WBAI Pacifica Foundation *and* United Electrical, Radio & Machine Workers of America (UE) and its Local 404. Cases 2–UC–496 and 2–UC–517

August 26, 1999

DECISION ON REVIEW AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On February 12, 1997, the Regional Director for Region 2 issued a Decision and Order Clarifying Unit finding it appropriate to include the classifications of Business Director and unpaid staff in the existing unit in the collective-bargaining agreement between the Employer and the Union. The Employer filed a timely Request for Review of the Regional Director's inclusion of the unpaid staff in the existing unit and the Union filed a response in opposition.

On June 4, 1997, the Board granted the Employer's Request for Review. Thereafter, the Employer and the Union filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, we conclude, contrary to the Regional Director, that the unpaid staff should be excluded from the existing bargaining unit.[1]

The Employer is a not-for-profit corporation engaged in operating a noncommercial FM radio station. The station does not accept advertising and is supported by listener contributions.

In 1987, the Employer voluntarily recognized the Union as the exclusive collective-bargaining representative in a unit of all paid and unpaid, full-time or part-time programming, technical, bookkeeping and clerical workers. Paid and unpaid staff have been included in the bargaining unit in successive collective-bargaining agreements. The most recent agreement was extended until April 30, 1996. At the time of the hearing, there were approximately 25 paid staff and 200 unpaid staff in the unit.

Unpaid staff are not subject to the hiring procedures prescribed for paid staff in the collective-bargaining agreement. Instead, some unpaid staff are brought in by management or through an introduction by paid staff. Some simply walk into the station. Unpaid staff may apply for paid positions, but receive no special preference or consideration.

Unpaid staff do not receive wages, sick leave, vacations or medical, dental and health benefits. No workers' compensation or unemployment insurance payments are made on behalf of unpaid staff. The number of hours that unpaid staff work is a matter within their discretion and desire.

Unpaid staff produce a majority of the Employer's programs under the general direction of the Program Director. The Program Director has the authority to preempt a program and to shape its format. Testimony of unpaid staff shows that their programs were initially approved by the Program Director. After that approval, the unpaid staff were allowed essentially to act independently.

Under the collective-bargaining agreement, a volunteer who works at least 10 hours per month for 4 months or 20 hours per month for 2 months is designated as unpaid staff and is covered by the agreement. Under the agreement, unpaid staff are required to attend General Manager meetings, department meetings and meetings to organize events. The agreement provides travel reimbursement and child care allowance for unpaid staff. The agreement also provides that unpaid staff may file and process grievances to arbitration. If unpaid staff substitute for paid staff, the agreement provides that unpaid staff receive contract wages. The agreement also makes clear that when an unpaid staff member substitutes for a paid staff member, the unpaid staff member is considered to be a paid staff member for the duration of the substitution.[2]

The Regional Director found that unpaid staff fell within the Section 2(3) definition of employee, based on the Supreme Court's approval of the Board's broad reading of the definition in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). The Regional Director pointed to the Court's citations of various definitions of employee such as a "worker" and "someone who works for another for hire." He concluded that unpaid staff were within these definitions of employee because they provide an essential service to the Employer and are subject to the Employer's control.

Regarding the subject of compensation, the Regional Director found that the Board would be defining "employee" narrowly and restrictively if it were to require the receipt of wages. He relied on the Supreme Court's finding in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), that applicants for employment (who do not receive wages from an employer) are statutory employees. The Regional Director further found that even though unpaid staff do not receive wages, they receive some form of compensation in the form of travel reimbursement and child care allowance. He also noted that they are paid for the time they act as substitutes for paid producers and that they receive finances to produce their programs. The Regional Director concluded that the law

[1] The Employer has requested oral argument. The request is denied as the record and the briefs adequately present the issues and the positions of the parties.

[2] Section 8F of the agreement provides that an individual cannot be paid staff and unpaid staff at the same time.

supports a finding that the unpaid staff are statutory employees. We disagree.

To be sure, the Court found, in the cases relied on by the Regional Director, that the reach of Section 2(3) is broad. However, in each case where the Court found statutory employee status, there was at least a rudimentary economic relationship, actual or anticipated, between employee and employer. In *Town & Country Electric*, where the Court decided that the Board lawfully interpreted Section 2(3) to include company workers who are also paid union organizers, the individuals at issue received wages from the employer as well as the union. In *Phelps Dodge*, where the Court held that an employer cannot lawfully refuse to hire applicants because of their union affiliation, the applicants were applying for wage-earning jobs. While the Court rejected arguments in both cases that would have narrowed the Section 2(3) definition to exclude paid union organizers or job applicants, it did not suggest that the definition should be so broad as to include individuals, like members of unpaid staff at issue here, whose relationship with the employer was devoid of any form of compensation, current or contemplated.

In *Town & Country Electric*, for example, the Court looked to the ordinary dictionary definition of employee, which includes compensation. The Court wrote:

> The ordinary dictionary definition of "employee" includes any "person who works for another in return for *financial or other compensation.*" American Heritage Dictionary 604 (3d ed. 1992). See also Black's Law Dictionary 525 (6th ed. 1990) (an employee is a "person in the service of another under *any contract of hire*, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed"). [516 U.S. at 90. Emphasis added.]

The definition of the term "hire" in either its noun or verb form also includes compensation. Thus, Black's Law Dictionary (6th ed. 1990) contains the following definition:

> Hire, v. To purchase the temporary use of a thing, or to arrange for the labor or services of another for a stipulated compensation.
>
> Hire, n. Compensation for the use of a thing, or for labor or services.

Compensation, in connection with labor or services, is defined in economic terms in Black's Law Dictionary (6th ed. 1990):

> Remuneration for services rendered, whether in salary, fees, or commissions.

Thus, when the Court stressed the breadth of Section 2(3) in *Town and Country Electric*, that breadth was bounded by the presence of some form of economic relationship between the employer and the individual held to have statutory employee status.

The Court's finding in *Phelps Dodge* that job applicants were employees under Section 2(3) similarly relied on economic relationships. The denial of employment to applicants because of their union affiliation not only prevented the applicants from entering the employer's workforce, it also had an adverse impact on those already employed by the employer. The Court viewed the protection of job applicants against discrimination for union affiliation as a necessary part of protecting employees' right to self-organization and improvement of their economic standards. Noting that Congress' ultimate concern in passing the Act was to eliminate the causes of certain obstructions to the free flow of commerce, the Court wrote:

> This vital national purpose was to be accomplished "by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association." Sec. 1 Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise. [313 U.S. at 182.]

The Court concluded:

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace. [Id. at 185.]

Thus, although the applicants did not receive any form of compensation from the employer, they were seeking entry to wage-paying jobs and the discrimination against them had an adverse impact on those who were already wage earners.

The Court also emphasized compensation in determining employee status in *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). There the Court addressed the question of whether retired employees were employees within the meaning of the Act for the purposes of bargaining about changes in their retirement benefits. The Court decided they were not. Stressing that the Act is concerned with remedying the inequality of bargaining power between employer and employee, the Court found that this concern did not extend to individuals who had left the work force and no longer worked for an employer. Noting House comments refer-

ring to the standard dictionary definition of employee as someone who works for another for hire, the Court wrote:

> In doubtful cases resort must still be had to economic and policy considerations to infuse Section 2(3) with meaning. But, as the House comments quoted above demonstrate, this is not a doubtful case. The ordinary meaning of "employee" does not include retired workers; retired employees have ceased to work for another for hire. [404 U.S. at 168.]

At the heart of each of the Court's decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act. The damage caused to the nation's commerce by the inequality of bargaining power between employees and their employers was one of the central problems addressed by the Act. A central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees and safeguards commerce from the harm caused by labor disputes. The vision of a fundamentally economic relationship between employers and employees is inescapable.

Applying the teaching of the Court to the case before us on review, we find that these unpaid staff are not employees within the meaning of Section 2(3) because there is no economic aspect to their relationship with the Employer, either actual or anticipated. In this connection, we, like the Court in *Pittsburgh Plate Glass*, find that this case is not a doubtful one. The ordinary meaning of employee does not include unpaid staff; unpaid staff do not work for another for hire. As we have observed earlier, to work for hire is to receive compensation for labor or services. Unpaid staff do not receive compensation for their work at the station.

The nature of unpaid staff's relationship with the Employer has virtually no economic component. They receive no wages or fringe benefits. To the contrary, they often raise money or contribute money to the station. Mimi Rosenberg, an unpaid staff member for approximately 28 years testified:

> . . . I know there is no cost that has ever paid or will compensate me for the 28 years not only of labor time but economic time that I put in to doing the programming which is buying my own tapes, doing my own mailings and numerous other economic commitments that I have made to the station as well as most of the unpaid staff.
>
> . . . .
>
> I just wanted to make sure you understand that we also contribute a lot economically to the station as well.

To the extent that unpaid staff receive compensation for their work, it is not compensation from the Employer and is not economic in nature. Thomas Shine, also known as Brother Shine, an unpaid staff member for 18 months testified:

> What has been money for me has been the work that I've been able to put on the air; what has been [pay] for me has been the fact that when I came to BAI and I still do feed the homeless, I was feeding the homeless every other week and I was feeding at least 100 to 200 people every other week.
>
> After coming to BAI, we do feedings where we feed over 1,000 in all five boroughs, plus New Jersey. So when I go into my community and one of my little brothers six or seven years old runs up to me and says, hey, Brother Shine, how you doing, that's pay to me.
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> When one of the panhandlers is down in the subway and getting ready to ask for money and says, oh, that's Brother Shine, hey how you doing. That's pay to me.
>
> So when I've heard the witnesses talk about paid staff and unpaid staff, and volunteers, personally you can throw all that out the window for me. I get my pay—I do what I need to do.

The testimony of the unpaid staff members shows that they do not work for "hire" in the ordinary sense of the word. They work out of an interest in seeing the station continue to exist and thrive, out of concern for the content of the programs they produce, and for the personal enrichment of doing a service to the community and receiving recognition from the community.

Nor do the contractual provisions allowing unpaid staff to receive reimbursement for travel and a child care allowance require a different result. There is no evidence that any unpaid staff have ever received a child care allowance. Although there is evidence that at least one unpaid staff member received travel reimbursement, it does not appear to be a widespread practice. As unpaid staff member Rosenberg testified above, it is common for unpaid staff to assume many of the economic burdens of producing the programs. That unpaid staff occasionally receive travel reimbursement and that those of them who have children are eligible for a child care allowance, is insufficient evidence that unpaid staff receive compensation for their work at the station.[3]

That unpaid staff are paid when they substitute for paid staff is also not evidence that they receive compensation for their work for the Employer. As we noted earlier,

[3] There is no contention and no evidence that the relationship between the unpaid staff and the Employer is such that the Employer would be required to meet the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act, 29 U.S.C. Sections 206(b), 207(a), 211(c), 215(a)(2), (a)(5). Cf. *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985). (Associates who worked for commercial enterprises of religious foundation and received benefits such as food, clothing and shelter in exchange for their services were employees covered by the Fair Labor Standards Act.)

Section 8F of the collective-bargaining agreement provides that an individual cannot be paid staff and unpaid staff at the same time. When an unpaid staff member substitutes for a paid staff member, the unpaid staff member is, therefore, treated as a paid staff member for the duration of the substitution. They do the work and receive the pay of the paid staff member.

Finally, the finances that unpaid staff receive for their programs is not a form of remuneration for services they have rendered to the Employer. Rather, the record shows that the purpose of these funds is to pay for the expenses of producing the programs, such as engineering and publicity.

The occasional reimbursement for travel, the contractual eligibility for a child care allowance, the payment of paid staff wages when substituting for paid staff, and the finances for producing programs are insufficient evidence of compensation, either monetary or in the form of a benefit given in exchange for labor. Nor is there evidence of anticipated compensation. The record shows that unpaid staff are given no preference when they apply for paid staff positions. Unpaid staff positions are not, therefore, a path or stepping stone to paid positions. In fact, some unpaid staff have remained in unpaid positions for many years.

These circumstances show that the relationship between the Employer and unpaid staff is not that of employer and employees contemplated by the Act. Unpaid staff do not depend upon the Employer, even in part, for their livelihood or for the improvement of their economic standards. They do not work for hire and thus the Act's concern with balancing the bargaining power between employer and employees does not extend to them.

For all of these reasons, we conclude that unpaid staff are not employees within the meaning of Section 2(3) of the Act and, accordingly, we shall clarify the existing bargaining unit to exclude them.

ORDER

IT IS ORDERED that the classification of unpaid staff be excluded from the existing unit in the collective bargaining agreement between the Employer and the Union.

Dated, Washington, D.C. August 26, 1999.

Sarah M. Fox, Member

Wilma B. Liebman, Member

Peter J. Hurtgen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD