

UNION SALTS BUT NO PEPPER

By Thomas Gill

At 12:42 PM, almost everyone at Frontier Industries was at lunch. An old school bus loaded with union members pulled up in front of the office door, and union members rushed into the office. One union member was videotaping and recording the event using a high intensity light bar. Another member told the frightened receptionist he was the “union organizer” and demanded applications for all present. The receptionist called an estimator who was eating at his desk. The estimator told the union organizer the company kept applications active for 6 months, but in fact applications were active for only 30 days. All the union members completed applications and left.

The 12:42 PM visit was Frontier’s introduction to salting. Salting was originally developed in the construction industry. Union members applied to non-union contractors to provoke discrimination or, if hired, to disrupt operations. Employers fought back by alleging that “salts” were not legitimate applicants because their first loyalty was to the union. In *NLRB v Town & Country Electric*, 516 US 85(1998), the Supreme Court held that paid (and non-paid) union organizers were “employees” under the National Labor Relations Act and were protected against discrimination.

Since *Town & Country*, salting has been a key part of aggressive union organizing. When union salts are not hired, the union files a discrimination charge with the NLRB. Frequently the union has submitted 60 or more applications by the time the case comes to hearing. If the employer has hired 60 or more people and paid each \$30,000 in wages, back pay can exceed \$900,000. Avoiding back pay is much more difficult than it is in a Title VII discrimination case.

In *FES*, 331 NLRB 9 (2000), the NLRB set the proof standard for salting discrimination. It held that General Counsel must prove the employer was hiring, the applicant had the experience or training necessary for the position, and that the employer’s antiunion attitude contributed to the failure to hire. At that point, the burden shifts to the employer. To avoid back pay and a hiring order, employer must prove that he would have hired the same person even if he did not dislike unions.

In practice, the NLRB rule is the opposite of the rule in criminal court. An accused criminal is innocent until proven guilty. An accused employer is guilty until proven innocent. Despite this burden, employers sometimes win.

The key to employer victory is a hiring practice uniformly applied. Employers have won by showing they always prefer referrals from employees over walk-ins. One employer was able to show that it never hired an applicant whose last wage was 10% or more higher than the employer was paying. Another employer showed it never hired anyone who was already working for another employer.

Most employers lose salting cases. The few who win do so because of excellent hiring practices. The NLRB’s attorney will pick apart any inconsistency in hiring. To

succeed, the employer must show; 1) that the hiring policy which excluded union applicants predated the salting, 2) that there were no exceptions to the hiring policy and, 3) that the policy was not used as a pretext for discrimination. If your company may be the object of an organization drive, you must have both policies and day to day practices in good order before the drive begins.