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Employee Status under the N.L.R.A.

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EMPLOYEE STATUS UNDER THE N.L.R.A.

Since 1935 the rights of laborers engaged in interstate commerce have been affirmatively defined and protected by federal legislation. In that year Congress passed the original National Labor Relations Act,[1] popularly known as the Wagner Act. The Act has undergone substantial amendment, first by the Labor-Management Relations Act of 1947,[2] better known as the Taft-Hartley Act, and again in 1959 when the Labor-Management Reporting and Disclosure Act[3] became law.

The National Labor Relations Act has as its declared purpose the elimination of labor disputes obstructing the free flow of commerce. The accomplishment of this purpose is sought through encouragement of collective bargaining and protection of the employee's right to organize.[4] The National Labor Relations Board is charged with primary responsibility in enforcing and effectuating the provisions and policies of the Act. One Board function is to determine whether particular individuals, or groups, are "employees" to which the protection of the Act extends. The purpose of this note is to consider whether the Board, in making this determination, is free to consider economic and statutory considerations at the core of the Act's policy, or whether the Board is confined solely to the application of traditional legal classifications.

The Board's jurisdiction depends first of all upon the concept of interstate commerce, but this gives the jurisdiction a broad scope. Under the commerce clause of the Constitution[5] the Act is allowed to govern not only all persons, organizations and business structures engaged in, but all those who activities affect, interstate commerce.[6]

The second most important requisite to coverage of the Act is the existence of "employee" status within the meaning of the National Labor Relations Act. An individual may be connected with an enterprise or organization engaged in activities affecting interstate commerce, and still not be entitled to protection under the Act unless he is an "employee." One who has employee status is entitled to all of the rights, privileges, and protection afforded by the Act. Generally speaking it may be said that an employee has the right to form, assist, and join labor unions, and to engage in collective bargaining and other concerted activities; he also has the right to refrain from any or all of such activities.[7] These rights are effectively protected against interference, influence or coercion by either employer or union.[8] Employee status gives the right to vote in representation elections to select collective bargaining representatives.[9]

[1] 49 Stat. 449 (1935).
[2] 61 Stat. 136 (1947), 29 U.S.C. §§ 141-197 (1958).
[3] 73 Stat. 519 (1959), 29 U.S.C.A. §§ 401-531.
[4] Section 1(b), 29 U.S.C. § 141(b) (1958).
[5] U.S. CONST. art. I, § 8.
[6] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The jurisdiction is so broad that the Board has voluntarily limited itself in the cases of which it will take cognizance.
[7] Section 7, 29 U.S.C. § 157 (1958).
[8] Section 8, 29 U.S.C. § 158 (1958).
[9] Section 9, 29 U.S.C. § 159 (1958).

Traditionally, the term *employee* is synonymous with *servant* as that term is used in the tort field for the purpose of fastening liability upon a master.[10] Americans prefer the term *employee* to *servant* and the latter has fallen into general disuse except in the field of tort law where it is a term of art.

At common law the conclusion that a particular individual was the employee of another depended upon the amount and type of control that could be exercised over employment conditions, hours, wages, hiring and firing, rates of pay and methods to be followed in doing the work. The right to control several or all of these activities would be sufficient to support a finding of employment relationship even though such right were not generally exercised.[11]

Before 1947 the National Labor Relations Act did not specifically define *employee* but delimited the term by a series of inclusions and exclusions beginning this way:[12] "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . ." The groundwork for a definition of *employee,* under the Act, much broader than its traditional meaning was laid in 1941 by the United States Supreme Court in *Phelps Dodge Corp. v. NLRB.*[13] In that case the Supreme Court upheld the reinstatement of workers discharged by reason of their union activities, with back pay, notwithstanding the fact that some of the workers had subsequently obtained jobs elsewhere. Mr. Justice Frankfurter, speaking for the Court, said:[14]

> The broad definition of "employee" . . . expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee. . . ."[15]

In 1944, the Supreme Court decided *NLRB v. Hearst Publications.*[16] In that case the Hearst newspapers had been charged with a refusal to bargain collectively with the representatives of their employees, under the Act.[17] The case turned on whether "newsboys" were employees within the purview of the Act. Actually the "newsboys" were mostly mature men who worked continuously to support families. Their earnings were influenced in a large measure by the publisher, who dictated buying and selling prices, fixed the market and controlled the supply of papers. In uphold-

[10]Pennsylvania Casualty Co. v. Elkins, 70 F. Supp. 155, 158 (E.D. Ky. 1947); Sills v. Sorenson, 192 Wash. 318, 73 P.2d 798, 801 (1937).
[11]Hull v. Philadelphia & Reading Ry. Co., 252 U.S. 475 (1920); Linstead v. Chesapeake & Ohio Ry. Co., 276 U.S. 28 (1928); Standard Oil Co. v. Anderson, 212 U.S. 215 (1909).
[12]49 Stat. 449 (1935).
[13]313 U.S. 177 (1941).
[14]*Id.* at 192.
[15]H.R. REP. No. 1147, 74th Cong., 1st Sess. (1935), reads in part: "In section 2 are listed various definitions of terms. These definitions are for the most part self-explanatory. The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer."
[16]322 U.S. 111 (1944).
[17]Section 8(5), now § 8(a)(5), 29 U.S.C. § 158(a)(5) (1958), requires employers to bargain collectively with the representatives of their employees.

ing the Board's determination that the men were "employees" the Court said:[18]

> The word [employee] is not treated by Congress as a word of art having a definite meaning. Rather it takes color from its surroundings in the statute where it appears . . . and derives meaning from the context of that statute, which must be read in the light of the mischief to be corrected and the end to be attained. . . . The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors." . . . [The word's] applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

Thus the Supreme Court departed substantially from the traditional legal distinctions between independent contractors and employees.[19] It is apparent that such a characterization of employee status broadened the scope of the Act immensely.

The National Labor Relations Board and the Courts of Appeals[20] were quick to adopt the *Hearst* approach and for a short time common law limitations upon the definition of *employee* were ignored in cases under the Act.[21]

In 1947, *NLRB v. E. C. Atkins & Co.*[22] came before the Supreme Court. The Atkins plant was engaged in making armor plate during the war. Because of this defense activity, the plant was required to have guards. These guards were paid, hired, discharged, and to an extent controlled by the company. On the other hand, any individual hired as a guard had to be approved by the United States. General orders were posted for the guards by military personnel and they were required to drill under military control for a short period of time each week. Their employment agreement recited that they were subject to military law just like any soldier. Thus, substantial amounts of control were reposed in both the United States and the company.

The Court of Appeals for the Seventh Circuit reversed the Board's finding that the guards were the company's employees, saying:[23] "[W]e are of the view that common law tests are not to be ignored, although not exclusively controlling, and that any test utilized must be consistent with the purposes of the Act."[24] The Supreme Court, reversing the Court of

[18]322 U.S. at 124, 126 and 129.
[19]See also NLRB v. Blount, 131 F.2d 585 (8th Cir. 1942).
[20]Section 10(e), 29 U.S.C. § 160(e) (1958), of the Act provides for enforcement of Board orders by petition to the Courts of Appeals of the United States. Section 10(f), 29 U.S.C. § 160(f) (1958), allows review in the Courts of Appeals of the United States for persons aggrieved by final orders of the Board.
[21]NLRB v. Gluek Brewing Co., 144 F.2d 847 (8th Cir. 1944); NLRB v. Armour & Co., 154 F.2d 570 (10th Cir. 1945); Mahoning Mining Co., 61 N.L.R.B. 792 (1945).
[22]331 U.S. 398 (1947).
[23]NLRB v E. C. Atkins & Co., 147 F.2d 730, 732 (7th Cir. 1945).
[24]Review by the Supreme Court on the merits was delayed when the war ended. The Supreme Court remanded the case to the Seventh Circuit Court of Appeals to determine whether demilitarization of the plant guards rendered the case moot. NLRB

Appeals, pointed out what it called "the hard facts of industrial life": that, due to their lack of individual strength and power to affect their working conditions, without collective bargaining such employees were subject to the unilateral determination by their employer of their wages, hours, and working conditions. The Supreme Court felt that even under conventional common law standards the company had enough control to make these guards its employees, but the Court had this to say about what the measure should be:[25]

> As we recognized in the *Hearst* case, the terms "employee" and "employer" in this statute carry with them more than the technical and traditional common law definitions. . . . [T]he Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. *This does not mean that it should disregard the technical and traditional concepts of "employee" and "employer."* But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. (Empasis added.)[26]

The recognition in the *Atkins* case that common law principles were still to be considered in defining *employee* under the Act, was seized upon and applied in *NLRB v. Swift & Co.*[27] In that case the Court of Appeals for the Third Circuit followed and applied the approach of the *Atkins* case in holding that plant clerks and standards department checkers were "employees," and as such entitled to protection under the Act.

Following these cases Congress stepped into the picture. In 1947, the National Labor Relations Act was substantially amended by the Labor-Management Relations Act, better known as the Taft-Hartley Act.[28] Although the policy of the amended act was still to remove obstructions from interstate commerce engendered by labor disputes, the tone of the Act changed. The emphasis of the original act had been encouragement of labor organization with the result that labor organizations rose from an inferior position to one of power and influence.[29] The Taft-Hartley amendments were aimed at giving management an equal position in some areas and at curbing labor abuses.[30]

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v. E. C. Atkins & Co., 325 U.S. 838 (1945). The Court of Appeals held that the issue was not moot and affirmed its former ruling that the guards were not employees of the Atkins Company. NLRB v. E. C. Atkins & Co., 155 F.2d 567 (7th Cir. 1946).

[25]331 U.S. at 403.

[26]The final disposition of the *Atkins* case was dictated on other grounds by sections 9(b)(3) of the Taft-Hartley Act, 29 U.S.C. § 159(b)(3) (1958). That section prohibits the Board from certifying any labor organization as a bargaining representative for plant guards if that organization also admits to membership employees other than guards. On this ground the Court of Appeals held that Atkins did not have to bargain collectively with the union representing these guards. NLRB v. E. C. Atkins & Co., 165 F.2d 659 (7th Cir. 1947).

[27]162 F.2d 575 (3d Cir. 1947).

[28]*Supra* note 2.

[29]See GREGORY, LABOR AND THE LAW 415 (1949).

[30]For example, section 7 was amended to allow employees to *refrain* from, as well as enter into, concerted activities. Thus an employer could compete with the union for the loyalty of his employees.

The amended act expressly excluded independent contractors from the definition of *employee*.[31] In making this change, Congress criticized the Supreme Court for refusing in the *Hearst* case[32] to apply the ordinary tests of the law of agency to determine the existence of the employer-employee relationship. The Conference Committee Report said:[33]

> The House bill also excluded from the definition of "employee" individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be employees, the Supreme Court in *N.L.R.B. v. Hearst Publications, Inc.* (1944), 322 U.S. 111, held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were "employees" within the meaning of the Labor Act. Consequently it refused to consider the question of whether certain categories of persons whom the Board had deemed to be "employees" were not in fact and in law really independent contractors.

Congress differentiated the two classifications, saying:[34]

> In the law, there always has been a difference . . . between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.

It may very well be that the recognition in the *Atkins* case that common law tests are not to be ignored, forms a basis upon which the approach of the *Atkins* case may still survive. It is noteworthy that the *Atkins* case was not criticized by Congress, especially since it was the other leading Supreme Court case in the area. Unless Congress intended to make common law tests the sole criterion for determining employee status under the Act, the *Atkins* approach is still open to the National Labor Relations Board.

Nowhere in the Act itself or in the congressional reports which accompanied the Taft-Hartley Act, does Congress manifest an intention that common law tests be controlling unless the following language, which Senator Taft made a part of the record on the Senate floor, had this effect:[35]

> The Supreme Court has . . . held [in the *Hearst* case] that the ordinary tests of the law of agency could be disregarded by the Board in determining if petty occupational groups were "employees" within the meaning of the Labor Relations Act. The Court consequently refused to consider the question of whether cer-

[31]Section 2(3); that section now reads in part, "The term 'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor. . . ." 29 U.S.C. § 152(3) (1958).
[32]322 U.S. 111 (1944).
[33]H.R. CONF. COMM. REP. No. 510, 80th Cong., 1st Sess. 32 (1947).
[34]H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947).
[35]93 CONG. REC. 6599 (daily ed. June 5, 1947).

> tain categories of persons whom the Board had deemed to be "employees" might not, as a matter of law, have been independent contractors. The legal effect of the amendment therefore is merely to make clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency.

It is apparent from the Board's decisions since 1947 that it considers the Taft-Hartley amendment to have made common law principles absolutely determinative of employee status. Under the amended Act the Board has consistently used a "right to control" test in determining the presence or absence of employee status.[36] Controlling factors used by the Board are complete control over employment conditions, such as authority to hire and discharge and to establish rates of pay, and control over the supervision and determination of policy matters.[37] The Board applies this test to all cases involving an employment issue, whether the question is who is the employer of an individual or a group of individuals, or whether an individual is an employee entitled to the rights guaranteed by the Act when he occupies some relationship that is admittedly not one of independent contractor.

The first case decided by the Board under the amended definition of *employee* was *Kansas City Star Company*.[38] That case, like the *Hearst* case, involved the employment status of newspaper carriers. However in the *Kansas City Star* case the carriers were quite independent; in addition to buying the papers at wholesale and selling them at retail, they established their own routes, hired their own assistants,[39] and supplied their own equipment. They were under virtually no supervision by the company. The Board cited legislative history of the Taft-Hartley Act[40] and held that Congress intended the Board to recognize as "employees" only those who work for wages or salaries under direct supervision and not those who undertake to do a job for a price. Although the Board emphasized the distinction between one who works for wages and one who works for a profit, it is clear that the decision was influenced to a great extent by the lack of company control over the carriers, *i.e.*, the traditional common law test.

Unlike the Board, the *courts* in cases since the Taft-Hartley amendment have not granted common law principles such universal and controlling application. The application of technical legal concepts may not work injustice in some cases, but those concepts simply cannot be used untempered by policy considerations of the Labor Act. In *NLRB v. George D. Auchter*

[36]American Broadcasting Co., 117 N.L.R.B. 13 (1957); Los Angeles Evening Herald and Express, 102 N.L.R.B. 103 (1953); Koontz Creamery, Inc., 102 N.L.R.B. 1619 (1953); Golden State Agency, 101 N.L.R.B. 1775 (1952); Oklahoma Trailer Convoy Inc., 99 N.L.R.B. 1019 (1952); Citizens News Co., 97 N.L.R.B. 428 (1951).

[37]Roane-Anderson Co., 95 N.L.R.B. 1501 (1951); J. Howard Smith, Inc., 95 N.L.R.B. 21 (1951); Shell Oil Co., 90 N.L.R.B. 371 (1950); Matheny Creek Lumber Co., 85 N.L.R.B. 515 (1949); Clarksburg Paper Co., 80 N.L.R.B. 1304 (1948); National Food Corp., 88 N.L.R.B. 1500 (1950).

[38]76 N.L.R.B. 384 (1948).

[39]Most had from one to seven assistants and some grossed as much as $10,000 per year.

[40]H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947).

Co.,[41] the Board charged a council representing various carpenter unions, among other parties, with an unfair labor practice in attempting to cause an employer to discriminate against an employee.[42] Various employers, a contractors' association, and the council were parties to a contract providing for the hiring of only those applicants approved by the union. The council contended that the word *employee* does not include a job applicant. Clearly this would be so under common law principles, but the Fifth Circuit held job applicants to be "employees" under the Act and said:[43]

> The application of § 8(b)(2),[44] can not be made to depend upon whether the labor union's efforts to induce the employer to discriminate with regard to hire are successful, for this would place a premium upon the success of the unfair labor practice which it perpetrated. We think that the word "employee" is broad enough to include, and does include, a job applicant who is discriminately denied employment in violation of § 8(a)(3).[45]

Thus the court recognized that a technical legal classification could not be mechanically applied if the policy of the Act were not to be circumvented. The same reasoning should apply to any threatened subordination of the policy of the Act, including cases in which the question is whether individuals are employees or independent contractors.

NLRB v. Texas Natural Gasoline Corp.,[46] decided by the Court of Appeals for the Fifth Circuit, contained the following dictum:[47]

> We are reminded though that technical concepts of employment are to be rejected in determining whether at a specified time a particular person is an employee within the meaning of the Act. [Citing *Phelps Dodge, Hearst* and *Auchter* cases.]

That language is too broad in the light of the legislative history of the Taft-Hartley Act, above considered, but it indicates an awareness, on the part of the court, that technical concepts alone will not always effectuate the policies of the Act. The court need not be criticized if it stated this awareness a little too broadly, since the actual decision of the case was quite sound.

The importance of choosing between the narrow common law test and the broader standard suggested by the *Atkins* case is illustrated by *International Brotherhood of Teamsters v. NLRB.*[48] In that case a large dairy corporation began entering into individual contracts with its milk truck drivers, notwithstanding the existence of a collective bargaining

[41]209 F.2d 273 (5th Cir. 1954).
[42]Section 8(b)(2), 29 U.S.C. § 158(b)(2) (1958), makes it an unfair labor practice for an employer to encourage or discourage membership in a labor organization by discrimination in regard to hire or tenure of employment. However, union shop contracts are expressly excluded from the operation of the latter section.
[43]209 F.2d at 277.
[44]*Supra* note 42.
[45]*Ibid.*
[46]253 F.2d 322 (5th Cir. 1958).
[47]*Id.* at 325.
[48]280 F.2d 665 (D.C. Cir. 1960).

agreement with a union. Under these individual contracts the dairy was to sell its trucks and routes to the drivers who then would become "independent contractors." Any driver who refused to sign one of these contracts was discharged. Under the contracts the dairy was to retain about the same amount of control over the drivers as before; only the formal nature of their relationship was altered.[49] Finding a violation of section 8 (d)[50] of the Act, the Board ordered the dairy to cease and desist from refusing to discuss the matter with the union. The union petitioned for modification of the order to include reinstatement of the discharged drivers and to invalidate the "independent distribution" agreements already in effect. In two badly confused attempts,[51] the Board was unable to reach a majority decision on the question of whether the drivers retained employee status after signing the individual distributorship contracts. One Board member was influenced by the change in form of remuneration, relying upon legislative history of the Taft-Hartley Act to the effect that one who works for wages is an employee, while one who depends for income upon profit over costs and expenses is an independent contractor.[52]

Faced with the Board's inconclusive findings, the Court of Appeals held that the drivers ceased to be employees when they entered into the contracts, and refused to modify the order. Judge Washington had this to say in a vigorous dissent:[53]

> In determining status, the Board and the courts must construe the term "employee" to effectuate the purposes of the Taft-Hartley Act, so long as a departure is not made from the common law standard of "right of control." . . . First, our duty to effectuate the purposes of the Act was manifested in National Labor Relations Board v. Hearst Publications . . . . The Supreme Court there said "Where all the conditions of the relation require protection, protection ought to be given." . . . This canon of construction has not been vitiated by the Taft-Hartley Act . . . .

Judge Washington went on to say the legislative history of the Taft-Hartley Act indicated that independent contractors were excluded from the term *employee* because the Supreme Court in the *Hearst* case had reasoned that common law concepts were *irrelevant* to a definition of *employee*. He summed up his view this way:[54]

> Accordingly, I believe that even though the right of control is now an essential consideration in determining whether or not

[49]The individual contracts reserved to the dairy the right to terminate unilaterally the services of the driver for any cause, the right to unilaterally name and appoint substitutes for the driver and to fix the compensation of such substitutes, and the power to determine the times and places at which the driver's services would be rendered. Upon termination of employment, the contract required the truck to be sold back to the dairy. Shamrock Dairy, Inc., 124 N.L.R.B. 494 (1959).

[50]Section 8(d), 29 U.S.C. § 158(d) (1958), sets forth requirements for altering or abandoning collective bargaining agreements.

[51]Shamrock Dairy, Inc., 119 N.L.R.B. 998 and 124 N.L.R.B. 494 (1959).

[52]H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947).

[53]280 F.2d at 670.

[54]*Id.* at 671.

> a person has "employee" status, the Board and the courts must consider other factors. Certainly where conflicting inferences can be drawn from the facts, so as to support either a conclusion of employee or independent contractor status by the common law "right of control" test, considerations of Taft-Hartley policy should be persuasive.

The *Teamsters* case exposes the danger of using exclusively the common law tests for determining the existence of the employer-employee relationship in the field of labor relations. Employers can give to their workers a semblance of independence sufficient to persuade the Board that they are independent contractors, and yet retain enough control so that the workers should be afforded the benefits of the Act. There is no doubt that where the worker is clearly an independent contractor there is no freedom to label him an employee, but as is always true in separating two classes there is frequently doubt as to which side of the line the workman should fall. In that situation the Board should not ask itself, how would this issue be resolved in a tort case, but how should it be resolved in view of the policy of the Act.

The policy of the Act will be defeated if the Board is allowed to decide close cases mechanically with technical concepts. On the other hand, *NLRB v. E. C. Atkins & Co.*[55] *NLRB v. George D. Auchter Co,*[56] *NLRB v. Texas Natural Gasoline Corp.,*[57] and the dissent in *International Brotherhood of Teamsters v. NLRB,*[58] suggest the more desirable approach. Under such an approach the courts and the Board could remain ever watchful for attempts to circumvent the purposes and policies of the Act and yet, by utilizing common law legal classifications as a frame of reference, still take advantage of this means to achieve certain and uniform results. It is submitted that Congress did not intend, by excepting independent contractors from employee status under the Act, to require that the Board and the courts look solely to common law classifications to the exclusion of the underlying policy of the National Labor Relations Act.

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[55]331 U.S. 398 (1947).
[56]209 F.2d 273 (5th Cir. 1954).
[57]253 F.2d 322 (5th Cir. 1958).
[58]280 F.2d 665 (D.C. Cir. 1960).