UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK HOTEL, LLC, D/B/A
NEW YORK NEW YORK HOTEL AND CASINO,
Employer

and Case No. 28-CA-14519

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226, AND
BARTENDERS UNION, LOCAL 165, AFFILIATED
WITH UNITE HERE,
Petitioner.

BRIEF, AMICUS CURIAE, OF PROFESSOR ELLEN DANNIN IN SUPPORT OF THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD

STATEMENT

This case is before the National Labor Relations Board on remand from the District of Columbia Circuit. *New York New York v. National Labor Relations Board*, 313 F.3d 585 (D.C. Cir. 2001). The Court of Appeals remand stated that the critical question in this sort of case is whether "individuals working for a contractor on another's premises should be considered employees or nonemployees of the property owner." In addition, the court observed that no Supreme Court case had addressed the issue "whether the term 'employee' extends to the relationship between an employer and the employees of a contractor working on its property.' Furthermore, the Supreme Court had not decided what level of rights a contractor's employees have to engage in organizational activities in non-work areas during non-working time.

The Court of Appeals directed the Board to answer these questions by applying relevant principles from Supreme Court decisions and by accommodating employees' § 7 rights with "the

rights of NYNY to control the use of its premises, and to manage its business and property." This brief is filed in response to the Board's invitation for amicus briefs that address these issues.

ARGUMENT

Before the issue of accommodating the rights of employers and employees can be addressed, it is first necessary to determine who in this case is an employee and what is the content of the rights of an employee. The court would find this to be an easy case if the employees involved were directly employed by New York New York Hotel and Casino and if they were addressing concerns about their working conditions and desire to organize a union to other New York New York employees. In this case, the employees were protesting their employer's nonunion status and the wages they were paid. However, while the workers worked on the premises of New York New York, they were employed by a subcontractor, Ark Las Vegas Restaurant Corporation. In addition, the Ark employees distributed handbills on the hotel's property but during times when they were not on duty. Finally, those who were targeted by the Ark employee handbills were hotel guests and customers who were unlikely to be employed by either Ark or New York New York.

To assist the Board and ultimately the Court of Appeals in their consideration of the questions directed to the Board, we address only the limited but fundamental issue of employee status. As the Court of Appeals observed, the manner in which employee § 7 rights is presented in this case is not one on which the Supreme Court has spoken. However, Congress has.

THE DEFINITION OF EMPLOYEE UNDER THE NATIONAL LABOR RELATIONS ACT

The issue and role of employee and employer status under all employment statutes, including the NLRA, differs in important ways from the common law. First, under workplace statutes, the definition of employee (and employer) determine the statute's jurisdiction. Each workplace statute has a different purpose. The definition of employee is tailored to promote the enforcement of the statute. Second, in enacting the NLRA Congress expressly rejected the common law definition of employee because it would have undermined the operation and policies of the Act and would have made it impossible to effectuate Congress' intent. When the NLRA rights of employees of a specific employee are involved, there is overlap with the common law definition. However, Congress wrestled with the definition for over a year as it sought to ensure that the rights granted in § 7 were meaningful.

The fruit of this struggle can be seen in § 2(3) which states: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . .." In 1941, the Supreme Court recognized the breadth of this definition as necessary to its operation. The Court said that a more limited definition would

> confine the "policies of this Act" to the correction of private injuries. The Board was not devised for such a limited function. It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The Board, we have held very recently, does not exist for the "adjudication of private rights"; it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining."

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 192-93 (1941).

The Court continued, saying that the central purpose of the Act was directed "toward the achievement and maintenance of workers' self-organization." Id. at 193. In 1947, the Board cited

Phelps Dodge in its assertion that employee, as defined by the NLRA, "is broad enough to include members of the working class generally" and that to limit protection "only to employees of a particular employer, would permit employers to discriminate with impunity against other members of the working class, and would serve as a powerful deterrent against free recourse to Board processes." *Briggs Manufacturing Co*., 75 N.L.R.B. 569, 570-71 (1947).

This broad definition promotes the Act's broad policy endorsement of freedom of association in § 1, as well as the inclusion of mutual aid or protection among the rights of employees listed in § 7. Furthermore, in § 2(9), Congress reiterated the position that the NLRA was to provide broad coverage to anyone in the class of employee, without consideration of who is the employer of that employee:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether the disputants stand in the proximate relation of employer and employee*. [emphasis added].

The Supreme Court in *Phelps Dodge* recognized Congress' intent to define employee broadly and to link between §§ 2(3) and (9):

> To circumscribe the general class, "employees," we must find authority either in the policy of the Act or in some specific delimiting provision of it.
>
> . . . The problem of what workers were to be covered by legal remedies for assuring the right of self-organization was a familiar one when Congress formulated the Act. The policy which it expressed in defining "employee" both affirmatively and negatively, as it did in § 2 (3), had behind it important practical and judicial experience. "The term 'employee'," the section reads, "shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . ." This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the

> Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. *Cf. New Negro Alliance v. Grocery Co*., 303 U.S. 552. The broad definition of "employee," "unless the Act explicitly states otherwise," as well as the definition of "labor dispute" in § 2 (9), expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer." H. R. Rep. No. 1147, 74th Cong., 1st Sess., p. 9; see also S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6, 7.

313 U.S. at 192-93.

Congress was concerned that if employees, broadly defined, could not make common cause with other employees regardless of employer, then the rights the NLRA was enacted to provide and the purposes the NLRA was to promote would be weakened and even destroyed.

Nothing in later amendments has changed these policies or these rights. The policy statement of the Labor Management Relations Act, 1947, recognizes that employers, employees, and labor organizations each have legitimate rights which each must recognize.

> Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
>
> It is the purpose and policy of this Act, 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.

The source of employees' legitimate rights is the National Labor Relations Act. Later amendments have not changed the critical language in either § 2(3) or § 2(9).

THE LEGISLATIVE HISTORY OF SECTIONS 2(3) AND (9)

The legislative history of the National Labor Relations Act demonstrates that the language of §§ 2(3) and (9) was not accidental. From the time the legislation was introduced in Congress on March 1, 1934, the language in both sections evolved. In that process, Congress rejected definitions of employee that were closer to the common law definition. However, the original bill already defined employee to mean any employee and was not limited to a particular employer.

When introduced on March 1, 1934, both the Senate and House bills defined employee as:

> The term "employee" means any individual employed by an employer under any contract of hire, oral or written, express or implied (including any contract entered into by any helper or assistant of such individual, whether paid by him or his employer, if such assistant or helper is employed with the knowledge, actual or constructive, of the employer,) or any individual formerly so employed whose work has ceased as a consequence of or in connection with, any current labor dispute or because of any unfair labor practice: *Provided*, That the term "employee" shall not include an individual who has replaced a striking employee. Wherever the term "employee" is used it shall not be limited to mean the employee of a particular employer, but shall embrace any employee, unless the Act explicitly states otherwise.

Legislative History of the National Labor Relations Act, 1935 2, 1129 (1985).

An amendment offered May 10, 1934, was reworded but retained the idea that employee was not limited to the employee of an employer. Legislative History of the National Labor Relations Act, 1935, at 1070 (1985).

Eleven months later, on February 15, 1935, the language of § 2(3) in the Senate Bill had come to reflect the version that was enacted:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, 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.

Legislative History of the National Labor Relations Act, 1935, at 1296.

The final version of § 2(3) was developed in a context of debate as to the wisdom of using an expansive definition of employee. For example, during House debate, Congressman Connery said:

> When labor is spoken of in this bill, we are not talking about the American Federation of Labor or any other particular union. We are talking about all the working people of the country. We say that we want all workers to have the right to bargain collectively. We want them to have the right to go to the employers and ask: "Do you not think we ought to get this wage?" We do not want the employer to be able to fire a man because he stands up and says: "Let us get together for our the protection of our families, to get short hours and decent wages. Let us form a union." That is all there is to this bill.
> . . .
> Mr. Taylor of South Carolina. . . but there is something in here I should like to ask the gentleman about because he knows more about this matter than anyone else. I am reading now from subsection 3 of section 2 on page 3: The term "employee" shall include any employee and shall not be limited to the employees of any particular employer." . . . Does that mean that every man on a pay roll has it within his own right or privilege to join whatever labor union he wants to at that plant?
> Mr. Connery. Yes.

Legislative History of the National Labor Relations Act, 1935, at 3119.

There was strong opposition to language of this breadth:

> Mr. Blanton: You will note that under the special heading in the bill, "Rights of employees", it is provided that they may "engage in concerted activities for mutual aid", and this is not restricted to an employer's own employees, but labor agitators from anywhere may thrust themselves into a man's business and interfere with his employees and try to get them dissatisfied and demand that they unionize against their will , because the bill, in defining "employee", uses this language on page 5, to wit: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer."

Legislative History of the National Labor Relations Act, 1935, at 3157.

Despite these and other objections, Congress concluded that in order to protect the rights created by the new law the definition of employee must embrace all employees and not be tied to an employment relationship. In its analysis of the bill, the Senate foresaw that situations were likely to arise that would bring employees into an economic relationship with employers who were not their direct employers and drafted language to give the government jurisdiction over those more complex relationships:

> The term "employee" is not limited to the employees of a particular employers. The reasons for this are as follows: Under modern conditions employees at times organize along craft or industrial lines and form labor organizations that extend beyond the limits of a single employer unit. These organizations at times make agreements or bargain collectively with employers, or with an association of employers. Through such business dealings, employees are at times brought into an economic relationship with employers who are not their employers. In the course of this relationship, controversies involving unfair labor practice may arise. If this bill did not permit the Government to exercise complete jurisdiction over such controversies (arising from unfair labor practices), the Government would be rendered partially powerless, and could not act to promote peace in those very wide-spread controversies where the establishment of peace is most essential to the public welfare.. . .

Sen Report No. 573 on S.1958, Legislative History of the National Labor Relations Act, 1935, at 2305.

The House agreed:

> These definitions are for the most part self-explanatory. The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self organization of employees may extend beyond a single plant or employers. This is so plain as to require no great elaboration.
>
> > . . .[quoting *American Steel Foundries*] To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the community united because in the competition between employers they are, bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild.
>
> This statement is a sufficient answer to those who, with questionable disinterestedness, proclaim that rugged individualism is the great boon of the American workman; or that there is something "unAmerican" in a movement by workers to pool their economic strength in a type of labor organization most effective in approximating the economic power of their employers, namely, in so-called "outside unions", thereby establishing that 'equality of position between the parties in which liberty of contract begins." While the bill does not require organization along such lines, and indeed makes no distinction between such organizations and others limited by the free choice of the workers to the boundaries of a particular plant or employer, it is imperative that employees be permitted so to organize, and that unfair labor practices taking in workers and labor organizations beyond the scope of a single be regarded as within the purview of the bill.

House Report (May 20, 1935), Legislative History of the National Labor Relations Act, 1935, at 2917-18; 3056-57; *see also id.* at 1296.

As with § 2(3), the expansive language of § 2(9) was the subject of strong objection and discussion. For example, James W. Deffenbaugh stated: "We do not believe anybody should have any rights to complain against an employer unless he is an employee of the company and

directly interested..” Legislative History of the National Labor Relations Act, 1935, at 1887; *see also id.* at 1688,1826.

By enacting the NLRA with its current language, Congress rejected these objections. Senator Wagner responded to them by saying that workers’ rights would be limited were issues restricted only to persons “connected with the plant.” Legislative History of the National Labor Relations Act, 1935, at 1826. He pointed out: “This is not a new principle. The Norris-LaGuardia Act has exactly this same provision in it.” *Id*. at 1826. Senator Wagner added:

> Of course, it comes back to the old question which is at the bottom of it. I do not say this of your representative plan, but of most representative plans, that you want to retain the economic advantage which you have – where an employee has any complaint to make, he is at once discharged and rather than lose his job he is not going to make a complaint. Now, do you want to have workers of that kind absolutely powerless to belong to an outside organization, and there is an individual who may lodge that complaint without running the risk. The complaint may be well founded, without the individual running the risk of being notified the next day that his job is at an end.

Legislative History of the National Labor Relations Act, 1935, at 1827.

The Senate Report on the legislation explained the need for the language in § 2(9):

> The term “labor dispute” includes cases where the disputants do not stand in the proximate relation of employer and employee. An identical provision is contained in section 13(c) of the Norris-LaGuardia Act . . . and in most recent labor legislation dealing with disputes. . . .But unfair labor practices may, by provoking a symptahetic [sic] strike for example, create a dispute affecting commerce between an employer and employees between whom there is no proximate relationship. Liberal courts and Congress have already recognized that employers and employees not in proximate relationship may be drawn into common controversies by economic forces. There is no reason why this bill should adopt a narrower, view or prevent action by the Government when such a controversy occurs.

Senate Report, May 1, 1935, Legislative History of the National Labor Relations Act, 1935, at 2300.

Congressman Boland on February 20, 1935, included the following explanation for the expansive definitions and included discussions of similar language in the NRA § 7(a):

> The ideas underlying this section are very simple. The worker is treated as a free person. He is accorded the right to associate with fellow workers, to join or refrain from joining any labor organization. He is protected from acts of aggression of his employer. His helplessness as an individual in bargaining with his employer is recognized.
>
> This section seeks to equalize the bargaining power of employers and employees by permitting the latter to pool their strength, for theoretical freedom of contract can exist only between equals. The statute recognizes the evils resulting from the present inequalities of bargaining power and proposes as a legislative remedy a regime of collective bargaining.
>
> Having permitted industry to unite through merger and consolidation into powerful corporate units, and having encouraged business to form trade associations covering entire industries, Congress sought to effect an economic balance through collective bargaining and the free association of workers in labor organizations. Only in this way could workers achieve even a meager sense of security.
>
> . . .
>
> I am not taking the position that section 7(a) does not take us into new territory; my analysis will show the contrary. I am, however, seeking to show that section 7(a) was the orderly and logical culmination of the efforts on the part of the Federal Government to free the laboring man from the restrictions imposed by employers and to afford same the opportunity to associate freely with his fellow workers for the betterment of working conditions and the improvement of his status in our economic system.

Legislative History of the National Labor Relations Act, 1935, at 2430-31 (discussing NRA § 7(a)).

DISCUSSION

In this case, the Board and Court of Appeals ask whether the definition of employee and thus the protections of the NLRA can apply to several common situations outside that of the common law relationship of employer-employee. Does the employee of a company's subcontrator have the rights of an employee under the NLRA? Can employee include employees

not on their work shift? When an employee asks bystanders and passers-by to support their struggle for better wages and for union representation, is the employee engaged in concerted activities that are protected by the act? In other words, are those bystanders and passers-by NLRA employees?

The common law would likely say "No" to most of these questions. However, as discussed above, Congress decided that the answer must be: "Yes."

Such a conclusion seems particularly uncomfortable in the case of appeals to bystanders and passers-by. How can we know that mere passers-by are employees? The resolution, however, need not be that difficult. As discussed above, the understanding was that employee included the working class in general. Longstanding law presumes employee status and places the burden of proof on the one who asserts nonemployee status. In the absence of sufficient evidence to meet the burden of proving the nonemployee status of these individuals, they are employees under the Act. As a practical matter, in this case, it seems likely that even if not all the people who were appealed to could be defined as an employee, certainly enough were to support a finding that the Ark employees were engaged in concerted activities and were thus protected by the Act.

Whatever limits there are on the ability to make common cause with others and to be protected in doing so must be made with an awareness that Congress frowned on limiting those rights and it did so because it had concluded that such limits weakened the law's effectiveness in promoting freedom of association, mutual aid or protection, equality of bargaining power, and the practice and procedure of collective bargaining.

The Board is also faced with the task of creating an appropriate accommodation of employee and employer rights. The policy statement in Taft-Hartley sets the standard. It

mandates that employees, employers, and unions must recognize and respect the legitimate rights of one another in their relations with each other. As Congress said there:

> It is the purpose and policy of this Act, 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 . . ..*

CONCLUSION

The Board should find that both the Ark employees and the bystanders and passers-by they appealed to fall under the NLRA's definition of employee and that their rights to engage in concerted activities with one another must be protected.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Brief was sent via first class mail postage prepaid, unless otherwise stated, to the following on October 1, 2007:

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