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## NOTES

### Are Trojan Horse Union Organizers “Employees”?: A New Look at Deference to the NLRB’s Interpretation of NLRA Section 2(3)

Jonathan D. Hacker

#### INTRODUCTION

Labor unions traditionally have depended on direct and continuous contact with employees in the workplace in order to organize effectively.<sup>1</sup> The Supreme Court, however, has recently limited the circumstances under which the National Labor Relations Board (NLRB or Board) can order companies to grant nonemployee union organizers access to their property to communicate with employees.<sup>2</sup> According to the Court, the right to union organization protected by section 7 of the National Labor Relations Act<sup>3</sup> (NLRA or Act) applies only to *employees*, not to nonemployee organizers.

Despite this holding, unions may be able to maintain direct and continuous contact with employees through the use of a so-called trojan horse organizer — a full-time, paid union organizer who applies for a job with a company with the specific and sole intent of organizing a union there.<sup>4</sup> This strategy has many benefits for un-

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1. See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 326-30 (1994).

2. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (holding that the Board may order an employer to grant access “only where ‘the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them’” (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956))). See generally Estlund, *supra* note 1, at 319 (“In [*Lechmere*], the Court ruled six to three that ‘nonemployee union organizers’ virtually never have the right to enter private property to communicate with unorganized employees.”).

3. Section 7 provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . .” 29 U.S.C. § 157 (1988).

4. This strategy is also called “salting.” Unions such as the International Brotherhood of Boilermakers, the International Ladies’ Garment Workers Union, and the International Brotherhood of Electrical Workers have used this technique in their organizing efforts. See Stephen M. Crow & Sandra J. Hartman, *The Fate of Full-Time, Paid Union Organizers as Employees: Another Nail in the Union Coffin?*, 44 LAB. L.J. 30, 30-32 (1993); Herbert R. Northrup, “Salting” the Contractors’ Labor Force: *Construction Unions Organizing With NLRB Assistance*, 14 J. LAB. RES. 469 (1993); see also Judd H. Lees, *Hiring the Trojan Horse: The Union Business Agent as a Protected Applicant*, 42 LAB. L.J. 814 (1991) (describing practice of and law concerning trojan horse organizing strategy). After *Lechmere*, other unions, including retail industry unions such as the United Food and Commercial Workers Union, which previously had relied to a great extent on access to store parking lots, may well look to trojan horse organizers to mitigate the effects of *Lechmere*. This method seems especially

ions: it provides the union day-to-day access to employees; it provides the union access to information about the work environment and employment practices at the company; and it allows the paid union organizer to lead and control employee organizing activities, reducing the exposure of other employees to the illegal discharges that often chill organizing drives.<sup>5</sup>

The effectiveness of this strategy, however, would be severely undermined if an employer could refuse to hire a trojan horse organizer simply because she works for the union, or if the employer could fire the organizer once her true intentions are uncovered. Employers seeking to keep their workforces union-free obviously do not want to hire union organizers. But if these organizers are *employees* as defined by section 2(3) of the NLRA, then employers cannot refuse to hire such organizers solely on the grounds that they are interested in organizing the workforce. Section 8(a)(3) of the NLRA protects employees — a category that includes job applicants<sup>6</sup> — from anti-union discrimination.<sup>7</sup> Under this provision, an employer may not refuse to hire an applicant solely because of the applicant's union affiliation.<sup>8</sup> If an individual is not an *employee*

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appropriate for organizing in the retail food industry, in which turnover is high and job qualifications are minimal.

The description "trojan horse organizer" has been used by management advocates as a way of highlighting the "threat" these organizers pose to management. See, e.g., Lees, *supra*. This Note argues to the contrary that such organizers in fact do not pose a legally cognizable threat to employers and concludes that such organizers should be protected under the NLRA. This Note nevertheless uses the phrase "trojan horse organizers" because it is colorfully accurate in the sense that these organizers join the workforce in order to unionize it, an objective most employers do in fact oppose. See *infra* notes 64-65 and accompanying text.

5. Professor Paul Weiler has documented the serious detrimental effects of employer unfair labor practices (ULPs) on union organizing campaigns. PAUL C. WEILER, GOVERNING THE WORKPLACE 112-14, 237-41 (1990); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983). Weiler attributes the overall decline in union organization in the United States in part to an increase in ULPs by employers and to the lack of effective remedies for employer ULPs. Although others have contested his findings, see, e.g., Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953 (1991), even these commentators make clear that employer ULPs have had negative effects on union organization. See *id.* at 994; see also Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1028 (1991) ("On their face [LaLonde and Meltzer's] numbers seem to state a rather compelling case for labor law reform.").

6. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941).

7. 29 U.S.C. § 158 (a)(3) (1988). An employer charged with having an anti-union motive in refusing to hire an individual must prove that it would have refused to hire the individual even in the absence of the anti-union motive. See *Wright Line Co.*, 251 N.L.R.B. 1083 (1980), *enforced*, *NLRB v. Wright Line Co.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line*).

8. Nor can employers fire or otherwise take action against an employee on the basis of union affiliation. 29 U.S.C. § 158 (a)(3) (1988). For the sake of convenience, this Note will consider the trojan horse question as a refusal to hire situation, although the analysis applies equally to other forms of employer action against an employee.

as defined by section 2(3), however, an employer may legitimately refuse to hire her solely for anti-union reasons.<sup>9</sup> Thus, if trojan horse union organizers are not considered *employees* under section 2(3), then employers have no legal worries about their motives in refusing to hire these applicants.

NLRA section 2(3) provides the following definition of *employee*:

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 . . . 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 herein defined.<sup>10</sup>

For over twenty years the NLRB has held that this definition includes trojan horse union organizers.<sup>11</sup> Courts, however, have not uniformly accepted this position.<sup>12</sup> The Fourth,<sup>13</sup> Sixth,<sup>14</sup> and — most recently — Eighth<sup>15</sup> Circuits have refused to consider such organizers bona fide *employees* entitled to the Act's protection. In contrast, the Second,<sup>16</sup> Third,<sup>17</sup> and D.C.<sup>18</sup> Circuits have enforced

9. For example, § 2(3) expressly excludes supervisors from the definition of *employee*. 29 U.S.C. § 152(3) (1988). The Act therefore allows employers to fire supervisors for supporting a union organizing drive.

10. 29 U.S.C. § 152(3) (1988).

11. See, e.g., Sunland Constr. Co., 309 N.L.R.B. 1224 (1992); Escada (USA) Inc., 304 N.L.R.B. 845, 845 n.4 (1991), *enforced*, 970 F.2d 898 (3d Cir. 1992); 299 Lincoln Street, Inc., 292 N.L.R.B. 172, 180 (1988); Multimatic Prods., Inc., 288 N.L.R.B. 1279, 1313 n.226 (1988); Pilliod of Miss., Inc., 275 N.L.R.B. 799, 811 (1985); Palby Lingerie, Inc., 252 N.L.R.B. 176, 182 (1980); Lyndale Mfg. Corp., 238 N.L.R.B. 1281, 1283 n.3 (1978); Anthony Forest Prods. Co., 231 N.L.R.B. 976, 977-78 (1977); Oak Apparel, Inc., 218 N.L.R.B. 701 (1975); Dee Knitting Mills, Inc., 214 N.L.R.B. 1041 (1974), *enforced*, 538 F.2d 312 (2d Cir. 1975).

12. For a summary of most of the recent case law, see 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. 351 (1994).

13. See *Ultrasystems W. Constructors, Inc. v. NLRB*, 18 F.3d 251, 255 (4th Cir. 1994); *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 72-73 (4th Cir. 1989). See generally Lees, *supra* note 4 (approving of *Zachry*); John Mark Tarver, Note, *H.B. Zachry Co. v. N.L.R.B.: Paid Full-Time Union Organizer Not an "Employee,"* 50 LA. L. REV. 1211 (1990) (criticizing *Zachry*).

14. See *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964).

15. See *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 628-29 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 933 (1995).

16. See *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1979).

17. See *Escada (USA) Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992), *enforcing* 304 N.L.R.B. 845 (1991).

18. See *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 1329-31 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252 (1993).

Board orders finding that an employer who refused to hire a paid union organizer had committed an unfair labor practice.

The framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*<sup>19</sup> typically guides courts adjudicating disputes involving agency interpretations of statutes.<sup>20</sup> *Chevron* establishes a two-step process through which courts assess interpretations of statutes by agencies such as the NLRB.<sup>21</sup> The *Chevron* rule of deference to agencies turns on statutory ambiguity. If the statute clearly expresses Congress's intent, then courts do not defer to the agency's interpretation of the statute; they simply enforce the statute's clear meaning.<sup>22</sup> If the statute is not clear, however, courts then move to the second step and defer to the agency's interpretation as long as it is reasonable.<sup>23</sup>

Although the *Chevron* framework is supposed to simplify the process of interpreting statutes in the administrative state,<sup>24</sup> courts, Board members, and commentators have employed the framework in a variety of ways to answer the question whether section 2(3) includes trojan horse organizers. One approach suggests that courts should stop at *Chevron* step one and enforce Board orders protecting trojan horse organizers, on the ground that section 2(3) clearly includes trojan horse organizers.<sup>25</sup> Another approach suggests the opposite: courts should stop at step one but *refuse* to enforce the Board's protection of trojan horse organizers, on the ground that

19. 467 U.S. 837, 842-43 (1984).

20. For comprehensive discussions of *Chevron* and its implications, see Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) and Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

21. See, e.g., NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987) (applying the *Chevron* two-step framework to an NLRB interpretation of the NLRA).

22. See 467 U.S. at 842-43.

23. See 467 U.S. at 842-43.

24. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (defending *Chevron* as superior to the previous case-by-case, multifactor approach).

25. See Sunland Constr. Co., 309 N.L.R.B. 1224, 1231-32 (1992) (Member Oviatt, concurring). Oviatt had dissented from an earlier Board decision that protected a trojan horse organizer as an *employee* under § 2(3). See Escada (USA) Inc., 304 N.L.R.B. 845, 845-46 (1991), *enforced*, 970 F.2d 898 (3d Cir. 1992). In *Sunland*, however, Oviatt offered a different view:

I have considered the possibility that the law permits me sufficient flexibility to apply to this case my own view of what should be wise national labor policy which, upon reflection, was what underlay my dissent in *Escada*. I do not now believe that I have that flexibility. . . . In my opinion, the legislative materials and Supreme Court decisions interpreting those materials simply do not provide support for a policy judgment to exclude union organizers from the definition of "employee." It is thus my view that I lack authority to exclude paid union organizers from the definition of "employee" in Section 2(3) on policy grounds. And I find it abundantly clear . . . that paid union organizers are "employees" within the ordinary meaning of that word. Accordingly, I believe that if paid union organizers are now to be excluded, Congress must say so explicitly.

309 N.L.R.B. at 1232.

section 2(3) clearly *excludes* trojan horse organizers.<sup>26</sup> Other approaches find that the statute is not clear but reach contrary conclusions on whether the Board's inclusion of trojan horse organizers is a reasonable interpretation of the statute.<sup>27</sup>

This Note takes a different approach to interpreting section 2(3). Although this Note agrees that section 2(3) neither clearly includes nor clearly excludes trojan horse organizers, it also argues that the definition of *employee* under section 2(3) must be determined by looking to common law principles of agency. In other words, the question whether courts should defer to the Board's interpretation of section 2(3) does not turn on statutory ambiguity. Rather, courts have a continuing duty to ensure that the Board interprets *employee* consistently with common law agency principles. Nevertheless, the correct interpretation of *employee* under agency principles ultimately turns on an empirical judgment about whether trojan horse organizers generally work as hard as other employees. This judgment is uniquely suited to the NLRB, whose experience and expertise with the complexities of industrial relations the Court has consistently recognized. This Note therefore concludes that courts should defer to Board orders protecting trojan horse organizers, not on the basis of statutory ambiguity, but because the Board is best equipped to make the judgments necessary to reach the proper legal conclusion under the principles of agency.<sup>28</sup>

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26. See *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 73 (4th Cir. 1989) (holding that "the plain meaning of the term 'employee' contemplates an employee working under the direction of a single employer," but not citing *Chevron*).

27. Compare *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 1330-31 (D.C. Cir. 1992) ("We hold, then, that the NLRB *could reasonably determine* that Hendrix or anyone else who is employed simultaneously by a union and a company is an 'employee' under § 2(3) of the Act . . . ." (emphasis added)), *cert. denied*, 113 S. Ct. 1252 (1993) with *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 627-29 (8th Cir. 1994) (stating that the "statute does not helpfully define 'employee,'" and that the court "will uphold the Board's interpretation only if it is reasonable" but refusing to do so), *cert. granted*, 115 S. Ct. 933 (1995).

It may be somewhat inaccurate, however, to characterize either opinion as a strict application of *Chevron's* second step. After invoking *Chevron*, *Willmar* spends the next seven paragraphs — the entirety of its analysis — demonstrating why the statute's language, history, and purposes cover trojan horse union organizers. 968 F.2d at 1329-30. Such analysis seems to suggest that the statute is clear at *Chevron's* step one. Nonetheless, the opinion upholds the NLRB's interpretation as reasonable, an apparent invocation of *Chevron's* second step. *Town & Country*, on the other hand, never even cites *Chevron*; nevertheless, the structure of the opinion seems consistent with the *Chevron* two-step framework. The opinion finds that the statute is unclear, 34 F.3d at 628 ("Section 2(3)'s definition of 'employee,' provides little help in deciding the issue before us."), and assesses the Board's interpretation under a standard of reasonableness, see 34 F.3d at 627.

28. It is possible to articulate this argument in *Chevron* terms, as follows: Although the statute is clear in the sense that it requires that *employee* be interpreted according to agency principles, the statute is ambiguous in the sense that the proper application of agency principles is unclear. Thus, courts should proceed to *Chevron's* step two and defer to the NLRB's application of agency principles, so long as it is reasonable; it is reasonable for the NLRB to conclude that trojan horse organizers are *employees* under agency principles because the Board has the experience and expertise necessary to make that judgment.

Part I of this Note examines the language and history of section 2(3), demonstrating that Congress intended for the Board and the courts to apply common law agency principles when interpreting this section. Part II identifies three problems for trojan horse organizers that arise under agency law. First, trojan horse organizers may be subject to the control of the union, which would mean they are not employees under traditional agency principles. But the union may only control the organizer with respect to legal organizing activities; the employer controls the organizer with respect to any legitimate on-the-job responsibilities. Second, trojan horse organizers have an interest in union organizing that directly conflicts with the employer's interest in avoiding unionization, a conflict of interest that would also negate the organizer's status as an employee under agency principles. Such a conflict, however, is not a relevant conflict under the NLRA because the statute is predicated on the view that an individual may be interested in organizing and still be loyal to an employer. A third problem that arises under agency law involves the question whether trojan horse organizers are generally good employees. This question is an empirical one, and Part III argues that the NLRB has the experience and expertise necessary to answer it. This Note concludes that courts should therefore enforce NLRB orders protecting trojan horse organizers as *employees* under section 2(3).

### I. INTERPRETING SECTION 2(3) — COMMON LAW AGENCY PRINCIPLES

Statutory interpretation generally begins with the text of the statute.<sup>29</sup> As noted above, NLRA section 2(3) does not provide a precise definition of *employee*. Instead, the Act simply defines *employee* as "any employee," subject to a limited number of exemptions.<sup>30</sup> Under the interpretive canon *expressio unius est exclusio*

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The problem with the *Chevron* version of the argument is that at step two courts almost never reverse agency interpretations. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEXAS L. REV. 83, 95-96 (1994). By contrast, this Note argues that courts should defer to the NLRB's interpretation of § 2(3) only because the Board has experience and expertise with respect to a policy judgment intertwined in the particular agency law question at issue. Determination of the employee status of other individuals under agency law, on the other hand, may not require the kind of policy judgments that are necessary in the trojan horse organizer case. In other words, this Note does *not* argue that courts should simply throw up their hands when reviewing Board interpretations of § 2(3), as seems to be the current judicial practice at *Chevron* step two.

29. *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990).

30. See 29 U.S.C. § 152(3) (1988); see also *supra* note 10 and accompanying text. According to the Supreme Court, "The breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee.' The only limitations are specific exemptions." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

*alterius*,<sup>31</sup> the explicit list of exemptions suggests that Congress intended to exclude all other possible exemptions. The *expressio unius* approach to section 2(3) would include any individual not specifically exempted by the language of the provision.<sup>32</sup> Because section 2(3) does not expressly exclude trojan horse organizers, this approach would dictate that such organizers must be considered *employees* under the statute.<sup>33</sup>

There is no need to resort to this interpretive canon, however, because Congress actually specified substantive content for the meaning of *employee*.<sup>34</sup> The Taft-Hartley amendments to section 2(3) make clear that Congress intended the definition of *employee* to have a meaning consistent with common law agency principles.<sup>35</sup>

Taft-Hartley amended section 2(3) to add to the exemptions from the definition of *employee* "any individual having the status of an independent contractor."<sup>36</sup> This amendment was an express rejection of the Supreme Court's decision in *NLRB v. Hearst Publications, Inc.*,<sup>37</sup> in which the Court construed section 2(3) broadly to include individuals who have some of the characteristics of independent contractors.<sup>38</sup> In his summary of the conference committee agreement, Senator Taft stated:

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31. See BLACK'S LAW DICTIONARY 581 (6th ed. 1990) ("Under [*expressio unius*], if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions . . . are excluded."). See generally 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (6th ed. 1992) (describing the *expressio unius* canon). The Supreme Court has applied the *expressio unius* canon specifically to § 2(3). See *Sure-Tan*, 467 U.S. at 891-92.

32. In *Sure-Tan*, for example, the Court held that undocumented aliens are *employees*, primarily because § 2(3) does not include undocumented aliens among the exemptions from the definition of *employee*. 467 U.S. at 892. See *infra* note 35.

33. The NLRB has relied on this reasoning in concluding that trojan horse organizers are *employees* under § 2(3). See *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1226 (1992) ("Paid union organizers' do not appear in [§ 2(3)'s] exclusions. Under the well settled principle of statutory construction — *expressio unius est exclusio alterius* — only these enumerated classifications are excluded from the definition of 'employee.' Accordingly, full-time, paid union organizers are 'employees' within the ordinary meaning of this provision." (footnote omitted)).

34. See SINGER, *supra* note 31, § 47.23 ("[*Expressio unius*] is a rule of statutory construction and not a rule of law. Thus, it can be overcome by a strong indication of contrary legislative intent or policy."); Merrill, *supra* note 20, at 988 ("Canons are maxims or rules of thumb that allow courts to *impute* answers to interpretive questions when it is not possible to discern by more direct means what the legislature intended.").

35. The Court's decision in *Sure-Tan* that undocumented aliens are included within § 2(3) because they are not expressly excluded, 467 U.S. at 892, is consistent with the requirement that § 2(3) be interpreted according to agency principles. Nothing in the law of agency makes undocumented alien status relevant to defining *employee*. Thus, undocumented aliens could only have been excluded from the definition if the statute expressly excluded them.

36. Labor-Management Relations Act, Pub. L. No. 80-101, sec. 101, § 2(3), 61 Stat. 136, 138 (1947).

37. 322 U.S. 111 (1944).

38. See 322 U.S. at 126-29.



The conferees also adopted language in the House bill excluding from the definition of "employee" individuals having [the] status of independent contractors. While the Board itself has never claimed that independent contractors were employees, the Supreme Court has . . . held that the *ordinary tests of the law of agency could be disregarded* by the Board in determining if petty occupational groups were "employees" within the meaning of the Labor Relations Act. The Court consequently refused to consider the question whether certain categories of persons whom the Board had deemed to be "employees" might not, as a matter of law, have been independent contractors. *The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency.*<sup>39</sup>

Similarly, in the conference report discussing the amendment, Congress made clear its intent with respect to the meaning of *employee*:

It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there has always been a difference, and a big difference, between "employees" and "independent contractors." . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings.<sup>40</sup>

The history of the Taft-Hartley amendment to section 2(3) thus demonstrates that *employee* is not to be defined solely with reference to the listed exemptions. Rather, Congress intended *employee* to have a meaning consistent with its ordinary meaning at law.<sup>41</sup>

The Supreme Court has repeatedly recognized the significance of the congressional reaction to *Hearst Publications*, interpreting it

39. 93 CONG. REC. 6441-42 (1947) (emphasis added).

40. H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947); see also H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 32-33 (1947) (noting that the Supreme Court in *Hearst Publications* had held that the Board could ignore the law of agency in defining *employee* to include independent contractors, and explaining that Congress meant effectively to reverse this opinion).

41. The fact that the conference report refers to "ordinary meanings" rather than "ordinary common law meanings" does not indicate that Congress intended meanings possibly inconsistent with the common law — like dictionary definitions — to apply. Compare *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 73 (4th Cir. 1989) (interpreting the meaning of *employee* without reference to the common law) with *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 1329 (D.C. Cir. 1992) ("[T]he NLRA . . . failed to indicate rejection of the common law model."), *cert denied*, 113 S. Ct. 1252 (1993). The committee was rejecting the tendency of the Board and the Court to ignore the common law in defining *employee*. Senator Taft spoke of the need for the Board and the courts to interpret the meaning of *employee* under general principles of agency. Moreover, the conference committee focused on the difference in the law between independent contractors and employees. It therefore seems reasonable to assume that the committee intended for the Board and the courts to return to the common law as the basis for defining *employee*.

as requiring the application of common law agency principles to the definition of *employee* in section 2(3). In *ULRB v. United Insurance Co. of America*,<sup>42</sup> for example, the Court stated that “[t]he obvious purpose of [the amendment to section 2(3)] was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors.”<sup>43</sup> Of course, it is possible to interpret Congress’s reaction to *Hearst Publications* as *solely* limited to resolving the distinction between employees and independent contractors, but the Court has interpreted the Taft-Hartley amendment to section 2(3) more broadly. In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*,<sup>44</sup> the Court rejected a Board decision that included retirees within the meaning of *employee* under section 2(3), even though retirees are not among the specified exemptions from the section. The Court noted that “the legislative history of § 2(3) itself indicates that the term ‘employee’ is not to be stretched beyond its plain meaning embracing only those who work for another for hire”<sup>45</sup> and concluded that the “ordinary meaning of ‘employee’ does not include retired workers; retired employees have ceased to work for another for hire.”<sup>46</sup>

Although the Court in *Pittsburgh Plate Glass* did not expressly invoke agency law to delineate the “ordinary meaning” of *employee*,<sup>47</sup> the Court has since highlighted the central role of agency principles in the interpretation of section 2(3). In *Nationwide Mutual Insurance Co. v. Darden*,<sup>48</sup> the Court stated that after *Hearst Publications*, “Congress amended the statute . . . to demonstrate that the usual common-law principles were the keys to meaning.”<sup>49</sup> The Court in *Darden* also endorsed the view that “[w]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doc-

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42. 390 U.S. 254 (1968).

43. 390 U.S. at 256.

44. 404 U.S. 157 (1971).

45. 404 U.S. at 166; *see also* 404 U.S. at 167-68 (citing legislative authorities cited *supra* in note 40).

46. 404 U.S. at 168. Of course, the “plain meaning [of *employee*] embracing only those who work for another for hire,” 404 U.S. at 166, also might appear to exclude individuals in the category of job applicants, which the Court has long held to be included in § 2(3), *see Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182-87 (1941). The Court in *Phelps Dodge* recognized, however, that the Act’s proscription of “discrimination in regard to hire,” 29 U.S.C. § 158(a)(3) (1988), requires that applicants be protected. *See* 313 U.S. at 185-86.

47. The Court’s decision in *Pittsburgh Plate Glass* was, however, completely consistent with agency principles. Retired workers are not subject to the control of the employer and therefore are not agents at common law. *See infra* notes 54-58 and accompanying text (describing the definition of *employee* under agency principles).

48. 112 S. Ct. 1344 (1992).

49. 112 S. Ct. at 1349 (emphasis added); *see Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 1329 (D.C. Cir. 1992), *cert denied*, 113 S. Ct. 1252 (1993).

trine.'<sup>50</sup> The Board<sup>51</sup> and several courts<sup>52</sup> have since relied on *Darden* in construing section 2(3)'s definition of *employee* according to common law principles.<sup>53</sup>

Thus, although trojan horse organizers are not expressly excluded from the definition of *employee* in section 2(3), it does not follow that they must be included. Clear and direct legislative history and Supreme Court precedent indicate that the determination whether a trojan horse organizer is an *employee* under section 2(3) turns on whether such an organizer would be considered an agent of the nonunion employer at common law.

## II. AGENCY PRINCIPLES AND THE TROJAN HORSE ORGANIZER QUESTION

The common law uses agency principles to define the employee-employer relationship.<sup>54</sup> According to the *Restatement of Agency*, *control* is the central defining characteristic of that relationship

50. 112 S. Ct. at 1348 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)). Although Congress did in fact provide a nominal definition of *employee* in § 2(3), the definition of *employee* as "any employee" except for certain specified exclusions is unhelpful in the sense that courts still must determine which individuals fall within the category of "any employee."

51. *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1227 (1992).

52. *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 628 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 933 (1995); *Willmar*, 968 F.2d at 1329.

53. It is possible to criticize *Darden* on the ground that even if Congress generally intends for courts to use common law principles in defining *employee*, *Chevron* seems to suggest that when a statute also creates an administrative agency like the NLRB, such ambiguous terms are to be left to the agency for interpretation. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); see also *supra* notes 19-24 and accompanying text (discussing *Chevron's* deference principle). Thus *Darden's* dicta might appear to apply only when a statute's use of *employee* is not subject to administrative interpretation. In the case of § 2(3), in other words, perhaps courts should not refer to the common law but instead defer to the NLRB's interpretation.

As demonstrated above, however, the specific history of § 2(3) indicates that Congress did not intend to leave the interpretation of the ambiguous term *employee* to the NLRB, even though the Board is the agency responsible for enforcement of the statute. Congress specifically intended to require that courts ensure that the Board employ common law agency principles when interpreting § 2(3). As leading commentators have recognized, in amending § 2(3), "Congress manifested an intention not only to narrow the scope of the Board's jurisdiction and the reach of the Act but also to curb the power of the Board in relation to that of the judiciary." ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* 103 (11th ed. 1991). In short, *Chevron* simply does not affect the responsibility of the courts to ensure that the Board interprets § 2(3) consistently with the common law. This Note does conclude, however, that proper application of common law principles of agency depends on the experience and expertise of the Board in administering the relationship between union organizers and employers, and that courts should therefore defer on *that* ground. See *infra* Part III.

54. RESTATEMENT (SECOND) OF AGENCY § 25 (1957) ("The rules applicable generally to principal and agent as to the creation of the relation, delegability and capacity of the parties apply to master and servant."). The Supreme Court refers to the *Restatement of Agency* as the guiding source of the common law of agency. See, e.g., *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 n.31 (1989) ("In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guid-

under agency law: "A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."<sup>55</sup> Under agency law a servant may be under the control of two independent masters simultaneously, so long as service to one master does not require the abandonment of service to the other master.<sup>56</sup> This principle is definitional: A person "cannot be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other."<sup>57</sup> Thus, even if a potential agent is subject to the control of independent masters, she will only be considered the agent for the one she truly intends to serve if that service prevents service to the other.<sup>58</sup>

Two general problems arise under agency law with respect to the trojan horse organizer question. The first involves the element of control. Agency principles suggest that "ordinarily the control which a master can properly exercise over the conduct of the servant would prevent simultaneous service for two independent persons."<sup>59</sup> Employers can argue that union organizers are not subject to their control but to the union's, and that therefore such organizers are not agents of the employer under common law agency principles. Section II.A, however, argues that employers lawfully

ance to the Restatement of Agency."); *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 323-24 & n.5 (1974).

55. RESTATEMENT (SECOND) OF AGENCY § 2(2) (1957).

56. RESTATEMENT (SECOND) OF AGENCY § 226 (1957) ("A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.")

57. *Id.* § 226 cmt. a (emphasis added). This definitional principle is related to the duty of an agent "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." *Id.* § 394. In addition, agency law requires that agents "act solely for the benefit of the principal in all matters connected with [the] agency." *Id.* § 387.

58. The question whether an individual is an employee or nonemployee under agency law often arises in cases involving questions of respondeat superior liability. For example, a truck driver involved in an accident may have been paid for his services at the time of the accident by both the trucking company and the owner whose goods he was transporting. A court uses agency principles to determine whether the trucking company, the owner of the goods, or both, could be legally characterized as the truck driver's employer for purposes of liability arising out of the accident. For examples of cases involving facts similar to these, see *Sharpe v. Bradley Lumber Co.*, 446 F.2d 152, 155 (4th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972), and *Mineo v. Tancini*, 502 A.2d 1300, 1306 (Pa. Super. Ct. 1986). See also *Oregon v. Tug Getter*, 299 F. Supp. 269, 276 (D. Or. 1969) (holding both a tug owner and a barge owner liable for a tug accident when the tug operator was subject to the partial control of the barge owner), *revd. on other grounds*, 468 F.2d 1270 (1972).

59. RESTATEMENT (SECOND) OF AGENCY § 226 cmt. a (1957). Thus, in the example given above, *supra* note 58, the owner of the goods might try to prove that the truck driver was not subject to his control and therefore was not his agent under the law. Cf. *Bailey v. Missouri-Kan.-Tex. Ry.*, 732 S.W.2d 248, 250 (Mo. Ct. App. 1987) (rejecting a plaintiff's attempt to hold both his employer — a contractor — and the railroad that hired the contractor liable for injuries).

control these organizers with respect to every legitimate work task the employer assigns.

The second general agency law problem for trojan horse organizers involves the prospect that an organizer's service to her union conflicts with service to her employer.<sup>60</sup> There are two ways in which an organizer's service to her union might conflict with service to her employer. First, an employer might argue that his interest in maintaining a union-free workforce directly conflicts with the interest of a union organizer in organizing the workforce. Section II.B argues that the NLRA rejects this kind of conflict as a basis for distinguishing employees from nonemployees. Second, an employer might argue that a union organizer has no interest in being a good employee, only in organizing. Section II.C analyzes this question and concludes that its resolution depends on an empirical judgment. Part III then argues that this judgment is better suited to the NLRB than to the judiciary.

### A. *The Problem of Control*

Employers can challenge the status of trojan horse organizers as agents under the common law by focusing on the fact that such organizers are, to some extent, controlled by the union while they work for the nonunion employer. The Eighth Circuit relied in part on this concern in refusing to enforce a Board order protecting trojan horse organizers:

[T]he 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.<sup>61</sup>

Thus, the prospect that an employer could not fully control the actions of the organizer suggested to the court that the organizer should not be considered an employee under agency principles.

But the problem of control does not represent a sound reason to reject the claim that trojan horse organizers qualify as employees under common law agency principles. A trojan horse organizer has two jobs: one in service to the union and one in service to the em-

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60. See *supra* notes 56-58 and accompanying text. This Note uses *conflict* as a label for what agency law describes as "an intent to serve one [that] necessarily excludes an intent to serve the other." RESTATEMENT (SECOND) OF AGENCY § 226 cmt. a (1957). It is true, however, that *conflict* may imply less than a complete exclusion of service. In other words, even with a conflict, one could still serve the other master, although perhaps less effectively. Under agency law, however, agents have a duty to "act solely for the benefit of the principal in all matters connected with [the] agency." *Id.* § 387. Combining the definition of *conflict* with this duty, it is apparent that if service to one master requires *any* degradation of service to the other, then the individual cannot establish an agency relationship with the second master.

61. *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 629 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 933 (1995).

ployer. A union can only control an organizer with respect to the organizer's efforts to unionize the workplace. The organizer is otherwise subject to every legal demand an employer makes, and the employer has every right to fire her for refusal to perform required work.<sup>62</sup> As the NLRB has recognized, "If the organizer violates valid work rules, or fails to perform adequately, the organizer lawfully may be subjected to the same nondiscriminatory discipline as any other employee."<sup>63</sup> Accordingly, as a matter of agency law, it should not matter what degree of control the union exerts over the organizer's union organizing efforts, as long as the organizer does her work for the employer like every other employee.

### B. *Conflict of Interest in Union Organizing*

Perhaps the most obvious kind of conflict that exists between union organizers and employers is the interest in union organizing. Many employers actively oppose the unionization of their employees,<sup>64</sup> and many base their opposition on the claim that unionization harms their companies.<sup>65</sup> The interest of these employers in

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62. See, e.g., *TRW, Inc. v. NLRB*, 654 F.2d 307, 312 (5th Cir. 1981) ("We decline to allow an employee, whose work or attitude is unacceptable, to draw a protective mantle around himself by espousing the union cause; Congress did not intend §§ 8(a)(1) and 8(a)(3) to provide a shield for the incompetent or job security for the unworthy."); *Wellington Mill Div. v. NLRB*, 330 F.2d 579, 587 (4th Cir.) ("[T]he picture portrayed [in the record] is that of an employee . . . who becomes so engrossed in union and antimanagement activities that he neglects his job responsibilities. It is clear that an employer has the right to discharge any employee under such circumstances, whether he be active in union organization or not."), cert. denied, 379 U.S. 882 (1964); cf. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941) ("The statute does not touch 'the normal exercise of the right of the employer to select its employees or to discharge them.' It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization.").

63. *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1230 (1992); see also 309 N.L.R.B. at 1230 n.36 ("Although employers lawfully may insist that employees adequately perform assigned work, they cannot insist that employees forego organizing activities, or treat those activities as 'disloyalty.'").

64.

Most American employers that do not employ unlawful tactics to prevent unionization clearly indicate their opposition to labor organizations. They disseminate literature and make "captive audience" speeches to massed assemblages of employees stating their unequivocal desire to remain nonunion. They emphasize the fact that only they possess the power to determine wages, hours, and working conditions, and they frequently note that if representative labor organizations strike to enforce union bargaining demands, the striking individuals may be permanently replaced.

CHARLES B. CRAVER, *CAN UNIONS SURVIVE?* 49 (1993); see also MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 190-91* (1987) (discussing anti-union trade associations).

65. Employers commonly attack unionization campaigns with dire warnings about the consequences of unionization on their companies. See 1 *THE DEVELOPING LABOR LAW* 112-13 (Patrick Hardin et al. eds., 3d ed. 1992); see, e.g., *Benjamin Coal Co.*, 294 N.L.R.B. 572, 577 (1989) ("There is little basis for disputing the fact that survival, bankruptcy, plant closure, and the loss of jobs were important 'bywords' of the campaign waged by Respondent against union representation."); *Harrison Steel Castings Co.*, 293 N.L.R.B. 1158, 1159 (1989) (quoting company statement suggesting that unionization could lead to "loss of business and loss of jobs").

operating their companies without a unionized workforce could not be more plainly in conflict with the interest of union organizers in unionizing the workforce.

The abiding principle of the NLRA, however, is that employees may be strongly committed to union organization and still serve their employers effectively. Section 1 of the NLRA, entitled "Findings and declaration of policy," states,

It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>66</sup>

This statutory language identifies union organization as a solution to industrial problems, not a cause. As the NLRB has observed,

The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. . . .

The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize.<sup>67</sup>

The Taft-Hartley amendments, which were passed in response to the significant growth in union power in the wake of the original NLRA, did not alter this fundamental philosophy. Taft-Hartley added some new restrictions on unions and new protections for employers,<sup>68</sup> but it did not alter the law's central commitment to the rights of employees to organize and to bargain collectively<sup>69</sup> — a commitment derived from the view that protection of the right to organize provides a means of addressing workplace conflicts and does not detract from management's legitimate powers.<sup>70</sup>

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66. 29 U.S.C. § 151 (1988) (emphasis added).

67. Sunland Constr. Co., 309 N.L.R.B. 1224, 1230 (1992).

68.

The new statute . . . shifted the emphasis of federal labor law. From an attitude of federal protection for the rights of employees to organize into unions and to engage in concerted economic activity and collective bargaining, the emphasis shifted to a more balanced statutory scheme that added restrictions on unions and also guaranteed certain freedoms of speech and conduct to employers and individual employees.

1 THE DEVELOPING LABOR LAW, *supra* note 65, at 39-40 (footnotes omitted).

69. Although Congress added important language to § 1 of the NLRA, 29 U.S.C. § 151 (1988), to highlight the new balance between union and employer rights, "Congress left unchanged the original commitment in the final paragraph of section 1." 1 THE DEVELOPING LABOR LAW, *supra* note 65, at 40.

70. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941) ("Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of the business enterprise.").

Thus, in utilizing agency principles to determine who constitutes an *employee* under section 2(3), employers cannot argue that an individual's commitment to union organization — whether it is a compensated commitment or not<sup>71</sup> — conflicts with the employer's interest in opposing union organization.<sup>72</sup> This kind of conflict is simply inconsistent with the central policies of the NLRA.<sup>73</sup>

### C. *The Problem of Incentives*

The Eighth Circuit has concluded that a trojan horse organizer's service to his union deprives him of the incentive necessary to serve his nonunion employer satisfactorily.<sup>74</sup> If an organizer is likely to shirk because he lacks the proper incentives — or because his incentives are perverse — then he is not serving as an agent for his nonunion master in a manner consistent with the definition of an agent under the common law. The Eighth Circuit, for example, speculated, "If [a trojan horse organizer] is terminated, he simply returns to his full-time union job. Indeed, he may even relish being discharged, because he then can file an unfair labor practice charge, claiming that he was terminated because of his organizing efforts."<sup>75</sup> Under this view, the organizer has less to lose by being fired because his union position provides him with economic security, and therefore he may not work as hard as other employees. In addition, trojan horse organizers might even have an affirmative incentive to seek discharge in order to file a charge against the employer under section 8(a)(3).<sup>76</sup>

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71. The fact that trojan horse organizers are paid goes to a different kind of conflict — the conflict over incentives. See *infra* section II.C. One commentator, however, rejects the possibility of conflict on the basis of compensation but does not consider the problem of incentives. See Tarver, *supra* note 13, at 1216 ("A paid organizer in the work force poses no more threat to an employer's property rights . . . than a pro-union employee.").

72. An employer might argue, however, that in applying agency principles one should do so without reference to the policies of the Act. According to this argument, however, *no* individual strongly committed to union organizing would be an *employee* under the statute, because such an individual would always have an interest that conflicts with the employer. The exclusion of employees interested in union organizing from a statute designed specifically to protect an employee's right to union organization would render almost the entire statute nugatory.

73. One could put this argument in agency terms as well. An agent's duty to her employer extends only to matters connected with the agency. See *supra* note 57. Thus, an organizer's only duty to an employer who hires her to make widgets is to make widgets. Although employers may argue that their interest is in making widgets with nonunion employees, the NLRA is founded on the view that an employee can serve both union and employer simultaneously. Thus, even when articulated in agency law terms, the argument reduces to the same argument presented in the text.

74. See *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 629 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 933 (1995).

75. 34 F.3d at 629.

76. 29 U.S.C. § 158(a)(3) (1988); see *supra* notes 6-8 and accompanying text (describing § 8(a)(3) restrictions on employer actions).



The NLRB, however, has specifically held that the incentives actually work in the opposite direction. According to the Board, [B]ecause the organizers seek access to the jobsite for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective. No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in such conduct.<sup>77</sup>

In the Board's view, then, the threat of discharge is precisely what ensures that organizers will actually be reliable employees — they simply will not be able to meet employees and spread the union message effectively if they lose their jobs. The Board considers trojan horse organizers *employees* under section 2(3) partly on the basis of its judgment that such organizers have no tendency to engage in conduct warranting discharge.<sup>78</sup>

The conflict between the Eighth Circuit and the NLRB reveals an important point unrecognized by courts and commentators that have addressed this issue: the answer to the legal question whether trojan horse organizers are employees under agency law ultimately reduces to a purely empirical judgment about whether such organizers are likely to — or do in fact — shirk their job responsibilities. The *Restatement of Agency* provides no guidance for making this judgment. As the Supreme Court has acknowledged in a re-

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77. *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1230 (1992).

78. The Board's rule amounts to a presumption, based on the Board's expertise and experience, *see infra* notes 86-94 and accompanying text, that trojan horse organizers do not regularly engage in conduct justifying an employer's blanket refusal to hire them. One Board member has suggested that the presumption is rebuttable and that the Board should use the *Wright Line* proof structure for identifying anti-union discrimination under § 8(a)(3), *see supra* note 7, in making § 2(3) judgments about trojan horse organizers. *See Sunland*, 309 N.L.R.B. at 1232-33 (Member Raudabaugh, concurring). For example, given the temporary nature of the organizer's project, an employer seeking only long-term employees might have interests inconsistent with those of the organizer. *See* 309 N.L.R.B. at 1232 ("[I]f an employer has a nondiscriminatory policy or practice of refusing to hire temporary employees, I think it clear that the employer, acting pursuant to that policy or practice, could refuse to hire someone who plans to work for the employer during an organizational drive and to leave thereafter."). An employer aware of a given organizer's track record of shirking in favor of organizing would also have a legitimate interest in not hiring that person. In addition, to the extent that trojan horse organizers are not interested in organizing but simply in disrupting the employer's business, *see Northrup, supra* note 4, at 471 (identifying disruption as the principal goal for some trojan horse organizers), the employer has a legitimate interest in refusing to hire them.

These concerns, however, provide no reason for the Board to make rebuttable its presumption that trojan horse organizers are *employees* under § 2(3), because nothing in the law prevents employers from acting against employees on the basis of such concerns. Section 8(a)(3) does not prohibit employers from enforcing a legitimate rule against temporary hires, nor does it prohibit employers from refusing to hire individuals known to shirk or who plan to disrupt business. *See supra* notes 62-63 and accompanying text. Section 8(a)(3) simply prohibits employers from using such concerns as pretexts for union-based discrimination. In short, nothing in the NLRA prevents an employer from taking an adverse action against a trojan horse organizer so long as the employer has a legitimate, nondiscriminatory reason for taking the action.

lated context, "In doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning."<sup>79</sup> In the case of trojan horse organizers, the relevant considerations are those that will answer the question whether trojan horse organizers are good employees.<sup>80</sup> The next Part argues that resort to such considerations is better taken by the NLRB than by the judiciary.

### III. DEFERENCE AND AGENCY LAW

This Part argues that courts should enforce NLRB orders involving trojan horse organizers on the ground that the Board has the experience and expertise necessary to reach the proper legal conclusion based on the principles of agency. Given the long history of Supreme Court deference to the Board's experience and expertise in applying the terms of the Act to the complex problems of industrial life, the only obstacle to deference in the context of section 2(3) is that the provision itself seems to limit the Board's authority. This Part demonstrates that an important role still exists for the Board in interpreting section 2(3) because the proper interpretation of *employee* under agency law depends on a judgment that requires experience and expertise unique to the NLRB.

The Supreme Court generally defers to the administrative expertise and experience of the Board in applying the broad strictures of the NLRA to the complex relations between employers and unions. According to the Court, deference is justified because of the NLRB's "special function of applying the general provisions of the Act to the complexities of industrial life, and of [appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases from its special understanding of the actualities of industrial relations."<sup>81</sup> In addition, the Court has repeatedly observed,

Because it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,' that body, if it is to accomplish the task which Congress set for

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79. *Chemical Workers v. Pittsburgh Plate Glass, Inc.*, 404 U.S. 157, 168 (1971).

80. The phrase *good employees* in this context means employees who work as hard as other employees.

81. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (alteration in original) (citations and internal quotation marks omitted); see also *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) ("[I]n many . . . contexts of labor policy, [t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." (quoting *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957))).

it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.<sup>82</sup>

In general, because of the Board's experience in administering the Act, the Court accords Board rules "considerable deference."<sup>83</sup>

But section 2(3) is unlike most other provisions of the NLRA in that it specifically requires the courts to take an active role to ensure that the Board's interpretations of *employee* are consistent with common law principles. As noted above, Congress passed the Taft-Hartley amendment to section 2(3) specifically to ensure that courts did *not* allow the Board to ignore common law principles when determining which individuals are *employees* under the Act.<sup>84</sup> In other words, although Congress assigned to the Board the general responsibility to "develop and apply fundamental national labor policy,"<sup>85</sup> Congress apparently intended to restrict the Board's authority to do so in the context of section 2(3), by requiring that the provision be interpreted according to common law agency principles.

Yet even if the meaning of section 2(3) is a "legal" question of agency that courts are generally competent to assess,<sup>86</sup> specific aspects of that judgment may nevertheless require experience with the "diverse circumstances" and the "actualities" of industrial relations<sup>87</sup> — experience long recognized as unique to the NLRB.<sup>88</sup> The question whether trojan horse organizers are *employees* under the common law depends on important empirical judgments about

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82. *Beth Israel*, 437 U.S. at 500-01 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)); see also *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (quoting passage in text).

83. *Curtin Matheson*, 494 U.S. at 786; see *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("The Board, of course, is given considerable authority to interpret the provisions of the NLRA."); *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). *But cf.* *NLRB v. Financial Inst. Employees Local 1182*, 475 U.S. 192, 202 (1986) (noting broad scope of deference but refusing to defer). See generally 2 THE DEVELOPING LABOR LAW, *supra* note 65, at 1890-93 (describing judicial deference to the NLRB). Because the NLRB operates through a process of adjudication rather than rulemaking, the phrase *Board rules* in this context simply refers to approaches or interpretations the Board applies to cases that it decides.

84. See *supra* note 53.

85. *Beth Israel*, 437 U.S. at 500.

86. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (refusing to defer to the INS because the question at issue was a "pure question of statutory construction"); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 493 (1947) (refusing to give deference on a "naked question of law").

87. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

88. See *supra* notes 81-83 and accompanying text. The relative number of cases heard by the NLRB, as compared to the federal courts, starkly reveals the NLRB's unique position with respect to factual judgments about unions, employees, and employers. In FY 1993, for example, the NLRB "received" 33,744 cases involving unfair labor practices. See 58 NLRB ANN. REP. 107 tbl. 1 (1994). By contrast, the federal courts of appeals decided a *total* of only 179 "petitions for review and/or enforcement" of Board orders. *Id.* at 164 tbl. 19.

the employment behavior of such organizers.<sup>89</sup> The NLRB has concluded that organizers generally do not engage in conduct warranting discharge and thus do not act in ways contrary to the legally recognized interests of their employers.<sup>90</sup> This empirical judgment clearly depends on knowledge of the diverse circumstances and actualities of industrial relations, which suggests that courts should defer to Board orders protecting trojan horse organizers as *employees* under section 2(3).

In *NLRB v. United Insurance Co. of America*,<sup>91</sup> the Supreme Court essentially endorsed this view of the Board's role in interpreting section 2(3). The Court in *United Insurance* upheld an NLRB order finding that an insurance company's debit agents were employees and not independent contractors. The Court observed that it is not obvious under the common law whether a particular individual is an employee or an independent contractor, and stated that "[w]hat is important is that the total factual context is assessed in light of the pertinent common-law agency principles."<sup>92</sup> The Court further noted,

The Board examined all [the] facts and found that they showed the debit agents to be employees. This was not a purely factual finding by the Board, but involved the application of law to facts — what do the facts establish under the common law of agency: employee or independent contractor?<sup>93</sup>

The Court held that it was error for the court below to have refused to defer to the Board's judgment, because the Board had already assessed the facts through hearing and argument and had reached a judgment "between two fairly conflicting views."<sup>94</sup>

*United Insurance* strongly supports deference to the Board's interpretation of section 2(3) in the trojan horse organizer context. As in *United Insurance*, the Board's judgment that trojan horse organizers are *employees* is not a purely factual finding. Rather, it involves an application of law to facts — what do the facts about conflicts between union organizers and employers establish under the common law of agency: employee or nonemployee? According to the NLRB, the facts show that organizers generally perform required work for their employers; under agency law, these facts make paid union organizers employees.<sup>95</sup>

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89. See *supra* notes 78-80 and accompanying text.

90. See *supra* notes 77-78 and accompanying text.

91. 390 U.S. 254 (1968).

92. 390 U.S. at 258.

93. 390 U.S. at 260.

94. 390 U.S. at 260.

95. The Court's opinion in *United Insurance* suggests another reason courts should defer to the Board's conclusion about trojan horse organizers. Although the Court ultimately held that deference to the Board was appropriate for the reasons set out in the text, the Court in

The Eighth Circuit's opinion in *Town & Country Electric, Inc. v. NLRB*<sup>96</sup> provides a useful counterpoint to this analysis. Instead of deferring in any respect to the Board's experience with union-management conflicts, the *Town & Country* court applied agency principles<sup>97</sup> de novo<sup>98</sup> and concluded that "an inherent conflict of interest exists" between a union organizer and the employer.<sup>99</sup> The court's central factual claim with respect to this conflict was that trojan horse organizers lacked sufficient incentive — that is, the threat of losing a paying job — to work hard.<sup>100</sup> The essence of this analysis is that trojan horse organizers are not employees as a *matter of law* because their interests conflict with employers as a *matter of one fact*: that organizers do not work as hard as other employees.

Aside from its questionable accuracy, the principal problem with this analysis is that it flatly ignores the traditional role of the Board in making judgments about conflicts between unions and employers. The question of whether trojan horse organizers are likely to work as hard as other employees is precisely the kind of question that calls upon the NLRB's considerable experience with issues of union organizing in the workplace. Rather than substitute their own judgments about the relationship between organizers and employers, courts should respect the Board's expertise in and experience with regulating that relationship and enforce Board orders protecting trojan horse organizers as *employees* under section 2(3).<sup>101</sup>

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*United Insurance* suggested one reason deference may *not* be appropriate in such a case: the "determination of pure agency law" at issue in the case — whether insurance debit agents are employees or independent contractors — "involved no special administrative expertise that a court does not possess." 390 U.S. at 260. The determination of whether trojan horse organizers can be expected to be good employees, on the other hand, *does* involve the special administrative expertise of the NLRB.

96. 34 F.3d 625 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 933 (1995).

97. See 34 F.3d at 628 (quoting RESTATEMENT (SECOND) OF AGENCY §§ 387, 394 (1957)).

98. The *Town & Country* court did not acknowledge the possibility that the NLRB could have a role in applying agency principles to the facts at issue. Noting that "[s]ection 2(3)'s definition of 'employee[ ]' provides little help in deciding the issue," 34 F.3d at 628 (footnote omitted), the court stated that "when a federal statute does not helpfully define the term 'employee,' we infer that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine," 34 F.3d at 628 (citations and internal quotation marks omitted). The court then proceeded with a de novo review of the applicable common law agency principles. See 34 F.3d at 628-29.

99. 34 F.3d at 629.

100. 34 F.3d at 629.

101. There is one situation in which the Board has implied that trojan horse organizers may not be *employees* under § 2(3). In *Sunland Constr. Co.*, 309 N.L.R.B. 1224 (1992), the Board held that "an employer should not be required *during a strike* to hire a paid organizer whose role is inherently and unmistakably inconsistent with employment behind a picket line." 309 N.L.R.B. at 1229 (emphasis added) (internal quotation marks omitted). The Board observed:

## CONCLUSION

Unions organize in a hostile world. Employers, of course, generally hate them,<sup>102</sup> but more problematic for unions is the suspicion and distrust with which employees themselves may initially view unions.<sup>103</sup> Union organizing is in part a constant struggle to build relationships with employees in order to overcome this distrust. Unions know they cannot build trust through billboards, leaflets, and faceless phone calls alone. Unions may increasingly consider sending in organizers to work side by side and day by day with employees in order to overcome latent barriers and convince employees of the value of union representation.

But courts and the NLRB itself are divided over whether the law requires employers to tolerate this organizing strategy. These authorities are also divided over whether the question is one primarily for the Board to answer or whether courts must find the answer in the statute itself. This Note has argued that the determination of whether trojan horse organizers are *employees*

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In our experience, when a company is struck it is not "business as usual." The union and employer are in an economic battle in which the union's legitimate objective is to shut down the employer in order to force it to accede to the union's demands. The employer's equally legitimate goal is usually to resist by continuing production, often with nonunit employees, nonstrikers, and replacements. Thus, an employer faced with a strike can take steps aimed at protecting itself from economic injury. For example, an employer can permanently replace the strikers, it can lock out the unit employees and it can hire temporary replacements for the locked-out employees. Consistent with these principles, we believe that the employer can refuse to hire, during the dispute, an agent of the striking union.

309 N.L.R.B. at 1230-31 (footnotes omitted).

It is unclear, however, whether the Board is distinguishing between a strike and a non-strike situation in a manner that is relevant to agency law. In fact, it is the conclusion that the refusal to hire a trojan horse organizer does not violate § 8(a)(3) — not that a trojan horse organizer is not an *employee* under § 2(3) — that underlies this aspect of the *Sunland* opinion. As the Board stated:

The Respondent plainly engaged in discriminatory conduct in refusing to hire Creeden because of his status as a paid organizer of the union. . . . [G]iven the conflict between an employer's interest . . . in operating during a strike and a striking union's evident interest in persuading employees *not* to help it operate, we find that the Respondent has a "substantial and legitimate" business justification for declining to hire a paid agent of the Union for the duration of the strike.

309 N.L.R.B. at 1231. *Sunland* does not really represent a "strike exception" to § 2(3)'s definition but rather a decision of substantive law under § 8(a)(3) that during a strike employers may permissibly discriminate against employees who are also paid union organizers.

Note, however, that an interpretation of § 2(3) that excludes trojan horse organizers during strikes is not inconceivable. For example, it is possible that during strikes trojan horse organizers typically disrupt production, or threaten strikebreakers, or take other similar actions designed to undermine the employer's operations. In such cases, the employer's interest in operating his facility would conflict with the organizer's interest in shutting down the facility and would thereby mean that the organizer could not be an agent of the employer. If the Board were to conclude that such behavior is in fact typical, then the Board could establish a presumption that during strikes trojan horse organizers do not qualify as *employees* under § 2(3).

102. See *supra* notes 64-65 and accompanying text.

103. See Seymour M. Lipset, *Labor Unions in the Public Mind*, in UNIONS IN TRANSITION 287 (Seymour M. Lipset ed., 1986) (discussing public perceptions of unions).

under NLRA section 2(3) ultimately reduces to a single question — whether trojan horse organizers are generally good employees. Judicial deference to the Board on this question is not a matter of statutory ambiguity. It is a matter of acknowledging the Board's experience with union organizers, employees, and employers. The Board has answered the question whether trojan horse organizers are generally good employees in the affirmative. Courts should defer to that judgment.