prohibited employees from (1) posting, distributing, removing, or altering any material on company property; (2) discussing "private matters of members and other employees … including topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc."; (3) sharing, transmitting, or storing for personal or public use without prior management approval sensitive personal information such as membership, payroll, confidential credit card numbers, Social Security numbers, or employee personal health information.[20]

To guide employers, the NLRB has prepared three separate updated social media reports, which describe all social media cases reviewed by the agency. These documents provide guidance to employers in formulating social media policies that will comply with federal labor laws.[21] Their two main advisories for employers are (1) employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees; and (2) an employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.[22]

Conclusion

Unions have a long and deep history in the United States and enjoy strong support under federal law. However, union membership is declining in America; unions in this country probably will not survive if they continue to display traditional adversarial relationships with employers. Traditional approaches to negotiation usually involved the union trying to gain concessions from management and winning the negotiation. To be successful in the future, unions must develop partnerships with employers and seek win–win outcomes to collective bargaining that strengthen both the union's position and employees' rights and enhance the performance of the organization. Rigid posturing by unions in attempting to maintain the status quo works against the many initiatives and innovations organizations develop as they attempt to respond to changes in their environments and remain more competitive.

Given the changing nature of organizations and work, unions clearly need to reinvent themselves. Unions need to consider that the jobs of today and those of the future are quite different from the jobs of the past. Increasing global competition, changing technology, the heightened pace of merger and acquisition activity, the move toward smaller businesses and autonomous divisions, and the increasing diversity in the workforce represent broad changes for unions in the United States. The jobs being created in our economy are more service- than manufacturing-oriented; are much more complex, multifaceted, and broadly designed; involve teams, cooperation, and working with others; and involve more self- or peer supervision than supervision by management. Countries such as Japan and Germany have extensive unionization and produce some of the highest quality, most technologically advanced products. Their unions facilitate worker involvement, development, and participation programs; also, the unions partner with employers in creating beneficial change rather than inhibiting change and attempting to ensure workers' rights by maintaining the status quo.

As unions decline in number and stature, workers become less powerful. Without union representation, employee interests can only be advanced through increased government regulation of the employment relationship or through innovative and responsive HR programs that organizations initiate themselves. Increased legislation may ensure worker rights, but it can also inhibit organizational flexibility and change. Innovative HR programs can provide workers with benefits, but usually, the organization retains power and control over the workers, who maintain their individual status in dealing with separate issues with the employer. Legislation preserves rights and empowers workers to a limited extent, but it inhibits change. Organization-designed initiatives can promote change but still leave individual workers at a disadvantage when dealing with employers on issues of equity. Hence, policymakers need to take a critical look at the institution of collective bargaining to determine whether it has lived up to the ideals Congress established for it under the NLRA.

Very few unionized companies have developed effective worker participation programs because unions are interested in keeping workers insulated from management issues. Ironically, however, successful employee participation programs in nonunionized organizations have actually increased workers' power and voice in dealing with management. Union leaders need to create a new model of worker representation if they plan to survive in the twenty-first century. This can only be done if union leaders rethink their roles and adopt collective-bargaining strategies that allow both the employees and employers to benefit. Union leaders need not only political and negotiating skills but also management skills in understanding the whole organization: strategic issues facing the employer and the organization's environment. Instead of seeing themselves as adversaries to management, they should envision themselves as facilitators and consultants. Although employers clearly need to consider labor relations from a strategic perspective, union representatives must do so even more if they are to keep their unions viable for tomorrow's organizations.

Critical Thinking

1. With unionization on the downturn, why should an organization be concerned about labor relations?
2. What benefits are received and what costs are incurred when workers unionize?
3. Describe the process by which workers unionize.
4. What are the possible outcomes of failure to reach consensus on a collective-bargaining agreement?
5. Contrast the style of labor unions in the United States to that found in other countries.
6. Does union diversification make unions stronger or weaker? How would you feel as an auto worker to see the United Auto Workers representing employees outside the auto industry?
7. What rights and responsibilities do employers and employees have regarding the use of social media communications under the National Labor Relations Act?

Reading 12.1

8. Assess the status of employer and union recruiter behaviors in union-organizing campaigns. How much access should union organizers have to employees? What new behaviors are likely from employers and union organizers in response to the actions of the other party?

Reading 12.2

9. How can social media impact the rights of employees under the National Labor Relations Act? Can or should any restrictions be placed by employers on workplace discussions that take place through social media?

Exercises

1. Locate a local unionized organization. Interview both a manager and a union employee to determine the level of satisfaction each has with the employment relationship. What types of union activity/inactivity contribute to these positions?
2. Investigate one large union, such as the United Auto Workers, United Steelworkers, or Teamsters, in depth and then examine its member base and recent activity on behalf of its members. Does it appear that diversification has made this union more or less effective?
3. Investigate the nature of collective bargaining in Australia, Canada, and Mexico and the countries that constitute the European Union and then compare and contrast the nature and state of collective bargaining in these areas as well as determine the implications this has for global business.
4. Visit the Web sites for the AFL-CIO (http://www.aflcio.org) and Teamsters (http://www.teamsters.com). What programs does each union offer its members? What are the main issues each union appears to be pursuing? Do these programs and issues appear to be well matched to the needs of the U.S. labor force?
5. Visit the Web site for the National Labor Relations Board (http://www.nlrb.gov). Of what value is this Web site for employers? Of what value is this Web site for union leaders?

6. Design a social media policy for an employer that would optimally serve both the employers and the employee without running afoul of the National Labor Relations Act.

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READING 12.1

A Big Chill on a "Big Hurt:" Genuine Interest in Employment of Salts in Assessing Protection Under the National Labor Relations Act

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Abstract

As union membership has continued to decline steadily in the US, union organizers have become more creative and vigilant with their organizing strategies. Chief among these strategies has been "salting," a process by which unions attempt to organize employees from the inside rather than the outside. The Supreme Court has ruled that, under the National Labor Relations Act, "salts" cannot be discriminated against solely on the basis of their status as salts. This paper examines employer responses to resist salting efforts, including a recent decision by the National Labor Relations Board, which redefines the landscape under which salting activities can be conducted and considered protected activity.

Union membership has been declining steadily in the US since the US Bureau of Labor Statistics began tracking such numbers 25 years ago. At that time, 20.1% of the US workforce was unionized. By 2008, only 12% of workforce was unionized with a continuous steady decline having been recorded over that time. In 2008, public sector unionization stood at 35.9% while private sector unionization had declined to 7.4%, with both percentages having each lost a full percentage point over the preceding 3 years (Bureau of Labor Statistics 2008). This steady 25 year decline, however, was not a new trend but rather the continuation of a trend that pre-dated the Bureau of Labor Statistics tracking (Curms *et al.* 1990).

This decline can be attributed to a number of factors. First, the movement of many traditionally union-held jobs to developing countries overseas to take advantage of lower labor costs has been increasingly dramatically in recent years. Second, changes in the nature of the employment relationship, including the increased transience of the workforce and the erosion of the assumption, or presumption, of lifetime employment and the growing trend toward part-time and contract employment have impacted workers' interest in being represented by unions. Third, the rise in undocumented or illegal workers who are unprotected or afraid to protest and/or organize has affected unions. Fourth, many of the jobs being created in our economy are in areas in which unions have no experience organizing, such as call centers, and involve workers who work from their homes or remote locations, rather than at the employer's physical facility. Fifth, an increasing number of employers are resisting and fighting union organizing attempts more so than in the past. More than 75% of employers confronted with union organizing campaigns now hire consultants and an entire new industry of "union avoidance firms," often consisting of former union leaders, has been established over the past three decades with anti-union success rates that generally exceed 90% (Maher 2005; Logan 2006). Sixth, unions themselves have been blamed for not keeping up with the times and failing to address the concerns of the fastest growing segments of the hourly labor force, including women, minorities and immigrants. Finally, the alleged antiunion doctrine and teachings of business schools have been cited as promoting and encouraging more adversarial relations between employers and unions (Gould 2008; Anonymous 2003).

Unions have responded to declines in membership by becoming much more aggressive in their recruiting tactics. One of the main strategies now being employed by unions is "salting," a process by which union organizers attempt to organize a workplace internally. Originally implemented in the early 1970s in the construction industry (Raudabaugh 2008), salting involves a union representative applying for and subsequently obtaining employment with the organization whose workers are being targeted for unionization. Salting provides union organizers with more direct and regular access to employees who are the target of the unionization drive that would be realized by organizing from the outside. More recently salting activity has evolved into a means of political and economic warfare against employers as the basis for unfair labor practice allegation filings with the National Labor Relations Board (NLRB). This paper discusses the legal foundation upon which salting activities are based, the recent court activity and NLRB rulings in salting cases, subsequent management reactions to curtail salting activity and the judgments on the legality of such activities under the National Labor Relations Act (NLRA; 29 U.S.C. § 151 et. seq.). These decisions have significant implications not only for unions as they attempt to maintain their viability but also for employers in ensuring that their management practices and actions do not run afoul of the NLRA.

Supreme Court Provides Protection to Salts Under the National Labor Relations Act

The Supreme Court first addressed salting in *NLRB v. Town and Country Electric, Inc.* (116 S. Ct. 459, 1995) where it found that paid union representatives who attempt to gain employment with a specific employer whose workers they are trying to organize cannot be discriminated against *solely* on the basis of their status as "salts." Even though a salt may have no intention of remaining with the employer subsequent to a successful organizing drive, the Court found that union salts are considered "employees" under the NLRA and hence, are entitled to the full range of rights expressly provided to employees under the statute. As a result, any failure to consider or hire otherwise qualified salts, as well as the decision to terminate a salt once the salt's intentions are made known or union organizing activities begin, solely based on salt status, is unlawful under the NLRA. While an employer has no per se obligation to hire a salt, no job applicant can be denied employment solely based on her or his status as a salt.

Town and Country constituted what was described as a "chess match" between employers and union organizers as each attempted to assert their rights under the NLRA (Mello 1998). A previous Supreme Court ruling, *Lechmere, Inc. v. NLRB* (112 S. Ct. 841, 1992), had strengthened management rights in resisting organizing activity by disallowing the practice of union organizers approaching employees on the employer's property; in this case, the employer-owned employee parking lot. Salting served as a union response to the restrictions placed on union organizer access to employees in *Lechmere* and the *Town and Country* decision validated the use of salting as a tactic to organize workers. While *Town and Country* was a significant victory for organized labor in prohibiting employers from refusing to hire an applicant or subsequently terminate an employee who is attempting to organize its workers, the decision didn't address the question of whether a salt can intentionally lie as part of her or his employment application process about his or her status as a salt and/or the intention to organize the workplace. More so, to the extent that *Town and Country* gave unions the upper hand in the "chess match," the decision certainly gave employers incentive to respond by monitoring more closely the specific activities of union organizing efforts.

Intentional Misrepresentation in the Employment Application Process

In 2002 the Seventh Circuit addressed the extent to which a salt may lie about organizing intentions in *Hartman Bros. Heating and Air Conditioning, Inc.* v. *NLRB* (280 F.3d 1110, 2002). Hartman Bros., an Indiana-based heating and air-conditioning contractor, hired Starnes, who had stated on his employment application that he had been laid off from his previous job which paid him $11 per hour. The truth was that Starnes had taken a formal leave of absence from his position so that he might work for a union to assist with its organizing efforts. As the position at Hartman for which Starnes had applied paid only $8.50 per hour, suspicions might have been aroused if Starnes stated that he was still employed at a job which paid $11 per hour. Immediately upon being hired, Starnes informed Hartman Bros. that he was a union salt who intended to organize the company. Hartman responded by telling Starnes to leave the workplace without formally terminating him.

The job for which Starnes had applied and been hired required driving. Consequently, as part of his application Starnes was required to provide information about his driving history and stated that he had received one speeding ticket. Hartman Bros. then informed him that its liability insurer would need to check his driving record and that Starnes would be ineligible for employment if, as a result of this investigation, the insurer refused to provide liability coverage for his driving. Four hours after Starnes had been ordered off the premises for declaring his salting intentions, the insurer contacted Hartman Bros. and disclosed that Starnes had received not one, but two speeding tickets and that he would be denied coverage. Starnes was immediately discharged as a result of this misrepresentation and his disqualification for insurance coverage.

Around the time Starnes applied for a position with Hartman, Till also applied for employment. Till, however, was accompanied by a known union organizer, who declared that he was a union organizer and wore a baseball cap with the union's logo. Hartman refused to hire Till.

The court found Hartman Bros. in violation of the NLRA in its refusal to hire Till as it found that this refusal was motivated solely by hostility toward unions. Hartman was ordered to cease and desist in its discriminatory practices against salts and other union supporters and to hire Till with backpay, in line with the Supreme Court ruling in *Town and Country.*

Starnes' case was more complicated than Till's. In justifying its decision to terminate Starnes, Hartman cited an Indiana law which prohibits any person from knowingly or intentionally making a false or misleading written statement in seeking employment. The court, however, found that if the state statute was being cited as a means for an employer to deny employment to an individual based on an applicant's lies about salt status, the statute would be pre-empted by the National Labor Relations Act. Any lie about salt status would be immaterial to the hiring decision nor to an applicant's qualifications for the job for which (s)he had applied and be based on a presumably erroneous employer assumption that the individual would not be a bona fide employee at any point in time. The court further found that criminalizing any applicant deception over salting intentions could only be a strong-arm means of discouraging salting, which would be further at odds with the Supreme Court's decision in *Town and Country.* The fact that Starnes lied about his being laid off by his previous employer would not be grounds for dismissal as it was done solely to hide his salting intentions and the NLRA would preempt the Indiana statute that prohibits individuals from making false or misleading statements as part of an employment application.

The Seventh Circuit did concur with the earlier NLRB ruling that the discharge of Starnes based on his driving record was legitimate as the action was done pursuant to a company policy that had been uniformly applied to all employees without animus toward an employee's participation with or attitudes toward unions. Hartman Bros. was, however, required to pay Starnes backpay, for the 4 h that had elapsed between his arrival at work and being sent home upon receipt of the insurance report. The court further ruled that the unfair labor practice committed by Hartman Bros. was not the discharge of Starnes but rather, sending him home and depriving him of the opportunity to begin organizing prior to the arrival of the insurance report.

Implications

Hartman Bros. dealt employers another post-Town *and Country* blow in finding that paid union organizers *can* lie on their job applications about their affiliation with unions as salts but *cannot* misrepresent facts about their credentials, skills or qualifications for employment. Lying about salt status is not material to a hiring decision because, under *Town and Country,* an employer cannot reject a job applicant solely on the basis of being a salt, union employee or union supporter. Any applicable state statutes which might make it illegal for applicants to lie or make misrepresentations on their employment applications are preempted by the National Labor Relations Act when any such lies or misrepresentations pertain to any union affiliation or activity.

The *Hartman Bros.* decision represented another victory for unions that further put employers on the defensive. Under *Hartman Bros.,* unions have less difficulty placing paid organizers in the employ of companies they are attempting to organize. To prevent unfair labor practice charges from being levied, employers need to be sure that any criteria used for screening and selection of employees is objective, valid, essential for job performance and not based, in any way, on an applicant's actual or perceived salt status. Although no cases have been heard relative to "perceived" salt status, the Seventh Circuit's ruling in *Hartman Bros.* makes it likely that those applicants perceived to be salts would enjoy the same protection as actual salts. One weapon employers might have to counter salting in light of *Hartman Bros.* would be the implementation of a policy that prohibits any employee from simultaneously holding any full or part-time employment with another employer, particularly one within the same industry. Any such policy may or may not be upheld in a given jurisdiction based on local laws and general attitudes toward labor but its chances of success are more likely if enforced in a uniform manner toward all employees.

Employers Fight Back—Use of Preferential Hiring Criteria

The Seventh Circuit provided unions with a significant victory in *Hartman Bros* which affirmed their rights to use aggressive salting tactics as a means of organizing a workplace. As unions have gained the upper hand in their "chess match" with employers, employers have not been passive in fighting aggressive union organizing efforts. A post-Hartman Seventh Circuit ruling, *Operating Engineers Local 150* v. *NLRB* (325 F.3d 818, 7th Cir, 2003), provided employers with a significant victory in their efforts to fight union salting tactics.

Local 150 involved Brandt Construction Company, an Illinois highway contractor, which provides municipal road construction, bridge building, concrete and asphalt paving, sewer and water utility work and demolition work. Brandt had utilized a long-term preferential hiring policy whereby employment applications submitted by current or former employees and those filed by individuals referred by current employees received preferential consideration over applications received from non-referred walk-in applicants. Brandt also gave preferential consideration to applicants referred by equal employment opportunity service providers under a prior conciliation agreement entered into with the US Department of Labor which required Brandt to increase the numbers of women and minorities employed on each job pursuant to federal, state and local equal employment opportunity regulations. Brandt allowed any of these applicants who receive preferential treatment to apply for employment at any time without an appointment while walk-in applications were only accepted on Mondays and only when the company was hiring.

These hiring practices and policies were formalized and posted at the time Brandt entered into its agreement with the Department of Labor. The posting noted that applications would only be "considered current for a period of two weeks.… After fourteen days the employment application expires and any individual interested in employment must complete a new application, if they are being accepted. We do not accept applications when we are not hiring."

The posting further specified that Brandt showed preference for applicants in the following descending order; (1) current employees of the company; (2) past employees with proven safety, attendance and work records; (3) applicants recommended by supervisors; (4) applicants recommended by current non-supervisory employees; (5) unknown (walk-in) applicants.

Shortly after the conciliation agreement and Brandt's award of a large job, Local 150 sent some of its members to Brandt to apply for employment. The union members had been told by Local 150 to apply wearing union hats or other insignia and further instructed to indicate on their applications that they were salts and had been sent by the union for the express purpose of organizing Brandt. At the same time, Brandt received 32 referral applications as well as 20 additional non-union walk-in applications. Brandt hired a total of eight applicants, all of whom had been referred. For the remainder of that year, Brandt hired 29 additional applicants, 28 of whom were referrals, from a pool of 67 referrals. Consistent with posted policy, all new hires were offered employment within 14 days of their application.

In response to the hiring, Local 150 filed an unfair labor practice charge against Brandt with the National Labor Relations Board. The union alleged that Brandt had "changed, limited and made more onerous its hiring practices and procedures with the purpose of making it more difficult for applicants with pro-union sentiments to apply or obtain employment," in direct violation of Section 8(a)(1) of the National Labor Relations Act. Several months later Local 150 filed an additional unfair labor charge against Brandt, alleging that the company refused to hire union members despite the fact that all of new hires at Brandt at that point had been former employees, referrals from current employees or supervisors or referrals from equal employment opportunity service providers and the company had also not accepted any walk-in applications. Local 150 later filed a third unfair labor charge which alleged that Brandt "has in effect and continues to maintain and apply a hiring practice of giving preference in hiring to referred applicants regardless of their skill level over walk-in or unknown applicants" and that "such policy is designed to discriminate, interfere and prevent union-affiliated applicants from being considered for employment ... and is designed to deter the effects of union organization in violation of the Act."

The court found that while Brandt's policy clearly made it more difficult for union applicants and salts to gain employment, it did not violate the NLRA as the manner in which all applicants had been hired, by referral, excluded *all* walk-in applicants, regardless of whether or not these individuals were affiliated with a union. In issuing this decision in favor of the employer the court relied on two earlier NLRB rulings. The first was *Zurn/N.E.P.C.O.* (329 N.L.R.B. 484, 1999), which held that a hiring policy which gives preference to current and former employees, as well as referrals by management, did not discriminate on the basis of union activities because "the policy does not on its face preclude or limit the possibilities for consideration of applicants with union preferences or backgrounds." The second, *Custom Topsoil, Inc.* (328 N.L.R.B. 446, 1999), held that an employer did not discriminate on the basis of union membership when it differentiated between "stranger" and "familiar" applicants as this differentiation did not involve a per se distinction between union and nonunion applicants.

In issuing its ruling favoring Brandt, the court relied on the fact that Brandt applied its preferential hiring policy in a nondiscriminatory manner with applications submitted by all walk-ins rejected under a long-standing and consistently applied policy, absent of any direct anti-union animus. The court also noted and commended Brandt for improving its employment of women and minority applicants pursuant to its conciliation agreement with the Department of Labor. The court found that the critical factor that prevented Local 150 members from being hired was the fact that they freely chose to apply as walk-ins, traditionally the applicants of last choice for Brandt under its publicized policy. Brandt gave union applicants exactly the same consideration as all other walk-in or unknown applicants and union members were in no way prevented from obtaining a referral from a preferential applicant source if they so chose.

The NLRB ruling in *Local 150* has found support in subsequent cases. The Board also ruled in favor of another employer who used preferential hiring criteria in *Ken Maddox Heating and Air Conditioning, Inc.* (340 N.L.R.B. No. 7, 2003). Maddox, an Indiana HVAC contractor, gave preference in hiring to applicants it had previously employed as well as to applicants referred by current employees and business associates, similar to Brandt. This long-standing policy was challenged when only one of 37 qualified overt union applicants was hired while 55 nonunion applicants were hired to fill 56 vacancies. The NLRB noted that because Maddox's policy had been in place for some time, this fact invalidated the allegation that the policy was specifically implemented to counter a salting campaign. The Board further found that the policy "was not inherently destructive of employee rights" or "sufficient, by itself, to establish animus." Citing *Brandt* as precedent the NLRB found that the general use of referral policies is a legitimate and justifiable employment practice. In *Maddox* the referral practice did not create a closed hiring system, which effectively screened out union applicants, nor was it applied in any kind of inconsistent or disparate manner.

Employers Find Additional Support for Their Use of Restricted Hiring Criteria

The victory for employers in *Local 150* was only the beginning as other employers have succeeded in their attempts to fight union organization and salting through the use of restricted, rather than preferential, hiring criteria. *Kanawha Stone*

Company, Inc. (334 N.L.R.B. No. 28, 2001) involved an employer whose hiring policy consisted of an assessment of specific hiring needs on a particular job, based on applications filled out on the employee's first day of work. The company did not maintain any applicant pool or hiring lists unless some kind of mass hiring was being conducted. All hiring was handled by superintendents at individual job sites rather than at the main office. Kanawha's hiring criteria restricted hiring to three groups of individuals; (1) employees on temporary lay off, (2) former employees and (3) referrals from existing employees. Applicants not falling into one of these categories were not considered for employment. This long-standing policy had been in effect since the company's inception. After a group of union members applied for employment at the main office, rather than at an individual job site, and who did not fit the above criteria were not hired, the union filed charges with the National Labor Relations Board.

Refusal to hire cases are considered under a burden-shifting scheme established by the Third Circuit in *NLRB v. FES (A Division of Thermo Power;* 301 F.3d 83, 3rd Cir., 2002). This case established the following criteria by which refusal-to-hire cases are analyzed:

> *To establish a discriminatory refusal to hire, the General Counsel must ... first show: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirement of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirement, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants. Once this is established, the burden will shirt to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.*

When the NLRB applied this criterion to *Kanawha,* it found that while union applicants were excluded from consideration for employment and some anti-union animus appeared to be present, Kanawha met its burden of proof by showing that it lawfully failed to consider the union applicants because they simply failed to meet any of its legitimate hiring criteria.

While *Kanawha* dealt with a flat-out refusal to hire, an employer in another case found a more specific means of excluding union members from consideration for employment. This criteria, refusal to hire based on wage incompatibility, was challenged in the NLRB ruling *Kelley Construction of Indiana, Inc* (333 N.L.R.B. No. 148, 2001). Kelley utilized the hiring criterion that new employees be accustomed to earning wages in line with those paid by Kelley. This policy ideally would allow Kelley to retain employees for as long as possible and minimize disruptions and costs incurred through excessive turnover. When Kelley refused to hire 27 union applicants based on this criterion, the union filed charges with the NLRB. The NLRB had previously established a precedent for wage disparity as a legitimate means of selecting applicants in the absence of evidence of disparate application to union members in *Wireways, Inc* (309 N.L.R.B. 245 1992). In *Kelley,* the Board applied the *FES* burden-shifting criterion in concluding that Kelley's hiring decisions were made without regard to the prospective salts' union affiliation because the salts did not satisfy the neutral and legitimate hiring criteria of wage compatibility.

Subsequent to *Kelley,* however, the NLRB was presented with another salting case involving wage incompatibility criteria in which it ruled that wage disparity was not a legitimate justification for denial of employment. In *Contractors Labor Pool* (CLP; 335 N.L.R.B. No. 25, 2001) the employer enforced a "30% rule," which involved rejection of any applicant whose most recent wages differed by more than 30% from CLP's starting wages. When challenged by a union, CLP's 30% rule had been newly established and based on a study of worker retention which calculated the "break point" at which employees would be less likely to remain in the employ of CLP.

The NLRB found that while CLP had shown a legitimate business reason for adopting the policy that appeared not to be motivated by anti-union animus, the policy was "inherently destructive" of employees' NLRA rights to organize as the net effect of the policy was to "disqualify automatically virtually all applicants who had recently earned union contract wages" which "directly penalizes those who have exercised their protected right to work in an organized workforce and imposes a formidable threshold barrier to protected organizational activity in the unorganized workforces of CLP and its contractor clients." The Board considered this outcome analogous to the theory of disparate impact applied to anti-discrimination cases heard under Title VII of the Civil Rights Act of 1964. In disparate impact cases, all individuals are treated the same but the treatment results in different outcomes or consequences for different groups.

While the NLRB acknowledged that the 30% policy impacted both union and non-union applicants, this fact did not mitigate the "obvious and profound discriminatory effect" it had on those who rights were "expressly protected under the NLRA." This was based on the finding that the policy, regardless of its intent, excluded virtually *all* applicants with union history while only excluding *some* applicants with nonunion wage history. The outcome was that the only way to gain employment with CLP was through prior employment with another nonunion employer.

Despite the fact that the NLRB accepted the employer's legitimate business interest in employee retention as the basis for its wage compatibility policy, it held that a balancing act was necessary between the legitimate rights of CLP's business interests and those of employees under the NLRA. Because the 30% rule was "not essential to the successful operation of CLP's business," the "destructive direct, broad, severe and enduring impact of this rule on employee rights" had to receive priority in the balancing act.

The Board did note that it was not making a blanket ruling in *CLP* on the legitimacy of any other wage compatibility rules "that may have a lesser exclusionary effect or that may be more narrowly drawn and essential to an employer's business operation." While *Kelley* provided affirmation for employer wage disparity policies, *CLP* refined that ruling by articulating the need for wage disparity cases to be examined on a case-by-case basis relative to balancing employer needs with employee rights. The end result is that while employers may be able to justify wage disparity employment screening policies, they clearly need to be able to show that such policies have a non-disparate impact on union members and/or prospective salts.

The Latest Chapter—Genuine Interest in Employment

As the courts and NLRB have ruled on wage disparity policies and clarified the criteria under which they should be considered, another issue has arisen regarding salting and employer responses to salting activities. This issue concerns whether prospective salts need to show a genuine interest in actually working for the employer to which they've applied in order to received protection of their salting activities under the NLRA.

In *Phelps Dodge Corp. v. NLRB* (313 U.S. 177, 1941), one of the first Supreme Court cases under the NLRA, it was held that the statute made it an unfair labor practice by an employer to discriminate against applicants for employment in addition to actual employees. As noted, the Supreme Court ruled in *Town and Country Electric* that job applicants who are also salts are considered "employees" under the NLRA and entitled to protection afforded by the statute, particularly section 8(a)(3) which prohibits an employer from "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In other words, job applicants are de facto "employees" under the NLRA. Such protection has served as the foundation for salting activities by union organizers but a new NLRB ruling, *Toering Electric Company* (Toering Electric Company and Foster Electric, Inc., and Local Union No. 275, International Brotherhood of Electrical Workers, 351 NLRB No. 18, 2007), answered the question of whether an applicant needed to be genuinely interested in employment to qualify for protection under the NLRA.

In 1987 the President of the International Brotherhood of Electrical Workers (IBEW) announced an aggressive campaign to begin targeted nonunion employers for unionization via salting. Indeed in a videotaped speech produced and distributed at that time he encouraged local unions to unite with him in "driving the non-union element out of business." In tandem with this, the IBEW issued a Construction Organizing Membership Education Training (COMET) manual, which provided guidance for local unions on how to conduct effective salting campaigns. The COMET manual emphasized organizing strategies that would cause employers to scale back their businesses, be forced to leave the union's jurisdiction entirely or even completely go out of business. The driving force behind such economic outcomes would be the filing of unfair labor practices charges against employers at every opportunity. Such charges would impose immediate and usually substantial costs on employers as they attempted to defend themselves as well as disrupt the employer's workforce and operations via a series of continuous and ongoing unfair labor practice allegations.

In 1994 Toering Electric became a target of Local 275 of the IBEW's salting campaign. IBEW filed charges alleging that Toering refused to hire or even consider any union-affiliated individuals who applied for employment, in violation of section 8(a)(3) of the NLRA. In 1995 Toering agreed to settle the allegations by offering employment to six members of Local 275 but all six failed to show up for work. Prior to the settlement, Local 275 boasted in its newsletter that it succeeded in inflicting "a big hurt" on Toering's business.

In 1996 Local 275 again targeted Toering via a salting campaign. The head of Local 275 submitted 18 resumes to Toering. Of these resumes, five contained no work history dates, five were "stale," meaning that they were not current, outdated by as much as 6 years, and one was from one of the six individuals who had failed to show up for work when hired the previous year under the settlement agreement. Because the resumes were mostly stale or incomplete, Toering declined to hire any of the individuals whose resumes were submitted by Local 275. This action prompted another set of unfair labor practices charges to be filed by Local 275 against Toering. Toering Electric argued that the applicant salts should not be entitled to protection under the NLRA as they had no intention of ever working for Toering, as evidence by the fact that none of the applicants to whom employment offers had been made the previous year ever showed up for work. Instead, Toering argued that the only purpose of the charges was to induce economic harm on Toering and such behavior should not be protected under the NLRA.

In considering the merit of Local 275's allegations, the NLRB considered that under *Phelps Dodge,* protection against discrimination is not limited to individuals who are actually employed by the employer and extends to job applicants as well. This interpretation was further reinforced by the Supreme Court in *Town and Country Electric* in 1995 in which the Court considered whether salts could receive any protection under the NLRA. In this latter case, the Court stated that the term "employee" did not necessarily exclude paid union organizers but stopped short of saying that paid union organizers enjoyed blanket protection under the NLRA. The NLRB was asked to determine in *Toering* whether in order for a job applicant to receive protection under the NLRA that such applicant have a genuine interest in employment with the employer to whom he had applied.

The NLRB found that *Phelps Dodge* was distinguishable from *Toering* as the applicants in *Phelps Dodge* were clearly interested in employment with the employer. The NLRB held in *Toering* that in order for a job applicant to receive protection under the NLRA the applicant had to be "genuinely interested in seeking to establish an employment relationship with the employer." The NLRB found that the salt applicants at Toering had incurred no harm as the employment they were being denied was not something they actually sought and that the filing party, the union, had to prove an individual's genuine interest in actually seeking to establish an employment relationship with the employer as a prerequisite for filing a charge. The Board found that it had an obligation to "allay reasonable concerns that the Board's processes can be too easily used for the private, partisan purpose of inflicting substantial economic injury on targeted nonunion employers rather than for the public, statutory purpose of preventing unfair labor practices that disrupt the flow of commerce." In considering the request for backpay for the rejected applicants, the Board found that Section 10(c) of the Act did not provide for any kind of punitive damages and was limited to effecting "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." Hence, there was no basis for any action or award to the salt applicants, even if Toering had been found to have committed an unfair labor practice in violation of the NLRA. The board found that "submitting an application with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity" under the NLRA.

Perhaps what is most significant about *Toering* is the fact that the Board realized that the automatic presumption of an applicant's genuine interest in employment with an employer is a flawed assumption. Because it had not been previously necessary to prove this as the basis for filing a charge, unions could easily inflict "big hurts" on employers by engaging in such tactics used by Local 275. Employers would indeed incur significant costs and disruption of operations. More so, the resources of the NLRB ended up being diverted to cases and protracted litigation where there was no actual loss of the opportunity to work as applicants never intended to work for the employer in the first place. Hence, in *Toering*, the Board shifted the burden of the employer needing to prove that the applicant was indeed interested in employment back to the union and applicant in requiring that this evidence of "genuine interest" be submitted in justifying the unfair labor practice allegation. Hence, the Board felt the need to "abandon the implicit presumption that anyone who applied for a job is protected" under the NLRA. Most important for employers is that the employer's motivation for engaging in the behavior that constitute the alleged discrimination act does not become relevant until the burden of proof has been satisfied that the applicant does indeed have a genuine interest in employment.

Implications

The Supreme Court decision in *Town and Country Electric* represented the beginning of a new era in labor relations in the US (Mello 2004). At the time of the decision, unions were suffering from declining memberships and finding little success as they attempted to employ more creative and aggressive organizing strategies. In its *Town and Country* decision, the Supreme Court validated the right of labor organizers to salt the workplace, handing organized labor a significant victory. As salting has become a more prevalent union organizing strategy, employers have attempted to counter salting by attempting to force salts to disclose their union affiliations if the salts have not blatantly done so and are attempting to organize in a more discreet manner. The Seventh Circuit handed unions and labor organizers an additional major victory in *Hartman Bros.*, which will bolster union efforts to continue to test the extent of their NLRA support in the courts.

These pro-labor rulings have enticed employers to devise new strategies to prevent their workplaces from becoming unionized. Chief among these have been the use of preferential and restricted hiring criteria. Employers do not appear to be in violation of the NLRA when they employ preferential hiring policies as evidence in *Local 150*, where the Seventh Circuit affirmed an employer's right to do so, as long as the policies were consistently applied to both union and nonunion applicants. Restricted hiring criteria cases, heard under the FES burden-shifting scheme, are a bit ambiguous. Initially affirmed by the NLRB relative to the right of an employer to exclude non-refereed applicants from hiring consideration, those cases involving wage disparity are less clear-cut as the Board has stressed the need to consider them based on their individual facts and circumstances.

Even though employers have enjoyed some success with the use of restricted hiring criteria, such policies should be implemented with caution. While both the courts and NLRB have found that referral-only policies do not directly violate the National Labor Relations Act, such policies may violate anti-discrimination in employment provisions of the Civil Rights Act of 1964. To the extent that an employer has a homogeneous workforce, referrals may logically come from the same population, which could expose an employer to a possible discrimination charge if non-hired salts were not part of this population. Under the theory of disparate impact, all employees/applicants are treated equally but the treatment results in different outcomes for different classes of individuals.