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"Salting" the Construction Industry

James L. Fox

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"SALTING" THE CONSTRUCTION INDUSTRY

James L. Fox†

salt . . . : to enrich (as a mine) artificially usu. with fraudulent intent by secretly placing valuable mineral in some of the working places.‡

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† Attorney, National Labor Relations Board, Region 18 (Minneapolis). Adjunct Professor, William Mitchell College of Law. B.A. 1971 St. Olaf College; J.D. 1976, M.S. 1977, Syracuse University. The views expressed in this article are the author's own, and may or may not coincide with the official positions of the NLRB and its General Counsel.

‡ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2005 (1993).

I. INTRODUCTION

Strength in numbers has been the foundation of labor unions since the beginning of the organized labor movement. The numbers of union-represented employees in most industries, including the construction industry, have dwindled in the last four decades, however, and unions have seen their strength reduced commensurately. The AFL-CIO Building and Trades Council has attempted to combat this trend by encouraging union members to seek employment with non-union employers for the purpose of organizing them. This technique is known as “salting.” This Article describes salting and the legal issues salting involves for the construction industry.

Part II of this Article defines and discusses the salting process generally. Part III delves deeper, considering issues of voting eligibility of union “salts” and manipulation of salts’ status as employees to gain access to employers’ property. Part IV describes employers’ responses to salting, including legislative initiative, changing application procedures, and state court actions. Part V concludes with a summary of the current state of the law and suggests that employers should exercise considerable caution before instituting state court lawsuits in response to salting.

II. THE BASICS OF SALTING

A. *Salting as an Organizational Technique*

As indicated by one of its dictionary definitions, the term “salt” originated with the practice of artificially enriching mines by placing valuable minerals in them. The obvious purpose was to defraud prospective buyers or investors by inflating the mine’s potential. Despite its ignominious etymological origins, unions have embraced the term “salt” in connection with an organizational technique. The technique has been traced to the International Workers of the World, who used it to organize lumber camps at the turn of the century.¹

It is no secret that the percentages of union-represented employees in general, and represented employees in the construction

1. See Herbert R. Northrup, “Salting” the Contractors’ Labor Force: *Construction Union Organizing with NLRB Assistance*, 14 J. LAB. RES. 469 (1993).

industry in particular, have declined steadily since the mid-1950s.² The prevailing view among construction trade unions is that the decline in their membership has resulted in a loss of bargaining strength. On this view, it follows that construction trade unions must of necessity organize and maintain "a loose monopoly of the manpower pool" in order to increase and ultimately regain their prior bargaining strength.³

In April 1993, the AFL-CIO Building and Construction Trades Council announced an initiative to reverse the trend of declining membership by initiating a "bottom-up" organizing campaign directed at non-union construction industry employers.⁴ Because of the potential for member resistance to increasing local unions' membership ranks by including previously unrepresented employees, the AFL-CIO Building and Construction Trades Council adopted a membership training program known as Construction Organizing Membership Education Training (COMET).⁵ One of the featured tactics of the construction trade unions' organizing campaign is the use of salting.

In the context of union organizing, "salt" is both a noun and a verb; it does not have a univocal meaning in either use. As a noun, "salt" refers generally to an individual who seeks employment in order to organize. A variety of different individuals fits this description.⁶ At one extreme are "salts" who are professional union organizers holding full-time employment with a union.⁷ At the other extreme are "salts" who are simply union members who vol-

2. See Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341, 1341 n.1 (1995) (indicating that union membership declined from 25.8 percent in the early 1970s to 15.5 percent in the early 1990s).

3. See INTERNATIONAL BHD. OF ELEC. WORKERS, UNION ORGANIZATION IN THE CONSTRUCTION INDUSTRY 2 (1994) [hereinafter UNION ORGANIZATION IN THE CONSTRUCTION INDUSTRY]. This publication is widely referred to as the "orange book." Michael J. Priem, Minnesota statewide organizer for the International Brotherhood of Electrical Workers (IBEW), advised this author that the IBEW has recently decided to abandon the "orange book" as the basis for its organizing. According to Priem, the IBEW's emphasis henceforth will be on more traditional organizing techniques, including resort to the Board's election processes.

4. See ASSOCIATED BUILDERS & CONTRACTORS, INC., COPING WITH COMET: A GUIDE FOR MERIT SHOPS TO DEAL WITH ORGANIZATIONS (1993).

5. See *id.* at 3.

6. A "salt" is to be distinguished from a "pepper." The latter is a current employee who is enlisted to perform the same or similar types of duties as a salt would perform if hired.

7. See *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 71 (4th Cir. 1989); *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1224 (1992).

unteer or are deputized to engage in organizational activities.⁸ Finally, some “salts” are rank-and-file union members who are reimbursed by the union for the difference in wages paid by the targeted employer and wages they would have received under a union contract.⁹

“Salt” is also used as a verb to describe a technique of organizing. This technique may be employed overtly or covertly, and unions may employ both strategies simultaneously.¹⁰ Job applicants who are overt salts wear clothing bearing union insignia, indicate that they are union members and/or organizers on their job applications, or otherwise clearly inform the prospective employer of their union affiliation and organizing intent. One of the obvious purposes of disclosing this intent is to take away an employer defense predicated on lack of knowledge of union membership or activity. On occasion, union members/organizers appear en masse in response to an advertisement or other notice that an employer is hiring.

Job applicants who are covert salts deliberately attempt to conceal their union affiliation and intent on their employment applications. Covert salts may omit references to prior employment with union contractors or participation in joint employer-union apprenticeship programs. Covert salts may also deliberately falsify information on an employment application. Obviously, covert salts omit or falsify information to increase their chances of being hired. Typically, covert salts disclose their union affiliation at some strategic point during the employment relationship.

The constitutions or bylaws of many unions prohibit members from working for non-union contractors. Such restrictions are generally permissible.¹¹ In order to engage in salting without violating these restrictions, unions typically enact “salting resolutions” or otherwise expressly exempt their salts from the ban on working

8. See *Fluor Daniel, Inc.*, 304 N.L.R.B. 970, 972 (1991).

9. See *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250, 1253 (1992), *enforcement denied*, 34 F.3d 625 (8th Cir. 1994), *vacated*, 516 U.S. 85 (1995).

10. See *Walz Masonry, Inc.*, No. 17-CA-18092, 1997 WL 402426, at *3 (N.L.R.B. July 16, 1997); *Clock Elec.*, Nos. 8-CA-26560 & 8-CA-26646, 1997 WL 397544, at *2-3 (N.L.R.B. July 14, 1997). See generally INTERNATIONAL BHD. OF ELEC. WORKERS, SALTING AS PROTECTED ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT (undated) (discussing overt and covert placement of union members in non-union jobs).

11. See *International Bhd. of Elec. Workers Local 1579*, 316 N.L.R.B. 710, 711 (1995).

for non-union employers.¹² These exemptions often require union members/organizers to leave their employment at the request of their union.¹³

Once employed, a salt attempts to organize the employer's work force. In doing so, however, the salt must conduct himself or herself consistent with normal work place expectations. The National Labor Relations Board (NLRB) has stated that "[i]f the organizer violates valid work rules, or fails to perform adequately, the organizer lawfully may be subjected to the same nondiscriminatory discipline as any other employee."¹⁴ "Valid work rules" include otherwise lawful no-solicitation rules.¹⁵

Unions employ other tactics in conjunction with salting. For example, unions often file charges or other complaints against employers with various government agencies. Allegations that an employer has violated state or federal safety and health provisions, failed to comply with licensing and prevailing wage laws, or committed unfair labor practices are not uncommon. One of the obvious, and admitted, purposes of making such allegations is to place economic pressure on the targeted employer.¹⁶ Identification of employer violations can also provide the basis for economic and unfair labor practice strikes.¹⁷ Finally, unions contend that the use of such tactics is necessary to create a level playing field by ensuring that non-union contractors do not enjoy a competitive advantage by virtue of their non-compliance with the law.

An administrative law judge who has heard a number of "salting" cases has written that "the goals of the salting program . . . which could be separate or overlapping depending on local circumstance," are as follows:

1. To put union members on a jobsite so as to enable the Union to organize the Company's employees in order to gain recognition either voluntarily or through a NLRB election.
2. To get union people on the job and create enough trouble by way of strikes, lawsuits, unfair labor practice

12. See *Town & Country Elec.*, 309 N.L.R.B. at 1252.

13. See *id.*

14. *Id.* at 1257; *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1230 (1992).

15. See *Town & Country Elec.*, 309 N.L.R.B. at 1256; *Sunland Constr. Co.*, 309 N.L.R.B. at 1229.

16. See UNION ORGANIZATION IN THE CONSTRUCTION INDUSTRY, *supra* note 3, at 16-17.

17. See *id.*

charges and general tumult, so that the nonunion contractor walks away from the job.

3. If number 2 does not work, to create enough problems for the employer by way of unfair labor practice charges, Davis Bacon, OSHA, or legal allegations requiring legal services so that even if the employer does not walk away from the job, he will be reluctant to bid for similar work in the local area ever again.¹⁸

Although the NLRB affirmed the judge's findings of violations in that case, it did not rely on "the judge's irrelevant discussion . . . of the goals of the Union's salting program."¹⁹

B. *Prima Facie Case and Rebuttal*

Section 7 of the National Labor Relations Act (NLRA) provides in relevant part that:

Employees shall have 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 or other mutual aid or protection, and shall have the right to refrain from any or all such activities²⁰

Section 8(a)(3) of the NLRA states that it is an "unfair labor practice" (and therefore unlawful) 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 a labor organization"²¹ It has long been settled that Section 8(a)(3)'s prohibition extends to job applicants.²² More recently, in *NLRB v. Town & Country Electric, Inc.*,²³ the United States Supreme Court definitively held that paid union organizers are "employees" within the meaning of Section 2(3) of the NLRA. On remand, the Eighth Circuit Court of Appeals concluded, in agreement with the

18. IPPLI, Inc., 321 N.L.R.B. 463, 465 (1996).

19. *Id.* at 465 n.1.

20. 29 U.S.C. § 157 (1994).

21. 29 U.S.C. § 158(a)(3) (1994).

22. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 181-82 (1941) (stating "Discrimination against union labor in the hiring of men is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization.")

23. 516 U.S. 85, 86 (1995).

NLRB, that the employer, Town & Country, had violated Section 8(a)(3) by refusing to consider for hire ten paid union organizers, including two professional staff members employed full-time by the International Brotherhood of Electrical Workers (IBEW), who had applied for available jobs.²⁴

The analytical framework for deciding discrimination cases that turn on employer motivation is set forth in *Wright Line*, a decision of the NLRB.²⁵ The Supreme Court upheld the *Wright Line* analysis in *NLRB v. Transportation Management Corp.*²⁶

The elements of a Section 8(a)(3) violation in a refusal-to-hire case are as follows:

[T]he General Counsel specifically must establish that each alleged discriminatee submitted an employment application, was refused employment, was a union member or supporter, was known or suspected to be a union supporter by the employer, who harbored antiunion animus, and who refused to hire the alleged discriminatee because of that animus.²⁷

The General Counsel must make a "prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" to refuse to hire or consider for hire.²⁸ If the General Counsel is successful in this regard, the burden shifts to the employer to show that it would have rejected the applicant for reasons unrelated to union membership or support.²⁹

The remedy in a meritorious refusal-to-hire case includes reinstatement and backpay.³⁰ If the jobs that applicants applied for no longer exist (for example, because the project has ended), the applicants are entitled to reinstatement in current, equivalent posi-

24. See *Town & Country Elec. v. NLRB*, 106 F.3d 816, 821 (8th Cir. 1997).

25. See *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

26. 462 U.S. 393, 403 (1983).

27. *Clock Elec., Inc.*, Nos. 8-CA-26560 & 8-CA-26646, 1997 WL 397544, at *7 (N.L.R.B. July 14, 1997) (citing *Big E's Foodland*, 242 N.L.R.B. 963, 968 (1979)). The NLRB's General Counsel prosecutes cases before the NLRB. See 129 U.S.C. § 153(d) (1994).

28. See *Wright Line*, 251 N.L.R.B. at 1089. The General Counsel's burden is one of persuasion and not merely of production. See *Manno Elec.*, 321 N.L.R.B. 278, 280 n.12 (1996).

29. See *Wright Line*, 251 N.L.R.B. at 1089.

30. See *B E & K Constr. Co.*, 321 N.L.R.B. 561, 561-62 (1996), *enforcement denied on other grounds*, 133 F.3d. 1372 (11th Cir. 1997).

tions unless the employer can show that it would not have assigned those employees to other jobs elsewhere.³¹

A recurring remedial problem in salting cases is that there are more applicants than available jobs. In that circumstance, the NLRB defers the determination of reinstatement and back pay to a compliance proceeding. The General Counsel bears the burden of showing that non-discriminatory consideration would have resulted in the hiring of particular employees for positions that became available after the employees submitted job applications. If the General Counsel meets that burden, the employees are entitled to back pay attributable to any such jobs. The employees are also entitled to an offer of reinstatement to any current equivalent positions, unless the employer can show that its personnel policies and procedures do not provide for retaining employees and reassigning them to jobs at other sites after the termination of a particular project.³²

III. BEYOND THE BASICS

A. Are "Salts" Eligible Voters in an NLRB Election?

One of the suggested bases for concluding that paid union organizers are not "employees" within the meaning of Section 2(3)³³ of the NLRA is that a contrary conclusion would interfere with employee self-determination rights. The Fourth Circuit Court of Appeals has reasoned that:

Once employed, [the organizer] would have the same right as any other employee to vote in elections concerning union representation. Unlike other employees, however, [the organizer], because of his simultaneous employment with the union, would essentially be paid by the union to cast his ballot in its favor.³⁴

The Fourth Circuit's reasoning in *Zachry* is inconsistent with traditional NLRB law. As the NLRB noted in *Oak Apparel*,³⁵ "[t]he distinction between an employee's status with respect to the ap-

31. See *id.* at 562 nn.8-9 (citing *Dean Gen. Contractors*, 285 N.L.R.B. 573 (1987)).

32. See *BE & K Constr. Co.*, 321 N.L.R.B. at 562.

33. 129 U.S.C. § 152(3) (1994) (defining the term "employees" within the meaning of the NLRA).

34. *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 74 (4th Cir. 1989).

35. 218 N.L.R.B. 701, 701 (1975).

appropriate unit and his or her status as an 'employee' within the meaning of Section 2(3) of the NLRA has been recognized since the infancy of the administration of the NLRA."³⁶ The Supreme Court has upheld this distinction between employee status and voting eligibility in other contexts.³⁷ In the context of salting, the NLRB has noted that paid union organizers may be excluded from voting in an NLRB-conducted election and from any resulting bargaining unit either because they are "temporary" employees or because they do not otherwise share a community of interest with other employees.³⁸ Thus, the voting eligibility status of paid union organizers is determined in the same manner as with other statutory employees. The result has been that "paid union organizers frequently are excluded from voting. . . ."³⁹

B. Salting as a Means to Circumvent Lechmere?

The general rule with respect to employee work place solicitation is twofold. First, there is a presumption that an employer may *not* prohibit employees from engaging in work place solicitation during non-working time.⁴⁰ Second, there is a presumption that an employer *may* prohibit work place solicitation during working time.⁴¹ These presumptions can be rebutted by "special circumstances," including the nature of the work place itself.⁴² In order to

36. *Id.*

37. See *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 499 (1985) (upholding exclusion of certain relatives of management from voting eligibility and bargaining unit notwithstanding status as statutory employees); *NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 188 (1981) (excluding certain "confidential" employees from voting eligibility).

38. See *Town & Country Elec.*, 309 N.L.R.B. 1250, 1256-57 (1992); *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1229 (1992).

39. *Id.*

40. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945). The Court noted, "It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property." *Id.* at 803 n.10.

41. See *id.* The Court emphasized, "Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours." *Id.*

42. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 507 (1978) (holding that health care facility seeking to maintain tranquil environment for patients was justified in prohibiting solicitation); *In re May Dep't. Stores*, 59 N.L.R.B. 976, 981 (1944), *enforced as modified*, 154 F.2d 533 (8th Cir. 1946), *cert. denied*, 329 U.S. 725 (1946) (holding that retail department store could restrict solicitation on retail selling floor because of the disruptive effect on customers).

be valid, a no-solicitation rule must be promulgated for a lawful, non-discriminatory reason and cannot be enforced to prohibit only Section 7 conduct.⁴³

The analysis is quite different when non-employee union organizers attempt to solicit members. The general rule, noted by the Supreme Court in *Lechmere*,⁴⁴ is that an employer has the right to exclude non-employee union organizers from its property.⁴⁵ Access is granted only in the rare situation where the union has no other reasonable means of communication with employees.⁴⁶ For example, a remote construction site, like a remote logging camp,⁴⁷ might give rise to a right of access that would not otherwise exist. Regardless of location, an employer's no-access rules cannot be enforced to discriminate against union solicitation.⁴⁸

In *Town & Country*,⁴⁹ the Supreme Court concluded that job applicants are employees within the meaning of the NLRA, even applicants who are "paid union organizers."⁵⁰ The question that arises is whether the Supreme Court's holding in *Town & Country*—that applicants are employees—undercuts its holdings in *Lechmere* and *Babcock & Wilcox*⁵¹ by granting non-employee union organizers the same rights that employees possess. In a decision issued before *Town & Country*, the Fourth Circuit concluded that if a paid union organizer were an "employee" within the meaning of the NLRA, employers would be required to permit the organizer "to solicit and organize on its property because he was claiming en-

43. See *Head Div., AMF, Inc. v. NLRB*, 593 F.2d 972, 975 (10th Cir. 1979).

44. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

45. See *id.* at 538.

46. See *id.*

47. See *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147, 151 (6th Cir. 1948) (holding that there must be reasonable rules governing access to otherwise inaccessible employees).

48. See *Lechmere*, 502 U.S. at 535 (quoting *Sears, Roebuck & Co. v. NLRB*, 436 U.S. 180, 205 (1978)). The law is unsettled as to what constitutes "discrimination" in this context. See *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996) (rejecting NLRB's conclusion that "discrimination" consists of permitting access to non-labor groups but denying it to labor groups, and holding that discrimination in this context means "favoring one union over another, or allowing employer-related information while barring similar union-related information"); *Riesbeck Food Markets*, 315 N.L.R.B. 940, 941 (1994) (comparing Board's approach with those of various courts of appeals).

49. *NLRB v. Town & Country Elec. Inc.*, 516 U.S. 85 (1995).

50. *Id.* at 97.

51. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (concluding that an employer may validly prevent non-employee distribution of union literature if other channels of communication are reasonably available).

trance as a 'job applicant,'" and that this would "render ineffective the protection offered employers in the *Babcock* decision."⁵² A member of the NLRB and several commentators have reached similar conclusions.⁵³ For example, in discussing the NLRB's decision in *Sunland Construction Co.*,⁵⁴ a companion case to *Town & Country*, the authors of a journal article opine that:

By declaring that non-employee organizers are employees with full access to the employer's premises, the *Sunland* decision eviscerates *Lechmere's* holding and throws open the employer's gates as soon as an organizer completes an ordinary job application, without regard to the availability of jobs or the suitability of the organizer for the available work, and without the slightest inquiry into the bona fides of the organizer's application.⁵⁵

Do the NLRB's *Sunland Construction* and *Town & Country* decisions really stand for the proposition that unions and their organizers can now circumvent *Lechmere* and gain "full access to the employer's premises" by the simple act of completing a job application? Neither those cases⁵⁶ nor any subsequent NLRB cases have so held. Moreover, Justice Thomas, *Lechmere's* author, and all five of *Lechmere's* concurring justices joined the Court's unanimous

52. *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 74 (4th Cir. 1989).

53. See *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1233 (1992) (Member Raudabaugh, concurring).

54. 309 N.L.R.B. 1224 (1992).

55. Michael J. Bartlett, et al., *Sunland Construction Company: Are Union Organizers Necessarily Bona Fide Applicants?*, 45 LAB. L.J. 277, 288 (1994) (emphasis added). See also R. Wayne Estes, et al., *Missing Analytical Link in Supreme Court's 'Salting' Decision Disturbs Balance of Union-Management Rights: A Critical Analysis of NLRB v. Town & Country Electric*, 30 IND. L. REV. 445, 460 (1997) (stating, "Essentially, *Town & Country* permits unions to accomplish indirectly what *Lechmere* prevents them from doing directly").

56. Although the NLRB did not expressly address the question whether a paid union organizer could gain access to an employer's private property through the simple expedient of filing an application for employment, identical language in both *Sunland* and *Town & Country* supports the conclusion that it would answer that question in the negative. The NLRB stated:

Although gaining such access [to an employer's private property] likely will facilitate the paid organizer's union activities, as long as the organizer is able, available, and fully intends to work for the employer if hired, he will not be disqualified from "employee" status. Further, a paid union organizer *employee* arguably poses no greater threat to an employer's property rights than a prounion employee who voluntarily engages in organizational activity.

Sunland Construction Co., 309 N.L.R.B. at 1229-30 n.35 (emphasis added); *Town & Country Elec.*, 309 N.L.R.B. 1250, 1257 n.34 (1992).

Town & Country decision.⁵⁷ Either these six justices failed to recognize that *Town & Country* effectively overruled *Lechmere* in substantial part, or *Town & Country* cannot be broadly interpreted as granting non-employee union organizers the rights of access that they were denied in *Lechmere*.

The contention that *Town & Country* “eviscerates *Lechmere*’s holding” ignores the rationale underlying the Court’s earlier decisions in *Republic Aviation*⁵⁸ and *Babcock & Wilcox*.⁵⁹ As the Court explained in *Hudgens v. NLRB*,⁶⁰ those cases strike a “wholly different balance” between the rights of employees and non-employees to engage in organizational activities on an employer’s property because the former, unlike the latter, are “already rightfully on the employer’s property.” In this circumstance, employee organizational activities implicate “the employer’s management interests rather than his property interests”⁶¹ The Court added that “[t]his difference is ‘one of substance.’”⁶² Thus, the critical difference between employees and non-employees in this context is that the employer has affirmatively granted the former, but not the latter, access to its property. It has done so by hiring employees and assigning them to perform duties on its property.

In contrast, an employer does not affirmatively grant any similar right of access to property to individuals who merely submit job applications. If it were otherwise, *all* job applicants—regardless of whether the applicants are union organizers or ordinary job seekers—would have a right of access to an employer’s property simply because they had submitted an application. Accordingly, until the non-employee organizer is hired and assigned duties, he or she cannot be considered to be “already rightfully on the employer’s property.” The contention that *Town & Country* “eviscerates *Lechmere*’s holding” and grants non-employee organizers “full access to the employer’s premises . . . as soon as an organizer completes an ordinary job application” is therefore simply incorrect.

Further support for this conclusion can be found in cases dealing with the rights of off-duty employees to gain access to an employer’s premises to engage in organizing activities. In *Tri-County*

57. *NLRB v. Town & Country Elec. Inc.*, 516 U.S. 85 (1995).

58. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

59. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

60. 424 U.S. 507, 521-22 n.10 (1976).

61. *Id.*

62. *Id.*

Medical Center,⁶³ the NLRB held that a no-access rule concerning off-duty employee organizers is valid only if the rule:

(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.⁶⁴

Significantly, the NLRB has expressly rejected the contention that *Lechmere* applies to off-duty employees.⁶⁵ The NLRB's rationale for distinguishing the access rights of off-duty employee organizers and non-employee organizers is as follows:

*By virtue of the continuing employment relationship, an off-duty employee, even if not scheduled to work on the day he seeks access to the premises, remains an employee of the employer. Unlike the non-employee union organizer whose status as a trespasser invokes the employer's property right to restrict access, an off-duty employee is a "stranger" neither to the property nor to the employees working there.*⁶⁶

Unlike an off-duty employee, a non-employee union organizer who has submitted an application but who has not been hired does not have a "continuing employment relationship" with the employer.⁶⁷ Rather, the non-employee organizer retains his status as a "stranger" to the property and to the employees working there. The Court's holding in *Town & Country* notwithstanding, employers retain their (non-discriminatory) *Lechmere* right to bar non-

63. 222 N.L.R.B. 1089 (1976).

64. *Id.*

65. Nashville Plastic Products, 313 N.L.R.B. 462, 463 (1993).

66. *Id.* (emphasis added).

67. The existence of a "continuing employment relationship" is important in other contexts as well. See, e.g., *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971) (holding that retirees who "had ceased work without expectation of further employment" were not employees within the meaning of Section 2(3)); *Star Tribune*, 295 N.L.R.B. 543, 546 (1989) (stating "applicants for employment are not 'employees' within the meaning of the collective-bargaining obligations of the Act" because they "perform no services for the employer, are paid no wages, and are under no restrictions as to other employment or activities." In addition, "there is no economic relationship between the employer and an applicant, and the possibility that such a relationship may arise is speculative.")

employee union organizers, including those who have submitted employment applications, from their premises.

IV. EMPLOYERS STRIKE BACK

A. Legislation

A bill styled the "Truth in Employment Act of 1997" has been introduced in the House of Representatives.⁶⁸ This legislation is intended to outlaw salting as an organizational technique. As of this writing, hearings have been held on the bill, but no further action has been taken.⁶⁹

B. Application Process as Means to Prevent Salting

In a concurring opinion in *Sunland Construction Co.*,⁷⁰ then-NLRB member John Neil Raudabaugh suggested four possible, non-discriminatory policies or practices that employers could lawfully adopt in order to protect themselves from salting by paid union organizers.⁷¹ Under these policies or practices, employers would refuse to consider for employment those applicants:

- who are seeking temporary employment only;
- who will simultaneously be employed by another employer;
- who will have "moonlighting" employment; and
- who will be employed by companies or other institutions who are adversaries of the employer.⁷²

Raudabaugh contends that an employer could lawfully refuse to hire a paid union organizer pursuant to such policies or prac-

68. H.R. 758, 105th Cong. (1997).

69. On March 18, 1998, President Clinton threatened, in a speech to 1,200 union workers, to veto the Truth in Employment Act of 1997. See *Clinton Promises to Veto 'Salting' Bill, Addresses Right of Workers to Organize*, Daily Labor Report (BNA) No. 53, at 21 (March 19, 1998). In stressing the importance of unions to American society, President Clinton stated that "workers in unions typically have higher pay, access to higher skills and better continuing education." *Id.* at 22. Clinton also stated that his administration will "fight for the right to organize" and work to increase the minimum wage over the next two years. *Id.* at 21-22.

70. 309 N.L.R.B. 1224 (1992) (Member Raudabaugh concurring).

71. *Id.* at 1232-33.

72. *Id.* The utility of this suggestion in the construction industry (where most salting cases arise) is limited by virtue of the fact that employment in that industry is typically, though not universally, temporary in nature.

tices, but could not similarly refuse to hire an "applicant-employee who is only a zealous union supporter."⁷³

Trade groups and practitioners who represent management interests in the construction industry have similarly recommended that their members and clients adopt various hiring policies or practices in an effort to deter salting of their businesses.⁷⁴ For example, one management practitioner has suggested that job applications include language emphasizing that misrepresentation or omission of information will lead to termination.⁷⁵ Although unstated, the underlying idea is that if an employer hires a covert salt and later determines that the salt misrepresented or omitted information on his or her application, including information related to union affiliation, the misrepresentation or omission (as opposed to union affiliation) provides a basis for lawful discharge.

The foregoing suggestions are fundamentally flawed, however. In the absence of evidence of unlawful motivation or discriminatory application, an employer's facially neutral hiring policies or practices are generally of no concern to the NLRB.⁷⁶ But if an employer adopts facially neutral hiring policies or practices for the avowed purpose of "protecting itself against the union stratagem [salting] involved herein,"⁷⁷ the employer's conduct is unlawful because salting is a lawful union activity.⁷⁸ As the NLRB said in a re-

73. *Id.* at 1233

74. These groups (and their respective publications) include the Associated General Contractors of America (*Preparing for COMET*) and the Associated Builders and Contractors, Inc. (*Coping with COMET*).

75. *See Preparation is Key for Health Care Adm'r*, 1 Lab. Rel. Rep. (BNA) (156 Analysis: News and Background Info.) 24 (Sept. 1, 1997).

76. *See Industrial Constr. Servs., Inc.*, No. 16-CA-17186, 1997 WL 345616, at *5 (N.L.R.B. June 19, 1997) (holding "no photocopies" policy lawful); *Bay Elec.*, Nos. 1-CA-31620 & 1-CA-32903, 1997 WL 96564, at *5 (N.L.R.B. Feb. 27, 1997) (stating policy that applications must be filled out in person and will only be accepted when an opening exists lawful); *Delta Mechanical, Inc.*, No. 16-CA-17235, 1997 WL 87330, at *5 (N.L.R.B. Feb. 26, 1997) (stating that restrictions on when applications are taken lawful); *Belfance Elec., Inc.*, 319 N.L.R.B. 945, 946 (1995) (giving preference in hiring to friends, relatives or former employees lawful); and *VOS Elec., Inc.*, 309 N.L.R.B. 745, 753 (1992) (same).

77. *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1232 (1992) (Member Raudabaugh, concurring). This article does not address the obvious legal and ethical problems associated with falsely testifying that a facially neutral hiring policy or practice was adopted for legitimate business reasons. Suffice it to say that proof that an employer's stated reason is false will permit an inference that the true reason is an unlawful reason. *See Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

78. *See* 29 U.S.C. § 157 (1994). In addition, Section 8(a)(3) of the NLRA broadly prohibits employers from discriminating against, or otherwise interfering

cent case, "When, as here, an employer implements a rule with the purpose of restricting or preventing employees from engaging in a protected activity, Section 8(a)(1) has been violated."⁷⁹ In addition, the refusal to hire (or to consider for hire) an employee pursuant to a facially neutral but unlawfully-motivated rule violates Section 8(a)(3) and exposes the employer to potential backpay and other remedial liability.⁸⁰

Similarly, simply inserting language in job applications indicating that misrepresentation or omission of information will lead to termination does not necessarily provide a safe haven and privilege discharge. The NLRB has held that misrepresentations or omissions on an employment application do not automatically privilege discharge or preclude a remedy where there is other evidence of unlawful motivation.⁸¹ The employer bears the burden of establishing that falsification on an employment application would have led to termination based on a preexisting, non-discriminatory policy.⁸² If the employer can sustain this burden, backpay may be limited to the point in time when the employer learns of the falsification.⁸³

Even facially neutral policies or practices that are not adopted for demonstrably unlawful reasons or are disparately applied may be unlawful if they are "inherently destructive" of employee Section 7 rights. The NLRB has held that an employer's application policy *requiring* that applicants disclose their union affiliation in order to be considered for employment is "inherently destructive" of their

with, restraining or coercing, employees, including applicants, who engage in lawful union or other concerted activity. See 29 U.S.C. § 158(a)(3).

79. *Tualatin Elec., Inc.*, 319 N.L.R.B. 1237, 1237 (1995) (citation omitted). Similarly, in *Starcon, Inc.*, No. 13-CA-32719, 1997 WL 328824, at *9 (N.L.R.B. June 13, 1997), the Board adopted an administrative law judge's conclusion that "an employer who establishes application and hiring procedures designed to impede or screen out union applicants violates Section 8(a)(3)." The general legal principles involved in these cases have been settled for decades. See *Peyton Packing Co., Inc.*, 49 N.L.R.B. 828, 843 (1943) (stating, "a rule [prohibiting union solicitation during working hours] must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose") (emphasis added), cited with approval in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-04 n.10 (1945).

80. See *Tualatin Elec., Inc.*, 319 N.L.R.B. at 1237 (stating "no moonlighting" policy unlawful because adopted in response to lawful union activity); *H.B. Zachry Co.*, 319 N.L.R.B. 967, 968 (1995) (discussing "no extraneous information on application" policy).

81. See *Pan American Elec.*, 321 N.L.R.B. 473 (1996).

82. *Escada (USA), Inc.*, 304 N.L.R.B. 845, 845 n.4 (1991), *enforced*, 970 F.2d 898 (3d Cir. 1992).

83. *John Cuneo, Inc.*, 298 N.L.R.B. 856, 857 n.7 (1990).

Section 7 rights.⁸⁴ Conversely, the NLRB expressly adopted an administrative law judge's alternative holding that an employer's policy *prohibiting* applicants from putting "extraneous information" on their applications in order to be considered for employment was "inherently destructive" of their Section 7 rights to openly declare their union support and solidarity.⁸⁵

The bottom line here is clear. Putting aside hiring policies or practices that raise comparatively rare "inherently destructive" issues, facially neutral hiring criteria that are adopted for non-discriminatory reasons and are not disparately applied to Section 7 protected conduct are not prohibited by the NLRA. Thus, a "no moonlighting" policy would be lawful if adopted because of a concern that additional employment raises safety or other performance issues. On the other hand, such a policy would be unlawful if adopted to deter employees from engaging in salting or other protected conduct. The circumstances under which an employer adopts or changes its hiring criteria, and the bona fides of the proffered justification for doing so, are critical in determining their legality.⁸⁶

C. Salting and State Court Lawsuits

The interplay and potential conflict between state and federal law in the context of labor relations have resulted in three categories of cases: (1) cases in which a party claims that state law cannot be enforced because federal law preempts state law; (2) cases in which a party claims that state law cannot be enforced because the objective sought is illegal under federal law; and (3) cases in which a party claims that state law cannot be enforced because the employer filed suit in retaliation for the exercise of federal rights.⁸⁷

84. Contractor Servs., Inc., Nos. 10-CA-28856, 10-CA-29123 & 10-CA-29174, 1997 WL 724879, at *2 n.4 (N.L.R.B. Nov. 8, 1997).

85. H.B. Zachry Co., 319 N.L.R.B. 967, 980-81 (1995).

86. See Starcon, Inc., No. 13-CA-32719, 1997 WL 328824 (N.L.R.B. June 13, 1997) (stating that changed policy made it virtually impossible for union-affiliated employees to apply and proffered justification for change was pretextual); Casey Elec., 313 N.L.R.B. 774 (1994) (changes in hiring procedure and pattern of advertising, together with failure to tell applicants about new hiring procedure, were designed to screen out union applicants).

87. Similar issues can arise in cases that are brought in federal court. See Bakery, Confectionery & Tobacco Workers' Int'l Union, 320 N.L.R.B. 133 (1995). Because such cases are comparatively rare, the focus here is on state court civil suits.

1. *Garmon Preemption Cases*

In *San Diego Building Trades Council v. Garmon*,⁸⁸ the United States Supreme Court held that “[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”⁸⁹ Exceptions to the *Garmon* rule of preemption have been recognized “where the activity regulated was a merely peripheral concern” of the NLRA.⁹⁰ Exceptions have also been recognized “where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress deprived the States of the power to act.”⁹¹ Certain forms of tortious or otherwise unlawful conduct fall within these exceptions.⁹²

The Supreme Court further refined *Garmon* preemption in *Sears, Roebuck & Co.*⁹³ In *Sears*, the employer sought to enjoin peaceful union picketing on its property. The Court held that although the union’s picketing was arguably protected by Section 7, state court jurisdiction was not preempted because the union had not filed a charge and because the employer therefore lacked a forum for deciding whether its property rights had been invaded.⁹⁴ Where the union files a charge, however, the NLRB can adjudicate the conflicting claims of employee Section 7 rights and employer property rights.⁹⁵

Filing a preempted lawsuit is not by itself unlawful under the NLRA. Rather, a preempted lawsuit “can be condemned as an unfair labor practice” only if it is also “unlawful under traditional NLRA principles.”⁹⁶ In *Manno Electric*,⁹⁷ the NLRB applied the rule

88. 359 U.S. 236 (1959).

89. *Id.* at 244-45.

90. *See id.* at 243-44.

91. *See id.*

92. *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) (trespass); *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977) (intentional infliction of emotional distress); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (defamation).

93. 436 U.S. 180 (1978).

94. *See id.* at 202-03.

95. *See id.* at 207.

96. *Bakery, Confectionery & Tobacco Workers’ Int’l Union*, 320 N.L.R.B. 133, 138 (1995).

97. 321 N.L.R.B. 278 (1996).

of *Garmon* preemption to an employer's state court lawsuit filed in response to a union's organizing campaign, which included overt salting. The NLRB upheld the administrative law judge's conclusion that the suit interfered with employees' rights to file charges with the NLRB, to engage in other concerted activities through a "job targeting program,"⁹⁸ and to seek employment for organizing purposes.⁹⁹ Since interference with such rights would independently violate Section 8(a)(1) of the NLRA, the lawsuit itself would be unlawful under traditional NLRA principles.

In *Loehmann's Plaza*,¹⁰⁰ the NLRB considered another aspect of preemption: when does preemption occur? The NLRB concluded that preemption occurs when the General Counsel issues a complaint.¹⁰¹ If the NLRB ultimately concludes that the conduct is unprotected by the NLRA, the state court suit can be revived.¹⁰² If, on the other hand, the NLRB concludes that the conduct is protected, the NLRB's decision supersedes any contrary decision of the state court.¹⁰³ The remedy for post-complaint prosecution of the state court lawsuit involving protected conduct includes reimbursement of legal expenses incurred in defending the suit after the point of preemption.¹⁰⁴

2. *Illegal Object Cases*

It is well-settled that the NLRB has the authority to enjoin prosecution of a state court lawsuit that seeks to achieve an objective that is prohibited by the federal labor laws.¹⁰⁵ In *Manno Electric*, the NLRB affirmed the administrative law judge's conclusion that a lawsuit has an illegal objective "if it is aimed at achieving a result

98. *Id.* at 298. A "job targeting program" involves the use of union funds to supplement the wages of employees who work for a union contractor. The union contractor can then bid on jobs against non-union contractors who enjoy a competitive advantage because of lower wage rates. Unions are thereby able to both preserve the union wage scale and obtain work for their members. *See id.*

99. *Id.* at 297-98.

100. 305 N.L.R.B. 663 (1991), *rev'd on other grounds*, 316 N.L.R.B. 109 (1995).

101. *Id.* at 670.

102. *Id.* at 671-72 n.56.

103. *Id.* at 672 n.59.

104. *Id.* at 672.

105. *See, e.g.,* Granite State Joint Bd., Textile Workers Union, 187 N.L.R.B. 636, 636 (1970), *enforcement denied*, 446 F.2d 369 (1st Cir. 1971), *rev'd*, 409 U.S. 213 (1972) (enjoining from pursuing state court lawsuit to enforce union fine that could not be lawfully imposed under the NLRA).

incompatible with the objectives of the [NLRA].”¹⁰⁶ In *Manno Electric*, an electrical contractor filed a state court lawsuit against a local union, its representatives, and individuals who either had worked for or applied for work with the contractor.¹⁰⁷ Among the allegations of the state court lawsuit were that the defendants had made false and defamatory statements about the contractor to the NLRB. The administrative law judge, concluding that one of the objectives of the NLRA is to provide free access to the NLRB, found that because the state court lawsuit sought to discourage worker access to the NLRB, the lawsuit was incompatible with the objectives of the NLRA.¹⁰⁸

3. Retaliatory Lawsuits

In *Bill Johnson's Restaurants, Inc. v. NLRB*,¹⁰⁹ the Supreme Court held that the NLRB could not, consistent with the First Amendment right to petition the government for redress of grievances, enjoin a well-founded state court lawsuit even if the suit were filed in retaliation for the exercise of rights protected under Section 7 of the NLRA. The Court held, however, that the NLRB could enjoin such a suit if the NLRB found that the suit lacked a “reasonable basis.”¹¹⁰ The obvious question is how the NLRB should undertake this “reasonable basis” analysis. The Supreme Court rejected the argument that the NLRB’s inquiry may not go beyond the “four corners” of the complaint.¹¹¹ Rather, the Court attempted to strike a balance:

Although the [NLRB’s] reasonable-basis inquiry need not be limited to the bare pleadings, if there is a genuine issue of material fact that turns on credibility of witnesses or on the proper inference to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined.¹¹²

Yet, the Court also said that the NLRB need not stay its hand “if the plaintiff’s position is plainly foreclosed as a matter of law or

106. 321 N.L.R.B. 278, 297 (1996).

107. *Id.* at 279.

108. *Id.*

109. 461 U.S. 731 (1983).

110. *Id.* at 745-49.

111. *Id.* at 744.

112. *Id.* at 744-45.

is otherwise frivolous."¹¹³ Significantly, the Court emphasized that its holding was confined to state court lawsuits that were filed for a retaliatory purpose.¹¹⁴

On remand, the NLRB concluded that the employer restaurant had violated Section 8(a)(4) and (1) of the NLRA by filing and prosecuting a state court lawsuit against certain of its employees.¹¹⁵ The restaurant sued after the employees had engaged in picketing and handbilling to protest certain work-related grievances.¹¹⁶ The suit alleged that the employees had engaged in mass picketing and harassment, blocked ingress to and egress from its facility, and created a threat to public safety.¹¹⁷ The state court granted summary judgment against the employer on those claims.¹¹⁸ Because the state court granted summary judgment, the NLRB held that a portion of the employer's suit lacked a reasonable basis.¹¹⁹ The NLRB also held that since the restaurant sued simply because the employees had filed a charge with the NLRB and engaged in concerted protected activities, the employer's lawsuit was filed for a retaliatory motive.¹²⁰ As part of the remedy, the NLRB ordered the employer to reimburse the employees for attorneys' fees and other expenses incurred in defending the non-meritorious state court claims.¹²¹

113. *Id.* at 747.

114. *Id.* at 737-38 n.5. The Court further emphasized that its holding in *Bill Johnson's Restaurants* did not apply to lawsuits which were preempted by federal labor laws or to lawsuits with unlawful objectives. *See id.*

115. *Bill Johnson's Restaurants*, 290 N.L.R.B. 29, 31 (1988).

116. *Id.* at 29.

117. *Id.*

118. *Id.*

119. *Id.* at 31-32.

120. *Id.* Subsequent relevant cases include *Johnson & Hardin Co.*, 305 N.L.R.B. 690, 692 (1991) (holding that criminal trespass complaint filed against union organizers by employer with no rights to relevant property was meritless and retaliatory), *enforced in relevant part*, 49 F.3d 237 (6th Cir. 1995); *Phoenix Newspapers, Inc.*, 294 N.L.R.B. 47, 47-48 (1989) (summarily dismissing libel suit seeking large punitive damages held meritless and retaliatory); *Summittville Tiles, Inc.*, 300 N.L.R.B. 64, 66 (1990) (holding that lawsuit against employees for malicious prosecution because they previously filed unfair labor practice charge was meritless and retaliatory).

121. *See Bill Johnson's Restaurants*, 290 N.L.R.B. at 32-33. The Circuit Courts of Appeals have generally agreed with the Board's position that a reimbursement remedy can be extended to both employees and unions. *See Geske & Sons, Inc.*, v. NLRB, 103 F.3d 1366, 1378-79 (7th Cir. 1997) (collecting cases). *But see Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 243-44 (6th Cir. 1995) (concluding that a reimbursement remedy is limited to employees).

4. Discovery

Both state and federal civil proceedings allow for broad discovery procedures. For example, Rule 26.02(a) of the Minnesota Rules of Civil Procedure, which is derived from Rule 26(b)(1) of the Federal Rules of Civil Procedure, provides that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party, seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if that information appears reasonably calculated to lead to the discovery of admissible evidence.¹²²

Although Rule 26.02(a) of the Minnesota Rules of Civil Procedure provides for broad discovery, it does not provide for unlimited discovery. Rather, Rule 26.02(a) limits discovery to matters that are "not privileged."¹²³ Thus, a discovery request cannot be used to require production of otherwise privileged information. If the information sought is privileged as a matter of federal law, it is not discoverable under state law.¹²⁴ In addition, Rule 26.02(a) limits discovery to a matter "which is relevant to the subject matter involved in the pending action"¹²⁵ Thus, a discovery request must satisfy a threshold test of relevance. If the information sought is not "relevant," there is no reasonable basis under Minnesota state law for requesting the information through discovery.¹²⁶

5. Discovery and the Federal Labor Laws

Unfortunately, the Supreme Court did not address the issue of

122. MINN. R. CIV. P. 26.02(a).

123. *Id.*

124. *See Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) (stating, "[i]t is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules).

125. *Id.*

126. *Id.* Discovery requests can independently constitute an unfair labor practice. *See Manno Elec., Inc.* 321 N.L.R.B. 278, 298 (1996); *see also Halloran v. Fisher Foods, Inc.*, 96 L.R.R.M. 3093, 3095 (N.D. Ohio 1977) (denying defendant's motion to compel discovery related to NLRB affidavits or their contents).

the scope of discovery in *Bill Johnson's Restaurants*.¹²⁷ However, it would be pointless to allow a suit to progress while making it procedurally impossible for a plaintiff to establish that its suit had merit. Accordingly, we must assume that the Court intended that plaintiffs in a *Bill Johnson's Restaurants* case could pursue discovery in order to establish the merits of their suit. A significant question remains, however: do federal laws place any limitations on the scope of discovery in a state court lawsuit?

a. Scope of Discovery: Garmon Preemption Analysis

The rationale underlying *Garmon* preemption is protection of the NLRB's primary jurisdiction to adjudicate conduct that is clearly, or even arguably, protected by Section 7 or prohibited by Section 8.¹²⁸ *Garmon* preemption is jurisdictional in nature: "[a] claim of *Garmon* preemption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* preemption is raised, it must be considered and resolved by the state court."¹²⁹

It is well settled that *Garmon* preemption imposes limits on state substantive law in the area of labor relations. For example, in *Linn v. United Plant Guard Workers of America Local 114*,¹³⁰ the United States Supreme Court imposed a standard derived from *New York Times Co. v. Sullivan*¹³¹ on state libel actions that arose in the context of labor relations.¹³² Similarly, in *Farmer v. United Brotherhood of Carpenters & Joiners of America Local 25*,¹³³ the Court relied on the federal labor laws in imposing limitations on state causes of action for intentional infliction of emotional distress.¹³⁴ The policy justification underlying these limitations on state substantive law—avoidance of "the potential for interference with the federal regulatory scheme"¹³⁵—is no less applicable to state procedural law.

Unlike state and federal civil litigation, discovery in NLRB proceedings is extremely limited.¹³⁶ For example, statements given

127. 461 U.S. 731, 733 (1983).

128. *Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 502-03 (1984).

129. *International Longshoremens' Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 393 (1986).

130. 383 U.S. 53, 55 (1966).

131. 376 U.S. 254, 256 (1964).

132. *Linn*, 383 U.S. at 65.

133. 430 U.S. 290, 292 (1977).

134. *Id.* at 295.

135. *Id.* at 297.

136. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236-37 (1978).

to the NLRB during the course of an investigation are not producible under the Freedom of Information Act¹³⁷ or otherwise unless the witness testifies at trial. To require production of such statements would "necessarily . . . interfere in the statutory sense with the Board's enforcement proceedings."¹³⁸ The identities of employees who signed union authorization cards or attended union meetings are likewise protected from disclosure.¹³⁹ Further, Section 8(a)(1) of the NLRA generally prohibits intrusive questioning of employees concerning their or other employees' Section 7 activities.¹⁴⁰ Depositions are permitted only upon a showing of "good cause."¹⁴¹ Under the NLRB's interpretation, the "good cause" rule generally does not permit pretrial discovery. Rather, the rule simply provides a device for preserving evidence, including deposing a witness whose testimony will be unavailable for trial.¹⁴² Thus, the scope of discovery in NLRB proceedings differs markedly from that available in civil litigation generally.

State court civil lawsuits sometimes raise substantive issues that parallel issues in an NLRB proceeding. The domain of relevant evidence in the two proceedings, therefore, inevitably overlaps. If the issues in the two proceedings substantially overlap, the state court (or, for that matter, the federal court) would lack jurisdiction¹⁴³ and the discovery issue would simply dissolve. But suppose

Considerations of undue delay and the possibility of intimidation of employee witnesses by their employer are among the reasons advanced for not providing pretrial discovery in NLRB proceedings. See *id.* at 239-42.

137. 5 U.S.C. § 552 (b) (1994) (exempting certain information from disclosure). See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242-43. The statements are not producible even if copies have been given to a union. *H.B. Zachry Co.*, 310 N.L.R.B. 1037, 1038 (1993).

138. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 243 (internal quotation marks omitted).

139. See *National Telephone Directory Corp.*, 319 N.L.R.B. 420, 422 (1995).

140. 29 U.S.C. §§ 157, 158 (a)(1) (1994). The Board's approach in deciding whether questioning employees is unlawful is set forth in *Rossmore House*, 269 N.L.R.B. 1176, 1176 (1984), *enforced*, *Hotel Employees & Restaurant Employees Union, Local 11 v. N.L.R.B.*, 760 F.2d 1006, 1008 (9th Cir. 1985). One exception allows questioning employees during pretrial preparation in the defense of an unfair labor practice proceeding provided that certain safeguards are observed. See *Johnnie's Poultry Co.*, 146 N.L.R.B. 770, 775 (1964), *enforcement denied*, 344 F.2d 617, 621 (8th Cir. 1965) (concluding that the NLRB's factual determinations were not supported by substantial evidence).

141. 29 C.F.R. § 102.30 (1997).

142. *Kenrich Petrochemicals, Inc. v. NLRB*, 893 F.2d 1468, 1484-85 (3d Cir. 1990); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 859-60 (2d Cir. 1970).

143. *Bakery Workers Local 6 (Stroehmann Bakeries)*, 320 N.L.R.B. 133, 137-38 (1995) (federal district court lacked subject matter jurisdiction to resolve

the case involves conduct that is of "peripheral concern" to the federal labor laws or involves interests that are "deeply rooted in local feeling and responsibility," falling within one of the *Garmon* exceptions. Also suppose that one of the reasons, if not the principal reason, for filing the state court lawsuit is to secure pretrial discovery for a pending NLRB hearing. If evidence is producible under broad state discovery rules but not producible under restrictive NLRB rules, an important question arises: who decides whether evidence is discoverable?

Traditional *Garmon* principles dictate that the party claiming preemption of discovery would bear the burden of persuasion.¹⁴⁴ The objecting party would argue that, even assuming the evidence sought through discovery is relevant to the state court lawsuit, the NLRB must determine whether such evidence is protected from disclosure. In other words, the issue of whether the evidence is protected must be "initially decided by the NLRB, not the state courts."¹⁴⁵ Therefore, the state court's jurisdiction to decide discovery issues would be preempted. On the other hand, the proponent of discovery would argue that the state court has authority to resolve discovery issues pursuant to the Supreme Court's holding in *Sears, Roebuck & Co.*, provided that no charge involving discovery is pending before the NLRB.¹⁴⁶

b. Scope of Discovery: Illegal Object Analysis

One can argue that a request for discovery of any information that is protected under federal law or otherwise interferes with employees' union or other concerted activities "is aimed at achieving a result incompatible with the objectives of the NLRA."¹⁴⁷ On this theory, discovery would be preempted regardless of the information's relevance to a state court proceeding. "If employee conduct is protected under Section 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy

plaintiff's claim because it raised representation issues that fall within the NLRB's jurisdiction); *American Pacific Concrete Pipe Co.*, 292 N.L.R.B. 1261, 1261-62 (1989) (state court jurisdiction preempted under *Garmon* because plaintiff's claim seeks to adjudicate many of the same issues that were pending before the NLRB).

144. *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 395 (1986).

145. *Id.* at 394.

146. *See supra* notes 101-103 and accompanying text.

147. *See supra* notes 115-23 and accompanying text.

Clause."¹⁴⁸ Where such a conflict exists, "[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that federal law must prevail."¹⁴⁹ Preemption follows "as a matter of substantive right."¹⁵⁰ Moreover, if the discovery sought were essential to maintenance of the state lawsuit, one could further argue that the entire lawsuit is preempted as an unlawful interference with federally protected rights.¹⁵¹

c. Scope of Discovery: Retaliatory Lawsuit Analysis

In *Bill Johnson's Restaurants*, the United States Supreme Court noted that "[a] lawsuit may be used by an employer as a powerful instrument of coercion or retaliation."¹⁵² Because of the possibility that discovery could be used in a coercive or retaliatory manner, discovery can be precluded altogether if a state court lawsuit is demonstrably baseless or otherwise interferes with the exercise of Section 7 rights.¹⁵³ Thus, if the state court plaintiff "provides no evidentiary basis for that suit and fails to describe what evidence he expects to obtain through discovery and to explain why he has not been able to obtain that evidence, the Board may properly enjoin prosecution of that suit prior to discovery."¹⁵⁴

One can also argue that *any* discovery request that seeks information not relevant to the subject matter of the action constitutes a violation of the NLRA. As developed above,¹⁵⁵ the elements of a *Bill Johnson's Restaurants* violation are (1) that the employer sued in retaliation for the exercise of Section 7 rights and (2) that the lawsuit lacks a reasonable basis in fact or law.¹⁵⁶ A discovery re-

148. *Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 501 (1984).

149. *Id.* at 503 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

150. *See id.*

151. *Cf. American Pacific Concrete Pipe Co.*, 292 N.L.R.B. 1261, 1262 (1989) (explaining that the NLRB has exclusive jurisdiction and state court lawsuit preempted under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) because it "seeks to adjudicate many of the same issues involved" in a proceeding before the NLRB).

152. 461 U.S. 731, 740 (1983). The court further explained that by suing an employee who files charges with the Board, an employer provides a notice to employees that those who file charges may subject themselves to a possible lawsuit. *See id.*

153. *See Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997). The Court held the plaintiff employer's suit against the union was clearly baseless, and was filed for retaliatory reasons. *See id.* at 1379.

154. *Id.*

155. *See supra* notes 110-11 and accompanying text.

156. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745-49 (1983).

quest in furtherance of a retaliatory lawsuit would itself be retaliatory on the theory that it is simply a means used to achieve a retaliatory objective. Since a request to discover irrelevant evidence lacks a reasonable basis in law, it follows that requests to discover irrelevant information in support of a retaliatory lawsuit constitute violations of Section 8(a)(1).¹⁵⁷

In addition, if the discovery request independently interferes with employee Section 7 rights (for example, by seeking to elicit otherwise protected information concerning employee union or other concerted activities), it would a fortiori violate Section 8(a)(1). Finally, since such discovery requests lack a reasonable basis under state law, the First Amendment considerations underlying *Bill Johnson's Restaurants* are not present. Accordingly, the employer's conduct would be enjoined by the NLRB as an unfair labor practice.

This analysis raises a further problem. Does the state court or the NLRB make the determination that if a discovery request lacks a reasonable basis under state law it is therefore enjoined under federal law? Rule 26.03 of the Minnesota Rules of Civil Procedure permits a party to seek a protective order limiting discovery. If the defendant moves to preclude discovery on the ground that the materials sought are not relevant, the state court's ruling will effectively resolve the *Bill Johnson's Restaurants* issue. If the state court grants the motion, discovery is precluded as a matter of state law and there is nothing to enjoin pursuant to *Bill Johnson's Restaurants*. If the state court denies the motion, however, further proceedings pursuant to *Bill Johnson's Restaurants* would be inappropriate because the state court has effectively concluded that the discovery request has a reasonable basis under state law.

Yet, suppose the defendant does not file a motion for a protective order and instead simply files a charge with the NLRB.¹⁵⁸ In that case, the NLRB's General Counsel initially, and the NLRB itself ultimately, would have to make the reasonable basis determination. That determination would require the General Counsel and the NLRB to evaluate *both* substantive state law claims *and* the scope

157. See *Bill Johnson's Restaurants*, 461 U.S. at 755 (Brennan, J., concurring) (stating "There is no constitutionally privileged method of harassing or punishing those who exercise rights protected by Sections 7 and 8 of the NLRA.").

158. Since the cost of investigating a charge and prosecuting a meritorious charge before the NLRB is borne by the government, there is an obvious economic incentive for filing a charge rather than seeking a protective order.

of discovery permitted under those claims. In doing so, the General Counsel and the NLRB would be evaluating substantive and procedural state law issues that are far removed from their area of expertise.¹⁵⁹ Moreover, since reasonable basis in this circumstance turns on relevance, the General Counsel and the NLRB would effectively supplant the state court as the arbiter of relevance, determining what, under state law, is discoverable. It is not difficult to imagine that the General Counsel and the NLRB would, for practical and/or institutional reasons, "decline . . . the invitation to enter that thicket."¹⁶⁰

D. Wright Electric, Inc.

The issues discussed in this article can perhaps be best illustrated by a concrete example. A suit is pending in Minnesota state court involving an electrical industry contractor's attempt to redress injuries by utilizing traditional state law principles.¹⁶¹ The injuries arose out of allegedly unprotected conduct in the context of covert salting.¹⁶² Not surprisingly, the defendants in that state court suit have responded by initiating proceedings before the NLRB.¹⁶³ These parallel proceedings raise exceptionally difficult and interesting issues concerning the proper allocation of state and federal authority in regulating labor-management relations.

In the fall of 1992, then-IBEW Local 292 Business Representative Michael J. Priem enlisted IBEW member Thomas A. Ouellette to serve as a covert salt in an effort to organize the employees of Wright Electric, Inc. (Wright Electric).¹⁶⁴ Ouellette filled out an employment application with Wright Electric.¹⁶⁵ The application contained language that provided in part that the information was "true and complete" and that the applicant understood that "false

159. Cf. *Bill Johnson's Restaurants*, 290 N.L.R.B. 29, 32 (1988) (declining to adjudicate the merits (as opposed to the reasonable basis) of a state law claim; also commenting that "[o]ur expertise lies in resolving labor law questions that arise under the Act, rather than deciding claims that arise under state law.") (footnote omitted).

160. *Id.*

161. See *Wright Elec., Inc. & International Bhd. Of Elec. Workers, Local 292, AFL-CIO*, Nos. 18-CA-12820, 18-CA-13193, 18-CA-13369, 1996 NLRB LEXIS 778 (N.L.R.B. Nov. 26, 1996).

162. See *id.* at *15.

163. See *id.* at *1.

164. See *id.* at *4.

165. See *id.* at *3.

or misleading" information "may result in discharge."¹⁶⁶ Ouellette nonetheless misstated and omitted information that might have disclosed that he had worked for electrical contractors that had collective bargaining agreements with the IBEW.¹⁶⁷ Wright Electric eventually learned about these misstatements and omissions and fired Ouellette.¹⁶⁸ A charge alleging that Ouellette's discharge violated Section 8(a)(3) and (1) of the NLRA was dismissed.¹⁶⁹

On August 24, 1993, Wright Electric filed suit in Hennepin County District Court against IBEW Local 292, Priem and Ouellette.¹⁷⁰ The suit alleged that all three defendants deliberately misrepresented Ouellette's employment history; that Wright Electric would not have hired Ouellette had it known of that misrepresentation or his true employment history; and that it had suffered damages due to the false application. The suit alleged that the defendants' conduct was actionable under Minnesota law as (1) a breach of Ouellette's employment contract; (2) a breach of Ouellette's fiduciary duty and duty of loyalty; (3) unjust enrichment; (4) fraudulent misrepresentation; (5) fraudulent concealment; and (6) wrongful use by the defendants of the Employer's physical facilities, vehicles and equipment for their own purposes.¹⁷¹ The complaint further alleged that the defendants were liable for malicious prosecution in the filing of the unfair labor practice charge concerning Ouellette's discharge, and also for filing a claim for unemployment compensation benefits.¹⁷² The relief sought by Wright Electric included (1) the costs of hiring, training and replacing Ouellette; (2) all salary and benefits paid to Ouellette; (3) the value of the facilities, equipment and supplies used by Ouellette; (4) attorneys' fees and costs; (5) declaratory relief; and (6) a permanent injunction prohibiting the defendants from submitting applications containing false information to *any* employer.¹⁷³ Wright Electric subsequently filed an amended complaint adding a claim for punitive damages.¹⁷⁴

In support of its state court complaint, Wright Electric sought

166. *See id.*

167. *See id.*

168. *See id.* at 4.

169. *See id.* at *14.

170. *See id.* at *12.

171. *See id.* at *16.

172. *See id.* at *17-*18.

173. *See id.*

174. *See id.* at *18.

to discover, inter alia, IBEW Local 292's efforts to salt it and other non-union employers.¹⁷⁵ In addition, Wright Electric sought to depose three named "salts" and representatives of certain educational institutions and employers at which the three salts had studied or worked.¹⁷⁶ Wright Electric also sought various educational and work records from the educational institutions and employers concerning the three salts.¹⁷⁷

Hennepin County District Court Judge Stephen D. Swanson eventually dismissed both of the malicious prosecution counts against all three defendants for failure to state a claim upon which relief could be granted.¹⁷⁸ He refused to dismiss the remaining counts.¹⁷⁹

IBEW Local 292 responded to Wright Electric's state court lawsuit by filing a charge and amended charge with the NLRB.¹⁸⁰ The Regional Director for the Eighteenth Region, on behalf of the General Counsel, issued a series of complaints against Wright Electric with respect to the state court lawsuit, the discovery requests, and other issues.¹⁸¹ More specifically, the Regional Director alleged that Wright Electric's state court malicious prosecution counts lacked a reasonable basis and had been dismissed and that the state court lawsuit was filed for a retaliatory basis; and that therefore the lawsuit violated Section 8(a) (4) and (1) of the NLRA with respect to the malicious prosecution counts.¹⁸² Thus, this aspect of the complaint is squarely predicated on a *Bill Johnson's Restaurants* theory of the violation. The Regional Director further alleged that the information Wright Electric sought to discover as described above was not relevant to its state court lawsuit and was protected information concerning IBEW Local 292's organizing activities; that by seeking this information Wright Electric interfered with employ-

175. See *id.* at *7. Wright Electric also sought to discover (1) communications with Wright Electric's employees; (2) authorization cards received from Wright Electric's employees; (3) charges or complaints filed against Wright Electric by IBEW Local 292; (4) information relating to three named and other unnamed "salts"; and (5) newsletters or informational bulletins given to members since January 1, 1991 which urged or advised employees to misrepresent matters of fact to employers. See *id.*

176. See *id.*

177. See *id.*

178. See *id.* at *19-*20.

179. See *id.* at *21.

180. See *id.* at *1.

181. See *id.* at *1-*2.

182. See *id.* at *6-*7.

ees' exercise of their Section 7 rights; and that therefore Wright Electric violated Section 8(a)(1) by pursuing these discovery requests.¹⁸³ Thus, the discovery aspect of the complaint is likewise predicated on a *Bill Johnson's Restaurants* theory.

Following a hearing on the complaints issued against Wright Electric, Administrative Law Judge William J. Pannier III dismissed all of the state court lawsuit and discovery allegations of the complaints.¹⁸⁴ With respect to the malicious prosecution claims, Judge Pannier concluded that although Judge Swanson had dismissed those claims, they were still appealable. Since there had been no final determination that the malicious prosecution claims lacked a reasonable basis under Minnesota law, one of the predicates for proceeding under *Bill Johnson's Restaurants* had not been satisfied. With respect to the discovery allegations, Judge Pannier concluded that neither he nor the NLRB would attempt to determine whether, as a matter of state law, the materials sought were relevant.¹⁸⁵ To do so, according to Judge Pannier, would in essence involve the NLRB in "micro-management of state court litigation."¹⁸⁶

Judge Pannier's decision is now before the NLRB on exceptions. The parties in the state court lawsuit have agreed to hold that proceeding in abeyance pending the NLRB's decision.

V. CONCLUSION

There can be no doubt that salting is generally a lawful organizing technique. Although Congress has considered legislation outlawing salting, it has not moved forward, and such legislation currently faces administrative opposition. This is not to say, however, that employers are entirely helpless. The NLRB generally excludes paid union organizers from voting in representation elections. Also, employers may lawfully discharge a salt for falsifying an employment application if nondiscriminatory bases exist. Moreover, salt applicants generally do not have free access to an employer's property before being hired, and encouragement to organize by employees may still be limited to appropriate times and places.

183. See *id.* at *8- *9.

184. See *id.* at *44. Judge Pannier did conclude that Wright Electric violated Section 8(a)(3) and (1) of the NLRA by refusing to hire or consider for hire an employee. *Id.* at *57.

185. See *id.* at *46.

186. See *id.*

As the pending *Wright Electric* case demonstrates, there is at present considerable uncertainty concerning the use of state court lawsuits in the context of salting. Since both state court lawsuits and discovery can violate the NLRA, the NLRB may be required to consider both state substantive and procedural law in adjudicating cases. This raises several fundamental and as yet unresolved policy issues. The NLRB is the entity that has principal responsibility for preventing and remedying violations of the NLRA. As the NLRB itself has acknowledged, its area of expertise does not extend to adjudicating claims arising under state law. Should the NLRB play an active or deferential role with respect to state court actions that implicate federal labor law rights? In addition, the scope of discovery under state law is generally much broader than under the NLRA. What is the appropriate scope of discovery in cases where state law and the NLRA overlap? The stakes are large for employers, unions and employees. On the one hand, employer state court actions expose unions and employees to expansive discovery and potential damages for fraud, misrepresentation and other state law violations. On the other hand, an employer that pursues an illegal object, preempted or retaliatory lawsuit may be liable under the NLRA for the costs, including attorneys fees, incurred by the defendants in defending against the lawsuit. Thus, the uncertainties as to the role of the NLRB and the scope of discovery, taken together with the magnitude of the stakes involved, suggest that employers should exercise considerable caution before instituting state court lawsuits in response to salting.