

Associated Builders and Contractors (ABC), would like to thank Chairwoman Murray, Chairman Andrews, Ranking Member Isakson and Ranking Member Kline as well as the members of the Senate Committee on Health, Education, Labor and Pensions Subcommittee on Employment and Workplace Safety and the House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions for holding this bi-cameral hearing today on the National Labor Relations Board. The committees' attention to the recent Board decisions and adjudication process is to be commended.

ABC is a national trade association representing more than 24,000 merit shop contractors, subcontractors, materials suppliers and construction-related firms in 79 chapters throughout the United States. ABC's membership represents all specialties within the U.S. construction industry and comprised primarily of firms that perform within the industry's industrial and commercial sectors. Our diverse membership is bound by a shared commitment to the merit shop philosophy within construction industry

During the course of this hearing some may argue that the recent Board cases are a major departure from past precedent. However the fact remain that the decisions are entirely consistent with fundament and long-held views of judicial principles

Specifically of interest to the construction industry were the following cases: *BE&K Const. Co.*, 351 NLRB No.29 (September 2007), *Toering Electric*, 351 NLRB No. 18 (September 2007), *Oil Capitol Sheet Metal*, 349 NLRB No 118 (May 2007) and *Glens Falls Building and Construction Trades Council*, 350 NLRB No. 42, It is these decisions which ABC's comments will focus.

In September the National Labor Relations Board (NLRB) issued a new standard for review of employer lawsuits against unions, on remand from the U.S. Supreme Court's decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). In its decision on remand, *BE&K Construction Co.*, 351 NLRB No. 29 (Sept. 29, 2007) the NLRB held for the first time that the "filing and maintenance of a reasonably based lawsuit does not violate the [National Labor Relations Act (NLRA)], regardless of the motive for bringing it."

This case dates back to 1987, when ABC member firm BE&K unsuccessfully sued the Contra Costa Building Trades Council for seeking to delay construction on a \$350-million project for USS-POSCO. The unions subsequently filed an unfair labor practice charge against BE&K, claiming that BE&K's lawsuit violated Section 8(a)(1) of the NLRA because it was filed to retaliate against the unions for engaging in protected concerted activity. The NLRB agreed with the unions, but the U.S. Supreme Court reversed that ruling in 2002. The court remanded the case back to the NLRB for issuance of a new

standard consistent with the First Amendment. Five years later, the NLRB has now reaffirmed that BE&K's lawsuit was "reasonably based in fact and law," and therefore held that the filing of the suit did not violate Section 8(a)(1). In its decision the NLRB established a new "bright line" test for employer litigation under the First Amendment. Under the new test, any lawsuit is protected from being an unfair labor practice so long as the suit is not "objectively baseless." The BE&K decision establishes an important precedent that will allow employers to better defend themselves against union corporate campaigns.

One of the most nefarious organizing tactic implemented by organized labor is "salting", the practice of intentionally placing trained union professional organizers on non-union jobsites to harass or disrupt company operations, apply pressure, increase operating and legal costs and ultimately put a company out of business. The objectives of the agents most often culminate in the filing of many unfair labor practice claims with the National Labor Relations Board (NLRB).

However, salting is not merely an organizing tool. It has become an instrument of economic destruction aimed at non-union companies that has little to do with organizing. A publication of the International Brotherhood of Electrical Workers, one of the principal proponents of this tactic, has described that union's salting tactics as a process of "infiltration, confrontation, litigation, disruption, and hopefully annihilation of all non-union contractors." Unions send their agents into open shop workplaces under the guise of seeking employment when their true intentions are to deliberately increase costs to employers through workplace sabotage and the filing of frivolous discrimination charges. ABC members across the country have become all too familiar with how disruptive, intimidating and damaging these pressure tactics can be.

Thankfully, on September 29, 2007 the NLRB ruled that an applicant for employment must be "genuinely interested" in seeking to establish an employment relationship with a hiring employer in order to be protected against hiring discrimination based on union affiliation or activity (*Toering Electric Co.*, 351 NLRB No. 18). The decision has the potential to significantly curb the shameful union practice of "salting". In its decision, the NLRB stated that "submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity [under the NLRA]. Indeed, such conduct manifests a fundamental conflict of interests ab initio between the employer's interest in doing business and the applicant's interest in disrupting or eliminating this business. "

As a result of this decision, the Board has imposed on the NLRB General Counsel in all hiring discrimination cases the burden of proving that the alleged discriminatee was genuinely interested in

seeking to establish an employment relationship. ABC has long opposed salting abuse of the type acknowledged by the NLRB in this case. This NLRB decision has the potential to control some of the worst salting abuse by limiting the number of alleged discriminatees in future salting cases.

May of 2007 provided another opportunity for the Board to weigh in on the union organizing tactic known as “salting”. In *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118, the NLRB refused to apply its general backpay presumption that an aggrieved worker would have been employed by the company for an indefinite period of time unless the employer rebuts the presumption. Under this former backpay standard, the indefinite period of time often lasted several years while lengthy administrative proceedings took place, unless the employer was able to prove otherwise. In *Oil Capitol*, however, the NLRB concluded that to apply the presumption of indefinite work in cases involving union salts is not only “unreasonable,” but also “punitive” in effect. According to the board, such information is better known by the union than by the targeted employer. The NLRB cited evidence that union salts typically do not stay for long at non union companies, preferring to continue their organizing efforts elsewhere.

In another significant back pay ruling, *Contractor Services, Inc.*, 351 NLRB No.4 (Sept. 27, 2007), the NLRB held that union salts who deliberately narrow their job search after being turned away from a non-union employer can lose some or all of their back pay claim, where evidence shows failure to mitigate damages.

These recent salting decisions merely shifted the evidentiary burden from the employer to the Board's General Counsel. It has always been a fundamental principle of law that, in enforcement and other prosecutions cases, the burden of proof should rightly be put on the prosecutor (the Board's General Counsel) and not the other way around. Prior to these recent salting decisions, employers had the burden of disproving a negative, which is hardly fair or consistent with our Nation's fundamental legal principles

Finally on August 3, 2007, the NLRB issued a new decision which concluded that a union-only PLA extracted from a power-plant owner under threat of environmental challenges was an illegal agreement. In *Glens Falls Building and Construction Trades Council*, 350 NLRB No. 42, the NLRB held that union-only subcontracting requirements violate Section 8(e) of the Act where they do not arise in the context of collective bargaining with the employer's own employees. The NLRB further held that threats of regulatory challenges to delay construction do not comply with 8(e).

In this case, developer and operator Indeck Energy Services, Inc. placed a new cogeneration power plant project up for bid by construction management firms. The Glens Falls (N.Y.) Building and Construction Trades Council subsequently informed Indeck that its union members would oppose the project on environmental grounds if the project was built with non-union labor. Indeck and the Trades Council then reached an agreement in which Indeck would instruct its construction manager to use only union labor on the project. A dispute later arose between Indeck and the construction manager, and Indeck proceeded to secure bids from other contractors, this time without a PLA. The Trades Council sued Indeck for \$12 million, claiming breach of the union-only agreement. Indeck then filed an unfair labor practice charge against the Trades Council with the NLRB, alleging that the lawsuit by the unions was illegal under the National Labor Relations Act.

Relying on the U.S. Supreme Court's 1975 decision in *Connell Construction v. NLRB*, the NLRB here ruled that unions could only enter into all-union construction agreements that were negotiated in the context of collective bargaining. The NLRB therefore found that the Trades Council's lawsuit was an illegal attempt to enforce an invalid agreement. Additionally, the NLRB concluded that the Trades Council's goal was to create a "labor monopoly at a major construction site to provide employment for their out-of-work members."