

The NLRB’s *Oil Capitol* and *Toering* Decisions and Their Effects on Unionization and American Labor Law

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ABSTRACT: In May of 2007, the National Labor Relations Board (“NLRB” or “Board”) radically changed remedies for union salting in the case Oil Capitol Sheet Metal, Inc. In the case, the Board determined that salts, rather than discriminating businesses, must prove what qualified as an adequate remedy for the business’s violation of labor law. This ruling also created a special exception from the general presumption that an employee would stay at a job indefinitely and thus would deserve backpay from the time the business discriminatorily fired the employee until the business offered to rehire the employee. The NLRB’s decision in Toering Electric Co. further deteriorates legal protections for salts, ruling that salts must prove that they had a genuine interest in employment when they were discriminated against by the offending employer.

This decision renders the strategy of overt salting practically useless. At the same time, this decision encourages unions to use salting for the supposedly reprehensible reasons that businesses complained of in their attempt to convince Congress to outlaw the practice of salting. The decision, however, may help provide the necessary impetus for desperately needed changes in labor law that would improve employer–employee relations by providing legal avenues for employees to unionize.

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I. INTRODUCTION

Congress passed the National Labor Relations Act (“NLRA” or “Act”) in 1935. This Act provided employees with the legal right to unionize and engage in collective bargaining.¹ Supporters of the Act hoped that it would craft viable legal avenues for employees to assert their right to unionize, engage in collective bargaining, and ultimately create “industrial peace” in the workplace.² Unfortunately, in the decades after the Act, businesses have found numerous legal and illegal avenues to avoid unionization,³ and since the mid-1950s, union membership in the private sector has steadily declined.⁴

Hoping to stop this half-century-long decrease in influence over employer–employee relations, individual unions and the American Federation of Labor and Congress of Industrial Organizations (“AFL–CIO”) have worked together to create new and aggressive unionization strategies designed for the current legal and social environment.⁵ One of the strategies that garnered significant attention from labor unions in the 1990s was union salting.⁶ The term “salting” refers to a strategy in which union members obtain employment in nonunionized businesses. Once hired, these union members, often called “salts,” pressure nonunion employees to

1. See ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 75–80 (14th ed. 2006) (discussing the impetuses and purposes behind the NLRA).

2. Harry G. Hutchison, *Compulsory Unionism as a Fraternal Conceit?*, 7 U.C. DAVIS BUS. L.J. 3 (2006), <http://blj.ucdavis.edu/article.asp?id=651> (reviewing GEORGE C. LEEF, *FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT* (2006)).

3. See COX ET AL., *supra* note 1, at 153–55 (discussing the passage of the Taft–Hartley Act in 1947, which altered the NLRA by allowing businesses to actively campaign against unionization as long as the business did not retaliate or threaten to retaliate against workers who supported unionization). After the passage of the Taft–Hartley Act, the NLRB showed a tendency to rule in favor of employer-speech rights in cases where the Board could view employer rhetoric as threatening. See *id.* at 155 (discussing NLRB support of businesses in “close cases” dealing with employer anti-unionization rhetoric). Furthermore, many businesses actively choose to violate the NLRA because they have concluded that it is cheaper to break the law defined in the NLRA than to follow the law and risk unionization. See LANCE COMPA, HUMAN RIGHTS WATCH, *UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* 71–75 (2000) (discussing how researchers and Congress have documented a dramatic increase in unfair labor practices since the 1970s).

4. See COX ET AL., *supra* note 1, at 1087 (discussing the decline in union membership since the mid-1950s and noting that the current rate of union membership in the private sector “stands at under 8%”).

5. See Rodney B. Sorensen, Comment, *Crossing the Picket Line in Support of the Union: The New Flavor of Salting*, 38 SANTA CLARA L. REV. 165, 165–67 (1997) (discussing a resurgence in union emphasis upon unionizing new workplaces and influencing presidential elections).

6. See *id.* at 166–67 (explaining that unions increased their use of salting in response to the *Lechmere, Inc. v. NLRB* decision).

join their labor union.⁷ Furthermore, salts typically search for and report unfair labor practices (“ULPs”) committed by the targeted business.⁸ Under current law, a business is guilty of a ULP and exposed to potentially significant financial liability if the business fires or refuses to hire a salt in order to prevent the unionization of the business or to prevent reports of illegal activity.⁹ Although salting has survived numerous legal and legislative challenges, businesses to this day continue to lobby Congress to pass legislation making labor-union salting illegal.¹⁰

The practical value of labor-union salting as a union-recruitment strategy, however, may soon diminish because of the NLRB’s rulings in *Oil Capitol Sheet Metal, Inc.*¹¹ and *Toering Electric Co.*¹² These rulings reversed a decade of precedent¹³ that presumed salts deserved backpay from the moment that businesses discriminated against them—either by illegally firing them or refusing to hire them—to the time that they received an offer of employment or reinstatement.¹⁴ The *Oil Capitol* Board (“Board”) held that the burden of proving a proper remedy for discrimination against salts must belong to the salts themselves.¹⁵ If a salt cannot prove that she would have stayed employed with the offending business indefinitely, the Board will award a salt backpay only for the period of time that the evidence shows the salt would have stayed employed at the business.¹⁶ Meanwhile, in *Toering*, the Board shifted the burden to the complaining union salt to prove that she “is someone genuinely interested in seeking to establish an employment relationship with the employer.”¹⁷ Although couched in common-sense language, the *Oil Capitol* and *Toering* rulings will significantly decrease or practically eliminate any meaningful financial penalty for businesses that discriminate against union salts.¹⁸

This Note examines how the *Oil Capitol* and *Toering* rulings may encourage unions to engage in subversive anti-business tactics in lieu of creating positive unionization strategies. On the other hand, this Note

7. See *infra* Part II (discussing the practice of union salting and the purposes behind using that strategy).

8. *Infra* Part II.

9. See generally *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995) (providing the Supreme Court’s endorsement of the NLRB’s protection of salts against discrimination).

10. See *infra* notes 66–69 and accompanying text (discussing attempts to pass the Truth in Employment Act, which would ban the practice of salting).

11. *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. 1348, 1356–57 (2007).

12. *Toering Elec. Co.*, 351 N.L.R.B. 225, 236–38 (2007).

13. See *Town & Country*, 516 U.S. at 87 (authorizing the NLRB to protect union salts as “employees” under the NLRA).

14. *Oil Capitol*, 349 N.L.R.B. at 1348.

15. *Id.*

16. *Id.* at 1351–52.

17. *Toering*, 351 N.L.R.B. at 228.

18. See *infra* Part III (discussing the *Oil Capitol* and *Toering* rulings).

argues that these two decisions should help add to the political impetus for labor unions to successfully lobby Congress to strengthen penalties for ULPs and ultimately develop full-scale changes to the NLRA. Part II provides a general history of salting and explains why the tactic became popular in the 1990s.¹⁹ Part III examines the *Oil Capitol* and *Toering* rulings, including a review of the reasons behind the decision to unilaterally impose changes in remedies for salting discrimination and the dissents' fierce disagreement with those reasons.²⁰ Part IV explains how the *Oil Capitol* and *Toering* rulings may cause unions to abandon NLRA protections and turn salting into a purely subversive tactic.²¹ Finally, Part V examines how these two rulings expose the dire need for reform in NLRA remedies and how the Employee Free Choice Act ("EFCA") could revive the use of salting in unionization strategies.²²

II. SALTING'S ORIGINS AND LEGAL PROTECTIONS

The term "salting" originated in the mining industry.²³ Historically, mine owners artificially sprinkled, or "salted," their mines with a valuable mineral like gold and hoped that this would make the mine "appear more valuable to investors."²⁴ In the labor setting, salting refers to a union strategy to gain access and unionize a business.²⁵ Unions have used salting as a recruitment strategy for over one hundred years.²⁶ Even though the word "salting" is rooted in a deceitful practice, unions have embraced the use of the term anyway.²⁷

During a salting campaign, a union enlists numerous organizers on a hired or volunteer basis to apply for jobs at a nonunion business.²⁸ These

19. See *infra* Part II (describing the history of union salting).

20. See *infra* Part III (discussing the *Oil Capitol* and *Toering* rulings).

21. See *infra* Part IV (explaining the immediate effects of the *Oil Capitol* and *Toering* rulings on the practice of salting).

22. See *infra* Part V (hypothesizing how the *Oil Capitol* and *Toering* rulings will change labor law).

23. Victor J. Van Bourg & Ellyn Moscowitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer's Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1, 5 (1998) (tracing the history of salting).

24. *Id.* (quoting Jill Hodges, *High Court to Hear Case of Union Tactic*, MINNEAPOLIS STAR TRIB., Oct. 10, 1995, at 1D).

25. See John A. Litwinski, *Regulation of Labor Market Monopsony*, 22 BERKELEY J. EMP. & LAB. L. 49, 80–81 (2001) (defining union salting in the labor setting).

26. See James L. Fox, "Salting" the Construction Industry, 24 WM. MITCHELL L. REV. 681, 682 (1998) (explaining that salting "has been traced to the International Workers of the World, who used [salting] to organize lumber camps at the turn of the century"); Van Bourg & Moscowitz, *supra* note 23, at 5–7 (tracing union salting's roots back to the 1860s).

27. See Fox, *supra* note 26, at 682 (discussing the etymology of the term "salting").

28. See Kenneth N. Dickens, Comment, *Town & Country Electric, Inc. v. National Labor Relations Board: Salts: We're Employees—What Happens Now?*, 99 W. VA. L. REV. 561, 565 (1997) (explaining salting campaigns in a union setting).

organizers, or “salts,” may explicitly inform their target business that they intend to unionize the workplace.²⁹ Once hired, salts attempt to recruit fellow employees to join their labor union.³⁰ Often, salts actively search for business conduct that qualifies as a ULP or violates health and safety laws.³¹ Salts typically report ULPs to the NLRB and health and safety violations to the Occupational Health and Safety Administration.³² However, to maintain their protected status, salts must follow general work rules and “perform [their jobs] adequately.”³³

The NLRB consistently holds that discriminating against salts, whether by an initial refusal to hire or a later discharge, qualifies as a ULP.³⁴ The NLRB reasons that the NLRA provides a broad definition of employees entitled to protection under the Act, and section 8(a)(3) of the Act outlaws all employers from discriminating against employees based upon employee involvement in union activity.³⁵ Although the NLRB allows the facts of each case to determine which salts qualify for a remedy under the NLRA,³⁶ the Board historically maintained that there was a “rebuttable presumption” that qualifying salts should receive backpay³⁷ from the date a business unlawfully refused to hire or fire the salt until the time the business gave the salt a job

29. *Id.* However, sometimes salts conceal their status from employers. See Fox, *supra* note 26, at 684 (explaining that many salts “omit or falsify information to increase their chances of being hired”).

30. Dickens, *supra* note 28, at 565.

31. Kathleen Sheil Scheidt, Comment, National Labor Relations Board v. Town & Country Electric, Inc.: *Allowing a Trojan Horse to Trample Employer Rights*, 24 J. CORP. L. 89, 91 (1998) (explaining that salts “tend to file unfair labor practice claims in an attempt to pressure the employer”); Elizabeth Walpole-Hofmeister, *Organizing: Union ‘Salts’ Being Used to Apply Economic Pressure, House Panel Told*, DAILY LAB. REP., Nov. 1, 1995, at D3 (explaining how a company hired 18,000 workers during an eight-year period and salts were the only employees of that group that filed ULPs).

32. Walpole-Hofmeister, *supra* note 31.

33. Town & Country Elec., Inc., 309 N.L.R.B. 1250, 1257 (1992), *enforcement denied*, 34 F.3d 625 (8th Cir. 1994), *vacated*, 516 U.S. 85 (1995).

34. See Oak Apparel, Inc., 218 N.L.R.B. 701, 701–02 (1975) (ruling that discriminating against a salt is a ULP).

35. *Id.*; see also 29 U.S.C. § 152(3) (2000) (defining an employee as “any employee . . . and . . . 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”); 29 U.S.C. § 158(a)(3) (2000) (defining an unfair labor practice as “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization”).

36. See Pamela A. Howlett, Note, “Salt” in the Wound? Making a Case and Formulating a Remedy When an Employer Refuses to Hire Union Organizers, 81 WASH. U. L.Q. 201, 217–24 (2003) (discussing four different methods the NLRB uses to determine the number of salts who qualify for backpay and instatement or reinstatement).

37. Although a salt’s labor union typically handles the salt’s litigation, it is the salt, and not the union, who receives the backpay award. See *Town & Country Elec.*, 309 N.L.R.B. at 1280 (A.L.J. decision) (awarding the named salts backpay awards, but offering no backpay award to the salts’ union).

offer or offer of reinstatement.³⁸ If the qualifying salt never received a job offer or an offer of reinstatement from the offending business, the NLRB ordered reinstatement or reinstatement, respectively.³⁹ If the salt's "former position no longer exist[ed]," the employee received an offer for a "substantially equivalent" job.⁴⁰ Numerous courts of appeals, however, initially overruled the NLRB's protections for salts.⁴¹

Although unions have engaged in salting for over a century,⁴² and since the mid-1970s the NLRB has explicitly held that the NLRA protects salts from discrimination,⁴³ the power of salting did not receive sustained attention from labor unions until the U.S. Supreme Court restricted union-organizer access to workplaces in *Lechmere, Inc. v. NLRB*.⁴⁴ *Lechmere* held that unions could not organize on a business's private property unless a union could not access a business's employees by any other "reasonable" alternative means.⁴⁵ In reality, *Lechmere's* holding meant that unions could not access business property except in "rare cases" where employees lived on the jobsite.⁴⁶ In *Lechmere's* aftermath, the AFL-CIO Building and Construction Trades Council recommended the use of salting in nonunion construction businesses nationwide.⁴⁷ The AFL-CIO believed that salting would be an effective way to increase unionization among otherwise hard-to-reach nonunion employees in construction settings.⁴⁸

This increase in the use of salting as a unionization tactic, together with the circuit split on the NLRA's definition of employees protected from discrimination for union involvement,⁴⁹ pushed the U.S. Supreme Court to

38. Oil Capitol Sheet Metal, Inc., 349 N.L.R.B. 1348, 1351-52 (2007).

39. See Howlett, *supra* note 36, at 207 (explaining that the Board's remedy will require the offending business to "offer employment . . . to certain individuals who suffered discrimination in hiring").

40. James Ottavio Castagnegra & Kenneth A. Sprang, *Proof That Firing Union "Salt" Is Not Unfair Labor Practice*, 53 AM. JUR. 3D *Proof of Facts* § 22 (1999).

41. See R. Wayne Estes & Andrea E. Joseph, *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, 451 (1997) (explaining that before the U.S. Supreme Court stepped in, three circuits affirmed the NLRB's protection of union salts while three other circuits "denied [salts] employee status").

42. See *supra* note 26 and accompanying text (tracing the history of salting).

43. *Supra* notes 34-40 and accompanying text.

44. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540-41 (1992).

45. *Id.* at 537.

46. DOUGLAS E. RAY ET AL., *UNDERSTANDING LABOR LAW* 75 (2d ed. 2005). The "rare cases" where unions receive access to employer jobsites include situations when employees are "totally inaccessible," such as when workers live on "remote lumber and mining camps." *Id.*

47. Fox, *supra* note 26, at 683.

48. See generally *id.* (explaining that the AFL-CIO viewed salting as a potentially potent tactic for a "'bottom-up' organizing campaign").

49. See Estes & Joseph, *supra* note 41 (discussing the circuit split in opinion over the legal protections for salting).

definitively determine whether the NLRA protects salts as employees. In *NLRB v. Town & Country Electric, Inc.*, the Court unanimously accepted the NLRB's definition of employees covered by the NLRA under section 2(3), and thus found that the NLRB has the authority to provide salts protection against discrimination because of their union involvement.⁵⁰ The Court reasoned that salts, even while working for a union, are "subject to the control of the company employer" while on the job.⁵¹ As long as companies require salts to follow company orders while on company time, a salt's involvement with a union does not equate to "abandonment of . . . service' to the company."⁵²

The Court's confirmation that salts are allowed to receive NLRB protection under the NLRA garnered significant attention from both labor unions and businesses. On the labor side, union leaders hailed the ruling for putting "a legal foundation under [their] organizing efforts."⁵³ Unions immediately found "numerous benefits from the Court's ruling," including (1) increasing access to nonunion workers; (2) giving nonunion workers greater freedom to form a union without fear of employer interference; (3) discouraging businesses from "blacklisting union members"; and (4) providing a clear avenue to prevent businesses from engaging in unlawful hiring practices and to report those that do.⁵⁴ As a result of these potential benefits from the ruling, AFL-CIO President John Sweeney announced that unions would pour \$20 million into numerous salting campaigns nationwide, with the dual goals of training "at least a thousand organizers a year" and diversifying the use of salting into trades outside the construction industry.⁵⁵

Business interests, on the other hand, uniformly condemned the ruling.⁵⁶ A U.S. Chamber of Commerce lawyer complained that the ruling forces businesses "to hire paid agents of the union."⁵⁷ Business interests argued that these agents could engage in subversive tactics like harassing fellow nonunion employees, purposefully working at a slow pace to decrease

50. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 98 (1995).

51. *Id.* at 95.

52. Scheidt, *supra* note 31, at 94 (quoting *Town & Country*, 516 U.S. at 95).

53. Joan Biskupic, *Court Backs Unions' On-job Organizing; Unanimous Decision Allows 'Salting.'* WASH. POST, Nov. 29, 1995, at F03.

54. Dickens, *supra* note 28, at 588.

55. Castagnegra & Sprang, *supra* note 40, § 2.

56. *See, e.g.*, Biskupic, *supra* note 53 (discussing the U.S. Chamber of Commerce's plan to lobby Congress to change the NLRA); Aaron Epstein, *Court Protects Union Organizers; Ruling Is Expected to Increase 'Salting.'* HOUS. CHRON., Nov. 29, 1995, at A8 (quoting a U.S. Chamber of Commerce lawyer as saying that the ruling will "put[] employers in an incredibly bad position"); Linda Greenhouse, *High Court Protects Union Organizers from Dismissals.* N.Y. TIMES, Nov. 29, 1995, at B11 (discussing criticism of the ruling from a contractors' organization).

57. Epstein, *supra* note 56.

workplace productivity, and damaging company property.⁵⁸ Furthermore, business interests claimed that an individual cannot show loyalty to both a business and a union at the same time.⁵⁹ Finally, business interests maintained that hired salts would “drive . . . companies out of business” by bringing numerous ULP charges that are only meant to pressure the business into unilaterally recognizing the union.⁶⁰ To these charges, unions and their supporters countered that salts generally serve as “exemplary employees” who “obey all of the employer’s work rules and . . . work efficiently and skillfully” because they do not want to give the business an excuse to fire them.⁶¹

Business disdain toward the *Town & Country* ruling spurred attempts to contravene the ruling and lobbying to change the law. In order to avoid liability for discriminating against salts, some businesses instituted uniform “no-moonlighting” policies that disqualify from employment any worker who is currently employed elsewhere.⁶² The Sixth Circuit ruled that this policy is not a ULP as long as it applies to every applicant, no matter where else they work.⁶³ Additionally, some businesses have successfully limited the information that employees may disclose on a job application to decrease the amount of evidence available to prove that a business was aware of a salt’s union status.⁶⁴ Although many courts hold that these hiring practices are legal, if a court finds that a business institutes these strategies for the purpose of discriminating against salts, the court will rule that the tactic still qualifies as a ULP.⁶⁵

Furthermore, businesses have lobbied Congress with the goal of pushing through legislation that would outlaw salting.⁶⁶ In 1996, Representative Harris W. Fawell (R-Illinois) introduced the Truth in

58. Melli, Walker, Pease & Ruhly, S.C., *Divided Loyalties: U.S. Supreme Court Rules Paid Union Organizers Are Also Employees of Targeted Company*, WIS. EMP. L. LETTER, Dec. 1995.

59. See Susan E. Howe, Comment, *To Be or Not to Be an Employee: That Is the Question of Salting*, 3 GEO. MASON INDEP. L. REV. 515, 516–17 (1995) (explaining why business interests believe the *Town & Country* ruling contravenes common-law principles of agency).

60. Scheidt, *supra* note 31, at 91.

61. Van Bourg & Moscovitz, *supra* note 23, at 31.

62. See Gregory C. Kloeppel, Note, *Salt Anyone? The United States Supreme Court Holds That Paid Union Organizers Qualify as Employees Under the NLRA in NLRB v. Town & Country Electric, Inc.*, 42 ST. LOUIS U. L.J. 243, 264 (1998) (citing *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426 (6th Cir. 1997)) (discussing business attempts to institute “‘no-moonlighting’ rule[s]”).

63. *Architectural Glass & Metal Co.*, 107 F.3d at 431–33.

64. Van Bourg & Moscovitz, *supra* note 23, at 40; see also *TIC—The Indus. Co. Se. v. NLRB*, 126 F.3d 334, 336 (D.C. Cir. 1997) (allowing businesses to create a uniform rule discarding applications including information not requested, such as “Vet, Boy Scout, or Union Organizer”).

65. See Castanegra & Sprang, *supra* note 40, § 5 (explaining that “rules cannot be used as a pretext for discrimination against union members”).

66. See Fox, *supra* note 26, at 694 (discussing the Truth in Employment Act of 1997).

Employment Act, a bill that would eliminate the NLRA's protection for union salts and thus make it perfectly legal for a business to purposefully fire or refuse to hire salts.⁶⁷ Legislators continue to justify the need for the Truth in Employment Act by claiming that “[s]alts’ are not genuine employees, since their purpose is not to work for the employer, [but] only to instigate a union.”⁶⁸ Although all attempts to pass the Truth in Employment Act have failed thus far, members of Congress have continued to introduce the bill in recent years.⁶⁹

III. THE OIL CAPITOL AND TOERING DECISIONS

A. OIL CAPITOL

1. Facts and Procedural History

Oil Capitol Sheet Metal's NLRB litigation began when Oil Capitol, a sheet-metal contracting business, refused to hire Michael Couch, an experienced labor organizer working for the Sheet Metal Workers' International Union.⁷⁰ Just a few months before applying at Oil Capitol, Couch unsuccessfully attempted to convince the company to “sign a union agreement” and become a union shop.⁷¹

Responding to a newspaper advertisement, Couch later applied for a job with Oil Capitol.⁷² However, Oil Capitol asked Couch to complete a written examination to test his knowledge about construction work.⁷³ The supervisor conducting the test admitted to Couch that no other applicant had to complete the test before the company would consider the applicant for a job.⁷⁴ After Couch expressed concern about the test, the supervisor took Couch to speak with the company president.⁷⁵ Although the president claimed he did not recognize Couch, Couch testified that the two had conversed about the possibility of unionizing Oil Capitol a few months

67. Van Bourg & Moscowitz, *supra* note 23, at 25.

68. Press Release, U.S. Congressman Steve King, King Proposes Law to Protect American Business, Employee (June 12, 2007), available at http://www.house.gov/list/press/ia05_king/61207SaltingIntro.html.

69. See Truth in Employment Act of 2007, H.R. 2670, 110th Cong. (2007) (amending the NLRA to eliminate protection for salts); Truth in Employment Act of 2007, S. 1570, 110th Cong. (2007) (Senate version of the House bill).

70. Oil Capitol Sheet Metal, Inc., 349 N.L.R.B. 1348, 1363–64 (2007) (A.L.J. decision).

71. *Id.* at 1364. The NLRA provides special rules for unionization in construction industries. Section 8(f) of the NLRA allows employers to reach agreements to unionize without first collecting employee signature cards or holding a union election. 29 U.S.C. § 158(f) (2000).

72. *Oil Capitol*, 349 N.L.R.B. at 1364 (A.L.J. decision).

73. *Id.*

74. *Id.* In fact, Oil Capitol hired another salt without administering any examination. *Id.* at 1365. This salt, however, did not disclose that he worked as a union organizer. *Id.*

75. *Id.* at 1364.

earlier.⁷⁶ After a contentious discussion, the president accused Couch “of trying to harass him.”⁷⁷ Oil Capitol did not hire Couch.⁷⁸

The Administrative Law Judge (“ALJ”) ruled that Oil Capitol committed a ULP by discriminatorily refusing to hire Couch.⁷⁹ Following the NLRB’s previous remedy rulings,⁸⁰ the ALJ awarded Couch backpay and ordered Couch’s instatement at Oil Capitol.⁸¹ After an NLRB remand and reaffirmation by the ALJ, the NLRB undertook a second examination of the case.⁸²

2. The NLRB’s Majority Opinion

In the *Oil Capitol* ruling, the NLRB examined whether the presumption of indefinite backpay and instatement, a remedy historically applied by the Board to employees discriminated against for their labor-union support or involvement, should apply to salting cases.⁸³ In a 3–2 decision, the Board found that the general presumption of indefinite employment should not apply to union salts, and thus held that salts, instead of employers, must carry the “burden of proving the reasonableness” of a backpay award.⁸⁴ Furthermore, the Board ruled that if a salt cannot prove that she would have stayed at a job indefinitely, she cannot receive instatement or reinstatement from the employer.⁸⁵ Finally, the Board held that if a salt worked at a temporary job site (like a construction job), she must prove that she would have accepted transfers to other job sites to receive backpay beyond the time period during which the company worked at the temporary site.⁸⁶ The Board ruled that salts carry this burden in both discriminatory refusal-to-hire and discriminatory-firing cases.⁸⁷

The Board provided three reasons for its decision. First, the Board explained that salts should not receive indefinite backpay and instatement because its experience with salting cases demonstrated that salts do not hold jobs at nonunion businesses for long time periods.⁸⁸ Instead, unions

76. *Id.*

77. *Oil Capitol*, 349 N.L.R.B. at 1364 (A.L.J. decision).

78. *Id.*

79. *Id.* at 1369. The ALJ also ruled that Oil Capitol committed a ULP by telling the covert salt that Oil Capitol was a nonunion shop. *Id.* This Note does not examine this ruling, nor its later reversal by the NLRB in the *Oil Capitol* decision.

80. See Howlett, *supra* note 36, at 207 (describing protections for employees after *NLRB v. Town & Country Electric, Inc.*).

81. *Oil Capitol*, 349 N.L.R.B. at 1369 (A.L.J. decision).

82. *Id.* at 1348 (majority opinion).

83. *Id.*

84. *Id.* at 1348–49, 1356.

85. *Id.*

86. *Oil Capitol*, 349 N.L.R.B. at 1349.

87. *Id.*

88. *Id.* at 1351.

generally create “defined objectives” for salts before they start at nonunion shops and expect salts to leave jobs once the objectives “have been achieved or abandoned.”⁸⁹ Second, the Board found that unlike typical employees, unions and salts possess the most pertinent evidence relating to a salt’s intended duration of employment.⁹⁰ Thus, the traditional presumption that the employer holds the most useful evidence to determine an appropriate backpay award in discrimination cases simply does not make sense.⁹¹ The Board provided examples of pertinent evidence held by unions and salts, including “union[] organizing objectives, plans, anticipated deployment of personnel, and employment histories of its salts.”⁹² Third, the Board explained that giving indefinite backpay to salts provided “awards that are more punitive than remedial.”⁹³ The Board pointed to a prior decision where a salt received five years’ worth of backpay even though the salt only stayed with the offending business for five weeks after accepting a remedial reinstatement offer.⁹⁴

The Board acknowledged that it substantively changed the remedy for employer discrimination against salts even though Oil Capitol never addressed the issue in its briefs or asked the Board to change its presumption.⁹⁵ Regardless, the Board justified its decision by explaining that it carries the “responsibility . . . to fashion a specific remedy for unlawful conduct, even if the parties have not sought that remedy.”⁹⁶ Furthermore, the majority recognized that its holding effectively treats employees classified as salts differently than any other employees in discrimination cases.⁹⁷ In support of this differentiation, the Board reasoned that it had the authority to create disparate remedies for different employees because the Supreme Court previously recognized that “the law [does not] treat[] paid union organizers like other company employees in every labor law context.”⁹⁸

Applying this ruling to Couch, the Board found that Oil Capitol committed a ULP by discriminatorily refusing to consider Couch’s application.⁹⁹ However, the Board remanded the case, instructing the ALJ to

89. *Id.*

90. *Id.* at 1352.

91. *Oil Capitol*, 349 N.L.R.B. at 1352.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1353.

96. *Oil Capitol*, 349 N.L.R.B. at 1353.

97. *See id.* at 1350 (discussing the holding in *NLRB v. Town & Country Electric, Inc.*).

98. *Id.* (quoting *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 97 (1995)).

99. *Id.* at 1356.

determine the backpay and reinstatement award in accordance with the Board's new evidentiary requirements for salting cases.¹⁰⁰

3. The Dissent

A stinging dissent attacked the majority opinion for "violat[ing] the well-established principle of resolving remedial uncertainties against the wrongdoer" without providing any sensible reason for a change in precedent.¹⁰¹ The dissent condemned the majority's decision to change remedies without providing the parties an opportunity to brief the issue.¹⁰² Furthermore, the dissent complained that the old remedy of indefinite backpay had survived scrutiny from two circuits and no other circuit had ever rejected it.¹⁰³

The dissent also rebutted each of the majority's three reasons behind changing the remedy for discriminating against salts. First, the dissent criticized the majority's perception that salts stay on jobs for brief time periods.¹⁰⁴ In its opinion, the majority only pointed to four cases to show that salts are generally temporary workers.¹⁰⁵ However, the dissent pointed to cases where salts stayed on jobs for relatively long time periods and thus concluded that a salt,¹⁰⁶ just like any other employee, can stay on a job for an indefinite duration of time.¹⁰⁷ Second, the dissent argued that unions and salts do not have access to relevant information regarding the appropriate amount of backpay because unions rarely have certain predetermined lengths for salting campaigns.¹⁰⁸ Instead, the dissent argued, employers generally determine the length of salting campaigns because unions have no control over employers' hostility toward unions or their willingness to engage in unlawful conduct to avoid unionization.¹⁰⁹ Third, the dissent took issue with the majority's characterization of previous salting discrimination awards as being punitive in nature.¹¹⁰ While acknowledging that some awards may provide backpay for a greater time period than a salt would have stayed employed with a particular business, the dissent argued that virtually every discrimination remedy is a mere "approximation[]" and

100. *Id.*

101. *Oil Capitol*, 349 N.L.R.B. at 1357 (Liebman & Walsh, Members, dissenting in part).

102. *Id.*

103. *Id.* at 1358.

104. *Id.* at 1359.

105. *Id.*

106. *Oil Capitol*, 349 N.L.R.B. at 1359 & n.18 (Liebman & Walsh, Members, dissenting in part) (citing *Tambe Elec.*, 346 N.L.R.B. 380 (2006), where salts stayed on the job for five years, and *Aztech Elec.*, 335 N.L.R.B. 260 (2001), *enforced in part*, 323 F.3d 1051 (D.C. Cir. 2003), where salts stayed with a discriminating business for three years).

107. *Id.* at 1359.

108. *Id.* at 1359–60.

109. *Id.*

110. *Id.* at 1360–61.

that the majority gave no valid reason why the Board should see salting-discrimination cases any differently than other discrimination cases.¹¹¹

B. TOERING

1. Facts and Procedural History

In 1994, the International Brotherhood of Electrical Workers (“IBEW”) instituted a salting campaign against Toering Electric Company (“Toering”).¹¹² This campaign, which was part of a larger IBEW salting campaign that had been in place since 1987, was intended to organize Toering worksites and impose costs that would “cause [Toering] to scale back its business, leave the . . . jurisdiction entirely, or go out of business altogether.”¹¹³ IBEW looked to create these costs through “the filing of unfair labor practice charges at every opportunity.”¹¹⁴ During the 1994 salting campaign, IBEW and its salts filed numerous ULPs; however, after settling the ULPs and earning reinstatement as employees of Toering, no salts ever accepted Toering’s employment offer.¹¹⁵

In 1996, IBEW instituted a second salting campaign against Toering and submitted eighteen employment applications, all of which Toering rejected.¹¹⁶ Subsequently, IBEW and the rejected salts filed ULP charges.¹¹⁷ The ALJ ruled that Toering illegally discriminated against the salts and thus committed a ULP.¹¹⁸

2. The Opinion

The *Toering* majority reexamined the NLRA’s definition of an employee and ultimately held that IBEW’s salts did not qualify as employees protected by the NLRA.¹¹⁹ In the process, the Board created a new test that each salt must meet in order to receive protection as an employee¹²⁰: (1) the

111. *Oil Capitol*, 349 N.L.R.B. at 1361 (Liebman & Walsh, Members, dissenting in part).

112. *Toering Elec. Co.*, 351 N.L.R.B. 225, 225–26 (2007).

113. *Id.* at 225.

114. *Id.*

115. *Id.* at 226.

116. *Id.*

117. *Toering*, 351 N.L.R.B. at 226.

118. *Id.* at 226–27.

119. *Id.* at 236.

120. Although the majority opinion is broadly worded, a later NLRB memorandum explained that the *Toering* test only applies in salting cases. Memorandum from Ronald Meisburg, Office of the Gen. Counsel, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers (Feb. 15, 2008), available at [http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-04%20\(Revised\)%20Guidelines%20Memorandum%20Concerning%20Toering%20Electric%20Company.pdf](http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-04%20(Revised)%20Guidelines%20Memorandum%20Concerning%20Toering%20Electric%20Company.pdf).

individual applied for employment and (2) “the application reflected a genuine interest in becoming employed.”¹²¹

For a salt to prove that she applied for employment, she must show that she either submitted an application herself or authorized a third party (in these cases, the relevant labor union) to submit an application for her.¹²² In the case at hand, an IBEW organizer submitted all eighteen employment applications;¹²³ however, no challenge to the authenticity of those applications appears in the *Toering* decision.

The second part of the test, involving “genuine interest,” allows the challenged employer to “contest the genuineness” of an application with evidence such as prior refusals of job offers, belligerent behavior during a job interview, or other “conduct inconsistent with a genuine interest in employment.”¹²⁴ Once the employer does so, the salt must show by a preponderance of the evidence that she genuinely wished to gain employment with the employer.¹²⁵ Only after the salt proves that she is an NLRA-defined employee will the Board consider the substance of her claim.¹²⁶ In *Toering*, the Board determined that some of the salts lacked evidence showing that they were genuinely interested in employment, and thus they had no claim.¹²⁷

IV. THE IMMEDIATE EFFECTS OF THE *OIL CAPITOL* AND *TOERING* DECISIONS

A. *BUSINESSES WILL FIRE SALTS IMMEDIATELY*

The *Oil Capitol* dissenters worried that weakening salting-discrimination remedies would effectively encourage employers to discriminate against union salts.¹²⁸ Especially when considering construction employers' purported reasons for their hostility toward union salts, the dissent's prediction seems likely to come true.

Shortly after the *Town & Country* decision affirmed the NLRB's authority to protect salts from discrimination, Associated Builders and Contractors President Gary Hess argued that Congress should pass legislation to ban salting because salts seek to increase the “operating and

121. *Toering*, 351 N.L.R.B. at 233.

122. *Id.*

123. *Id.* at 226.

124. *Id.* at 233–34.

125. *Id.*

126. *Toering*, 351 N.L.R.B. at 233–34.

127. *Id.* at 234. In fact, the Board found strong evidence that the salts lacked interest in employment. For example, numerous salts already had full-time jobs elsewhere, others submitted stale resumes, and others failed to testify at the original hearing. *Id.*

128. *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. 1348, 1357 (2007) (Liebman & Walsh, Members, dissenting in part).

legal costs” of nonunion businesses by filing numerous ULP charges.¹²⁹ On average, litigating each ULP charge costs a business approximately \$10,000.¹³⁰

Although unions may file a ULP charge after a business discriminates against a union salt, businesses will quickly recognize that *Oil Capitol* makes discrimination against salts a cost-effective way to limit a union’s ability to discover other business ULPs to report to the NLRB. Many businesses would rather face guaranteed litigation stemming from discrimination against a union salt—a ULP that now carries little chance of substantial financial penalty—and lower the risk that a salt would expose numerous ULP charges that may force a business to change its practices and pay potentially crippling legal fees.

Through the process, businesses will likely become more willing to interrogate a job applicant about her union involvement. Because *Oil Capitol* fails to provide a working definition of a union salt unworthy of general NLRB-defined discrimination penalties,¹³¹ businesses may decide to discriminate against numerous applicants with a history of union support in the hopes of convincing the Board that the employee is a salt. Furthermore, by purposefully seeking to discriminate against both salts and union sympathizers before they can step onto a worksite, businesses may quash the momentum of a current unionization campaign.¹³² Union organization campaigns are generally driven by momentum. By preventing organizers from gaining access to a worksite and subsequently engaging in prolonged litigation, businesses can destroy a potentially effective union campaign.¹³³ Finally, because *Oil Capitol*’s prescribed remedies for salting no longer include an assumption of reinstatement or reinstatement,¹³⁴ businesses can effectively return to the *Lechmere* world of union inaccessibility to a worksite for unionization purposes, as long as they are willing to pay relatively limited litigation costs.

129. Gary E. Hess, *Salting: An Industry Perspective*, 18 J. LAB. RES. 47, 48, 52 (1997). Indeed, Hess claims that “[s]alts so frequently show up at the NLRB officers [sic] that jokes have been made that the salters should maintain offices at the NLRB building for convenient access to file charges.” *Id.* at 52.

130. See Scheidt, *supra* note 31, at 91 (discussing the costs of NLRB litigation and penalties).

131. See *Oil Capitol*, 349 N.L.R.B. at 1361 (Liebman & Walsh, Members, dissenting in part) (stating that the majority’s decision invites litigation in every case regarding whether the discriminatees are salts).

132. Recall that *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), strictly limited union access to nonunion jobsites, thus convincing unions to increase their use of union salts in the early 1990s. See *supra* notes 44–48 and accompanying text (describing *Lechmere* and its aftermath).

133. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 236 (1990) (discussing how businesses have taken advantage of the slow pace of NLRB litigation in the past).

134. *Oil Capitol*, 349 N.L.R.B. at 1349.

B. UNIONS WILL ABANDON OVERT SALTING

In the aftermath of the Supreme Court's *Town & Country* decision, AFL-CIO Organizing Director Richard Bensinger acknowledged that for unions to survive, they must continue to think "'outside the box' of traditional grassroots organizing."¹³⁵ This statement is particularly true when considering that private-sector union membership has declined over the last half-century to less than ten percent of the private-sector workforce.¹³⁶ Thus, to maintain the centuries-old practice of salting in the post-*Oil Capitol-Toering* environment,¹³⁷ unions will likely abandon their dependence upon NLRB remedies and return to covert salting.

First, because the NLRB's legal protections are now virtually worthless to unions and salts, ULP charges of union-salting discrimination will probably decrease. While businesses generally look at the financial costs behind NLRB litigation, unions are usually most concerned with the time costs of a protracted ULP charge.¹³⁸ Unless a ULP charge has a strong likelihood of bringing a useful remedy, unions have little reason to rely upon the NLRA's legal protections. Although some commentators suggest that unions will find a way around the *Oil Capitol* decision by creating written, strategic plans outlining the "anticipated duration" of a salting campaign,¹³⁹ this belief ignores the fact that the Board outlined numerous pieces of evidence besides written plans that boards should consider when determining an appropriate backpay and reinstatement remedy.¹⁴⁰ Now that

135. Cory R. Fine, *Union Salting: Reactions and Rulings Since Town and Country*, 23 J. LAB. RES. 475, 475 (2002).

136. Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 582 (2007).

137. See *supra* note 26 and accompanying text (discussing the historical roots of union salting).

138. See WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 158-162 (1993) (explaining how delays in ULP litigation can lead to a deterioration in employee interest in unionization). Unfortunately, "in the fiscal years 1989 and 1990, it took 736 and 691 days, respectively, from the time that [a 'major'] charge was filed until the Board's decision was issued in unfair labor practice proceedings." *Id.* at 159. In *Oil Capitol*, the employer discriminated against the salt in 1998; almost nine years later, the NLRB's ruling still called for another remand of the case to the ALJ. *Oil Capitol*, 349 N.L.R.B. at 1356.

139. Howard Z. Rosen & W.V. Bernie Siebert, *NLRB Announces New Evidentiary Standards for Establishing Duration of Backpay Period in "Salting" Cases*, LAB. & EMP. L. FLASH, July 2007, http://www.abanet.org/labor/hot_topic/oil_capitol.shtml.

140. See *Oil Capitol*, 349 N.L.R.B. at 1349. The Board stated:

Such evidence may include . . . the salt/discriminatee's personal circumstances, contemporaneous union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the salt/discriminatee and union concerning the anticipated duration of the assignment, and historical data regarding the duration of employment of the salt/discriminatee and other salts in similar salting campaigns.

the current rules for determining a salt's remedy resolve ambiguities against the interests of the salt,¹⁴¹ unions will probably recognize that the Act provides little to no motivation to resolve legal wrongs through the NLRB.

However, this does not mean that salting will disappear. Although unions may not continue to spread salting to new industries like they did in the wake of *Town & Country*,¹⁴² construction unions probably will persist in using covert salts to infiltrate nonunion worksites.¹⁴³ Once on a jobsite, these covert salts will have less motivation to actively gain union support amongst workers, knowing that businesses probably will fire them immediately after discovering the salts' actions.¹⁴⁴ Instead, these salts will focus their attention on uncovering as many non-salting-related ULPs as possible. Once satisfied with their evidence, they will disclose their status as union salts with the purpose of getting fired.¹⁴⁵ The process will circumvent the entire purpose of the NLRA,¹⁴⁶ and the union salts could give targeted businesses even more grief with their new focus than they did before the *Oil Capitol* and *Toering* decisions.¹⁴⁷ Meanwhile, some despondent construction unions may

Id. Worse yet, the Board considered a case where a reinstated salt only stayed on the job for five weeks as evidence that salts do not stay with employers very long. *See id.* at 1351–52 (discussing *Aneco, Inc. v. NLRB*, 285 F.3d 326 (4th Cir. 2002)). However, the Board gives no credence to the fact that the salting campaign may have lasted much longer if the business had hired the salt when she originally applied.

141. *See id.* at 1360 (Liebman & Walsh, Members, dissenting in part) (“[A] union . . . cannot know, let alone prove, how long a campaign *would* have lasted, or how long the salt *would* have stayed to participate in it, if the employer had not acted unlawfully.”).

142. *See supra* text accompanying note 55 (discussing the AFL–CIO’s announcement that it would increase funding for salting campaigns in industries where salting had not been used in the past).

143. Recall that unions have used different forms of salting for over a century now. *Supra* note 26 and accompanying text.

144. *See supra* Part IV.A (discussing how businesses may respond to the *Oil Capitol* and *Toering* rulings).

145. *See Fox, supra* note 26, at 684 (discussing how “covert salts disclose their union affiliation at some strategic point during the employment relationship”). For salts that have limited unionization power, there will be no better time to disclose their status than when they are ready to leave a job.

146. *See* 29 U.S.C. § 151 (2000) (explaining that the purpose behind the NLRA is to “promote[] the flow of commerce by . . . encouraging practices fundamental to the *friendly* adjustment of industrial disputes arising out of differences” (emphasis added)); *see also* Joshua B. Shiffrin, Note, *A Practical Jurisprudence of Values: Rewriting Lechemere, Inc. v. NLRB*, 41 HARV. C.R.-C.L. L. REV. 177, 206 (2006) (“By its own terms, the NLRA encourages worker self-organization for the purposes of promoting industrial peace, protecting workers’ free choice, and redressing the unequal bargaining power that employees experience in the modern workplace.”).

147. This would not be the first time that a change in union strategy in response to a pro-business interpretation of the NLRA caused increased problems for businesses. The resurgence of salting in response to the *Lechemere* decision is a prime example of how businesses can come to regret seemingly pro-business court rulings. *See* Ellen Dannin, *Teaching Labor Law Within a Socioeconomic Framework*, 41 SAN DIEGO L. REV. 93, 103 (2004) (discussing how “employers found

lose sight of their core purpose of unionizing employees¹⁴⁸ and instead choose to devote too many of their resources toward attacking businesses with covert salting.

V. THE EFFECTS OF THE *OIL CAPITOL* AND *TOERING* DECISIONS ON CURRENT AND FUTURE LEGISLATION

Although the *Oil Capitol* and *Toering* rulings may create strife and discontent in the near future, the rulings could potentially have a profound and positive long-term effect on labor law. Because the rulings give businesses a reason to believe that unions will decrease salting, unions may be able to respond to the rulings by increasing their attention toward labor-law reforms that are more beneficial to their cause. During the course of advocating for labor-law reform, unions should be able to point to the rise and fall of labor-union salting as evidence that reform is desperately needed to preserve labor-management relations and ensure that unions have a fair opportunity to reach nonunion workers.

A. THE TRUTH IN EMPLOYMENT ACT WILL TEMPORARILY RECEIVE LESS ATTENTION FROM BUSINESS INTERESTS

As discussed earlier, business interests and their congressional allies have attempted to pass the Truth in Employment Act and make salting illegal since the *Town & Country* decision.¹⁴⁹ Their sustained fight against salting, however, may come to a halt in response to the changes in remedies provided by the *Oil Capitol* and *Toering* rulings. Shortly after the *Oil Capitol* ruling, the Associated Builders and Contractors—one of the organizations most aggressively supporting the Truth in Employment Act¹⁵⁰—cheered the decision, saying that the new standard for determining remedies will “provide[] a huge boost for merit shop contractors and small businesses nationwide.”¹⁵¹ Meanwhile, lawyers representing employers have applauded

[salting] far more objectionable than handing out leaflets in a parking lot,” which *Lechmere* outlawed).

148. Salts may have less motivation to excel on the job while employed by the nonunion business. Conversely, when serving as an overt salt, successful salts generally try to set a good example for the nonunion employees, hoping that they can gain these employees’ trust. See Van Bourg & Moscowitz, *supra* note 23, at 4 (“Unions must be careful in using [salting] tactics not to alienate workers on the job, and to exercise old fashioned patience in building trusting relationships with the union.”).

149. See *supra* notes 66–69 and accompanying text (discussing attempts to pass the Truth in Employment Act and the reasons that proponents give for supporting the bill).

150. See generally Hess, *supra* note 129 (discussing why Associated Builders and Contractors vehemently opposed the *Town & Country* decision and its confirmation of the legality of salting).

151. Bob Hirsch, *NLRB Establishes New Standard for Determining Backpay Period for Union Salts*, NEWSLINE (Associated Builders & Contractors, Inc., Arlington, Va.), June 6, 2007, http://www.abc.org/Newsroom2/News_Letters/7/22/Newsline_NLRB_Establishes_New_Standard_for_Determining_Backpay_Period_for_Union_Salts.aspx.

the NLRB for finally “undo[ing] some of the decisions made by the so-called ‘Clinton Board.’”¹⁵² Although the potential dangers of full-scale covert salting could someday cause another push for the Truth in Employment Act, the *Oil Capitol* decision should convince business interests to shift their energies to other areas for the near future. Businesses will justify their retreat from lobbying for the Truth in Employment Act by pointing out that the costs of a salting discrimination ULP are now minimal, and thus there is little reason to invest energy in fighting claims of salting discrimination at either the NLRB or congressional level. Additionally, businesses will probably need to spend the vast majority of their lobbying capital in fighting the Employee Free Choice Act.¹⁵³

B. UNIONS MAY USE THE OIL CAPITOL AND TOERING DECISIONS AS ANOTHER REASON TO PUSH FOR LABOR-LAW REFORM

Especially when one considers how much energy labor unions invested in salting campaigns in the decade before *Oil Capitol*, unions and their supporters remained conspicuously silent in its immediate aftermath.¹⁵⁴ In fact, the only printed commentary from unions came in the form of an Internet bulletin, calling the *Oil Capitol* decision one of the ten “worst Board cases in the past few years.”¹⁵⁵ Meanwhile, Professor Richard Bales showed relative indifference to the ruling, claiming that even the old salting-discrimination remedies had proved to be just a “slap-on-the-wrist” for offending businesses that wanted to keep unions out of their workplaces.¹⁵⁶

More than likely, unions are showing indifference to *Oil Capitol* and *Toering* because they have come to the conclusion that the NLRB failed to protect salts that businesses illegally discriminated against, and their energies would be better spent on legislative attempts toward wholesale labor-law reform. Professor Thomas A. Kochan complained that the NLRA in its current form “no longer serves the purposes for which it was originally

152. G. Phillip Shuler, *Bush Board Finally Emerges; The NLRB Recently Advanced Board Precedent in the Controversial Area of Union Salting*, S. CENT. CONSTRUCTION, Aug. 1, 2007, at 57.

153. See *infra* Part V.B (discussing the Employee Free Choice Act).

154. See *supra* text accompanying notes 47, 56–58 (discussing union strategies and salting’s role in the aftermath of the *Lechmere* and *Town & Country* decisions).

155. Donna R. Euben et al., *The Ten Worst NLRB Cases? A Recent LCC Listserve Discussion*, LCC E-BULLETIN (AFL–CIO, Washington D.C.), Sept. 2007, http://lcc.afcio.org/lcc_bulletin/bulletins/Bulletin184.asp#TenWorst.

156. Posting of Richard Bales to Workplace Prof Blog, *NLRB Changes Standards for Proving Damages in Salting Cases*, http://lawprofessors.typepad.com/laborprof_blog/2007/06/nlrb_changes_st.html (June 5, 2007). Furthermore, Professor Bales complained that the remedy of reinstatement serves little value to unions and salts “because by the time reinstatement occurred the union movement would probably fizzle, and in any event the employer would quickly find an excuse to fire the employee again.” *Id.* Ultimately, Bales concluded, “[w]ithout a meaningful remedy, there’s no meaningful right.” *Id.*

enacted.”¹⁵⁷ Other labor experts argue that “one-sided restraints on union organizing” are “buried deep within the structure” of the NLRA, and thus full-scale labor-law reform is the only way to resurrect the American labor movement.¹⁵⁸ In fact, some labor-union supporters have called for the complete repeal of the NLRA.¹⁵⁹ While unions may not publicly show as much animosity toward the current NLRA as some of their members and supporters do, they have been attempting to pass legislative changes to the NLRA since the 1970s.¹⁶⁰ None of these attempts have been successful.¹⁶¹

Labor unions and their supporters should use *Oil Capitol* and *Toering* as evidence that Congress must reform the NLRA to ensure that unions have a fair opportunity to unionize workplaces. Currently, the AFL–CIO and its member unions are pushing to preserve the NLRA’s general framework and amend the Act through the Employee Free Choice Act (“EFCA”), which adds stronger remedies to dissuade businesses from choosing to break the law.¹⁶² The EFCA proposes to award treble damages in discrimination cases and allow the Board to punish ULPs with civil penalties of up to \$20,000 per violation.¹⁶³ Furthermore, the EFCA’s provisions allow unions to gain certification and collective-bargaining power through authorization cards, rather than through secret-ballot elections.¹⁶⁴ While many labor supporters recognize that this Act is by no means perfect, they generally acknowledge

157. Thomas A. Kochan, *Labor Policy for the Twenty-First Century*, 1 U. PA. J. LAB. & EMP. L. 117, 117 (1998). Professor Kochan described the purposes of the Act as follows:

[I]t is intended to provide workers with a voice and representation on critical issues affecting their job; to resolve, in an efficient and equitable fashion, conflicts occurring between workers and employers; and to provide a process that enables workers and employers to contribute to the performance of the economy and share equitably in the fruits of their joint labors.

Id.

158. WEILER, *supra* note 133, at 228.

159. See DANIEL V. YAGER, *HAS LABOR LAW FAILED? AN EXAMINATION OF CONGRESSIONAL OVERSIGHT AND LEGISLATIVE PROPOSALS (1968–1990)*, at 9 (1990) (explaining that some “labor spokesmen claim that ‘labor law has failed’ and even profess to support [the NLRA’s] repeal”).

160. See *id.* at 2 (discussing the Labor Reform Act of 1977, which proposed “expanded access to employers’ premises for union organizers, expedited representation elections, addition of punitive remedies for NLRA violations, and mandatory injunctions against certain employee discharges”).

161. See Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 570 (2007) (explaining that the NLRA has remained basically unchanged since 1947 and today has become a “legal dinosaur”).

162. See AFL–CIO, *Employee Free Choice Act*, <http://www.aflcio.org/joinaunion/voiceatwork/efca> (last visited Jan. 24, 2009) (explaining why the AFL–CIO supports the Act and the efforts to get the Act passed).

163. See *Employee Free Choice Act of 2007*, H.R. 800, 110th Cong. § 4(b) (2007) (outlining the proposed penalties for ULPs).

164. See *id.* § 2 (providing unions with the opportunity to gain certification through authorization cards rather than full-scale elections).

that the Act is a strong step toward reform to keep unions viable in the coming years.¹⁶⁵

A Democratic majority in Congress and a labor-friendly President in the White House¹⁶⁶ provide a possible window of opportunity for labor-law reform in the near future, but labor unions must be ready to make effective arguments for reform as soon as that window opens.¹⁶⁷ *Oil Capitol* and *Toering* could serve as prime examples of how businesses now actively choose to break the law and how they may receive a financial benefit in the process. The image of benefiting by breaking federal law could create an effective rhetorical frame to convince legislators and the general public that Congress must pass the EFCA.

In the process, the EFCA may help revive overt salting in the workplace by strengthening the financial penalties for discriminating against salts and increasing the potential rewards of a successful salting campaign. While the penalties of salting under a combined *Oil Capitol* and EFCA regime may not reach the levels of penalties awarded before *Oil Capitol*,¹⁶⁸ unions will have more financial motivation to conduct overt salting than they currently do after *Oil Capitol*.¹⁶⁹ Unions could reinvest these financial rewards from the EFCA's new penalties into new salting campaigns.

Additionally, the EFCA provision allowing union certification through authorization cards will encourage unions to use salting for its original purpose of unionizing currently nonunion workplaces. Unions will recognize that the EFCA allows a salt to be a more effective unionizer

165. See, e.g., Erin Johansson, *Checking Out: The Rise of Wal-Mart and the Fall of Middle Class Retailing Jobs*, 39 CONN. L. REV. 1461, 1490 (2004) (describing the EFCA as “an important first step” toward “reforming labor law”); Thomas A. Kochan, *Updating American Labor Law: Taking Advantage of a Window of Opportunity*, 28 COMP. LAB. L. & POL’Y J. 101, 112 (2007) (calling the EFCA “a necessary but not sufficient step for updating our labor relations system”); Iris Halpern, Recent Development, *Increasing Health Care for Women of Color in the Workplace: A Proposal for Legislative Change in Labor Law*, 21 BERKELEY J. GENDER L. & JUST. 132, 149–50 (2006) (discussing the EFCA and calling the bill “a laudable initial step” in labor-law reform). *But see* Michael Weiner, Comment, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1624 (2005) (claiming that there is “little reason to hope” that the EFCA will get enough support for passage).

166. President Obama is on the record as a supporter of the EFCA. David R. Francis, *Unions See Better Days Ahead Under Obama’s Leadership*, CHRISTIAN SCI. MONITOR, Feb. 2, 2009, at 16.

167. See generally Kochan, *supra* note 157 (discussing the fact that labor law is hard to change and unions must now determine what legal changes they desire so they are prepared when a friendly political environment develops).

168. Treble damages plus a maximum \$20,000 punitive award with a presumption that a salt would stay on the job only for a limited time will not always compare to the backpay awards in cases that took many years to reach a final decision. For a discussion of the length of time that NLRB cases take to reach finality, see *supra* note 138 (discussing the long periods of time it may take to conclude ULP litigation).

169. *But see* Posting of Richard Bales to Workplace Prof Blog, *supra* note 156 (discussing how even the old presumption of indefinite employment did little to discourage businesses from discriminating against salts).

because she will have the ability to get nonunion employees to sign union-authorization cards, which serve as a vote for unionization, at the time of interaction. An employee can sign this card before the business has the ability to influence the employee. Even if the employer later fires the salt, the union will get to hold on to the authorization cards the salt previously collected. With the amendments provided in the EFCA, the NLRA could again serve its initial goals of industrial peace and freedom of unionization.¹⁷⁰

VI. CONCLUSION

Evidence suggests that about sixty million currently unorganized workers wish that they had labor-union representation.¹⁷¹ However, over the course of the last half-century, unions have failed to organize these unrepresented employees, and the current structure of labor law has played a significant role in creating the American Labor Movement's current political and social weaknesses. The *Oil Capitol* and *Toering* decisions, their reasoning, and their aftermath provide an excellent example of exactly how current interpretations of the NLRA weaken the labor movement by encouraging businesses to break the labor laws intended to protect unions and employees. As long as the NLRB continues to limit the power of remedies under the NLRA, unions will be forced to ignore the remedies provided by the Act and create strategies outside of the NLRA's framework to regain viability in private sector workplaces.

Luckily for unions, the current political environment may provide a rare opportunity for change in labor law.¹⁷² Rather than virtually ignoring the effect of *Oil Capitol* and *Toering* on the practice of salting,¹⁷³ unions must trumpet the case as a prime example of how businesses are intentionally and efficiently breaking federal law. While salting may not serve as the tremendously successful unionization strategy for which unions once hoped,¹⁷⁴ the EFCA could provide the necessary legal changes to once again

170. See *supra* notes 1–2 and accompanying text (discussing the initial reasons for the passage of the NLRA).

171. Roy Adams, *The Employee Free Choice Act: A Skeptical View and Alternative*, 31 LAB. STUD. J. 1, 2 (2007).

172. See Kochan, *supra* note 157, at 123 (discussing how the “conservative ideology and ideas that took root in the 1980s ha[ve] about run [their] course” and current concerns about corporate greed could provide the “political pressure needed to address” labor law’s shortcomings).

173. See *supra* note 154 and accompanying text (describing labor unions’ muted response to the *Oil Capitol* decision and its effects upon salting).

174. Compare *supra* text accompanying notes 53–55 (explaining the AFL–CIO’s initial hopes after the *Town & Country* ruling to use salting in numerous industries and increase financial support for the strategy), with Posting of Richard Bales to Workplace Prof Blog, *supra* note 156 (discussing one professor’s opinion that *Oil Capitol* would have little effect on salting and

make salting an effective tactic to increase unionization rates in the United States. Without reform in labor law, however, employers and unions alike should anticipate that unions will fight with subversive and costly strategies, like covert salting, outside of the NLR's realm of authority, which will increase future strife in the workplace.

implying that overt salting as a strategy had already ceased to be effective before the *Oil Capitol* ruling).