

Contractors' Labor Pool Inc. v. NLRB, D.C. Cir., No. 01-1393, 3/28/03

W.D.D.W. Commercial Sys. & Investments Inc., d/b/a Aztech Elec. Co., 335 N.L.R.B. No. 25 (2001).

D.C. Circuit Overturns NLRB Ruling On Temporary Help Agency's Wage History Rule

A temporary help agency's rule that **it would not hire workers whose previous wages were 30 percent higher or lower than the company's wage rates did not violate federal labor law**, the U.S. Court of Appeals for the District of Columbia Circuit held March 28, reversing a National Labor Relations Board ruling (*Contractors' Labor Pool Inc. v. NLRB, D.C. Cir., No. 01-1393, 3/28/03*).

In a September 2001 ruling, the board held 3-1 that Contractors' Labor Pool's policy had a discriminatory effect on union members and was inherently destructive of workers' rights to choose whether or not to join a union.

The appeals court declined to decide whether the policy was inherently destructive but said the board's finding that the policy was not motivated by anti-union animus made it impossible to decide that the policy discriminated against union members in violation of Section 8(a)(3) of the National Labor Relations Act. "[T]he Supreme Court's long-standing interpretation of [Section] 8(a)(3) is plainly at odds with the Board's reasoning in this case," Judge Laurence H. Silberman said. "Indispensable to a determination of a violation of [Section] 8(a)(3) ... is a finding that an employer acted out of an anti- (or pro-union) motivation." However, the appeals court agreed with the board's decision that Contractors' Labor Pool discriminated against two paid union organizers by declining to send them out on any more assignments. Judges Harry T. Edwards and Judith W. Rogers joined in the opinion.

Wage Policy Adopted to Improve Retention

Contractors' Labor Pool, based in Reno, Nev., supplies construction workers on a temporary basis to contractors in six western states. To improve its applicant screening process, the company implemented policies to carefully examine applicants' driving records and references and to ask the applicant to specify an acceptable wage rate. **It was assumed that applicants who previously had earned substantially higher wages soon would become dissatisfied and quit. Based on a worker retention study it conducted, the labor supplier in 1994 adopted a rule rejecting applicants whose previous wages deviated by 30 percent or more from the company's starting wage rate.** The percentage of rejected applicants increased from 70 percent to 75 percent, but the retention rate rose from 57.6 percent to 63.9 percent.

In the early 1990s, International Brotherhood of Electrical Workers Local 441 began targeting Contractors' Labor Pool and other nonunion employers on the West Coast. Through the activity called "salting," union organizers or "salts" apply to work for nonunion contractors with the intent of organizing their workers from within. Local 441's President Vaughn Hedges successfully applied with Contractors' Labor Pool, without revealing his union affiliation, and was assigned in November 1992 to Aztech Electric,

headquartered in Irvine, Calif. Four days later, Hedges was laid off. He then started talking about the benefits of unionization, took some union literature out of his truck, and began to distribute it to electricians at the construction site. Hedges left when a foreman told him to leave. The next day, a Contractors' Labor Pool staff manager criticized Hedges for distributing union literature. The company put an entry on Hedges' computer file stating "DNU [do not use] until further notice." Union member Shawn Smith completed two assignments for Aztech and was not referred to any other job. A "DNU" notice also was placed on his file. An NLRB administrative law judge found the Aztech foreman was aware of Smith's union affiliation and intent to distribute literature.

The ALJ found that the 30 percent policy had a legitimate business objective and was not motivated by anti-union animus **but also found** that the policy had the illegal effect of excluding union workers. The board agreed in a 3-1 decision (*W.D.D.W. Commercial Sys. & Investments Inc., d/b/a Aztech Elec. Co.*, 335 N.L.R.B. No. 25, 168 LRRM 1073 (2001); 173 DLR AA-2, 9/7/01).

The ALJ found that it was not an unfair labor practice for Contractors' Labor Pool to stop sending Hedges and Smith on assignments because, as paid union organizers, their goals conflicted with the employers' operations and therefore they were not employees covered by the NLRA. The board disagreed, ruling that the two organizers were covered employees under the U.S. Supreme Court's decision in *NLRB v. Town & Country Elec.*, 516 U.S. 85, 150 LRRM 2897 (1995). Without deciding whether there was a sufficient conflict to make the organizers' activity unprotected, the board ruled 4-0 that the labor supplier failed to show that it relied on the alleged conflict in deciding not to use the two workers any more.

'Inherently Destructive' Issue Sidestepped

Contractors' Labor Pool argued on appeal that its 30 percent policy is not inherently destructive and relied on the Board's dissenting opinion. But Silberman found the "dissent does not squarely respond to the [board] majority's contention that the [company's] rule is inherently destructive." The labor supplier also argued that the wage policy is not inherently destructive because it does not adversely impact union members in all of the company's geographic labor markets. Finding insufficient evidence of union rates versus Contractors' Labor Pool's rates in every relevant labor market, **Silberman found it preferable not to decide whether the policy is inherently destructive.** He moved on to the question whether the board could find the policy was not motivated by anti-union animus and still conclude that the policy was inherently destructive.

In *NLRB v. Great Dane Trailers Inc.*, 388 U.S. 26, 65 LRRM 2465 (1967), the Supreme Court said:

"[I]f it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that conduct was motivated by business considerations."

The board majority relied on this statement to conclude "it was free to hold that [the labor supplier] violated [Section] 8(a)(3) even if it also found that [the company's] motive was blameless" if the policy has a disparate impact, Silberman said. He agreed with Contractors' Labor Pool that the Board majority misinterpreted *Great Dane* and later Supreme Court decisions. In the quote relied on by the board majority, the Supreme Court meant that "if the employer's conduct was inherently destructive of union rights the Board could legitimately draw the inference that the employer had the proscribed motivation" and therefore "no further proof of antiunion motivation" would be needed, Silberman said.

The union cited the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 16 LRRM 620 (1945), that it was an unfair labor practice to discharge a pro-union employee for violating an overly broad no-solicitation rule that was not motivated by anti-union animus and did not discriminate against union solicitation. "We think *Republic Aviation* should be regarded as something of an anomaly," Silberman said. "It stands for the limited proposition that if an employer adopts an illegal rule . . . and then fires an employee for transgressing the rule, it automatically violates [Section] 8(a)(3) even though it adopted the rule for wholly benign reasons."

"[O]utside the *Republic Aviation* exception," a finding of anti-union motivation is "[i]ndispensible to a determination of a violation of [Section] 8(a)(3)," Silberman said. "Whatever legitimate inference that might be drawn from [the labor supplier's] adoption of the 30 [percent] rule the Board certainly cannot conclude explicitly that [the company's] motivation is benign and then hold that its practice independently violates [Section] 8(a)(3)." The judge also found that the board majority erred by finding support in disparate impact cases under Title VII of the 1964 Civil Rights Act, which contains broader statutory language than Section 8(a)(3).

Employee Status Decided in *Town & Country*.

Silberman agreed with the Board that the argument of Contractors' Labor Pool that the two union organizers were not employees under the NLRA is "foreclosed" by the Supreme Court's decision in *Town & Country*.

The Board has recognized that union organizers "might engage in conduct that raises a disabling conflict with their employer and is therefore unprotected," Silberman said. He found that the board "reasonably determined" that it was unnecessary to decide whether there was a disabling conflict in this case because the labor supplier failed to show that the alleged unprotected conduct caused the company's action. Since the labor supplier never contended that it was aware of the two organizers' union affiliation "(or any allegedly disabling conflicts) at the time it engaged in discriminatory conduct this defense was unavailable," Silberman said.

Contractors' Labor Pool argued that the back pay award to the two organizers should be cut off as of the time the company discovered their status during the ALJ hearing. "This is an untenable proposition," Silberman said. "An employee does not lose his protected

status merely because he is a salt. Rather, he may lose it if he engages in unprotected activity that emanates from disabling conflicts arising in connection with salting." Silberman also found the labor supplier waived the tolling argument by failing to raise it before the board.

Robert W. Tollen of **Seyfarth Shaw** in San Francisco represented the labor supplier. NLRB attorney William M. Bernstein in Washington, D.C., represented the agency.

Robert D. Kurnick of **Sherman, Dunn, Cohen, Leifer & Yellig** in Washington, D.C., represented the union.