Indiana Law Review

Volume 30 1997 Number 2

ARTICLES

MISSING ANALYTICAL LINK IN SUPREME COURT'S "SALTING" DECISION DISTURBS BALANCE OF UNION-MANAGEMENT RIGHTS: A CRITICAL ANALYSIS OF *NLRB V. TOWN & COUNTRY ELECTRIC*

R. WAYNE ESTES*
ANDREA E. JOSEPH**

> [B]e it
>
> RESOLVED: That the [Union] Business Manager be empowered to authorize [union] members to seek employment by nonsignatory [nonunion] contractors for the *purpose* of organizing the unorganized, and be it further
>
> . . . .
>
> RESOLVED: That such members, when employed by nonsignatory employees, 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 By-Laws.[1]

This excerpt from the International Brotherhood of Electrical Workers' (IBEW) Job Salting Resolution is typical of the commitment a union member makes when deciding to partake in a union "salting program." Salting is a process, used primarily in the construction industry, whereby the union attempts to place its paid organizers and members in the employ of a nonunion contractor or company in an effort to organize the workers or to obtain evidence sufficient to file unfair labor practice charges.[2]

---

* Professor of Law, Pepperdine University School of Law, Malibu, California.

** J.D., *summa cum laude,* 1996, Pepperdine University School of Law.

1. WACO, Inc., 316 N.L.R.B. 73, 74 (1995) (emphasis added) (quoting the Job Salting Resolution of the International Brotherhood of Electrical Workers).

2. *See* Sullivan Elec. Co., No. 26-CA-16107, 1995 NLRB LEXIS 82, at *4-5 (Feb. 1, 1995); Herbert R. Northrup, *"Salting" the Contractors' Labor Force: Construction Unions*

As the IBEW acknowledges, the term, salting, was derived from "the process of 'salting' mines in order to artificially enrich them by placing valuable minerals in some of the working places. The organizing potential in nonunion bargaining units is likewise artificially enriched by 'salting' valuable craftsmen in some of the working places."[3] Administrative Law Judge Raymond P. Green pointed out the irony of this analogy in one of his recent opinions:

> The purpose of salting a mine is to defraud a prospective buyer or investor. Here, the employer is claiming that the Union's attempt to salt the job site by inserting members on the job, is similarly a fraudulent scheme to get people on the job who do not really intend to become employees.[4]

Salting is not a new phenomenon; however, it was not until recently that local unions revived the practice in an effort to combat the steadily declining interest in union membership. Union membership in general has dropped considerably in the past few decades, and the construction industry is no exception.[5] In response to this decline, the IBEW and other craft unions have placed great emphasis on salting and other organizing programs[6] in an attempt to turn the tide.[7] As the prevalence of salting campaigns increased, so did the number of unfair labor practice charges alleging that a nonunion company had discriminated against a paid union organizer by refusing to hire him in violation of section 8(a)(3).[8] Section 8(a)(3) provides protection against employer discrimination based on union affiliation to those individuals who fall within the definition of "employee" as set forth in section 2(3) of the NLRA.[9] Given this prerequisite, the underlying

---

Organizing with NLRB Assistance, 14 J. LAB. RES. 469, 469-71 (1993). In a typical salting program, the union sends its paid organizers and members to a non-union company to submit an application for employment during the company's hiring drive. The union organizer will usually disclose up front his intention to organize the workers, thereby placing the company on notice of his union affiliation. If the company refuses to hire the organizer, the union immediately files an unfair labor practice alleging employer discrimination in violation of the National Labor Relations Act (NLRA), ch. 372, § 8(a)(3), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(3) (1994)). *See infra* note 8.

3. *Sullivan*, 1995 NLRB LEXIS 82, at *6.

4. *Id.* at *6 n.3.

5. *See* Northrup, *supra* note 2, at 469-74.

6. For a description of other tactics construction industry unions utilize in attempt to obtain new members, see *id.* at 471.

7. *Id.* at 473-75.

8. "It shall be an unfair labor practice for an employer by 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 . . . ." 29 U.S.C. § 158(a)(3) (1994).

9. The definition of employee in section 2(3) is uninstructive because it includes "any employee." Additionally, the statute expressly excludes certain individuals from its definition. *Id.* § 152(3). *See infra* note 51.

issue that arose in these cases was whether a paid union organizer qualifies as an "employee" within the meaning of section 2(3).

In *NLRB v. Town & Country Electric, Inc.*,[10] the Supreme Court answered this question by holding that job applicants who are paid union organizers *are* "employees" within the meaning of section 2(3). The decision received the support of all nine Justices. This unanimity, however, belies the problems with the Court's decision. A deeper exploration of the issue and of the Court's opinion reveals that the Court reached its conclusion by narrowing its focus to agency principles, while failing to explore the true underlying issue—whether paid union organizers qualify as bona fide applicants. This Article will analyze the status of paid union organizer-applicants as "employees" by providing a critique of the Court's opinion and suggesting how the Court should have analyzed this issue[11] in light of the strong policy considerations favoring the contrary conclusion.

I. HISTORICAL BACKGROUND

Since the Supreme Court decision in *Phelps Dodge Corp. v. NLRB*,[12] the assertion that the NLRA's protection includes applicants for employment has gone virtually unchallenged.[13] Therefore, under section 8(a)(3), it is an unfair labor practice for an employer to discriminate against a job applicant based on the applicant's union affiliation or the company's anti-union animus.[14] On the other hand, whether a paid union organizer-applicant qualifies as an "employee" within the meaning of section 2(3) has been a perennial source of controversy for the lower courts and the National Labor Relations Board ("NLRB" or "Board").[15]

---

10. 116 S. Ct. 450 (1995).

11. The analysis contained in this Article applies to the situation where a paid union organizer, who fully discloses his or her union affiliation and intent to organize, attempts to gain employment with a nonunion company.

12. 313 U.S. 177 (1941).

13. This Article argues, however, that the transition from applicant to covered employee is not automatic. Before an individual can acquire employee status, the Board must first determine whether the individual qualifies as a bona fide applicant. Only after an affirmative determination as to this issue is made does the applicant deserve the protection that accompanies classification as an "employee" under the NLRA. It is this initial step in the analysis that the Board and courts often overlook, thereby leading to incorrect results. *See infra* note 75 and accompanying text. *See generally* Michael J. Bartlett et al., Sunland Construction Company*: Are Union Organizers Necessarily Bona Fide Applicants?*, 45 LAB. L.J. 277 (1994) (arguing that paid union organizers are not necessarily bona fide applicants entitled to protection as employees under the NLRA).

14. *Phelps Dodge*, 313 U.S. at 185-86.

15. *Compare* Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327 (D.C. Cir. 1992) (holding that paid union organizers are employees under the NLRA); NLRB v. Henlopen Mfg. Co., 599 F.2d 26 (2d Cir. 1979) (same), *and* Escada (USA), Inc. v. NLRB, 970 F.2d 898 (3d Cir. 1992) (same), *with* H.B. Zachry Co. v. NLRB, 886 F.2d 70 (4th Cir. 1989) (holding that paid union organizers are not bona fide applicants and therefore, not employees under the NLRA); NLRB v. Elias Bros. Big Boy, 327 F.2d 421 (6th Cir. 1964) (same), *and* Town & Country Elec., Inc. v. NLRB, 34 F.3d

The Sixth Circuit was the first to address the issue.[16] Without providing any real rationale, the court in *NLRB v. Elias Bros. Big Boy*[17] held that a waitress who had worked concurrently for the union and for the defendant restaurant "was not a bona fide employee within the intent of § 2(3) . . . ."[18] Ten years later, the NLRB in *Dee Knitting Mills, Inc.*[19] reached a contrary result, holding that a female garment worker did qualify as a bona fide employee under section 2(3) despite her status as a paid union organizer.[20] In 1975, in *Oak Apparel, Inc.*,[21] the Board reasserted its opinion that paid union organizers were bona fide employees under the NLRA. Unlike the cases that preceded *Oak Apparel*, this time the Board took the opportunity to explain, in some detail, the reasoning behind its decision. Relying on a broad interpretation of the definition of "employee," the Board noted that the two discharged union organizers belonged to the "working class" in general, and therefore fell within the class of individuals included in the NLRA's

---

625 (8th Cir. 1994) (same), *vacated,* 116 S. Ct. 450 (1995).

This debate has also surfaced in law reviews and other scholarly journals. *See generally* Bartlett et al., *supra* note 13; Judd H. Lees, *Hiring the Trojan Horse: The Union Business Agent as a Protected Applicant*, 42 LAB. L.J. 814 (1991) (examining the split in circuits regarding the status of paid union organizer-applicants as employees); Jonathan D. Hacker, Note, *Are Trojan Horse Union Organizers "Employees"?: A New Look at Deference to the NLRB's Interpretation of NLRA Section 2(3)*, 93 MICH. L. REV. 772 (1995) (analyzing the meaning of the term employee as used in section 2(3) and concluding that the courts should defer to the NLRB's determination of employee status); Susan E. Howe, Comment, *To Be or Not To Be an Employee: That is the Question of Salting*, 3 GEO. MASON INDEP. L. REV. 515 (1995) (examining the controversy surrounding the status of paid union organizers as employees and urging Supreme Court resolution of the issue); Note, *Organizing Worth its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341 (1995) (advocating the position that paid union organizers should be considered employees entitled to protection under the NLRA) [hereinafter *Organizing Worth its Salt*]; Gregory A. Rich, Note, *A Balancing of Interests: The Status of Professional Union Organizers Under the NLRA*, 73 WASH. U. L.Q. 1429 (1995) (proposing a test to resolve the uncertainty surrounding the status of paid union organizers under the NLRA); John M. Tarver, Note, H.B. Zachry Co. v. NLRB: *Paid Full-Time Union Organizer Not an "Employee"*, 50 LA. L. REV. 1211 (1990) (examining and analyzing the *Zachry* decision).

16. Although many of the cases discussed in this section involve unlawful discharge rather than refusal to hire claims, the courts often erroneously blend these two issues. Therefore, the analysis used in the discharge cases will be examined to illustrate the basic reasoning behind the courts' holdings regarding the status of organizers as employees.

17. 327 F.2d 421 (6th Cir. 1964).

18. *Id.* at 427. Although *Elias Bros.* involved an unfair labor practice charge alleging discriminatory firing, rather than hiring of a paid union organizer, it became the first case in which a court addressed the status of paid union organizers as employees under the NLRA.

19. 214 N.L.R.B. 1041 (1974).

20. *Id.*

21. 218 N.L.R.B. 701 (1975); *see also* Anthony Forest Prods., Co., 231 N.L.R.B. 976, 977-78 (1977) (holding that paid union organizers are "employees" under the NLRA).

"employee" definition.[22]

The Board's view that paid union organizers are "employees" under the NLRA gained acceptance in the appellate courts in 1979, when the Second Circuit in *NLRB v. Henlopen Manufacturing Co.*[23] held that a "paid union infiltrator" was a bona fide employee.[24] In the years to follow, both the Third[25] and D.C. Circuits[26] similarly found paid union organizers to be "employees." In contrast, both the Fourth[27] and Eighth[28] circuits held that paid union organizers do not deserve the NLRA's protection because they were found not to be bona fide applicants and, therefore, not "employees."

The Fourth Circuit's decision in *H.B. Zachry Co. v. NLRB*[29] represents one of the most thorough judicial examinations of the status of paid union organizer-applicants under the NLRA. The *Zachry* court supported its decision that paid union organizers are not "employees" with a multitude of reasons and policy considerations. First, the court relied on what it deemed was the "plain meaning" of the term "employee"—an individual "working under the direction of a single employer."[30] According to the *Zachry* court, a paid union organizer does not fit within the definition of "employee," because the organizer is performing services for the targeted company based solely on instruction from the union and is inevitably "working for two different employers at the same time and for the same working hours."[31] The *Zachry* court further highlighted the fact that a paid union organizer is not a bona fide applicant for employment because his sole purpose in applying is to carry out his union organizing responsibilities.[32] Failing to qualify

---

22. *Oak Apparel, Inc.*, 218 N.L.R.B. at 701. One commentator takes the scope of the term employee to its extreme, contending that even nonemployee union organizers (those that do not even apply) should fall within the broad definition of employee. *See* Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of* Lechmere, Inc. v. NLRB, 9 HOFSTRA LAB. L.J. 1, 11 (1991); *see also* R. Wayne Estes & Adam M. Porter, Babcock/Lechmere *Revisited: Derivative Nature of Union Organizers' Right of Access to Employers' Property Should Impact Judicial Evaluation of Alternatives*, 48 S.M.U. L. REV. 349, 355 n.33 (1995).

23. 599 F.2d 26 (2d Cir. 1979).

24. *Id.* at 30.

25. *See* Escada (USA) Inc. v. NLRB, 970 F.2d 898 (3d Cir. 1992).

26. *See* Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327, 1328 (D.C. Cir. 1992).

27. *See* H.B. Zachry Co. v. NLRB, 886 F.2d 70 (4th Cir. 1989); Ultrasystems W. Constructors, Inc. v. NLRB, 18 F.3d 251 (4th Cir. 1994); *see also infra* notes 29-36 and accompanying text.

28. *See* Town & Country Elec., Inc. v. NLRB, 34 F.3d 625 (8th Cir. 1994), *vacated,* 116 S. Ct. 450 (1995).

29. 886 F.2d 70.

30. *Id.* at 73.

31. *Id.*

32. *Id.* The *Zachry* court was quick to point out that the distinguishing factor between a paid union organizer and a bona fide applicant does not lie in the temporary nature of a paid union organizer's employment interest, but rather "the entire character of the future employment

as a bona fide applicant thereby removes the paid union organizer from any consideration as an employee. The court also noted that classifying a paid union organizer as a bona fide applicant under the NLRA would serve to upset the "careful balance struck by Congress" between the rights of management and those of the union.[33] Moreover, attaching employee status to job applicants who are paid union organizers could lead to the organizer obtaining greatly expanded access to company employees on company property and thus would fly directly in the face of Supreme Court precedent that protects employers from this type of union organizing effort.[34] Citing the same reasoning it relied on in *Zachry*, the Fourth Circuit in *Ultrasystems Western Constructors, Inc. v. NLRB*[35] recently reaffirmed its position that paid union organizers are not bona fide applicants entitled to protection under the NLRA.[36]

On the other side of the coin, the D.C. Circuit, in *Willmar Electric Service, Inc. v. NLRB*,[37] became one of the first courts to rely upon common law agency principles to uphold a Board decision declaring paid union organizers "employees" for purposes of receiving NLRA protection. In attaching a common law meaning to the statutory use of the word "employee," the court noted that

---

relationship." *Id.* at 74. It appears that the *Zachry* court took a common sense approach by recognizing the inherent difference between an applicant who is truly interested in establishing an employment relationship and a paid union organizer who, although he may be willing to carry out his employment responsibilities, is foremost interested in accomplishing the union's organizational goals.

33. *Id.* The careful balance that the *Zachry* court was referring to is set out in the Taft-Hartley Act:

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of *both employees and employers* in their relations, . . . to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, [and] . . . to define and proscribe practices on the part of labor and management. . . .

29 U.S.C. § 141(b) (1994) (emphasis added).

It is clear from the legislative history that Congress did not intend to favor labor over management, or vice versa, rather, it intended to strike a balance between the competing interests of both groups in an effort to provide more equality in labor relations.

34. *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (holding that nonemployee union organizers cannot conduct organizing activities on company property except where the employees are otherwise inaccessible to the union); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (reaffirming an employer's right to deny the union and its nonemployee organizers access to company property except under very limited circumstances). *See infra* notes 83-86 and accompanying text.

For a further discussion of the *Zachry* opinion, see generally Lees, *supra* note 15 and Tarver, *supra* note 15.

35. 18 F.3d 251 (4th Cir. 1994).

36. *Id.* at 254.

37. 968 F.2d 1327 (D.C. Cir. 1992).

according to common law principles, "[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."[38] Therefore, a paid union organizer's concurrent employment with both the targeted company and the union does not exclude him from the broad definition of "employee."[39] Without expanding on its rationale, the *Willmar* court refused to view the *Babcock* and *Lechmere* decisions as an obstacle to a paid union organizer receiving employee status for purposes of the activity proscribed under section 8(a)(3).[40]

To summarize, before the Supreme Court's recent *Town & Country* decision, the Second, Third, and D.C. Circuits all held views consistent with the Board—that paid union organizers are "employees" deserving of protection. On the other hand, the Fourth, Sixth, and Eighth Circuits denied organizers employee status. As a result, in these circuits, organizers lacked protection under the NLRA.

II. THE *TOWN & COUNTRY* DECISION

It was in light of this unsettled backdrop that the Supreme Court granted certiorari in *Town & Country* to resolve the question of whether paid union organizers who have applied for or have actually accepted employment with a nonunion company are "employees" within the meaning of section 2(3) for purposes of an alleged section 8(a)(3) violation. Unfortunately, the unanimous decision that followed oversimplified the issue, and as a result, the Supreme Court answered the wrong question. Rather than making an initial determination of whether paid union organizers qualified as bona fide applicants, the Court focused solely on whether the organizers fell within the scope of the term "employee." This second step proves to be irrelevant if the answer to the first issue is in the negative. Had the Court fully confronted the importance of this critical distinction, it might have reached a different result.

A. Facts

The unfair labor practice charges filed against Town & Country Electric, Inc. ("Town & Country") arose from Town & Country's actions during one of its hiring drives. In 1989, Town & Country received a contract to perform electrical renovations at a mill in Minnesota, thus creating the need to hire several licensed Minnesota electricians.[41] To assist in its search for qualified electricians, Town & Country hired the Ameristaff employment agency, which advertised the openings

---

38. *Id.* at 1329-30 (quoting RESTATEMENT (SECOND) OF AGENCY § 226 (1958)). It was this same argument that prevailed in *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995). *See infra* notes 59-63 and accompanying text.

39. *Willmar,* 968 F.2d at 1330-31.

40. *Id.* at 1330.

41. Town & Country Elec., Inc., 309 N.L.R.B. 1250, 1250 (1992), *enforcement denied*, 34 F.3d 625 (8th Cir. 1994), *vacated*, 116 S. Ct. 450 (1995).

in local newspapers.[42] As part of its salting campaign, the IBEW sent several of its members to apply for positions with Town & Country.[43] When they arrived at the interview site, the eleven IBEW organizers announced their desire to apply for the job, and all but one were refused an interview.[44] Although the organizers did not openly announce their union affiliation, Town & Country suspected that they were union organizers.[45] Town & Country did interview and hire one of the paid union organizers, but he was dismissed two days after he began work.[46] The IBEW immediately filed a complaint with the Board, alleging that Town & Country had violated sections 8(a)(1)[47] and (3)[48] of the NLRA by refusing to interview (or retain) its paid union organizer-applicants.[49]

B. Procedural History

The Board, affirming the Administrative Law Judge's ruling, held that the paid union organizer-applicants were "employees," regardless of their intent to organize Town & Country.[50] The Board cited three primary reasons for reaching its conclusion. First, in the Board's opinion, the plain language and meaning of section 2(3) encompasses paid union organizers, as evidenced by the fact that they are not listed among those expressly excluded from the NLRA's coverage.[51] Second, the Board cited common law agency principles as supporting a broad reading of section 2(3) by noting that "paid union organizers cannot be excluded from the definition of 'employee' on the basis that they are paid by their union as well as by the employer they are attempting to organize."[52] The Board's reliance on common law agency principles appears to have played a role in framing the issue as it worked its way up to the Supreme Court. Lastly, the Board relied on its own precedent, citing those cases in which it had previously held that paid union

---

42. *Id.* at 1250-51.

43. *Id.* at 1251.

44. *Id.* at 1251-52.

45. *Id.* at 1251.

46. *Id.* at 1251-52.

47. 29 U.S.C. § 158(a)(1) (1994). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in section 7. *Id.* In turn, section 7 rights include the right "to self-organization, [and] to form, join, or assist labor organizations . . . ." *Id.* § 157.

48. For a description of section 8(a)(3), see *supra* notes 8-9 and accompanying text.

49. NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450, 452 (1995).

50. *Town & Country*, 309 N.L.R.B. at 1250.

51. *Id.* at 1253. Those excluded from the NLRA's coverage include: agricultural laborers, domestic servants, individuals employed by their parent or spouse, independent contractors, supervisors, and individuals employed by an employer subject to the Railway Labor Act. 29 U.S.C. § 152(3) (1994). This list is not exclusive, as it provides that the exclusion additionally applies to individuals employed by "any other person who is not an employer as defined herein." *Id.*

52. *Town & Country*, 309 N.L.R.B. at 1254.

organizer-applicants are "employees" under the NLRA.[53]

On appeal, the Eighth Circuit reversed the Board's decision, finding that paid union organizer-applicants were not employees entitled to protection under the NLRA.[54] The Eighth Circuit's reasoning was also stated in terms of common law agency principles, but its analysis led to a contrary result.[55] The appellate court found that an inherent conflict of interest exists when an individual is under the strict control of a union, while simultaneously performing duties for a nonunion company.[56] Under the court's reasoning, this conflict destroys the organizer's status as an "employee" of the nonunion company, as well as the organizer's right to protection.[57]

C. Supreme Court Decision

Justice Breyer, writing for a unanimous Court, defined the issue as "[Whether] a worker [can] 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?"[58] Following the Board's lead, the Court answered this question through an analysis of common law agency principles.[59] As did the lower courts, the Court quoted section 226 of the Restatement (Second) of Agency, which states in part, "A person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other."[60] Relying on what it deemed "common sense," the Court concluded that because a paid union organizer remained under the company's control during

---

53. *Id.* at 1255.

54. Town & Country Elec., Inc. v. NLRB, 34 F.3d 625, 629 (8th Cir. 1994), *vacated*, 116 S. Ct. 450 (1995).

55. *Id.* at 628-29. The court cited sections 226, 387 and 394 of the Restatement (Second) of Agency. Collectively, these sections outline an agent's duty of loyalty owed to an employer while under his employ. "[A]n agent is subject to a duty not to act or agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed." RESTATEMENT (SECOND) OF AGENCY § 394 (1958). Although the court of appeals recognized that a "typical job applicant" could simultaneously perform services for two employers without violating his duties under the Restatement, the court did not feel that a paid union organizer was a "typical job applicant." *Town & Country*, 34 F.3d at 628-29. *See also* H.B. Zachry Co. v. NLRB, 886 F.2d 70, 73 (4th Cir. 1989) (holding that paid union organizers are not bona fide applicants). Under the union's salting resolution, paid union organizers were required to "promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification." *Town & Country*, 34 F.3d at 629. The court of appeals found this strict union control over the organizer to be inconsistent with a finding of an employer-employee relationship between the organizer and the nonunion company. *Id.*

56. *Town & Country*, 34 F.3d at 628-29.

57. *Id.*

58. NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450, 452 (1995) (citation omitted).

59. *Id.* at 454-57.

60. *Id.* at 456 (quoting RESTATEMENT (SECOND) OF AGENCY § 226 (1958)).

working hours, concurrently being paid by the union to organize—a protected activity under the NLRA[61]—does not involve abandonment of service to the company.[62] Using the common law definition of the word, "employee," the Court held that paid union organizers do constitute "employees" under the NLRA.[63] The Court was careful to highlight, however, that its decision was limited to construing section 2(3),[64] and was not intended as an expression of any views on whether Town & Country had committed an unfair labor practice by refusing to hire the paid organizers.[65]

---

61. Under section 7 of the NLRA, an employee is guaranteed "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . ." 29 U.S.C. § 157 (1994). In other words, an employee has the right to conduct organizing activities, as long as he or she does not violate employer rules prohibiting solicitation and/or distribution in work areas during working hours.

62. *Town & Country*, 116 S. Ct. at 456.

63. *Id.* at 457. This decision has been consistently followed by the Board. *See, e.g.*, Quality Control Elec., Inc., 323 N.L.R.B. No. 29, 1997 WL 96559, at *2 n.8 (Feb. 27, 1997) (citing *Town & Country* for proposition that salts are per se bona fide applicants); TEC Elec., Inc., 322 N.L.R.B. No. 147, 1997 WL 9818, at *6 (Jan. 9, 1997) (affirming ALJ finding that salts were bona fide applicants for employment); Arrow Flint Elec. Co., 321 N.L.R.B. 1208, 1209 (1996) (holding that union organizer was an employee entitled to protection under the NLRA). *But see id.* at 1210 (Cohen, M., dissenting) (distinguishing *Town & Country* based on ALJ's finding that union organizer never intended to work for company as did organizer in *Town & Country*).

64. The Court noted that its decision that paid union organizers were employees did not automatically grant the organizers the same status as other employees with respect to other labor issues, such as the right to vote. *Town & Country*, 116 S. Ct. at 457. The Court hinted that paid union organizers might fail to satisfy the "community of interest" standard which must be met for them to be included in the same bargaining unit as other employees. *Id.*

For a complete explanation of the community of interest standard, see Francis M. Dougherty, Annotation, *"Community of Interest" Test in NLRB Determination of Appropriateness of Employee Bargaining Unit*, 90 A.L.R. FED. 16 (1988). *See generally* NLRB v. Action Automotive, Inc., 469 U.S. 490 (1985); NLRB v. Illinois-American Water Co. S. Div., 933 F.2d 1368 (7th Cir. 1991); NLRB v Catherine McAuley Health Ctr., 885 F.2d 341 (6th Cir. 1989).

65. *Town & Country*, 116 S. Ct. at 457. *Town & Country*'s companion case, *Sunland Construction Co., Inc.*, 309 N.L.R.B. 1224 (1992), which has since been settled, illustrates this point. Although the Board in *Sunland* found that the union organizers were "employees" within the meaning of the NLRA, it held that Sunland did not commit an unfair labor practice by refusing to hire the paid union organizers. *Id.* at 1229. The Board created an exception to a section 8(a)(3) violation where paid union organizers apply for a job during a strike.

> In our experience, when a company is struck it is not "business as usual." The union and employer are in an economic battle in which the union's legitimate objective is to shut down the employer in order to force it to accede to the union's demands. The employer's equally legitimate goal is usually to resist by continuing production, often with nonunit employees, nonstrikers, and replacements. Thus, an employer faced with

III. CRITIQUE OF THE SUPREME COURT'S DECISION

At the beginning of the Court's opinion, Justice Breyer noted: "We granted certiorari to decide only that part of the controversy that focuses upon the meaning of the word 'employee' . . . ."[66] Unfortunately, by focusing so intently on this question, the Court overlooked the more important underlying issue of whether paid union organizers qualify as bona fide applicants. This initial inquiry is vital to an accurate analysis of the legal status of paid union organizers. In bypassing this stage of analysis, the Court made the answer to this primary inquiry appear much clearer than it truly is.

Once the Court narrowed its purpose solely to defining the term "employee," it fell into its "strict constructionist" mode, assigning great importance to the express language of the statute.[67] Because the text of the statute does not provide much insight into the term's intended scope,[68] the Court turned to common law agency principles to supply the appropriate boundaries.[69] In its analysis, the Court relied on the definitions provided in the Restatement (Second) of Agency, which in the Court's view were consistent with a finding that paid union organizers are "employees."[70] However, the Court's emphasis on the Restatement's agency

---

> a strike can take steps aimed at protecting itself from economic injury. For example, an employer can permanently replace the strikers, it can lock out the unit employees and it can hire temporary replacements for the locked-out employees. Consistent with these principles, we believe that the employer can refuse to hire, during the dispute, an agent of the striking union.

Id. at 1230-31 (footnotes omitted).

Therefore, the *Town & Country* holding does not automatically provide the union with a successful unfair labor practice charge. The Board must make a separate finding that the company violated section 8(a)(3). The Court's holding simply brings paid union organizers within the class of employees protected from the unlawful activity proscribed by the NLRA. Except in limited circumstances, however, this finding is likely to be fatal for a nonunion employer defending against an unfair labor practice charge. *See infra* notes 94-96 and accompanying text.

66. *Town & Country*, 116 S. Ct. at 453.

67. *Id.* at 453-54.

68. *See supra* note 9.

69. *Town & Country*, 116 S. Ct. at 455-56.

70. *Id.* at 456. The Restatement provides that an agent may be a servant of two masters at the same time as long as service to one does not involve abandonment of the service to the other. RESTATEMENT (SECOND) OF AGENCY § 226 (1958). To exemplify its position that a paid union organizer fits within this definition, the Court stated:

> Common sense suggests that as a worker goes about his *ordinary* tasks during a working day, say, wiring sockets or laying cable, he or she *is* subject to the control of the company employer, whether or not the union also pays the worker. The company, the worker, the union, all would expect that to be so. . . . [T]hat union and company interests or control might *sometimes* differ should make no difference.

Town & Country, 116 S. Ct. at 456 (emphasis in original).

principles was misplaced[71] and premature. The Court's initial focus should have been on the status of paid union organizers as bona fide applicants.

Although it was easy for the Court to quickly dispose of the issue by hiding behind the guise of strict constructionism, the Court was not truly "strictly construing" the language of the statute in affirming the Board's broad definition of the term "employee." Section 2(3) does not expressly include applicants for employment within its language.[72] The Court made this intermediary step by citing *Phelps Dodge Corp. v. NLRB*[73] for the proposition that the "statutory word 'employee' includes job applicants . . . ."[74] A closer examination of the *Phelps Dodge* decision, however, reveals that nowhere in the opinion does the Court grant applicants automatic employee status. Unfortunately, most courts since *Phelps Dodge* have equated the two without much, if any, hesitation.[75] In doing so, these courts, like the Supreme Court in *Town & Country*, have misconstrued the real principle espoused in *Phelps Dodge*—that "the Act prohibits discriminatory hiring as well as firing."[76]

In most situations, a job applicant (if bona fide) will be entitled to the NLRA's protection; however, this assumption should not be automatic. Applicants and employees possess important distinguishing characteristics which justify their distinct treatment when determining their right to protection. For example,

---

71. The accuracy of the Court's reliance on the Restatement is questionable in that the Restatement itself provides, in section 2(d), that its definition of the term "servant," although often equated with the statutory word "employee," should not be used in interpreting those statutes that do not include a statement that specifically indicates that in interpreting the statute, an employee is a servant in the common law meaning. The Restatement notes: "The rules as to these matters [including fair labor practices] are beyond the scope of the Restatement of this Subject." RESTATEMENT (SECOND) OF AGENCY § 2(d) (1958). "These matters" include legislation involving social security, unemployment insurance, *fair labor practices*, and similar matters. *Id.* In light of this language, reference to the Restatement in interpreting the meaning of the term "employee" as used in section 2(3) is inappropriate.

72. In fact, it seems to expressly *exclude* job applicants. An applicant seeks to *become* an employee and is only granted the NLRA's protection through the application of the *Phelps Dodge* principle. *See infra* note 76 and accompanying text.

73. 313 U.S. 177 (1941).

74. *Town & Country*, 116 S. Ct. at 452 (citing *Phelps Dodge*, 313 U.S. at 185-86).

75. *See* Town & Country Elec., Inc. v. NLRB, 34 F.3d 625, 627 (8th Cir. 1994) ("Applicants for employment . . . have long been considered to be employees under the Act."), *vacated*, 116 S. Ct. 450 (1995); *see also* Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327, 1329 (D.C. Cir. 1992) ("First, it makes no difference that Hendrix [the paid union organizer] was not working for Willmar at the time of the alleged unfair labor practice. Applicants for employment are considered 'employees' under the Act."); Sunland Constr. Co., 309 N.L.R.B. 1224, 1225 (1992) ("We begin our analysis recognizing that applicants are 'employees.'"). *But cf.* Utah Constr. Co., 95 N.L.R.B. 196, 203-04 n.19 (1951) (hinting that if the organizer's application was not made in good faith, he would not be considered an applicant entitled to employee status).

76. Bartlett et al., *supra* note 13, at 281.

although "an applicant can insist on the right to be considered for employment on nondiscriminatory basis, . . . he or she does not enjoy all the accoutrements of employment that an employee does, such as salary, vacations, seniority, health and pension benefits, and a grievance and arbitration system."[77] Both the Board and the Supreme Court have recognized this distinction in numerous other aspects of labor and employment law.[78]

Taking the analysis one step further, when independently examining an individual's status as an applicant, only those applicants that the Board finds to be "bona fide" deserve the NLRA's protection. Paid union organizers do not fall into this category. Although the term "bona fide" is not defined anywhere in the NLRA, its meaning can be ascertained through a combination of common sense and reference to prior case law. Black's Law Dictionary defines "bona fide" as: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense."[79] In *Zachry*, the Fourth Circuit took a common sense approach in denying bona fide status to a paid union organizer:

> [I]t would be disingenuous to say that Edwards [the paid union organizer] was a job applicant in the ordinary sense of the word. Edwards was not in search of a job; he already had and would continue to have that. Edwards was looking for entry to the Zachry plant in order to fulfill his duties as an organizer.[80]

The Board, as well as several Administrative Law Judges and the General Counsel, have additionally addressed the issue of what constitutes a "bona fide" applicant.[81] The sentiment drawn from these cases is that an applicant will not be

---

77. *Id.* at 282.

78. *See id.* at 283-84 (describing the other areas of labor and employment law that treat applicants and employees separately). Some of the contexts in which the courts and Board have distinguished between applicants and employees include: Title VII claims, drug testing cases, Fourteenth Amendment claims brought by state employees, and collective bargaining cases. *Id.*

79. BLACK'S LAW DICTIONARY 177 (6th ed. 1990) (citations omitted).

80. H.B. Zachry Co. v. NLRB, 886 F.2d 70, 73 (4th Cir. 1989) (holding that paid union organizers are not bona fide applicants and therefore not employees within the meaning of section 2(3)).

81. *See, e.g.*, WACO, Inc., 316 N.L.R.B. 73, 75 (1995), stating:

> [T]he conditions of employment imposed by the Union under the terms of the Salting Resolution negate the possibility of any bona fide employer-employee relationship between the [company] and the union member job applicants, specifically because it is the Union, not the employer and not the employee who has complete discretion to determine the duration of the employer-employee relationship.

G.A. Dress Co., 225 N.L.R.B. 60, 68 (1976) ("A status of 'applicant' presupposes a reasonable bona fides in seeking work. Here, [the union members] were mere *agents provocateurs*. This status of provocateur . . . ought to be distinguished from an employee who may be both a provocateur and is actually performing unit work."); Peter Kiewit Sons, Inc, Gen. Couns. Adv. Mem., Case No. 17-

considered "bona fide" if he lacks a good faith intent to establish an employer-employee relationship or if he is seeking a job, either under the insistence and control of the union, or in order to cause disruption or financial hardship for the nonunion employer.[82]

Returning to the Salting Resolution cited at the beginning of this Article, it becomes clear that paid union organizers do not qualify as bona fide applicants. A paid union organizer's primary motivation in applying for a job with a nonunion company is to organize the employees. In fact, outside of the terms of the Salting Resolution, union members are prohibited from accepting employment with a nonunion company. Once a paid union organizer obtains nonunion employment, the express terms of the Salting Resolution mandate that the organizer immediately terminate his employment with the nonunion company upon instruction from the Union Business Manager. Organizers are under the strict control of the union and are subject to fines and expulsion if they do not abide by the resolution. Therefore, paid union organizers should not be considered bona fide applicants, because their obligations under the Salting Resolution prevent them from exhibiting a good faith intent to enter into a "normal" employer-employee relationship. In failing to address this critical issue, the Supreme Court in *Town & Country* missed a vital link in its chain of analysis, thereby producing an erroneous result.

CA-12474, 1985 NLRB GCM LEXIS 60, at *3 (Apr. 26, 1985) (defining a bona fide applicant as "someone who approaches an employer with a genuine desire to become employed").

82. A recent article suggested the following factors for determining whether an individual qualifies as a "bona fide" applicant:

> (1) Can the organizer remain in the targeted company's employ at his own discretion (bona fide), or can the union require the organizer to leave the job at or before the conclusion of the organizing campaign (not bona fide)?
>
> (2) Does the union retain any authority to direct when or how the organizer performs work for the employer (for example, the authority to order the organizer to slow down, file safety complaints, walk off the job, commit acts of sabotage, etc.)? If so, the applicant is not a bona fide employee.
>
> (3) Has the organizer applied at the union's instigation (not bona fide) or his own (bona fide)?
>
> (4) Does the organizer demonstrate any indicia of personal motivation for working for the targeted employer (bona fide)? What is the credibility of those indicia?
>
> (5) Does the evidence indicate that the union or the organizer is attempting to entrap the employer into conduct over which the union intends to file charges of illegality with the Board or some other enforcement agency (not bona fide)?

Bartlett et al., *supra* note 13, at 288.

IV. *LECHMERE* ANOMALY

The *Town & Country* decision raises additional concerns because it conflicts with well-established Supreme Court precedent. In *Lechmere, Inc. v. NLRB,*[83] the Supreme Court endorsed the *Babcock* doctrine, which clearly distinguished between the rights of employees and non-employees to enter company property in an attempt to organize nonunion employees.[84] Under *Lechmere*, non-employees of a company, namely unions and their organizers, must use means other than entry onto the employer's property to accomplish their organizing goals.[85] By completely ignoring the fundamental distinction between applicant and employee, *Town & Country* allows unions to circumvent the *Lechmere* restriction by simply having their salts apply for a position with a targeted nonunion company. Although the Court's decision does not automatically grant organizer-applicants complete access to company property, if the Board reinstates a dismissed organizer-employee or compelled the company to hire the organizer-applicant, not only will the union organizer be allowed *on* company property for the express purpose of organizing the employees, the organizer will have direct access through the employment office to reach the employees *inside* the company's workplace.[86] Essentially, *Town & Country* permits unions to accomplish indirectly what *Lechmere* prevents them from doing directly.

It is interesting to note that in *Lechmere*, the Court focused on the rights of the union when the true focus should have been on the underlying rights of the employees.[87] In contrast, the *Town & Country* Court focused its attention on the rights of employees when the more appropriate focus would have been on the rights of the union. Had the Court shifted its attention to the union, it would have realized that its decision upset the delicate balance established by Congress, through the NLRA, with respect to the competing interests of labor and management. Rather than placing labor and management on equal footing, *Town & Country* could swing the pendulum in favor of organized labor, a result that is

---

83. 502 U.S. 527 (1992).

84. *Id.* at 535-38; *see also* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

85. An exception to this rule applies when the employees are otherwise inaccessible to the union. If the union can show that "unique obstacles" exist making their reasonable attempts to communicate organizing information to employees ineffective, the court will, in very limited circumstances, allow the union access to company property. *Lechmere,* 502 U.S. at 535

86. Under *Town & Country*, by merely submitting an application for employment and without the slightest change in objective or motive, the same people who in *Babcock* and *Lechmere* were considered trespassers and denied access to company property become "employees" for purposes of an alleged section 8(a)(3) violation. *See supra* Part II.C. Depending on the Board's remedy, this "employee" status has the potential of providing the organizer virtually unrestricted access to company property.

87. Estes & Porter, *supra* note 22, at 358-59 ("While the Court may refer in short-hand fashion to the 'rights' of union organizers . . . it is, in fact, referencing the underlying rights of the employees under the NLRA.").

inconsistent with the policies and intent of the NLRA.[88] As previously discussed, the decision further serves to blur the well recognized distinction between the rights of employees and nonemployees.[89]

V. *WRIGHT LINE* ANALYSIS

As the Court noted in *Town & Country*, a finding that organizer-applicants are protected "employees" does not automatically result in a successful unfair labor practice charge.[90] Once the court validates an organizer-applicant's status as an "employee," the employer's actions with respect to that employee (refusing to hire or firing the organizer) are examined using a *Wright Line*[91] analysis to determine

---

88. *See* Rich, *supra* note 15, at 1451-52, stating:

> Congress did not intend for the Act to further only the interests of labor; it should further the interests of management as well. With the passage of the NLRA, Congress hoped to create stability in labor relations, recognizing that any disruptions could have a detrimental effect on interstate commerce. Although management had an advantage over labor before Congress enacted the NLRA, providing unions with an unrestrained right to organize would tip the scales in favor of labor and maintain the preexisting instability. Each side must be given an equal amount of power in order to create a peaceful balance.

(footnotes omitted). *See also supra* note 33 and accompanying text.

89. *See supra* notes 83-86 and accompanying text.

90. *See supra* notes 64-65 and accompanying text. Member Raudabaugh noted this same distinction in his concurring opinion in the *Sunland* Board decision:

> Without necessarily endorsing the entire rationale, I agree with my colleagues that paid union organizers are employees within the meaning of Section 2(3) of the Act. However, it does not necessarily follow that the employer's refusal to hire a paid union organizer is unlawful under Section 8(a)(3). In order to establish a violation of that section, it must be established that the employer's action was unlawfully motivated.

Sunland Constr. Co., 309 N.L.R.B. 1224, 1232 (1992) (Raudabaugh, M., concurring). Member Raudabaugh went on to note that if an employer had a nondiscriminatory policy of refusing to hire employees who additionally work for another employer, whether simultaneously or as "moonlight" employment, then that employer "could lawfully refuse to hire a paid union organizer." *Id.* at 1233.

This thinking was partially undermined by the recent Board decision in *Tualatin Elec., Inc.*, 319 N.L.R.B. 1237 (1995) where the Board held that the company's "moonlighting" policy which prohibited employees from being paid by anyone other than the employer was an unfair labor practice. *Id.* at 1237. In making this determination, the Board relied on the Administrative Law Judge's finding that although the policy was neutral on its face, there was an abundance of evidence "indicating that the moonlighting policy was adopted primarily as a result of the [company's] antiunion animus." *Id.* Therefore, it appears that a "moonlighting" policy may still be a viable defense to an unfair labor practice charge. However, the company must overcome the strong inference that arises during a union salting campaign—that its actions were based on antiunion animus. Without a showing that the policy was completely nondiscriminatory, the company will once again fail to meet its burden.

91. NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), *approved in* NLRB v.

if the company's conduct constitutes an unfair labor practice. Under *Wright Line*, once the General Counsel makes a prima facie showing[92] that the company's actions were based in whole or in part on the employee's union affiliation or the company's anti-union animus, the burden shifts to the employer. The employer must then rebut this inference of impropriety by proving that it would have taken the same course of action regardless of the employee's union activities or the company's anti-union sentiment.[93]

Applying this test to an employer that is the target of a salting campaign will inevitably lead to disastrous results for the company. By openly declaring their union affiliation during the application stage, organizers provide a very large hurdle for the employer to overcome. The organizer's "announcement" normally provides sufficient evidence to allow the General Counsel to meet its initial prima facie showing.[94] The employer is thereafter faced with the virtually insurmountable burden of rebutting the organizer's contention that the company's decision was based on the organizer's union affiliation.[95] Unless numerous other

---

Transportation Management Corp., 462 U.S. 393 (1983).

92. The standard of proof imposed upon the General Counsel is a preponderance of the evidence. *Id.* at 904.

93. *Id.* at 902, 904-05; *see also Transportation Management*, 462 U.S. at 401-02.

94. *See Organizing Worth its Salt*, *supra* note 15, at 1345 n.38, stating:

> The Board has observed that an applicant who clearly indicates that he is a . . . union organizer "explicitly places the employer on notice that he will try to exercise his statutorily protected right to organize his fellow employees." Flour Daniel, Inc., 311 N.L.R.B. 498, 500 (1993). Thus, the employer cannot contest the General Counsel's prima facie showing and bears the burden of proving that a legitimate cause justified the refusal to hire.

95. *See, e.g.*, Pan American Elec., Inc., No. 26-CA-16607, 1996 NLRB LEXIS 199 (Apr. 4, 1996). As Administrative Law Judge Lawrence W. Cullen concluded, the burden proved too heavy for Pan American to overcome: "I . . . find that Respondent [Pan American] has failed to rebut the prima facie case established by the General Counsel and has failed to prove that it would have refused to permit [the union applicants] to file applications and would have refused to hire them in the absence of the unlawful motive." *Id.* at *23. The Eighth Circuit, on remand in *Town & Country*, affirmed a similar ruling by the ALJ. *See* Town & Country Elec., Inc. v. NLRB, 106 F.3d 816, 820 (8th Cir. 1997).

In *Bat-Jac Contracting, Inc.*, 320 N.L.R.B. 891 (1996), the Board applied *Wright Line* to union charges of unlawful refusal to hire and wrongful discharge of union members, post-*Town & Country*. Although the discriminatee who was denied employment was not a paid union organizer, he did announce his union membership at the interview pursuant to a union salting campaign. Based on his union affiliation, Bat-Jac refused to hire him. As a result, the Board charged Bat-Jac with a violation of sections 8(a)(1) and (3). *Id.* With regard to the unlawful discharge allegations, the Board affirmed the Administrative Law Judge's application of *Wright Line* and his finding that Bat-Jac did not satisfy "its burden of demonstrating that the 'same action would have taken place even in the absence of the protected conduct.'" *Id.* at 893. *See also* Quality Control Elec., Inc., 323 N.L.R.B. No. 29, 1997 WL 96559, at *1 (Feb. 27, 1997) (affirming ALJ's finding that the company

equally qualified nonunion applicants also applied for the position, the employer will most likely be unsuccessful in overcoming this burden.[96] As a result, the nonunion company will be found guilty of the alleged unfair labor practice and forced to comply with time consuming and often costly court orders, which can include reinstatement or compelled employment of the paid union organizer.

VI. APPLICATION TO THE CONSTRUCTION INDUSTRY

The construction industry is in a class of its own when it comes to labor law. In recognition of the fact that short-term projects are the norm in the construction industry, Congress enacted special laws to cover labor relations within the construction industry. Most notably, section 8(f) of the Labor Management Relations Act ("LMRA")[97] allows construction industry employers to "execute bargaining agreements [known as prehire agreements] with bona fide unions prior to the actual employment of employees, without running afoul of NLRA prohibitions against employers giving unlawful support and assistance to labor unions."[98] "The importance of these special rules for the construction industry is that they permit the establishment of bargaining relationships and bargaining units before . . . construction unions have shown that they represent . . . a majority of a contractor's work force."[99] The construction industry enjoys other privileges not available in the typical labor-management setting;[100] however, construction

---

violated section 8(a)(3) by denying employment to four union job applicants); Greg Murrieta, 323 N.L.R.B. No. 14, 1997 WL 93607, at *5 (Feb. 27, 1997) (reversing ALJ's dismissal of section 8(a)(3) allegations for lack of prima facie case and remanding for determination of whether company presented a successful *Wright Line* defense); TEC Elec., Inc., 322 N.L.R.B. No. 147, 1997 WL 9818, at *6 (Jan. 9, 1997) (affirming the ALJ's finding that the company violated section 8(a)(3) when it refused to hire two union organizers who openly expressed their intention to engage in organizing activity).

96. *See, e.g.*, H.B. Zachry, 319 N.L.R.B. 967 (1996). In reviewing the Administrative Law Judge's finding that Zachry had violated sections 8(a)(1) and (3) by refusing to interview 18 organizer-applicants who had disclosed their union affiliation, the Board noted:

> [W]e shall leave to compliance the determination of which discriminatees would actually have been hired if the Respondent [Zachry] had used nondiscriminatory hiring criteria. . . . [W]e shall permit the Respondent to introduce evidence, during the compliance proceedings, that these discriminatees would not have been hired after the dates indicated on their application forms in any event. *The Respondent shall, however, bear the burden of proving that the employees hired after the application dates of the discriminatees actually had superior qualifications over the discriminatees.*

Id. at 971 (citations omitted) (emphasis added).

97. 29 U.S.C. § 158(f) (1994).

98. ARTHUR B. SMITH, JR., CONSTRUCTION LABOR RELATIONS 44 (1984); *see also* THE DEVELOPING LABOR LAW 421-24 (Patrick Hardin et al. eds., 3d ed. 1992 & Supp. 1995).

99. SMITH, *supra* note 98, at 44.

100. For a discussion of other unique aspects of construction labor law, including the rules regarding hiring halls, see THE DEVELOPING LABOR LAW, *supra* note 98, at 1533-43.

industry employers are on equal footing with other employers when it comes to violations of sections 8(a)(1) and (3).

Furthermore, although salting is most prevalent in the construction industry, the Court did not restrict its opinion to the confines of the construction industry. No limiting remarks or principles that would prevent its application to other industries are found in the Court's opinion. Although the construction industry is unique in that it is governed by its own set of rules in many areas of labor law, section 2(3) has general application, and therefore, the effects of the Court's decision have the potential of reaching far beyond the construction industry.[101] Now that the Court has impliedly acknowledged salting as a protected and legitimate union activity, it is likely to spread to other industries where unions perceive it to be an effective organizing device.

CONCLUSION

Town & Country presented the Court with an opportunity to resolve the uncertainty surrounding the status of paid union organizer-applicants under the NLRA. Although the Court's agency analysis may have been accurate, its focus on common law agency principles to determine whether paid union organizer-applicants qualify as "employees" was unnecessary, or at least premature. The Court's energy would have been better spent analyzing whether paid union organizers qualify as bona fide applicants. Instead of making this critical determination, the Court summarily dismissed the matter without hesitation.[102] By failing to address this initial inquiry, the Court's analysis was fatally incomplete. The Court's limited focus most likely resulted from the way the issue was pitched in the lower courts[103] and by counsel for Town & Country.[104] The Supreme Court, like the Board and the court of appeals, made the erroneous assumption that *Phelps Dodge* stands for the proposition that all applicants for employment qualify

---

101. *See* United States Supreme Court Official Transcript, NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450 (1995) (No. 94-947), 1995 WL 611733, at *41-42. ("[T]he holding in this case will not just apply in the construction industry . . . . This could apply in all industries, and it could apply in a situation where . . . the employer was already unionized by one union and it could be another union that's coming in to try to take it away.") (statement by James K. Pease, Jr., counsel for Town & Country).

102. *See Town & Country*, 116 S. Ct. at 452. Citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941), the Court noted that "under well established law, it made no difference that the 10 members who were simply applicants were never hired" because the "statutory word 'employee' includes job applicants." *Id.*

103. *See* Town & Country Elec., Inc. v. NLRB, 34 F.3d 625, 628-29 (8th Cir. 1994), *vacated*, 116 S. Ct. 450 (1995); Town & Country Elec., Inc., 309 N.L.R.B. 1250, 1254 (1992).

104. *See* United States Supreme Court Official Transcript, *supra* note 101, at *21-44; *id.* at *33-34 ("I believe that . . . this Court has held that when Congress uses a circular definition of employee, they intend to incorporate the law of agency into that definition, and I think that's what they did in this case.") (statement by James K. Pease, Jr.).

as employees.[105] However, not all individuals who submit an employment application deserve automatic employee status. An initial inquiry must be made to determine whether the individual qualifies as a bona fide applicant. In absence of bona fide status, the individual should not be afforded the protection available to those deemed "employees" under the NLRA.

Had the Court shifted its attention to the true underlying question presented in this case— whether paid union organizers are bona fide applicants—the Court may very likely have reached the opposite conclusion. Given the strict commitment that a paid union organizer must make to the union when he signs a Salting Resolution, it would be difficult to argue that the organizer is a bona fide applicant. Pursuant to the Resolution, the organizer owes first allegiance to the union, and his sole purpose in applying for a job with a nonunion employer is to organize the employees. Once this goal is accomplished or at any other time that the union so desires, the organizer vows to terminate his "employment" with the company. In light of the overwhelming degree of control the union exercises over the organizer, the so-called "employment relationship" that the organizer is attempting to form with the nonunion company is anything but bona fide. Because the organizer fails this first step, the Court need not even consider the validity of the next transition—from applicant to employee.

The *Town & Country* holding additionally conflicts with well established Supreme Court precedent that distinguishes between the rights of employees and nonemployees. In allowing paid union organizers to gain employee status by simply submitting an application for employment, regardless of the organizer's true intent or motive, the Supreme Court managed to blur the line that it had previously drawn in *Babcock* and *Lechmere* between the rights of employees and nonemployees. As a result, unions have the potential to acquire direct and easy access to nonunion employees through the use of salting campaigns. If the Board orders reinstatement or compelled employment of the paid organizer as a remedy to a section 8(a)(3) violation, not only will the union, through its paid union organizer-applicants, be allowed *onto* company property, it can take its organizing efforts directly through the company's front door. Any attempt by the company to stop the union (by refusing to hire or refusing to interview the union "salts") will result in an immediate filing of an unfair labor practice charge. Because of the heavy burden placed on the company to defend against such charges, the union has a good chance of succeeding on the merits. Even if unsuccessful, the ensuing litigation would be both disruptive and costly to the nonunion employer.

Lastly, and most importantly, the *Town & Country* decision has the potential to disturb the balance that Congress previously struck between the competing interests of labor and management in favor of organized labor, a result Congress did not intend when enacting the NLRA. Gary Vos, President of the Associated Builders and Contractors, alluded to this concern in a statement he made shortly

---

105. *See Town & Country*, 116 S. Ct. at 454; *Town & Country*, 34 F.3d at 627 ("Applicants for employment. . . have long been considered to be employees under the Act."); *Town & Country*, 309 N.L.R.B. at 1253 ("We begin our analysis recognizing that applicants are 'employees.'").

after the Court handed down its opinion:

> Labor Law must be rewritten to change the definition of employee so that it more accurately reflects the intent of Congress that the Board be an impartial protector of the rights of employers and employees. Right now you have a situation where the Board has become an advocate for organized labor.[106]

---

106. *Contractor Group to Seek Legislative Relief Following High Court Ruling on Union Salts*, PR Newswire, Nov. 28, 1995, *available in* WESTLAW, LBNEWS Database.

Mr. Vos' concern is shared by many, including numerous members of Congress. On February 13, 1997, identical bills were introduced in the House and Senate addressing the concerns raised in this Article and by Mr. Vos. *See* Truth in Employment Act of 1997, S. 328, 105th Cong. (1997); Truth in Employment Act of 1997, H.R. 758, 105th Cong. (1997). If adopted, these bills would amend the National Labor Relations Act for the following express purposes:

(1) to preserve the balance of rights between employers, employees, and labor organizations which is fundamental to our system of collective bargaining;
(2) to preserve the rights of workers to organize, or otherwise engage in concerted activities protected under the National Labor Relations Act; and
(3) to alleviate pressure on employers to hire individuals who seek or gain employment in order to disrupt the workplace of the employer or otherwise inflict economic harm designed to put the employer out of business.

Id. § 3. To achieve these purposes, the proposed legislation would amend section 8(a) of the NLRA by adding the following language: "Nothing in this subsection shall be construed as requiring an employer to employ any person who seeks or has sought employment with the employer in furtherance of other employment or agency status." *Id.* § 4.

This proposed legislation was introduced as a direct result of the *Town & Country* decision. In his statement in support of the bill, Congressman Fawell emphasized the "Hobson's Choice" presented to employers by the Supreme Court's broad interpretation of NLRA's reach: "either hire the union salt who is sure to disrupt your workplace and file frivolous charges resulting in costly litigation; or, deny the salt employment and risk being sued for discrimination under the NLRA." 143 CONG. REC. E253 (daily ed. Feb. 13, 1997). A similar sentiment was expressed by Senator Hutchinson in his address to the members of the Senate. 143 CONG. REC. S1396 (daily ed. Feb. 13, 1997) (statement of Sen. Hutchinson upon introduction of S. 328). In essence, this legislation would serve to restore the balance between the rights and protections of employers and employees that was altered as a result of the Supreme Court's tacit acceptance of union salting practices in *Town & Country*.