SALTING UPDATE: A PEPPERY ROAD
by Thomas R. Davies, Esquire

Salting is a tactic used by unions to infiltrate and organize nonunion employers. When this tactic is employed, unions send members known as salts to apply for jobs with targeted nonunion employers. Some salts operate covertly and apply for and receive jobs with the nonunion employer without revealing their union ties. If enough of them infiltrate the company and scatter like salt from a shaker, it increases the union's chances of organizing the worksite. Other salts will openly and sometimes antagonistically display their union ties during the application process. Then, if not hired, these salts will sue the employer for unfair labor practices. Indeed, many salting efforts appear to have little to do with legitimate organizing efforts, rather they seem designed to harass employers.

When this happens, the employer must demonstrate a valid, non-discriminatory reason for its denial because in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 95 (1995) the U.S. Supreme Court held that even full time union organizers who apply for positions as salts are employees protected under the National Labor Relations Act (NLRA). For the same reason, employers must treat salts the same as other employees when it comes to promotion, discipline, termination, and other terms and conditions.

In 2001, when our original salting update was published, union organizers had the upper hand. That year, the NLRB issued two pro-employee decisions in which the NLRB refused to reduce the employees' back pay even though the employers asserted that the employees failed to mitigate their damages by seeking only union sanctioned employment rather than any available employment. These decisions only increased the disruptive and costly effect unions could have on nonunion employers.

In the following years, when NLRB members appointed by President Bush controlled the Board, the tides changed. In 2004 and 2005, the Board found that the consistent use of well-defined hiring policies was a valid defense to a refusal-to-hire charge. (CBI Na-Con, Inc., 343 NLRB 792 and Zurn N.E.P.C.O., 345 NLRB 12) Then, in *Oil Capitol Sheet Metal Inc.*, 349 NLRB 1348, the NLRB reversed the burden of establishing the duration of back pay. Before *Oil Capitol Sheet Metal*, employers had the burden of proving a union salt would not have worked the entire back pay period claimed by the NLRB General Counsel. However, in *Oil Capitol Sheet Metal*, the NLRB decided to reconsider the appropriate back pay period in salting refusal-to-hire cases. The NLRB explained that in a non-salting case there is a "rebutable presumption" that the back pay period should continue indefinitely from the date of discrimination until an offer of reinstatement is made. But a salt, unlike other applicants, often does

not seek employment for an indefinite duration; rather, many salts remain or intend to remain with the targeted employer only until the union's defined objectives are achieved or abandoned.

From the NLRB's perspective, much of the uncertainly regarding the duration of back pay is attributable to the salt and not the employer. Therefore, the employee is in the best position to prove the reasonableness of the claimed back pay by presenting evidence such as the salt's personal circumstances, union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the salt and union concerning the anticipated duration of the assignment, and historical data regarding the duration of employment of the salt and other salts in similar salting campaigns.

For these reasons, the NLRB held that for the NLRB General Counsel must present evidence that the salt, if hired, would have worked for the employer for the back pay period claimed. The NLRB noted that its decision extended to unlawful discharges and layoffs. Recognizing this victory, the then Chairman of ABC said the decision showed that the NLRB "recognized that the practice of union salting has a devastating and often crippling impact on the nation's small businesses."

Finally, in *Toering Electric Co.,* 351 NLRB 225, the NLRB announced that it would no longer automatically presume an applicant's interest in employment. It instead would place the burden of proving an applicant's general interest on the NLRB general counsel. The NLRB called this an essential change to the effective administration of the NLRA because the presumption that any applicant is genuinely interested in being hired had led to provocative conduct and abuse of the law.

Unfortunately for the open shop construction industry, these NLRB "victories" are likely to be overturned by the new NLRB, which is now controlled by appointees of President Obama, unlike most judicial bodies, the NLRB has a demonstrated track record of sharply changing course when its membership changes. Ultimately, a legislative change is needed to effectively overturn the Supreme Court's *Town & Country* decision. A bill entitled The Truth in Employment Act would accomplish this and has been introduced in every session of Congress for about the past ten years. Given the current political climate, however, it has no chance of passage.

In closing, keep in mind that a salt does not have to be hired, but the refusal to hire should be based on legitimate business reasons. As always, when interviewing someone who appears to be a salt, ensure that the selection

process is uniformly applied to all applicants to avoid being found liable for an unfair labor practice.

This article is not intended to be legal advice, but should be considered general information. Particular questions should be directed to legal counsel.