

# A BALANCING OF INTERESTS: THE STATUS OF PROFESSIONAL UNION ORGANIZERS UNDER THE NLRA

## I. INTRODUCTION

*Fred is a member of the United Breadmakers Union. He also works for the union as a professional organizer. Although Fred enjoys organizing, the job does not pay well and he is forced to take a second job to support his family. He obtains a full-time position with the Better Bread Company. Union officials believe that this is the perfect opportunity to organize the Better Bread employees. They inform Fred of his responsibilities and instruct him to report periodically to the union with updates on his progress. After one week, Fred's organizing is going much better than expected. Nearly twenty-five percent of the Better Bread employees have signed union authorization cards. However, the Better Bread owner is not pleased with Fred's organizing activities. He would rather deal with his employees on an individual basis. The next day, the owner calls Fred into his office and explains to Fred that his performance on the job has been unsatisfactory. Fred believes he has been doing an excellent job. Nevertheless, the owner fires Fred. The union then files an unfair labor practice charge against the Better Bread Company for discriminating against Fred because of his union organizing activities. The Better Bread Company responds by claiming that Fred was never a true employee of the company because he was already employed by the United Breadmakers Union. Therefore, according to the company, the National Labor Relations Act does not protect Fred.*

The National Labor Relations Act ("NLRA" or "The Act")<sup>1</sup> gives employees the right to self organization without undue interference by employers.<sup>2</sup> Employees who have either been discharged or refused employment<sup>3</sup> because of their professional organizing activities frequently assert violations of the NLRA. These employees rely on section 8(a)(3) of

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1. 29 U.S.C. §§ 151-69 (1988).

2. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965). Section 7 of the NLRA, which outlines the specific rights of covered employees, provides that "[e]mployees shall have 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." 29 U.S.C. § 157 (1988).

3. Job applicants are considered "employees" for purposes of the NLRA. See *infra* notes 51-56 and accompanying text.

the Act, which expressly provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."<sup>4</sup>

Although section 8(a)(3) seems to protect professional organizers, section 8<sup>5</sup> confers rights only on employees.<sup>6</sup> As defined in section 2(3), "employee" means "any employee," subject to several exceptions.<sup>7</sup> Courts interpret this circular language in different ways depending on the particular employment situation.<sup>8</sup> As a result, there is no clear consensus as to who is considered an employee under the Act. The federal courts of appeals stand divided as to whether professional union organizers qualify as employees under the NLRA.<sup>9</sup>

The purpose of this Note is to eliminate some of the uncertainty surrounding the status of professional union organizers under the NLRA. Part II focuses on the various approaches courts have taken in interpreting the definition of employee provided in section 2(3) of the Act. Part III discusses the common law definition of "employee" as it relates to the

4. 29 U.S.C. § 158(a)(3) (1988).

5. 29 U.S.C. § 158 (1988). Section 8(a) prohibits employers from interfering with, restraining, or coercing employees in the exercise of their section 7 rights. 29 U.S.C. § 158(a). Likewise, section 8(b) prohibits labor organizations from restraining or coercing employees in the exercise of their section 7 rights. 29 U.S.C. § 158(b).

6. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("By its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers.").

7. Section 2(3) defines an employee as follows:

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, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, 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 defined herein.

29 U.S.C. § 152(3) (1988).

8. See *infra* notes 10-26 and accompanying text.

9. See *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 933 (1995); *Ultrasystems W. Constructors, Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994); *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252 (1993); *Escada (USA), Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992), *enforcing* 304 N.L.R.B. 845 (1991); *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26 (2d Cir. 1979); *NLRB v. Elias Bros. Big Boy*, 327 F.2d 421 (6th Cir. 1964). This Note focuses primarily on the decisions of these cases in formulating a workable test that courts can apply. Each case will be discussed in more detail *infra*.

interpretation of section 2(3). Part IV examines and analyzes cases involving the issue of whether professional union organizers are employees under the Act. Finally, Part V proposes a test that resolves this issue while balancing the interests of employers, employees, and unions.

## II. GENERAL MEANING OF SECTION 2(3)

Before an administrative agency or a court can determine whether professional union organizers are covered by the NLRA, it must first interpret the term "employee" as used in section 2(3) of the Act. A broad interpretation would cover almost any person in the workforce, while a narrow interpretation would undoubtedly exclude many workers. In order to provide certainty, agencies and courts must interpret the term "employee" with uniformity and consistency.

Congress created the National Labor Relations Board ("NLRB" or "the Board") to oversee the administration of the NLRA.<sup>10</sup> As part of its "usual administrative routine," the NLRB interprets the term "employee" as it is used in the Act.<sup>11</sup> The Board's interpretation of the statute, however, is subject to judicial review.<sup>12</sup>

In *NLRB v. Hearst Publications*,<sup>13</sup> the Supreme Court upheld the Board's determination that newsboys who bought newspapers from publishers and sold them on the streets qualified as employees under the

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10. Sections 3-6 of the NLRA provide for the Board's creation and define the Board members' general powers and duties. 29 U.S.C. §§ 153-156 (1988). Sections 9-11 give the Board its specific powers regarding elections, unfair labor practices, and investigations. 29 U.S.C. §§ 159-161 (1988).

11. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944) (quoting *Gray v. Powell*, 314 U.S. 402, 411 (1941)). The court explained that Congress gave the board this task because of its experience:

Everyday experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers.

*Id.* See also *Sperry v. Local Joint Bd., Hotel & Restaurant Employees and Bartenders Int'l Union*, 216 F. Supp. 263, 266 (W.D. Mo. 1963) (recognizing the power of the Board to interpret the NLRA).

12. Section 10(f) of the NLRA provides in part:

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.

29 U.S.C. § 160(f) (1988).

13. 322 U.S. 111 (1944).

NLRA.<sup>14</sup> The Court concluded that Congress did not intend for the term "employee" to have a strict definition, but one that could be adapted to reflect both the purpose of the Act and economic realities.<sup>15</sup>

When Congress amended the NLRA in 1947 with the passage of the Taft-Hartley Act,<sup>16</sup> it criticized the Court's decision in *Hearst Publications*.<sup>17</sup> When Congress amended section 2(3) to expressly exclude independent contractors from the scope of the NLRA, Congress indicated its intent to give words in the Act "not far-fetched meanings[,] but ordinary meanings."<sup>18</sup> The Supreme Court has since recognized that the purpose of this amendment was to apply general agency principles to the definition of "employee."<sup>19</sup> The Court now assumes that when Congress uses the term "employee" without providing a specific definition, it intends for the agency law definition to apply.<sup>20</sup> Because the NLRA does not offer a definition of employee, courts look to agency law.

In each case, courts also rely on the Board's interpretation of the term. As the Supreme Court noted in *Hearst Publications*, courts have generally given administrative agencies such as the NLRB a considerable amount of

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14. *Id.* at 132. The Court relied on the Board's findings that the publishers supervised the newsboys and supplied much of their sales equipment and advertising materials with the intent that it be used for the publishers' benefit. *Id.* at 131.

15. *Id.* at 129; see also *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947) (recognizing that the terms "employee" and "employer," in addition to their traditional definitions, also "draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life").

16. Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, Title I, § 101, 61 Stat. 136 (1947).

17. In the legislative history of the Taft-Hartley Act, Congress discussed what it considered to be the common definition of "employee":

An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board.

H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 309 (1948).

18. *Id.* Although the Board has primary authority to interpret the definition of terms in the Act, "[i]t is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished." *Id.*

19. See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). However, in doubtful cases, courts may still have to resort to economic and policy considerations. *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971).

20. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)).

deference in cases involving issues of statutory construction.<sup>21</sup> Since deciding *Heart Publications*, the Supreme Court has consistently confirmed this principle.<sup>22</sup>

Because the definition of “employee” in section 2(3) of the NLRA is very vague, courts should be even more willing to defer to the Board’s expertise. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>23</sup> the Supreme Court held that where a statute is silent or ambiguous on a particular issue, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>24</sup> If so, then the court is bound by the agency’s determination.<sup>25</sup> However, courts have been increasingly willing to find agency determinations unreasonable.<sup>26</sup>

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21. The Court emphasized the experience the Board acquires through its administration of the Act: Undoubtedly, questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty it is to administer the questioned statute. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited. . . [T]he Board’s determination that specified persons are ‘employees’ under this Act is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.

*Hearst Publications*, 322 U.S. at 130-31; accord *NLRB v. Carbonex Coal Co.*, 679 F.2d 200 (10th Cir. 1982); *NLRB v. Neuhoff Bros. Packers, Inc.*, 398 F.2d 640 (5th Cir. 1968); *Signal Oil and Gas Co. v. NLRB*, 390 F.2d 338 (9th Cir. 1968); *Jervis Corp. v. NLRB*, 387 F.2d 107 (6th Cir. 1967); *Matthews & Co. v. NLRB*, 354 F.2d 432 (8th Cir. 1965), *cert. denied*, 384 U.S. 1002 (1966); *NLRB v. Randolph Elec Membership Corp.*, 343 F.2d 60 (4th Cir. 1965).

22. See *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (holding that “[o]n an issue that implicates [the Board’s] expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference[.]”); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (holding that “[i]f [the Board’s] construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute.”); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (recognizing the Board as “one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect”); see also *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968) (holding that the Board’s “determination should not be set aside just because a court would, as an original matter, decide the case the other way”); but see *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

23. 467 U.S. 837 (1984).

24. *Id.* at 843. The majority explained that a “court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844. Courts are likely to defer to the Board in arguable situations. See, e.g., *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 691-92 (1951) (holding that the Board’s interpretation and application of the Act are entitled to weight in doubtful situations); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 681 n.1 (1943) (recognizing as settled law that “the experienced judgment of the Board is entitled to great weight” where questions of law are involved).

25. *Chevron*, 467 U.S. at 843.

26. The Supreme Court has recognized that there are situations when courts should be wary about upholding agency decisions:

This has clearly been the case with respect to professional union organizers. In effect, courts substitute their own judgments for those of the agencies.

### III. AGENCY PRINCIPLES AT COMMON LAW

Employment relationships encompass both agency law principles and aspects of common law master-servant relationships. In order to understand how modern courts interpret the term "employee" under the NLRA, a discussion of these principles is necessary. Courts must use these common law principles to determine the ordinary meaning of "employee." This meaning can then be used to determine whether professional union organizers are employees.

#### A. *Employment Relationships In General*

An employment relationship can be characterized as one between master and servant, employer and employee, or principal and agent. There are no significant differences between these terms,<sup>27</sup> and they will be used interchangeably throughout the remainder of this Note. In general, an employment relationship exists when one person who employs another exercises a substantial amount of control, or has the right of control, over the work of the employee.<sup>28</sup> At common law, there are traditionally four elements that are present in an employment relationship: the hiring of the employee, the payment of wages, the power to discharge the employee, and the power of control over the employee's conduct.<sup>29</sup> If one or more of these elements is missing, it becomes much more likely that the relationship is something other than that of employer and employee.<sup>30</sup> However, courts

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Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

NLRB v. Brown, 380 U.S. 278, 291-92 (1965). For further discussion, see *infra* notes 140-47.

27. C.J.S. *Employer-Employee* § 3 (1992) (stating relationship of employer and employee to be substantially the same as that of master and servant).

28. *Id.*; 53 AM. JUR. 2D *Master and Servant* § 1 (1970).

29. 53 AM. JUR. 2D *Master and Servant* § 2 (1970).

30. See, e.g., *Schlotter v. Leudt*, 123 N.W.2d 434, 438-40 (Iowa 1963) (driver who owned truck, had no schedule, and was not compensated by shop for whom he made deliveries, was not an employee); *Kamm v. Morgan*, 157 So.2d 118, 122 (La. Ct. App. 1963) (pilot who provided pest-control services as he desired, planned his own itinerary, and determined the price charged, was an independent contractor); *Thurn v. La Crosse Liquor Co.*, 46 N.W.2d 212, 214-15 (Wis. 1951) (salesman who conducted sales activities as he saw fit, received commissions on sales, and was not required to attend sales meetings was an independent contractor).

must examine the facts of each individual case before making that determination. Though the four common law elements are not controlling, they do serve as guidelines for courts to follow in determining whether an employer-employee relationship exists.<sup>31</sup> The most important factor is the employer's control over the employee.<sup>32</sup>

In most employment relationships, the work performed must be for the employer's benefit.<sup>33</sup> In addition, the *Restatement (Second) of Agency* states that an agent must act *solely* for the benefit of the principal.<sup>34</sup> Therefore, if an agent performs work that is for the benefit of someone other than the principal, a court will probably consider the agent an independent contractor rather than an employee.

In all employment relationships, the employee owes a fiduciary duty to the employer.<sup>35</sup> This means that the employee must be honest, faithful, and loyal,<sup>36</sup> and must not do anything that would be detrimental to the

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31. *Id.*; see *Standard Oil Co. v. Anderson*, 212 U.S. 215, 225 (1909) ("In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation . . . are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.").

32. 53 AM. JUR. 2D *Master and Servant* § 2 (1970).

It is . . . essential that the master shall have control and direction not only of the employment to which the contract relates, but also of all of its details and the method of performing the work, and if these elements of control and direction are lacking, no relationship of master and servant exists.

*Id.*

33. See *Miller Bldg. Supply, Inc. v. Rosen*, 503 A.2d 1344, 1348 (Md. 1986) (holding that employment contract created employee's duty to act for employer's benefit); *Yorston v. Pennell*, 153 A.2d 255, 259-60 (Pa. 1959) (holding that servant's work must be performed on business of master or for his benefit).

34. RESTATEMENT (SECOND) OF AGENCY § 387 (1958). The Restatement explains: "An agent is one who acts on behalf of the principal and only for his benefit. The purposes which the principal has manifested to the agent as the object of the agency constitute the benefit which the principal is entitled to have the agent seek." *Id.* § 387 cmt. a (internal citations omitted).

35. 30 C.J.S. *Employer-Employee* § 110 (1992); 3 AM. JUR. 2D *Agency* § 210 (1986). See *Wadsworth v. Adams*, 138 U.S. 380, 389 (1891) (holding that "[t]he law requires the strictest good faith upon the part of one occupying a relation of confidence to another").

36. See, e.g., *Langensiepen v. Unemployment Compensation Bd. of Review*, 451 A.2d 814, 816 (Pa. Commw. Ct. 1982) (stating that an employee owes his employer "loyalty, diligence, fidelity, obedience, and, above all, honesty"); *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 780 (Minn. 1989) (explaining that "[e]very employment contract encompasses implied duties of honesty and loyalty . . ."); *City of Lancaster v. Trumbo*, 660 S.W.2d 954, 956 (Ky. Ct. App. 1983) (holding that "[a]n employee is obligated to render loyal, diligent, faithful and obedient service to his employer . . ."); *Lane Co. v. Taylor*, 330 S.E.2d 112, 118 (Ga. Ct. App. 1985) (recognizing that agent's primary obligation is loyalty to principal); *Ability Search, Inc. v. Lawson*, 556 F. Supp. 9, 15 (S.D.N.Y. 1981), *aff'd*, 697 F.2d 287 (2d Cir. 1982) (holding that employees are prohibited from acting in a disloyal manner).

employer's interests.<sup>37</sup> In other words, the employee must act with the utmost good faith toward the employer.<sup>38</sup> An employee's failure to act in good faith contravenes the standards of behavior that an employer expects from an employee,<sup>39</sup> and the employer then becomes justified in discharging the employee.<sup>40</sup>

### B. Working for Two Different Employers

Courts dispute whether a person can be simultaneously employed by two different employers. According to general agency principles, "[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."<sup>41</sup> However, because control is one of the primary elements of an employment relationship,<sup>42</sup> it seems unlikely that two different employers could exercise a sufficient amount of control over a single employee that two employer-employee relationships could exist simultaneously.<sup>43</sup> Nevertheless, in *Kelley v. Southern Pacific Co.*,<sup>44</sup> the Supreme Court acknowledged that, under common-law principles, a dual employment relationship may exist.<sup>45</sup>

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37. *Advance Ross Elecs. Corp. v. Green*, 624 S.W.2d 316, 318 (Tex. Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982) (stating that employees have an implied obligation "to do no act which has a tendency to injure the employer's business or financial interest").

38. 3 AM. JUR. 2D *Agency* § 210 (1986).

39. *Trumbo*, 660 S.W.2d at 956.

40. *See Advance Ross Elec.*, 624 S.W.2d at 318.

41. RESTATEMENT (SECOND) OF AGENCY § 226 (1958). *But see* Brotherhood of Locomotive Firemen & Enginemen v. Mitchell, 190 F.2d 308, 309 (5th Cir. 1951) (stating that the following scriptural pronouncement is a favored principal at law and in equity: "No man can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other.").

42. *See supra* notes 28-32 and accompanying text.

43. *The Restatement (Second) of Agency* recognizes that "ordinarily the control which a master can properly exercise over the conduct of the servant would prevent simultaneous service for two independent persons." RESTATEMENT (SECOND) OF AGENCY § 226, cmt. a (1958). Moreover, since "the relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service, giving service to two masters at the same time normally involves a breach of duty to one or both of them." *Id.*

44. 419 U.S. 318 (1974).

45. *Id.* at 324. The Court held that, for FELA purposes, the plaintiff could establish his employment with a rail carrier even while he was employed by another if he could show that he was working for two masters simultaneously. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 226). *See also* Standard Oil Co. v. Anderson, 212 U.S. 215 (1909); NLRB v. Long Lake Lumber Co., 138 F.2d 363 (9th Cir. 1943); Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655 (10th Cir. 1942); Utah Copper Co. v. Railroad Retirement Bd., 129 F.2d 358 (10th Cir.), *cert. denied*, 317 U.S. 687 (1942); Walling v. Merchants Police Serv., 59 F. Supp. 873 (W.D. Ky. 1945).

An agent is also under a duty while working for the principal not to act for persons whose interests conflict with those of the principal.<sup>46</sup> The agent breaches this duty "by acting for another in an undertaking that has a substantial tendency to cause him to disregard his duty to serve his principal with only his principal's purposes in mind."<sup>47</sup> Therefore, if one employer's interests conflict with those of another, it is unlikely that a court would find the employee to be working for both. This concept relates to the fiduciary duty the employee owes to the employer.<sup>48</sup>

The question of whether a person can work for two employers simultaneously directly relates to the topic of this Note. Because professional union organizers have two different employers, courts must face the difficult task of determining whether the organizers can serve one employer without abandoning service to the other.<sup>49</sup>

#### IV. CONFLICT AMONG THE CIRCUITS: ARE PROFESSIONAL UNION ORGANIZERS "EMPLOYEES" UNDER THE NLRA?

The circuit courts are in disagreement as to whether professional union organizers are "employees" under section 2(3) of the NLRA. Some circuits, following the lead of the NLRB, interpret section 2(3) broadly and consider professional union organizers to be employees. Other circuits, however, believe Congress intended the term "employee" to have a much narrower meaning, and thus reach a contrary result.<sup>50</sup>

One issue on which all courts agree is that the NLRA applies to job applicants.<sup>51</sup> Professional union organizers who are denied employment at the application stage do not technically become "employees" as that term is commonly used, because they are never actually hired. However, the Supreme Court has held that applicants for employment who are discriminated against because of union affiliation fall under the statutory definition

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46. *Restatement (Second) of Agency* § 394 provides that "[u]nless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed." *RESTATEMENT (SECOND) OF AGENCY* § 394 (1958). See *CCMS Publishing Co. v. Dooley-Maloof, Inc.*, 645 F.2d 33, 37 (10th Cir. 1981) (citing *RESTATEMENT (SECOND) OF AGENCY* § 394 (1958)).

47. *RESTATEMENT (SECOND) OF AGENCY* § 394 cmt. a (1958).

48. See *supra* notes 35-40 and accompanying text.

49. See *supra* note 41 and accompanying text.

50. See *infra* notes 62-139 and accompanying text.

51. See, e.g., *Copes-Vulcan, Inc.*, 237 N.L.R.B. 1253, 1256 (arguing that "[i]t is idiomatic that a refusal to hire an applicant because of the union activities or sympathy of the applicant violates section 8(a)(3) and (1) of the Act.').

of "employee."<sup>52</sup> In *Phelps Dodge Corp. v. NLRB*,<sup>53</sup> the Court stated that "[d]iscrimination against union labor in the hiring of men is a dam to self-organization at the source of supply."<sup>54</sup> The legislative history of the Act also shows that the word "hire" includes this specific situation.<sup>55</sup> Therefore, applicant status does not exclude professional union organizers from coverage under the Act, although some courts have excluded them for other reasons.<sup>56</sup>

Courts also agree that an employer can violate section 8(a)(3) of the Act even when its decision is not based solely on an employee's protected activities. Under the test developed by the NLRB in *Wright Line*,<sup>57</sup> once an employee shows that protected activities played any role in the employer's decision, the burden shifts to the employer to show that the same decision would have been made in the absence of the protected activities.<sup>58</sup>

The courts that have examined the status of professional union organizers under the NLRA rely on several different rationales in arriving at their conclusions. Some use common law agency principles to determine whether a professional union organizer can work for two different employees simultaneously.<sup>59</sup> Others look to the underlying policies of the NLRA to determine congressional intent.<sup>60</sup> Other courts simply defer to the expertise

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52. See *supra* note 7 and accompanying text.

53. 313 U.S. 177 (1941).

54. *Id.* at 185. The employer in *Phelps* wanted the Court to interpret the word "hire" in section 8(a)(3) of the Act as meaning the wages paid to an employee. The Court realized that doing so would render the word "hire" meaningless, because wages are already included in the prohibition against "discrimination in regard to . . . any term or condition of employment." *Id.* at 186. In its decision, the Court recognized Congress' belief "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee . . ." *Id.* at 192 (quoting H.R. REP. NO. 1147, 74th Cong., 1st Sess. 9 (1935)). See also, e.g., *Copes-Vulcan, Inc.*, 237 N.L.R.B. 1253 (1978); *General Fence Supply Co.*, 230 N.L.R.B. 1153 (1977); *H.C. Thomson, Inc.*, 230 N.L.R.B. 808 (1977); *Apex Ventilating Co.*, 186 N.L.R.B. 534 (1970); *Shawnee Industries, Inc.*, 140 N.L.R.B. 1451 (1963).

55. *Phelps Dodge*, 313 U.S. at 186 n.5. The court explained, "The Chairman of the Senate Committee expressly stated during the debate that 'no employer may discriminate in hiring a man whether he belongs to a union or not, and without regard to what union he belongs [except where there is a valid closed shop agreement].'" *Id.* (quoting 79 CONG. REC. 7674 (1935)) (statement of Senator Walsh).

56. See *infra* notes 84-89 and accompanying text.

57. 251 N.L.R.B. 1083 (1980).

58. *Id.* at 1087.

59. See, e.g., *Town & Country Elec. v. NLRB*, 34 F.3d 625 (8th Cir. 1994); *Williams Elec. Serv. v. NLRB*, 968 F.2d 1237 (D.C. Cir. 1992).

60. See, e.g., *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989).

of the NLRB.<sup>61</sup> These rationales have led to different conclusions among the circuits.

*A. NLRB and Judicial Treatment of Professional Union Organizers:  
The Early Years*

It has been three decades since courts first faced the issue of whether professional union organizers are “employees” under the Act. In *NLRB v. Elias Bros. Big Boy*,<sup>62</sup> the Sixth Circuit concluded that an employer did not discriminatorily discharge a waitress for organizing employees on the job.<sup>63</sup> Evidence showed that the union paid the waitress fifteen dollars per week to cover expenses<sup>64</sup> incurred during her effort to organize the employees, and also that she had met with the secretary-treasurer of the union prior to her employment by the restaurant.<sup>65</sup> The respondent contended that the union “planted” the waitress at its restaurant and that she was therefore not a bona fide employee within the meaning of section 2(3) of the NLRA.<sup>66</sup> The court agreed with the respondent and concluded that the waitress was neither covered by the Act nor entitled to reinstatement and back pay.<sup>67</sup> The court did not explain its decision, but it seems the court did not believe that a person could simultaneously work for two employers.<sup>68</sup>

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61. See, e.g., *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26 (2d Cir. 1979).

62. 327 F.2d 421 (6th Cir. 1964).

63. *Id.* at 427.

64. *Id.* at 423. The expenses incurred by the waitress included telephone calls to other employees and gasoline used in her car to drive employees home from work. She used this time to talk to the other employees about the union. *Id.*

65. *Id.* As further evidence of her employment with the union during her employment with the respondent, the waitress became a full-time professional organizer for the union only a few days after her discharge from the restaurant. 327 F.2d at 423.

66. *Id.*

67. *Id.* at 427. The court gave little credence to the testimony of the waitress in concluding that she had worked for the union during her employment with the respondent. The waitress had lied to the respondent about her previous employment. In addition, she testified under oath that she had attended business school classes on at least two occasions when she asked for time off from work. However, a representative from the business school testified that the only time the waitress attended classes was four months before she began working for the respondent. *Id.* at 426.

68. The court focused on the evasiveness of the waitress' testimony in concluding that she was lying about her relationship with the union. *Id.* at 426-27. Once the court came to this conclusion, it presumed the waitress was not a bona fide employee under section 2(3) of the NLRA. *Id.* at 27. Under these facts, the court's rationale was probably one of the following: 1) a person cannot work for two employers simultaneously under general agency principles, or 2) a person can work for two employers simultaneously, but the fact that the waitress lied to her employer indicated that her true motive was to further only the union's interests.

Fifteen years passed before another circuit court addressed this issue. In the interim, the NLRB issued several decisions holding that professional union organizers qualify as employees under the NLRA. In *Dee Knitting Mills, Inc.*,<sup>69</sup> *Oak Apparel, Inc.*,<sup>70</sup> and *Anthony Forest Products Co.*,<sup>71</sup> the Board disagreed with the *Elias Bros.* court. These cases concluded that an employee does not lose employee status simply because he is also paid to organize.<sup>72</sup> It was clear by 1977 that the NLRB had decided to provide

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69. 214 N.L.R.B. 1041 (1974).

70. 218 N.L.R.B. 701 (1975).

71. 231 N.L.R.B. 976 (1977).

72. In *Dee Knitting*, the respondent discharged Barbara Laufman, along with eighteen other employees, for union activity after three months of employment. While working for the respondent, Laufman maintained her position as a professional union organizer. She began to organize other *Dee Knitting* employees shortly after she began her employment. 214 N.L.R.B. at 1041. The Board held that Laufman did not lose her status as an employee merely because she was also paid to organize. The important question, the Board noted, was whether the employment itself was solely to organize. *Id.* If that was the case, Laufman's employment would have only been "temporary" and she would not have been part of any bargaining unit. However, she would still have been considered an "employee" under the Act. The Board did not find any evidence that Laufman took the job solely to organize and therefore she was entitled to the full protection of the NLRA. *Id.*

In the *Dee Knitting* case, the Board relied on a footnote from an earlier case, *Sears, Roebuck and Co.*, 170 N.L.R.B. 533 (1968). In *Sears*, the Board held that a company did not violate section 8(a)(1) of the Act by discharging a professional union organizer (there was no claim of a section 8(a)(3) violation). In the footnote, the Board noted in dictum that the union organizer was a bona fide employee. According to the Board,

[a]s long as the employee gives a full day's work to his "regular" employer, the fact that he renders services in other hours to the Union does not affect his employee status, whether such latter services are paid or not. Of course, if he seeks only temporary employment in order to organize, and withholds from his employer the fact that he seeks only temporary employment, a different result might follow . . .

*Id.* at 535 n.1. Thus, the Board indicated that a professional union organizer might not be a bona fide employee if his sole motive is to organize a company's employees.

In *Oak Apparel*, the respondent discharged two union organizers for attempting to organize its employees. 218 N.L.R.B. at 703. One of the organizers received a salary from the union and gave all of her wages from her second job to the union. The union supplemented the other organizer's wages to bring them up to the level of a comparable unionized plant. Both organizers took the jobs at the respondent's plant under orders from the union. *Id.* at 704. The Board in this case did not believe that it was important whether the organizers were seeking "an employment relationship of a permanent nature." *Id.* at 701. As the Board noted, that issue is only important for purposes of determining which employees are part of a bargaining unit. *Id.* (citing *Dee Knitting*, 214 N.L.R.B. 1041 (1974)). The Board applied a broad definition to the term "employee" in concluding that unlawful discrimination includes discrimination against the working class generally, which includes the two organizers. *Id.*

A dissenting Board member in *Oak Apparel* did not believe that the two organizers were employees under the Act. In contrast to the majority opinion, he believed that the critical factor was whether the organizers were seeking an employment relationship of a permanent nature. He found that the organizers never intended to remain employed by the respondent after they completed their organizational activities. Therefore, they were not employees within the meaning of section 2(3) of the Act. 218

professional union organizers the full protection of the NLRA.

In 1979, the Second Circuit followed the lead of the NLRB. In *NLRB v. Henlopen Manufacturing Co.*,<sup>73</sup> a union paid a professional organizer fifty dollars per week during the four weeks she worked for the respondent.<sup>74</sup> The organizer claimed that the respondent discriminated against her because of her union activities in violation of section 8(a)(3); initially by refusing to transfer her to the day shift and subsequently by discharging her.<sup>75</sup> Without explaining its decision, the court held that she was a bona fide employee under the Act.<sup>76</sup> The court based its decision on the previous NLRB decisions holding that professional union organizers are employees within the meaning of the Act.<sup>77</sup>

### *B. NLRB and Judicial Treatment of Professional Union Organizers: Recent Decisions*

After the Second Circuit decided *Henlopen*, no courts addressed the issue for another ten years. In 1989, *H.B. Zachry Co. v. NLRB*<sup>78</sup> provided a major turning point. For the first time since *Elias Bros.*, a court held that professional union organizers are not employees under the NLRA.

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N L R.B. at 702.

In *Anthony Forest Products*, the respondent discharged Ricardo Medrano for organizing on only his fifth day of employment. Evidence showed that the union paid Medrano \$200 per week for his job as a union organizer and reimbursed him for out-of-pocket expenses related to his organizing activities. 231 N L.R.B. at 976-77. Medrano acknowledged that he was under the direction of the union while working for the respondent and that he would have taken an assignment elsewhere if asked to do so. *Id.* at 977. Once again, the Board returned to the *Sears* footnote and concluded that a person can be a bona fide employee even though he is working full time for a union. *Id.* at 977-78. The decision of the administrative law judge, which the Board upheld, expressed some doubt as to whether this was the correct decision. In a footnote he stated, "I personally have great difficulty in understanding how an individual can be an employee of two different employers at the same time for the same working hours. There is a certain master-servant relationship encompassed in any employer-employee relationship which is absent under such circumstances." *Id.* at 978 n.6.

73. 599 F.2d 26 (2d Cir. 1979).

74. *Id.* at 28.

75. *Id.* at 27-28. The organizer initially began working 8:30 a.m. to 1:00 p.m. because of her desire to work part time. Three days after she began working, she agreed to transfer to the evening shift at the request of her employer. Over the next week, she began missing work for various reasons. During this period, her employer found out about her organizing activities. When she asked to be transferred back to the day shift, her employer told her that it would not be possible. The next day, she told her employer that she was too sick to work. Her employer asked if she was resigning; when she said no, she was fired. *Id.* at 28-29.

76. *Id.* at 30.

77. See *supra* notes 69-72 and accompanying text.

78. 886 F.2d 70 (4th Cir. 1989).

Significantly, the Fourth Circuit provided the first in-depth analysis of the issue.<sup>79</sup>

In *Zachry*, the respondent company refused to hire a professional union organizer, allegedly in violation of section 8(a)(3).<sup>80</sup> The company claimed it was justified in refusing to hire him because of his status as a professional organizer.<sup>81</sup> When the organizer applied to work for the company, he was working full-time for a union and planned to remain employed by the union during his employment with the company.<sup>82</sup> Had he been hired, the union would have reimbursed him for any expenses related to the organizing job.<sup>83</sup>

The court first reaffirmed that the organizer's status as a job applicant did not bar him from the protections provided an employee under the NLRA.<sup>84</sup> Unlike the Board, however, the Fourth Circuit concluded that the term "employee" is not broad enough to include a person who works for two employers simultaneously.<sup>85</sup> According to the court, "[a]n employee is a person who, while on the job, works under the direction of a single employer."<sup>86</sup> As the court further explained, this is the "ordinary meaning" that Congress intended to give to the term when it passed the Taft-Hartley Act in 1947.<sup>87</sup> Because the organizer would "at core . . . remain an employee of the union," he could not also be an employee of the respondent.<sup>88</sup> The court went even further and concluded that the

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79. For a discussion of *H.B. Zachry Co. v. NLRB*, see John Mark Tarver, *H.B. Zachry Co. v. N.L.R.B.: Paid Full-Time Union Organizer Not an "Employee,"* 50 LA. L. REV. 1211 (1990).

80. 886 F.2d at 71.

81. *Id.* at 72. The organizer, Barry Edwards, had originally worked for Zachry at another one of its plants. In what the Board found to be an unfair labor practice, Zachry discharged Edwards from that job. *Id.* at 71. When Edwards applied to work at another plant, the company refused to hire him. The Board found Zachry's refusal to hire Edwards to be an unfair labor practice, because he had participated in the earlier proceedings against the company and because he was a union organizer. *Id.* at 71-72. According to the record, Zachry would have refused to hire Edwards solely because of his organizing activities. *Id.* at 72.

82. 886 F.2d at 71.

83. The union intended to pay Edwards the difference between the salary he received from Zachry and what he normally received from the union. Also, the union would have paid Edwards' insurance premiums, transportation expenses, and any living expenses related to the job. *Id.* Edwards admitted that his only purpose was to organize the respondent's plant. *Id.*

84. *Id.* at 72. See *supra* notes 51-56 and accompanying text.

85. *Id.* at 72-73.

86. *Id.* at 73.

87. *Id.*

88. *Id.* The court stated its rationale as follows:

If Edwards simultaneously performs services for Zachry at his union employer's behest, he nonetheless remains in the union's employ, even though he receives some remuneration from

organizer was not a job "applicant" as that term is normally used. He was not in search of a job because he already had one.<sup>89</sup>

The *Zachry* court acknowledged previous NLRB decisions holding that professional union organizers are employees.<sup>90</sup> However, unlike the Board, the court did not believe that whether the organizer was seeking only temporary employment was important.<sup>91</sup> In the court's view, what separates union organizers from other employees is the entire nature of the employment relationship.<sup>92</sup> The court concluded that professional union organizers are not employees even if they plan to remain employed after their organizational activities have been completed.<sup>93</sup>

In addition, the *Zachry* court outlined several policy reasons for excluding professional union organizers from the scope of the NLRA. The most important reason, according to the court, is that unions do not have an unrestrained right to organize.<sup>94</sup> Section 8 of the Act restricts the activities of both employers and unions.<sup>95</sup> As the Supreme Court recognized in *NLRB v. Babcock & Wilcox Co.*,<sup>96</sup> employers do not have to provide unions with unrestricted use of their property for organizing purposes.<sup>97</sup> Employers have a strong interest in controlling their own

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*Zachry*. He cannot be considered an employee of *Zachry* since he is performing services for *Zachry* only because instructed to do so by his union employer. This is not to say that an employee owes his employer some type of transcendent loyalty; rather, it is only to emphasize that the plain meaning of the term "employee" contemplates an employee working under the direction of a single employer. The term plainly does not contemplate someone working for two different employers at the same time and for the same working hours.

*Id*

89. *Id.*

90. 886 F.2d at 74; *see* *Sears, Roebuck and Co.*, 170 N.L.R.B. 533, 535 n.3 (1968) (cited with approval in *Dee Knitting Mills, Inc.*, 214 N.L.R.B. 1041 (1974)).

91. *Zachry*, 886 F.2d at 74.

92. *Id.* Although the court did not explain the meaning of this statement, it appears that the court was referring to its earlier conclusion that a person cannot work for two employers simultaneously.

93. *Id.*

94. *Id.* The court explained: "[T]he NLRA and its amendments strike a 'balance . . . between the uncontrolled power of management and labor to further their respective interests.'" *Id.* (quoting *Carpenters' Union v. NLRB*, 357 U.S. 93, 99-100 (1958)). Other courts have also held that "the rights created by section [7] in favor of organized employees is [sic] not absolute . . . It is limited in extent and relative in character and must be balanced against competing rights of other persons and the public." *Oliver v. All-States Freight, Inc.*, 156 N.E.2d 176, 187 (Ohio C.P. Summit County 1956), *aff'd*, 156 N.E.2d 190 (Ohio Ct. App. 1957).

95. *See supra* note 5.

96. 351 U.S. 105 (1956).

97. *Id.* at 112. *See also* *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533-34 (1992) (holding that employers do not have to give non-employee union organizers access to their property as long as the organizers have reasonable access to the employees outside the employer's property). For a discussion

property, and they do not have to accommodate unions in every possible way.<sup>98</sup> Therefore, the *Zachry* court noted, allowing professional union organizers onto an employer's property solely to organize its employees would not be consistent with the *Babcock & Wilcox* decision.<sup>99</sup> Accordingly, employers should have the right to prevent access to their property by union organizers who do not have a legitimate purpose for being there.

The *Zachry* court also held that including professional union organizers within the definition of "employee" would interfere with the other employees' rights to self-determination.<sup>100</sup> A union could flood a company with its own representatives, each of them being able to vote. An election might result in the union's favor even though the "regular" employees do not actually want a union.<sup>101</sup> Thus, they would effectively be compelled to organize against their will. This was clearly not Congress' intent in enacting the NLRA.<sup>102</sup>

*Zachry's* narrow definition of the term "employee" directly contradicts the definition given by the earlier line of NLRB cases beginning with *Dee Knitting*.<sup>103</sup> Under *Zachry's* reasoning, the Board's interpretation would no longer prevail. However, just three years later, the District of Columbia Circuit declined to follow *Zachry*.

of the conflict between union organizing and property rights, see Timothy A. Gudas, Note, *Access Rights of Nonemployee Union Organizers to an Employer's Property: Lechmere, Inc. v. NLRB*, 34 B.C. L. REV. 311 (1993). See also William B. Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); Dexter L. Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266 (1958).

98. See *Jean Country*, 291 N.L.R.B. 11, 11 (1988) (recognizing that a property owner has a "right to protect his property against intrusions by those whom he has not invited to enter"). The Supreme Court has recently held that while "[t]he right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it." *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771, 781 n.21 (1994).

99. *Zachry*, 886 F.2d at 74.

100. *Id.*

101. *Id.* at 74-75. The Fourth Circuit also envisioned a peculiar result if professional union organizers were covered by the NLRA:

Because the salary paid such "employees" by the company would partially relieve the union of its obligation to pay its own organizers, this tactic ironically could be construed to compel employers to subsidize labor organizations in violation of section 8(a)(2) of the Act (making it an unfair labor practice for an employer to "contribute financial or other support" to a labor organization).

*Id.* at 75.

102. 29 U.S.C. § 157 (1988). Though the Act grants employees the right to self-organization, it does not require employees to organize against their will.

103. See *supra* notes 69-72 and accompanying text.

In *Willmar Electric Service v. NLRB*,<sup>104</sup> the District of Columbia Circuit took issue with the Fourth Circuit's interpretation of the term "employee" and followed the reasoning of the NLRB.<sup>105</sup> In *Willmar*, an electrician who had just begun working as a union organizer applied for a job doing electrical work for a company at a nearby construction project.<sup>106</sup> Although the union did not plan to pay the organizer while he worked for the company, he retained his title of field organizer.<sup>107</sup> Prior to the company's hiring decision, the organizer actively worked for the union at the company's job site. Based on this activity, the company decided not to hire him.<sup>108</sup> Because the company's refusal to hire the organizer was based on his union activities, its only possible defense to an action under section 8(a)(3) was that the organizer did not qualify as an "employee" under section 2(3) of the Act.

To resolve the issue, the *Willmar* court focused primarily on common law employment principles.<sup>109</sup> While the *Zachry* court concluded that a person cannot work for two employers simultaneously, the *Willmar* court found no such restriction. It referred to the *Restatement (Second) of Agency*, section 226, which expressly states that a person may be the servant of two masters at the same time.<sup>110</sup> In the court's opinion, as long as an organizer does not abandon the non-union employer for the union employer, he should be protected by the Act.<sup>111</sup>

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104. 968 F.2d 1327 (D.C. Cir. 1992).

105. *Id.* at 1330-31.

106. *Id.* at 1328. On his application, the organizer listed his present employer as the International Brotherhood of Electrical Workers. He told the respondent that his reason for leaving was to "work in the field." *Id.* He later testified that he meant "going into the field to organize actually on the job." *Id.*

107. 968 F.2d at 1328. The organizer informed the project foreman that if the company hired him, he planned to use his free time to try to organize the Willmar employees. *Id.*

108. *Id.* The project foreman told the organizer that the company would not consider his application because "it's kind of hard to hire you when you're out there on the other side, picketing." *Id.* Therefore, the company clearly based its decision solely on the organizer's union affiliation, in direct violation of section 8(a)(3). *See id.*

109. *See supra* notes 27-49 and accompanying text.

110. 968 F.2d at 1329-30. *See supra* note 41 and accompanying text. The court found evidence of a congressional assumption that a person can be employed by a union and another employer simultaneously. The court looked to section 302 of the Labor Management Relations Act, which places restrictions on financial transactions between employers, on one hand, and employees, representatives, and labor organizations on the other. Section 302 contains an exception for payments made "to any . . . employee of a labor organization, who is also an employee . . . of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1) (1988); 968 F.2d at 1329.

111. 968 F.2d at 1330. The company argued that the organizer's status would create the risk that he would be disloyal to the company, and that this risk justified its refusal to hire him. While noting

Both the *Zachry* and *Willmar* courts noted that the nature of the employment relationship as a whole is important in deciding this issue. The *Willmar* court concluded that the organizer's employment would not have been a sham simply because of his ties to the union.<sup>112</sup> He could still have completed the required work for the company while organizing during his free time.

Five years after deciding *Zachry*, the Fourth Circuit was asked to reconsider its decision. In *Ultrasystems Western Constructors v. NLRB*,<sup>113</sup> the court reaffirmed *Zachry* and held that a professional union organizer was not a bona fide employee under the Act.<sup>114</sup> The parties did not dispute that the organizer was employed by the union at the same time that he applied to work for the company.<sup>115</sup> Because the organizer's employment with the company would be "in furtherance of his union employment," the court held that he was not protected by the Act.<sup>116</sup> The Fourth Circuit clearly intended to maintain its position, even in light of two recent NLRB decisions which contradicted *Zachry*.<sup>117</sup>

With the Fourth and D.C. Circuits leading the way, other circuits also split on the issue. In *Escada (USA) v. NLRB*,<sup>118</sup> the Third Circuit, without an opinion, enforced a Board order that included professional union

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that disloyalty may be a factor, the court stated that the company must prove it would have made the same decision based on the risk of disloyalty alone, rather than on the organizer's union activities. A company cannot simply argue that the organizer is not an "employee." *Id.*

112. *Id.* at 1329. As the court noted, "[i]n most respects [the organizer] would have been indistinguishable from a zealous volunteer who resolved to use his free time during lunch and after work to advance the union's interests." *Id.* The court did concede, however, that the organizer's retention of a union title and his prospect of reemployment with the union might have had subtle, or even not so subtle, effects on his conduct as a *Willmar* employee. *Id.*

113. 18 F.3d 251 (4th Cir. 1994).

114. *Id.* at 254-55.

115. *Id.* at 254. The parties stipulated that the organizer intended to remain an employee of the union if the company hired him. *Id.*

116. *Id.* at 255. The court expressly declined to follow the D.C. Circuit's decision in *Willmar*. 18 F.3d at 255.

117. *See id.* (citing *Sunland Constr. Co.*, 311 N.L.R.B. 685 (1993); *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250 (1992)). In *Sunland Construction*, the Board repeated the principle that "protection of the Act has been 'specifically applied to full-time paid professional union organizers who, although their ulterior purpose may be to organize the unorganized, are merely applying for a job, just like any other employees, and are forbidden by the Act to be judged on their union sympathies.'" 311 N.L.R.B. at 703 (quoting *H.B. Zachry Co.*, 289 N.L.R.B. 838, 839 (1988)). *See generally* Malcolm A.H. Stewart, *Status of Paid Union-Organizers as "Employees" Under the National Labor Relations Act: Sunland Construction Co. and Town & Country Electric*, 35 B.C. L. REV. 349, 351-65 (1994).

118. 970 F.2d 898 (3d Cir. 1992).

organizers within the meaning of the term "employee."<sup>119</sup> The Third Circuit appeared to defer to the Board because of its experience in these types of matters.<sup>120</sup>

The Eighth Circuit, with its decision in *Town & Country Electric v. NLRB*,<sup>121</sup> became the first court to follow *Zachry*. The circuit courts then became evenly divided. The *Town & Country* court acknowledged the split among the circuits, but it found *Zachry* to be more persuasive than *Willmar*.<sup>122</sup>

In *Town & Country*, several union members were sent by their union to apply for jobs at a company's construction site.<sup>123</sup> The company hired one of the union members through a temporary employment agency<sup>124</sup> and he began organizing the company's other employees when he arrived at the site.<sup>125</sup> Upon learning that state law required all electricians to be hired directly by the contractor, the company discharged the union member.<sup>126</sup> The union member then asked the company if it would hire

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119. See *Escada (USA), Inc.*, 304 N.L.R.B. 845 (1991). In *Escada*, a professional union organizer applied to work for the respondent after he was already employed as a union organizer. After working for a month, the company discharged him, allegedly because he had been walking around and talking to other employees, and because he had been harassing them. *Id.* at 846-47. The Board followed its own precedent, see *supra* notes 69-72 and accompanying text, in holding that the organizer was an "employee" under section 2(3). The Board recognized here, as it did in *Oak Apparel*, 218 N.L.R.B. 701, that although professional union organizers may be excluded from any bargaining unit because of the "temporary" nature of their employment, they are still "employees" covered by the Act. *Escada*, 304 N.L.R.B. at 845 n.4.

A dissenting Board member did not believe that the organizer was an "employee" under the Act. He focused on the purpose of the employment, which was solely to organize the respondent's employees. *Id.* at 845-46.

120. See *supra* notes 10-11, 21-25 and accompanying text.

121. 34 F.3d 625 (8th Cir. 1994).

122. *Id.* at 627-28.

123. The union members were not full-time paid organizers. However, their organizing activities were in many respects equivalent to those of a full-time organizer. See *id.* at 629. In any event, the court's opinion specifically addresses professional union organizers. *Id.* at 627-29.

124. *Id.* at 626. The company conducted interviews for electricians to work at one of its job sites. It hired a temporary employment agency to find applicants for the available positions. The agency placed an advertisement in a newspaper stating that the company was looking for electricians. It prescreened the applicants and scheduled interviews at a local hotel. 34 F.3d at 626. The union member who was eventually hired by the company arrived at the hotel with about a dozen other members of his union. He was the only one of them who had scheduled an interview. The company, realizing that the other applicants appeared to be union members, declined to interview them because they did not have scheduled appointments. The company subsequently hired the one who did have an appointment, knowing that he was a union member. *Id.* at 626-27.

125. *Id.* at 626-27.

126. *Id.* at 627. There is evidence that even in the absence of the state law, the company would have discharged the union member because of his low productivity and poor workmanship. *Id.*

him directly, but it refused to do so.<sup>127</sup> The company was aware of the union member's organizing activities during his employment.<sup>128</sup>

The Board unanimously found that the company violated section 8(a)(3) by refusing to re-hire the union member because of his organizing activities.<sup>129</sup> However, the court reversed, holding that the union member was not a bona fide employee under the Act.<sup>130</sup> The court relied on common law agency principles.<sup>131</sup> At common law, an agent has a duty to act solely for the benefit of his principal<sup>132</sup> and not to act for whose interests conflict with those of his principal.<sup>133</sup> According to the court, an inherent conflict of interests exists when a union organizer applies for a job for the sole purpose of furthering the union's interests.<sup>134</sup> While employed by his non-union employer, the organizer will remain under the control of the union.<sup>135</sup> For this reason, the court held that an employer "should not be required to place and retain on its payroll those whose continued presence on the job will be determined by an entity other than itself."<sup>136</sup>

To summarize, the Second, Third, and District of Columbia Circuits have held that professional union organizers are "employees" within the meaning of section 2(3) of the NLRA.<sup>137</sup> These courts argue that, the fact that employees are being paid to organize while they are working for their non-union employer does not remove them from the protection of the Act. In contrast, the Fourth, Sixth, and Eighth Circuits have held that professional

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127. 34 F.3d at 627.

128. *Id.*

129. *Id.*

130. *Id.* at 629.

131. *Id.* at 628.

132. *Id.* at 638. See *supra* notes 33-34 and accompanying text.

133. 34 F.3d at 638. See *supra* notes 46-48 and accompanying text.

134. 34 F.3d at 629. The critical factor, in the court's opinion, was that the plaintiff was not a typical job applicant. He was not in search of a job, because he already had one. He "wanted to enter Town & Country's work force not for financial gain, but to organize its workers." *Id.* at 628-29.

135. *Id.* at 629. The court concluded that in such a situation,

the union official will follow the mandates of the union, not his new employer. If the union commands him to increase his organizational activities at his second employer's expense, he will do so. If the union asks him to quit working for his second employer, he will do so. Additionally, a union organizer in this position has a reduced incentive to be a good employee for his second employer. If he is terminated, he simply returns to his full-time union job. Indeed, he may even relish being discharged, because he can then file an unfair labor practice charge, claiming that he was terminated because of his organizing efforts.

*Id.*

136. *Id.*

137. See *supra* notes 73-77, 104-11, 118-20 and accompanying text.

union organizers are not “employees.”<sup>138</sup> According to these courts, it is not possible for professional union organizers to work for two different employers when they are actually only working for the benefit of the union. The NLRB has consistently held that professional union organizers are covered by the Act because the Act prohibits “discrimination against members of the working class generally.”<sup>139</sup>

## V. ANALYSIS AND PROPOSAL

The Courts of Appeals and the NLRB stand divided as to the proper interpretation of section 2(3) of the NLRA. Although the Supreme Court has ruled that courts should apply agency principles when interpreting the statute, the NLRB and the courts continue to disagree on the status of professional union organizers under the NLRA.

### A. Analysis

The NLRB clearly has more experience in labor-related matters than any circuit court. However, not all reviewing courts have given the Board the amount of deference that it deserves.<sup>140</sup> The Fourth and Eighth Circuits found that the Board’s interpretation of the term “employee” is unreasonable. In fact, these courts in effect reviewed each case de novo, giving no weight to the Board’s decisions.<sup>141</sup>

Several commentators argue that courts should give administrative agencies little deference in cases involving statutory interpretation. The primary argument in support of this position is that there is an inherent danger of bias which may affect agency decisions.<sup>142</sup> As instrumentalities

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138. See *supra* notes 62-68, 78-102, 113-17, 121-36 and accompanying text.

139. See *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975).

140. See *supra* notes 21-26 and accompanying text.

141. See *supra* notes 78-102, 121-36 and accompanying text.

142. As one commentator explains:

The strongest argument for those who assert the superiority of courts as lawfinders is that judges are less likely than agencies to allow personal bias or self-interest to distort their reading of the enactor’s intent . . . Headed by political appointees with short tenure in office and staffed by bureaucrats interested in budgetary expansion, agencies are likely to be much more responsive to the will of the current legislature than to the will of some previous enacting legislature. Only the current legislature, after all, can punish or reward them.

Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 579-80 (1985) (citations omitted).

Although many commentators believe that reviewing courts should decide all relevant questions of law, courts have been very inconsistent in the amount of deference afforded administrative agencies. See *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 913-14 (3d Cir. 1981) (recognizing inconsistency among the courts). For a discussion of the Supreme Court’s inconsistency in this area, see generally

of Congress, agencies are at the mercy of the legislature. Therefore, the judiciary is more likely to interpret statutes without any outside, or undue, influence.<sup>143</sup>

Furthermore, section 10(e) of the Administrative Procedure Act ("APA")<sup>144</sup> provides that reviewing courts shall "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."<sup>145</sup> Nothing in the APA implies that reviewing courts should give deference to administrative agencies. Despite its history of supporting deference to administrative agencies, the Supreme Court has given little deference to agencies in some cases.<sup>146</sup> In reality, courts often decide cases based on their own views rather than those of the administrative agencies they are reviewing.<sup>147</sup> Regardless of whether this is proper, it has resulted in inconsistency throughout our judicial system.

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KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 30.00 (1st ed. 1958 Supp. 1976 & 2d ed. Supp. 1982); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 10.32-33 (2d ed. 1982).

143. As one commentator noted, the judiciary has an important role in the administrative process:

If our independent judiciary is to perform this role of keeping the agency within its statutory limits, surely the court—not the agency—must decide what the statute means. To take the easy way out of accepting the view of one of the litigants concerning the meaning of the statute so long as the meaning is not irrational or unreasonable is an abdication of judicial responsibility.

Clark Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 *ADMIN. L. REV.* 183, 191 (1981). Courts are clearly competent to rule upon questions of statutory interpretation. *United Steelworkers of Am. v. NLRB*, 243 F.2d 593, 600 (D.C. Cir. 1956), *rev'd in part*, 357 U.S. 357 (1958). However, "it is the duty of the court to interpret the statute as it is and not to read into it something that is not there." *Northern Pac. Ry. Co. v. Reynolds*, 68 F. Supp. 492, 499 (D. Minn. 1946), *aff'd*, 168 F.2d 934 (1948).

144. 5 U.S.C. §§ 551-706 (1994).

145. 5 U.S.C. § 706 (1994). Several courts have also agreed that they are entitled to make the ultimate decision regarding questions of law. *See, e.g.*, *Rosen v. NLRB*, 455 F.2d 615, 617 (3d Cir. 1972) (holding that courts of appeals are not constrained to respect the findings of the Board in reviewing purely legal questions); *Sweetlake Land and Oil Co. v. NLRB*, 334 F.2d 220, 223 (5th Cir. 1964), *cert. denied*, 380 U.S. 911 (1965) (holding that courts must ultimately determine what the law is in each matter). *Cf.* *Standard Generator Serv. Co. v. NLRB*, 186 F.2d 606, 607 (8th Cir. 1951) (holding that courts and not the Board are to draw inferences from evidence as to questions of law, but the Board's judgment upon such questions is entitled to respect).

146. *See Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983); *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89 (1983). In *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981), the Court noted that reviewing courts "are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Id.* at 32.

147. *See, e.g.*, *Aurora Packing Co. v. NLRB*, 904 F.2d 73 (D.C. Cir. 1990) (holding that the NLRB is not entitled to deference in determination of "employee" status because issue is one of pure agency law).

In the context of union organizers, courts are probably justified in not deferring to the NLRB. Although the Board is experienced, it seems to ignore some of the policies behind the NLRA by automatically assuming<sup>148</sup> that all professional union organizers are covered by the Act.<sup>149</sup> Congress did not intend for the Act to further only the interests of labor; it should further the interests of management as well.<sup>150</sup> With the passage of the NLRA, Congress hoped to create stability in labor relations, recognizing that any disruptions could have a detrimental effect on interstate commerce.<sup>151</sup> Although management had an advantage over labor before Congress enacted the NLRA, providing unions with an unrestrained right to organize would tip the scales in favor of labor and

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148. See *Dee Knitting Mills, Inc.*, 214 N.L.R.B. 1041 (1974); *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975).

149. It is a fundamental principle that the policy of Congress cannot be frustrated by the Board's interpretation of the NLRA. See *Local Lodge No. 1424, Int'l Assoc. of Machinists v. NLRB*, 362 U.S. 411, 429 (1960) (holding that the policy of Congress cannot be defeated by the Board's policy); *Department & Specialty Store Employees' Union, Local 1265 v. Brown*, 284 F.2d 619, 626 (9th Cir. 1960), cert. denied, 366 U.S. 934 (1961) (explaining that "[t]he language of the Act is not to be distorted so as to reach unintended results").

150. 29 U.S.C. § 141(b) sets forth the purpose and policy of the Labor Management Relations Act of 1947 (Taft-Hartley), which amended the original NLRA:

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141(b) (1988).

Several courts have recognized the equalizing purpose of the Taft-Hartley Act. See, e.g., *Worthington Pump and Mach. Corp. v. Douds*, 97 F. Supp. 656, 660 (S.D.N.Y. 1951) ("concluding that [T]he Taft-Hartley Act was specifically designed to grant employers protection not afforded them in the Wagner Act, and thereby minimize any differences in rights granted unions or employers."); *United Packing House Workers of Am. v. Wilson & Co.*, 80 F. Supp. 563, 568 (N.D. Ill. 1948) (finding that "It is clear from the legislative history of the Labor Management Relations Act of 1947 that the purpose, among other things, of its Congressional sponsors was to equalize the National Labor Relations Act so that it would no longer be 'one-sided'.") (citing H.R. REP. NO. 510, 80th Cong., 1st Sess. 31 (1947)). See also *Penello v. Int'l Union, United Mine Workers of Am.*, 88 F. Supp. 935, 937 (D.D.C. 1950) (acknowledging that "the legitimate rights of labor and management shall be recognized").

151. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102-03 (1970); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949); *NLRB v. Reliance Steel Prods. Co.*, 322 F.2d 49, 55 (5th Cir. 1963); *Int'l Union, Progressive Mine Workers of Am. v. NLRB*, 319 F.2d 428, 437 (7th Cir. 1963), rev'd on other grounds, 375 U.S. 396 (1964); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961); *NLRB v. Kiekhaefer Corp.*, 292 F.2d 130, 135-36 (7th Cir. 1961); *NLRB v. Brooks*, 204 F.2d 899, 907 (9th Cir. 1953), aff'd, 348 U.S. 96 (1954).

maintain the preexisting instability.<sup>152</sup> Each side must be given an equal amount of power in order to create a peaceful balance.<sup>153</sup> For this reason, courts should not automatically give professional union organizers the protection of the NLRA.

This same logic also dictates that some professional union organizers should be covered by the Act. Eliminating all professional organizers from coverage would not adequately solve the balancing problem. As the NLRB and some courts have correctly recognized, an employee can work for two different employers at the same time, so long as there is no conflict of interests. The key is to determine which employees have conflicting interests and eliminate them from the Act's coverage. The remainder can work effectively for both employers without undermining the policies of the NLRA.

### *B. Proposal*

Until the Supreme Court addresses the issue of professional union organizers and settles the controversy,<sup>154</sup> circuit courts will probably remain divided. Instead of strictly adhering to one position, courts should examine the facts of each particular case before making their decisions.<sup>155</sup> The *Zachry* and *Willmar* courts, representing both sides of the controversy, each supported their opinions with logical reasoning. However, the following new proposal creates a neutral test that is formulated to protect the rights of employees to organize and the rights of employers to protect their legitimate business interests.

There are two different types of professional union organizers. The first type includes those whose primary motive is to enter another employer's

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152. Congress did not intend for the NLRA to give employees an absolute right to disregard their employment obligations. *NLRB v. Washington Aluminum Co.*, 291 F.2d 869, 877 (4th Cir. 1961), *rev'd on other grounds*, 370 U.S. 9 (1962); *NLRB v. Draper Corp.*, 145 F.2d 199, 203 (4th Cir. 1944).

153. Giving labor and management equal amounts of power would help to "strengthen . . . that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise." *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 472 (1953).

154. The Supreme Court has granted certiorari to *Town & Country Elec. v. NLRB*, 34 F.3d 625 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 933 (1995). The court will hear and decide this case during the 1995-96 term.

155. While examining the facts of each particular case may be more burdensome for courts, this is the only way to ensure fairness to both employers and union organizers. *See NLRB v. Blount*, 131 F.2d 585, 590 (8th Cir. 1942), *cert. denied*, 318 U.S. 791 (1943) (holding that "the question whether persons are or are not employees must always depend upon the particular facts as they are related to the inquiry in which the question is raised").

workforce, organize its employees, and then move on to another job. These organizers usually have no concern for the interests of their non-union employers. This is the type of organizer that the *Zachry* court had in mind. The second type of organizer includes those who wish to become gainfully employed by the non-union employer. In these situations, the organizer will work to further the interests of both the non-union employer and the union. The *Willmar* court envisioned this type of organizer. Because the nature of the employment relationship differs depending on the type of organizer involved, courts must distinguish between the two types in order to balance the interests of employers and unions.

The first type of union organizer should not be protected by the NLRA. As the *Zachry* court correctly noted, this type of organizer is not a typical job applicant.<sup>156</sup> Most job applicants apply for jobs for personal benefit, not for the benefit of a third party such as a union. Moreover, "employees" traditionally must work to further the interests of their employers.<sup>157</sup> A union organizer whose sole purpose is to organize a group of employees for a union is not working to further the interests of the non-union employer. Therefore, an inherent conflict exists between the interests of the union and those of the non-union employer.<sup>158</sup> The organizer in this situation cannot organize employees for the union without abandoning his services to the non-union employer. At common law, this would make it impossible for the organizer to work for both employers simultaneously.<sup>159</sup> In addition, the non-union employer would lose a certain amount of control over the organizer. Thus, the most essential element of the employment relationship would be lacking.<sup>160</sup> Although the non-union employer would retain the power to discharge the organizer and to ensure that the organizer completed his normal work, the element of control also involves some fear of discipline on the part of the employee. Here, the organizer does not care if he loses his job with the non-union employer, because he will still have his job with the union. These factors make it clear that this type of union organizer is not a traditional employee and should not receive the protection of the NLRA.

The second type of organizer, however, should be covered by the Act. Unlike the first type, this type of organizer wants to further the interests of

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156. See *supra* note 88 and accompanying text.

157. See *supra* notes 33-34 and accompanying text.

158. See *supra* notes 132-35 and accompanying text.

159. See *supra* note 41 and accompanying text.

160. See *supra* notes 28-29, 32 and accompanying text.

both employers. At common law, the organizer could work for both the union and the non-union employer because he would not be abandoning his duties to either one of them.<sup>161</sup> As long as he performs his duties faithfully for each employer, there is no conflict of interests. The non-union employer would enjoy a greater amount of control over this type of organizer, because the organizer would be worried about losing his job. He would be no different than any other employee who used his free time to organize fellow employees.<sup>162</sup> The employer can ensure that the organizer performs his delegated duties during working hours,<sup>163</sup> but in most instances the organizer, like any employee, cannot be restrained from organizing during non-working hours.<sup>164</sup> Therefore, the interests of the non-union employer and the union would be sufficiently balanced.

To determine whether a particular union organizer qualifies as an employee under the Act, courts must examine several factors. The most critical factor is the amount of control the union is able to exercise over the organizer while the organizer is working for the non-union employer.<sup>165</sup> The following questions may be used to help ascertain the union's level of control: Did the union send the organizer to work for the non-union employer? Does the union control the organizer's decision to remain employed by the non-union employer? Does the union make up for any shortfall in the organizer's new salary or benefits? Does the union control the amount of organizing? How often does the organizer report back to the union?<sup>166</sup> The answers to these questions may indicate that the organizer is merely a puppet controlled by the union. In that situation, the organizer should not be covered by the NLRA. Although he can still work productively for the non-union employer, productivity is not one of the elements of a common-law employment relationship. The organizer must be faithful

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161. See *supra* note 41 and accompanying text.

162. See *supra* note 112 and accompanying text.

163. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (recognizing that employers have an undisputed right to maintain discipline in their establishments); *In re Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943) (holding that an employer can make and enforce reasonable rules covering the conduct of employees on company time because "[w]orking time is for work").

164. *Peyton Packing*, 49 N.L.R.B. at 843-44. An employer cannot make and enforce rules prohibiting union solicitation during non-working hours unless it is necessary to maintain production or discipline. *Id.*

165. See *supra* notes 28-29, 32 and accompanying text.

166. Clearly these are not the only questions courts can use to categorize union organizers, but they will probably provide the best result. The key to the control issue is the amount of interaction which takes place between the organizer and the union.

and loyal to the non-union employer.<sup>167</sup> He cannot do this if his controlling intent is to further the interests of the union. If, however, the organizer controls his own destiny with his second employer, he should be protected by the Act. This latter situation indicates some amount of loyalty toward the non-union employer, bringing the organizer within the common-law definition of "employee." Each court must conduct this individualized analysis before reaching its ultimate decision.

In the introductory hypothetical, Fred would fall into the second category of union organizers. Several aspects of his employment relationship with the Better Bread Company indicate that he is not entirely under the union's control. First, the union did not send Fred to work at the Better Bread Company. He went there on his own initiative so that he could earn extra money to support his family. Second, it does not appear that Fred's employment with the Better Bread Company is at the will of the union; Fred can quit whenever he wants. Third, there is no arrangement whereby the union supplements Fred's wages at the Better Bread Company to bring them up to union standards. Finally, although Fred reports periodically to the union, Fred controls the amount of organizing that he performs. Fred should be able to work faithfully for both the union and the Better Bread Company. The fact that Fred needs extra money means that he will not abandon his services to the Better Bread Company in favor of the union.

### C. Application

When an organizer claims that an employer has violated section 8(a)(3) of the Act by discriminating against him, the Board bears the initial burden of proving the organizer was discharged or refused employment because of his union organizing activities.<sup>168</sup> The Board must prove this by a preponderance of the evidence.<sup>169</sup> If the evidence fails to establish that the employer's decision was motivated in any way by antiunion animus, then

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167. See *supra* notes 35-38.

168. See *Trinity Valley Iron & Steel Co. v. NLRB*, 410 F.2d 1161, 1168 (5th Cir. 1969); *Miller Elec. Mfg. Co. v. NLRB*, 265 F.2d 225, 226 (7th Cir. 1959); *NLRB v. Kaiser Aluminum & Chem. Corp.*, 217 F.2d 366, 368 (9th Cir. 1954); *Indiana Metal Prod. Corp. v. NLRB*, 202 F.2d 613, 616 (7th Cir. 1953); *Martel Mills Corp. v. NLRB*, 114 F.2d 624, 631 (4th Cir. 1940).

169. Section 10(c) of the Act provides that

[i]f upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . . .

29 U.S.C. § 160(c) (1988).

no violation of section 8(a)(3) exists. If, however, the evidence shows the employer's decision was motivated in whole or in part by antiunion animus, the Board has made a prima facie case. Under this proposal, the employer would then have two options.

First, under the *Wright Line* test,<sup>170</sup> the employer can attempt to prove it would have made the same decision even in the absence of the organizer's union activities. If the employer can show it had a legitimate business reason for its decision, then no violation of section 8(a)(3) will exist.<sup>171</sup> For example, if an employer refuses to hire a union organizer and can show that more qualified applicants were available for the job, there is no violation because the organizer would not have been hired even in the absence of his organizing activities. In the hypothetical, if the Better Bread Company could show that Fred's performance on the job was inadequate and that it would have fired him even if he was not a union organizer, the company would not have violated section 8(a)(3).

The employer's second option is to prove by a preponderance of the evidence that the organizer is not an "employee" within the meaning of section 2(3) of the Act. As previously illustrated, the employer can prove this by showing that the union has a substantial amount of control over the organizer's activities. If the court finds the organizer is an "employee," and the employer also fails to meet the *Wright Line* test,<sup>172</sup> then the employer will have violated section 8(a)(3) of the Act. If the court finds that the organizer is not an "employee," then the organizer is not covered by the Act and there can be no violation.

In the hypothetical, Fred would be an "employee" under the Act. Therefore, the Better Bread Company would have to rely on the first option. Assuming Fred was doing an excellent job, as he believed he was, the company would have committed an unfair labor practice by terminating Fred's employment.

This proposal is designed to aid courts in determining whether professional union organizers should be covered by the NLRA. Employment relationships, especially those involving union organizers, are not black and

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170. See *supra* notes 57-58 and accompanying text.

171. Membership in a union does not protect against discharge on proper grounds. See, e.g., *NLRB v. Ogle Protection Serv., Inc.*, 375 F.2d 497, 505 (6th Cir. 1967) ("An employer has the right to discharge an employee for any reason, whether it is just or not, as long as the discharge is not in retaliation for union activities or support."); *Farmbest, Inc. v. NLRB*, 370 F.2d 1015, 1018-19 (8th Cir. 1967) ("Because an employee is a labor protagonist does not insulate him from discharge whether or not any cause for his discharge exists just so long as management acts without an unlawful motive.")

172. See *supra* notes 57-58 and accompanying text.

white. Courts must recognize that every situation is unique and that the NLRA must be flexible enough to handle them all.

## VI. CONCLUSION

The United States has a long history of union organizing under the NLRA. Although section 8 of the Act prohibits employers from interfering with union organizing activities, employers have a right to protect their legitimate business interests.<sup>173</sup> Professional union organizers who have no purpose other than to organize a group of employees can be harmful to those interests. Employers should not be forced to hire anyone who will not be honest, faithful, and loyal to them. Such a result would be inconsistent with Congress' intent to balance the interests of management and labor with the passage of the NLRA.

*Gregory A. Rich*

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173. See *United Steelworkers of Am. v. NLRB*, 243 F.2d 593, 597 (D.C. Cir. 1956) (holding that employees' right to organize "does not take precedence over the right of an employer to conduct his business in a reasonable manner and with reasonable prospects of success").

