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PAID UNION ORGANIZERS AS PROTECTED “EMPLOYEES” UNDER THE NLRA: THE NLRB v TOWN & COUNTRY ELECTRIC, INC. DECISION

by DAVID P. TWOMEY*

I. INTRODUCTION

In one of the Supreme Court’s first decisions interpreting the National Labor Relations Act (NLRA) of 1935, the Court held that the term “employee” as used and defined in the Act included job applicants.\(^1\) In the decision, Phelps Dodge Corp. v NLRB, the Court upheld the National Labor Relations Board’s determination that in refusing employment to two individuals who had affiliations with a union, the employer violated Section 8(3) of the 1935 Act.\(^2\) Recently the Supreme Court addressed the question of whether or not it was a violation of the amended NLRA to terminate an individual when it discovered that the individual, while employed by a company, was also being paid by a union in order to help the union organize the company.\(^3\) This paper will set forth the facts and contentions of the parties at interest, present the questions raised by certain Supreme Court justices at the oral argument of the case before the Court, give the Court’s decision and rationale, and comment on the implications of this decision.

* Phelps Dodge Corp. v N.L.R.B., 313 U.S. 177 (1941).
\(^1\) Id. at 182, See also, Toulatin Electric, Inc. v N.L.R.B., 84 F.3d 1202 (9th Cir. 1996) which involved an employer’s decision to discharge an employee, who was also a paid union organizer, for that employee’s union activities. After the Supreme Court’s Town & Country Electric decision, the employer withdrew its argument that the individual was not an “employee” protected by the National Labor Relations Act.
II. BACKGROUND

Town & Country Electric, Inc., a nonunion electrical contractor, desired to hire licensed Minnesota electricians for construction work at a paper mill in International Falls, Minnesota. Town & Country, through an employment agency, advertised for job applicants, but it refused to interview 10 of 11 union applicants who responded to the advertisements. Its employment agency hired one union applicant whom Town & Country interviewed, but he was dismissed after three days on the job.4

The eleven members of the union, the International Brotherhood of Electrical Workers, filed charges with the National Labor Relations Board claiming that Town & Country and the employment agency had refused to interview or retain them because of their union membership. The National Labor Relations Board, in the course of its decision, determined that all eleven job applicants, including two union officials and the one member briefly hired, were "employees" as the Act defines that word.5 The Board recognized that under well-established law, it made no difference that the ten members who were simply applicants were never hired.6 Moreover, the Board concluded with respect to the meaning of the word "employee," that it did not matter that the union members intended to try to organize the company if they secured the advertised jobs,7 or that the union would pay them while they went about their organizing.8

The United States Court of Appeals for the Eighth Circuit reversed the Board, holding that the Board had incorrectly interpreted the statutory word "employee." In the Court's view, the term "employee" does not cover those who work for a company while a union simultaneously pays them to organize that company.9 Since this determination was in conflict with decisions by the District of Columbia Circuit10 and the Second Circuit,11 the Supreme Court granted certiorari to resolve the conflict.

4 Id. at 452. This individual, Malcom Hansen, was a journeyman electrician with 28 years as a member of the IBEW. In his three days on the construction project, he earned $725 from the employer, and $1100 from the union. See 309 N.L.R.B. 1250 at 1259.
6 Id. at 1257.
7 Id.
8 Id.
9 Town & Country Electric Inc. v N.L.R.B., 34 F.3d 625, 629 (8th Cir. 1994).
III. CONTENTIONS

In support of the Board's position that the paid union organizers were "employees" entitled to the protection under the Act from discrimination based on their union activities, the ordinary dictionary definition of "employee" referenced: "any person who works for another in return for financial or other compensation." The phrasing of the Act is broadly written, "any employee"; and Section 302(c)(1) of the 1947 Labor Management Relations Act of 1947 contemplates the possibility that a company's employee might also work for a union. The Board's interpretation of the term "employee" is consistent with the purposes of the Act, including the right of employees to organize for mutual aid and without employer interference. Moreover, the Supreme Court has recognized that the Board has a degree of legal leeway when it interprets its governing statute.

On the other hand, the employer, Town & Country contended that the common law of agency supports its view that the paid union organizers were not protected employees under the NLRA. It pointed to Section 6, Comment a of the Restatement of Agency (Second) dealing with respondeat superior liability for torts, and it argued that when a paid union organizer serves his union, the organizer is acting adversely to the company, with the union not the company having the right to control the servant. Further, Town & Country argued that "salts" — paid union organizers who obtain positions in companies the union is trying to organize — may try to harm the company by quitting when the company needs them, disparaging the company, or sabotaging the company or its products.

IV. QUESTIONING BY THE SUPREME COURT

Chief Justice William Rehnquist questioned the Deputy Solicitor General during his oral presentation to the Court on behalf of the NLRB, asking whether a company is obligated to an employee whose only purpose is to get inside the plant and blow it up. "He's a

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12 116 S.Ct. at 453.
13 Id. at 454.
14 Id.
15 Id.
16 Id. at 453.
17 Id. at 455.
18 Id.
19 In Diamond Walnut Growers, Inc. v N.L.R.B., 80 F.3d 485, 496 (D.C. Cir. 1996) Judge Wald defines union "salts" as organizers who apply for jobs with the intent to organize at the job site.
20 DLR No. 196, AA-1, October 11, 1995.
terrorist," asserted Mr. Rehnquist, relating to the discussion on whether the applicant is also an "employee."  

The Deputy Solicitor General responded that any paid union organizer is subject to the employer's control, with his or her organizing efforts limited to break time or time after work.  

Justices Antonin Scalia and Stephen Breyer in their questioning agreed that there is no inherent incompatibility between loyalty to the union.  

Justice Ruth Bader Ginsburg asked the Deputy Solicitor General whether the Act protects an employee who is under the control of a competitor who will leave a position when told by the competitor to do so?  

V. DECISION AND RATIONALE  

A unanimous Supreme Court decided the paid union organizers can qualify as "employees" of a company, and are therefore entitled to applicable protections offered them under the National Labor Relations Act.  

Section 2(3), the definitions' section of the NLRA states:  

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include 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, but shall not include any other substantially equivalent employment, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.  

The Supreme Court held that the Board's broad, literal reading of the above quoted statutory definition of "employee" is entitled to considerable deference as the interpretation of the agency created by Congress to administer the Act.  

Further, Section 302(c)(1) of the LMRA of 1947 specifically contemplates the possibility that a company's employee may also work for a union.  

21 Id.  
22 Id.  
23 Id.  
24 29 U.S.C., Section 152(3) (1988 ed.).  
25 116 S.Ct. at 453.  
26 Id. at 454.
The Supreme Court rejected the employer's agency law argument based on Comment a, of the Restatement (Second) Agency, Section 226, which comment stated in part, that a person "... cannot be a servant of two masters at the same time in doing an act as to which an intent to serve one necessarily excludes an interest to serve the other." The Court pointed out that the Restatement (Second) Agency, Section 226, also stated 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 the abandonment of the service to the other." The Court adopted the Board's view that service to the union for pay does not involve abandonment of service to the company.

Concerning the employer's argument that practical considerations like "salts" may quit when the company needs them, or they may disparage the company, or sabotage the firm or its products, the Court pointed out that nothing in the record proves that such acts of disloyalty were present in the instant case. Further, the Court listed for the employer alternative remedies available to it to correct such problems, other than the exclusion of paid or unpaid union organizers from all protection under the Act.

VI. IMPLICATION OF THE DECISION

In Lechmere Inc. v NLRB the Supreme Court held that employers who have and enforce no-solicitation policies on their property, as a general rule, cannot be compelled to allow employee union organizers on their private property to distribute organizational literature.

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27 Id. at 455.
28 Id. at 456.
29 Id.
30 Id.
31 Id. at 457.
32 112 S.Ct. 841 (1992). In Lechmere, Local 919 of the United Food and Commercial Workers sought to organize the 200 workers at a newly opened Lechmere store located in a strip mall in Newington, Connecticut. On June 18, union organizers began leafleting cars at this so-called Lechmere mall, but the organizers were ordered by store officials to leave the parking lot and the leaflets were removed by the security guards. The union placed five advertisements in the Hartford Courant, in an attempt to organize Lechmere's workforce, with little evidence that affected employees actually saw the ads. The union also took down the license plate numbers of cars parked where employees had been told to park and the union obtained certain names and addresses from the Registry of Motor Vehicles. Ultimately, it obtained 41 names and addresses from all of their efforts, but half of the individuals had unlisted telephone numbers. The union filed unfair labor practice charges against Lechmere because of its refusal to allow representatives of Local 919 to engage in organizational activity in the parking lot. The Board decided that Lechmere had committed an unfair labor practice by barring union representatives from handbilling in the parking lot and Lechmere...
This decision was a dramatic departure from the Labor Board's policy on allowing outside organizers onto company property contained in its Jean Country decision, which involved the weighing of interrelated facts concerning (1) the strength of the Union's Section 7 rights, (2) the strength of the employer's property rights, and (3) the availability of reasonable and effective alternative means of communication. In the Lechmere case, the union attempted to reach some two hundred workers at a retail store to explain the benefits of union representation, but the outside union organizers were forced off company

petitioned for review of the Board's order.

Lechmere Inc. believed that it had the absolute right to ban the nonemployee union organizers from its property under the Supreme Court's 1956 decision, NLRB v Babcock and Wilcox (351 U.S. 105). It posted on each set of doors to its premises 6" x 8" signs stating:

TO THE PUBLIC No Solicitation, Canvassing, Distributing of Literature or Trespassing by Non-Employees in or on Premises.

And, Lechmere strictly enforced this no-solicitation rule in its store and parking lots. Lechmere also believed that the union did have reasonable alternative means of communicating with Lechmere's employees through the "usual channels" as stated in Babcock.

After the NLRB's decision in favor of the union, the Court of Appeals for the First Circuit approved and applied the Board's Jean Country (129 LRRM 1201 (1988)) test in upholding the Board's order. The Court found that the union's Section 7 interest in disseminating organizational information to employees was "robust." The strength of Lechmere's property right was not quite as strong, according to the Court, even though Lechmere was a co-owner and followed a strict no-solicitation rule, because of the public nature of the parking lot, and, the union activity did not disrupt business, constitute harassment, or impede traffic flow. The third Jean Country test—whether the union had open to it other reasonable and effective means of reaching the workforce—also weighed in favor of the union according to the Court. The Court reasoned that although it had expended considerable time and effort, the union was able to compile merely a skeletal employee roster. The mall, which is not an effective alternative to personal contact, was impractical because of the incomplete list of names and addresses, newspaper advertising was futile, television advertising of the organizational message would be expensive, and in the context of reaching 200 workers in a market of 900,000 people would be extravagantly wasteful. Much of the same can be said for radio and newspaper advertising. The Court concluded that the Board had a rational basis for its conclusions in this case, and it supported the Board's holding that Lechmere violated Section 8(a)(1) of the NLRA by barring union representatives from organizational activity in the mall's parking lots. The Supreme Court rejected the Jean Country balancing test as it applied to nonemployee union organizers as contrary to its distribution of union literature by nonemployee organizers on its property except under the very narrow circumstances where the location of the property and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with the employees. Examples of such isolated locations are logging camps, mining camps, and mountain resort hotels. The Supreme Court majority found that the union organizers had reasonable access to employees outside the employer's property.

33 129 LRRM 1201 (1988); affirmed 914 F.2d 313 (1st Cir. 1990).
property by the employer and relegated to picketing on public property on a 46-foot wide grassy strip on a highway outside Lechmere's parking lot, trying to communicate their message to employees. They also purchased five advertisements in a metropolitan daily newspaper. Ultimately, the organizers obtained the names and addresses of just forty-one of the two hundred employees of the store. Such a small listing of names was insufficient to be successful in an organizational campaign.

Based on the reduced access of outside organizers to company property under the Lechmere rule, and the resulting ineffectiveness of some of the traditional organizational techniques used by outside organizers, and, perhaps based on the pressure placed on union leaders by the decline of union memberships in the country,34 many unions may be expected to utilize a strategy based on the Town & Country Electric decision, of "salting" the work force of companies unions have targeted for organizational campaigns.

In its Town & Country Electric decision, the Supreme Court dealt with certain problems that may be faced by employers dealing with employees who are also paid union organizers. It points out that if the company believes there may be a problem with employees quitting without notice, it can offer employees fixed-term contracts, rather than "at-will" status; or it can negotiate a notice period.35 If the company is faced with unlawful activities by employee-union organizers, it may file a complaint with the Board, dismiss the individuals involved in the unlawful activity, and/or notify local law enforcement authorities.36 It may be expected as well that employers will develop and strictly enforce no outside employment (or no second job or "moonlighting") rules for their employees. With such a policy the employer would screen out applicants who report second jobs on their applications, or, if the employer's investigation uncovers a second job, it would lead to the termination of the individual for falsification of the employment application.37 If it is shown, however,

35 116 S.Ct. at 457.
36 In Diamond Walnut Growers, Inc. v N.L.R.B., 80 F.3d 485 (D.C. Cir. 1996), an employer was allowed to discriminate in regard to job selection against three union leaders who "unconditionally" returned to work just prior to a union representation election based on the employer's fear of violence and sabotage.
37 At the oral argument of the Town and Country Electric case, Sandra Day O'Connor asked the Deputy Solicitor General if an employer can lawfully screen out moonlighters and he responded affirmatively, provided the policy is applied neutrally and with no union animus. DLR No. 196, AA-1, October 11, 1995.
that the employer initiated the no outside employment rule because of its anti-union animus, then such a policy would be in violation of the NLRA.