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Town & Country Electric, Inc. v. National Labor Relations Board: Salts: We're Employees—What Happens Now

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***TOWN & COUNTRY ELECTRIC, INC. v. NATIONAL
LABOR RELATIONS BOARD:
SALTS: WE'RE EMPLOYEES — WHAT HAPPENS
NOW?***

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I. INTRODUCTION

For the last twenty years, labor union memberships have been on the decline.¹ As a result, unions have been forced to design strategies and programs in

¹ Herbert R. Northrup, "Salting" the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance, 14 J. LAB. RES. 469 (1993); Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341 (1995) (stating that "although union members comprised 25.8% of the total workforce in 1974, that figure had declined to 15.5% in 1994").

an effort to reverse or at least slow down this decline.² To say the least, unions have been very lethargic about organizing efforts to slow this decline.³ Recently though, certain unions have implemented plans that are allowing them to combat union-avoidance tactics by the companies and have enabled the unions to communicate more effectively and efficiently with non-union workers.⁴ One of the union's most effective and most controversial tactics is known as "salting."⁵ "Salting" is a technique where the union organizers apply for jobs at nonunion companies with the intent of organizing their workers.⁶ For many years, the National Labor Relations Board (NLRB) has faithfully held that "salts" or paid union organizers are "employees" and are protected by section 2(3) of the National Labor Relations Act (NLRA).⁷ However, this long established holding was an issue of controversy in the

² See Northrup, *supra* note 1, at 1341. "Even with the stepped-up organizing efforts over the last few years, federal figures show that the percentage of construction workers belonging to unions has dropped from 42% in 1970 to 19% last year." David G. Savage & Stuart Silverstein, *High Court Extends Job Protections to Organizers; Labor: Ruling Likely to Boost Recruiting Efforts. Justices Say Firms Can't Fire Employees Who are Also Paid by Unions*, LOS ANGELES TIMES, Nov. 29, 1995, at D1.

³ Northrup, *supra* note 1, at 469.

⁴ Note, *supra* note 1, at 1341.

⁵ See *id.* at 1341 (explaining that "unions send organizers (salts) to apply for jobs as employees in the non-unionized workplace [in effect to organize them]"). Board Member Oviatt "regarded salts as 'reminiscent of the Trojan Horse whose innocuous appearance shields a deadly enemy.'" *Id.* at 1343.

⁶ See *id.* at 1341.

⁷ National Labor Relations Act [hereinafter NLRA], 29 U.S.C. § 141. Section 2(3) of the NLRA provides:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this [Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3). DINAH PAYNE ET AL., *The Fate of Full-Time, Paid Union Organizers as Employees: What Next From the Supreme Court?*, LAB. L. J., June 1995, at 371; Brief for the National Labor Relations Board at 10, *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995) (No. 94-947) [hereinafter Brief for NLRB]; *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975) (deciding that paid

circuit courts throughout the country on a recurring basis.⁸ In *Town & Country Electric, Inc. v. NLRB*,⁹ the Supreme Court was asked to resolve the issue of whether salts or paid union organizers were “employees” as defined in Section 2(3) of the NLRA.¹⁰ In a 9-0 decision, Justice Breyer held that a “worker may be a company’s ‘employee,’ within the terms of the NLRA, even if, at the same time, a union pays that worker to help the union organize the company.”¹¹

The *Town & Country* decision was a very important event to unions because for the first time the Supreme Court upheld the NLRB’s interpretation of the term “employee.”¹² The facts of the case convinced the Court that the NLRB’s rationale was within the NLRA’s language. The court reasoned that: (1) the NLRB’s interpretation supported the NLRA’s purposes; and, (2) the interpretation followed the Court’s past decisions.¹³ Additionally, the *Town & Country* decision has special significance because the Court took the opportunity to eliminate the controversy and give guidance to the circuits to follow.

This Comment examines the decision of the Supreme Court in *Town & Country, Inc. v. NLRB* and explores the possible consequences of the Court’s opinion. In Part II, there will be a brief overview on the history of “salting.” This analysis will cover what “salting” is, how it is used, and the test used by the NLRB in deciding these types of cases. Also, there will be a brief look at one strategy adopted by a particular construction union. Part III of this Comment will contain a concise statement of the facts surrounding this case. In Part IV, there will be a general overview of the law concerning paid union organizers. A large portion of this part will discuss the split among the various circuit courts that have addressed

union organizers were entitled to protection under the NLRA).

⁸ Nancy Montwieler, *Supreme Court Will Determine if Refusal to Hire Union Organizers Violates NLRA*, BNA U.S. L. WK., Jan. 26, 1995, at d5 (stating that “the government asked the justices to resolve a continuing conflict in the circuits over whether a paid union organizer is an ‘employee’ within the meaning of section 2(3) of the act. The issue also is presented in more than 70 cases pending before the NLRB . . .”).

⁹ *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995).

¹⁰ *Id.* at 452.

¹¹ *Id.* at 450.

¹² See Bernie Mower & Brian Lockett, *Supreme Court Sustains Union Use of ‘Salting’ as Organizing Tactic*, BNA U.S. L. WK., Dec. 8, 1995, at d5 (stating that “in a victory for organized labor, the U.S. Supreme Court has ruled that the National Labor Relations Board properly interpreted the word ‘employee’ to include paid union organizers or ‘salts’”).

¹³ *Town & Country Elec., Inc.*, 116 S. Ct. at 451.

this issue. Part V will consist of a discussion of the holding of the *Town & Country* case, and the rationale used by the court to reach its decision and the arguments offered by *Town & Country*. Finally, Part VI will consist of the analysis of the decision, examining the implications of the decision. It will show how the union sees the decision helping its efforts and the company's viewpoint on the decision.

II. HISTORY OF SALTING

The tactic of "salting" is not a new strategy for unions.¹⁴ Labor unions have been placing staff or union members as hires into companies for many years.¹⁵ This tactic has been traced back to when the "Industrial Workers of the World used it to organize lumber camps at the turn of the century."¹⁶ However, the tactic has been used by unions only sparingly throughout the years.¹⁷ As labor unions struggle to maintain their sagging memberships, the tactic's "popularity has re-emerged during the last several years."¹⁸

A. *How Salting is Applied*

When a construction union targets a company, two things can happen. First, the union may ask the company to sign a pre-hire agreement¹⁹ providing for the union to be the exclusive bargaining representative of the workforce.²⁰ Second, if

¹⁴ Kenneth C. Crowe, *High Court Gives Unions a Boost / Planting Organizers is Allowed*, NEWSDAY, Nov. 29, 1995, at A39.

¹⁵ Northrup, *supra* note 1, at 470.

¹⁶ *Id.*

¹⁷ See Savage & Silverstein, *supra* note 2, at D1.

¹⁸ *Id.*

¹⁹ Susan E. Howe, *To Be or Not To Be an Employee: That is the Question of Salting*, 3 GEO. MASON INDEPENDENT L. REV. 515, 518 (1995). Howe explains:

When the Landrum-Griffin Act amended the NLRA in 1959, it restricted certain union practices and provided for the use of 'pre-hire agreements' in the construction industry, thus allowing a construction company to establish a union as its exclusive bargaining agent without a majority of employees having expressed support for union representation.

Id. at 553 n.19.

²⁰ *Id.* at 518.

this does not work, a salting campaign²¹ may be implemented by the union.²² When a salting campaign is instituted, the union salts go to the nonunion company for jobs en masse.²³ The “salters” openly put the employer on notice of their union affiliation and their intent to organize the employer’s labor force.²⁴ As a consequence, a number of things can happen: (1) an open-shop²⁵ construction contractor is unionized; (2) a union contractor replaces the open-shop contractor; (3) unfair labor practice charges will be filed by the union; or (4) the salters are hired.²⁶

B. *Wright Line Test*

Oftentimes, if the company refuses to hire the salters, the salter’s recourse is to file unfair labor practice charges with the NLRB. Once charges have been filed and after the NLRB reviews the charges, the General Counsel of the NLRB must

²¹ Note, *supra* note 1, at 1347. The salting campaign magnifies the strategies used by the employers and the unions:

[E]ach side in the competition over unorganized workers reacts to the other’s tactics and tries to shape labor law to privilege its conduct. The unease with which some observers regard the unions’ salting strategy may reflect a distaste for the coordinated role that unions, as institutions, play in the campaign against non-union firms. Yet the NLRA protects the activities of unions with legitimate concerns for the situation of employees throughout their industry.

Id.

²² Howe, *supra* note 19, at 518 (explaining that “during such a campaign, the union expressly waives its prohibition, usually contained in the union’s constitution or bylaws, against members working for a non-union company provided that the employment is sought for the exclusive purpose of organizing the employer”).

²³ See *id.* at 519; see also Fluor Daniel Inc., 304 N.L.R.B. 970, 974 (1991) (During a union organizing campaign against Fluor Daniel, a national open shop contractor, the Savannah Building Trade Unions submitted a batch of 48 applications to the company.); Sunland Constr. Co., 309 N.L.R.B. 1224, 1224 (1992) (The union submitted 90 applications in four batches to Sunland.).

²⁴ *Id.*

²⁵ An “open shop” is a business where union and nonunion workers are employed indiscriminately and which union membership is not a condition of securing or maintaining employment. BLACK’S LAW DICTIONARY 525 (6th ed. 1990).

²⁶ Northrup, *supra* note 1, at 475; see Sunland Constr. Co., at 1224 (1992); see also Howe, *supra* note 19, at 517 n.117 (stating that “the filing of labor charges is vital to the success of the salting campaign. Sunland signed a settlement agreement with the International Brotherhood of Boilermakers on September 16, 1994. The NLRB approved the agreement, which provided that the union would withdraw the unfair labor practice charge filed with the NLRB and that the company would recognize the union.”).

make a prima facie case to proceed.²⁷ The Board adopted in *Wright Line* a test for establishing the prima facie case.²⁸ Under the *Wright Line* test, the General Counsel must show an “inference that [the employer’s opposition to] protected conduct was a ‘motivating factor’ in the employer’s [discharge or hiring] decision.”²⁹ To maintain a prima facie case, the General Counsel must prove that the employee participated in a protected union activity, had knowledge of the activity by the employer, and the employer’s anti-union animus.³⁰

If the General Counsel meets its burden, the burden of production shifts to the employer.³¹ Then, the employer must show: “(1) that improper motivations had no part in the employment decision; or (2) that the same action would have been taken regardless of (a) the employee’s involvement in protected activities; or (b) the employer had no anti-union animus.”³² Indeed, it would seem that if a union “salter” notifies an employer of his union affiliation and his intentions, and the “salter” is denied a job or hired and then discharged, the “salter” would file an unfair labor practice charge with the NLRB alleging the company would not hire the “salter” because of his or her union affiliation.³³

To this end, the labor charges forthcoming by the union “salter” puts the employer in a precarious position.³⁴ The employer is faced with two choices: (1) hire the “salters” who want to organize his workforce or (2) refuse to hire them and

²⁷ NLRB v. *Wright Line Inc.*, 662 F.2d 899 (1st Cir. 1981).

²⁸ *Id.* at 901-02.

²⁹ *Id.*

³⁰ *Id.*; see *Howe*, *supra* note 19, at 520. *Howe* states:

Disclosure of an applicant’s union activities automatically fills the first two of these *Wright Line* requirements while also effectively denying the employer the affirmative defense of ignorance of the applicant’s union status. “[P]roof that the employer had knowledge of the affected employee’s union allegiance or activities when the action was taken’ is ‘an essential step in proving the existence of unlawful union animus.’”

Id.

³¹ See *Wright Line Inc.*, 662 F.2d at 904.

³² See *id.* at 901-02.

³³ *Id.*

³⁴ See *Howe*, *supra* note 19, at 520.

await the pending labor charges.³⁵ If the *Wright Line* test is met, the company will be ordered to hire or reinstate the “salters” with backpay.³⁶ Therefore, “no matter what action the employer takes, under the current NLRB policy, the employer is effectively forced to hire a known union activist who is intent on salting the company.”³⁷

C. *Construction Industry Salting*

One example of a designed plan to use the tactic of salting [or sprinkling] in an employer’s workforce has been renewed in the construction industry.³⁸ The reoccurrence of this tactic has been brought about because of major legal developments over the past decade which have restricted the union’s ability to communicate with the unorganized employees.³⁹ Succinctly, the strategy consists of the unions⁴⁰ sending union organizers to nonunion workplaces to seek employment.⁴¹ In 1993, the Building and Construction Trades Department (BCTD) of the AFL-CIO, which consists of fifteen various construction trades unions,

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 520-21.

³⁸ *Id.*

³⁹ See *Union Tactics Against Companies, Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Economic and Educational Opportunities*, 104th Cong., (1995) (statement of John J. Barry, President, International Brotherhood of Electrical Workers, AFL-CIO); see also *Peter Kiewit Sons’ Co.*, 206 N.L.R.B. 562 (1973) (under this decision construction employers were essentially allowed to commit unfair tactic as a way to avoid their collective bargaining agreements); *John Deklewa*, 282 N.L.R.B. 1375 (1987), *enforced*, 843 F.2d 770 (3d Cir. 1988) (stating that an employer could terminate its bargaining relationship with the union at the end of a prehire agreement, if the union had not secured and won a NLRB representation election); *Hearing Before the Subcomm. on Oversight and Investigation of the House Comm. on Economic and Educational Opportunities*, 104th Cong., (1995) (statement of Robert A. Georgine, President, Building and Construction Trades Department AFL-CIO).

⁴⁰ See *Howe*, *supra* note 19, at 517 n.12 (explaining that the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers (IBB); the International Brotherhood of Electrical Workers (IBEW); and the United Brotherhood of Carpenters and Joiners (UBCJ) are well known for their use of salting.); see *Northrup*, *supra* note 1, at 470.

⁴¹ Note, *supra* note 1, at 1341, (stating that “although some ‘salts’ are professional organizers who continue to draw their union salary for organizing, others are ‘volunteers organizers’ who often apply en masse and to whom the union typically pays the difference between the union wage scale and the pay at the new job”).

designed and instituted an organizing campaign involving salting tactics called "Construction Organizing Membership Education Training" (COMET).⁴²

The COMET plan is based, in part, on the tactic of salting which has seen an increased rate of use since the Supreme Court's decision in *Lechmere, Inc. v. NLRB*.⁴³ In *Lechmere*, the court gave "employers [the] right to exclude non-employee organizers from private property."⁴⁴ In *Lechmere*, the union alleged that the company was committing unfair labor practices by not allowing the union organizers on its property to pass out pro-union handbills.⁴⁵ The Supreme Court agreed that nonunion employees should have access to information to assist them in self-organization.⁴⁶ However, the Court maintained that the "[p]lain terms of the NLRA confer rights only on employees, not on unions or their non-employee organizers."⁴⁷ Nonetheless, the NLRB has clarified the *Lechmere*⁴⁸ decision and has

⁴² Howe, *supra* note 19, at 517. Howe reported:

Under COMET, all members of BCTD unions receive extensive training in organizing tactics and are taught their rights under the NLRA. With unions representing less than 21 percent of construction workers and open-shop contractors performing more than 70 percent of construction, COMET enlists all BCTD union members in an aggressive 'bottom-up' salting campaign against non-union contractors.

Id. at 517-18.

⁴³ Note, *supra* note 1, at 1348; *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537-38 (1992).

⁴⁴ Note, *supra* note 1, at 1348. The Note explains:

In *Lechmere*, the Court rejected the Board's policy of balancing the targeted employee's organizing rights against the employer's property rights. Instead, the Court limited access for non-employee organizers to private property to cases in which the employees are 'inaccessibl(e)' by 'reasonable' alternative means. By restricting the section 7 right to engage in concerted activities to employees themselves, while 'trivializ(ing)' their interests in obtaining information about unions, the *Lechmere* decision impels organizers interested in reaching employees to become statutory 'employees' themselves by applying for a job at the company.

Id.

⁴⁵ Howe, *supra* note 19, at 525.

⁴⁶ *See id.*

⁴⁷ *Id.* Howe related:

The Court "explained that the NLRB erred by failing to make the critical distinction between the organizing activities of employees (to whom section 7 guarantees the right of self-organization) and non-employees (to whom section 7 applies only derivatively)." The Supreme Court reiterated its support for one exception to the rule that allows unions access to the employer's private property if the employees would otherwise be "beyond the reach of reasonable union efforts to communicate with them." Consequently, the majority in *Lechmere* held

rightly held that it does not apply to Section 2(3) employees.⁴⁹ Consequently, the *Lechmere* decision did not clear the waters concerning the definition of “employee” in Section 2(3).⁵⁰ Thus, the stage was set for the court to address this issue in *Town & Country*.

III. STATEMENT OF THE CASE

A. *The Facts*

Town & Country, a non-union electrical contractor based in Wisconsin, won a contract to do repair work at a paper mill in International Falls, Minnesota.⁵¹ After obtaining the contract, Town & Country found out, under Minnesota law, that for every two unlicensed electricians working on the job there must also be at least one Minnesota licensed journeyman electrician on the job.⁵² Since Town & Country had no electricians with Minnesota licenses, they retained Ameristaff Personnel Contractors to recruit electricians for the job.⁵³

that an employer is not obligated to provide nonemployee organizers access to the employer’s private property unless the union meets the “heavy” burden of establishing that “unique obstacles” exist.

Id. at 525-26 (citations omitted).

⁴⁸ Note, *supra* note 1, at 1343 (stating that “the Board distinguished *Lechmere*, . . . as a property-rights decision that did not affect the rights under the NLRA of job applicants and other statutory ‘employees’”).

⁴⁹ *See id.* at 1348-49. The Note reports:

First, and most important, the employer may bring to bear only whatever right to exclude trespassers is recognized under relevant state law; *Lechmere* does not incorporate into the NLRA a particular substantive property right. Second, the *Lechmere* rule applies only to non-employees and does not limit organizing activities from by off-duty employees. Third, the employer may not exclude union organizers from his property if, by allowing others to solicit on the property, he discriminates against the union. Finally, the Board has held that *Lechmere* guarantees private property protection not only against organizing activity, but also against area-standards picketing and handbilling.

Id. at 1348-49.

⁵⁰ *See id.* at 1349.

⁵¹ Brief for International Brotherhood of Electrical Workers Local 292 at 2, *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995) (No. 94-947) [hereinafter Brief for IBEW].

⁵² *Id.* at 2.

⁵³ *Id.* at 3.

As applicants began to reply to the advertisement about the job, Ameristaff questioned the applicants about their union status.⁵⁴ Town & Country wanted to know if the applicants would work on a nonunion job and whether the applicant's previous work had consisted only of union jobs.⁵⁵ As a result, Town & Country scheduled seven applicants for interviews.⁵⁶ Shortly thereafter, local unions of the International Brotherhood of Electrical Workers (IBEW) learned about the job and had their unemployed members apply for the job.⁵⁷ Although most union constitutions do not allow union members to work for nonunion employers, the IBEW passed a salting resolution⁵⁸ allowing its members to work for nonunion companies in an effort to organize the job sites.⁵⁹ On the day of the scheduled

⁵⁴ PAYNE ET AL., *supra* note 7, at 373.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ In part, Local Union IBEW 292's resolution read as follows:

WHEREAS: a principal obligation of the members of the local union is to organize the unorganized in order to maintain and secure our wages, benefits and other conditions of employment and;

WHEREAS: the success of any organizing drive depends upon the support of each and every union craftsman, both on and off the job; Therefore be it

....

RESOLVED: that the Business Manager be empowered to authorize members to seek employment by nonsignatory contractors if they are willing, in addition to the performance of work assigned by their employer, and as set forth below, to assist in the local union's organizing program, and be it further

RESOLVED: that such members, when employed by non-signatory employers, shall promptly and diligently carry out the electrical construction work assigned to them by their employer for the duration of the project, and shall engage in organizing their fellow employees only on non-work time, and/or in non-work areas and in accordance with any lawfully promulgated distribution and solicitation rules and be it further

RESOLVED: that such members, when employed by nonsignatory employers, shall be compensated by the local union only for the time spent organizing before or after working hours of the nonsignatory employer.

RESOLVED: That any member accepting employment by a nonsignatory employer, except as authorized by this

RESOLUTION, shall be subject to charges and discipline as provided by our constitution and bylaws.

Brief for IBEW, *supra* note 51, at 1-2.

⁵⁹ Brief for IBEW, *supra* note 51, at 3.

interviews, the IBEW members showed up for the interviews.⁶⁰ After some apparent confusion concerning the interviews, the IBEW members were told they would not be interviewed because they did not have appointments and the interviews were cancelled.⁶¹

At that point, one of the IBEW members, Hansen, protested that he had scheduled an interview that morning.⁶² He was granted an interview and was reluctantly hired by Town & Country, even though it knew he was a union member.⁶³ Town & Country refused to interview the remaining ten union members⁶⁴ despite the fact that Town & Country needed more licensed electricians.⁶⁵ Once on the job, during a break, Hansen stated in front of one of Town & Country's superintendents that he would attempt to organize employees for the union.⁶⁶ Later, the superintendent told Hansen that "he would be fired if he continued to talk about the union."⁶⁷ While on lunch break, Hansen continued to discuss the benefits of the union to the other workers.⁶⁸ He was discharged that day.⁶⁹ After his discharge, the IBEW reimbursed Hansen for the difference in wages,⁷⁰ benefits, and travel

⁶⁰ *Id.* at 3.

⁶¹ *Id.* at 4.

⁶² *Id.*

⁶³ *Id.* at 4-5.

⁶⁴ NLRB v. Town & Country Elec., Inc. 116 S. Ct. 450, 452 (1995).

⁶⁵ Brief for NLRB, *supra* note 7, at 4.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Brief for Respondent *Town & Country Electric, Inc.* at 5, NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450 (1995) (No. 94-947) [hereinafter Brief for Respondent] (stating that:

The Union paid Hansen One Thousand Ninety-One and 82/100 dollars (\$1,091.82) for his three days' work [for *Town & Country*] . . . [As opposed to] the Seven Hundred Twenty-Five and 15/100 Dollars (\$725.15) he received from Ameristaff for that same period of time. The Union's business manager testified that, pursuant to the Union's salting resolution, all salts were to be paid on the same basis.).

expenses.⁷¹

B. Proceedings Below

Subsequently, the members of the IBEW who were denied interviews filed a complaint with the National Labor Relations Board.⁷² The Board issued a complaint stating that Town & Country had violated Sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. 158(a)(1) and (3).⁷³ The complaint alleged that Town & Country refused to interview or hire the union members because of their union affiliation, and that Hansen was terminated because of his union activities.⁷⁴ Town & Country countered arguing that its actions were not based on discrimination, but on the fact that none of the applicants, nor Hansen, were bona fide 'employees' within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3).⁷⁵ At a hearing before an administrative law judge (ALJ), the ALJ found that Town & Country had violated Sections 8(a)(1) and (3) of the NLRA and ruled in favor of the union.⁷⁶ The NLRB concurred and affirmed the ALJ's ruling.⁷⁷

The NLRB and the ALJ's findings were based on the following factors:

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See id.* at 5-6. The Code states:

Section 158(a)(1) of the act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1994). Section 157 of the Act grants employees the right, inter alia, "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).

Section 158(a)(3) of the Act makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1994).

⁷⁴ *See* Brief for Respondent, *supra* note 70, at 5.

⁷⁵ *Id.* at 6.

⁷⁶ *Town & Country*, 116 S. Ct. at 452.

⁷⁷ *Id.* *See also* *Town & Country Electric, Inc.*, 309 N.L.R.B. 1250, 1258 (1992).

(1) The Board . . . reaffirmed its position in *Zachry*⁷⁸ that paid union organizers are ‘employees’ within the meaning of Section 2(3) and are therefore protected against discriminatory refusals to hire and discriminatory termination.⁷⁹

(2) Moreover, both the legislative history and this Court’s interpretations of the Act support a broad definition of the statutory term ‘employee.’ For a paid union organizer simultaneously to be an ‘employee’ of another entity also comports with the common-law principles of agency to which this Court has looked to define the term ‘employee’ in cases in which it was left undefined by statute, the Board concluded. Under the common-law, ‘[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.’⁸⁰

(3) [P]rotecting paid union organizers as ‘employees’ furthers the Act’s goal of promoting the right to organize, while leaving intact management’s legitimate rights to direct and control employees under its supervision and to limit union solicitation to nonwork time.⁸¹

As a remedy, the Board held that Town & Country must “offer employment to Hansen and the union members who had been denied interviews, and make the union members whole for any losses suffered as a result of Town & Country’s discrimination.”⁸²

⁷⁸ *H.B. Zachry Co.*, 289 N.L.R.B. 838 (1988), *rev’d*, 886 F.2d 70 (4th Cir. 1989) (the board had held that paid union organizers who apply for or in fact work for hire for an employer are “employees” within the meaning of Section 2(3) of the Act); *see also* *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975); *John Mark Tarver, H.B. Zachry Co. v. N.L.R.B.: Paid Full-Time Union Organizer Not an “Employee,”* 50 LA. L. REV. 1211 (1990).

⁷⁹ Brief for NLRB, *supra* note 7, at 7.

⁸⁰ *Id.* at 7-8.

⁸¹ *Id.* at 8.

⁸² *Id.* at 8. *See, e.g.*, Note, *supra* note 1, at 1345. “The Board has rigorously enforced the traditional make-whole remedy of reinstatement and back pay, which takes on added importance given that, unlike the more stable employment relationships common in other sectors of the economy, building

C. *The United States Court of Appeals for the Eighth Circuit*

On review, the United States Court of Appeals for the Eighth Circuit did not agree with the Board's reasoning and reversed its decision.⁸³ The Eighth Circuit held that the Board's interpretation of "employee" was wrong.⁸⁴ The Eighth Circuit declared that there was an "inherent conflict of interest" when professional organizers applied for jobs for the sole purpose of furthering the union interest.⁸⁵ The Eighth Circuit court relied on the common law agency doctrine in reaching its decision to exclude organizers from NLRA coverage.⁸⁶ In addition, the Eighth Circuit said that even unpaid organizers' adherence to the union's "job salting organizing resolution" was "inimical to, and inconsistent with, the employer-employee relationship."⁸⁷ The Eighth Circuit believed that the case involved two classes of union members: the full-time union organizers and the other union members, including Hansen.⁸⁸ In short, the court's rationale was

projects in the construction industry are of relatively brief duration." *Id.*

⁸³ *Town & Country*, 116 S. Ct. at 452.

⁸⁴ *Id.*

⁸⁵ *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 629 (8th Cir. 1994).

⁸⁶ *Id.* at 628. "When a federal statute does not helpfully define the term 'employee,' we infer that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Id.*

⁸⁷ *Id.* at 629. *But see* *Ultrasystems W. Constructors, Inc. v. NLRB*, 18 F.3d 251, 255-58 (4th Cir. 1994) (re-affirming *Zachry*) ("The Fourth Circuit, however, while disapproving the Board's remedy, has also held that volunteer organizers are protected."); *Fluor Daniel, Inc. v. NLRB*, 976 F.2d 744 (11th Cir. 1992) (*mem.*) (enforcing 304 N.L.R.B. 970 (1991) ("The Eleventh Circuit, in an unpublished opinion, has enforced a Board order reinstating volunteer organizers.")) *Id.* at 1358 n.32.

⁸⁸ *Town & Country Elec., Inc.*, 34 F.3d at 627. Brief for IBEW, *supra* note 51, at 10. The IBEW stated in its brief that:

The Eighth Circuit further found that the union members who were not full-time union officers lost their status as "employees" because they were encouraged by their union, while unemployed, to apply for employment with Town & Country and to organize Town & Country's employees if hired. The sole basis for this holding was the provision of the union's organizing resolution (unknown to the employer at the time of the refusals to hire and discharge) which reinstates the union's usual prohibition on union members' working for nonunion employers if the union determines that the organizing activity should cease. The Eighth Circuit

that the term “employee” did not provide protection for those individuals who work for a “company while a union simultaneously pays them to organize that company.”⁸⁹ As a result, the Eighth Circuit refused to enforce the Board’s decision.⁹⁰

The decision by the Eighth Circuit added to the confusion and controversy over the definition of an employee under section 2(3) of the NLRA.⁹¹ The ambiguity regarding this issue has created a split among many of the circuit courts.⁹² Finally, certiorari was granted by the Supreme Court in attempt to eliminate and solve a number of issues and problems surrounding the definition of “employees.”⁹³

IV. BACKGROUND ON EXISTING LAW

The NLRB has firmly held to its policy through the years that “paid union organizers [or salts] are ‘employees’ under the NLRA despite contrary

viewed that provision as “controlling, for third-party control over a putative employee’s job tenure, in contrast to, say, an employee-initiated decision to engage in a work stoppage, is inimical to, and inconsistent with, the employer-employee relationship.”

Id.

⁸⁹ *Town & Country Elec., Inc.*, 34 F.3d at 629; *see also* *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 75 (4th Cir. 1989).

⁹⁰ *Town & Country Elec., Inc.*, 34 F.3d at 629.

⁹¹ Andrea F. Hoeschen & Julie Richard-Spencer, *Labor and Employment Law*, 43 LA. B.J. 399 (December 1995).

⁹² *Town & Country*, 116 S. Ct. at 453; PAYNE, *supra* note 7, at 375; Montwieler, *supra* note 8, at d5; *see also* Brief for NLRB, *supra* note 7, at 9 (stating that the circuits are split on whether paid union organizers are employees under the Act, with the District of Columbia, Second, and Third Circuits holding that they are, and the Fourth and Sixth Circuits holding that they are not). *See* *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 1329-31 (D.C. Cir. 1992) (enforcing an NLRB order against Willmar for refusing to hire union organizer); *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1979) (holding that a paid union organizer was an employee protected by the NLRA); *H.B. Zachry Co.*, 886 F.2d at 72 (holding that a paid union organizer was not an employee as defined by the NLRA); *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964) (refusing to enforce the NLRB order and held that the waitress was not a protected employee); *Escada (USA) Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992) (holding that a full-time paid union organizer was an employee).

⁹³ *Town & Country*, 116 S. Ct. at 459.

inferences at common law.”⁹⁴ Despite this policy, “salting” continued to cause enormous confusion and debate among the circuit courts prior to the Supreme Court’s decision in *Town & Country Elec., Inc.*

A. *Split of Authority Among the Circuits*

The ongoing conflict, between the NLRB and the Circuit Courts, concerning section 2(3) of the NLRA, caused the court’s docket to expand.⁹⁵ There are two possible reasons for this increase: (1) the increasing use of salting by unions; or (2) the employer’s reluctance to accept the NLRB’s policies under section 2(3).⁹⁶ When examining the cases chronologically the facts and holdings of the cases lend some guidance to understanding the confusion and conflict that is abound in the circuits.⁹⁷

In 1964, in *NLRB v. Elias Brothers Big Boy*,⁹⁸ the Court of Appeals for the Sixth Circuit refused to enforce the NLRB order and held that a waitress was not a protected employee within the intent of section 2(3).⁹⁹ The waitress had met with the union before seeking employment with Big Boy.¹⁰⁰ After she was hired, she actively assisted the union in organizing Big Boy.¹⁰¹ For this work, she was paid fifteen dollars a week.¹⁰² After she was discharged, she continued to work for the union as a full-time organizer.¹⁰³ Based on these facts, the Court of Appeals for the Sixth Circuit Court felt there was a strong inference that the waitress had worked for the union all along and that she was not a bona fide

⁹⁴ Howe, *supra* note 19, at 518.

⁹⁵ *Id.* at 533.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 327 F.2d 421, 422-27 (6th Cir. 1964).

⁹⁹ *Id.* at 427.

¹⁰⁰ *Id.* at 423.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Elias Bros. Big Boy*, 327 F.2d at 427.

employee under the intent of the NLRA.¹⁰⁴

Notwithstanding, in 1974, in *Dee Knitting Mills v. NLRB*,¹⁰⁵ the NLRB held that an employee being paid by the union to organize did not lose her employee status.¹⁰⁶ In *Dee Knitting Mills*, an employee was working for Dee Knitting, while employed by the union.¹⁰⁷ The NLRB stated that “she was a bona fide full-time employee within the meaning of section 2(3).”¹⁰⁸

In 1975, in *Oak Apparel, Inc.*,¹⁰⁹ two paid union organizers¹¹⁰ were hired by Oak Apparel as employees.¹¹¹ The union sent the organizers to Oak Apparel to make an assessment on how the employees viewed unionization.¹¹² Both organizers were well qualified machine operators.¹¹³ But, they were fired for their organizing efforts of the other nonunion workers.¹¹⁴ In making its decision, the NLRB held that because it had consistently defined “employee” in the broadest of terms, members of this class were entitled to the NLRA’s coverage and their rights would be protected from employers as well as unions.¹¹⁵ Furthermore, the NLRB held that any restrictive reading of section 2(3) would withhold from discriminatees, “the status and protection to which job applicants, even

¹⁰⁴ *Id.*

¹⁰⁵ *Dee Knitting Mills, Inc.*, 214 N.L.R.B. 1041 (1974).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (holding that paid union organizers were entitle to protection under Section 2(3)).

¹¹⁰ *Id.* at 701. (The union organizers were from Local 107, International Ladies’ Garment Workers’ Union, AFL-CIO.)

¹¹¹ *Id.* at 3.

¹¹² *Id.* at 6.

¹¹³ *Id.*

¹¹⁴ *Oak Apparel, Inc.*, 218 N.L.R.B. at 710.

¹¹⁵ *Id.* at 701.

prospective applicants, are entitled."¹¹⁶

In 1979, the United States Court of Appeals for the Second Circuit decided *Henlopen Mfg. Co., Inc. v. NLRB*, holding that a paid union organizer was "an employe[e] protected by the Act."¹¹⁷ In *Henlopen*, a female union organizer was discharged after being hired as an assembly line worker for Henlopen.¹¹⁸ Prior to being hired by Henlopen, she had volunteered as a student organizer for the International Industrial Production Employees Union (IPEU).¹¹⁹ She was paid fifty dollars (\$50) a week for organizing.¹²⁰ She was told to do her job, organize the workers, and to report back to the IPEU.¹²¹ In reaching its decision, the court's only rationale was that a paid union organizer was protected.¹²²

In 1989, the Fourth Circuit Court of Appeals decided *H.B. Zachry Co. v. NLRB*, holding that a paid union organizer was not an employee as defined by the NLRA, reversing the NLRB.¹²³ In *H.B. Zachry*, Barry Edwards, a journeyman boilermaker welder, was hired by the company at its North Carolina work site in 1980.¹²⁴ The welder was discharged some time after being hired.¹²⁵ The NLRB ordered Zachry to reinstate the welder with back pay because it had committed unfair labor practices.¹²⁶ But, by the time the order was issued, the project had been completed.¹²⁷

In 1984 and 1985, Edwards re-applied for work with Zachry at another

¹¹⁶ *Id.*

¹¹⁷ *Henlopen Mfg. Co., Inc. v. NLRB*, 599 F.2d 26, 30 (2d Cir. 1979).

¹¹⁸ *Id.* at 28.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Henlopen Mfg.*, 599 F.2d at 30.

¹²³ *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989).

¹²⁴ *Id.* at 71.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

project while being a full-time organizer for the union.¹²⁸ It could be inferred from the facts that the company refused to hire him because he admitted that he was seeking employment at Zachry to organize the plant.¹²⁹ Zachry's argument to the NLRB was that "it could lawfully refuse to hire a paid, full-time, professional union organizer."¹³⁰ However, the NLRB followed its previous rulings and found that the union organizer was an employee within the meaning of the NLRA.¹³¹ The Zachry Company appealed the NLRB's decision.¹³²

The Fourth Circuit court reasoned that the "plain meaning" of the term "employee" meant working for only one employer as opposed to two different employers at the same time.¹³³ The court held that finding Edwards an employee would distort the "plain meaning" of the term "employee," since the union was paying the organizer also.¹³⁴ Furthermore, the court stated that finding that a paid union organizer was an employee would disturb the "careful balance struck by Congress."¹³⁵ In addition, the court was concerned that a decision of this nature would disrupt the balance of the "Zachry employees' right to self-determination" in representation elections.¹³⁶ Finally, the court feared that an employee's loyalties would be divided between employers thereby affecting his productivity.¹³⁷ Therefore, the court ruled that as long as an employer does not discriminate against union employees, it was management's right to hire only those workers who would answer to only one employer.¹³⁸ To that end, the Court of Appeals held that a "paid full-time union organizer [is] not [a] bona fide

¹²⁸ *H.B. Zachry*, 886 F.2d at 71.

¹²⁹ *Id.*

¹³⁰ *Howe*, *supra* note 19, at 535.

¹³¹ *H.B. Zachry*, 886 F.2d at 71.

¹³² *Id.* at 72.

¹³³ *Id.* at 73.

¹³⁴ *Id.*

¹³⁵ *Id.* at 74.

¹³⁶ *H.B. Zachry*, 886 F.2d at 74.

¹³⁷ *Id.* at 75.

¹³⁸ *Id.*

'applicant' and [is] not covered by the National Labor Relations Act."¹³⁹

After the Fourth Circuit's decision in *H.B. Zachry*, the United States Court of Appeals for the District of Columbia affirmed the NLRB's decision in *Willmar Elec. Serv., Inc. v. NLRB*.¹⁴⁰ On appeal, the court granted enforcement of the NLRB's order against Willmar on the grounds that it had refused to hire a union organizer because of his affiliation with the IBEW.¹⁴¹ In *Willmar Elec. Serv.*, a journeyman electrician named Hendrix was working for the IBEW as a field organizer.¹⁴² Sometime later, Hendrix applied for a job with Willmar.¹⁴³ On his application Hendrix stated that he worked for the IBEW and if hired, would attempt to organize the other employees during his free time.¹⁴⁴ Willmar refused to hire him because, as one of Willmar's foreman said, "it's kind of hard to hire [him] when [he's] out there on the other side, picketing."¹⁴⁵

The court explained that the real issue in the case was "whether Hendrix's employment ties to the union disqualified him from being a Willmar employee enjoying full protection of the Act."¹⁴⁶ In affirming the NLRB's holding, the court held that "Hendrix would have been indistinguishable from a zealous volunteer who resolved to use his free time . . . to advance the union's interests."¹⁴⁷ Furthermore, the court said that a person holding simultaneous jobs was only moonlighting and that he could not be excluded as an "employee."¹⁴⁸

¹³⁹ *H.B. Zachry*, 886 F.2d at 70; see *Ultrasystems W. Constructors, Inc. v. NLRB*, 18 F.3d 251, 254 (4th Cir. 1994) (Reaffirming *Zachry*, the Court held that an application from a union organizer, applying for work at the direction of the union employer, was 'qualitatively different from that of a bona fide applicant. Because the union organizer would work for the employer only to carry out his duties as a union organizer and would be paid by the union at the same time, he was not 'in search of a job' with the expectations of employment.).

¹⁴⁰ *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992).

¹⁴¹ *Id.* at 1328.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Willmar Elec. Serv.*, 986 F.2d at 1328.

¹⁴⁶ *Id.* at 1329.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Thus, the court used the common law principles of agency in that “[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.”¹⁴⁹

Willmar argued to the court that hiring a union employee increased the risk of disloyalty by the employee.¹⁵⁰ The court suggested that the Act does not stop the employer from taking whatever remedial action is necessary to prevent disloyalty.¹⁵¹ Willmar also argued that allowing a union representative to vote in a representation could result in serious ramifications.¹⁵² The court held that “qualification as an ‘employee’ is not the same as eligibility to vote; he could be included in a bargaining unit only if found to share the necessary community of interest with the other workers.”¹⁵³ Finally, Willmar argued that there was case law that prevented giving the union members who are employees the right to use the employer’s property for propagandizing.¹⁵⁴ The court rejected Willmar’s rationale, stating that a union organizer, on the company’s property would be in a better position to advocate the union’s benefits, but so would any other union zealot who was working for Willmar.¹⁵⁵

Also in 1992, the United States Court of Appeals for the Third Circuit decided *Escada (USA), Inc. v. NLRB*, in which a paid union organizer was discharged for attempting to organize the employer’s warehouse workers for Local 138 of the International Ladies’ Garment Workers’ Union.¹⁵⁶ In *Escada*, the Board rejected Board Member Oviatt’s dissenting opinion in which he relied upon the *Zachry* case for his support.¹⁵⁷ Instead, the court followed the Board’s

¹⁴⁹ *Id.* at 1329-30. RESTATEMENT (SECOND) OF AGENCY § 226 (1958); *see also* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 320 (1992) (“Where a statute containing that term [employee] does not helpfully define it, this Court presumes that Congress means an agency law definition unless it clearly indicates otherwise.”).

¹⁵⁰ *Willmar Elec. Serv.*, 968 F.2d at 1330.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Willmar Elec. Serv.*, 968 F.2d at 1330.

¹⁵⁶ *Escada (USA), Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992).

¹⁵⁷ *Id.* at 898; *Howe*, *supra* note 19, at 245.

previous holdings in *Oak Apparel*, *Zachry*, and *Willmar* in making its decision.¹⁵⁸

In yet another 1992 case, *Fluor Daniel v. NLRB*,¹⁵⁹ the United States Court of Appeals for the Eleventh Circuit affirmed the NLRB's order that union organizers were employees.¹⁶⁰ The NLRB had upheld an Administrative Law Judges' ("ALJ") findings that Fluor had committed unfair labor practices towards the union applicants.¹⁶¹ The ALJ confirmed that his decision was "bound by the Board 'rather than by appellate court precedent' and distinguished the facts in *Fluor Daniel* from *Zachry* on the basis that *Zachry* involved a paid union organizer."¹⁶²

V. THE DECISION

Finally, in *Town & Country*, the United States Supreme Court was asked to resolve the inherent ambiguity in the term "employee" as it relates to the National Labor Relations Act.¹⁶³ Justice Breyer, writing for the Supreme Court, held that "[t]he Board's construction of the word 'employee' is lawful; [and] that term does not exclude paid union organizers."¹⁶⁴ The unanimous court essentially held that the NLRB is statutorily required to interpret the section 152(3) language of the NLRA and that its definition of "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise."¹⁶⁵

Basically, the Court's decision recognized paid union organizers as employees.¹⁶⁶ In so holding, the Court adopted the NLRB's expansive reading of the term employee because Congress created the agency to oversee and enforce

¹⁵⁸ Howe, *supra* note 19, at 245.

¹⁵⁹ *Id.* at 245; *Fluor Daniel v. NLRB*, 976 F.2d 744 (1992) (enforcing the NLRB's order without issuing an opinion).

¹⁶⁰ Howe, *supra* note 19, at 245.

¹⁶¹ *Id.* at 246.

¹⁶² *Id.*

¹⁶³ *Town & Country*, 116 S. Ct. at 452.

¹⁶⁴ *Id.* at 457.

¹⁶⁵ *Id.* at 451.

¹⁶⁶ *Id.* at 452.

the NLRA.¹⁶⁷ Therefore, its interpretations should be given “considerable deference.”¹⁶⁸ Finally, the Court determined that the NLRB’s previous interpretation was justified based on statutory mandates, legislative history and prior decisions by the Court.¹⁶⁹ However, the Court did not address the issues of: (1) whether a paid organizer shared the requisite “community of interest” with the other employees to allow him to vote in a representation election; or (2) the issue of Town & Country’s failure to interview or hire workers who were being paid by the union.¹⁷⁰

To resolve this ambiguity, the Court’s decision in *Town & Country* was based on a dictionary definition, Congressional reports, and case law.¹⁷¹ Likewise, the Court addressed the reasoning behind the NLRB’s interpretation. First, the Court confirmed that the Board’s holding was “consistent with the broad language of the Act” and that paid union organizers should not be excluded.¹⁷² The Court explained that the Act’s language was analogous to the plain dictionary definition of the term “employee”¹⁷³ because the Act states the term as “shall include any employee.”¹⁷⁴ Additionally, the Court said that the Act included exceptions but that none applied in this case.¹⁷⁵ Second, the Court found that the NLRB’s interpretation of the term employee was consistent with the NLRA’s purposes, especially the right to participate in protected concerted activities without interference from the employer.¹⁷⁶ Third, the *Town & Country* Court

¹⁶⁷ *Town & Country*, 116 S. Ct. at 453.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 457.

¹⁷¹ *Id.* at 454.

¹⁷² *Town & Country*, 116 S. Ct. at 453.

¹⁷³ *Id.* at 453; AMERICAN HERITAGE DICTIONARY 604 (3d ed. 1992) (stating that “employee” includes any person who works for another in return for financial or other compensation). *See also* BLACK’S LAW DICTIONARY 525 (6th ed. 1990) (stating that an employee is a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed).

¹⁷⁴ *Town & Country*, 116 S. Ct. at 454. *See also* 29 U.S.C. § 152(3) (1994).

¹⁷⁵ *Town & Country*, 116 S. Ct. at 454.

¹⁷⁶ *Id.*

held that the broad reading of the statute was consistent with the Supreme Court's prior decisions.¹⁷⁷ Finally, the Court relied on 29 U.S.C. § 186(c)(1) (1988) of the Labor Management Relations Act (LMRA).¹⁷⁸ The Court decided that the LMRA language allowed an employer's employee to work for a union.¹⁷⁹ The Court concluded that if Town & Country's arguments on the statute's reading were followed, "there would not seem to be many (or any) human beings to which this last phrase could apply."¹⁸⁰

Next, Justice Breyer addressed all of Town & Country's arguments.¹⁸¹ The premise of Town & Country's argument was based on the common-law agency doctrine.¹⁸² Town & Country argued that by applying the common-law agency doctrine, an employee who works for the union as a paid organizer should be excluded from coverage.¹⁸³ In support of this assertion, Town & Country quoted a section of the Restatement (Second) of Agency.¹⁸⁴

Town & Country further argued that a paid union organizer worked only

¹⁷⁷ *Id.* at 454. The Court held that the "breadth of section 2(3)'s definition is striking: The Act squarely applies to 'any employee.'" *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2808 (1984) (the Act covers undocumented aliens).

¹⁷⁸ *Town & Country*, 116 S. Ct. at 454.

¹⁷⁹ *Id.* The LMRA provision "forbids an employer (e.g., the company) from making payments to a person employed by a union, but simultaneously exempts from that ban wages paid by the company to 'any . . . employee of a labor organization, who is also an employee' of the company." *Id.* at 454.

¹⁸⁰ *Id.*

¹⁸¹ *Town & Country*, 116 S. Ct. at 455-56.

¹⁸² *Id.* at 455 (citing *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992)) (using common-law test to distinguish between "employee" and "independent contractor" under Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001).

¹⁸³ *Id.* at 455.

¹⁸⁴ The Restatement (Second) of Agency states:

Since . . . the relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service, giving service to two masters at the same time normally involves a breach of duty by the servant to one or both of them [A person] cannot be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other.

RESTATEMENT (SECOND) OF AGENCY § 226 cmt. a (1958).

for the union and could not be an employee of the employer.¹⁸⁵ They reasoned that the union's [salting] resolution, allowing union employees to work for nonunion employers, was only a scheme to organize.¹⁸⁶ Town & Country argued that allowing the union organizer to work for the company would result in possible "harm [to] the company" by "[the employee] quitting [his job] when the company needed [him]" or "[by] disparaging the company to others" or "even sabotaging the firm or its products."¹⁸⁷ Town & Country concluded that the organizer was a servant of the union and controlled by the union and could not be a servant to the company.¹⁸⁸

The Supreme Court rejected all of Town & Country's arguments. In regards to Town & Country's first argument, common-law of agency, the Court said it failed because the "Board correctly found that it lacks sufficient support in common law."¹⁸⁹ The Court reasoned that the Board is statutorily mandated to define the term "employee" by Congress and that the Board's definition is wholly consistent with common law.¹⁹⁰ As to Town & Country's second argument, the Court looked to the Restatement¹⁹¹ and concluded that an employee could work for two employers, as to one act, as long as it did not "involve abandonment of the service to the other."¹⁹² Accordingly, "service to the union for pay does not 'involve abandonment of . . . service' to the company," said the Court.¹⁹³ The Court explained that an organizer could not abandon his job during a normal working day because the organizer would be under the control of the

¹⁸⁵ *Town & Country*, 116 S. Ct. at 455.

¹⁸⁶ *Id.* at 456.

¹⁸⁷ *Id.*

¹⁸⁸ *Town & Country*, 116 S. Ct. at 455.

¹⁸⁹ *Id.* at 456.

¹⁹⁰ *Id.* at 455.

¹⁹¹ *Id.* at 456. The Restatement states that a "person may be 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." RESTATEMENT (SECOND) OF AGENCY § 226 (1958).

¹⁹² *Town & Country*, 116 S. Ct. at 456.

¹⁹³ *Id.*

employer not the union.¹⁹⁴ However, if the union employee exercised his right to organize during nonworking hours, the Court said this was no more than moonlighting (having a second job).¹⁹⁵ The Court analogizes this act as being no different than a police detective working undercover as a waiter at a restaurant attempting to pick up clues.¹⁹⁶

The Court went on to say that Town & Country's abandonment argument was not convincing because union organizing activities are a protected act and that the employer had no legal right to demand an employee, as part of his job, to give up this protected activity.¹⁹⁷ Furthermore, the Court dismissed Town & Country's argument concerning acts of disloyalty because the record was devoid of any such acts.¹⁹⁸ But, the Court did suggest alternative solutions to allay Town & Country's fears. For example, the company could use discipline, file a complaint with the NLRB, create a policy limiting nonemployee access to company property, offer fixed-term contracts that would forbid quitting without notice, or informing law enforcement agencies (possibly having the employee arrested if found to have destroyed company property).¹⁹⁹ The Court maintained that the "[u]nion's resolution²⁰⁰ contains nothing that suggests, requires, encourages, or condones impermissible or unlawful activity."²⁰¹ Also, the Court reasoned that any employee might leave an employer's company for a better job and that a paid union organizer should be treated no differently than any other employee.²⁰² Furthermore, the Court concluded that if a paid organizer would attempt to sabotage the company through unlawful acts so too might a dissatisfied worker.²⁰³ To this end, the Court held "this does not mean they are not

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Town & Country*, 116 S. Ct. at 456.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 457.

²⁰⁰ Brief for IBEW, *supra* note 51, at 1a & 2a app.

²⁰¹ *Town & Country*, 116 S. Ct. at 456.

²⁰² *Id.*

²⁰³ *Id.*

‘employees.’”²⁰⁴ Ultimately, the Supreme Court found that union organizers or “salts” who participate in a salting campaign are employees of the employer whom they seek to organize. As a result, they are entitled to be protected under the antidiscrimination provisions of the NLRA.²⁰⁵

VI. ANALYSIS

A. *Labor Organizations*

Employers seek to paint ‘salting’ as a sinister or underhanded union organizing technique. It is important to recognize this attack as an attempt to divert attention from the employer’s actual goal of preventing unions from engaging in traditionally protected organizing activities. This attack by employers also serves to divert attention from the reality of the growing rate of illegal conduct of employers under the NLRA. Statistics show an alarming increase in illegal discharges under Section 8(a)(3). Comparing the early 1950s with the late 1980s shows that ‘the incidence of illegal firing increased from one in every 20 elections adversely affecting one in 700 union supporters to one in every four elections victimizing 1 in 50 union supporters.’²⁰⁶

In a landmark case, the Supreme Court’s decision in *Town & Country* resolved the ambiguity over the term “employee.” Labor organizations have hailed *Town & Country* as a tremendous victory dealing a severe blow to the nonunion employers discriminatory tactics.²⁰⁷ Many labor leaders have proclaimed that this ruling will increase their memberships and union organizing

²⁰⁴ *Id.*

²⁰⁵ Hoeschen, *supra* note 91, at 399; *see also* Montwieler, *supra* note 8, at d5.

²⁰⁶ *Hearing Before the House Comm. on Economic and Educational Opportunities Subcomm. on Oversight and Investigations*, 104th Cong., Congressional Hearing Testimonies (October 31, 1995) (statement of Risa L. Lieberwitz, Asso. Professor, School of Industrial and Labor Relations Cornell Univ.) [hereinafter Statement by Lieberwitz].

²⁰⁷ Frank J. Murray, *Justices Approve Union Tactic of Infiltrating Firms to Organize*, WASHINGTON TIMES, November 29, 1995, at A6.

efforts.²⁰⁸ Robert Georgine, president of the AFL-CIO Building and Construction Trades department, said “the ruling . . . puts a legal foundation under our organizing efforts.”²⁰⁹ In addition, John J. Barry, president of the International Brotherhood of Electrical Workers, portrayed this ruling as retribution for “all workers who have seen their right to organize into unions badly eroded in recent years.”²¹⁰ Even the Chairman for the NLRB proclaimed this decision as a major victory.²¹¹

Many union supporters are boasting that the Supreme Court has restored the rights of unions to organize once again.²¹² Union officials have already cited numerous benefits from the Court’s ruling. These include: (1) giving unions more access to the nonunion workers;²¹³ (2) allowing nonunion workers more freedom in forming a union without the employer’s interference;²¹⁴ (3) exerting more pressure on employers and how they do their business;²¹⁵ (4) discouraging employers from blacklisting union members;²¹⁶ (5) curbing prevalent and unlawful hiring practices by employers;²¹⁷ and (6) it will remain a vital weapon in their “salting” campaigns.²¹⁸ Advocates for the unions are hoping that this decision is

²⁰⁸ Mower & Lockett, *supra* note 12, at d5. Allan H. Weitzman & Kathleen M. McKenna, *According to the Supreme Court, Employers May Not Refuse to Interview Applicants Solely for Being Union Organizers*, NAT’L L.J., Feb. 5, 1996, at B4, 18. The officials of the AFL-CIO announced that “\$20 million dollars will be funded towards organizing this year.” *Id.*

²⁰⁹ Joan Biskupic, *Court Backs Unions’ On-Job Organizing; Unanimous Decision Allows ‘Salting,’* WASH. POST, Nov. 29, 1995, at F03.

²¹⁰ Savage & Silverstein, *supra* note 2, at D1.

²¹¹ Biskupic, *supra* note 209, at F03; Murray, *supra* 207, at A6. (“NLRB Chairman William B. Gould IV said the ruling shows ‘there is no inconsistency in loyalty to the collective-bargaining process and loyalty to the firm for which one works.’”).

²¹² Jim Flasch, *Unions, Employers and ‘Salting,’* MARKETPLACE MAG., Jan. 9, 1996, at v7, n4, Section 1.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Savage & Silverstein, *supra* note 2, at F03.

²¹⁷ *Id.*

²¹⁸ Crowe, *supra* note 14, at A39.

the stimulus that many labor organizations needed to bring more members into their folds. Finally, the bottom line is that this decision sends a message that union people have rights, too.²¹⁹

B. *Nonunion Employers and Friends*

The “salting” issue was also very important to the business community and losing this decision was very disturbing.²²⁰ Nonunion contractors have admitted that the Court’s ruling is a definite setback, but they have plans to continue the fight.²²¹ The business community has gone to Congress to pursue their battle against the Court’s ruling.²²² They expect Congress to redefine the

²¹⁹ Flasch, *supra* note 212, at Section 1.

²²⁰ Crowe, *supra* note 14, at A39. “Mona Zeiberg, senior counsel for labor and employment law at the U.S. Chamber of Commerce, said the business community is upset by this ruling. ‘It is pretty significant,’ Zeiberg said.” *Id.*

²²¹ Flasch, *supra* note 212, at Section 1. Flasch reveals that:

The case, seen from the outset as far-reaching, attracted a great following among organizations near and far from the construction industry. As a result of that interest, four institutions -- the Associated General Contractors (AGC), Associated Builders and Contractors (ABC), the Chamber of Commerce of the United States, and the Labor Policy Association -- all filed amicus curiae (‘friend of the court’) briefs supporting *Town & Country’s* position.

Id.

²²² Crowe, *supra* note 14, at A39. Crowe states:

The business community’s fierce opposition to salting surfaced several months ago in a rider to an appropriations bill passed by the House. That rider barred the National Labor Relations Board from investigating or prosecuting any cases involving the tactic until the Supreme Court ruling came down. It would have effectively stopped the NLRB from responding to any unions’ charges that employers either refused to hire their organizers, or fired them.

Id. In addition, Rep. William F. Gooding (R-Pa), chairman of the House Committee on Economic and Educational Opportunities, denounced the use of “salts” as a government-imposed disruption of the workplace that increases “the cost of doing business by forcing the employer to defend itself against frivolous or meritless charges filed” with NLRB. He left open the prospect that legislation is needed to undo the Supreme Court holding. Mower & Lockett, *supra* note 12, at d5. Finally, Paul Barrett of the *Wall Street Journal* wrote that “[s]eparately, House Republicans have attached a ‘rider’ to appropriations legislation that would make it much more difficult, if not impossible, for unions to bring this type of case.” Paul Barrett, *Employers Can’t Discriminate Against Paid Union Organizers*, WALL ST. J., Nov. 29, 1995, at B6.

term “employee” in an effort to stop this tactic of “salting.”²²³ Business leaders are literally screaming that the Federal labor laws need to be changed in order to reflected the intent of Congress.²²⁴ Further, business leaders are proclaiming that the Court’s decision will essentially put them out of business.²²⁵ They argue that an employee cannot have two masters and that they cannot have people working for them whose sole purpose is put them out of business.²²⁶ Many of these organizations feel that with the NLRB as an advocate, and the Court’s decision by their side, unions have added ammunition to their arsenal in pushing for more union organizing.²²⁷ These business people want to stop this cancer of “salting” before it spreads into other industries.²²⁸ One business leader stated “[t]his case now impacts on all working men and women including those who do not want to be organized.”²²⁹

C. *What Happens Now?*

On its face, the Court’s decision appears to have settled the dispute over the definition of the term “employee.” However, a few more questions remain concerning the Court’s opinion that should be addressed. Such as, are employers and the unions overstating their concerns over this decision? How will this decision impact collective bargaining? Is this decision advantageous to the unions using the salting tactic and if so, how? What are the employers really worried about? The remaining portion of this comment will attempt to discuss these questions.

²²³ Flasch, *supra* note 212, at Section 1. “As a result of the court decision, ABC [Associated Builders and Contractors] now will work through Congress to get the definition of employee redefined so that union ‘salts’ cannot be working for the union and trying to organize individuals on a job site while also being employed by the nonunion contractor.” *Id.* “Several said they expect congressional action to ban the tactic, among them Dan Yager, general counsel of the Labor Policy Association.” Murray, *supra* note 207, at A6.

²²⁴ Mower & Lockett, *supra* note 12, at d5.

²²⁵ Murray, *supra* note 207, at A6. AFL-CIO spokesman, James B. Parks, said “What does it benefit a union to drive a company out of business? That means people don’t have jobs.” *Id.*

²²⁶ *Id.*

²²⁷ Crowe, *supra* note 14, at A39.

²²⁸ Murray, *supra* note 207, at A6.

²²⁹ Flasch, *supra* note 212, at Section 1.

The excitement over the *Town & Country* decision by the American labor force could be grossly overstated. However, the significance of the Court's holding was crucial for the continued implementation of the "salting" tactic. Because employers have to recognize union organizers as employees, the "salting" campaigns will remain a viable strategy. The companies have to afford the union organizers the same treatment as other potential employees or applicants. The *Town & Country* decision will give union organizers more access and a better way to communicate with the nonunion employees. But, unions have to be aware that the "salting" tactic does not mean overall union organizing will be successful.

Moreover, unions must be cautious because employers still retain control over their workplaces and employees. They are still in control of the hiring and firing and they also have statutory protections. Furthermore, at the jobsite, the employers still have broad "managerial power."²³⁰ It is widely recognized that a employer has a "business justification in restricting employee solicitation and distribution activities during worktime and in work areas."²³¹ Although employees are protected in exercising their section 7 rights at the workplace, they must do it during non-working hours to be free from employer discrimination.²³² Also, it is imperative that there be at least two employees on the nonunion jobsite to qualify for protection while participating in concerted activities. Consequently, depending on which side one stands, the reading of this decision will be either broadly or narrowly construed, depending on the circumstances. Thus, it is this author's opinion that the *Town & Country* decision settled the ambiguity in the definition of employee and as a result, it may limit the employer's illegal tactics.

The *Town & Country* decision has the potential to limit illegal tactics by the employers. For example, it may decrease the employer's coercive opposition to unionization. But, it could also increase the employer's use of labor-management consultants to help the company fight unionization. This decision might stop the employer's illegal tactics during an organizing drive. For instance, the employer will be more cautious when giving captive audience speeches about the negative effects of unionization. Also, the threats of the operation shutting down, if the union wins a representation election, should be eliminated. Likewise, the incentives of increased pay and fringes will be stopped as a method of swaying a representation election. The rationale for this theory is that these practices are unfair labor practices and, with union employees on the job to report these tactics, the employers should be leery of conducting these practices.

²³⁰ Statement by Lieberwitz, *supra* note 206, at 4.

²³¹ *Id.*

²³² *Id.* at 4-5.

Essentially, for the salting campaigns to operate effectively, the employers have to commit unfair labor practices for it to be successful.

However, there are several weaknesses in this decision. For example, *Town & Country* will likely have no effect on collective bargaining or labor laws. As a result, if a paid union organizer is hired by a nonunion employer and the union wins a representation election, they have only won a battle not the war. The union must now negotiate a contract with the anti-union company. Under the NLRA, the employer has a duty to bargain in good faith but he does not have to agree to anything. The *Town & Country* decision does nothing to change this obligation. For an employer to continue operating nonunion, it only has to bargain over wages and hours. It does not have to give in to other worker demands. If the parties cannot reach an agreement and an impasse occurs, the employees have to take the company's last best offer. Of course, if the employees strike, the employer can continue to operate with replacement workers. The bottom line is that this decision may allow organizers more access to the nonunion employees and assist in winning an NLRB election. But, this does not guarantee the employees a decent collective bargaining agreement. In addition, the employers will continue to fire pro-unionists as a method of scaring employees into believing that the same thing will happen to them if they support the union. They will continue to commit unfair labor practices because the punishment is slight and it sends a message to the workers of just how far the company will go to defeat unionization. Finally, the *Town & Country* decision will not preclude employers' exploitation of the current law.

What advantages will the *Town & Country* decision grant to the unions using the salting tactic? First, the use of salting is cost-effective, it's cheap! With union memberships declining, expending money for organizing is a significant issue. The smaller unions cannot afford large organizing drives as well as the larger unions. The salting tactic will be useful because if the organizer is hired by the targeted company, the company will be paying the union organizer. Second, the decision will allow union organizers more access to the nonunion employees on the jobsite. Union organizers are not always free to go on company property for organizing purposes. Third, for the nonunion employers, this decision could manifest serious implications when the "salting" tactic is used.

The biggest benefit from the *Town & Country* decision is the position employers are put in when numerous unfair labor charges are filed by the unions. That is, union organizers are now viewed as bona fide employees and are fully protected by the NLRA, as any other employee would be. If a paid union organizer goes to a nonunion employer for a job, the employer is put into a seemingly hopeless situation. When seeking employees, the employer has to consider the union organizers, otherwise, the organizer will file labor charges that

the employer did not hire or consider him because of his union status and could probably win his case. Under the *Town & Country* decision, it appears that the nonunion employer cannot refuse to consider the union organizer as long as he is qualified. Fourth, the “salting” tactic can prohibit an employer from using a temporary hiring agency. Finally, this decision will allow unions to organize the company from the top-down. Instead of going to the employees, the union will seek to get the company to recognize the union, thereby bypassing the NLRB election. The union’s objective is to file an enormous amount of unfair labor charges with the intent to break the company or have it sign a contract. The companies have to pick between the lesser of two evils: (1) go bankrupt trying to pay large backpay awards that the union organizers will win, or (2) settle with the union to drop the labor charges and recognize the union.

The final question is: why did the employers raise such a fuss over the union organizer as employees? *Town & Country* argued among other things, that it was worried about employees abandoning the company and being disloyal. The disloyalty argument is ironic in that the company expects the employees to be loyal but the company does not have to do the same. There are people in every walk of life that are members of other organizations and still continue to work for their employers. *Town & Country* argued that union organizers may abandon the company when it needs them. This is a silly argument because in an at-will employment situation, which this was, any employee, whether he works for management, is a union organizer, or is just an employee, can quit or leave an employer with or without notice or cause. You might say that these arguments were nothing more than a smoke screen for *Town & Country*’s real motive. Its real motive was “to immunize itself from hiring employees who are motivated to unionize the workplace.”²³³ Nonunion employers do not want their employees unionized because unions give employees a voice in the workplace, it allows for self-determination. Many employees do not know what their rights are. As a result, employers exploit those employees because of this lack of information and they want to keep it that way.

VII. CONCLUSION

On its face, the Supreme Court’s ruling is a tremendous victory for the unions. The Court was asked to define the term “employee” which had been a point of controversy for many years. The strength of the Court’s ruling is that the definition allows union applicants, whether they are volunteers or paid by the union, to apply for nonunion jobs. For the Supreme Court to have ruled otherwise would have created a “chilling effect on all employees’ choice to

²³³ Statement by Lieberwitz, *supra* note 206, at 5.

engage in union activities.”²³⁴ Moreover, unions are given a cost-effective and a new communicative device to contact nonunion employees at the workplace. Overall, the benefits of the *Town & Country* decision should far outweigh the weaknesses of it. From the union’s standpoint, the *Town & Country* ruling gave them the green light to pursue the “salting” plan in other industries.²³⁵

However, even though the *Town & Country* Court made a well-reasoned decision which should eliminate the confusion over the term “employee” between the NLRB and the various Circuits Courts throughout the country, American labor unions have not won the war. This decision may be a step in the right direction for unions, but it is too early to tell whether this decision will be “the key that unlocks the workplace door or whether nonunion contractors can muster enough support in Congress to reverse the Supreme Court’s holding.”²³⁶ Nonetheless, many American labor unions consider this victory to be great and regardless of how narrow or effective this decision is, the impact of the decision could create a “pandemic alert for union solidarity and organizing on the job site.”²³⁷

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²³⁴ *Id.*

²³⁵ Murray, *supra* note 207, at A6.

²³⁶ Weitzman, *supra* note 208, at B4.

²³⁷ Flasch, *supra* 212, at Section 1.

* The author worked in the coal mines in southern West Virginia for over twenty years and was a member of the United Mine Workers of America during that time.

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