

TRUTH IN EMPLOYMENT ACT OF 1999

OCTOBER 11, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLING, from the Committee on Education and the Workforce, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 1441]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 1441) to amend section 8(a) of the National Labor Relations Act, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 1441, the Truth in Employment Act, is to provide employers some measure of confidence that job applicants are motivated by a desire to work for that employer—not to promote the interests of another organization bent on putting that company out of business. The legislation protects the employer by making it clear that they are not required to hire an applicant whose primary purpose is not to work for the employer, and therefore is not a “bona fide” employee applicant. At the same time, the Act recognizes the legitimate role for organized labor, and would not interfere with legitimate union activities. Employees would continue to enjoy their right to organize or engage in other concerted activities protected under the National Labor Relations Act (NLRA).

COMMITTEE ACTION

H.R. 1441, the Truth in Employment Act, was introduced by Representative John Boehner on April 15, 1999. The bill was marked-

up in Full Committee on July 29, 1999, and ordered favorably reported by roll call vote (yeas 21, nays 18, not voting 10).

The Truth in Employment Act is similar to Title I of last Congress' H.R. 3246, the Fairness for Small Business and Employees Act of 1998, introduced by Representative Bill Goodling on February 24, 1998. H.R. 3246 was marked-up in the Employer-Employee Relations Subcommittee on February 26, 1998, was marked-up in Full Committee on March 11, 1998, and ordered reported favorably by roll call vote. H.R. 3246 passed the House last Congress on March 26, 1998 by a 202 to 200 vote. Mr. Boehner's H.R. 1441 of this Congress includes language from a Goodling amendment added to Title I of H.R. 3246 last Congress by a 398 to 0 vote, that makes clear nothing in the Truth in Employment Act infringes on anyone's rights under the NLRA.

H.R. 1441 currently has 83 cosponsors. The bill was addressed by the Employer-Employee Relations Subcommittee during a field hearing on May 10, 1999 in Indianapolis, Indiana, held jointly with the Senate Labor Committee's Subcommittee on Employment, Safety and Training. Testimony was heard from witnesses Mr. Harry C. Alford, president/CEO, National Black Chamber of Commerce, Inc., Washington, DC; Mr. Carl Shaffer, Indiana state organizer, International Brotherhood of Electrical Workers, Walkerton, Indiana; Mr. Charlie Farrell, president, C.R. Electric Company, Indianapolis, Indiana; Mr. Neil Gath, attorney, Fillenwarth, Dennerline, Groth & Towe, Indianapolis, Indiana; Mr. Randy Truckenbrodt, president, Randall Industries, Inc., Elmhurst, Illinois; and Mr. Larry Gordon, owner, G & N Fabrications, Franklin, Indiana.

The Indianapolis field hearing in May 1999 was the sixth hearing the Committee has held the past three Congresses on the issue of salting and needed legislation. The Subcommittee on Employer-Employee Relations held a hearing on H.R. 758 (the "Truth in Employment Act" of the 105th Congress) on February 5, 1998, during which testimony was received on the legislation from Mr. Jay Krupin, partner, Krupin, Greenbaum & O'Brien, Washington, DC; Mr. Thomas J. Cook, employee, Omega Electric Construction Company, Williston, Vermont; Mr. Peter C. Rousos, director of corporate human resources, Gaylord Entertainment Company, Nashville, Tennessee, testifying on behalf of the U.S. Chamber of Commerce; Mr. Peter R. Kraft, partner, Kraft & Winger, Portland, Maine; and Mr. Patrick Parcell, member, Boilermakers Local 169, Dearborn, Michigan, testifying on behalf of the Building and Construction Trades Department, AFL-CIO.

The Subcommittee on Employer-Employee Relations held a hearing on H.R. 758, the Truth in Employment Act of 1996, on October 9, 1997. Testimony was received on the legislation and on the unions' "salting" technique from Steven R. Weinstein, partner, Dunetz, Marcus, Brody & Weinstein, L.L.C., Livingston, New Jersey; Charles Fletcher, vice president, industrial relations and safety, Corey Delta Constructors, Benicia, California; Larry Cohen, senior partner, Sherman, Dunn, Cohen, Lifer & Yellig, Washington, DC, testifying on behalf of the AFL-CIO; Don Mailman, owner, Bay Electric Co., Inc., South Portland, Maine; and Maurice Baskin, partner, the Venable Law Firm, Washington, DC, testifying on behalf of the Associated Builders and Contractors.

The Committee on Economic and Educational Opportunities and the Committee on Small Business held a joint field hearing on April 12, 1996, in Overland Park, Kansas, on The Practice of "Salting" and its Impact on Small Business, and heard testimony from Mr. Bill Love, president, SKC Electric, Inc., Lenexa, Kansas, accompanied by SKC Electric, Inc. employee, Mr. Richard Oberlechner; Mr. Greg Hoberock, vice president, HTH, Co., Union, Missouri; Mr. Dave Meyer, vice president, secretary, Meyer Brothers Building Co., Blue Springs, Missouri; Mr. Robert Janowitz, esq., chair, labor and employment law, Group Practice, Shook, Hardy & Bacon, Kansas City, Missouri; Mr. William Creeden, director of organizing, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Kansas City, Kansas; Mr. James K. Pease, Jr., Attorney-at-law, Pease & Ruhley, Madison, Wisconsin; and Mr. Lindell Lee, business manager, Local 124, International Brotherhood of Electrical Workers, Kansas City, Kansas.

The Committee on Economic and Educational Opportunities' Subcommittee on Oversight and Investigations held a Hearing on Union Corporate Campaign Tactics, including the tactic of "salting," on October 31, 1995. Testimony was heard from Dr. Herbert R. Northrup, professor emeritus of management, The Wharton School, University of Pennsylvania, Haverford, Pennsylvania; Ms. Sharon Purdy, secretary/treasurer, Purdy Electric, Inc., Columbus, Ohio; Mr. Barry Kindt, president, SECCO, Inc., Camp Hill, Pennsylvania; Mr. John C. Gaylor, president, Gaylor Electric Co., Carmel, Indiana; Mr. Michael McCune, CEO, Contractors Labor Pool, Inc., Reno, Nevada; and Professor Risa Lieberwitz, School of Industrial and Labor Relations, Cornell University, Ithaca, New York.

The Subcommittee on Employer-Employee Relations held a Hearing on the National Labor Relations Board (NLRB) Reform on September 27, 1995, which included testimony on "salting" and its impact, from Rosemary M. Collyer, former General Counsel, NLRB, attorney-at-law, Crowell & Moring, Washington, DC; Charles Craver, professor of law, George Washington University Law School, Washington, DC; Larry K. Durham, president and CEO, Durham Transportation, Inc., Austin, Texas; Mark R. Thierman, attorney-at-law, Thierman Law Firm, San Francisco, California; and David J. Tippeconnic, president and CEO, The UNO-VEN Company, Arlington Heights, Illinois.

SUMMARY

H.R. 1441, the Truth in Employment Act, simply says to employers that they will not violate the National Labor Relations Act if they do not hire someone who is not a "bona fide" applicant. The legislation addresses the practice of professional agents and union employees being sent into non-union workplaces under the guise of seeking employment—commonly known as "salting." H.R. 1441 amends the NLRA to make clear that an employer is not required to hire someone who is not a "bona fide" employee applicant, in that the applicant's primary purpose in seeking the job is to further other employment or agency status. Simply put, if someone is not at least "half" motivated by a desire to be a genuine, hardworking employee, the employer should not have to hire them.

COMMITTEE VIEWS

“Salting” abuse is the placing of trained professional organizers and agents in a non-union facility to harass or disrupt company operations, apply economic pressure, increase operating and legal costs, and ultimately put the company out of business. The object of the union agents is accomplished through filing, among other charges, unfair labor practice charges with the National Labor Relations Board. As the six hearings the Committee has held on this issue in the past three Congresses has shown, “salting” is not merely an organizing tool, but has become an instrument of economic destruction aimed at non-union companies that often has nothing to do with organizing.

As a former “salt” from Vermont testified before the subcommittee:¹

[Salting] has become a method to stifle competition in the marketplace, steal away employees, and to inflict financial harm on the competition. Salting has been practiced in Vermont for over six years, yet not a single group of open shop electrical workers has petitioned the local union for the right to collectively bargain with their employers. In fact, as salting techniques become more openly hostile (with the appearance of paid organizers who willfully undermine the flow of productivity), most workers view these activities as a threat to their ability to work. In a country where free enterprise and independence is so highly valued, I find these activities nothing more than legalized extortion.

A former NLRB field attorney testified that, from his experience, “salts have no intention of organizing a company by convincing the co-workers that unions are a good thing for them. Instead, once a salt enters the workplace, that individual engages in a pattern of conduct to disrupt the workplace; to gather information about the employer to feed to the union; to disrupt projects; and ultimately to file charges with the National Labor Relations Board.”² Another witness quoted directly from the International Brotherhood of Electrical Workers’ organizing manual, which states that the goal of the union salt is to “threaten or actually apply the economic pressure necessary to cause the employer to raise his prices, scale back his business activities, leave the union’s jurisdiction, go out of business and so on.”³

¹ Hearing on Legislation to Provide Fairness for Small Businesses and Employees before the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, 105th Cong., 2nd Sess., p. 72 (February 5, 1998) (Serial No. 105-72).

² Hearing on H.R. 758, the Truth in Employment Act of 1996, before the Subcommittee on Employer-Employee Relations, 105th Cong., 1st Sess., p. 6 (October 9, 1997) (Serial No. 105-52). See also, May 10, 1999 written testimony of Vincent T. Norwillo, labor counsel, Tradesmen International, Inc., before a joint field hearing of the House Subcommittee on Employer-Employee Relations and the Senate Subcommittee on Employment, Safety and Training, Indianapolis, Indiana, 106th Cong., 1st Sess., p. 2 (“[M]odern day salting has nothing to do with organizing. The ‘organizers’ dispatched by salting coordinators to merit shop business offices and job sites do not conduct traditional campaigns. Rather, these perpetrators simply produce salting charges alleging practically every conceivable violation of labor law without ever producing as much as a single representation petition”).

³ Hearing on H.R. 758, the Truth in Employment Act of 1996, before the Subcommittee on Employer-Employee Relations, 105th Cong., 1st Sess., p. 108 (October 9, 1997) (Serial No. 105-52). See also, Hearing on the National Labor Relations Board Reform, before the Employer-Employee Relations Subcommittee of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess., p. 44 (September 27, 1995) (Serial No. 104-44) (“The IBEW pro-

Hiding behind the shield of the National Labor Relations Act, unions “salt” employers by sending agents into non-union workplaces under the guise of seeking employment. These “salts” often try to harm their employers or deliberately increase costs through various actions, including sabotage and frivolous discrimination complaints with the NLRB. When unions send “salts” into a workplace, these agents often state openly that their purpose is to advance union objectives by organizing the employer’s workforce. If an employer refuses to hire the union agents or members, the union files unfair labor practice charges.

Alternatively, if the “salts” are hired by the employer, they often look for other reasons to file unfair labor practice charges, solely for purposes of imposing undue legal costs on the employer they are seeking to organize.

As the U.S. Chamber of Commerce testified before the subcommittee, “In Louisiana [for example], Tri-Parish Electric, a company with six employees, was forced out of business as a result of a salting campaign and the frivolous charges that ensued. Clearly, the drafters of the 1935 National Labor Relations Act did not intend this result. The Act was not intended as a device to circumvent the will of employees, to strangle businesses into submission to further a union’s objectives, or to put nonunion employers out of business.”⁴ One construction company testified that it had to spend more than \$600,000 in legal fees from one salting campaign, with an average cost per charge of more than \$8,500.⁵ One Indiana employer that spent \$80,000 in defending a “salting” charge pointed out that “it costs the union nothing to force the company to incur tens of thousands of dollars in expenses defending the union offensive,” since the charges are handled by the NLRB at taxpayer expense.⁶ Another, who ran a small shop of five employees, testified he was dumbfounded to receive salting charges from three applicants since he did not even have any jobs available, and felt violated that his business could so easily be put at financial risk.⁷ Beyond legal fees, one employer testified, “it would be

gram is one bent on the involuntary submission of innocent and law-abiding employers to the union, or the employer’s financial destruction. By perverting the NLRB process in this manner, the IBEW is threatening two of the core beliefs that this country treasures: freedom and the entrepreneurial spirit”); Joint Hearing on the Practice of “Salting” and Its Impact on Small Business, before the Committee on Small Business and the Committee on Economic and Educational Opportunities, 104th Cong., 2nd Sess., p. 20 (April 12, 1996) (Serial No. 104–71/104–51) (labor attorney testifying that “I think that salts differ fundamentally from other employees. They are just temporarily there on an assignment, a mission for the union. They are working for the union. When they are done doing * * * what duties they have been given by the union, they either return to the work for the unionized employers or they are sent on to another salting assignment”).

⁴Hearing on Legislation to Provide Fairness for Small Businesses and Employees, before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee, 105th Cong., 2nd Sess., p. 101 (February 5, 1998) (Serial No. 105–72).

⁵Hearing on H.R. 758, the Truth in Employment Act of 1996, before the Subcommittee on Employer-Employee Relations, 105th Cong., 1st Sess., p. 8 (October 9, 1997) (Serial No. 105–52).

⁶May 10, 1999 written testimony of Charles Farrell, C.R. Electric, Inc., Indianapolis, Indiana, before a joint field hearing of the House Subcommittee on Employer-Employee Relations and the Senate Subcommittee on Employment, Safety and Training, Indianapolis, Indiana, 106th Cong., 1st Sess., p. 3.

⁷May 10, 1999 written testimony of Larry Gordon, owner, G&N Fabrications, Franklin, Indiana, before a joint field hearing of the House Subcommittee on Employer-Employee Relations and the Senate Subcommittee on Employment, Safety and Training, Indianapolis, Indiana, 106th Cong., 1st Sess., p. 2 (“It was not the law that saved me. The law could have destroyed my livelihood and the livelihood of my employees and their families. It was only my good luck that the employee who I was trying to replace was able to return to work immediately so I did not need to hire anyone”).

impossible to put a dollar amount on the pain and suffering caused by the stress of the situation to a small company like ours who does not have the funds to fight these charges.”⁸

Thus, under current law, an employer must choose between two unpleasant options: either hire a union “salt” who is there to disrupt the workplace and file frivolous charges resulting in costly litigation, or deny the “salt” employment and risk being sued for discrimination under the NLRA.

H.R. 1441 would protect the employer by making it clear that an employer is not required to hire any person who is not a “bona fide” employee applicant. The legislation states that someone is not a “bona fide” applicant if such person “seeks or sought employment with the employer with the primary purpose of furthering other employment or agency status.” Simply put, it is the Committee’s view that if someone wants a job, but at least 50 percent of their intent is not to work for the employer, then they should not get the job and the employer has not committed an unfair labor practice if they refuse to hire the person.

As drafted, the Truth in Employment Act is very narrow legislation simply removing from the protection of Section 8(a) of the NLRA a person who seeks a job without at least 50 percent motivation to work for the employer. At the same time, the legislation recognizes the legitimate role for organized labor, and it would not interfere with legitimate union activities. H.R. 1441 has a proviso making clear that it does not affect the rights and responsibilities available under the NLRA to anyone, provided they are a bona fide employee applicant. Employees and bona fide applicants will continue to enjoy their right to organize or engage in other concerted activities under the NLRA, and, employers will still be prohibited from discriminating against employees on the basis of union membership or union activism.

The legislation sets up a test that the NLRB general counsel must utilize before allowing a Section 8 “salting” charge to go forward. The test involves examining the intent of the individual who is seeking employment. So long as the “primary purpose” of the individual is not to further employment or agency status with someone other than the employer with whom the individual is applying, then they are a “bona fide” employee applicant and the charge should not be dismissed by the general counsel because of H.R. 1441. In testifying against the legislation, an active “salt” told the subcommittee, “I do good work. I work hard,” and that he is “a worker who knew his rights, did a good job, and urged other workers to organize and unionize.”⁹ The legislation is not meant to impact individuals such as this, who are clearly at least half motivated to be a good employee.

It has been alleged by some throughout the course of the many hearings on “salting” that this legislation overturns the Supreme Court’s decision in *NLRB v. Town & Country Electric, Inc.*¹⁰ However, H.R. 1441 in fact reinforces the narrow holding of *Town &*

⁸Hearing on Union Corporate Campaign Tactics, before the Subcommittee on Oversight and Investigations of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess., p. 88 (October 31, 1995) (Serial No. 104–45).

⁹Hearing to Provide Fairness for Small Businesses and Employees, before the Employer-Employee Relations Subcommittee of the Education and the Workforce Committee, 105th Cong., 2nd Sess., pp. 82–83 (February 5, 1998) (Serial No. 105–72).

¹⁰116 S.Ct. 450 (1995).

Country. The Court held only that paid union organizers can fall within the literal statutory definition of “employee” contained in Section 2(3) of the NLRA.¹¹ The Court did not address any other legal issues, but the effect of the decision is to uphold policies of the NLRB which subject employers to unwarranted union harassment and frivolous complaints.

The Truth in Employment Act does not change the definition of “employee” or “employee applicant” under the NLRA, it simply would change the Board’s enforcement of Section 8 “salting” cases by declaring that employers may refuse to hire individuals who are not at least half motivated to work for the employer. So long as even a paid union organizer is at least 50 percent motivated to work for the employer, he or she cannot be refused a job pursuant to H.R. 1441. As Maury Baskin, general counsel for Associated Builders and Contractors, testified before the subcommittee, the legislation “does not seek to overrule the Supreme Court’s *Town & Country* case. It would return enforcement of the Act to a policy consistent with the *Lechmere* case.”¹²

Thus, H.R. 1441 establishes a test that does not seek to overrule *Town & Country* and does not infringe upon the legitimate rights of bona fide employees and employee applicants to organize on behalf of unions in the workplace. Indeed, the Supreme Court’s holding that an individual can be the servant of two masters at the same time is similarly left untouched.¹³ In fact, it is the acknowledgment that an applicant may in fact be split in motivation between an employer and a union that gives rise to the need for examining an applicant’s motivation—a “primary purpose” test that the NLRB general counsel and courts will apply. The test is intended to apply to the motivation of the individual at the time he or she attempted to secure employment.

The focus of the Truth in Employment Act is not on the individual’s mere support for unionization, but on the individual’s furtherance of employment or agency status with someone other than the employer with whom the individual is seeking a job. The term “employment or agency status” is intended to refer to the common law definitions of employee or agency status, as the Supreme Court and the NLRB have repeatedly construed these terms over the course of decades. As the Court noted in *Town & Country*, the ordinary definition of “employee” refers to “a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how work is to be performed.”¹⁴ Similarly, an “agent” is well defined by common law and NLRB decisions as “one who agrees to act subject to a principal’s control.”¹⁵

¹¹ Id. at 457.

¹² Hearing on H.R. 758, the Truth in Employment Act of 1996, before the Employer-Employee Relations Subcommittee, 105th Cong., 2nd Sess., p. 14 (October 9, 1997) (Serial No. 105-52). In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court held that outside union representatives can be denied access to an employer’s workplace, and reaffirmed that Section 7 of the NLRA was intended to protect the rights of bona fide employees, not outside union organizers.

¹³ The Court cited *Restatement (Second) of Agency*, Section 226, at 498, for the proposition that a “person may be the servant of two masters * * * at one time as to one act, if the service to one does not involve abandonment of the service to the other.” Id., at 456.

¹⁴ 116 S.Ct. at 454.

¹⁵ *Restatement (Second) of Agency*, Section 226, Comment a (1957). See also, *Cambridge Wire Cloth Co., Inc.*, 256 NLRB 1135, 1139 (1981) (mere participation in union activities such as card solicitation or organizing committee does not constitute one an agent of a union).

Thus, only individuals who fall within these narrow categories due to a union's control over their activities could be denied employment by an employer, and only if they seek or sought employment with the "primary purpose" of furthering their union employment or agency status.

Regarding the standard of proof involved in determining an individual's motivation under H.R. 1441, the test that the NLRB general counsel and courts would apply is not a new one. In *Wright Line, Inc.*,¹⁶ the NLRB established a uniform method of proving discriminatory motivation, in the context of Section 8(a)(3) of the NLRA. The Board has held that an employer will not be found to have violated the NLRA if the employer's action towards an employee would have occurred even in the absence of protected conduct. Under *Wright Line*, the general counsel bears the burden of establishing a prima facie case that an employee's "protected activity" was a substantial or motivating factor for an employer's adverse action. The employer can rebut this showing, however, by demonstrating that it would have taken the same action against the employee even in the absence of the protected conduct.¹⁷

Under the Truth in Employment Act, the act of seeking employment with the "primary purpose" of furthering another employment or agency status would not be "protected activity" under the NLRA. Therefore, the general counsel would bear the burden as part of his prima facie case of showing that the employee applicant on whose behalf the charge of discrimination has been filed is not a person who has sought employment with such a primary purpose—that the applicant would have sought the job even in the absence of his or her salting activity. In the event the general counsel does make out a prima facie case with the necessary element that the applicant still would have sought the job, the employer would still be entitled to rebut the prima facie case with contrary evidence.

CONCLUSION

Forcing employers to hire union business agents or employees, who are primarily intent on disrupting or even destroying employers' businesses, does not serve the interests of bona fide employees under the NLRA and hurts the competitiveness of small businesses. H.R. 1441 does not prohibit organizers from getting jobs. The legislation simply removes an incentive to use the NLRA as a weapon against an employer by persons who have little interest in employment. All the legislation does is give the employer some comfort that it is hiring someone who really wants to work for the employer. As long as the "salt" is applying to do a good job for the employer, H.R. 1441 does nothing but protect the employee applicant, and the employer who has a right to have a workforce that is going to work for the good of the company. The Truth in Employment Act returns a sense of balance to the NLRA that is being undermined by the Board's current policies.

¹⁶ 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

¹⁷ 662 F.2d at 905.

SECTION-BY-SECTION ANALYSIS

Section 1

Contains the Short Title, “Truth in Employment Act of 1999.”

Section 2

Establishes the findings of the Committee related to the necessity of a healthy atmosphere of trust and civility in labor-management relations, the prevalence of “salting” tactics, and an employer’s right to expect job applicants to be primarily interested in working for that employer.

Section 3

Provides that the purpose of H.R. 1441 is to preserve the balance of rights under the NLRA and to alleviate pressure on employers to hire individuals who seek or gain employment to disrupt the workplace or inflict economic harm to put the employer out of business.

Section 4

Amends the National Labor Relations Act to provide that nothing in the NLRA shall require an employer to hire someone who is not a “bona fide” employee applicant, in that such a person seeks or sought employment with the primary purpose of furthering other employment or agency status. Also provides that this section does not affect any rights and responsibilities of any employee so long as they are or were a “bona fide” employee applicant.

EXPLANATION OF AMENDMENTS

The bill was reported without Amendment.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill protects employers by making it clear that they are not required to hire an applicant whose primary purpose is not to work for the employer, and therefore is not a “bona fide” employee applicant. The bill does not prevent legislative branch employees from receiving the benefits of this legislation.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill protects the employer by making it clear that they are not required to hire an applicant whose primary purpose is not to work for the employer, and therefore is not a “bona fide” employee applicant. As such, the bill does not contain any unfunded mandates.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote

on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 1 BILL H.R. 1441 DATE July 29, 1999
PASSED 21 - 18

SPONSOR/AMENDMENT Mr. Barrett / motion to report the bill to the House with the recommendation that the bill do pass

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GOODLING, Chairman	X			
Mr. PETRI, Vice Chairman	X			
Mrs. ROUKEMA	X			
Mr. BALLENGER	X			
Mr. BARRETT	X			
Mr. BOEHNER				X
Mr. HOEKSTRA	X			
Mr. McKEON				X
Mr. CASTLE	X			
Mr. JOHNSON	X			
Mr. TALENT	X			
Mr. GREENWOOD	X			
Mr. GRAHAM				X
Mr. SOUDER				X
Mr. McINTOSH	X			
Mr. NORWOOD				X
Mr. PAUL	X			
Mr. SCHAFER	X			
Mr. UPTON	X			
Mr. DEAL	X			
Mr. HILLEARY	X			
Mr. EHLERS	X			
Mr. SALMON				X
Mr. TANCREDO	X			
Mr. FLETCHER	X			
Mr. DEMINT	X			
Mr. ISAKSON	X			
Mr. CLAY		X		
Mr. MILLER		X		
Mr. KILDEE		X		
Mr. MARTINEZ				X
Mr. OWENS		X		
Mr. PAYNE		X		
Mrs. MINK		X		
Mr. ANDREWS		X		
Mr. ROEMER		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. ROMERO-BARCELO				X
Mr. FATTAH				X
Mr. HINOJOSA				X
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KIND		X		
Ms. SANCHEZ		X		
Mr. FORD		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
TOTALS	21	18		10

CORRESPONDENCE

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
July 29, 1999.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Education & the Workforce,
Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN, On today's Roll Call Vote #1 regarding reporting H.R. 1441 to the House floor, I was unavoidably detained. Had I been present, I would have voted aye.

I would appreciate this letter being inserted into the Committee's report. Thank you for your attention to this matter.

Sincerely,

JOHN A. BOEHNER.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, August 3, 1999.

Hon. WILLIAM GOODLING,
Committee on Education and Workforce,
Rayburn HOB, Washington, DC.

DEAR MR. CHAIRMAN, On roll call vote number one, regarding reporting H.R. 1441 to the House floor, I was unavoidably detained due to legislative duties. Had I been present, I would have voted aye.

I would appreciate this letter being inserted into the Committee's report. Thank you for your attention to this matter.

Sincerely,

HOWARD P. "BUCK" MCKEON.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, September 21, 1999.

Hon. BILL GOODLING,
Chairman, The Education and the Workforce Committee,
Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN GOODLING: Due to a conflict in my legislative responsibilities, I was unavoidably detained from voting during the July 29, 1999 full committee mark-up of H.R. 1441, the Truth in Employment Act of 1999. Please accept my apologies for my absence during this important roll call vote.

Had I been present during this mark-up, I would have voted "aye" in favor of final passage of the Truth in Employment Act of 1999. I would appreciate if this letter could be inserted in the committee report for public record.

Thank you for attention to this matter.

Sincerely,

LINDSEY O. GRAHAM.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, September 21, 1999.

Chairman WILLIAM F. GOODLING,
Committee on Education and the Workforce,
Rayburn HOB, Washington, DC.

DEAR CHAIRMAN GOODLING: Due to my legislative duties, I was unable to vote on reporting H.R. 1441 out of the Committee on Education and the Workforce on July 29, 1999. Had I been present, I would have voted aye.

I would appreciate your assistance in placing this letter of explanation in the relevant section of the record.

Thank you for your assistance in this matter.

Sincerely,

MARK E. SOUDER.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, September 27, 1999.

BILL GOODLING, *Chairman,*
House Education and the Workforce Committee,
Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN GOODLING: Due to a conflict in my legislative responsibilities I was unavoidably detained from voting during the Committee on Education and the Workforce's consideration of Roll Call Vote number 1, the motion to report favorably the bill H.R. 1441, the "Truth in Employment Act", to the House of Representatives.

Had I been present I would have voted "aye". I would appreciate this letter being included in the Committee Report to accompany this bill. Thank you for your attention to this matter.

Sincerely,

CHARLIE NORWOOD.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
September 21, 1999.

Hon. WILLIAM F. GOODLING,
Chairman, House Education and the Workforce Committee,
Rayburn House Office Building.

DEAR MR. CHAIRMAN, Due to other legislative responsibilities, I was unable to be present for the House Education and Workforce Committee vote on H.R. 1441, the Truth in Employment Act of 1999. Had I been present I would have voted in the affirmative. Please include this in the full committee report. Thank you.

Sincerely,

MATT SALMON.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF
THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1441 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 2, 1999.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Education and the Workforce,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1441, the Truth in Employment Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Sadoti.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

H.R. 1441—Truth in Employment Act of 1999

H.R. 1441 would amend the National Labor Relations Act (NLRA) to make it easier for employers to deny employment to applicants who are not bona fide employee applicants. This provision would allow employers to refuse to hire union organizers who seek jobs with the intention of organizing workers—a practice known as salting. Current law prohibits employers from discriminating against prospective employees based on their union membership status. About half of the unfair labor practice charges against employers that are brought to the National Labor Relations Board (NLRB) involve unfair hiring allegations. A fraction of these cases deal with salting. While enactment of H.R. 1441 could affect the number of future unfair hiring allegations, CBO cannot predict whether they would increase or decrease. In any case, any budgetary impact due to a change in caseloads would be subject to the annual appropriations process. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

H.R. 1441 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would impose no costs on state, local, or tribal governments.

This estimate was prepared by Christina Hawley Sadoti (federal cost), Susan Sieg (impact on state, local, and tribal governments), and Ralph Smith (impact on the private sector).

This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

STATEMENT OF OVERSIGHT FINDINGS OF THE COMMITTEE ON GOVERNMENT REFORM

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform on the subject of H.R. 1441.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

COMMITTEE ESTIMATE

Clauses 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 1441. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 8 OF THE NATIONAL LABOR RELATIONS ACT

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—
(1) * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Nothing in this subsection shall be construed as requiring an employer to employ any person who is not a bona fide employee applicant, in that such person seeks or has sought employment with the employer with the primary purpose of furthering another employment or agency status: Provided, That this sentence shall not affect

the rights and responsibilities under this Act of any employee who is or was a bona fide employee applicant, including 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.

* * * * *

MINORITY VIEWS

H.R. 1441 WOULD REPEAL THE PRIMARY PURPOSE OF THE NATIONAL LABOR RELATIONS ACT (NLRA)

Under the guise of “The Truth in Employment Act of 1999”, H.R. 1441 represents major assault on the National Labor Relations Act (NLRA). H.R. 1441 declares that “job applicants who “seek employment * * * with the primary purpose of furthering another employment or agency status” fall outside of a newly-created class of “bona fide employee applicant[s],” and gives employers license to refuse to hire them. In doing so, H.R. 1441 denies employment to those union supporters who seek jobs at non-union worksites, solely because they may exercise their right to engage in collective action.

None of the measures contained in this bill is new, and as we discuss below, they have already failed to withstand the scrutiny of the NLRB, the courts, and the Congress. Nonetheless, the Committee, along party lines, has decided to report out a bill that threatens the right of employees to opt for collective representation free of employer interference. As such, H.R. 1441 reverses over 65 years of Congressional policy promoting workplace freedom of association “as an instrument of peace rather than of strife.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937).

H.R. 1441 WOULD UNDERMINE THE RIGHTS OF EMPLOYEES TO ENGAGE IN UNION ORGANIZING AND DISCREDIT THE NLRA’S PRINCIPLE OF FREE CHOICE

The NLRA recognizes the “fundamental right” of employees “to select representatives of their own choosing for collective bargaining * * * without restraint or coercion by their employer.” *Jones & Laughlin*, 301 U.S. at 33. Indeed, “such collective action would be a mockery if representation were made futile by interference with freedom of choice.” *Id.* at 34. Yet this is precisely what H.R. 1441 would accomplish, by creating a new class of job applicants who are not entitled to a job solely by virtue of their support for collective representation; prohibiting workers from exercising their statutory “initiative * * * [to] select[] an appropriate [bargaining] unit” in any case in which they petition for an election (*American Hospital Ass’n v. NLRB*, 499 U.S. 606 (1991)).

H.R. 1441 would permit employers to discharge or refuse to hire any employee who sought or obtained employment in order to promote union organization. It would, for the first time since the enactment of the Wagner Act in 1935, permit employers to discharge and refuse to hire employees because they intended to engage in union organizing. It would thus seriously undermine a fundamental purpose of the National Labor Relations Act—to protect the right of employees to organize and bargain collectively.

H.R. 1441 is intended to end the practice of “salting,” where by union members seek employment from nonunion employers to organize their employees. Salting is an organizing tactic that has been in use for many decades in many different industries. *E.g.* *Baltimore Steamship Packet Co.*, 120 NLRB 1521, 1533 (1958); *Elias Bros. Big Boy, Inc.*, 139 NLRB 1158, 1164–65 (1962); *Sears Roebuck & Co.*, 170 NLRB 533, 533, 535 n.3 (1968). In recent years, its use in the construction industry has become widespread—not because the tactic is new—but to a large extent because recent legal developments have rendered other types of organizing in that industry less effective or more difficult.

In the construction industry, organizing has always been a difficult undertaking. Because jobs are short-lived and work is intermittent, it is nearly impossible for unions to engage in that type of organizing common in other industries involving lengthy campaigns culminating in an NLRB representation election. Because of these difficulties, Congress enacted Section 8(f) of the NLRA in 1959, permitting unions and employers in the construction industry to enter into prehire collective bargaining agreements (agreements entered into before the union demonstrates majority support or even before any employees are hired). Recent developments, however, have made prehire agreements less valuable as a means of organizing nonunion employers. In *John Deklewa & Sons.*, 282 NLRB 1375 (1987), *enfd.*, 843 F.2d 770 (3d Cir. 1988), the Board held that an employer could terminate a prehire bargaining relationship when the prehire agreement expires, unless the union had either won an NLRB election or obtained voluntary recognition based on a showing of majority support. After *Deklewa*, it became apparent that the key to organizing in the construction industry was reaching the employees of nonunion contractors whose demonstrated support the union needed to establish permanent bargaining relationships.

That task became far more difficult, however, after the Supreme Court decided *Lechmere, Inc., v. NLRB*, 502 U.S. 527 (1992), holding that non-employee organizers had no right of access to an employer’s property and that employers could invoke state trespass laws to exclude union organizers from their property. Thus *Deklewa* made access to non-union employees critical to union organizing and *Lechmere* denied that access to non-employees. In response to these developments unions in the construction industry have turned to “salting”—using union members as volunteer organizers who seek employment with nonunion employers to organize their fellow employees during non-working time.

Those who participate in salting programs apply for jobs with nonunion contractors to explain to unorganized employees the benefits of union organization and persuade them to support the union’s efforts to obtain recognition and a collective bargaining agreement from their employer. The efforts to obtain recognition may include a representation election, a recognition strike, an unfair labor practice strike (if the employer commits unfair labor practices), or other lawful tactics, all of which are traditional means of obtaining recognition that have heretofore been protected by the NLRA. Employees engaged in salting (salts) also file unfair labor practice charges, if the employer commits an unfair labor

practice, file complaints with OSHA, if the employer violates applicable safety regulations, and notify the appropriate authorities of any other observed unlawful activities. Employers have never before been permitted to discharge employees because they had reported, or might report, unlawful conduct by the employer.

Salts understand, when they apply for work, that they will be expected to fulfill the employer's legitimate expectations. Because union organizers do not want to give nonunion contractors an excuse to discharge them, and because they need to earn the respect of their coworkers, they are encouraged to be exemplary employees, to work efficiently and obey the employer's lawful work rules. The employer is free to promulgate work rules which all employees, including salts, must follow. Union activity can lawfully be prohibited in working areas during working times. Employees engaged in salting who do not comply with such rules or who are insubordinate or incompetent can be lawfully discharged on the same basis as other employees.

Nevertheless, some employers who have been the object of salting campaigns have complained about what they contend is the unfairness of salting. Many of the employer witnesses who appeared before the committee to complain about salting had themselves committed a number of serious unfair labor practices. One employer witness, for example appeared on behalf of a company called Nordic Electric to complain about salting. Prior to his appearance, however, the NLRB had issued a complaint against Nordic and an Administrative Law Judge had found that Nordic had discharged and refused to hire employees because of their support for the union, unlawfully interrogated employees and even threatened employees with violence. *Nordic Electric, Inc.*, NLRB Case No. 22-CA-20530. Another employer witness was a vice president of a company called Corey Delta, Inc. Prior to his appearance, the NLRB had issued a complaint against Corey Delta alleging that the company had committed numerous unfair labor practices. Among other things, it was alleged that Corey Delta had discharged 45 employees for engaging in union activities such as wearing union buttons, had unlawfully interrogated employees, told employees that the company's no-solicitation rule applied only to union activities, stated that the company intended to avoid hiring union members, and told employees that the company would "close its doors" before it would "go union." The witness himself was alleged to have promulgated an unlawful no-solicitation rule. See also the employers' unlawful responses to salting in *H.B. Zachry Co.*, 319 NLRB 967 (1995), *enforced in pertinent part*, 127 F.3d 1300 (11th Cir. 1997) and *Tualatin Electric, Inc.*, 319 NLRB 1237 (1995).¹

It is apparent that those employers who object to salting do not object to any inherent unfairness of the practice; rather, they object to the fact that the law permits their employees to organize and

¹In *Tualatin*, union organizers had been admonished by their union to "work as hard for a nonunion contractor as they would for a union contractor," to "try to make a favorable impression," and in particular *not* to engage in "sabotage * * * lying, stealing cheating, [or] obtaining information unlawfully." Nevertheless, the employer responded to the salting campaign by "referring to [the union] as organized crime trying to put him out of business and attempted "to eliminate wherever possible any personnel that were affiliated with the union." 319 NLRB at 1239.

prohibits them from discharging those employees who would, or might, promote union organizing among their employees. Accordingly, what is at stake is not whether employers should be allowed to run their own work places in accord with neutral rules designed to assure productivity and discipline. What is at stake is whether employers should be allowed to discriminate on the basis of suspected union membership and organizing activity. Congress settled that issue in 1935, and the law on that issue should not be changed now.

H.R. 1441 would, unquestionably, destroy the right to organize in the construction industry. It would permit employers to refuse to hire any applicants who were suspected of being union supporters and discharge any employees who attempted to promote union organizing. Those applicants who were, or had been, union members could, and would, be “blacklisted” by nonunion contractors. In short, H.R. 1441 would return construction industry employees to their status prior to the enactment of the Wagner Act, when union membership frequently cost employees their jobs.

The right of employees to engage in salting has been upheld, not only by the National Labor Relations Board, but also by the United States Supreme Court, which in *NLRB v. Town & Country Electric, Inc.*, 116 S. Ct. 450 (1995), unanimously held that the NLRA protects those engaged in salting. In the decision, Justice Breyer, writing for the unanimous Supreme Court stated:

Can a worker be a company’s ‘employee’ * * * if at the same time, a union pays that worker to help the union organize the company? We agree with the National Labor Relations Board that the answer is yes.

* * * * *

The employer has no legal right to require that, as part of his or her service to the company, a worker refrain from engaging in protected activity, 116 S. Ct. 450.

That principle, which has been a cornerstone of labor relations for several decades, would be undone by H.R. 1441.

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