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H.B. Zachry Co. v. N.L.R.B.: Paid Full-Time Union Organizer Not an "Employee"

In *H.B. Zachry Co. v. N.L.R.B.*,¹ an employer refused to hire a paid full-time union organizer whom it had previously fired in violation of Section 8(a)(1) of the National Labor Relations Act.² The National Labor Relations Board subsequently held the employer's refusal to hire the organizer a violation of Section 8(a)(1), (3) and (4) of the Act and ordered the employer to offer the organizer employment. A unanimous panel of the United States Fourth Circuit Court of Appeals denied enforcement of the Board's order, finding that a paid full-time union organizer is not an "employee" within the meaning of Section 2(3) of the Act³ and, thus, held the organizer unentitled to the protection of the Act.

The significance of *Zachry* is two-fold. The case contains the first express finding that a paid full-time union organizer is not a protected "employee" in an unfair labor practice context. More broadly, the case indicates the willingness of a federal appellate court to extend the relatively sophisticated constructions of the term "employee," long used in the context of collective bargaining, into that of unfair labor practice litigation, where the term has traditionally received a broad construction.

This brief note will outline the relevant law and jurisprudence, sketch the treatment this case received from the Board and from the court, and analyze the case.

LAW AND JURISPRUDENCE

Section 2(3) defines the term "employee" as it is used in the Act. For purposes of this discussion, the term is relevant in two contexts: 1) unfair labor practice litigation under Section 8(a) and (b) and 2) elections and collective bargaining under Section 9.

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1. 886 F.2d 70 (4th Cir. 1989).

2. 29 U.S.C. § 151-169 (1988) [hereinafter the Act]. The Board ordered reinstatement, 261 NLRB 681 (1982).

3. Section 2(3) provides in part that "[t]he 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, and who has not obtained any other regular and substantially equivalent employment"

In *Allied Chemical & Alkali Workers, Local No. 1 v. Pittsburgh Plate Glass Co.*,⁴ the United States Supreme Court faced the question whether retired workers' benefits are a mandatory subject of collective bargaining such that an employer's refusal to bargain over them would be a violation of Section 8(a)(5) of the Act. Although the case involved an alleged unfair labor practice, the underlying dispute was whether a retired worker is an "employee" properly included within a bargaining unit.⁵ Examining the legislative history of the Taft-Hartley Amendments, the Court found that Congress intended that the Board give to the words of the Act "not far-fetched meanings but ordinary meanings."⁶ The Court then turned to *N.L.R.B. v. Hearst Publications, Inc.*,⁷ which the Taft-Hartley Amendments overruled:

The 1947 Taft-Hartley revision made clear that general agency principles could not be ignored in distinguishing "employees" from independent contractors. Although *Hearst Publications* was thus repudiated, we do not think its approach has been totally discredited. In doubtful cases resort must still be had to economic and policy considerations to infuse Section 2(3) with meaning.⁸

The Court, however, refrained from applying policy considerations to the definition of "employee" because it found that the case before it was not "doubtful" under the plain meaning of Section 2(3). The Court found that retired workers were clearly not properly included in a Section 9(a) bargaining unit and, therefore, held that the employer had not violated Section 8(a)(5).

Similarly, the Board recognized in *Dee Knitting Mills, Inc.*⁹ that when a worker takes a job "solely to organize, so that the employment is really only temporary," that worker's authorization card cannot be counted.¹⁰ In *Oak Apparel, Inc.*,¹¹ however, the Board declined to sophisticate its construction of "employee" in an unfair labor practice context. Faced with the question whether a paid full-time union organizer was an "employee" protected by the Act from unfair labor practices, the Board rejected an invitation to extend the temporary worker exclusion

4. 404 U.S. 157, 92 S. Ct. 383 (1971).

5. See Section 9 of the Act.

6. 404 U.S. at 167-68, 92 S. Ct. at 391, quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947).

7. 322 U.S. 111, 64 S. Ct. 851, reh'g denied, 322 U.S. 769, 64 S. Ct. 1148 (1944). Like *Chemical Workers*, this case turned on what workers are properly included in a bargaining unit as "employees."

8. 404 U.S. at 168, 92 S. Ct. at 392 (citations omitted).

9. 214 NLRB 1041 (1974), enf'd, 538 F.2d 312 (2d Cir. 1975).

10. 214 NLRB at 1041.

11. 218 NLRB 701 (1975).

recognized in *Dee Knitting* to the case before it: "The distinction between an employee's status with respect to the appropriate bargaining unit and his or her status as an 'employee' within the meaning of Section 2(3) has been recognized since the infancy of the administration of the Act."¹² The Board accordingly found that full-time union organizers are "employees" within the meaning of Section 2(3), because in an unfair labor practice context "employees" are "members of the working class generally."¹³

TREATMENT OF THE CASE

Barry Edwards was the "leading organizer" in an organizational campaign at a H.B. Zachry construction site in North Carolina in 1980. Zachry discharged him in June of that year. The Board held that this discharge was a violation of Section 8(a)(1) of the Act.¹⁴ Accordingly, the Board ordered Zachry to offer Edwards reinstatement or, if his job no longer existed, to offer him substantially equivalent employment.¹⁵ By the time this order became binding, Zachry had finished its work at the North Carolina site. Edwards unsuccessfully applied for work at a Zachry site in Virginia five times between December 1974 and August 1985. Since 1983, Edwards had been a paid full-time union organizer for Local 30.

In the subsequent proceeding before an Administrative Law Judge, Zachry Vice-President Eugene Hammond admitted the company's knowledge of Edwards' union status.¹⁶ The ALJ, in rejecting Zachry's argument for a dual motives case, wrote:

If there are two motives, they are both illegal, one under Section 8(a)(3), because Edwards engaged in union activities, and the other under Section 8(a)(4), because Edwards was involved . . . and was still being punished for his testimony, participation, and success in that proceeding.¹⁷

Following Board precedent, the ALJ found that an "employee" entitled to the protection of the Act for unfair labor practice purposes

12. *Id.*, citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192, 61 S. Ct. 845, 851-52 (1941). While the distinction the Board seeks to draw here is correct, the language it uses may incorrectly suggest that an employee's bargaining unit status is not dependent on a construction of Section 2(3). Section 9(a) uses the term "employee." *Phelps Dodge* indicates that some of the exclusions from the term "employee" in Section 2(3) apply only in a bargaining context. *Phelps Dodge*, 313 U.S. at 192, 61 S. Ct. at 851-52.

13. 218 NLRB 701 (1975). See also *Anthony Forest Products Co.*, 231 NLRB 976 (1977).

14. 261 NLRB 681, 685-86 (1982).

15. *Id.* at 693

16. 289 NLRB No. 117, at 4 (1988).

17. *Id.* at 5.

is "a member of the working class generally."¹⁸ Noting that the term thus encompasses applicants for employment,¹⁹ the ALJ found that paid full-time union organizers are "employees" in an unfair labor practice context because "although their ulterior purpose may be to organize the unorganized, [they] are merely applying for a job, just like any other employees, are to be judged on their abilities as employees, and are forbidden by the Act to be judged on their union sympathies."²⁰ The ALJ accordingly held that Zachry's refusal to hire Edwards violated Section 8(a)(1), (3) and (4) of the Act and ordered Zachry to offer Edwards employment. The Board then adopted this decision and order.

In the subsequent enforcement proceeding, the Fourth Circuit Court of Appeals found that a paid full-time union organizer is not an "employee" within the meaning of Section 2(3) and, consequently, held that Zachry had not violated Section 8. In analyzing the case, the court set out to follow the guidelines announced by the Supreme Court in *Chemical Workers* for the construction of the term "employee." In the first stage of its analysis, the court, examining the terms under which Edwards planned to work for Zachry and the union,²¹ concluded that "[i]t would distort the plain meaning of the word 'employee' to hold that Edwards could ever be an employee of Zachry"²² Unlike the *Chemical Workers* court, however, the *Zachry* court applied policy considerations in construing Section 2(3) in a case found not to be "doubtful."

In this regard, the court first isolated the "careful balance" of limitations imposed on union and employer for the protection of the employees' Section 7 rights. The court concluded that the Board's construction of "employee" would circumvent the restrictions on a union's right to enter an employer's premises set forth in *NLRB v. Babcock & Wilcox*.²³

Second, the court isolated the employee's right to self-determination. The court here warned that under the Board's construction, "a union might command significant numbers of its employees to work for corporations in which elections are anticipated in order to skew the results."²⁴

18. *Id.* at 4.

19. *Copes-Vulcan, Inc.*, 237 NLRB 1253 (1978), *enf'd in part*, 611 F.2d 440 (3d Cir. 1979). See also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S. Ct. 845 (1941).

20. 289 NLRB No. 117, at 4 (1988).

21. 886 F.2d 70, 73 (4th Cir. 1989). The union had agreed 1) to supplement Edwards' salary, 2) to continue payments for his health and life insurance policies and for his pension, 3) to pay daily transportation expenses, and 4) to pay job-related living expenses. *Id.* at 71.

22. *Id.* at 73.

23. *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 76 S. Ct. 679 (1956).

24. *Zachry*, 886 F.2d at 75.

ANALYSIS

Assuming for the moment that the court's extension of bargaining jurisprudence into the area of the unfair labor practice is correct, two problems immediately appear in its finding that a paid full-time union organizer is not an "employee" in an unfair labor practice context.

First, an *unpaid* full-time union organizer would, by negative implication, appear fully entitled to the protection of the Act. Prohibiting union payment of organizers, thus, does little, if anything, to prevent the asserted circumvention of the employer's *Babcock & Wilcox* rights,²⁵ assuming that unions will be able to find sufficiently dedicated organizers to work at target plants without extra compensation. For the same reason, the court's finding is equally ineffectual in preventing the packing of plants with organizers to skew election results.

The second problem with the court's finding is that a bona fide employee who, sometime after hire, becomes a paid full-time union organizer would be stripped of Act protection. Thus, for instance, should an employer discriminate against two workers because of identical lawful full-time organizing activities, the employer would escape liability as to one if that worker had received pay for his organizing after hire. Not only is such a result incongruous, it must tend to chill any on-going organizational efforts.

These observations highlight the fundamentally problematic enterprise of regulating union control over the work force. The Fourth Circuit rule may find some measure of justification in the increased probability that the interests of the union, rather than those of target plant employees, will rank most prominently among the motives driving the organizational efforts of union-paid organizers. But unlike the employer, the union is not forbidden by Section 8 to "interfere" with employees' Section 7 rights. Indeed, as the Supreme Court indicated in *Babcock & Wilcox*, one component of the employees' right to self-determination is the right to receive organizational help from unions.²⁶

The court's argument, furthermore, mistakes the controlling source of law. *Babcock & Wilcox* concerned only the rights of the employer vis-a-vis non-employee union solicitors. The *Zachry* court would, however, find the full-time organizer a non-employee for Section 2(3) pur-

25. On the other hand, the policy considerations the court used in *Zachry* appear to support the denial of employee status to organizers who forego compensation. Unpaid organizers would presumably be as intrusive as paid ones; similarly, unpaid organizers would presumably be just as inclined to vote for the union. Denial of employee status to unpaid organizers, however, would be problematic in light of the court's focus on the union's compensation arrangements. See *supra* note 20.

26. See *Babcock & Wilcox*, 351 U.S. at 113, 76 S. Ct. at 685 ("The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.").

poses because of *Babcock & Wilcox*, when it is Section 2(3) that should determine who is an employee for *Babcock & Wilcox* purposes. It is, then, inappropriate to view a union as a rival employer sending its industrial saboteurs into the target employer's premises. Congress has, furthermore, not undertaken to regulate the advisability of union organizing efforts. This is a decision employees will ultimately make at the polls.

The court's application of the *Chemical Workers* standard is, furthermore, fundamentally flawed. The "ordinary meaning" of Section 2(3) by no means demands the exclusion of the paid full-time union organizer from the term "employee." Even assuming that such an organizer is an "employee" of her union, the second clause of Section 2(3) may indeed include the organizer, in providing that the term "employee" is not limited "to the employees of a particular employer, unless the Act explicitly states otherwise."²⁷ Because the Act nowhere explicitly excludes the paid full-time union organizer from the term, the court's insistence on honoring the "ordinary meaning" of the Act is anomalous at best, inasmuch as the court ignores the quoted language altogether.

The court's venture into policy argument is, moreover, clearly uncalled for in light of the case on which it relies for its analysis. If it would distort the plain meaning of the Act to include the paid organizer within the term "employee," no further analysis should be conducted under *Chemical Workers*.

Assuming for the sake of argument, however, that *Zachry* is a "doubtful case," the court's policy arguments do not withstand scrutiny. To reiterate, *Babcock & Wilcox* concerns the property rights of the employer vis-a-vis non-employees only. Unlike the union solicitors in that case, a paid full-time union organizer hired by an employer would be subject to employer control during work time. Should the organizer attempt to solicit fellow employees during work and, thus, disrupt the work of others or fail to do her own, the employer might properly fire her. It becomes, therefore, all too ingenious to strip such a worker of employee-status because she is paid and, thus, obviously in the control of the union only. A paid organizer in the work force poses no more threat to an employer's property rights, as the ALJ's decision in *Zachry* suggests, than a pro-union employee.²⁸

As for employee self-determination, the court ignores the concomitant right of employees to receive union assistance in organization that played so prominent a role in the *Babcock & Wilcox* balancing. Further, the court's concerns about skewed election results are addressed under current Board law in the bargaining stage. As *Dee Knitting* makes clear,

27. See *supra* note 3.

28. *H.B. Zachry Co.*, 289 NLRB No. 117, at 6 (1988).

temporary employees may not be “employees” properly included in a bargaining unit. If the organizer’s sole purpose in working is to organize the employer’s plant and, thus, the organizer intends to quit after the election, of course her vote cannot be counted.

Finally, it is a mistake to sophisticate the construction of the term “employee” in an unfair labor practice context. As the *Zachry* court seems to realize, the strictures of Section 8 are intended to shield the employee’s right to self-determination. Section 2(3) should be given a broad construction in an unfair labor practice context so that the protective measures of Section 8 do their job. The grudging distinctions the court introduces with *Zachry* will chill Section 7 activity as other paid organizers are refused employment and as bona fide employees who accept pay for organizing after hire are discriminated against with impunity. When similar distinctions are made in a bargaining context, however, there is no such chilling effect; instead, a sophisticated definition of “employee” serves to effectuate the policies of the Act by ensuring that it is, indeed, the employees who are determining their own future and not the union.

CONCLUSION

The court in *Zachry* found that a paid full-time union organizer is not an “employee” within the meaning of Section 2(3) of the National Labor Relations Act. Accordingly, the court held that an employer had not violated Section 8 of the Act in refusing to hire such an organizer because of his union status. The court erred in ignoring the distinction, dating from the beginning of the administration of the Act, between the meanings of the term “employee” in an unfair labor practice context and in a bargaining context. While a relatively sophisticated construction of the term is appropriate in the latter, where employee choice must be protected by determining which workers are properly classified as “employees,” narrow constructions of Section 2(3) will have a chilling effect on the exercise of Section 7 rights in an unfair labor practice context, because the employer will be able to discriminate against union activity with impunity.

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