next on the list.

Mr. ALDI. Yes, they do, but—

Ms. SANCHEZ. Mr. Cohen, is that your experience

Mr. COHEN. Yes. And if names are jumped without a legitimate reason, it is a violation of the act.

I would just have to caution the Committee once again, with all due respect to Mr. Aldi, that if I may be humorous for a moment, his testimony has to be taken with a large grain of salt—

Ms. SANCHEZ. No pun intended

Mr. COHEN. —in view of the fact that he has been found guilty in an earlier case where he was represented by counsel, and that even though he did not defend himself in this case, the reasons asserted for the discharges were found to be protectual by the administrative law judge.

Ms. SANCHEZ. Thank you.

Another quick question for Mr. Mix, and Mr. Cohen, and then I would like to go back to Mr. Aldi before my time expires.

But it is my understanding that if union members want to contribute to political action funds, they have to do so voluntarily. Their dues cannot summarily be used by the union for political campaigns; is that correct, Mr. Cohen

Mr. COHEN. It is.

Ms. SANCHEZ. Thank you.

Mr. Aldi, with respect to educating workers about their rights, have you ever been on a non-union construction site where prevailing wage law information was posted for the benefit of non-union workers?

Mr. ALDI. Yes, many times.

Ms. SANCHEZ. And were employees actually explained what the prevailing wage laws were and what peoples' benefits were?

Mr. ALDI. Yes.

Ms. SANCHEZ. I find that astonishing given that I used to patrol work sites to see if the prevailing wages were being paid, and at none of the several hundreds or even possibly thousands of job sites that I ever visited did I ever see a prevailing wage schedule posted on a construction work site for the classifications of workers that were doing work. That is just my personal account.

Is the information that you saw posted, was that posted in several languages in the event that there were employees there that did not speak English fluently?

Mr. ALDI. Well, in my experience, I have seen it posted in Spanish also.

Ms. SANCHEZ. Okay, Mr. Isaac, have you seen prevailing wage law information posted on construction sites for all employees to see, and in multiple language in case there were employees that did not speak the language fluently?

Mr. ISAAC. I do not get on job sites as often as I used to. I am sorry.

Ms. SANCHEZ. Okay. Well, my experience has been—

Mr. ISAAC. On prevailing rate jobs, I guess I should clarify?

Ms. SANCHEZ. Yes, on prevailing rate jobs.

Mr. ISAAC. Well, you probably would not see that because even the municipalities do not know that they are supposed to be bidding it out at prevailing rates.

Ms. SANCHEZ. Okay. Mr. Cohen, is it not a function of prevailing wage law that the prevailing law wage schedules have to be posted on construction sites

Mr. COHEN. They are certainly supposed to be.

Ms. SANCHEZ. And in your experience have they always been posted on these site?

Mr. COHEN. No.

Ms. SANCHEZ. Have they been posted in multiple languages in the ones where they were posted for workers who may not speak English fluently?

Mr. COHEN. I really cannot answer that from personal experience, Congresswoman.

Ms. SANCHEZ. Thank you. I yield back.

Chairwoman MUSGRAVE. Thank you.

Mr. King?

Mr. KING. Thank you, Madam Chair.

First of all, I would point out to this panel, this Subcommittee and the panel of witnesses, I have spent my life in the construction business, and we do a number of prevailing wage scale jobs, and we have always had all the postings up that were required by law, and we make it a matter of standard practice, we do it one of two ways.

One of them is we build a poster board, I mean, a plyboard sign and we will post all of those notices up there on that sign, and we will put plexiglass up over the top of that and we will seal it up so that the rain does not bother it. Or else we put it inside the job trailer where the employees are coming and going all the time. We make that information available.

I had some questions, and I hope I get to them, but I also want to point out something that happens, and I can think of a case where we are a union shop operations, and we started a prevailing wage job, it was a large sewer lagoon project. My first employee, I sent him up there to just simply go in and bush hog the weeds off, and they we were hauling equipment in that day. When we got everybody on the job site, we would typically then have a construction meeting. It would be a safety meeting. It would be a meeting to layout all of the wage scale and all of the rules that we would follow by that job.

Before I got there some of my employees arrived, and there is the federal government misrepresenting my company policy and their wage scale, and telling my employees that I could be subject to—if I remember right—a $50,000 fine and maybe up to 15 years in jail, and allege that I was violating federal laws, which undermined my relationship with my employees. That was just a small thing in comparison to what at least two of the gentlemen sitting here in this panel have talked about today.

And this undermining that goes on is something that—this adversarial relationship between labor and management, I want to associate myself with the remarks of Mr. Westmoreland when he said you cannot serve to masters.

If someone comes onto my job and I am paying them the best wage that I can afford to pay them, giving them the best benefits I can afford to pay them because I want to keep highly qualified employees so we can be more competitive in the marketplace, and he is being paid by somebody else, even if it is that little sliver or that little extra for break, little extra for lunchtime, little after hours time, he is serving two masters. He is undermining you.

It brings to mind a little anecdote that flipped up in my head here, and that is, I remember when I was a senior in high school we had a coach come in who was an MP in the marines, a drill instructor. He was just back from Vietnam. This was 1967. He decided he was going to make about 50 of us seniors in high school learn how to march. And we decided we will be doing that soon enough, and so we are going to figure out how he cannot force us to march.

And so when he would say left, some of us would go right, some of us would keep going forward, and some would stop and some would turn left. And every time he issued an order some of us would go in the opposite direction. You know, you could never really tell who really knew what was going on, and who understood and who was doing it on purpose.

This went on for several weeks, and he was a pretty determined DI. You know what those guys are like. And he took some of us down on the mat and rubbed us around on the mat. But in the end we did not learn to march.

And in the end Mr. Isaac nor Mr. Aldi can force those union salts to do the job and do an hour's worth of work for an hour's worth of pay if they are determined to undermine the profitability of the company. It is impossible.

And as a matter of meeting all the requirements and going and file your claim, and vindicate yourself before the NLRB, and come up with some profit with a company that is its proficiencies have been slowed down because the people that are serving another master, all of these rules and all of these hoops to jump through here are actually it is ludicrous to think that we can write enough rules.

So I would pose this question, and it comes this when. When your survival of your company is at stake, and it is, then whether or not the law allows an employer to remove someone whom you are convinced as an employer has not the best interests of your company in mind, but the interests of the union or his own self-interests in mind, either to destroy the competition or create a union environment?

Then I would pose my question to Mr. Cohen, and that would be, how can you blame an employer for firing a union salt

Mr. COHEN. For firing him or hiring him?

Mr. KING. If that employer has gone through this scenario that I have described, how could you blame an employer for firing a union salt whether or not it complied with the letter of the law when you keep into consideration that the very survival of that person's live's work is at stake?

Mr. COHEN. Well, I think the key is whether it is within the letter of the law, Congressman. If the law is broken by the discharge, then it is not acceptable.

And I would like to answer your two master's argument by quoting from the NLRB decision in Town and Country, affirmed by a unanimous Supreme Court, "The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer."

And later, "The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer."

Mr. KING. I would call that a flawed premise, but thank you, Mr. Cohen. Thank you, Madam Chair. I yield back.

Chairwoman MUSGRAVE. Thank you, Mr. King.

I am going to ask the final question today of Mr. Mix. Mr. Cohen, in his testimony said that salting is about organizing, and we had some excellent questioning by Ms. Sanchez with a very different viewpoint than I have, but could you please respond to salting is about organizing?

Mr. MIX. Well, I would think that is probably absolutely accurate in the sense that organized labor has come to a point in their livelihoods where they are no longer organizing workers the traditional way.

I think in the statistics, and the record would reflect the NLRB's report for 2004, I think 90,000 workers were organized through conventional NLRB means. The other 400,000 workers were organized through top-down organizing campaigns, these types of corporate campaigns that are designed just like salting, to put pressure on employers to finally give in and say we give up, we can no longer afford to defend ourselves against this campaign of salting, or this campaign of death by a thousand cuts, as Richard Trumka put it, you know, in the quote I gave you in my testimony.

I think what it is it is organizing but it is aggressive organizing in the sense that they come to a point where their political agenda and their government activity and all the things that they are doing have lost sight of what their actual role was.

You know, Samuel Gompers said it best in 1918, when he addressed the AFL for the last time, he said, "Workers of America adhere to voluntary institutions. Anything contrary to that is a menace to their rights," and he understand it.

And prior, if you go back into the history before the Wagner Act, there were many members of organized labor that said when we get this compulsion it is going to be the death of our organization. It is a cancer inside unions where they use legal privilege of government to force these types of campaigns on workers and small businessmen who can barely defend themselves with the limited resources they have, and it is a war of attrition, and I would suggest to you that we need to find ways to again protect workers' rights to join unions. It is clearly stated in the National Labor Relations Act, but these types of activities are reprehensible and I think we could bring in a whole another panel of workers and small business people that would say exactly the same thing, and story after story could be told.

Chairwoman MUSGRAVE. Thank you. Mr. Avakian, could you respond to that, please?

Pull the microphone a little closer if you could.

Mr. AVAKIAN. Okay. I think Mr. Mix has got it right. The history of the labor act, and we have heard the statement about how one cannot serve two masters.

In this particular case where we are dealing with salting, we are talking about activities which are essentially of recent vintage, in the last 15 years, maybe 20 years maximum as the salting programs go. But we have union personnel who are entering a workplace, usually under false pretenses, engaging in activities, and these activities are not just organizational in nature, they are also designed to disrupt the employer's operations, to harass him, to cause deep pain through the cost of litigation and so forth, and those are the costs which are not associated with normal organizing that we normally would see.

There is no problems with unions having organizers outside the gates. When the employees leave work, they meet with them, meet them off-site at bars or restaurants, or visit them at their homes. Those are all legitimate activities.

Here we have an activity which is designed on its face to do those same sorts of functions, but in actuality do not. There is no organizer at any of the cases that I—numerous cases that I have been involved in dealing with salting and litigation with the labor board and in the federal courts in which those salts only do activities on breaks, and after hours and so forth. They are doing it all day long. They are protesting all day long. They are engaging in conversations with employees, other employees who they are trying to proselytize on the job site all day long, and these employees are also fed up with that type of activity, and they cannot be violent. They cannot do activities against these particular person.

But the whole point is it is a campaign not to organize the employees. It is a campaign to harass the employer to engage in top-down organizing, just to either surrender to the union or to go out of business, and those are fundamentally what the case law demonstrates to us. It has nothing to do with the historic, deep-seated interest in trying to organize the workplace, which is in section 1 of the statute. It has to do—rather, it has all to do with power. It all has to do with control, and to either force the workers through these types of activities, to cave into the unions in order to avoid any further disruptions, or for the employer and his employees to go out of business.

I think that is the fundamental question, and I think the statute—the bill as proposed will answer that question by making it very clear if you are an 80,000 or 90,000 dollar a year union organizer, and you are going in working part time, the mere fact that you can find something legitimate that you are doing to cover and disguise these adverse activities will not save you when the labor board—from an employer's discharge, and the labor board will not save you, or will not be able to save you when that happens, and that is what this statute is going to allow to occur.

Chairwoman MUSGRAVE. Thank you very much. I would like to thank all of the witnesses. The time has expired, Mr. Aldi. I apologize. I would like to thank you all for coming today, particularly those of you who have the stories to tell that have made you very vulnerable when you have appeared before this Committee today.

I would also like to acknowledge there were others who wanted to come and testify that did not do so out of fear. So thank you, members, and thank you, witnesses, today.

This meeting is adjourned.

[Whereupon, at 11:50 a.m., the Subcommittee was adjourned.]

MARILYN MUSGRAVE, COLORADO
CHAIRMAN

DANIEL LIPINSKI, ILLINOIS
RANKING MINORITY MEMBER

# Congress of the United States
## House of Representatives
109th Congress
## Committee on Small Business
Subcommittee on Workforce, Empowerment and Government Programs
2361 Rayburn House Office Building
Washington, DC 20515–0319

Prepared Remarks
Marilyn Musgrave
Chairman

Good Morning. Thank you all for being here today. I appreciate our witnesses taking time to testify before this subcommittee, and I offer a special thanks to those who have traveled great distances to be with us.

Today's hearing is an opportunity for us to learn more about what is happening to small business owners and their employees throughout the United States when union officials direct abusive organizing campaigns toward non-organized employees and small businesses. This practice is referred to as "salting".

The term "salting" originated with the dishonest practice of placing gold in a barren mine to convince potential investors that the mine had potential.

Union salting is a practice directed by labor union bosses aimed at deliberately inserting one of their members into a non-union company. The union agent may or may not reveal their intentions on the employment application, but have a strategy for attack in either circumstance. The goal is normally to achieve a closed, exclusive union shop or to destroy the business.

Quite often small businesses are the favorite targets because they have minimal resources to defend against the abusive practice.

Without disclosing union affiliation, the paid union organizer typically aims to establish a wellspring of support for the union effort within the company. Fellow employees often do not know that their new co-worker is a paid union organizer. The union-paid salt is often intentionally disruptive, antagonistic, and combative with both the employer and fellow employees during the organizing process.

Whether organization is successful or not, the agent typically employs some of the following tactics:

- Sabotage of equipment and work sites
- Deliberate work slow downs

- Intentionally creating unsafe working conditions

- And, perhaps the most crippling, filing frivolous unfair labor practice complaints or discrimination charges against the employer with the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA), the Equal Employment Opportunity Commission (EEOC).

The goal of salts that actually reveal their affiliation on the application, but are not hired, is to immediately notify union lawyers who, in turn, file suit against the company on the grounds of discrimination. This happens irrespective of the reason for non-employment.

Willfully deceiving an employer during the hiring process, as part of a systematic agenda to harm a business, is a deplorable tactic. I believe these acts should be exposed for what they are—fraudulent practices.

The following statement was published in the newsletter of the International Brotherhood of Electrical Workers, dated March 1995: "These [companies] know that when they are targeted with stripping, salting and market recovery funds, it is only a matter of time before their foundations begin to crumble. The NLRB charges, the attorney fees, and the loss of employees can lead to an unprofitable business."

Salting is a practice rooted in dishonesty and deception. Its focus is to make Small Businesses die the death of a thousand cuts.

The brutal practice is extremely harmful to an employer, who acting in good faith, wants to provide a service, make a living, create jobs, and provide wages for families in his community.

No small business owner should be threatened with expensive, protracted legal fights if they don't break under the pressure applied by union agents and ruinous lawsuits.

This hearing should reveal candid, real life experiences from honest employers subjected to salting. Many others were also invited to testify, but declined an invitation, out of fear their business would be targeted for retribution by organized labor.

In fairness, we also submitted a personal invitation to John Sweeney, president of the largest labor organization in the nation, the American Federation of Labor and Congress of Industrial Organizations. He declined to appear.

In a few minutes, we will hear from our respected colleague from Iowa, Representative Steve King. I consider him a dear friend and appreciate his leadership on

this issue. He is also a member of the full committee, so I extend to him the offer to join us on the dais following his testimony.

Congressman King will be explaining the need for his legislation, H.R. 1816, the "Truth in Employment Act of 2005."

While I will let Mr. King go into further detail, the bill amends section 8(a) of the National Labor Relations Act (NLRA) to make clear that an employer is not required to hire any person who seeks a job in order to promote interests unrelated to those of the employer.

I am proud to cosponsor his legislation and will work with him in any way possible to ensure its passage in the House.

As I stated, I am very eager to hear today's testimony, but before we get to Mr. King, I yield to the Distinguished Gentleman from Illinois, our Ranking Member, Mr. Lipinski.

**Testimony of U.S. Rep. Steve King**
**Before the Subcommittee on Workforce,**
**Empowerment and Government Programs**
**June 21, 2005**

Thank you, Madame Chairman and Ranking Member Lipinski for the opportunity to testify before the Subcommittee on Workforce, Empowerment and Government Programs of the House Small Business Committee regarding "salting," which is a union tactic designed to put unfair economic pressure on non-union employers. I commend Chairman Musgrave for her outstanding leadership in holding this hearing to discuss the negative impacts of union salting to small businesses.

When I say "salting" abuse, I'm not talking about legitimate union organizing. I'm talking about an economic weapon of mass destruction that is used by certain unions deliberately to harm businesses by increasing their costs, to force them to spend time, energy, and money to defend themselves against frivolous charges

filed at the National Labor Relations Board (NLRB), and often, to run employers out of business.

Let me say that the Truth in Employment Act I have introduced in the House and that Senator DeMint has introduced this year in the Senate would not curtail legitimate, protected rights that anyone has under the NLRA. To the contrary, our bills, H.R. 1816 and S. 983, specifically spell out that employees and "bona fide" employee applicants will continue to enjoy their right to organize or engage in other concerted activities under the Act, and that employers will still be prohibited from discriminating against employees on the basis of union membership or union activism.

These are the facts about what the bill does not do. Now let me clarify what the bill does.

The bill simply gives an employer a level of reassurance that someone coming to work for them is truly motivated to be an employee, and not someone primarily seeking to destroy or work

against the interests of the employer. Under this bill, if a job applicant's "primary purpose" in seeking a job is to further the interests of another, then they are not a "bona fide" applicant and it would not be an unfair labor practice for the employer not to hire them.

Some might ask the eternal question, "how do you measure a job applicant's character or motivation?" and "who would make the determination?" Let me say that the NLRB for years has had no problem looking at the surrounding facts and circumstances of a case and determining the intent of an employer. The same test and criteria that the Board uses for an employer's intent should be good enough test for determining the intent of an employee applicant.

Investigating frivolous complaints wastes limited federal agency resources that could be better spent at the NLRB, OSHA or EEOC. Unfortunately, the taxpayer is footing the bill of many of these frivolous charges and lawsuits.

In closing, I look forward to the contributions by those testifying today about harassing tactics used by organized labor in addition to "salting." When charges are filed in these circumstances, and the employer wins its case, it seems to me that the least we can do is have the NLRB reimburse the employer its legal expenses. I look forward to discussing this issue as well.

Thank you again for holding this hearing that continues the discussion on how to alleviate the tyranny and coercion imposed on employers through union “salting” campaigns.

**Testimony of Mark Mix**
**in support of H.R. 1816**
**the Truth in Employment Act of 2005**
**before the House Small Business Committee's**
**Subcommittee on Workforce, Empowerment,**
**and Government Programs**
**on June 21, 2005**

Madam Chairwoman, thank you for the opportunity to speak before you today.

My name is Mark Mix, and I am the President of the National Right to Work Committee. The Committee is a 2.2 million member grassroots organization dedicated to fighting compulsory unionism in the workplaces of America.

With this in mind, the National Right to Work Committee wholeheartedly endorses the passage of House Resolution 1816, the Truth in Employment Act, and commends Representative Steve King and the bill's 22 cosponsors for shedding "light" on the important issue of union "salting."

When a small, growing company seeks to hire new employees, union officials identify that business as a target to expand their forced-unionism reach.

Union officials coordinate a stream of job applicants some of whom openly identify themselves as "union organizers."

Union officials call this "salting," and it puts the employer, and his current employees, in a catch-22.

If the employer hires the union "salts," who are often actually paid union organizers, union officials instigate a quick-snap National Labor Relations Board or NLRB "representation" election. This so-called election then locks compulsory unionism on yet another company. Or, if they fail at that, they begin to sabotage their employer's business and manufacture a blizzard of unfair labor practice charges to bury the employer with legal fees until he signs over his employees.

If the employer doesn't hire the union-planted applicants, the union plants go straight to unfair labor practice charges and again the employer is faced with huge legal fees.

Thus, the company's choice will be either not to expand, or if they do seek new employees, to face a union "salting" campaign.

Either way, employers and employees both lose in the end. Either unwanted monopoly bargaining is forced on another small business which turns over control of its

employees, or union lawyers bleed the company dry with unfair lawsuits, ultimately putting everyone out of work.

The problem is, "salting" is currently sanctioned by law, thanks to a ruling by the NLRB.

Federal law should not force anyone to hire union "salts" whose goal is to put him out of business, or force their unwanted "representation" on current employees.

Big Labor "salting" hurts all Americans. This kind of forced unionism can cost employees their jobs and cause businesses to close their doors.

To give you a sampling of what employers face, I'd like to give you two examples.

As the first example, take the case of Randy Truckenbrodt, owner of a non-union equipment rental company in Illinois, who fought to save his business from union bosses' "salting" tactics.

A union "salt" applied for a job with Mr. Truckenbrodt's firm and was hired.

Within months, using company information provided by the "salt," union organizers began following Mr. Truckenbrodt's employees as they delivered their products to client businesses.

There, they warned clients that they would face picketing and strikes unless they stopped buying and renting from Mr. Truckenbrodt.

Union members also picketed in front of Mr. Truckenbrodt's offices 24 hours a day, seven days a week for months until they cost the firm $600,000 in lost revenue from intimidated customers.

In addition to these intimidation tactics, Mr. Truckenbrodt's company was directly vandalized dozens of times during the union's so-called "organizing" drive.

Tires were slashed, electrical cables were cut, and truck windows were broken, all during the effort to unionize Mr. Truckenbrodt's company.

In the 23 years prior to the organizing drive, there had never been a recorded incident of vandalism at Mr. Truckenbrodt's firm.

While this destruction was taking place, the union "salt" filed multiple false "unfair labor practice" charges against Mr. Truckenbrodt's company, all of which were eventually dismissed, but at a cost of tens of thousands of dollars in legal fees.

Fortunately, Mr. Truckenbrodt's business survived the "salting" campaign, and he and his workers are still able to provide for their families. But, Mr. Truckenbrodt's courage has come at great personal expense.

As another example, let me tell you about Charley Walz, who runs a masonry company in Nebraska.

Charley started out in the trades as a union man, but soon he figured out he could provide better service at lower prices for customers by going out on his own.

Charley wanted his piece of the American dream, and like many hard-working Americans, he started his own company to make that dream a reality.

Before long, his company was flourishing. His clients were happy, and so were his small but growing army of employees.

But Charley's success came with a price.

The bigger Charley's company grew, the more the union officials wanted to force his employees under union monopoly "representation."

When Charley's employees resisted the unwanted advances of union organizers, that's when the "salting" started.

Video taped evidence showed that the union "salts" had refused job applications that were offered to them.

But Charley's company was fined $20,000 by the NLRB despite that evidence (after having spent double that amount on legal expenses) for failing to hire union "salts."

Unfortunately, there is example after example of this happening all across the country.

"Salting" also leads to more working Americans being forced to pay union dues out of every paycheck.

Whether small businesses resist "salting" extortion and are subjected to potentially ruinous legal costs and fines, or acquiesce to union-monopoly control, their employees suffer.

Our nation's small businesses and employees deserve protection from these devious union tactics.

The Truth in Employment Act of 2005, introduced in Congress by Congressman Steve King of Iowa, would protect employers and honest employees by making it clear

that an employer is not required to hire any person that does not have an honest interest in working for the employer.

The bill states that someone is not a "bona fide" applicant if such person "seeks or has sought employment with the employer in furtherance of other employment or agency status." Simply put, if someone wants a job, but his true intent is not to work for the employer, then the employer has not committed an unfair labor practice by refusing to hire the person.

This legislation simply removes the protection of Section 8(a) of the NLRA from a person who seeks a job without an honest motivation to work for the employer.

However, the legislation continues to recognize the role of organized labor, and it would not interfere with legitimate union activities. Similar legislation, H.R. 3246, the Fairness for Small Business and Employees Act, passed the House in 1998.

This bill will not affect the rights available under the NLRA to anyone, provided he or she is a "bona fide" employee applicant.

Employees and bona fide applicants will continue to possess their right to organize or engage in other concerted activities under the NLRA, and employers will still be prohibited from discriminating against employees on the basis of union membership or union activism.

The Truth in Employment Act does not change the definition of "employee" or "employee applicant" under the NLRA. It simply would change the Board's enforcement of Section 8 "salting" cases by declaring that employers may refuse to hire individuals who are not honestly motivated to work for the employer. So long as even a paid union organizer is at least honestly motivated to work for the employer, he or she cannot be refused a job pursuant to the Act.

This bill does not infringe on the rights of bona fide employees and employee applicants to organize on behalf of unions in the workplace.

In closing, Madam Chairman, forcing employers to hire union business agents or employees, who are primarily intent on disrupting or even destroying businesses, does not serve the interests of bona fide employees under the NLRA.

This bill does not prohibit organizers from getting jobs, and it is completely consistent with the policies of the NLRA. All this legislation does is give the employer the freedom to hire employees who really want to do an honest day's work for an honest day's pay.

The Truth in Employment Act of 2005 returns a sense of balance to the NLRA, which is being undermined by the Board's current policies. Therefore, I urge Congress to take action to pass this vital piece of legislation.

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**TESTIMONY ON "SALTING – ORGANIZING AGAINST SMALL BUSINESS"**

**BEFORE THE SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND GOVERNMENT PROGRAMS**

**THE HOUSE COMMITTEE ON SMALL BUSINESS**

**SUBMITTED BY**
**RAY ISAAC**
**ISAAC HEATING AND AIR CONDITIONING, INCORPORATED**

**JUNE 21, 2005**

Chairman Musgrave, Ranking Member Lipinski and members of the Subcommittee on Workforce, Empowerment and Government Programs of the House Committee on Small Business, on behalf of the Air Conditioning Contractors of America (ACCA), thank you for providing me the opportunity to testify today on this very critical issue to small business. ACCA is the national non-profit trade association that represents the technical, educational and policy interests of the men and women who design, install, and maintain indoor environmental systems. We have over 50 federated chapters with nearly 5,000 local, state, and national members. Most of our contractor members are family-owned small businesses and many of these small businesses are in their second and third generation of family ownership.

In addition to being a member of ACCA, I am President of Isaac Heating and Air Conditioning, based in Rochester, New York. We are a third generation heating and air conditioning business and have 150 employees working for the company. We provide residential, commercial, and industrial heating, ventilation, air conditioning, and refrigeration service to customers throughout the greater Rochester, New York area and have been in business since 1945. In addition to running my business, I serve in various industry organizations including serving a one year term as Secretary on ACCA's Board of Directors.

In running my business, I face many complex issues and challenges ranging from the industry labor shortage to complying with federal government regulatory requirements. In addition to these issues, I also have to contend with an abusive practice from labor unions, known as salting, that threatens to disrupt my business, as well as others in my industry.

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Salting is a term to describe a union member who obtains, or attempts to obtain, employment from a non-union contractor. Once employed, the union member, or "salt", attempts to educate non-union employees about their rights, including the right to organize. While I have felt that union salting was not a very honest way for a union to infiltrate an unsuspecting business, I could see how salting could be viewed as a legitimate organizing tool by the unions. You can see the systematic approach that unions take to control jurisdictions to make sure that all construction work is done by union workers. These procedures take many forms and include salting, controlling manpower in a geographical area and applying economic pressure to the customers of a non-union contractor. I would like to submit for the record a copy of a manual from the International Brotherhood of Electrical Workers (IBEW) that provides extensive information on how to union organize, including discussion of salting and other organizing tactics.

Recently, however, instead of educating non-union employees on their rights, union salting has become nothing more than an overt and glorified tool of harassment and intimidation designed to antagonize the non-union business. The salt enters into employment with a contractor with the purpose of making allegations of unfair labor practices under the National Labor Relations Act. In many cases these allegations are proven false but require the non-union contractor to spend financial resources defending themselves from these false accusations. Instead of educating workers, the goal of the unions is to inflict economic loss on non-union employers by using the National Labor Relations Board (NLRB) as a shield against these practices. In my experience, another tool that is equally prevalent is the practice by a particular union to send in applicants who are under qualified, unprofessional and, in some cases, intoxicated. This game of "cat and mouse" is played by construction unions all across the country, and it is a game that costs honest, hard-working small businesses countless hours and hundreds of thousands of dollars to play this game with unions.

The unions are allowed to behave with disingenuous intentions when sending a union salt to obtain employment with a non-union contractor. Unfortunately, the small businesses are expected to respond to these applicants with genuine business reasons for not hiring the applicant. In my experience, many times the union does not even wait for a response on the status of an employment application from the business before filing an Unfair Labor Practice (ULP) charge claiming "union animus." In most cases these charges are dismissed as frivolous, yet the action of filing frivolous claims against contractors

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before the National Labor Relations Board uses up precious federal time and resources that could be better used to pursue bona fide claims against truly egregious labor law violations.

I operate my business under the philosophy of providing good wages to my employees for an honest day's work. My industry is currently undergoing a tremendous labor shortage and we have to work hard to find qualified workers to meet the demands of my customers. Because of this intense competition for qualified workers, we must competitively compensate our technicians, otherwise they will (and can) seek employment with another company. I also feel it is important to compensate employees for quality work and not have to follow a pre-determined time schedule or other job classifications that a union requires.

In today's economy and the employment realities of my industry, this activity is counter productive to the stimulation of the workforce. In some cases, honest small businesses are caught in a quagmire. Instead of hiring genuine, valid applicants honestly seeking gainful employment, they spend significant time and money addressing union harassment. Defending your small business against an ULP charge can be expensive for a small business, whereas the NLRB covers the cost for the union salt that files the charge. Many small businesses subsequently find themselves taking the safest route possible to avoid litigation – they hire no-one! The government has indicated that the greatest job growth is going to occur in the private, small business sector. This disruptive behavior is the last thing our economy needs.

As I stated at the start of my testimony, most of ACCA's member companies are family-owned businesses. Congress has previously examined legislative remedies to salting abuse in previous years. Your support for these measures would demonstrate recognition of the unique challenges that our small business contractors face every day in running our businesses. By helping to address these issues, and create a level playing field between small business contractors and organized labor, Congress can go a long way in assisting job growth while also providing a real benefit to American consumers.

Thank you for your attention and the opportunity to present our views before your subcommittee.

**STATEMENT OF LAURENCE J. COHEN, ESQ.**

**ON BEHALF OF**

**EDWARD C. SULLIVAN, PRESIDENT**

**BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO**

**BEFORE THE SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND GOVERNMENT PROGRAMS**

**OF THE COMMITTEE ON SMALL BUSINESS**

**UNITED STATES HOUSE OF REPRESENTATIVES**

**IN OPPOSITION TO**

**H.R. 1816**

**THE TRUTH IN EMPLOYMENT ACT OF 2005**

**JUNE 21, 2005**

**STATEMENT OF LAURENCE J. COHEN, ESQ., ON BEHALF OF**

**EDWARD C. SULLIVAN, PRESIDENT**
**BUILDING AND CONSTRUCTION TRADES**
**DEPARTMENT, AFL-CIO**

**BEFORE THE SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND GOVERNMENT PROGRAMS**
**OF THE COMMITTEE ON SMALL BUSINESS**
**UNITED STATES HOUSE OF REPRESENTATIVES**
**IN OPPOSITION TO H.R. 1816**
**THE TRUTH IN EMPLOYMENT ACT OF 2005**

**JUNE 21, 2005**

The Building and Construction Trades Department, AFL-CIO ("the BCTD") appreciates the opportunity to appear before this Subcommittee and to express its views on H.R. 1816, the Truth in Employment Act of 2005, and on organizing efforts often referred to as salting.

The BCTD is comprised of fifteen National and International unions representing one million employees in the construction industry. These affiliated unions represent in the aggregate several million employees. In order to maintain the status of salting as a legitimate form of protected activity, the BCTD submitted an *amicus curiae* brief to the National Labor Relations Board ("NLRB") in the companion cases of *Town & Country Electric* and *Sunland Construction* and has participated in many other "salting" cases.

The BCTD has also often testified in Congress on this very subject. Indeed, the bill before you, H.R. 1816, the Truth in Employment Act of 2005, is essentially identical to: (a) H.R. 1793, the Truth in Employment Act of 2003, considered by the 108th Congress; (b) H.R. 2800, the Truth in Employment Act of 2001, considered by the 107th Congress; (c) H.R. 1441 and S. 337, the Truth in Employment Act of 1999, considered by the 106th Congress; (d) H.R. 758 and

S. 328, the Truth in Employment Act of 1997, considered by the 105th Congress; (e) Title I of H.R. 3246 and S. 2085, the Fairness for Small Business and Employees Act of 1998, also considered by the 105th Congress; (f) S. 1981, the Truth in Employment Act, also considered by the 105th Congress; and (g) H.R. 3211 and S. 1925, the Truth in Employment Act of 1996, considered by the 104th Congress. The BCTD and representatives from its affiliated national and international unions have appeared before various Congressional Committees in connection with those bills.

H.R. 1816, like those efforts before, would deprive union organizers of the protection of the National Labor Relations Act and permit employers to engage in what has heretofore been deemed unlawful discrimination. And like those efforts before, H.R. 1816 is ill-conceived and is based on misconceptions about the purpose and nature of salting.

I.

The interest in bottom-up, employee-to-employee organizing among construction unions is a result of several factors, including the nature of the construction industry. In the construction industry, organizing has always been a difficult undertaking. Because jobs are short-lived and work is intermittent, it is nearly impossible for unions to engage in the type of organizing that takes place in other industries in which organizing campaigns frequently last several months and culminate in a representation election conducted by the National Labor Relations Board.

In 1959, Congress enacted Section 8(f) of the National Labor Relations Act, 29 U.S.C. §158(f), ("NLRA" or "Act"), permitting unions and employers in the construction industry to enter into prehire collective bargaining agreements (agreements entered into before the union can demonstrate that it represents a majority of the employer's employees, or even before any employees are hired), because Congress understood that "[r]epresentation elections in a large

segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of employment by specific employers." S. Rep. 187, 86th Cong. 1st Sess. at 55-56 (1959).

Several decisions in recent years have made the task of organizing construction workers and construction employers more difficult than it had been. In 1987, the NLRB issued its landmark decision in *John Deklewa & Sons, Inc.* 282 NLRB 1375 (1987), *enf'd*, 843 F.2d 770 (3d Cir. 1988), holding that at the expiration of a Section 8(f) prehire agreement, a construction industry employer could terminate its bargaining relationship with a union, unless the union had won an NLRB representation election or obtained voluntary recognition from the employer based on a showing of support from a majority of its employees.

That task became far more difficult, however, after the Supreme Court decided *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In *Lechmere*, the Court held that the NLRA did not provide non-employee union organizers any right of access to an employer's property and that an employer could invoke state trespass laws to exclude union organizers from its property. *Lechmere* thus permitted employers, including those in the construction industry, to deny non-employee union organizers access to the employees that they wanted to assist in organizing.

II.

The BCTD and its affiliated unions are committed to organizing unorganized employees in the construction industry. The right of employees to organize and join unions is the most fundamental right in the National Labor Relations Act. That right has been protected by federal law since 1935, when Congress passed the Wagner Act, declaring that commerce had been obstructed and burdened by "[t]he denial by some employers of the right of employees to

organize and the refusal of some employers to accept the procedure of collective bargaining." 29 U.S.C. §151.

Unions use numerous different methods to reach unorganized employees, to assist them in joining and supporting labor organizations, and to convince employers to recognize and bargain with the unions formed by those employees. Salting – the effort of union supporters and organizers to obtain employment with nonunion employers in order to organize the employer's workforce – is one such organizing method.

There is nothing new about salting. It has been used for many decades in several different industries. *E.g., Baltimore Steamship Packet Co.*, 120 NLRB 1521, 1533 (1958) (maritime industry); *Elias Bros. Big Boy Inc.*, 139 NLRB 1158, (1962) (restaurant); *Sears Roebuck & Co.*, 170 NLRB 533, 533, 535 n.3 (1968) (retail distribution center); *Dee Knitting Mills, Inc.*, 214 NLRB 1041, 1041 (1974) (textile industry); *Margaret Anzalone, Inc.*, 242 NLRB 879, 884-86 (1979) (clothing manufacturer); *Oak Apparel, Inc.*, 218 NLRB 701, 702, 714-07 (clothing manufacturer). In the construction industry, the practice goes back to the earliest days of the founding of construction unions in the latter part of the 19th century.

The increased use of salting in more recent years, particularly in the construction industry, is largely the product of changes in the law that limits other types of organizational activity. It is a valid and legitimate form of union organizing which, as one commentator has noted, "lie[s] at the core of NLRA protection." NOTE, ORGANIZING WORTH ITS SALT: THE PROTECTED STATUS OF UNION ORGANIZERS, 108 HARV. L. REV. 1341, 1347 (1995) (hereinafter "*Note*").

Some employers who have been the object of salting campaigns have complained vociferously – to the NLRB, to the courts, and to Congress – about what they contend is the

unfairness of salting. At bottom, however, the essence of these employers' complaints is that the law prohibits them from discriminating against employees simply because the employees intend to participate in employee organizing. There is nothing unfair in that prohibition, and it is consistent with the basic policies of the Act.

Those who participate in a salting program are union supporters and organizers who apply for jobs with nonunion contractors so that they can gain employment, perform exemplary work, and explain to unorganized employees the benefits of union organization. These organizers assist and support unorganized employees' efforts to obtain union recognition and a collective bargaining agreement from their employer. The efforts to obtain recognition may include a representation election, a recognitional strike, an unfair labor practice strike (if the employer has committed an unfair labor practice), or other lawful tactics, all of which are traditional means of obtaining recognition that are protected by the Act. The participants are very often volunteers, who may be unemployed, and who are willing to work for nonunion companies in order to promote the union's goal of organizing unorganized employees.

Salts understand when they apply for work that they will be expected to fulfill the employer's legitimate employment expectations. Because union organizers do not want to give the nonunion contractors an excuse to discharge them, and because they need to earn the respect of their nonunion co-workers, they are encouraged to be exemplary employees. They are instructed to obey all of the employer's work rules and to work efficiently and skillfully. Indeed, most salts are journeymen with years of experience on top of a rigorous five-year apprenticeship.

If, as frequently happens, an employer responds to a salting campaign by committing unfair labor practices – often by refusing to hire union salts, or by firing those it learns are union salts – charges will be filed with the NLRB. We make no apology for filing these charges:

employers do not have the right to restrain, coerce, or discriminate against employees who support union organizing, and employers who commit those violations of the law should be held responsible for their conduct. That is not merely our view of how things ought to be: that is the law.

III.

The so-called issue of "divided loyalties" is, frankly, a phony one. The complaint of some employers that a salt should be denied the protections of the Act on the ground that he or she cannot be truly loyal to the employer, has been rejected both by a National Labor Relations Board whose members were appointed by Presidents Reagan and the first President Bush and by a ***unanimous*** Supreme Court.

The case that so held is, of course, the now-famous *Town & Country Electric* case. In that case, Town & Country, a very large, nonunion electrical contractor, acting through an employment agency, ran a newspaper advertisement announcing job opportunities for licensed electricians, and set up interviews in a hotel suite. Eleven members of the International Brotherhood of Electrical Workers showed up for the interviews. Two were paid union organizers; the other nine were unemployed members. After learning that these eleven applicants were union members, the company canceled the interviews. When one of the unemployed electricians, Malcolm Hansen, protested that he had an appointment to be interviewed, the company interviewed and hired him. Once on the job, Hansen began soliciting support for the union during work breaks. Within a few days, the company fired him because of his organizational activities. Hansen, a very experienced journeyman electrician, had been an exemplary employee at Town & Country.

The company took the position before the NLRB that, regardless whether it is an unfair labor practice for an employer to fire an employee for engaging in organizing activities, there could be no violation here because neither the applicants nor Mr. Hansen were "employees" under the Act. The basis for this contention was the notion that receiving any sort of remuneration from the union rendered these members beholden to the union and, accordingly, incapable of possessing the degree of loyalty necessary to make them the employer's employees.

Reviewing the language of the Act, the legislative history, Supreme Court rulings and its own precedent, the National Labor Relations Board found consistent support for construing the term "employee" as "broadly cover[ing] those who work for another for hire," *Town & Country Electric, Inc.*, 309 NLRB 1250, 1254 (1992), and thus broad enough to encompass these union organizers. The Board found further support in common law agency principles, which provide that "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." *Id., citing Restatement (Second) of Agency* §226, pp. 498-500 (1957).

The Board then looked to the policies of the Act, to determine whether they were furthered by "protecting paid union organizers as 'employees.'" 309 NLRB at 1256. Starting with the proposition that "[t]he right to organize is at the core of the purpose for which the statue was enacted," the Board observed that "[n]o coherent policy considerations to the contrary have been advanced that do not, on analysis, resolve themselves into arguments that employers be permitted to discriminate based on an individual's presumed or avowed intention to join or assist a labor organization." *Id.* The Board found no conflict between affording these organizers the same protections enjoyed by other employees, and legitimate managerial rights. That is, the union organizer – like any other employee – is subject to the employer's direction and control, is

responsible for performing assigned work, can be limited by lawful no-solicitation rules, and is generally subject to the same *nondiscriminatory* discipline. In rejecting the company's contention that paid organizers will, by their very nature, engage in conduct inimical to the employer's legitimate interests, the Board found that:

> "[t]he statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize." *Id.* at 1257.

That decision was appealed, and in 1995, the Supreme Court issued its decision in *National Labor Relations Board v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). Justice Breyer, speaking for the ***unanimous*** Court, asked and answered the question before the Court as follows:

> Can a worker be a company's "employee," within the terms of the National Labor Relations Act ... if, at the same time, a union pays that worker to help the union organize the company? We agree with the National Labor Relations Board that the answer is "yes." *Id.* at 87.

The Supreme Court held that the Board's decision was consistent with the unmistakable language of the Act's broad definition of "employee" and with the policies of the Act, including "the right of employees to organize for mutual aid without employer interference . . . ." *Id.* at 91.

In holding that union organizers are employees entitled to the Act's protections, the unanimous Court thoroughly rejected the argument that paid union organizers were not protected by the Act because their so-called "divided loyalties" could lead them to quit at a moment's notice, try to harm the company, or even sabotage the company's products. As the Court held:

> If a paid union organizer might quit, leaving a company employer in a lurch, so too might an unpaid organizer, or a worker who has found a better job, or one whose family wants to move elsewhere. And if an overly zealous union organizer might hurt the company through unlawful acts, so might another unpaid zealot

> (who may know less about the law), or a dissatisfied worker (who may lack an outlet for his grievances). This does not mean they are not "employees." [A] company disturbed by legal but undesirable activity, such as quitting without notice, can offer its employees fixed-term contracts, rather than hiring them "at will" . . . or it can negotiate with its workers for a notice period.

516 U.S. at 96-97.

Thus, in *Town & Country*, a unanimous Supreme Court established that there is no distinction between a union organizer and an applicant/employee who is not an organizer. Both are "employees" under the Act, and both are entitled to the Act's protections. Accordingly, those that contend that H.R. 1816 would not curtail legitimate, protected rights under the National Labor Relations Act, are simply wrong. The Supreme Court has held that salts have a protected right to be considered for hire and employed on a non-discriminatory basis. H.R. 1816 would eviscerate that right, legitimizing the creation of a blacklist of employees who need not apply for work with non-union construction contractors. Moreover, H.R. 1816 would also allow employers to fire those of its employees who dared engage in organizing under the direction of a labor union. These are massive changes, detrimental to working men and women in the United States, and are completely at odds with the core purpose and structure of labor relations in this country.

IV.

Although salting is both a lawful and legitimate form of organizing, the most common response by construction industry employers to a salting campaign is the commission of unfair labor practices. Employers refuse to hire union organizers *because* they are union organizers and, if they are hired, discharge them because they engage in organizing. For example, in one case in which an employer discriminated against an employee in recall from layoff because of his "open support for the union," the Administrative Law Judge ("ALJ") concluded that the

employer's "testimony about [the employee's] productivity [failures] was pure fabrication in an attempt to obviate the real [unlawful] reasons for not wanting [him] to work." *H.B. Zachry Co.*, 319 NLRB 967, 979 (1995), *enforced in relevant part*, 127 F.3d 1300 (11th Cir. 1997). The same employer had refused to offer overtime to an employee unless he stopped organizing; told the employee that he had been put on the employer's "hit list;" and subsequently fired the employee. 319 NLRB at 974.

Another case involved a salting program in which union organizers had been admonished by their union to "work as hard for a nonunion contractor as they would for a union contractor," to "try to make a favorable impression," and in particular *not* to engage in "sabotage . . . lying, stealing cheating, obtaining information unlawfully . . . [or] mak[ing] any assumption that nonunion employees are less competent than union members." *Tualatin Electric*, 319 NLRB 1237, 1239 (1995), *enforced*, 84 F.3d 1202 (9th Cir. 1996). The employer responded to the salting campaign by "referring to [the union] as organized crime trying to put him out of business." *Id.* The owner told the superintendent "to eliminate wherever possible any personnel that were affiliated with the union;" told the employees that "as long as he owned the Company it would never be union;" and instituted a "no-moonlighting" policy for the specific purpose of eliminating those participating in the salting program. *Id.* The ALJ concluded that "Respondent's union animus is . . . pervasive and the nature of the unfair labor practices . . . egregious, striking at the very heart of the Act . . . Respondent['s] . . . conduct was directed against any applicant that had either worked for a unionized employer or that it suspected of having ever had a union connection." *Id.* at 1241.

There is no question that the employer conduct that I have just described is unlawful; the NLRA simply does not permit employers to exclude people from the workforce solely because

they intend to organize employees. It makes no difference whether the union supporter is acting with or without financial support from the union. Yet, the volumes of NLRB decisions are filled with these cases, each telling a story of unlawful, often blatant, discrimination against union organizers. Nonunion construction employers, who find obeying the law either too burdensome or too threatening to their nonunion status, are promoting a fiction when they argue that working as union organizers converts these employees into an unprotected status and entitles the employers to discharge or refuse to hire them with impunity.

V.

Three years ago, the NLRB clarified its framework for analyzing salting cases in *FES*, 331 NLRB 9 (2000), a case in which the BCTD participated. The NLRB held that, in order to establish that an employer refused unlawfully to hire union organizers, the NLRB General Counsel must prove that: (1) the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) the applicants had the experience or training relevant to the announced job requirements (or the employer has not adhered to such requirements, or that the requirements themselves are pretextual); and (3) that antiunion animus contributed to the decision not to hire the applicants. The employer may then prevail by demonstrating that it would not have hired the union organizers even if they had not been union supporters. Thus, nothing in the law prohibits employers from refusing to hire union organizers, so long as the employer is not acting in a discriminatory manner.

The NLRB's framework in *FES* for evaluating an unlawful refusal-to-hire has been approved by all of the Courts of Appeals that have considered it. *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 968 (6th Cir. 2003), *cert denied*, 160 L. Ed. 2d 898 (2005); *Operating Engineers Local 150 v. NLRB*, 325 F.3d 818, 828 (7th Cir. 2003); *Maisongale Electrical-Mechanical v.*

*NLRB*, 323 F.3d 546, 553 (7th Cir. 2003); *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1194 (D.C. Cir. 2003); *NLRB v. FES*, 301 F.3d 83 (3d Cir. 2002); and *NLRB v. Little Rock Electrical Contractors*, 2002 U.S. App., Lexis 15016 (4th Cir. May 8, 2002).

Moreover, prohibiting employers from discriminating against union organizers simply because they are union organizers does not deprive employers of any greater degree of control over their work force or their work place than is inherent in the employee protections afforded by the Act. The law protects an employer's right to promulgate and enforce legitimate work rules that are not a pretext for discrimination against union supporters. The law permits an employer to discharge an employee who is insubordinate or incompetent. The law also permits an employer to refuse to hire an employee for a valid business-related reason; if, for example, the employer concludes, based on nondiscriminatory grounds, that the applicant cannot perform the job adequately. Although employees have a protected right to communicate with each other on the subject of union organization, the law also permits an employer to promulgate valid "no solicitation" rules, which effectively prohibit organizing activity during work time. Additionally, the law permits the employer to exercise control over what work employees perform and how they perform it.

Contrary to the complaints of some nonunion construction employers, what is at stake here is not whether employers should be allowed to run their work places in accord with neutral rules designed to assure productivity and discipline. Rather, what is at stake is whether employers should be allowed to discriminate on the basis of suspected union membership and organizing activity. That is a point ignored by many of the critics of salting, principal among them Professor Emeritus Herbert R. Northrup of the Wharton School, University of Pennsylvania. *See* Northrup, "SALTING" THE CONTRACTORS' LABOR FORCE; CONSTRUCTION

UNIONS ORGANIZING WITH NLRB ASSISTANCE, 14 J.LAB.RES. 469 (1993). Professor Northrup, relying on anecdotal evidence, surmises and conjecture, refuses to acknowledge the legitimacy of the organizing objective of salting. For example, Professor Northrup notes that salting allows a union to obtain information on the jobsite concerning possible violations of prevailing wage requirements, OSHA or environmental standards, *etc.* He calls the reporting of violations of these legal requirements, which protect employees and the public, a "scam." That is a perverted view of the operation of law, however, as it seems to us that it is the *employer* that has failed to pay legally-mandated wages, or that has violated OSHA or environmental requirements, that has engaged in a scam. Indeed, employers that commit such violations victimize not only their employees, but also the legitimate contractors that comply with the law and must compete with those that do not.

Embedded in the NLRA is the premise that there is no conflict between the right of employees to engage in collective activity and their obligations to their employers. There is thus no conflict between a union organizer's duty to the nonunion employer by which he or she is employed, and that organizer's duty to the union. As the NLRB concluded in *Town & Country*,

> The Statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's workforce if hired establishes neither their unwillingness nor their inability to perform quality services for the employer.
>
> . . . .
>
> The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may give rise to a conflict, it is a conflict that was resolved by Congress long since in favor or the right of employees to organize.

309 NLRB at 1257.

Acceding to the wishes of nonunion construction industry employers to treat union organizers differently in order to permit employers to screen them out would effectuate a fundamental change in the law, "undermin[ing] the purpose of the Act to protect workers' rights to organize." NOTE, 108 HARV.L.REV. AT 1342.

I want to emphasize again the only objective of salting is organizing. The Associated Builders and Contractors ("ABC") and some of its allies have claimed that salting is really about the filing of frivolous or harassing unfair labor practice charges against employers. That is simply not true. Charges are filed with the NLRB only in response to unlawful firings, refusals to hire, or other unlawful conduct by employers. Actually, the ABC has pointed out the fallacy of its own arguments. In the course of an ABC conference in 1995, entitled "Coping with COMET," ABC distributed a collection of papers. In those materials, this statement appeared: "Unions plan to wear down nonunion contractors by filing unfair labor practice charges with the NLRB *each time a contractor steps outside the National Labor Relations Act. (Emphasis added.)* That is absolutely correct; when a contractor violates the National Labor Relations Act in order to defeat organizing activities, charges will be filed – and should be filed. In short, if there exists a "problem" of "too many" unfair labor practice charges being filed as a result of salting campaigns, that problem results from too many employers committing too many violations of the Act.

Some contractors have complained that union salts file frivolous unfair labor practice charges solely to make those contractors less competitive. Frequently these complaints come from contractors who have themselves been found to have violated the law. Those complaints are not only disingenuous, but they ignore the procedure under the NLRA which renders non-meritorious unfair labor practice charges against an employer of little or no value to a union.

When charges are filed, the charging party must submit supporting evidence. If, but only if, such evidence is submitted, the NLRB General Counsel will conduct an informal investigation of the charge, during which employers generally do not retain or need legal counsel. Only if the NLRB General Counsel concludes that the charge has merit will an unfair labor practice compliant be issued and formal proceedings initiated.

Indeed, the National Labor Relations Board's own statistics demonstrate that any claim that salting has resulted in frivolous charges being filed with the NLRB is mistaken. For example, the National Labor Relations Board tracks the percentage of cases in which an NLRB regional office determines that a charge is meritorious and that more formal proceedings are warranted. From 1980 to fiscal year 2004, this "merit factor" percentage has held relatively steady, fluctuating between 32% and 40%, including a 40% rating in the first two years after the *Town & Country* decision, and 37.7% in FY 2003. NLRB General Counsel Memorandum 05-01 at p. 6 (December 10, 2004) (available at www.nlrb.gov); SIXTY-NINTH ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 2001 at p. 11, chart 5 (April 29, 2005) (available at www.nlrb.gov). Thus, there is no truth to the claim that the NLRB has seen a growing number of frivolous unfair labor practice charges.

Moreover, the sheer number of charges filed with the NLRB has not increased precipitously in the last several years. In fact, the number of charges filed has decreased since salting has allegedly become prevalent in the construction industry. For example, in FY 1994, the year before the Supreme Court issued its decision in *Town & Country Electric*, 34,782 unfair labor practice charges were filed with the NLRB, 26,058 of which were filed against employers. FIFTY-NINTH ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 1994 at p.6 (June 23, 1995). In FY 2004, 26,890 unfair labor charges were filed with the NLRB, 19,946 of

which were filed against employers. SIXTY-NINTH ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 2004 at p. 6-7 (April 29, 2005). Thus, in the six years following the *Town & Country* decision, the overall number of unfair labor practice charges filed has decreased 22% and the number filed against employers has decreased 23%. Accordingly, the assertion that salts are abusing employers and the NLRB processes as a result of *Town & Country* by filing frivolous unfair labor practice charges is completely false.

VI.

In conclusion, the Supreme Court's unanimous *Town & Country* decision is a wholly accurate reading of both the National Labor Relations Act and the policies underlying it. There can be no legitimate debate about whether the right to organize is a core value of the Act. Nor can it fairly be argued that there is a lesser right to organize in the construction industry. Yet, this bill would foreclose effective organizing in the construction industry.

For the reasons we have shown, organizing in this industry is more difficult than it is in other industries. It is because of those difficulties, and for the reasons set forth above, that salting as a means of organizing in this industry has grown in recent years. For the reasons articulated by both the NLRB and the Supreme Court, that conduct is – and should be – protected by the NLRA. Support for a union, or the intent to organize an employer, is simply not disloyalty to the employer.

H.R. 1816 would turn the NLRA on its head and erode seriously the fundamental right of employees to organize. Therefore, on behalf of the fifteen national and international unions representing millions of employees, I urge you to reject H.R. 1793, the misnamed Truth in Employment Act of 2005.

**Testimony of Michael Aldi, Jr.**
**before the House Small Business Committee's**
**Subcommittee on Workforce, Empowerment,**
**and Government Programs**
**on June 21, 2005**

Madam Chairwoman, members of the Subcommittee, thank you for the opportunity to share with you today my story about the devastating effects of union "salting."

My name is Michael Aldi, Jr. and I am a victim of a union "salting" campaign. I was the owner and president of a medium-sized electrical contracting company, Aldi Electric, in upstate New York. Aldi Electric was established in 1989 and was incorporated in July of 1997.

I am the product of divorced parents and was raised on welfare. I was a welfare-to-work success story, building my "American Dream," or so I thought. With only $2,000 in my pockets and many long hours of work, I built a company that had yearly sales of over one million dollars in 2001. In retrospect, my success in the electrical contracting business would be my downfall. Soon, my business would gain the "attention" of the International Brotherhood of Electrical Workers (IBEW).

In 1997, I had my first taste of union "salting" and sabotage. You see, through the competitive bidding process, I was awarded the contract to wire a new Revco Pharmacy in Niskayuna, NY. During this project, it was discovered that concrete was poured into a conduit 30 feet in the air. The cost to correct this deliberate sabotage was over $5,000. The suspected saboteur was eventually laid off, leading the IBEW to file "unfair labor practice" charges with the National Labor Relations Board (NLRB). This case is still open and has cost well over $10,000 in legal fees to defend.

In 2000, I hired an employee to work as a foreman to manage various jobs. This foreman/employee quit within three months of being hired, without notice, in the middle of a large job. After he left, it was discovered that he had stolen company tools and equipment. Additionally, I found many hidden mistakes this employee made while acting as foreman that would cost the company $6,000 to repair.

This employee then filed false allegations with the New York State Department of Labor, which the company decided to settle for $800, rather than face another expensive legal battle. After the settlement was reached, it was discovered that the former employee had been on the union payroll the entire time he was working for me.

The most extensive and egregious acts of union "salting" against my company were perpetrated by IBEW Local 236 from 2002 to 2004. These acts would eventually ruin my company and force me into bankruptcy.

Toward the end of 2001, a childhood acquaintance approached me asking for a job. He expressed to me that he'd had a falling out with IBEW Local 236 "due to the way he had been treated." Needing his skill set, I hired him to work as a foreman. Unknown to me at the time, IBEW Local 236 did not have any work in the area. Since this childhood acquaintance did not travel out of the area, a representative from IBEW Local 236 gave him an ultimatum, "...salt Aldi Electric, or go on unemployment." During his tenure at my company, he was constantly making mistakes that would cost thousands of dollars and numerous man-hours to repair.

In July 2003, I caught this childhood acquaintance stealing electrical materials and equipment from several job sites. After I fired him, several employees approached me to tell me what the former employee had been doing.

Employees stated they had seen him: stealing materials and equipment from job sites, sabotaging work, "padding" his and others time sheets, and forcing other employees to "pad" their time sheets. He also threatened other employees with violence and "black balling" within the electrical trade if they disclosed his activities, communicated false statements to customers driving a wedge between my company and customers, and bragging to other employees that "he was helping the IBEW bring Aldi down."

In addition, on the advice of this childhood acquaintance, I hired his mother as office manager. During her four-month tenure at Aldi Electric, she helped her son's "salting" campaign by: sabotaging company payroll records, altering employee records, destroying company equipment sign-out sheets (helping to cover up her son's theft), mismanaged company office practices and equipment, and succeeded in alienating customers. When the internal sabotage was brought to my attention by my bookkeeper, the office manager was eventually fired.

Also during 2003, I hired two additional employees to work as foremen. Eventually, both of these foremen were caught sabotaging jobs, stealing equipment, and "padding" time sheets and were suspected of arson that burned down an Aldi Electric equipment trailer. They also threatened a builder not to pay Aldi Electric or they would face union problems of their own (this led to the builder withholding over $30,000 in payments due).

Several months after terminating these union "salts," additional employees left the company out of fear of union retaliation and ended up joining the IBEW. This left Aldi Electric extremely short staffed.

So, we sought to hire new employees. Following our company's hiring policy we added six new employees. Two of these new employees quit within two to three days of being hired after making numerous mistakes and leaving work half done. This cost the company valuable time and resources to repair.

In addition, after filling those positions, IBEW Local 236 officials were still not finished. They began showing up to my office to fill out applications. They completely

ignored a posted sign stating, "No Applications Accepted at This Time," and set about intimidating my office staff into receiving employment applications. They then returned partially filled out applications. Since my company had already filled the positions, and the manner in which they filled out their applications did not meet my company's hiring policy, we did not hire any of the applicants.

This did not stop them, however, from filing additional "unfair labor practice" charges with the National Labor Relations Board. These charges were eventually dropped, but cost Aldi Electric over $2,000 in added legal fees.

The most telling evidence that this was a coordinated "salting" campaign is that all four of these former employees currently work for IBEW Local 236, which has filed "unfair labor practice charges" against my company with the U.S. Department of Labor and the National Labor Relations Board. During the subsequent investigation, I was told by agents of the IBEW, and the investigator from the U.S. Department of Labor, that if I handed my employees over to IBEW Local 236, "all of these charges would just go away."

The battle that I have been forced into due to the union "salting" campaign waged by IBEW Local 236 has cost my company well over $100,000 to find and repair mistakes made by these union "salts," over $60,000 in legal fees to defend myself against these false allegations, and has cost 14 employees their jobs.

The fact is, none of these employees ever had a desire to do legitimate work for my company. The only reason they sought employment with my company was to help IBEW Local 236 force me to either hand over my employees to their control, or put me out of business.

Madam Chairwoman, I am here today to share with you my experiences and to ask for your help to make sure that no other company in America has to go through what I've had to endure. I ask you to consider the arguments made here today by Congressman Steve King, business owners, and the National Right to Work Committee and pass The Truth in Employment Act. Too many companies are being put at risk and it's time for Congress to act.

# Statement of Associated Builders and Contractors

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U.S. House of Representatives
Committee on Small Business
Subcommittee on Workforce, Empowerment and Government Programs

June 21, 2005

"Union Salting Abuses Against Small Business"

By

Anita Drummond
Director of Legal and Regulatory Affairs

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## The Voice of the Merit Shop

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Good morning Chairwoman Musgrave and members of the subcommittee. My name is Anita Drummond, and I am the Director of Legal and Regulatory Affairs of Associated Builders and Contractors, Inc. (ABC).

ABC represents over 23,000 contractors and related firms in the construction industry, both union and non-union. ABC members believe that construction work should be awarded on the basis of merit, regardless of labor affiliation. We educate our members about the importance of treating all job applicants and employees fairly without regard to their race, color, religion, creed, age, sex, national origin or ancestry, marital status, status as a disabled, Vietnam era, or other veteran, status as a qualified individual with a disability, union affiliation, or any other protected status, in accordance with applicable laws.

In spite of the best efforts of many contractors to comply with the prohibitions against discrimination based on union affiliation under the National Labor Relations Act (the Act), however, contractors have been subjected to thousands of unfair labor practice charges filed by unions engaged in salting tactics. The interpretations by the National Labor Relations Board (the Board) and various U.S. Courts of Appeal have left businesses—especially the smallest—confused at best and at worst vulnerable to unscrupulous union tactics that are intended to eliminate non-union contractors and recapture market share for unions.

In the last 25 years, unions have lost their foothold in representing American workers. In 2004, less than 15 percent of all construction workers were members of a union. The failures of union representatives to convince Americans of the value of membership have driven some in the union movement to take aggressive tactics to eliminate competiting employers by filing unfounded unfair labor practice charges with the National Labor Relations Board. This results in tying up the resources of the Board and employers, especially the smaller companies, and it does

nothing to achieve the objectives of the Act, which is protecting the interests of workers and employers.

In effect, the interpretations of the Act—without a clear statutory definition—have created an opportunity for the Board to establish an affirmative action hiring mandate for union agents. With the simple filing of an unfair labor practice charge, an employer is thrown into defending itself against a government-funded prosecution machine and is dealt the penalty of hiring union agents with little regard for the individuals' qualifications for a position.

ABC strongly supports H.R.1816, the Truth in Employment Act. The bill would amend the Act to codify that an employer is not required to employ any person who is not a bona fide applicant. In essence, this bill simply says that an employer should not be required to hire somebody who is really seeking the job in order to further the interest of another employer. The bill is vitally needed to prevent ongoing abuse of Board resources and to preclude unfair economic pressure by union salts against nonunion contractors.

The present bill achieves a common sense balance of interests and would help to curb the gross abuses which are taking place under the Board's present enforcement of the National Labor Relations Act. While the bill does not overturn the U.S. Supreme Court's 1995 *Town & Country* decision, it clarifies the intent of Congress to enforce the Act in a balanced and neutral manner with regard to the hiring and employment process. *National Labor Relations Board v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

While some courts have declared that employer rights to select the best qualified candidate remains, in practice employers have been consistently penalized by the Board, which has required hiring of salts—sometimes all of them no matter the needs of the employer. The Sixth Circuit U.S. Court of Appeals observed that the *Town & Country* opinion "does not mean that an employer's refusal to hire a paid union organizer is always unlawful under section

8(a)(3)." *National Architectural Glass & Metal Co., Inc. v. National Labor Relations Board*, 107 F.3d 426 (6th Cir., 1997). However, employers that challenged the system have been saddled with legal fees and the burden of hiring unqualified candidates. *See e.g., Great Lakes Chemical Corp. v. National Labor Relations Board*, 967 F.2d 624 (D.C. Cir. 1992) (where court upheld Board order to offer all workers a job regardless of company need or qualification requirements) and *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994) (where the court order all openings to be filled with salts regardless of their qualifications). Smaller employers have been forced to settle to avoid further legal defense costs and accept the forced hirings.

The Board has placed a heavy burden on contractors to defend even the most neutral hiring policies that union salts can routinely force contractors to spend thousands of dollars to defend completely innocent activity. The expansive interpretation of the Act continues although there have been some reversals by the U.S. Courts of Appeal.

One such reversal is the case of *TIC-The Industrial Company Southeast, Inc. v. National Labor Relations Board*. 126 F.3d 334 (D.C. Cir. 1997). The employer had neutral hiring policies in place and consistently followed them; yet the court had to step in to keep the Board from imposing hundreds of thousands of dollars of back pay liability against the employer for failing to hire union agents who had not complied with the employer's neutral policies.

After a decade of litigation, the Minnesota Court of Appeals held in 2004 that union salts have the right to lie on their employment applications to nonunion companies about their job qualifications. When an employee lied on the job application and covered up misconduct at previous jobs, the employer was denied a remedy to terminate. *Wright Electric, Inc. v. Ouellette*, 686 N.W. 2d 313 (Minn. Ct. App. 2004) (reviewed denied by Minnesota Supreme Court). While

the case is on petition for writ of certiorari to the U.S. Supreme Court, now is the time for Congress to codify the balance and neutrality always intended by the Act.

The National Labor Relations Act was never intended to encourage fraud in the workplace. If the current bill is not passed, we will continue to see such abuses occur.

Nothing in the proposed language of H.R. 1816 would permit employers to discriminate against bona fide employees or bona fide employee applicants who happen to support unions. The bill would simply allow employers to refuse to employ individuals who seek access to the workplace in furtherance of another employment or agency status. The Board's policies have encouraged union agents to file charges, often without merit, just to punish employers whose employees have chosen to work nonunion.

Few salting cases have led non-union employees to actually vote for a union by any democratic process. Salting is a pressure tactic, designed to harass employers that are competitive in the marketplace with their team of merit workers.

H.R. 1816 would help correct abuse of the current law by establishing a clear test for both labor and management that would preserve the right of bona fide employees to be free from discrimination while preserving the right of employers to hire people who want to work for them and who do not intend to work for somebody else.

Thank you for providing ABC the opportunity to testify on this important issue.

STATEMENT OF

MICHAEL E. AVAKIAN

On Behalf Of The

CENTER ON NATIONAL LABOR POLICY, INC.

Before The

SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT
AND GOVERNMENT PROGRAMS

Of

COMMITTEE ON SMALL BUSINESS

Of The

UNITED STATES HOUSE OF REPRESENTATIVES

Concerning

UNION SALTING—ORGANIZING SMALL BUSINESS

June 21, 2005

Mr. Chairman and Members of the Subcommittee:

My name is Michael Avakian and I am General Counsel for the Center on National Labor Policy, Inc. ("Center"). It is an honor for me to appear before you today, at your request, to discuss proposed amendments to the National Labor Relations Act. The Center is a public interest, non-profit legal foundation whose major goal is to protect individual rights from excesses of union and governmental power. Most of the Center's litigation activity is devoted to representing employees and small employers whose rights under our National Labor Laws have been violated.

SUMMARY OF THE CENTER ON NATIONAL LABOR POLICY'S POSITION

The Center on National Labor Policy believes that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, should be amended to account for union salting which has destabilized labor relations in this country and caused unbearable overreaching by labor organizations in using the prosecutorial tools available to the National Labor Relations Board in order to force "top-down organizing." That is, signed union contracts without employee votes.

With over thirty years of experience in labor relations activities, the Center on national Labor Policy, Inc. has found the state of the law relating to organizing by "salts" to be anything but an attempt to legitimately represent employees under Section 7 of the Act. Salting is all about coercion, duplicity, fraud, and extortion.

The Act provides employees the right to associate and to restrain from associating with other employees and labor organizations. It also provides a right to an NLRB supervised election. However, in the construction industry where salting is most prevalent, the opportunity for employee choice is bypassed through prehire agreements permitted by Section 8(f) of the

Labor Act, *i.e.*, "top-down" organizing.

What has been experienced since the Supreme Court's decision in Town & Country, is that paid union agents have no interest in performing productive work for the employer, engage in activities that defeat the productivity of the employer, decrease morale, engage in coercive activities beyond the reach of law enforcement under the Emmons decision, and have no other purpose but to foment anti-employer sentiment.

Once the union salt has achieved those objectives, which usually leads to the destruction of the employer's business, the union agent moves on to try the same tactics elsewhere. Where the salt is exposed, the Labor Board will step in and have the person reinstated, awarded backpay or both. Usually, salts have no interest in reemployment and take the settlement money and move on. That has been our observation—there is no interest in stable employment.

No sound purpose otherwise exists in the Act for permitting non-employee union agents to seek employment under false pretenses, to foment litigation, and then to leave without consequences. In very real terms, these labor organization agents get to accomplish on behalf of their signatory employers anticompetitive acts and spying that competitors have been forbidden from doing to each other since the Sherman Antitrust Act was passed in the 1800s.

For these reasons, the Center supports legislation to remove these privileged activities of paid union agents.

**INTRODUCTION**

The premise upon which the Labor Management Labor Relations Act was enacted was to encourage collective bargaining between businesses and labor organizations. 29 U.S.C. § 151. The National Labor Relations Act was enacted in 1947 with Section 7to preserve and protect the right of individuals to associate or not to associate with labor organizations. Congress realized

that all too often individuals' rights were forsaken by the Labor Board for the benefit of labor organizations. To remedy this unfairness, Congress provided for Section 7 of the Act.

I have represented clients both for the Center and as private counsel in cases involving union salting activities. Some of the cases are published, some are not. *See e.g., Brandt Construction Co.*, 336 N.L.R.B. No. 58 (2001), *enf'd Operating Engrs., Local 150 v. NLRB*, 325 F.3d 818 (7th Cir. 2003). A copy of that decision is attached.

Yet, repeatedly the most troublesome aspect of salting has been the avowed taunts to employers to take direct action against salts who have exposed themselves. In these situations, the individuals seek to force an employer to fire them by engaging in self-destructive acts in order to weaken the employer in the eyes of the employees.

Congress limited the scope of Section 7 of the Act with the Section 10© right of the employer to discharge its employees for cause. 29 U.S.C. § 160©. Specifically, the Board's power to do so was deliberately revoked by Congress:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

In House Conference Report No. 510 on H.R. 3020, the Managers discussed the provisions of Section 7 in relation to Section 10:

> Furthermore, in section 10© of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, ***applies with equal force whether or not the acts*** constituting the cause for discharge were committed ***in connection with a concerted activity***. (Emphasis added).

The Bill as introduced by Senator Taft during debate on June 6, 1947, 93 Cong. Rec. 6593, 6598 (1947), contained the text of H.R. 320. The Bill was affirmed that day by the Senate. It recognized a number of objections to the prior conduct of the Board that the revisions, which

were to become Sections 7 and 10© of the NLRA, were to correct.

First, the Conference Report stated that the Board had interpreted prior to NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939), that the "language of section 7 protected concerted activities, regardless of their nature or objectives." Second, the amendments were to ensure "a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past accorded protection to such activities, the conference agreement makes such protection no longer possible." Id. at 6599; reprinted in I NLRB, Legislative History of the Labor Management Relations Act, 1947 1536-37 (1959).

Employees covered by the Act were to be given no special immunity for engaging in "improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee *for any such reason* is protected in specific terms in Section 10(c)." Id. at 6563.

Insubordination is a typical behavior. "The legal principle that misconduct, disobedience or disloyalty is adequate for discharge is plain enough." NLRB v. Local No. 1229, IBEW, 346 U.S. 464, 475 (1953). Thus, "[t]he fortuity of the coexistence of a labor dispute affords these technicians no substantial defenses." 346 U.S. at 476.[1]

And the rights of salts do not carry over to them as union agents. Avowed agents have only limited rights as recognized in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In that case, the Supreme Court explained what Section 7 rights include:

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[1]Section 2(9) of the Act, 29 U.S.C. § 152(9), defines "labor dispute" as including "any controversy concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

> [in *Babcock & Wilcox v. NLRB*] we explained that the Board had erred by failing to make the critical distinction between the organizing activities of employees (to whom § 7 guarantees the right of self-organization) an non-employees (to whom § 7 applies only derivatively). Thus, while "[n]o restriction may be placed on the employees; right to discuss self-organization *among themselves*, unless the employer can demonstrate that a restriction is necessary *to maintain production or discipline*, 351 U.S., at 113...., ***no such obligation is owed nonemployee organizers***," 351 U.S., at 113....

*Lechmere*, 502 U.S. at 533 (emphasis in original) (citations omitted).

An Employer has no obligation to the nonemployee organizers. As the Supreme Court made quite clear in *Lechmere*, nonemployees cannot trump an employer's property interest. Yet, once on the property, the right of those same agents are transformed by the Labor Board into superior rights. From there, the Labor Board utilizes unfairly its superior litigation prowess to protect these salts. Not only are the Board's resources consumed by these cases that do not protect Section 7 rights of *employees*, it undermines the Agency's core mission.

Other typical problems include issuance of conflicting statements concerning wages and employee activities alleged by salts against employers. Employers deny these statements made of them. But, the Labor Board will likely go to a hearing on the questions because credibility questions require a hearing to resolve under its Rules and Regulations. All such statements could be considered protected employer speech under the Act.

Even if the alleged statements are found to have been made, statements to employees concerning their working conditions and an employer's view of unionization are clearly expressions protected by Section 8© of the Act and the First Amendment to the Constitution, as explained below.

Section 8© of the Act, 29 U.S.C. § 158©, provides:

> 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 under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Without Section 8(c), Section 8(a)(1) of the Act would restrict almost any employer speech relating to union organization. Hertzka v. NLRB, 503 F.2d 625 (9th Cir. 1974), cert. denied, 423 U.S. 875 (1974). Congress intended that 8(c) would also prevent the Board from attributing antiunion motives to an employer on the basis of past statements. Linn v. United Plant Guard Workers, 383 U.S. 53, 62 (1966): "We acknowledge that the enactment of § 8 (c) manifests a congressional intent to encourage free debate on issues dividing labor and management."

In light of the Board's decision in Clark Equip Co., 278 N.L.R.B. No. 85 (1986), it is difficult to discern how factual statements about union activity are coercive of employee rights which would amount to a "threat of reprisal" to any employee that would fit into the exception to the protection extended to expression under the Act. In Clark, the Board agreed that the statements made,

> accurately reflect the obligations and possibilities of the collective bargaining process. They do not contain any threats the Respondent will not bargain in good faith, or that only regressive proposals will result....The leaflets contain permissible campaign materials within the protection of Section 8(c), and we, accordingly, dismiss this allegation.

The Supreme Court has also previously explained in employment cases that the federal court's and agencies may not substitute their views for the business decisions of employers: "In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress *they should not attempt it.*' Furnco Construction Corp. v. Waters, 438 U.S., at 578, 98 S.Ct., at

2950." Wards Cove, 109 S. Ct. at 2127, (quoting Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2791 (1988)(emphasis added)). Consequently, this issue stands properly poised on this record. Cf. Richard Mellow Electrical Contractors Corp., 327 N.L.R.B. No. 171 at 4 (1999) (offer of business related reasons and policy of preference for referrals).

These explanations represent the employment of legitimate business reasons for an employer's employment decisions. Generally, these concepts are rejected by the Board's General Counsel and support litigation only.

Moreover, it is not necessary that the employer's production of business justifications be "essential" or "indispensable" to its operations when it engages with the salts, but only that it "serves legitimate employment goals of the employer." Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989). See C.S. Telecom, 336 N.L.R.B. 1194, 1195 n.5 (2001); Asbestos Services, 333 N.L.R.B. 70 n.2 (2001). "We do not substitute our business judgment for that of the employer." FES, 331 N.L.R.B. No. 20, Slip op. at 5 n.10 (2000); NLRB v. GATX Logistics, Inc., 160 F.3d 353, 357 (7th Cir. 1998), *enf'g* 323 N.L.R.B. 328 (1997).

In other cases, salts apply for positions that they only indirectly may be qualified for. In one case, a union business agent submitted an application for an electrician position showing he held bachelor's and master's degrees. His resume showed career experience as a business representative/organizer, as a legislative director for a NYS Assemblywomen, a democratic party committeeman, and he had served years ago on the executive board of his union. He listed that he is was journeyman electrician, but he identified *no relevant work experience* or *where he obtained any qualifications* as an electrician, when and where he trained as an apprentice, or what his relevant work background as an electrician has been that made him "experienced." The Labor Board pursued the employer's motives with vigor but dropped the charges prior to issuing

a complaint.

Finally, in Brandt, the Union engaged in two waves of mass applications and videotaping. Dozens of persons applied for jobs, including many retirees who's pay would have been reduced if offered employment.

Testimony by two employees against Brandt was also unreliable and representative of the problem the pending Bill would correct. There, the union hiredand paid employee informants and charged them to get information on Brandt for the Union. One employee, a Mr. Stevens, was presented as a fact witness and admitted the Union paid him to gather information for it at the rate of $176.00 per week, to be used against the company.

Section 10(b) of the Act directs that the Rules of Evidence in the U.S. district courts are to be followed by the Board "so far as practicable." The policy of the courts is to prohibit the compensation of fact witnesses, by overt and contingent methods. Hamilton v. General Motors Corp., 490 F.2d 223, 229 (7th Cir. 1973). In large respect, this is part of unambiguous federal criminal law as well, in 18 U.S.C. § 201(c)(3):

> ***Whoever—directly or indirectly***, demands, seeks, ***receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath*** or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom; shall be fined under this title or imprisoned for not more than two years, or both.

Similarly, 18 U.S.C. § 201(c)(2) provides that:

> Whoever—directly or indirectly, gives, offers, or promises anything of value to any person for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom; shall be fined under this title or imprisoned for not more than two years, or both.

Section 201(c) neither requires a "corrupt mind" nor does it "distinguish between truthful or untruthful testimony." Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F. Supp 1516, 1522-26 (S.D. Fla. 1994), aff'd, 117 F.3d 1328, 1335 n.2 (11th Cir. 1997). The statute is not vague or overbroad. It requires "exclusion of all evidence tainted by the ethical violations." 865 F. Supp. at 1526.

In the instant case, stipends to employees certainly creates an invitation to formulate evidence favorable to labor unions because their continued employment as a paid informants to the Union, depends on the information they gather. Such witnesses who qualify as salts should be ineligible to testify under federal law, but the Labor Board does not exclude such testimony and did not in Brandt. See Golden Door, supra.

Similarly, Section 102.177 of the Board's Rules & Regulations covers "misconduct at any and all stages of any Agency proceeding, including the investigative, pre-hearing and/or compliance stages of a representation or unfair labor practice proceeding." 61 Fed. Reg. 65,323 (Dec. 16, 1996) *Scope of Rule*. Presentation of a paid witness by Local 150 is covered by this rule. The language of the Rule specifically applies to a "representative." Because "[t]he primary purpose of disciplinary rules is to protect the integrity of the adjudicatory and administrative process, including the rights of parties, witnesses, and other participants," before the Board, the Board found it "unfair or unjust" not "to hold nonattorney party representatives to the same standards as attorneys who appear and practice before the Agency." 61 Fed. Reg. 65,323. The Model Rules of Professional Conduct, Rule 3.4(b)(1993), prevents attorneys from paying fact witnesses.

Moreover, in its Final Rule proclamation, the Board explained that:

> Were we to permit nonattorney party representatives to engage in conduct which would be prohibited if engaged in by attorneys, we would, in effect, be sanctioning conduct that undermines that process and may also prejudice or

otherwise harm the parties and other participants. Id.

That concern led the Board to confirm that it would apply its disciplinary rules to non-parties, citing Herbert J. Nichol, 111 N.L.R.B. 447 (1955) (suspending union representative for six months). Although "nonattorney representatives may not be as familiar with the standards of ethical conduct applied to attorneys by the bars and courts, we do not believe that this warrants the application of a different standard to representatives. Id. Hence, union representatives receiving pay from employers should be held to this standard and not be called to testify or if called, barred from testifying upon disclosure of payments..

Without a doubt, the level of inconsistency in their testimony and Union developed affidavits of salts should cause the utmost suspect for testimony presented against an Employer. But, the Board looks on the testimony as if it were normal. The proposed Bill will focus the resources of the public, employers, employees, and labor organizations on protecting rights of working men and women.

In summation, federal Labor Law should attempt to ensure the identification and expression of employee rights while protecting the ability of labor organizations and employers to present their messages to employees. Salting is a process that serves no useful purpose. It promotes litigation and disharmony in the workplace. It causes emotional distress and often leads to open conflict in the workplace. For these reasons, legislation that places the focus on the process of employee organizational rights versus union agent access to gather the cloak of employee rights, should be enacted.

## CONCLUSION

The Truth in Employment Act of 2000 serves a beneficial purpose by refocusing Section 7 rights on employees and not on persons with no intent to obtain employment.

Respectfully submitted,

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June 21, 2005

# UNION ORGANIZATION

# IN THE

# CONSTRUCTION INDUSTRY

IBEW Special Projects Department
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# UNION ORGANIZATION IN THE CONSTRUCTION INDUSTRY

An intelligent discussion of organizing in the construction industry demands an understanding of common industry practices and problems.

Most craftsmen in the construction industry are part of a constant ebb and flow of employees from employer to employer and from job to job. They may be employed by a dozen different contractors over a relatively short period of time or, as the exception, they may be employed by a shop contractor or on a large project for several years. Craftsmen who work together on one job may not work together again for long periods of time or maybe never again.

Economic considerations prohibit the continued employment of craftsmen during periods when the contractor has no work. As the contractor's work is completed, excess craftsmen are returned to the construction labor market for prospective employment by other contractors whose work is just beginning or is increasing. Therefore, no single contractor can be identified as their employer in the usual sense or usage of the word. Instead, the construction labor market consists of a pool of craftsmen from which all of the contractors in the trade draw their labor based on need, training or experience, and availability.

It is readily apparent that common practices and problems in the construction industry prohibit union organization based on definite employers with stable work forces of identifiable employees even though this is the commonly used organizational procedure in most other industries. Instead, union organization in the construction industry must be directed toward recruiting, initiating, and controlling a meaningful majority of the craftsmen who make up the construction industry labor pool from which all contractors draw their employees. Historically, successful organization has followed craft jurisdictional and geographical lines. Once organization is accomplished, if a contractor then utilizes this pool of craftsmen who are members of their union, the union will then represent a majority of the contractor's employees and may require effective collective bargaining.

The union which controls a meaningful majority of the qualified construction manpower in its geographical or craft jurisdiction will obviously control its work. This basic truth has remained constant throughout the entire history of our American construction unions and will continue constant into the foreseeable future.

**THE GOAL, THEN, IN UNION ORGANIZATION OF THE CONSTRUCTION INDUSTRY IS THE ORGANIZATION AND MAINTENANCE OF A LOOSE MONOPOLY OF THE MANPOWER POOL.**

## TOP-DOWN/BOTTOM-UP

There are two basic ways to organize construction bargaining units; (1) top-down and (2) bottom-up.

Under some circumstances, it is possible for the union to accomplish its immediate organizational objectives without recruiting the support of, or taking into membership, the employees of nonsignatory contractors. Thus, **top-down organizing has as its primary focus the construction owner/user and the construction employer.** It requires a program which may include selling the advantages of union construction over nonunion construction (quality, speed, price, etc.); applying financial and/or political pressure; boycotting the owner's or user's product or business; joining forces with special interest groups (environmentalists, senior citizens, consumer groups, etc.) to oppose the owner's or user's objectives (construction permits, power company rate increases, government regulations, etc.); picketing; selling the advantages of being able to bid all work instead of just nonunion work; and other creative and effective methods.

**Bottom-up organizing is directed at the craftsman,** rather than the owner/user or contractor, and envisions recruiting and taking into membership all who are employed in the construction industry. This approach is sometimes considered to be old-fashioned since it was the method used in the original organization of the building and construction trades unions. Properly employed, it results in the formation and perpetuation of a loose **monopoly** of qualified tradesmen. Thus it ensures control of the work and allows for imposition of uniform industry standards.

When unions control a meaningful majority of the construction labor pool, top-down organizing works well simply because many contractors cannot obtain an adequate supply of craftsmen except through union hiring halls. When unions allow their majority control to erode, as has happened in the recent past, contractors no longer need union craftsmen and **top-down organizing becomes difficult if not impossible.** Bottom-up organizing then becomes the only viable choice in most situations.

## CUSTOMERS AND MANPOWER
**(The vital ingredients)**

What does a journeyman take with him when he leaves his employer to start his own business? The obvious answer and the first indispensable ingredient, other than the knowledge and experience stored in his head and hands, is **customers.** Once the customers necessary to a fledgling business are acquired, growth is possible only through expansion of that customer pool.

In the typical sweat-equity firm, as the contractor becomes more successful and expands, more and more time is devoted to obtaining, cultivating, and retaining customers. Thus, the capitalistic journeyman-turned-employer confronts a shrinking ability to personally estimate jobs, visit job sites, or run work. This heightens the demand and necessity for the second indispensable ingredient, **qualified manpower**. Obtaining and retaining it becomes vital to success as the contractor becomes more and more reliant upon others to oversee and perform the actual construction responsibilities.

Simple common sense should tell us that, if **customers** and **qualified manpower** are indispensable to success, the most effective organizing methods and the most necessary research activities center on these two items. **Deny the contractor his customers and/or his qualified manpower, and he immediately ceases to be a factor in the industry.**

Effective bottom-up organizing makes top-down organizing possible in many instances. Imagine that you are an architect, engineer, general contractor, construction manager, owner, or some other party with a direct stake in the

development and completion of a particular construction project and that you know without doubt, if you build nonunion or if you use a particular open-shop employer, the job will experience aggressive organizing efforts. Certainly this would give the union powerful leverage in convincing you that a quality, timely, and economical job should employ organized labor.

The construction organizer has witnessed firsthand the fears, frustrations, and costs resulting from delays and faulty work. He knows that contractors who do not, or cannot, avoid or cope with these problems are not successful. Getting future work is often directly dependent on delivering quality work, within budget, and on time.

Experienced construction owners and users demand that contractors minimize quality, budget, and time problems; therefore, reputation is essential. Since owners or users often have the right to terminate or replace contractors at will, effective and aggressive organizing efforts can determine whether contractors are allowed to finish particular jobs, earn profits, obtain additional work, or even remain in the jurisdiction or industry. From the organizer's perspective, achieving any or all of these negative results is next preferable to obtaining signed collective bargaining agreements.

Unlike industrial unions, unions representing craftsmen engaged in the primary construction industry maintain apprenticeship and training programs, operate hiring halls, and engage in other activities typical of a labor broker. Their function is to supply craftsmen to contractors. Thus, by making life difficult for nonsignatory contractors, unions protect their members.

Organizing in the building trades requires different thinking and tactics than organizing in the industrial fields. What industrial organizer would base initial research for a campaign on how to strike an employer, if necessary, as a desirable organizing goal? What industrial organizer would think in terms of providing permanent alternative employment to target bargaining unit employees as a successful tactic? What industrial organizer would attempt to organize a monopoly of qualified industrial workers? The answer, of course, is that none would. On the other hand, the construction organizer who does not think in these terms is untrained and naive at best.

So little bottom-up organizing took place in the building trades for so many years that the necessary tactics and skills ceased to be passed on in our unions' nonwritten, on-the-job-training tradition. Coupled with the confusion caused by various industrial organizers, labor education centers, universities, and others who eventually tried to fill the void with well-meaning attempts to apply unworkable industrial organizing law, tactics, and methods to the construction industry, many construction organizers have been encouraged in wrong-headed or futile directions.

## RESEARCH
### (How much and when?)

Competent union organizers obtain as much information as possible about the employer to be organized before undertaking a campaign. The data sought covers a wide range of items including the physical nature of the job site, the business of the employer, sales, profits, return on investment, nature of ownership, personnel data on executives, labor history of the employer including union contracts from other locations if any, identity of major competitors, locations of jobs and number of employees, job classifications and wage rates, starting and stopping times for each shift, number of paid holidays and pay when worked, paid vacation entitlement, seniority application, contributory and/or noncontributory insurance and pension plans, shift premium, overtime pay, health and safety programs, etc.

In addition to acquiring data concerning the employer, the organizer learns as much as possible about the employer's work force such as ratio of skilled to semi-skilled and unskilled workers, and the sexual and racial composition. This information will be valuable in planning the types of appeals and, **at the proper time**, the literature which will be most effective during the campaign.

All the information an organizer can gather regarding the employer and workers is **potentially valuable.** A good organizer conscientiously and methodically goes about gathering bits and pieces of information wherever and whenever available. In the construction industry, however, the average contractor employs less than ten men and remains in business for a relatively short period of time. For employers of this size and volatility, data on sales, profits, return on

investment, personnel data on executives, labor history, or other like items may not exist or may be impossible to obtain.

Since the mere expense and disruption caused by a well-conducted organizing campaign can cause a contractor that is unwilling to honor union standards to leave the jurisdiction or industry, whether an industry employer is profitable or has extensive financial backing may be immaterial to the decision to undertake an organizing effort. **One of the major differences between construction and industrial organizing is that the construction organizer's first concern is to police a geographical trade jurisdiction**, i.e., to make sure the work is performed under union standards and to prevent nonsignatory employers from operating there.

Since formal research is often unneeded in the construction industry to decide that an organizing campaign should be undertaken, it is difficult to decide in advance how much research is needed and whether the time needed to do it will be better spent on the actual job of organizing. Research must not replace action or be used as an excuse to postpone action.

The two most important items of research in most construction organizing campaigns revolve around the employer's **(1) customers** and **(2) qualified manpower**. The single most important item of research, in building **monopoly** control of an entire geographical trade jurisdiction, is identification of qualified manpower.

## SALT THE JOB
**(What to do!)**

Encouraging and assisting union members and sympathizers to seek and obtain nonunion jobs for the purpose of organizing, what we now call **salting**, is an old and well-established organizing tactic which has been used by the building and construction trades from their earliest history. It is effective for many reasons, several of which are as follow: **(1)** a continual organizing program is the lifeblood of any union because it is the only way to maintain control of the construction labor pool; **(2)** through members or sympathizers on the job, the organizer gains access to valuable information on customers, evaluation of

employee skill and ability, employee addresses, wage rates, job classifications, overtime pay, holiday pay, vacation pay, pension and insurance coverage, shift premiums, OSHA safety and health violations, the progress or lack of progress on the job, shoddy work, code violations, Davis-Bacon compliance, the chief complaints and/or dissatisfactions of the employees, etc.; (3) placing union members on unorganized jobs eliminates an equal number of jobs for nonunion tradesmen; (4) unemployed members can use the work; (5) the organizer can use these salted members to form the nucleus of his Volunteer Organizing Committee and supply needed leadership on the job; and (6) the organizer has members on the job whom he can trust to report and testify against union members who are surreptitiously working for nonsignatory employers, report and testify to employer unfair labor practices, etc.

Generally, the most accurate and fastest information on customers is obtained through salts. Remember that the average size contractor in the United States is less than ten men. Dunn and Bradstreet is not out chasing these guys and Thomas Register is not writing them up. And, although the organizer might get some financial information from the local bank, it is doubtful they have a customer list, or a potential customer list, ranked by value.

Customers come in many guises and forms. They may be owners or general contractors on projects that are well known to the organizer. They may be owners or general contractors on projects that the organizer is not even aware of, especially since an increasing amount of work is negotiated rather than bid. They may be repeat users who simply call the only contractors they know and ask for prices. They may be retail establishments, shopping centers, warehouses, real estate management firms, etc., who deal with one contractor only. Just as important as knowing who a particular contractor's customers are is the ability to rank those customers in terms of revenue produced, continuing business, and other values.

Identifying the potential customers of a target contractor on a continuing basis is often as important as identifying current ones, especially if the organizer has, or can develop, the ability to target this work through funded or unfunded target programs (Kansas City Plan, Elgin I, Elgin II, etc.), can effectively discourage these potential customers from using the target contractor, can encourage fair contractors to seek this work, and so on.

Information on qualified manpower, other than license or test results, must usually come from direct evaluation on the job. The efficient way to obtain it is through the use of salts who are qualified to make these judgments.

Manpower, especially in the unorganized segment of the industry, comes in at least as many shapes and sizes as customers. It is important for the organizer to know who the target contractor is relying on and if that reliance is justified. Just as important is identification of unrecognized or unappreciated workhorses. Who is qualified? Who is regular and reliable? Who has a bottle or drug problem? Who is a self-starter? Who can handle men or run work? Who is liked or disliked? Who is a former union member or thinks he has gotten a bad deal from the union at one time or another? Who is pro-union?

The union's ability to persuade nonmember craftsmen to support organizing and to become union members is clearly improved by having salts employed on nonunion jobs. The ability to engage in aggressive organizing efforts, affecting the productivity of both craftsmen and management, and to engage in other protected concerted activity, such as unfair labor practice strikes, is also clearly enhanced.

Although salting has always been an effective organizing tool, any problems with its use usually revolve around (1) maintaining the integrity of the union's bylaw provisions prohibiting work for nonsignatory employers or (2) "agency" of salted employees under the National Labor Relations Act.

Occasionally a union member will file charges against a fellow member who is found to be working for a nonsignatory employer only to discover that the union authorized such nonunion employment for purposes of organizing. In these instances, such charges are usually found to be without merit. The danger is that other members who are rightfully charged with working for nonsignatory employers might be able to escape discipline through appeal to the courts claiming unequal or discriminatory treatment under the union's bylaws.

The courts recognize a union's right to make its own rules and determine its own conditions of membership but only so long as those rules and conditions are applied equally to all members. Since enforcement of a union's bylaws requires a uniform interpretation and application, it is not permissible to use one interpretation now and a different interpretation later nor to enforce the provisions

against one member but not another. Therefore, the union should determine well in advance how its bylaws will be interpreted to apply to working for nonsignatory employers and should then apply that interpretation uniformly to all.

To protect its bylaws, and also to assure that **salting** is done in a systematic and controlled atmosphere, adoption by the local union of a **salting resolution**, setting forth the conditions under which working for nonsignatory employers is permissible, may sometimes be desirable. A **salting resolution** is not intended to be part of the local union's bylaws. It is simply a resolution adopted by the membership making certain interpretations, granting specific authority, and defining responsibility.

For example, a **salting resolution**, in its lead language, may confirm the obligation of every union member to organize the unorganized and to cooperate fully in support of an organizing program. The real meat, however, is in the language controlling the employment of union members by nonsignatory employers on unorganized jobs. As a minimum, a **salting resolution** should designate the business manager, local union organizing director, or some other union official or committee as being responsible for (1) approving organizing targets for **salting**, as well as (2) sending union members to these targets for employment purposes and should require that such members (a) promptly and diligently carry out their organizing assignments, and (b) leave the employer or job immediately upon notification (see **Exhibit A**).

Once the **salting program** is in operation, any member who fails to cooperate should be notified to leave the salted job or employer immediately and, if failing to comply, should be charged with the appropriate violations of the union's bylaws. As a defense, a charged member may try to use the fact that other members are working for nonsignatory employers with the full knowledge and acquiescence of the union and without being prosecuted. In a situation such as this, a properly adopted and applied **salting resolution** can help protect the integrity of the union's bylaws by defining the circumstances under which working for nonsignatory employers is permissible.

Occasionally, a **salted member** may be viewed as an "agent" of the union. However, the NLRB will consider an agency finding only if it is alleged by the employer and will require that the employer meet strict guidelines and standards of proof. While agency is to be avoided if possible, it is not something to fear or

avoid at all costs. For example, while Job Stewards are agents, their actions have not put unions out of business. On the contrary, unions could not operate efficiently without them. The same holds true for **salted members.** In many cases unions could not organize efficiently or successfully without them. In short, the threat of agency is not a big deal when the ability to organize outweighs the liability. A search of NLRB case records will confirm that agency findings applied to **salted members** are few and far between.

Regardless of whether or not the union chooses to adopt a **salting resolution**, members participating in an organizing program should be given preliminary training along with a list of unorganized jobs and shops where they are to seek employment. At prearranged times, the organizer should meet with and completely debrief each of these members on all employment applications and interviews. Employment by a nonsignatory employer should be reported immediately.

In addition to being an old and well-established organizing tactic, **salting is protected activity under the National Labor Relations Act.** The Act makes it an unfair labor practice (ULP) to discriminate against employees "in regard to hire or tenure of employment to encourage or discourage membership in any labor organization". Violation of this provision, however, is the most common ULP.

One real problem may be trying to get nonsignatory employers to hire union members since job applications will usually reveal a history of employment by union contractors and probable union membership. Of course, **refusal to hire because of union membership is an unfair labor practice** (ULP) if it can be proven. Sometimes a local union or building and construction trades council will send dozens of qualified members to apply for employment with a nonsignatory employer while wearing buttons or other insignia identifying them with the union. If none are hired, ULP charges alleging refusal to hire because of union affiliation are filed seeking back pay plus interest. If some are hired, these **salted members** are used as employee organizers.

In making application for employment, members may be completely honest and candid about their previous work experience and union membership or may deny union membership or sympathies. Each method has its particular advantages, disadvantages, and uses.

Salt the Job

If a member is completely candid and honest, the employer may quickly surmise from the previous employment listed on the job application form that the applicant is a union member and may violate the law by refusing to hire for that reason without openly saying so. In these cases, the organizer should keep a close watch on the employer to determine if less experienced nonunion employees are being hired, in which case, after ascertaining all the facts, the organizer should file appropriate 8(a)(1) and 8(a)(3) charges with the NLRB seeking employment and back pay plus interest by alleging that the employer refused to hire because of union membership and/or previous employment by union contractors. Once a charge is filed, the NLRB will require that **the organizer provide the evidence** necessary to establish a prima facie case.

The organizer may be able to sting a law-violating employer by placing a nucleus of covert salts on the job. This will facilitate evidence gathering since these salts will then be able to ascertain and testify to the identities, dates of hire, and qualifications of newly hired nonunion employees. Since the organizer will also be required to show employer knowledge of union affiliation or activity, the organizer may wish to instruct all additional job applicants to wear union buttons, jackets, caps, or other obvious insignia; to pointedly tell the prospective employer that they are union members; or to even write it on their job applications. If the employer should openly question a job applicant about his union activities, employment, or membership, the organizer should immediately **prepare an affidavit** setting forth these facts for later use in an NLRB charge.

**If members falsify their employment applications and deny union membership, or if the union cannot show employer knowledge of union membership or sympathy, there is usually little the organizer can do about it if these applicants are not hired.**

A common procedure is to salt the job with one or two members using any method that works. Once these members are on the job and can gather information, observe employment, etc., the organizer may instruct additional applicants to be honest and candid regarding their union membership or sympathies, depending on what tactical approach the organizer may choose.

As an example of the extent of protection afforded salting by the Act, organizers sometimes utilize cover letters written on union letterhead in submitting union member employment applications to nonunion employers. These letters

outline the applicants' training and experience as well as their union membership. Some even go so far as to announce the applicants' intent to organize once they are hired. In cases such as Yeargin, Inc. and IBEW Local 934, NLRB Case No. 10-CA-23188, where hiring was done without the proffered union salts being considered, the NLRB has issued appropriate complaints against the employer and moved to secure mandatory employment remedies. (See the booklet titled ***Salting As Protected Activity Under The National Labor Relations Act.***)

Salted members know or are told that nonsignatory contractors do not make contributions to union fringe benefit plans. It is not unusual, however, for a union to make contributions to fringe benefit funds on behalf of a **salted member**(s) provided the member(s) agrees to remain with the nonsignatory employer until the campaign is completed. This may also include a wage subsidy equal to the difference between actual wages and union scale. This encourages and allows these members to remain on these jobs for the duration of the organizing effort, even after employment by signatory employers becomes available.

If nonsignatory employers in the union's jurisdiction have regularly assumed that union members who apply for employment are doing so without the knowledge or consent of the union, have employed ticket-in-their-shoe-artists in the past, or have come to rely on their skill and ability at least on sizeable jobs, a **salting program** can be particularly effective. Once the organizing effects become obvious and the word circulates as to what is happening, these nonsignatory employers will not know which union members to hire and which ones not to hire.

## UTILIZING THE MEMBERSHIP APPLICANT

Many unions have developed methods to utilize membership applicants in their salting programs. These methods are designed to allow applicants to **earn** membership in the union. (See later section titled PLACEMENT EXAMINATION SYSTEM.)

Membership applicants with the required number of years of experience (use any time period agreed upon in advance) in the industry or who are journeyman members of other locals are automatically referred to the organizer or other

responsible union official for investigation and interview. If an applicant's experience and qualifications check out and he also appears to have the attributes necessary to win friends and influence tradesmen, the organizer reviews with him the normal procedure used to process and act upon membership applications including the fact that the applicant may not be accepted. Then the organizer diplomatically informs the applicant that there is, however, one sure method of gaining membership. The organizer tells the applicant of several employers, shops, or jobs in the jurisdiction that the union is interested in organizing. If the applicant can secure employment in one of these locations, when that job or shop is organized, the applicant will be initiated along with the other employees. The applicant is instructed to contact the organizer immediately for further instructions upon securing employment.

## APPLYING ECONOMIC PRESSURE
**(Time, Quality, Price)**

Contractors obtain and retain customers by delivery of quality work, on time, and at reasonably competitive costs.

Once a construction organizing target is identified, the organizer's full attention should be focused on identifying and evaluating the target employer's customers and qualified manpower. This is most efficiently accomplished through the placement of salts or, failing that, through recruiting supporters among the employer's own craftsmen. A great deal of care and patience should be devoted to this activity. The information gathered will shape the strategy the organizer will use later in the campaign to threaten or actually apply the economic pressure necessary to cause the employer to sign an agreement, raise his prices to recoup additional costs, scale back his business activities, leave the union's jurisdiction, go out of business, and so on.

The construction organizer should structure each campaign in capsules, or activities, that are useful to the union in and of themselves. For example, a campaign to organize XYZ Contractors might be structured as follows:

Action Capsule 1

Identify and rank XYZ's craftsmen by skill, ability, experience, work habits, reliability, and key positions.

Determine what tactics may be effectively used to recruit the support of XYZ's most qualified and reliable key craftsmen.

- Salt the job if possible;
- Concentrate on those craftsmen who estimate jobs, run work, hold master or journeyman licenses, or are otherwise particularly valuable to XYZ. Check their backgrounds, social ties, former employment histories, and any other leads that might enable the organizer to be introduced or otherwise approach them in a trustful atmosphere;
- Be prepared to guarantee (1) membership in the union and (2) a job classification employable under the collective bargaining agreement in return for their cooperation and support. If a particular key craftsman is not an obvious journeyman, be prepared to explain and sell the no-fail test concept;
- Use salts (both overt and covert) to help make converts, but don't rely on them exclusively. Salts may or may not be recognized as union members but, in any event, they are working craftsmen. The organizer is a full-time, professional union representative and official spokesman who can make commitments. The organizer should eventually talk to each valued craftsman, one on one.

Action Capsule 2

Identify and rank the value of XYZ's customers by estimated dollar volume, regular or repeat business, cost to service, profit margin, etc.

Determine what tactics may be effectively used to switch these customers to signatory employers or, at least, cause them to stop using XYZ.

- Salt the job if possible;
- Apply the U.S. Supreme Court decision in DeBartolo in using handbills, radio, newspaper, television, bullhorns, and billboards to truthfully reveal the existence of a labor dispute with XYZ and urge the public to boycott XYZ's neutral customers until these neutrals promise to use signatory contractors only;
- Develop a roving picket system to follow XYZ's employees to all or selected jobs for the purpose of conducting primary picketing (to get the customers' attention) while XYZ's craftsmen are on the premises;
- Work to insure that XYZ's customers receive sales visits and other special attention emphasizing that signatory employers have no labor or consumer boycott problems;
- At the appropriate time, encourage a representative of the contractors association to make a series of sales calls on XYZ to explain how the association works and its advantages.

handbill by st

Disruption of Commerce?

picketing

"sales visit"

Action Capsule 3

Identify potential work being bid or negotiated.

Determine what tactics may be effectively applied to discourage future customers.

- If the union targets jobs (funded or unfunded), plan to target the type work performed by XYZ. If the

opportunity presents itself, buy away long-time or particularly reliable customers;

- Prepare to advise potential customers that use of XYZ will guarantee labor problems on their projects (don't make statements you can't deliver on);

- Insure that potential XYZ customers receive sales calls to emphasize the organized industry's ability to deliver quality, speed, and competitive price with no labor or consumer boycott problems.

Action Capsule 4

Start moving salts and/or supporters into a Section 7, concerted protected activity, mode.

Determine what actions may be taken most effectively to move XYZ's employees into bottom-up organizing activity and demonstrate the power of the union.

- Inform XYZ of the identity of those salts and/or supporters who are willing to participate in this capsule by certified letter to XYZ, with a copy to the NLRB, or by having them wear union insignia on the job such as caps, shirts, buttons, etc.;

- Identify violations of OSHA, building codes, licensing requirements, prevailing wage determinations, NLRA, wage and hour laws, etc., which may provide a basis for concerted activity;

- Steadily increase the level of concerted activity;

- Prepare to demonstrate the power of the union by calling a short, minority ULP strike;

- Continue increasing the level of concerted activity, protesting any additional ULPs with strikes.

Action Capsule 5

**File ULP charges with the NLRB at every viable opportunity.**

- Carefully and completely document all XYZ reactions to protected activity, especially those which violate Section 8(a) of the Act;

- Begin filing ULP charges when you are reasonably sure you have the evidence/witnesses necessary to cause the NLRB to issue a Complaint and Notice of Hearing.

Every organizing plan should be subject to circumstantial amendment when necessary. The preceding plan to apply economic pressure to XYZ Contractors is divided into five action capsules. **The sixth and final action capsule — where a Section 8(f) prehire agreement may be signed; the NLRB may issue a bargaining order; XYZ may scale back its operations, leave the local's jurisdiction, or go out of business; etc. — cannot be anticipated in advance. The organizer must simply prosecute the campaign through each of its planned action capsules to its logical conclusion.**

Let's look at the XYZ organizing plan in more depth to determine if (1) the organizer has applied his knowledge of the primary construction industry and (2) if each action caption is a self-contained unit that will be useful, once accomplished, on a stand-alone basis.

Action Capsule 1 Revisited

In action capsule one, the organizer seeks to identify and rank the craftsmen by their value to XYZ and to recruit their support. Union organization is a function of education; it is always preceded by proselytization. But, aside from any attempt or desire to organize them or their employers, educating unorganized tradesmen about the benefits of union representation can have splendid effects. It gives them clear benchmarks as to their potential worth and puts them in better

positions to request or bargain for improvements with their nonunion employers. It sows the seeds of dissatisfaction and aspiration. It makes the union a focal point when they wish to complain of injustices. It pointedly and repeatedly reminds their employers that the union is there and might get them if they don't watch out. **All of this benefits union tradesmen, as well, by improving their competitive positions.** Therefore, even if successive action capsules are never reached, the activity pursued in action capsule one will have been worthwhile.

Action Capsule 2 Revisited

In action capsule two, the organizer demonstrates applied knowledge of the construction industry by beginning to concentrate on XYZ's customers — who are they and which are most valuable to XYZ; how can they be effectively pressured as neutrals; and how can they be persuaded to embrace the union's signatory employers as desirable alternatives. The organizer plans to use primary picketing and secondary publicity, in combination where customer operations make it possible and separately as other opportunities present. **When XYZ learns that its customer pool is under siege, the economic pressure, not to mention the diversion from handling the everyday workings of the business, has the potential to become tremendous.** As a secondary organizing benefit, **each and every customer or job switched to a signatory employer enhances the work opportunities and job security of union craftsmen.** Even if the other action capsules never become operational or effective, the activity pursued here will have been worthwhile.

Action Capsule 3 Revisited

The organizer has directed action capsule three toward cutting off XYZ's future work or potential customers. Applying pressure to existing neutrals, in order to switch them to union contractors, makes little sense if XYZ can simply replace them with others. The organizer plans to use a number of tools utilized in action capsule two as well as target programs if available. **The same stand-alone benefit applies here as in action capsule two.**

Action Capsule 4 Revisited

The organizer has designed action capsule four to utilize the rights guaranteed employees in Section 7 of the Act to engage in "concerted activity for the purpose of ... mutual aid or protection". Unlike the first three action capsules,

the activation of capsule four depends upon the successful execution of capsule one.

First, the organizer plans to inform the employer of the identity of the union's supporters or, at least, those supporters who will be **overtly** participating in action capsule four. He knows that, once ULP charges are filed with the NLRB, he must be able to prove employer knowledge of union activity, sympathy, and support of activity in concert with other craftsmen for the purpose of their mutual aid or protection. After all, an employer that is truly unaware of these factors cannot discriminate in retaliation. The organizer should be careful to inform the employer in a manner which meets the standards of evidence set by the NLRB.

As an evidence gathering and/or organizing tactic, the organizer may choose not to reveal all of his salts or supporters immediately. **Covert** salts who appear to be nonsympathizers, especially if they become trusted by the opposition, can be invaluable aids in gathering evidence and testifying to the commission of ULPs.

Next, the organizer plans to begin the systematic identification of issues upon which concerted activity will be based. As examples, a craftsman, or group of craftsmen, identify or perceive a situation to be a safety violation. One (or more) of the group, acting on behalf of the others for the purpose of mutual aid or protection, goes to the contractor's trailer and asks the supervisor for permission to use the telephone to call OSHA and report the violation. This activity — because it is concerted and for the purpose of mutual aid or protection — is protected by the Act. If the employer responds in an intimidative, coercive, or threatening manner (which is a most common reaction), a ULP has been committed which can form the basis of an NLRB charge and/or a ULP strike.

A tradesman (or group of tradesmen, as the case may be) may next decide that he should ask for wage increases for his fellow employees. After informing at least some of them of his intentions to speak on behalf of all, he approaches management, in conformity with the employer's policy (if there is one), and presents his case. Again, this activity — because the craftsman acted on behalf of other employees as well as himself for the purpose of mutual aid — is protected by the Act. If the employer responds in an intimidative, coercive, or threatening manner (I don't need your agitation; You better start worrying about your own job if you want to stay here; If you don't like it here, don't let the door hit you in the

back; I know who you've been talking to: Get back to your job and don't come up here ever again; etc.), a ULP has been committed which can form the basis of an NLRB charge and/or a ULP strike.

**The possibilities** for increasing the level of concerted activity for the purpose of collective bargaining or other mutual aid or protection **are endless.** The craftsmen may decide to picket the job before and after work and during lunch (on their own time) advertising that XYZ Contractors isn't furnishing hospitalization insurance or paying fair wages; to talk about the substandard conditions in loud voices in the presence of management; to openly ask people to sign union authorization cards; etc. If the agents of the employer do not commit ULPs immediately, they will eventually as the concerted activity level rises.

In action capsule four the organizer plans "to demonstrate the power of the union by calling a short minority strike." He wants to demonstrate that just a few employees can walk off the job in a ULP strike, without fear of being fired, and return to work upon unconditional offer. He hopes, of course, to take a number of craftsmen out at once and during a critical time in the work schedule so as to maximize the effect. But the organizer plans to conduct a ULP strike in any event.

We know, of course, that ULP strikers have a right to reinstatement to their jobs upon unconditional offer to return and, if the employer refuses, liability for backpay and benefits begins. Once the ULP strike begins, XYZ Contractors will try to discourage its nonstriking employees from honoring the picket or joining the strikers. Like most construction employers, XYZ will probably announce that the strikers have lost their jobs and will never return, which is another ULP. When the strikers do eventually return in a jovial, undefeated mode and continue to engage in protected concerted activities, the power of the union will have been demonstrated.

The organizer, in action capsule four, is prepared to engage in a series of ULP strikes, **each one based on ULPs committed after the previous strike ended.** A premeditated series of short strikes is not protected by law. A series of short ULP strikes, however, cannot be premeditated because, by definition, they are based on the independent and arbitrary illegal actions of a party the union cannot control. If XYZ Contractors does not commit ULPs, the craftsmen cannot

engage in self-help in response. In this sense, the employer — not the craftsmen or the union — controls whether a ULP strike or strikes can occur.

Assume that XYZ works fifteen tradesmen. How much profit is there in a fifteen-man operation? How many ULP strikers can XYZ afford to refuse to reinstate at journeyman backpay and benefits? How many ULP strikes can XYZ afford before being union is cheaper than resisting? How long will XYZ's customers be willing to suffer the disruption?

Action Capsule 5 Revisited

Action capsule five is simply a confirmation of the organizer's intent to use the National Labor Relations Act and the NLRB against the employer at every viable opportunity. Once a charge has been filed and investigated by NLRB agents with the cooperation and assistance of the organizer, the employer must provide its own defense at its own expense. Generally speaking, contractors are entrepreneurial craftsmen. They are not qualified by training or experience to handle legal filings or defenses. **Legal fees can become substantial financial drains within short periods of time.**

The utilization of action capsule five may begin during any of the other capsules of the campaign as need or opportunity dictates.

This Is Construction

**The construction organizer should not be confused or limited by industrial organizing scenarios. He is not dealing with regular employers with stable groups of identifiable employees. He is policing an industry where the job site changes every day, as the job moves toward completion, until it disappears completely and with craftsmen who face a continuous expectation of layoff. He is organizing contractors who compete, one with the other, for customers that demand the lowest price that time and quality necessities will allow.**

Forcing a nonunion employer to scale back his business may not be a desirable outcome in industrial organizing, but it may be very desirable in construction. It may open more work opportunities to other employers, hopefully union. A like, but more pronounced, result may accrue when the nonsignatory

employer leaves the local's jurisdiction or the industry completely. Increasing a nonsignatory employer's costs may drive up bid or negotiated job prices and likewise improve union contractors' competitive positions.

Historically, formal apprentice training programs have been available only through the sponsorship of unions and the employers that are bound to participate and contribute on a regular and continuing basis by the terms of collective bargaining agreements. Journeyman skill improvement training has traditionally been available on the same basis. Nonunion craftsmen rely on other institutions, such as vocational schools, military services, etc., coupled with actual work experience, or on work experience only, for their training. **As a group, union craftsmen are better trained.**

The average age of union craftsmen is greater than nonunion. This may be because union craftsmen earn more money and enjoy better working conditions and fringe benefits and are thus encouraged to remain in the industry rather than leaving to seek economic security as many nonunion craftsmen are pressured to do. Regardless of why they stay, age and experience march hand in hand. **Union craftsmen, as a group, are more experienced.**

Training and experience are key ingredients to productivity. The maturity of age is another. Immature craftsmen bicker, horseplay, goof off, and miss work. Open-shop supervisors spend a lot of time acting as arbiters of disputes. Mature craftsmen come to work regularly, start on time, and work steadily in a safe manner. **Union craftsmen, as a group, are more productive.**

In an industry where delays, shoddy work, and cost overruns are sure killers, training, experience, and productivity are powerful competitive tools. But unions cannot count on these advantages alone to retain the work. They must insure that the differential between union and open-shop training, experience, and productivity is wide while keeping the price differential as narrow as possible.

There are not enough trained, experienced union organizers in construction and probably never will be. Therefore, it is important that our limited organizing assets be utilized to the fullest with little wasted effort. Every campaign should be given careful thought and structured so that each action capsule is a self-contained unit which, once accomplished, will be useful to the union **even if none of the other action capsules are attempted or completed.**

As pointed out in a previous section, **deny the contractor his customers** and/or his qualified manpower and he immediately **ceases to be a factor in the industry.**

## THE RIGHT TO STRIKE AND/OR PICKET

NLRB v. Insurance Agents' Union, 361 US 477, 495, 45 LRRM 2704 (1980) held that a strike "is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining".

The National Labor Relations Act provides significant protection of the right to strike. Section 7 guarantees to employees the right to engage in concerted activities; Section 8 protects that right from infringement by employers and unions; and Section 13 provides that the Act shall not be construed "so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right" except as expressly stated in the Act. Section 2(3) provides that, "The term employee . . . shall include any individual whose work has ceased . . . in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

The right to strike and/or the right to picket is not completely unqualified, however, and Section 8(b) prohibits or limits strikes and/or picketing for certain proscribed objectives. Therefore, we will devote some effort to the task of defining and clarifying a union's right to strike and/or picket in certain circumstances, particularly as these circumstances apply to or affect organizing.

## STRIKING FOR RECOGNITION

In the building and construction industry, if the organizer can effectively close down the job and keep it down, **striking** is usually the fastest and most effective way to gain union recognition. But don't make the mistake of thinking

the union must be able to place all, or even a majority, of the strikers on other jobs before a strike is possible.

Recognitional strikes should be called and prosecuted on the premise that the striking tradesmen will remain on strike and picket duty, without other employment, until the strike is settled, at which time they will return to work for the same employer. This is not an unreasonable premise. In fact, the majority of all strikes are called and prosecuted on this basis. Can you imagine 100,000 automobile workers or 325,000 steelworkers waiting to strike until their union has secured other employment for them or striking with the intent of not returning to work for the same employer? Workers must realize that they are striking to improve and secure their own terms and conditions of employment. They are not striking for the union or to gain union membership or to help the boys down at the hall. They are acting in concert for their own mutual aid and protection.

Under the Board's decision in Deklewa, 282 NLRB 184, construction unions may sometimes be in the position of demanding recognition from employers who are parties to prehire agreements permitted by Section 8(f) of the Act. If such an agreement contains a no strike clause, striking for recognition during its term is not a viable alternative. In this situation, provided the employer refuses to voluntarily recognize, filing an NLRB election petition may be the only immediate choice.

## ECONOMIC AND UNFAIR LABOR PRACTICE STRIKES

There are two kinds of strikes: **(1) economic strikes** and **(2) unfair labor practice strikes.** Both are essentially the same except that greater protection is offered to unfair labor practice strikers in the event that the employer is able to hire scabs to replace the strikers or the strikers have to offer to return to work with no conditions attached.

Basically, if an **economic** strike ends without agreement that the employees will be returned to their jobs, those strikers who have been **permanently** replaced have no right to reinstatement or rehire until a job opening becomes available. They are entitled to reinstatement but not immediately.

When an **unfair labor practice** strike ends, the employer must immediately reinstate the strikers to their existing jobs, even if replacements have been hired and must be fired to create job openings.

**The construction organizer should avoid economic strikes and rely instead on unfair labor practice strikes and the additional protection they afford.**

While strikers cannot be legally fired or disciplined for engaging in a strike, strikers remain employees and may be fired or disciplined for engaging in violence, serious threats of violence, destruction of property, etc. In addition, these actions may also involve civil or criminal penalties.

## NEVER DRAG UP — ALWAYS STRIKE

Union and nonunion, all construction jobs and employers experience a turnover in employment. Craftsmen drag-up for varied reasons that often have little or nothing to do with the organizational status of the employer. The point the organizer should remember is that, during an organizing effort, supporters should never drag-up; they should strike instead.

One-person strikers are not protected by law. However, under certain limited circumstances, one craftsman may strike an employer as long as he is acting in concert with other employees; i.e., striking on behalf of two or more. Of course, when two or more employees strike together, they are obviously acting in concert and are protected. Although strikes are often accompanied by picketing, it is not necessary to picket in order to strike or to strike in order to picket.

Craftsmen who voluntarily drag-up have no guaranteed reemployment rights. An economic striker has the legal right to be placed on a preferential hiring list upon making an unconditional offer to return to work. A ULP striker has the legal right to immediate reinstatement upon making an unconditional offer to return. Therefore, the experienced construction organizer encourages his salts or other supporters, who are leaving the job or employer anyway, to **never drag up — always strike** (see Blount Construction and IBEW LU 477, Case No. 31-CA-17440, 1989).

## CREATING THE ULP STRIKE

As previously stated, there are two kinds of strikes. Unfair Labor Practice (ULP) strikes offer the greatest protection to strikers. When a ULP strike ends, with or without agreement, upon unconditional application, the employer is legally required to reinstate the strikers to their existing jobs even if replacements have been hired and must be fired to make room for them or even if the work has been subcontracted during the strike. If the employer fails or refuses to offer reinstatement, liability for back pay plus interest for unreinstated strikers begins immediately and could bankrupt some contractors if allowed to build. Therefore, it is to the organizer's advantage if he can rely upon ULP strikes or convert economic strikes to ULP strikes.

**A ULP strike is a strike that is caused, contributed to, or prolonged by a ULP committed by the employer.** If the employer has committed a ULP and employees then strike because of it, in whole or in part, their right to reinstatement to their existing jobs is guaranteed.

Employer ULPs do not have to be particularly serious in nature to qualify a work stoppage as a ULP strike. A minor 8(a)(1) violation will suffice as long as the organizer can show that it caused, contributed to, or prolonged the strike. If and when the ULP is remedied, however, the work stoppage ceases to be a ULP strike and the strikers must either return to work or continue as economic strikers without the additional ULP protection. The organizer should realize that less serious ULPs are more likely to be remedied quickly by the employer than major or numerous ULPs, thus removing the additional strike protection that ULPs afford.

If ULPs are committed prior to the strike, the organizer should include these as an issue in any strike vote and in any speeches, leaflets, or other explanations as to why the strike is being called. Picket signs should also bear the legend **Unfair Labor Practice Strike** or **ULP Strike**. This will help the organizer show, if necessary, that the ULPs were a strike issue.

If ULP charges are filed and found to be without merit, ULP strike protection does not apply. Unless the organizer is positive that the ULP charges

are meritorious, he should rely instead upon the economic effectiveness of any strike while working for ULP protection.

## ULP STRIKES AS A TACTIC

Strikes and lockouts are punitive and coercive. Strikes are a legally sanctioned method of directly harassing employers (see earlier section titled, STRIKING FOR RECOGNITION) and indirectly harassing others. The ULP strike is especially effective because of its direct relation to a violation of the law.

Imagine the following scenario: (1) the employer commits a ULP; (2) the organizer files a charge and strikes the job; (3) the employer subcontracts the work; (4) as soon as the subcontractor gets the job manned and operating, the organizer makes an unconditional offer on behalf of all striking employees to return to work; (5) the employer spends a couple of weeks talking to his attorneys before reinstatement is offered; (6) the subcontractor is removed from the job to make room for the strikers; (7) the organizer files a charge demanding back pay plus interest for the period of time between the unconditional offer to return to work and the employer's offer of reinstatement; (8) the subcontractor sues the contractor for cost recovery, damages, and breach of contract; (9) the employer commits another ULP and the organizer strikes the job again; (10) this time the employer can't find a subcontractor, so he hires replacements; (11) as soon as the job is operational, the organizer makes another unconditional offer to return to work; (12) this time the employer fires the replacements and offers immediate reinstatement to the strikers; (13) as soon as the replacements are gone and most have other jobs, the organizer calls an economic strike; (14) this time the employer can't get a subcontractor or sufficient replacements for the strikers, so he offers to sign the union's standard agreement; (15) the union advises the employer that the standard agreement is not available and proposes scale plus $2.00 per hour; (16) the owner removes the employer from the job and hires a union contractor; (17) the union initiates the men; (18) the employer declares bankruptcy; (19) etc.

It may never happen just this way, but the organizer would not have been able to remove the subcontractor from the job absent ULP protection for the strikers. The same thing applies to removing the replacements hired during the second strike.

**ULP strike protection may be the key to winning.** If an economic strike is lost, the organizing effort is usually dead. If a ULP strike is lost, the organizer can put the strikers back on the job where they continue to engage in protected concerted activity and/or prepare for a second strike. Employees are also more willing to strike if they know they can have their jobs back virtually on demand. In the scenario above, strikes were lost twice but the campaign was won.

## WHEN TO STRIKE

Assuming that the organizer has filed unfair labor practice charges if appropriate, has discussed the strike issue with the employees affected and secured their assurances of participation, and has completed all other necessary preparations, when should the strike actually start?

The answer is simply — when the organizer determines that a strike will be the most effective. The organizer should be convinced that the strike will hurt the employer, or demonstrate the effectiveness of concerted activity, or both and, unless ULP strike protection is assured, that the job will remain closed down.

## SECTION 8(b)(7)

Subsection 7 was added to Section 8(b) of the Act in 1959 in an effort to prohibit "extortion" or "blackmail" picketing in organizing or recognitional contexts. This subsection proscribes picketing where:

- Another union has already been lawfully recognized by the employer in accordance with Section 9 of the Act;
- A valid NLRB election has been held within the last 12 months; or
- A petition for an NLRB election is not filed "within a reasonable period of time not to exceed thirty days from the commencement of such picketing".

## NLRB REPRESENTATION ELECTIONS IN CONSTRUCTION

There are a number of reasons why NLRB elections are often not necessary or appropriate in construction.

The Act permits Section 8(f) prehire agreements to be consummated and enforced during their terms in the primary construction industry. Therefore, proof of majority status through an NLRB representation election or other means is not legally necessary prior to the execution of a collective bargaining agreement as it is in the industrial sector.

The typical construction local union is confined by its constitution and bylaws to operating in a well-defined geographical jurisdiction. The local union cannot organize or represent craftsmen working outside its assigned areas without infringing on the territorial rights of its sister local unions. In those situations where a representation election petition is filed simply to convert an existing Section 8(f) prehire agreement to Section 9(a) majority status, the NLRB will accept the geographical jurisdiction recognized by that agreement.[1] **Otherwise, the confines of the bargaining unit will usually be found to be the geographical area in which the employer actually performs work.**

As an example, a local union whose geographical jurisdiction covers seven counties may file a representation petition seeking NLRB certification in the seven counties in which the Local Union operates for an employer that performs work in eight counties, only four of which are in the petitioning local's geographical jurisdiction. The remaining four counties lie in the territory of a sister local. The NLRB will normally find the employees performing work in all eight counties to constitute a single appropriate bargaining unit, irrespective of the limits of the local's geographical jurisdiction.

In the preceding example, a temporary solution may be for the local unions to become joint petitioners for the eight counties so that, once certified, each may bargain conditions for the work in its respective geographical jurisdiction. But this

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[1]See IBEW publication titled The Deklewa Decision, Appropriate Bargaining Units Under Deklewa.

does not solve the problem of neither local having bargaining rights for its entire geographical jurisdiction. What happens if the locals are able to negotiate an agreement for the certified counties, the employer later begins open-shop operations in the noncertified counties, and the locals are not able to organize or obtain agreements for those additional parts of their jurisdictions? What might be the end result if other signatory employers attempt to cease using the hiring halls, making fringe benefit contributions, and otherwise honoring their agreements in the noncertified counties of the locals' geographical jurisdictions citing, as justification, favored-nation clauses, **i.e, contractual provisos stating that if more favorable terms are granted to other employers, similar terms must be granted to all employers**? Would the locals allow part of their geographical jurisdictions to go completely open-shop, or would they disclaim bargaining rights in the eight-county unit (in which event, the original organizing effort would have proven to be useless)?

**The Act excludes supervisors (foremen and general foremen) from the bargaining unit** even though the majority of construction agreements include them. Once the NLRB certifies the union to represent a particular bargaining unit, it is an unfair labor practice for the union to insist, to the point of impasse, on inclusion of excluded jobs (supervisors). Thus, all the newly certified construction employer need do to keep its supervisory employees out of an NLRB determined bargaining unit is just say "no".

If the union should proceed to negotiate and execute an agreement covering a unit certified by the NLRB, **sans supervisors**, the newly organized employer could continue to hire supervisors off the street, unilaterally determine their pay and fringe benefits, and ignore the hiring hall for those classifications. If the union is party to a basic construction agreement containing a favored-nation clause, it might be required to remove the supervisory classifications and pay rates from that agreement as well.

The Act imposes rights and duties on certified bargaining agents that may not be desirable or workable in construction. One is the duty to bargain in good faith. **The usual situation in construction is that the union cannot or does not wish to bargain.** The union usually wants the target employer to sign its basic construction agreement; one that has already been bargained, ordinarily with an association of employers, and which often contains a favored-nation clause.

Absent some sophistication, the construction organizer in this situation may find his union facing Section 8(a)(5) refusal-to-bargain charges instead of the employer.

Rightly or wrongly, craftsmen who participate in any NLRB representation election which results in a majority of votes being cast for the union often feel that they have "won". In fact, they are usually no closer to a labor agreement than they were before the election victory and, for all of the previously enumerated reasons, may even be in worse shape organizationally. Unfortunately, it is common for them to turn to the organizer, at that point, and say, "We won; make the employer sign the agreement."

What is the organizer's usual reaction? He demands bargaining, which he will usually get once all the election objections and appeals are eventually exhausted; makes many futile trips to the bargaining table; and spends time uselessly reporting little or no progress to the expectant craftsmen. Eventually, the craftsmen lose faith and hope. They witness the employer acting with impunity and the union demonstrating that it is powerless to effect meaningful change.

Anyone who questions the legitimacy of this scenario need only check the NLRB election statistics for construction, eliminate those expedited elections held simply to convert existing Section 8(f) prehire agreements to Section 9(a) majority status agreements, and then calculate how many of the remaining certifications are successfully converted to collective bargaining agreements. Successful conversions are nearly nonexistent.

If the union does win an NLRB election in construction and if a prebargained area agreement is to be applied, it usually must be done quickly or not at all. This precludes a long or drawn-out bargaining process. Therefore, the union will most likely have to apply the same economic pressures to obtain a contract after an NLRB election is won as would have been needed to obtain voluntary recognition without an election.

If the union petitions for and loses an NLRB election, even a Section 8(f) prehire agreement is prohibited for a year.

NLRB election, certification, and good-faith-bargaining requirements can take months and even years to complete. Under the provisions of the National Labor Relations Act, it is possible for determined employers to delay or stall the

certification process by insisting on unit determination hearings with attendant legal briefs; by committing and/or filing unfair labor practice charges with attendant hearings, appeals, and legal briefs; by filing objections to the conduct of representation elections with attendant hearings, appeals, and legal briefs, etc. By the time final decisions are made and enforced by the NLRB, the construction project may have been long completed and the employer may have even left the jurisdiction of the union. Therefore, if the NLRB election process is to be used in building and construction organizing, it should be applied with discretion to projects of long duration, to stable employers which employ tradesmen on a long-term or permanent basis, or to conversion of Section 8(f) contracts to Section 9(a) status.

**Before filing an NLRB representation petition seeking certification of a bargaining unit the union will not sign an agreement for, the construction organizer should ask himself, "What good is it?" Winning an NLRB election prior to obtaining a Section 8(f) agreement may simply guarantee that an agreement will never be consummated.**

In summary, NLRB elections are often inappropriate to construction organizing for the following reasons:

- NLRB certification or other proof of majority status is not a legally necessary priority to negotiating and executing a construction agreement.
- The NLRB will define the appropriate bargaining unit to encompass the territory in which the employer performs work rather than the local union's geographical jurisdiction (except where a Section 8(f) agreement is already in effect).
- The NLRB will exclude supervisors from the bargaining unit.
- NLRB certification confers a duty to bargain even though an area construction agreement, often containing a favored-nation clause, is already bargained and in place.
- Winning an NLRB election often conveys a false and dangerous sense of victory

- Losing an election bars all Section 8(f) collective bargaining agreements and recognitional picketing for one year.

- NLRB election certifications and good-faith-bargaining requirements can take months and even years to complete.

- **The union often must apply the same economic pressure to obtain a contract after an election is won as needed to obtain an agreement without an election.**

Other than conversion elections mandated by the Deklewa decision, why do construction organizers continue to seek and participate in NLRB representation elections in construction? The answer usually is simple ignorance of the proper methods and reliance on (improper) training by labor study centers, universities, and others who try to apply the industrial organizing tactics they understand to construction which they don't understand.

An example of what can and does happen when NLRB election procedures are applied to construction organizing is demonstrated by the following excerpt from the testimony of Mr. J. C. Turner, General President, International Union of Operating Engineers, AFL-CIO, before the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, U.S. House of Representatives on March 8, 1983;

> "On other occasions, particularly during the hearings on labor law reform, the labor movement has presented evidence concerning the inordinate delays in the processing of representation cases under current NLRB procedures, and the damage such delays inflict upon the organizational rights of workers. More recently, in your hearings on union busting labor consultants, you reviewed the evidence of how labor consultants manipulate delays in the processing of representation cases to defeat organizing efforts.
>
> "While the evidence in those hearings established the scope of the delays and manipulation and their impact on the rights of workers in all industries, it is beyond peradventure that **in the construction industry the delays alone, without manipulation, effectively**

**preclude the possibility of securing collective bargaining** representation. The NLRB itself recognized this fact early on.

"After the passage of the Wagner Act, and until passage of the Taft-Hartley Act, **the Board didn't even try to conduct elections in** the industry. The most commonly cited reason for the Board's abdication of jurisdiction over the construction industry was that stated in its 1943 Brown and Root decision, i.e., application of the Act to the construction industry 'would not effectuate the policies of the Act.' 51 NLRB 820. Indeed, even after Taft-Hartley, which contained amendments specifically directed to the construction industry, the Board's General Counsel advised the Board to ignore the statute in the construction industry for election purposes. (25 Lab. Rel. Rep. 107, 1949).

**"At the time everyone, including industry representatives, acknowledged that employment in the industry was too sporadic and transitory for representation proceedings conducted on an employer-by-employer, job-site-by-job-site basis to effectively provide collective bargaining representation.**

"A current case involving the International Union of Operating Engineers provides an excellent example of the frustration encountered by workers who attempt to secure union representation through the NLRB's election procedures. In 1981, the S. J. Groves Company of Minneapolis, Minnesota commenced work on two very large Interstate highway projects in downtown Atlanta, Georgia. The International Union of Operating Engineers is familiar with the Groves Company because it has been a major national heavy and highway construction firm for many years. In my experience, until these Atlanta projects, Groves had worked throughout the country as a union contractor, and prospered as such. At the present time, the Company enjoys mutually beneficial collective bargaining relationships with a number of IUOE local unions around the country. In spite of these long-standing relationships, when approached by construction unions in Atlanta concerning the two Interstate projects, Groves advised that they intended to perform the work on a nonunion basis and refused to negotiate a collective bargaining agreement.

**Because of the unusual magnitude and duration of these projects,** the unions determined to attempt to secure an NLRB election for the workers involved. It is estimated that the two projects will cost one hundred and twenty-five million dollars and take approximately three and a half years to complete. Such a time frame makes an election petition at least worth a try, even though **it is recognized that a contested NLRB case with appellate review can take much longer than a mere three and a half years.**

"Soon after the Atlanta jobs began, IUOE Local 926, as well as four other building trades and Teamster local unions, began organizing. The Company responded with what has become an increasingly normal employer reaction to employee attempts to organize: Unfair labor practice activity aimed at intimidating and coercing the workers into rejecting the union. From the outset of the organizing drive, the Company engaged in acts of surveillance, interrogation, threat and reprisal which the General Accounting Office's report to this Subcommittee of last year showed to be cost effective law breaking from the employer's standpoint. Suffice it to say that the unions filed a series of unfair labor practice charges on behalf of the workers which resulted in a formal settlement by Groves in which it agreed to cease and desist all such unfair labor practices and make whole the affected employees in the amount of $22,000.

"Almost one year ago today, on March 10, 1982, the five local unions filed a joint election petition with the NLRB. In response to this petition, the Company filed with the Board a list of its employees, which allegedly demonstrated that the unions' petition was not supported by a sufficient showing of interest, i.e., 30% of the employees in the bargaining unit.

"The unions had requested an election in a unit consisting of all operating engineers, carpenters, cement masons, laborers, and teamsters on the two Interstate projects, and the central garage facility which serviced the jobs. While the unions estimated that approximately 120 employees were encompassed in the unit, the employer's list included well over 200 names. Accordingly, on

March 26 the Board's Regional Director dismissed the petition for lack of a 30% showing of interest.

"Four days later, the unions filed another petition, excluding the teamsters and the central garage from the requested unit. This time, the Regional Director found that there was a sufficient showing of interest and directed that a hearing be conducted on the petition. That hearing was held on April 20, 1982 and the employer raised all of the issues that are common to construction industry cases. For instance, the employer argued that the unions' petition should be dismissed because the two project unit was too narrow, and should have included thirteen other small, short-duration jobs being performed by the Company in the area. This argument is made, of course, to dilute the unions' established support and force them to secure authorization cards from workers on widely scattered job sites. Of the thirteen additional projects all had anticipated completion dates in 1982, which of course meant that **by the time an election might be expected some, if not all, of the work would have been completed**, and the workers widely scattered. And let me assure you that if the unions' original petition had included all of those small projects, the employer would have gone to the hearing and argued that since the small jobs were of limited duration and presented no prospects for continuing employment, their inclusion by the union required dismissal of the petition.

"The Company also asserted a number of other arguments. They contended that the work performed by the construction employees was not sufficiently segregated by function to identify the workers along craft lines. The usual arguments concerning the inclusion or exclusion of supervisory personnel were also made. Where the union argued for exclusion the Company argued for inclusion and vice versa.

"It's a game; we recognize that. It's a game played under NLRB rules stacked against workers in all industries, but **in our industry we don't have time to play because, by the time the game is over, the work is also over and our people are unemployed.**

"On June 21, 1982, two months after the close of the hearing, the Regional Director issued a decision holding that the unit in this case must include the thirteen small projects, in addition to the two Interstate projects. The unions accepted this setback and immediately gathered enough additional authorization cards to proceed with an election in this expanded unit. The election was set for July 16, 1982.

"The Company, however, was far from through. Although it had prevailed in its argument that all fifteen jobs should be included in the unit, the Regional Director had rejected the Company's argument that all employees, not just the specified craftsmen, should be included in the unit. Since the Regional Director had accepted some, but not all, of the Groves' position, the door was left open for the Company to file a Request for Review with the Board in Washington, asking that the Regional Director's decision be set aside. This the Company did. While that Request for Review was pending, election preparations progressed. But, on July 15, the eve of election day, the parties received a telegram from Washington advising that the Board had granted the employer's Request for Review and directing that the election be postponed until further notice.

"As I sit before you today, the unions and workers sit in Atlanta awaiting that further notice from the NLRB. Next week, they will have waited for eight months. **In the meantime, the completion dates for all of the thirteen small projects have passed.** Two days from now, one year will have elapsed since the first petition in this case was filed. One year, and we know that the game is far from over. Should the unions ultimately prevail before the Board it is fully anticipated that the Company will seize upon a basis to refuse to bargain and appeal the Board's decision to the Circuit Court of Appeals. The Board's handling of such refusal to bargain cases typically consumes some (sic) months and I am advised that thereafter it can reasonably be anticipated that the court proceedings in the Eleventh Circuit would take at least a year."

[Emphasis added.]

Under the interpretation and application of the Act presently embraced by the NLRB, **there is only one situation where representation elections are nearly always appropriate, desirable, and necessary in construction**; i.e., where the employer has already been organized and is party to a Section 8(f) prehire agreement which the employer will not agree to convert to Section 9(a) majority status through a card check and execution of a voluntary recognition agreement. Here, the only possible conversion tool is an election. But this situation is entirely different from that in a bottom-up campaign; i.e., the employer is already organized, a contract is in effect, the voters should already be union members, the NLRB will accept the unit description (job classifications and geography) contained in the agreement, and thus the election will be expedited.

## NATIONAL LABOR RELATIONS ACT - SECTION 8(f)

As defined by the NLRB (National Labor Relations Board), an appropriate unit of employees for the purpose of collective bargaining ordinarily requires a regular employer and a stable group of identifiable employees. In the construction industry, however, if appropriate collective bargaining units were determined to be each construction project separately, many or even most of those projects might be completed before NLRB representation elections could be held and certainly before final certification of the union could be issued and a first labor agreement negotiated. Likewise, if appropriate collective bargaining units were determined to be the employees of each contractor separately, the entire work force or a substantial portion thereof might change once or even several times before an NLRB election could be held and the lengthy processes necessary to certification and negotiation of a first agreement completed. For these and other reasons, **NLRB representation election processes are not always appropriate to construction organizing.** (See later section titled **NLRB REPRESENTATION ELECTIONS IN CONSTRUCTION**).

The National Labor Relations Act (NLRA) was not designed for application to the construction industry and, therefore, has never fit its realities well. During the Wagner Act period, the NLRB acknowledged this fact by refusing to apply the Act to construction, and following passage of the Taft-Hartley Amendments, its attempts to apply the Act to construction were not very successful. The 1959 Landrum-Griffin Amendments attempted to address these problems but failed to

cope with the serious flaws inherent in applying the NLRB's industrial procedures to construction job sites. Regardless, in recognition of the unique nature of the industry, the NLRA does make some special exceptions for construction.

In recognition of the inability of construction craftsmen to achieve a truly effective voice in their wages, hours, and conditions of work except through the organization and control of a loose **monopoly** of the construction labor pool, Section 8(f) of **the National Labor Relations Act encourages the formation of such monopolies by making legal their operation by construction unions.** The rights granted construction unions by Section 8(f) are generally denied to unions in other industries. For construction unions, Section 8(f) is the single most important section of the Act because:

> It permits building and construction trades employers to sign union agreements without requiring the union to **first** establish that it represents a majority of the employees. Absent this proviso, **prehire agreements** would be unlawful, as they are in other industries. Agreements signed after a job is manned would also be unlawful unless the union **first** established that it represented a majority of the employees. Needless to say, this proviso is a powerful weapon which building and construction trades unions can utilize to its fullest extent only by organizing and controlling a loose **monopoly** of the construction labor pool;
>
> It permits building and construction trades collective bargaining agreements to require union membership after seven (7) days of employment or after seven (7) days following the signing of the agreement;
>
> It permits building and construction trades unions to require employers to notify the union of employment opportunities and **allows the union to refer qualified applicants** for employment;
>
> It permits building and construction trades unions to contractually establish standards of training or experience as **qualifications** for employment and to grant **priorities** in employment based upon length of service (a) with the employer, (b) in a geographical jurisdiction, or (c) in the industry.

The special privileges granted by Section 8(f) provide the tools needed to operate **monopolies** of qualified tradesmen formed by organizing and taking into membership a majority of all who are employed or available for employment in the industry. Once a **monopoly** has been built, the union automatically controls its work since employers cannot readily employ qualified tradesmen except through the union. In order to employ union tradesmen, an employer must first sign a "prehire agreement" made lawful by Section 8(f). These agreements will contain provisions establishing training or experience qualifications and employment priorities as also permitted by Section 8(f).

It is easy to see why Section 8(f) is so important. A **monopoly** of available manpower is possible under Section 8(f); without Section 8(f), it is impossible.

## THE LAW OF SUPPLY AND DEMAND

The same principles apply to the skilled trades today as when the pioneers formed our labor organizations; to survive and prosper, the service offered must be matched with the **demand**. The law of supply and demand applies to the labor movement just as stringently as it applies to commercial endeavors.

Labor organizations must not be deluded into thinking they can survive or prosper by controlling or regulating the level of **demand** for skilled labor. The labor movement has attained only limited, short-term success in mediating **demand**, most often through political action designed to stimulate the level of construction activity; eliminate the least qualified and/or restrict entry to the trades through licensing requirements, training minimums, and ratios; or legislate union-only jobs.

Unions have sought to stimulate **demand** for their members' services by insuring that their levels of skill and ability are high and remain so; by investing their trust fund assets on favorable terms in projects that employ members only; and, in some cases, by directly subsidizing employers through stratagems such as funded target programs, i.e., the Kansas City Plan, Elgin I, and Elgin II. The effect of these efforts have been limited to localized or short-term successes and primarily have rewarded one group of tradesmen (union) to the detriment of the other group (nonunion). But in truth, these stratagems have had little long term

effect; while they have directed additional work to members, they have not substantially increased the continuing overall **demand** for skilled tradesmen nor have they allowed unions to regain control of the manpower **supply**.

The true long-term accomplishments of skilled trades unions have come from organizing and maintaining control of the **supply** of skilled tradesmen and then using that control through strikes, boycotts, limiting referral to those employers who agree to minimum terms and conditions of labor, and so on, to keep prices fair and working conditions good. Unions' declared intent, since their inception, has been to control the **supply**; to organize all building tradesmen into local unions for the purpose of eliminating that competition which is based on substandard terms and conditions of employment. It is the only strategy that has worked; continually organizing and controlling a working monopoly of the **supply** of skilled labor — the labor pool — and, through that working monopoly, enforcing minimum standards.

Like many social organizations which evolve over a long period of time, skilled trades unions have adopted some policies or programs which continue to work to their advantage but, in bureaucratic maturity, have taken on some disadvantageous characteristics as well. Thus, at the same time unions are trying to organize and control the existing **supply**, they may also support activities that add to the glut.

Think of the jurisdiction of a hypothetical skilled trades local union as a "labor market" controlled, as it is, by the basic law of supply and demand. There is a finite amount of skilled trades work to be performed in such a "labor market" and to the extent that the union controls the **supply** of skilled tradesmen, it can also control labor prices; that is, wages, fringe benefits, and other terms and conditions of employment. Assume, for purposes of illustration, that this "labor market" supports a **demand** for 600 tradesmen. Present building trades union control of 20-30% of the manpower in the U.S. construction industry will support an assumption that 180, or 30%, of these tradesmen are members of a local union and that the remaining 420 are self-employed or work for various nonsignatory employers.

FIGURE 1.

| Union | plus | Others | equals | Supply | less | Demand | equals | Excess |
|---|---|---|---|---|---|---|---|---|
| 180 | + | 420 | = | 600 | - | 600 | = | 0 |

Assume that the 180 building tradesmen who are members of the local union are wisely investing in their futures by employing organizers whose task it is to bring the 420 unrepresented tradesmen into membership so that, through control of the **supply**, they will be able to increase their standard of living and enhance their job security.

If this **supply** of 600 building tradesmen is stable or shrinks, thus fueling demand, the organizers' task will be easier and progress can be more readily attained. If, on the other hand, this **supply** of 600 tradesmen grows, the organizers' task will be more difficult and wages, fringe benefits, and other terms and conditions of employment will experience downward pressure as the result of more than 600 tradesmen competing for the 600 available jobs.

Now introduce into this "labor market" a program created by the union which continues to offer advantages but which has developed some disadvantageous characteristics; a joint apprenticeship and training committee. For the purpose of this example, assume that the basic local union agreement provides for a ratio of one apprentice to every three journeymen. Based on 180 journeymen members of this hypothetical local union, the joint committee's assessment of the ideal situation in a five-year apprenticeship program is to annually start classes of twelve each. They realize that, due to attrition, they will not be able to maintain a full 3-to-1 journeyman-apprentice ratio using these numbers, but it is a figure that has been arrived at through a consensus of the parties.

FIGURE 2.

| Union | plus | Others | equals | Supply | less | Demand | equals | Excess |
|---|---|---|---|---|---|---|---|---|
| 180 | | | | | | | | |
| +60 | Apprentices | | | | | | | |
| 240 | + | 420 | = | 660 | - | 600 | = | 60 |

In this example, to the extent that increases in **supply** are not offset by decreases due to retirement, injury, death, and other reasons, there will soon be more tradesmen than there are jobs. The union will then encounter problems in accomplishing its basic objective of maintaining high wages and full employment and, thus, will become less attractive to nonmembers. Current members will resist taking in additional journeymen members through organizing because they fear their competition for available union jobs. The union's stated goal of an ever increasing standard of living for its members will become less attainable as market

conditions become depressed due to oversupply and a working monopoly of the manpower **supply** becomes more difficult to maintain.

Those who originally organized the building trades unions knew that their first priority had to be control of the existing **supply** of skilled tradesmen, and that is why the goal of organizing all workers in the entire industry became boilerplate in all building trades union constitutions. In response to this same hypothetical example, they would have acted, first, to bring the 420 nonmember tradesmen into the union before increasing the **supply** by training additional ones.

FIGURE 3.

| Union | plus | Others | equals | Supply | less | Demand | equals | Excess |
|---|---|---|---|---|---|---|---|---|
| 180 | | 420 | | | | | | |
| +60 Apprentices & Trainees | | -60 Recruited by Union | | | | | | |
| 240 | + | 360 | = | 600 | - | 600 | = | 0 |

The problem is simply that union apprenticeship and training efforts have largely become apprenticeship efforts only; **as bottom-up organizing in the building trades slowly ceased, the training function took a distant second place as well.** As skilled trades organizations, unions have always conducted skill improvement and training activities. On the other hand, apprenticeship programs, as they operate today, are fairly recent innovations. Certainly, the challenge of training those who may not be high school graduates, who may not have the best study habits or well developed learning skills, and who may have pressing family and community obligations as well is greater than training carefully selected registered apprentices. **But it represents change from our present method of operation** — a change from present paradigms and a renewed obedience to the basic law of supply and demand.

The law of supply and demand dictates that **union tradesmen do not command superior wages and conditions by virtue of their demonstrated superior skill and ability.** If they did, wage cuts, funded target programs, and other concessions would never be necessary. Tradesmen command superior wages and conditions when they are organized well enough to affect the **supply** of labor, by withholding it in meaningful amounts or releasing it only under stated minimum conditions. To the extent that joint apprenticeship and training efforts have tended to instill a belief that union wages and conditions are based solely upon a skill and

ability platform, our labor organizations are endangered. Why would a tradesman need a union if wages were actually based upon skill and ability alone; that is a personal asset which does not require a union to promote. Those who are forced to market themselves in competition with the nonunion manpower supply soon realize that it is union organization, not skill and ability, that provides true marketing support. That is why strong organizations of relatively unskilled workers, such as in automobile plants, usually command higher wages and better conditions than most unorganized tradesmen whose skills are high.

## CLASSIFYING AND INITIATING NEWLY ORGANIZED CONSTRUCTION WORKERS

Open-shop contractors are free to arrange their work so as to use individual employees on a wide variety of tasks and, therefore, they employ journeymen, subjourneymen, helpers, laborers, etc. These are the workers whose support must be secured if organization of the work force is to succeed. Union contractors, on the other hand, are constrained by collective bargaining agreements which specify the use of journeymen for certain work and which limit the number or ratio of apprentices who may be employed. Because of this, the organizer must recognize and understand that, to some extent, union contractors and open-shop contractors are looking at different sources for their manpower.

**In order to organize most jobs, shops, or contractors it is necessary for the union to offer, or convincingly promise, two basic conditions to the workers in the unrepresented bargaining unit:**

Promises

- **job classifications employable under the collective bargaining agreement;**
- **an opportunity for union membership.**

In top-down situations, the contractor may be willing to sign a union agreement and employ all needed additional craftsmen in conformance with the referral procedure while at the same time insisting that all, or a selected group, of his current employees be employed under the labor agreement and offered union membership.

In bottom-up situations, the union cannot realistically expect to secure the necessary support of a meaningful majority of the bargaining unit **unless union membership and placement in jobs covered by the labor agreement are the projected end results.** If the above stated conditions cannot be met, bottom-up organizing of entire bargaining units cannot usually be accomplished. Unfortunately, unorganized workers do not fall into the neat categories of journeymen and apprentices as recognized by most construction collective bargaining agreements and whom most unions are equipped to process as new members under their normal systems.

In the past, some local unions have attempted to deal with this problem by taking into membership only those craftsmen who passed required journeyman examinations and proved minimum experience levels while expecting or requiring contractors to get rid of and replace all others by using the referral procedure. Whether or not a contractor would cooperate usually depended on the strength of his desire or need to become party to the local union's labor agreement. Faced with losing his work, not being able to bid desirable work, being thrown off key jobs, etc., a contractor might be willing to discharge all of his employees, qualified as well as unqualified. On the other hand, faced with unemployment, losing a particularly desirable job, etc., the local union might be willing to accept into membership all of a contractor's employees.

Between these two extremes lie infinite variations ranging from refusing to allow a contractor to sign a local union agreement, thus forcing him and all of his employees off the job to be replaced by a contractor employing local union members, to such shoddy operations as promising to test and accept into membership all employees who achieve acceptable scores and then, after the contractor has already signed the agreement, designing the test so that none pass. Needless to say, these and like schemes have not solved the long-term problem and, in fact, actually work to erode the union's strength and eventually destroy it.

No Pass Test

All union representatives responsible for organizing should understand that it is an unfair labor practice, in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, for a contractor to discharge or otherwise discriminate "against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that

membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership". Those contractors who have violated this part of the Act with impunity usually have been able to do so only because the discriminatees were ignorant of their rights and protections under the law. Otherwise, in most cases, those contractors would have eventually faced a reinstatement-to-employment order with appropriate back pay and interest.

All union representatives responsible for organizing should also understand that it is an unfair labor practice, in violation of Sections 8(b)(1) and (2) of the National Labor Relations Act, for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection 8(a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership". Those unions who may have violated this part of the Act with impunity usually have been able to do so because the contractor either did not know the law or chose not to use it or, again, because the discriminatees were ignorant of their rights and protections under the law. Otherwise, in most cases, those unions would have eventually faced orders for back pay plus interest also.

**Removing an open-shop contractor from a job temporarily gains some work for union craftsmen but it also leaves this open-shop contractor intact and free to continue to bid against, or otherwise compete with, union contractors and union craftsmen. At the same time, it creates or aggravates bitter feelings against the union by the open-shop contractor and his unorganized workers thus making eventual organization even more difficult. Left free to operate nonunion, this contractor will eventually cost the union more work than the union gained by having him thrown off a job and will erode the union's wages, benefits, and working conditions while doing it. Whenever the union has or gains the advantage, it should cause the contractor to become party to a collective bargaining agreement, multiemployer if possible, and should improve its control of the construction labor pool by initiating the workers. This destroys the ability of the contractor to continue to compete based on substandard wages, benefits, and working conditions which, after all, is an important purpose of unions.**

Classifying and Initiating Newly Organized Construction Workers

Prior to passage of the Davis-Bacon Act in 1931, placing newly organized construction workers in job classifications covered by the labor agreement did not pose as large a problem since the use of helpers, preapprentices, learners, trainees, subjourneymen, etc., was common practice in most construction unions. However, because of the tremendous impact of Davis-Bacon which excluded all classifications except journeymen and those apprentices registered in BAT (Bureau of Apprenticeship and Training, U.S. Department of Labor) programs from the wage categories set in its regulations, use of other classifications in the unionized sector had virtually disappeared by the early 1950s and classification of newly organized workers had become more difficult as well.

Many open-shop contractors are able to underbid or otherwise compete effectively against union contractors because they are free to organize their work so as to use individual workers who lack journeyman skills (subjourneymen) on a wide variety of tasks and assignments ordinarily performed by union journeymen. Although the employment of subjourneymen together with the absence of BAT-approved apprentice training programs has helped to limit the Davis-Bacon work performed by these open-shop contractors, it is the major source of their ability to compete effectively for work not involving use of public funds.

Recently, because of the economic climate, the tremendous growth in numbers of double-breasted, merit-shop, and open-shop contractors, and changes in the regulations of the Davis-Bacon Act to allow use of subjourneymen and use of the average wage rather than the union wage as prevailing on projects involving use of public funds, some unions have added various subjourneyman categories to their labor agreements in order to improve the ability of union contractors to compete against the subjourneyman categories. It has been anticipated that, where used, subjourneymen categories will eliminate the **white ticket** or **permit system** used by some unions to refer unqualified nonmembers at full journeyman rates to jobs where manpower is needed but journeymen are not available.

Although classification of newly organized workers is easier under agreements containing subjourneyman categories, this trend is not widespread enough to have a meaningful impact on this problem and some unions will not approve any agreement providing for use of subjourneyman categories in their craft jurisdiction.

**How, then, does the union approach the organization of bargaining units which include subjourneyman categories such as helpers, laborers, preapprentices, learners, and others who do not fit the predetermined qualifications and classifications enumerated in the labor agreement?** Must the union fail in recruiting majority support because the organizer cannot guarantee classification in jobs covered by the labor agreement or because certain workers must be told that they cannot be accepted into membership? This problem is one of the toughest to solve and is the single most damaging obstacle to both top-down and bottom-up construction union organizing. It usually breaks down into two parts: (1) how can unorganized workers be guaranteed that the local union body will eventually accept them into membership; and (2) how can newly organized workers be meshed into the job classifications specified by the union's collective bargaining agreements.

**PREPARATIONS TO DEAL WITH THIS PROBLEM MUST BE MADE IN ADVANCE IF ANY CONSTRUCTION ORGANIZING PROGRAM IS TO BE SUCCESSFUL OR SUSTAINED.**

Placement Examination System

One of the best ways to accomplish both the proper classification under the current labor agreement and initiation into membership of newly organized workers is through use of a **placement** or **no-fail** examination system. In order to successfully operate such a system, in addition to its normal apprentice training arrangements and facilities, the local union may want to offer separately the instruction and training necessary to upgrade the skills of newly organized workers who cannot immediately qualify for the journeyman classification. Many local unions already have this capability. Those which do not may want to develop it before implementing the placement examination system.

Under the placement or **no-fail examination system**, all newly organized workers are given tests for the purpose of ascertaining their knowledge of and familiarity with their craft. These tests may be written, oral, or practical and should include experience ratings. Although acceptable minimum scores may be predetermined for the purpose of attaining immediate journeyman classification, the primary purpose of the testing is placement.

Although newly organized tradesmen may be meshed into existing apprentice classes, this is not always practical. Placing subjourneymen with long years of experience in classes with inexperienced recent high school graduates, for example, may not provide the most desirable educational environment. More importantly, these subjourneymen may have different educational or instructional needs which can be more adequately and timely addressed in separate skill improvement and training classes. These separate classes may be set up with journeyman certification or automatic journeyman classification, based on experience ratings, as the end result.

Those tradesmen who cannot achieve immediate journeyman classification and who are not placed in separate skill improvement and training classes should be placed in the apprentice training program at the level indicated by their test results (1 month, 6 months, 12 months — 42 months, etc.). The normal qualifications required of apprenticeship applicants such as age, education, residency, etc., may usually be waived to accept newly organized tradesmen into BAT-registered apprenticeship and training programs provided evidence that they came as the result of an organizing effort (a majority of tradesmen in the bargaining unit sign union authorization cards, an agreement is signed, or an NLRB election is won) can be furnished to BAT or provided their employer becomes party to the local union's labor agreement and pays into the program and, in either case, further provided that some credit for previous experience (as little as one month) is given to each so that none start at the beginning.

The BAT will occasionally object to the waiving of some requirements but will often back away if pressed. Any real roadblocks to placement of newly organized workers in the apprentice training program usually arise on the joint committee. For this reason, **particular care should be taken to win the joint committee's support for the organizing program in advance.** This should not be difficult once the employers understand that organizing makes them more competitive.

An efficient way to insure that newly organized tradesmen qualify for inclusion in the union's apprentice training program is to amend the standards. This approach has been utilized by the National Joint Apprenticeship and Training Committee for the Electrical Industry (NJATC). The Qualifications for Apprenticeship section of the NJATC's National Standards, which are registered

with the U.S. Department of Labor, Bureau of Apprenticeship and Training, contains the following exceptions or additions to the traditional qualifications:

> "(1) ...To qualify for oral interview an applicant must meet the .... basic requirements unless he or she has a minimum of six thousand hours of substantiated electrical construction work experience.
>
> "(2) An employee, of a nonsignatory employer, not qualifying as a journeyman when the employer becomes signatory shall be evaluated by the JATC and indentured at the appropriate period of apprenticeship based on previous work experience and related training.
>
> "(3) An individual who signs an authorization card during an organizing effort wherein over fifty percent of the employees have signed: Whether or not the employer becomes signatory, an individual not qualifying as journeyman shall be evaluated by the JATC and indentured at the appropriate period of apprenticeship based on previous work experience and related training."

For those subjourneymen who actively assist in organizing efforts but are not able to substantiate 6,000 hours of electrical work experience and whose employers do not become signatories or where NLRB elections are not won or a majority of authorization cards are not obtained, an alternative is to simply place these workers in training without registering them with BAT. These nonregistered trainees cannot be used, as such, on prevailing rate work and, upon completion of the program, will not receive a state or federal certification. They will receive the ultimate recognition, however, which is journeyman classification for purposes of referral and employment under the collective bargaining agreement.

Most collective bargaining agreements provide that the joint committee (JATC) shall be responsible for all training and not just the apprenticeship program and not just "registered" apprentices. **Many newly organized workers can be processed through special skill upgrading and training classes designed especially for that purpose.**

Regardless of age and/or excellent qualifications, an applicant may prefer placement in the apprentice training program to an immediate journeyman

classification. Applying the sample referral language which appears in the following pages, consider an employment situation where the Group I applicant pool is turning over on a regular and frequent basis but where Group II is seldom, if ever, utilized. Simultaneously, the union is engaged in an organizing drive which hinges upon the recruitment and subsequent employment of key qualified nonunion tradesmen. Since none of these key tradesmen have been employed for a period of "at least one year in the last four years" under the union's collective bargaining agreement, none can qualify for registration in Group I. They face the Hobson's choice of remaining nonunion and employed or becoming members only to face an indefinite period of unemployment as Group II registrants. In this situation, an apprentice classification may be preferable because apprentices are not subject to the referral procedure but, instead, are placed on jobs by the joint committee. Inclusion of key tradesmen in the final year of the apprentice training program can provide employment under the collective bargaining agreement at a relatively high rate of pay. Additionally, the minimum employment period under the collective bargaining agreement of "at least one year in the last four years" may be satisfied while completing the final apprenticeship year so that Group I registration eligibility and the journeyman classification are achieved simultaneously.

Following the **placement examination**, but prior to acceptance, as an additional precaution, newly organized tradesmen who do not qualify for immediate journeyman classification may be given individual letters clearly stating the placement level achieved or other conditions (see **Exhibit B**).

First preference for employment and the highest wage rates are the right of those who have earned or acquired the journeyman classification. This is usually evidenced by a membership book, ticket, dues receipt, etc., issued by the local union and requires certification as a journeyman by a joint apprenticeship committee or a passing score on a journeyman examination given by a construction local union. The following referral language excerpt from a construction labor agreement is typical:

Sample Contractual Referral Language

> Section_____. The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or nonmembership in the Union and such selection and

referral shall not be affected in any way by rules, regulation, bylaws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements. All such selection and referral shall be in accord with the following procedure.

Section_____. The Union shall maintain a register of applicants for employment established on the basis of the Groups listed below. Each applicant for employment shall be registered in the highest priority Group for which he qualifies.

GROUP I. All applicants for employment who have four or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a Journeyman examination given by a duly constituted Construction Local Union or have been certified as a Journeyman by any Joint Apprenticeship and Training Committee, and who have been employed for a period of at least one year in the last four years under a collective bargaining agreement between the parties to this Agreement.

GROUP II. All applicants for employment who have four or more years' experience in the trade and who have passed a Journeyman examination given by a duly constituted Construction Local Union or have been certified as Journeyman by any Joint Apprenticeship and Training Committee.

GROUP III. All applicants for employment who have two or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market, and who have been employed for at least six months in the last three years in the trade under a collective bargaining agreement between the parties to this Agreement.

GROUP IV. All applicants for employment who have worked at the trade for more than one year.

> Section____. If the registration list is exhausted and the Local Union is unable to refer applicants for employment to the Employer within 48 hours from the time of receiving the Employer's request; Saturdays, Sundays, and holidays excepted; the Employer shall be free to secure applicants without using the Referral Procedure but such applicants, if hired, shall have the status of "temporary employees".

In the four referral groups appearing in the above sample, you will note that the only registration requirement the union has direct control over is the journeyman examination or certification. Even though the referral procedure is not subject to or dependent upon union membership or other union requirements, it is the reason underlying most membership application rejections. Too often the local union membership wrongly reasons that it is to their advantage to limit the number of craftsmen who are entitled to employment preference under the labor agreement by withholding the journeyman classification and/or a union card, ticket, book, etc., as evidence of the journeyman classification. By doing so, they are often guaranteeing that these craftsmen will be permanently available to their nonunion competitors, usually at substandard rates and conditions.

It is easy to limit the number of craftsmen certified as journeymen by a joint apprenticeship committee. First, all applicants must meet certain standards which may be based on age, education, physical fitness, aptitude tests, residency, etc., and survive a committee interview based on judgment factors such as interests, moral character, cooperativeness, judgment, financial condition, etc. Second, and most important, the number of new apprentices to be accepted is arbitrarily determined in advance.

It is more difficult, but not impossible, to limit the number of craftsmen who pass a journeyman examination given by a duly constituted construction local union. Sometimes these examinations are offered in writing only or, if offered orally, may not be administered by interview designed to determine actual knowledge and familiarity with the craft. Experience ratings may be ignored or not given proper weight. Under the guise of maintaining high industry standards, examinations may be deliberately designed to be difficult, or even impossible, to pass. Applications to take examinations may be discouraged through various forms of intimidation, coercion, or discrimination. Those who apply, if already

employed under the labor agreement, may suddenly be laid-off or referral under the permit system may suddenly become difficult or impossible to achieve.

Our sample referral language, in accord with the law, makes it plain that preference for employment referral shall not be based on union classification or membership. In theory, therefore, a journeyman classification issued by a union is meaningless for referral purposes unless it is earned by examination or certification. However, in some situations where local unions have classified craftsmen as journeymen even though they have not taken or passed a journeyman examination or been certified by an apprenticeship and training committee, the NLRB has ruled that such classification, absent conclusive proof to the contrary, is based on experience ratings and indicates qualification for employment referral as journeymen.

It goes without saying that newly organized workers who pass a journeyman examination should be classified and referred for employment as journeymen just as those who are placed in apprentice training programs should be classified and employed as apprentices. Those who are not placed in either category but are enrolled in skill improvement and training classes may be classified in a variety of ways. If the labor agreement makes provisions for use of subjourneymen, they may be classified and referred for employment in that manner pending full journeyman status. They may be classified as **steamfitter** rather than **journeyman steamfitter**, as **wireman** or **residential wireman**, etc., and be referred out of the proper group (GROUPS III or IV in the sample), be used in place of **white tickets** or the **permit system**, be used as supplements to maintain the proper apprentice/journeyman ratio if permitted, etc. If necessary to organizing purposes and permitted by agreement with signatory employers, they may even be classified as **provisional journeyman** pending full journeyman status.

What recourse, if any, does the union have following classification and initiation into membership if a newly organized worker fails to complete the terms of the placement letter by attending skill improvement and training classes or completing the required apprenticeship and training program? As long as the journeyman classification has not been granted, such classification may be withheld and registration for employment referral as a journeyman (in GROUPS I or II in our sample) would not be permitted. Whenever possible, the full journeyman classification should not be granted until the necessary skill improvement and training is completed. If there are any who cannot be classified as journeymen or

apprentices, hopefully they will remain with their newly organized employers until the terms of their placement letters put them in classifications recognized by the labor agreement so that the referral procedure will not come into use prematurely.

The possibility should be acknowledged that referral out of GROUPS I or II of our sample referral procedure may imply journeyman status just as granting a journeyman classification without requiring a journeyman examination may imply it as earlier noted. In addition, the knowing referral out of any group of a person or persons not so entitled may subject the local union to charges by those rightfully entitled and thus disadvantaged.

So far we have discussed how the **placement** or **no-fail examination system** can make a sustained organizing program possible and successful by providing a workable mechanism to guarantee workers that, once organized, they will be placed in employable job classifications. This is only half of the problem, however. To be successful, we must also offer union membership.

Initiating The Newly Organized

With rare exception, apprentices are automatically offered union membership. By using **the placement or no-fail examination system** to move as many newly organized workers as possible into the apprentice training program, we are also guaranteeing that union membership will be open to them. In any event, once apprentices are certified as journeymen, they are entitled to preference for employment referral (through GROUPS I and II in the sample) so there is no longer a reason to oppose their membership in the union. Problem solved for this group.

If strong membership opposition is expected, an effort may be made to see that these journeymen applicants qualify for preference in referral before any membership vote. Under our sample referral language, this would require a year's employment under the labor agreement. Assuming that these journeymen applicants are currently employed under the labor agreement by a recently organized contractor, this should not be impossible. Once an applicant qualifies for referral preference (registration in GROUP I in our sample), opposing his membership in the union no longer makes sense.

In situations where the examining board may be hostile to organizing, those who are qualified for journeyman classification may be placed in the final stage of the apprentice training program and, upon completion, certified as journeymen by the joint committee.

Permanent Solution

There are, of course, better and more permanent ways to solve the two major internal problems prohibiting or limiting union organization of the construction manpower pool. The best way is through an educational program, such as IBEW's COMET, designed to improve the rank-and-file member's understanding of the necessity of taking in new members. However, this cannot be accomplished over night nor can the organizer always afford to wait.

**REGARDLESS OF THE METHOD USED, BEFORE ANY ORGANIZING PROGRAM CAN BE SUSTAINED, THE UNION MUST BE ABLE TO GUARANTEE THAT NEWLY ORGANIZED WORKERS WILL BE (1) PLACED IN JOB CLASSIFICATIONS EMPLOYABLE UNDER THE LABOR AGREEMENT AND (2) OFFERED MEMBERSHIP IN THE UNION.**

## THE IATC - A CRITICAL ORGANIZING ROLE

In order to mount a successful bottom-up organizing effort, it is absolutely essential to be able to extend two basic guarantees to nonunion employees. These guarantees are:

1. JOB CLASSIFICATIONS EMPLOYABLE UNDER THE COLLECTIVE BARGAINING AGREEMENT; and

2. THE OPPORTUNITY FOR UNION MEMBERSHIP.

The above stated guarantees are not all that may be needed in order to successfully organize bottom-up. They are minimums.

Being skilled in all facets of the trade is no longer necessary for lifetime employment in the nonunion branch of the construction industry even though the union definition of "qualified" includes it, the journeyman classification requires

it, most standard collective bargaining agreements recognize no employable job classifications except foreman, journeyman and apprentice, and most standard referral-for-employment procedures recognize but one referable job classification; journeyman.

When organizing, how can unions appeal to the vast majority of the nonunion craftsmen who are performing skilled work under substandard terms and conditions of employment? If they are completely honest, most local unions must simply say:

> "If you will support our union in its effort to organize your nonunion employer and the effort is successful, you will be given an examination to determine if you are knowledgeable in all facets of the trade -- both in theory and in code. Provided you achieve an acceptable score on this examination, you will be classified as a journeyman. You will thereafter be allowed to remain with your present employer without penalty as long as that employer remains signatory to our union's collective bargaining agreement and wishes to keep you.
>
> "If your employer lets you go for any reason, and provided that you have at least four years experience in the industry, you will be eligible to sign our union's out-of-work-list in one of the top two groups.
>
> "If you are a resident in the jurisdiction and further provided that you have worked at least one year out of the last four under our union's collective bargaining agreement, you will be eligible to register in Group I. Otherwise, you will be placed in Group II where the prospects for your employment are not good since our union does not anticipate being able to refer from that group for several months or even years.
>
> "You may travel away from home and family to work out of Group II in the jurisdiction of other local unions provided they need the help. In the meantime, even if your present employer, who has employed you for many years and who has recalled you from layoff repeatedly, should experience an increase in work and wish to call you back as

has been his custom, you will not be allowed to return and your former job will be given to a Group I registrant.

"If you should perform any nonunion electrical work while you are unemployed, you will be subject to discipline including fines and the loss of your newly acquired union membership.

"Since most of the craftsmen working for your nonunion employer are subjourneymen when measured against our union's journeyman standard of knowledge of all facets of the trade, you probably will not be able to pass a journeyman examination. In this event, you may apply for inclusion in our union's pool of eligible apprenticeship applicants. To be included in this pool you must be a high school graduate or have a GED, have completed one full year of algebra, achieve qualifying scores on aptitude tests, and be physically able to perform the work or you must have at least 6,000 hours of experience in the industry. In the event you meet these standards and are included in the pool, you still may not be selected for training and placement in a job covered by our union's collective bargaining agreement.

"In the event you cannot qualify as a journeyman and are not accepted as an apprentice, you cannot be placed or referred for employment under the standard collective bargaining agreement and, in all honesty, there is no employable place for you in our union.

"Regardless, we are asking for your support in our organizing effort and we hope that you will authorize our union to represent you, strike if necessary, and do all other things necessary to bring your employer under our union's collective bargaining agreement even if you cannot be employed as a union craftsman yourself."

**Unorganized tradesmen cannot be expected to engage in organizing activity such as recognitional or unfair labor practice strikes if success will result in their unemployment or will not bring union membership.**

## The Placement Examination

Unfortunately, unorganized workers do not fall into the neat categories of journeyman or apprentice recognized by, and employable under, most construction agreements and whom most local unions are equipped to process as new members under their present systems. Therefore, in order to conduct a successful organizing program, modifications must be made to alleviate this problem. The method that has worked best for many years is use of a placement examination (no-fail test) system.

In recognition of its changing major responsibility and its critical organizing role, in August 1987, the NJATC for the Electrical Industry helped prepare a comprehensive placement examination and on August 1, 1988, issued Bulletin 88-34 titled *Organizing — JATC's Role and Responsibility*, (see **Exhibit C-1**), which stated, in part, that:

> "As you are aware, the IBEW and NECA are dedicated to an organizing effort. With such efforts **individuals not qualifying as journeyman will be referred to the JATC** for evaluation and placement in apprenticeship.
>
> "The JATC should develop or adopt a standard test to help evaluate the individual's past education, training and experience. In addition to evaluating tests results, the committee (JATC) or representative should interview the individual to determine previous OJT experience and related training. The sole purpose of testing and interviewing the individuals is to place them in the program at a realistic level. A level at which they can succeed.
>
> "It is the opinion and belief of the NJATC that local **JATCs should cooperate fully in the organizing effort**, and it is also our view that this can be done and must be done in such a manner as to insure, protect and promote the quality and integrity of the training program."

The message delivered by Bulletin 88-34 is clear. The elimination of fair employers' nonunion competition cannot be accomplished unless two basic conditions are met as minimums. The first of these is the guarantee of a job classification employable, through placement or referral, under the union's

collective bargaining agreement. **The JATC has a vital role in this part of the organizing process.** If newly organized employees cannot qualify as journeymen, the JATC has a training responsibility which begins with proper placement. Every JATC should be cognizant of the fact that they are responsible for all training and not just apprenticeship.

The National Electrical Contractors Association (NECA) has determined that its proper function is as a union contractors association. As such, NECA's future growth also depends upon the success of the union's organizing effort. The proper function of electrical industry JATC's is to discharge the duties which IBEW/NECA assigns to them. Presently this includes an organizing responsibility.

Broadening The Applicant Pool

On September 14, 1988, the NJATC for the Electrical Industry once again assumed the lead position in the building and construction industry by issuing **Bulletin 88-43** titled *Section V of Apprentice Wireman Standards - Revised*, (see **Exhibit C-2**), which announced revisions in the standards for inclusion of newly organized craftsmen in the apprentice applicant pool. These changes, which are registered with the U. S. Department of Labor, BAT, waived all educational, aptitude, physical, and age requirements for newly organized tradesmen under certain circumstances.

**JATCs do not have a responsibility to process all newly organized craftsmen through apprenticeship training.** Many will be processed through local union examining or executive boards. Others will be placed in special JATC skill upgrading classes or be processed in other ways. JATCs should act only upon those newly organized craftsmen brought before them.

As a stop-gap measure, some local unions have initiated all newly organized craftsmen and if, after being admitted to membership, it was found upon investigation that they were not sufficiently acquainted with the branch or type of work on which they were engaged to earn or command the established wages, then the local union, through its executive or examining board or an especially appointed committee, required them to revert to the proper apprentice grade and pay rate, to attend study classes, or devote time toward becoming competent, properly informed mechanics.

On September 21, 1989, the NJATC for the Electrical Industry issued Bulletin 89-63 titled *Emphasizing JATCs' Responsibilities in Organizing as seen by the NJATC*, (see **Exhibit C-3**), which stated in part as follows:

> "The rapid and sometimes drastic decline in the number of apprentice applicants increases the demand for JATCs to recruit applicants employed elsewhere in the electrical construction industry. Many individuals working **nonunion** already meet your basic requirements for interview. Others may qualify by having the six-thousand hours work experience that qualifies an individual for interview by the committee.
>
> "We believe JATCs should seek out the best qualified candidates from this untapped [nonunion] supply.
>
> "The national standards also clearly provide provisions for indenturing through organizing.
>
> "The written examination (placement examination) is not a test to determine if one coming through organizing will be indentured. . . The individual should be caused to understand it is not a qualifying test but necessary to help determine what training they need to succeed. Don't anticipate or look for high scores on the placement examination.
>
> "Not all of those coming through organizing will perform all the job skills as well as many of your more carefully selected applicants, but most of them can be trained to be a productive part of our industry. Remember; somehow, someway, they have been doing your work in the past years and **if they don't produce for you they will compete against you.**
>
> "No decline in quality training, selection or apprenticeship standards is suggested, nor is it threatened, if we approach this organizing effort in a positive productive manner. Knowing the growth in the number of nonunion workers and employers over the past should be motivation enough to cause us to **act expediently to redirect the course of the electrical construction industry.**"

On October 17, 1992, the NJATC for the Electrical Industry issued Bulletin 92-122 titled *Organizing - Recruiting Apprentices From the Nonunion Work Force*, (see **Exhibit C-4**), which provides in part as follows:

> ". . . we want to encourage JATCs to start doing some very special recruiting.
>
> "The registered standards allow [nonunion] individuals with six-thousand hours to qualify for an interview.
>
> "You will also find individuals working for the nonunion with less than six-thousand hours who will qualify for interview . . . You should do everything possible to have these people apply so as to have an opportunity to interview them as potential candidates for your program.
>
> "We further believe that we should **make a concerted effort to recruit the best workers the nonunion has to offer.** Recruiting the best performers from the competition is a means of organizing that will prove extremely successful.
>
> "The IBEW-NECA apprenticeship standards permit providing selected applicants with credit for previous EXPERIENCE and TRAINING where warranted."

It is clear that the NJATC for the Electrical Industry is a training organization that is not oblivious to the creeping destruction of union standards in the construction industry. It has responded well by shedding outmoded and unworkable paradigms while urging all affiliated JATCs to follow its effective example. Unfortunately, as in all advocated change, the JATC response has not been uniform or complete. A few continue to slop at the same trough by failing to comprehend or assume their necessary roles. Some who owe their livelihoods to joint apprenticeship programs even deny that JATCs have a critical organizing role. They view their primary occupation as training traditional apprentices and anything that threatens this activity is also viewed as threatening their livelihood. Surely we can understand and sympathize with this position especially since, as labor unions, our purpose is job security. But it should not be so. At best, it would take a number of years to organize and upgrade the skills of the 420

nonunion tradesmen working in the hypothetical "labor market" of our example. Surely, this would pose a much greater challenge to the joint committee and offer more job security than simply selecting and training the brightest and most easily taught from among the pool of eligible applicants for apprenticeship.

## COLLECTION OF UNION FINES IN CIVIL COURT

Nearly all members of building and construction trades unions are familiar with various kinds of union imposed discipline including fines, expulsion from membership, or both. But many construction union officials have come to erroneously believe that union fines cannot be enforced in court once a member resigns or otherwise allows his membership to lapse.

While there may have been strong arguments against bringing suit to collect union fines in the past when loss of union membership was the more threatening prospect, the situation today is entirely different. Unions no longer represent a majority of the building tradesmen in this country. In a situation where thousands of building tradesmen of all crafts have resigned their union membership to work open-shop while thousands more have allowed their membership to terminate through nonpayment of dues, the collected fine is often more effective than loss of membership. Uncollected, however, the fine becomes less than meaningless.

Since some union officials mistakenly assume that union imposed fines are not collectible in civil court, a discussion of the legal basis may be helpful. The courts have traditionally held that there is a contractual relationship between a union and its members. By joining a union, a member becomes contractually bound by its constitution and bylaws except to the extent that this common-law principle is modified by the National Labor Relations Act and the Labor Management Reporting and Disclosure Act. While these Acts do proscribe union discipline in certain situations, unions are left with great discretion in enforcing their constitutions and bylaws. Since we are primarily concerned with the collection of legal fines in civil court, we will not discuss these proscriptions here.

Construction unions commonly fine members who are discovered working for nonsignatory employers. Provided that working nonunion is properly proscribed by the union's constitution or bylaws and the member is not employed

as a supervisor, these fines are perfectly legal. In Scofield v. NLRB, 394 US 423, 70 LRRM 3105 (1969), the U.S. Supreme Court noted that unions are "free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave and escape the rule". Also see Orange County Carpenters, 242 NLRB No. 75, 101 LRRM 1173 (1979).

How much can a union legally fine a member? In NLRB v. Boeing Co., 412 US 67, 83 LRRM 2183 (1973), an employee was fined and the union then sued in state court to collect. The employee filed an NLRB charge alleging that the amount of the fine was unreasonable. Following dismissal by the NLRB, the employee appealed and the U.S. Supreme Court stated: "While 'unreasonable' fines must be more coercive than 'reasonable' fines, all fines are coercive to a greater or lesser degree. The underlying basis [is] not that reasonable fines were noncoercive under the language of Section 8(b)(1)(A) of the Act, but was instead that those provisions were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act."[2]

The Court, in effect, held that while causing an employee to be discharged from employment for failure to pay a fine is unlawful, court action to collect a fine does not violate the Act. The Court went on to tell us that: "Issues as to the reasonableness of such fines must be decided upon the basis of the law of contracts, voluntary associations, or such other principles of law as may be applied in a forum competent to adjudicate the issue. Under our holding, state courts will be wholly free to apply state law to such issues at the suit of either the union or the member fined".

Since members may contest the reasonableness of fines in courts, what size fines are reasonable? As one example, courts have held that a reasonable fine for working behind a legal picket line is an amount equal to the money earned while so engaged. Since this question may be determined by state courts, there is a potential for fifty different sets of criteria. You may wish to consult legal counsel in the state where you are located on this question.

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[2]A more recent case, Woodell, holds that fines may also be collected in federal court.

Fines

The U.S. Supreme Court has ruled that a union trial board has the right to determine whether its constitution and bylaws have been violated and that a court is not supposed to substitute its judgement for the union's. The Court has said that if a disciplined member appeals to court, the union's decision must be upheld as long as it is supported by some credible evidence. Therefore, if a union fines a member for working for a nonsignatory employer and then sues in court to collect the fine, the court should uphold the union's decision as long as there is credible evidence that the member actually committed the offense. See Boilermakers v. Hardeman, 401 US 233, 76 LRRM 2542 (1971).

Generally speaking, a tradesman must be a union member when an offense is committed but membership is not a requirement at the time of trial or at the time suit for collection is brought in court.

Since union fines may be collected under state contract law, unless there is a specific statute providing that the winner is entitled to legal fees or unless the member is contractually bound to pay the legal fees by the union's constitution or bylaws, each side must pay its own legal fees.

IBEW Special Projects Department
1125 15th Street, NW
Washington, DC 20005

May 1994

EXHIBIT A

## SALTING RESOLUTION

WHEREAS: (Name of local union here) is committed to organizing all unorganized craftsmen working in our jurisdiction, and

WHEREAS: A continual organizing program is the lifeblood of all building and construction trades unions because it is the only proven method of maintaining control of the construction labor pool, and

WHEREAS: The first obligation of the members of this local union is to organize the unorganized in order to maintain and secure our wages, benefits, and other conditions of employment, and

WHEREAS: The success of any organizing drive depends upon the support of each and every union craftsman, both on and off the job; therefore be it

RESOLVED: That the (title of responsible local union official or committee here) be empowered to authorize members to seek employment by nonsignatory contractors for the purpose of organizing the unorganized, and be it further

RESOLVED: That unemployed members shall report to the (title of responsible local union official or committee here) for the purpose of assisting as needed in the organizing program, and be it further

RESOLVED: That the (title of responsible local union official or committee here) shall maintain records of all members authorized to seek employment by nonsignatory employers including date(s) of authorization, date(s) of employment, and all other pertinent information, and be it further

RESOLVED: That such members, when employed by nonsignatory employers, shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification, and be it further

RESOLVED: That any member accepting employment by a nonsignatory employer, except as authorized by this RESOLUTION, shall be subject to charges and discipline as provided by our Constitution and Bylaws.

Adopted by the Local Union and entered into the minutes of the membership meeting this _____ day of _____, 19__.

_____
President

L.U.
SEAL

_____
Recording Secretary

EXHIBIT B

1st Sample Letter

Dear (Newly Organized Worker):

The placement examination administered on (insert date here) has been evaluated and indicates that you do not presently qualify for a journeyman classification. These tests and other required criteria do indicate, however, that you are eligible for inclusion in our joint apprenticeship training program at the (insert period, hour, level, etc., here). You will be required to complete this program in order to achieve a journeyman certification.

If the above conditions meet with your approval, please indicate your acceptance by signing and dating the original copy of this letter in the space provided below and returning it to this office.

_____
(Acceptance signature,
Newly Organized Worker)

DATE: _____

Sincerely yours,

_____
Business Manager

2nd Sample Letter

Dear (Newly Organized Worker):

The placement examination administered on (insert date here) has been evaluated and indicates that you do not presently qualify for a journeyman classification. These tests and other criteria do indicate, however, that you are eligible for voluntary participation in our skill improvement and training program which is designed to assist you in acquiring the skills and knowledge necessary to achieve a journeyman classification. If you accept, you will be allowed to attend study classes and devote time as necessary to becoming a competent, properly informed mechanic.

If the above conditions meet with your approval, please indicate your acceptance by signing and dating the original copy of this letter in the space provided below and returning it to this office.

_____
(Acceptance signature,
Newly Organized Worker)

DATE: _____

Sincerely yours,

_____

3rd Sample Letter

Dear (Newly Organized Worker):

Experience ratings included as part of the placement examination administered on (insert date here) indicate that you may be issued an immediate provisional journeyman classification pending completion of voluntary skill improvement and training classes designed to enhance your competence as a properly informed mechanic. If, for some reason, you do not complete these classes, your provisional classification will be changed to the proper grade (apprentice, subjourneyman, no classification, etc.) and pay rate.

If the above conditions meet with your approval, please indicate your acceptance by signing and dating the original copy of this letter in the space provided below and returning it to this office.

Sincerely yours,

_____
(Acceptance signature,
Newly Organized Worker)

DATE: _____

_____
Business Manager