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UNITED STATES SUPREME COURT TO RESOLVE "EMPLOYEE" STATUS OF UNION ORGANIZERS

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In October, the United States Supreme Court heard oral argument in *NLRB v Town & Country Electric, Inc.*,[1] a decision of the Eighth Circuit from which the Board sought certiorari for review of that Court's refusal to enforce a Board order premised, in part, on the Board's long-settled position that a paid union organizer is engaged in conduct protected under the NLRA when applying for employment in order to organize.[2] The Eighth Circuit had held that there is no violation of federal labor law when an employer refuses to hire paid union organizers or even rank-and-file union members when those individuals apply for a job in order to further the union's efforts to organize that employer's non-unionized workforce.[3] That Court joined the Fourth Circuit in rejecting the Board's determination that such individuals are within the Act's protection because, it is said, those individuals are not "bona fide applicants" and can not be "employees" as defined in section 2(3) of the NLRA since they were, or would be, subject to the union's direction while in the Respondent Employer's employ.[4] The Supreme Court's decision in this case will resolve a split in the circuits over whether paid union organizers are Section 2(3) "employees".[5] This much anticipated decision will have substantial ramifications for all covered employers, their present and potential employees, and for the labor movement.

In this regard, it is perhaps no coincidence that a week after the Court heard argument in *Town & Country Electric*, the AFL-CIO, meeting for its annual convention in New York City, chose SEIU President John Sweeney as its new President. President Sweeney was chosen after he and Interim President Thomas Donahue engaged in numerous debates around the country in which Sweeney repeatedly declared that the primary task his administration would undertake would be to organize the unorganized and to do so he would seek to increase efforts ten-fold. Following Mr. Sweeney's election, the director of the Federation's Organizing Institute stated that the Federation will seek to expand use of the "salting" or "colonizing" tactic which gave rise to the organizing effort denied protection in the *Town & Country Electric* case.[6] Thus, it is fair to suggest that the Supreme Court's resolution of this controversial issue will be among its most significant decisions in recent years since it will likely determine whether the Federation, its member unions and their members will be able to continue using this particularly effective tactic in their organizing efforts.

SALTING EFFORTS INVOLVE MEMBERS AS WELL AS PAID UNION ORGANIZERS

In the context of the various union organizing programs which have given rise to the current controversy, the term "salt" refers to an individual, including a paid union organizer, who applies to a non-unionized firm in order to pursue the union's organizational goals. It also includes union members who participate in their union's organizing efforts, whether they do so solely at the behest of the union or as signatories of a "salting" resolution. Some unions use a resolution simply to authorize its members to accept employment with a non-signatory employer (ordinarily conduct which would violate the union's constitution) and to protect such members from intra-union charges, while under some programs the resolution also provides for a stipend or benefits to those participating members who obtain employment with the targeted employer. Some "salting" resolutions provide that participating members will withdraw from their employment if the union's organizing effort is concluded.

THE BOARD HAS CONSISTENTLY HELD THAT EMPLOYEES WHO ARE ALSO PAID UNION ORGANIZERS ARE ENTITLED TO THE PROTECTION OF THE NLRA

In decisions stretching back as far as 1974, the Board has consistently held that the fact that an individual was a paid union organizer did not deprive that individual of the protections extended to "employees" under the NLRA, such that an employer violated the Act if it discriminated against that individual because of union affiliation.[7] Prior to 1988 and issuance of its decision in *H.B. Zachry Co.*[8], the Board had applied its determination to require reinstatement of individuals discharged for organizational activity, even though the individuals were union organizers while in the employ of the respondent-employer.[9] At the time it was considering the charge of discriminatory refusal to hire a paid union organizer-applicant in *Zachry*, its determination had been accepted by the Second Circuit, then the only Court of Appeals to consider the Board's determination in an enforcement proceeding.[10]

In *H.B. Zachry Co.*[11], the employer had refused to hire an individual, Barry Edwards, who it had previously been found to have discriminatorily discharged from another project. Edwards had become a full-time union organizer in the interim and the record revealed that the union would supplement his wages and benefits. It also established that Zachry had blacklisted Edwards despite a Board order requiring his reinstatement. The Board dismissed as without merit Zachry's claim that it did not hire Edwards because it had a policy not to hire employed persons or to avoid creating an appearance that it supported or gave financial assistance to the union.

On review, the Fourth Circuit denied enforcement and specifically rejected the Board's determination that a paid union organizer was an employee within the meaning of Section 2(3) of the Act.[12] It declared that as an employee of the union, Edwards could not be a "bona fide applicant" because he wanted to be an employee of Zachry to perform his duties for the union and would be under the union's direction while he worked for Zachry. The Court asserted that the plain meaning of the statutory language necessitated its ruling and that to accept the Board's decision would disrupt the balance struck by Congress in the Act, noting that union access to an employer's property has been restricted by the courts.[13] The opinion is striking for the court's failure to accord any deference to the Board on this statutory issue and for the absence of any reference to the substantial Board and Supreme Court precedent which the Board regarded as supporting its determination.

THE ZACHRY OPINION CREATES A CONFLICT AMONG THE CIRCUITS

Despite the Fourth Circuit's rejection of its position, the Board did not acquiesce but rather continued to make determinations based on its long-held position that paid union organizers are employees within the meaning of the Act.[14] Significantly, the Board received additional support for its determination from several courts, including the District of Columbia Circuit in *Willmar Electric Services, Inc. v NLRB*.[15] Whereas the Board had emphasized the factual record to distinguish *H.B. Zachry*, the Court found that persons with employment ties to a union did not lose the Act's protection when they applied for another position, stressing that moonlighting is too widespread to support the employer's contention that concurrent employment serves to remove an individual from the statute's purview.[16] The Court also found that neither the common law, the purported risk of disloyalty, nor the perceived conflict with the protection afforded employers by the *Babcock & Wilcox* and *Lechmere* decisions, warranted a finding that the Board's determination was vulnerable upon judicial review.[17]

It was at this juncture that the Board was considering its decision in *Town & Country Electric* and a companion case, *Sunland Construction* and, in recognition of the serious import of its decision and of the Fourth Circuit's rejection of its long-held position, the Board heard oral argument and accepted submissions from numerous *amici*. *Town & Country* involved the attempt by two union organizers to obtain employment for themselves and several fellow IBEW members they had induced to appear for a hiring interview with this out-of-state employer, while *Sunland Construction* arose from the efforts of boilermakers to obtain employment on a major project by delivering the "batched" applications of 90 members, including two paid organizers. In neither case were the organizers hired and the one member hired by Town & Country was subsequently discharged when he pursued organizational activities. Sunland Construction was found to have failed to consider any of the union member-applicants despite the fact it had stated publicly that it needed employees with the craft skills those applicants possessed. In both cases, the Board concluded that the employers had violated Section 8(a)(3) and (1) by their actions, including their failure to consider the paid union organizer-applicants.[18]

In its analysis, the Board first examined the statutory language at issue, the definition of "employees" found in Section 2(3), and proceeded to consider its meaning the exclusions contained in the Act, the pertinent legislative history, Supreme Court opinions interpreting the Section, and the common law. It then reviewed the respective obligations of the Board and the courts in making determinations under the Act, and articulated a comprehensive array of policy considerations that it found uniformly supported its consistently-held position that full-time, paid union organizers are "employees" entitled to the Act's protections. The Board specifically rejected the contention that its holding improperly diminished employers' property rights or deprived them of the loyalty they can reasonably expect from their employees, stressing that the Act is "founded on the belief that an employee can give allegiance to both a union and an employer".[19]

Despite the Board's effort to establish the reasonableness of its determination, the Eighth Circuit denied enforcement to its order in *Town & Country Electric*, noting that it found its fellow circuit court's opinion in *Zachry* "more persuasive".[20] The Court then extended its ruling further to hold that the union member-applicants were not "employees" because they were signatories of a "salting" resolution and were, therefore, "under the Local's control" and "were encouraged to apply and to organize Town & Country's employees".[21] It asserted this "third-party control" rendered these individuals incompatible as employees and found that there was "an inherent conflict of interest" where the applicant seeks employment to organize, rather than for financial gain.[22] As the Board's decision suggests, the Court's opinion in *Town & Country Electric* seems at odds with core aspects of the Act as it denied the Act's protection to those who are motivated to encourage others to embrace their statutory rights. The Board sought *certiorari* to overturn the Eighth Circuit's decision and to establish the propriety of its own determination.

While it might well be described as a fool's errand to speculate on the Supreme Court's ultimate resolution of this issue[23], it should be acknowledged that the Court will need to distinguish much of its own precedent regarding both the purview of Section 2(3) and the standard for judicial review of the Board's determinations if it is to reject the Board's determination, as it unquestionably involves a matter of statutory construction committed to the Board in the first instance.[24] Whether the Court resolves the issue by affirming the Board's construction of Section 2(3) or by removing certain categories of "salts" from the Act's reach, it will have a significant impact on labor-management relations and Section members will want to review the Court's opinion carefully when it issues later this term.

ENDNOTES

1. Dkt. No. 94-947, *cert. granted* January 23, 1995, to review 34 F.3d 625 (8th Cir. 1994), *denying enforcement* to 309 NLRB 1250 (1992). Oral argument was heard October 10,1995.
2. *Town & Country Electric, Inc.*, 309 NLRB 1250 (1992).
3. 34 F.3d at 629.
4. *NLRB v Town & Country Electric, Inc.*, 34 F.3d 625, 629.

5. In rejecting the Board's considered opinion regarding the protected employee status of paid union organizer-applicants, the Eighth Circuit joined two others, the Sixth and the Fourth, which held they were not statutory employees; the Second, Third and District of Columbia Circuits have held that they are and that a violation of the Act occurs when an employer refuses to consider such an individual for employment or, if employed, suffers discrimination because of union affiliation.

6. *New York Times*, Sunday, October 29, 1995 at E 3.

7. *See, Dee Knitting Mills*, 214 NLRB 1041, 88 LRRM 1273 (1974), *enf'd mem*, 538 F.2d 312 (2d Cir. 1975); *Oak Apparel*, 218 NLRB 701, 89 LRRM 1381 (1975); *Pilliod of Mississippi*, 275 NLRB 799, 119 LRRM 1279 (1985); *Multimatic Products*, 288 NLRB 1279, 130 LRRM 1482 (1988).

8. 289 NLRB 838, 130 LRRM 1510 (1988), *enf. denied* 886 F.2d 70, 132 LRRM 2377 (4th Cir. 1989).

9. See cases cited in n. 7 above.

10. *See, NLRB v Henlopen Mfg. Co.*, 599 F.2d 26, 30, 101 LRRM 2247, *denying enf.* On other grounds (2d Cir. 1979), in which the Second Circuit noted its own earlier opinion according deference to and accepting the Board's determination in *Dee Knitting Mills*, 538 F.2d 312 (1975), *enf'g* 214 NLRB 1041 (1974), and the Sixth Circuit's decision to the contrary.

    While the Board concedes that the Sixth Circuit "disagree(s) with the Board", *Town & Country Electric*, 309 NLRB 1250, 142 LRRM at 1046, citing *NLRB v Elias Bros. Big Boy*, 327 F.2d 421 (6th Cir. 1964), that opinion did not benefit from the Board's prior consideration of the contested status of paid union organizers as it had no reason to address the issue on the facts of that case. In addition, it should be noted that, in denying enforcement to the Board's order, the Court declared that it refused to be bound by the credibility findings adopted by the Board and decided that the alleged discriminatee, a waitress discharged when she admitted her union sympathies and who was subsequently employed by the union as an organizer, was not a "bona fide employee within the intent of 2(3) of the Act", 327 F.2d at 426. The Court based this conclusion upon the inference it drew that she was an employee of the union before she accepted employment as a waitress. *Id.*

11. 289 NLRB 117, 130 LRRM 1510 (1988).

12. *H.B. Zachry v NLRB*, 886 F.2d 70, 132 LRRM 2377 (4th Cir. 1989).

13. 886 F.2d at 72-74, citing *NLRB v Babcock & Wilcox*, 351 U.S. 105, 110 (1956), as establishing protection offered employers which would be rendered ineffective by the Board's determination.

14. *See, Willmar Electric Service, Inc.*, 303 NLRB 245, 137 LRRM 1365 (1991), *enf'd* 968 F.2d 1327, 140 LRRM 2745 (D.C. Cir. 1992); *Escada (USA), Inc.*, 304 NLRB 845, *enf'd*, 970 F.2d 898 (3d Cir. 1992); *Ultrasystems Western Constructors, Inc.*, 310 NLRB 545 (1993), *enf. denied*, 18 F.3d 251 (4th Cir. 1994); *Sunland Construction Co.*, 309 NLRB 1224 (1992); *Town & Country Electric, Inc.*, 309 NLRB 1250 (1992), *enf. denied*, 34 F.3d 625 (8th Cir. 1994), *cert. granted* 63 LW 355 (January 23, 1995); *Sunland Construction Co.*, 311 NLRB 685 (1993).

15. 968 F.2d 1327, 140 LRRM 2745 (1992), *enf'g* 303 NLRB No. 33, 137 LRRM 1365, *cert. denied*, ___ U.S. ___, 113 S.Ct. 1252 (1993).

    This opinion served to consolidate the Board's position, as Member Oviatt cited the "recent, thoughtful opinion in *Willmar*" as prompting her decision to abandon her *Zachry*-based dissent in *Escada (USA)*, and join the Board majority. *Sunland Construction*, 142 LRRM at 1034-1035. Member Oviatt stressed that the question is answered by resort to the statute and not from the members' view of what our labor policy should be and noted that ". . . underlying the Act is the Congressional goal of 'facilitating the organization and recognition of unions . . ." *Id.* She concluded that the legislative materials and Supreme Court opinions reveal that paid union organizers are not excluded from the Act's protections. *Id.*

16. 968 F.2d at 1329.

17. 502 U.S. 527, 122 S.Ct. 841, 117 L.Ed.2d 79 (1992).

18. The Board's decisions are reported at 309 NLRB 1250, 142 LRRM 1036 and 309 NLRB 1224, 142 LRRM 1025, respectively.

19. *Town & Country Electric*, 142 LRRM at 1044.

20. 34 F.3d 625, 628, 147 LRRM 2133 (1994).

21. 34 F.3d at 629.

22. *Id.*

23. See, e.g., *Lechmere, Inc. v NLRB*, 502 U.S. 527, 122 S.Ct. 841, 117 L.Ed.2d 79, 139 LRRM 2225 (1992); *NLRB v Health Care & Retirement Corp. of America*, 114 S.Ct. 1778, 146 LRRM 2321 (1994), for recent examples of Supreme Court opinions which surprised many court watchers.

24. As regards the proper construction of Section 2(3), the Board has looked to the Supreme Court's opinions in *Phelps Dodge Corp. v NLRB*, 313 U.S. 177, 8 LRRM 439 (1941); *Chemical Workers v Pittsburgh Plate Glass Co.*, 404 U.S. 157, 78 LRRM 2974 (1971); and *Sure-Tan, Inc. v NLRB*, 467 U.S. 883, 116 LRRM 2857 (1984); to confirm its understanding of the statutory language and of Congressional intent as requiring that Section 2(3) be interpreted broadly and to cover individuals not explicitly excluded. *Town & Country Electric*, 142 LRRM at 1041.

    The Court has repeatedly declared that a reviewing court, including itself, must defer to an agency's interpretation of the statute authorizing its operation, if that interpretation is "reasonable". See, e.g., *Beth Israel Hospital v NLRB*, 437 U.S. 483, 501, 98 LRRM 2727 (1978); *Curtin-Matheson Scientific v NLRB*, 494 U.S. 775, 787, 133 LRRM 3049 (1990); *NLRB v E.C. Atkins & Co.*, 331 U.S. 398, 403, 20 LRRM 2108 (1947) (The Board's determination as to whether one is an "employee" must be accepted by courts if not inconsistent with the law). See also, *Lechmere, Inc. v NLRB*, ___ U.S. ___, 112 S.Ct. 841, 139 LRRM 2225, 2231 (1992), White, J., dissenting, ("We will uphold a Board rule so long as it is rational and consistent with the Act, . . . even if we would have formulated a different rule had we sat on the Board") (citations omitted); and *ABF Freight Systems, Inc. v NLRB*, 114 S.Ct. 835, 145 LRRM 2257 (1994), where the Court found deference to the Board was required where its decision was not "arbitrary, capricious, or manifestly contrary to the law", and a concurrence found the Board's decision in that instance "unintelligent but nonetheless lawful".