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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: NATIONAL LABOR RELATIONS BOARD, Petitioner
v. TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.

CASE NO: 94-947

PLACE: Washington, D.C.

DATE: Tuesday, October 10, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL LABOR RELATIONS BOARD, :

4 Petitioner :

5 v. : No. 94-947

6 TOWN & COUNTRY ELECTRIC, INC., :

7 AND AMERISTAFF PERSONNEL :

8 CONTRACTORS, LTD. :

9 - - - - - X

10 Washington, D.C.

11 Tuesday, October 10, 1995.

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:04 a.m.

15 APPEARANCES:

16 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the Petitioner.

19 JAMES K. PEASE, JR., ESQ., Madison, Wisconsin; on behalf
20 of the Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-947, National Labor Relations Board v.
5 Town & Country Electric..

6 ORAL ARGUMENT OF LAWRENCE G. WALLACE

7 ON BEHALF OF THE PETITIONER

8 MR. WALLACE: Mr. Chief Justice, and may it
9 please the Court:

10 For almost 30 years, the National Labor
11 Relations Board consistently and repeatedly has held that
12 a person who applies for or holds a job with an employer
13 that he intends to try to organize, and who will be
14 compensated by a union for his organizational activity, is
15 an employee within the meaning of section 2(3) of the
16 National Labor Relations Act.

17 That section is set forth on page 2 of our
18 brief, and was last interpreted and applied by this Court
19 in its 1984 decision in Sure-Tan Incorporated against the
20 NLRB, and we are content to use the words of this Court in
21 Sure-Tan in describing this provision, and I'm quoting now
22 from page 891 of Volume 467 U.S., the breadth of section
23 2(3)'s definition is striking. the act squarely implies
24 to 'any employee'.

25 The only limitations are specific exemptions for

1 agricultural laborers, domestic workers, individuals
2 employed by their spouses or parents, individuals employed
3 as independent contractors or supervisors, and individuals
4 employed by a person who is not an employer under the
5 National Labor Relations Act.

6 The Court then concluded that undocumented
7 aliens are not among the few groups of workers expressly
8 exempted by Congress, and they therefore plainly come
9 within the broad statutory definition.

10 QUESTION: Is it your position, Mr. Wallace,
11 that if a person does not come within any of those
12 exemptions and is "hired" he is therefore an employee?

13 MR. WALLACE: Well, that is the conclusion that
14 the Court reached, and it is our --

15 QUESTION: I asked what your position --

16 MR. WALLACE: Our position is that he is
17 therefore an employee unless there are reasons, in
18 interpreting the National Labor Relations Act, why an
19 implied exemption should be found, a question for the
20 board to address initially, and the only example in which
21 this Court found an implied exemption was the case of NLRB
22 v. Bell Aerospace which involved managerial employees, and
23 the Court in reliance upon the legislative history of the
24 Taft-Hartley Act and its overruling of this Court's
25 decision in the Packard case by adding to this list of

1 exemptions supervisors has -- that Congress had relied on
2 the notion that managerial employees would be excluded
3 sort of a fortiori from supervisors, and that the board
4 had always, while not holding them not to be employees,
5 had always placed them in separate bargaining units from
6 other employees.

7 QUESTION: What about an employee who fills out
8 a job application, is hired, and yet his only purpose is
9 to get into the plant so that he can blow it up? He's a
10 terrorist. Is that person an employee for purposes of the
11 National Labor Relations Act?

12 MR. WALLACE: If he applied for a job that he
13 was seeking where he would be working for wages under the
14 supervision of the employers --

15 QUESTION: Yes.

16 MR. WALLACE: -- he would be within the
17 statutory definition of employee. What the board has --

18 QUESTION: So he -- that person is an employee.

19 MR. WALLACE: That doesn't mean that he has to
20 be hired.

21 QUESTION: Well, suppose he -- the company, not
22 knowing this, goes ahead and hires him.

23 MR. WALLACE: Then he's subject to all of the
24 company's work rules and duties of loyalty. Of course if
25 the company hires him, he's even more so an employee. The

1 Court resolved in the 1941 decision in Phelps Dodge that
2 applicants are within the statutory coverage because
3 section 8(a)(3) --

4 QUESTION: But isn't that a --

5 MR. WALLACE: -- protects applicants from
6 discrimination in hiring.

7 QUESTION: Isn't that Exhibit A, what I'm
8 talking about, of inconsistent loyalties? I mean, the
9 person is simply going on the payroll in order to get into
10 the factory. He'll perform the work for a day, but then
11 he intends to blow the place up that night.

12 MR. WALLACE: This is -- of course it would be a
13 breach of duty, whether it would be because he wanted to
14 do it of his own volition or whether because of loyalty to
15 some other group. It would be a breach of duty.

16 What the board -- the board has pointed the way
17 to the proper analysis of these issues in the companion
18 case of this very case. There were two cases decided
19 together, this case and Sunland Construction Company,
20 which is cited in all of the briefs, and there the board
21 held, after writing an opinion identical to the opinion in
22 this one until the last few paragraphs -- reaching the
23 conclusion that applications of this kind are employees
24 within the meaning of the act, the board held that
25 nonetheless it would not be a violation, an unjustified

1 discrimination under 8(a)(1) or 8(a)(3) for an employer to
2 refuse to hire a paid union organizer in the discrete
3 context of an ongoing strike situation in which the paid
4 union organizer would have a duty to support the work
5 stoppage in an attempt to coerce the employer, a
6 legitimate attempt under the law to coerce the employer to
7 accede to the union's demands.

8 And the employer would have an equally
9 legitimate right to want to hire replacement workers who
10 might be nonunion members, might be outside the bargaining
11 unit, might be outside strike-breakers --

12 QUESTION: Mr. Wallace, why --

13 MR. WALLACE: -- of other kinds to try --

14 QUESTION: Mr. Wallace --

15 MR. WALLACE: -- to carry on their operations.

16 QUESTION: -- why wouldn't the same reasoning
17 that you've just explained to us for the strike exception
18 apply to the person who is under an agreement with the
19 union to walk out when the union blows the whistle? Why
20 isn't there that same inconsistency?

21 MR. WALLACE: Because while that is a rule of
22 the voluntary organization, section 7 of the act protects
23 the right of workers to have voluntary organizations,
24 including their right to make reasonable rules of conduct
25 for their members, but you're talking about a future

1 contingency, and when the time comes, under this Court's
2 decision in Pattern Makers and the rationale of this
3 decision, each individual can decide for himself whether
4 he will in fact adhere to the union rule --

5 QUESTION: But that's different, Mr. Wallace.
6 Different -- the worker can decide for himself. The
7 worker who is under an agreement that the worker will walk
8 when told to by a third party -- let's say the third party
9 were not the union, but a competitor. The applicant has
10 an agreement with the competitor that he will, if he gets
11 this job he'll stay on it till the competitor says, walk
12 out. Can such a person qualify as an employee when, going
13 in, he has that agreement with a competitor?

14 MR. WALLACE: He would definitely qualify as an
15 employee, although the rationale of Sunland might apply.

16 This is not an uncommon hypothetical. There can
17 be employees who have been suspended from their job who
18 have an agreement with the employer that they will return
19 when recalled and retain their seniority and retain their
20 advanced pay scale status, so they have an economic
21 incentive to return to this competing employer. In the
22 meantime, they've been laid off, they need a job, they go
23 to another competitor, and take the job.

24 They're -- of course they're an employee.
25 They're covered by the Fair Labor Standards Act. The

1 employer must withhold taxes for them.

2 QUESTION: But one can be an employee for one
3 purpose and not the other, isn't that --

4 MR. WALLACE: It's possible, but they are an
5 employee --

6 QUESTION: For example, let's take these
7 employees, and there's an election. They go in, and they
8 try to organize. There are a number of workers who are in
9 favor of the union. There's an election. Can the paid
10 organizer -- does a paid organizer count as an employee
11 for that purpose?

12 MR. WALLACE: He's an employee, but that doesn't
13 mean that he's entitled to vote. That is a question about
14 which employees have a community of interest with a
15 purpose --

16 QUESTION: What is the provision in the statute
17 that entitles someone to vote in a union election?

18 MR. WALLACE: I don't recall. It's not directly
19 before us, but it's --

20 QUESTION: If it uses the word employee, someone
21 might not be an employee for that purpose, although would
22 be an employee for another purpose.

23 QUESTION: Well, isn't the answer --

24 MR. WALLACE: Well, the board has always held --

25 QUESTION: -- he may not be in the bargaining unit?

1 MR. WALLACE: -- these people are employees.
2 They just -- they don't have a community of interest with
3 other employees in the bargaining unit. That has always
4 been the inquiry about whether someone can vote in a
5 particular election, whether he is a member of the
6 bargaining unit because of the community of interest
7 standards --

8 QUESTION: Tell me --

9 MR. WALLACE: -- that the board looks to.

10 QUESTION: -- what you're saying about someone
11 who has an inconsistent obligation, whether that coincides
12 with the approach that Judge Williams took in the Willmar
13 case, or is it different?

14 MR. WALLACE: Well, I think the board's approach
15 and the approach that Judge Williams took on behalf of the
16 D.C. Circuit in the Willmar case are substantially
17 identical. There may be some differences in articulation,
18 but in Willmar, the D.C. Circuit said that yes, these are
19 employees, and we leave for another day whether the
20 employer would be justified in treating them differently
21 under 8(a)(1) or 8(a)(3), in other words in not hiring
22 them.

23 It was shortly thereafter that the board decided
24 Town & Country and Sunland, and it reached opposite
25 conclusions on the question left for another day,

1 depending on whether there was an ongoing strike or not,
2 because the board did not regard it as an irreconcilable
3 conflict of interest under the National Labor Relations
4 Act for an employee to have a loyalty to his union and to
5 the voluntary right of self-organization and to the
6 employer. That's what the --

7 QUESTION: Mr. Wallace, did the board rule
8 expressly on the provision of the salting resolution that
9 the employee would walk when told to by the union? I
10 wasn't aware that the board had ruled specifically on
11 that, as distinguished from being paid by the union.

12 MR. WALLACE: The focus before the board was on
13 the compensation question. It was the court of appeals
14 that relied more strongly and responded, and their amici
15 are relying more strongly on the salting resolution
16 itself.

17 So the board did not address a contention
18 specifically based on the salting resolution, but it did
19 discuss the question of control, which is what that
20 argument is based on, and pointed out that any paid union
21 organizer, as the board calls anyone getting any form of
22 compensation from the union with a duty to organize, would
23 still be subject to the employer's direction and control,
24 to his work rules, to the obligations to perform his
25 duties in an acceptable manner for the employer and,

1 indeed, what the board found is that someone in this
2 situation has an added incentive not to perform in a
3 substandard manner or to do any act that would warrant
4 discharge, because that would defeat his opportunity to be
5 on the premises and to engage in his organizing campaign
6 during off-work hours.

7 So far from finding any conflicting duties --
8 because after all he's subject to the same rules of no
9 solicitation during work time or in work areas. It's done
10 at lunch break or after work is over. You don't really
11 have acts simultaneously being performed --

12 QUESTION: Mr. Wallace --

13 MR. WALLACE: -- in the classic sense for two
14 different masters under the Restatement.

15 QUESTION: Mr. Wallace, can an employer
16 legitimately adopt a hiring policy to the effect that we
17 will not hire anyone who moonlights for another employer,
18 or who has another job, including a job for the union,
19 it's just our policy not to hire people who do have, or
20 may have a second job?

21 MR. WALLACE: So long as it's a neutral policy
22 that is not directed at antiunion animus. It could be in
23 a particular factual setting a pretext for the denial of
24 rights under the act.

25 QUESTION: Yes, but if -- presumably there could

1 be such an employer policy, and it could include even
2 employment by the union, as in this context.

3 MR. WALLACE: Absolutely. Any neutral across-
4 the-board policy requiring a commitment to work for a
5 certain duration of time, asking whether there are
6 obligations to any third party that might interfere with
7 future duties in any way, certainly asking whether there
8 was an obligation to anyone --

9 QUESTION: Would you say this -- this would be
10 answered no, that last question. You say that that
11 question, put to a union organizer, would be answered no,
12 whether there's any conflicting obligation to someone else
13 that would interfere with duties in any way.

14 MR. WALLACE: Well, I --

15 QUESTION: You say the union organizer can stand
16 up and say no.

17 MR. WALLACE: Well, that depends on what the
18 neutral policy of the employer is. If the employer says
19 that they want everyone to swear that they have no
20 obligation to --

21 QUESTION: Well, no, I'm just talking about the
22 question that you put. You said that the employer may ask
23 applicants whether he has any commitment to a third party
24 that would interfere with duties in any way, and as I
25 understand your presentation to us, you think that the

1 union organizer can answer that question honestly, no.

2 MR. WALLACE: That is true in the context of
3 this case, where you have employment at will, where either
4 the employer or the employee has a right to leave at any
5 time. That's the only possible --

6 QUESTION: Now, what if it were a term contract.
7 I mean -- but that -- would people who are -- sure. You -
8 - suppose it's a term contract for 3 years, and he has the
9 same arrangement with the union that he'll quit when the
10 union tells him to.

11 MR. WALLACE: The employer could definitely ask
12 whether there are any conflicting obligations that would
13 result in premature departure and failure to observe the
14 term.

15 QUESTION: But suppose he doesn't ask? Would
16 that, the existence of that conflict not be a sufficient
17 reason for dismissal? That's not this case --

18 MR. WALLACE: That's not this case --

19 QUESTION: -- I understand, but --

20 MR. WALLACE: -- and I can't really precommit
21 the board to it. This is not an employer who asked for
22 any term --

23 QUESTION: Okay.

24 QUESTION: -- on behalf of these people.

25 QUESTION: Do you acknowledge that would be

1 different, though, because there his obligation to the
2 union might indeed require him to break a duty, a
3 commitment to the employer.

4 QUESTION: Mr. Wallace, it would be different in
5 terms of whether the employer has a right to discharge
6 him, but would it be different with respect to the
7 question of whether he was nevertheless an employee during
8 the period of the service.

9 MR. WALLACE: Precisely what I was about to say.
10 He would still be an employee as an applicant for the job,
11 but it would raise the Sunland question.

12 The Sunland contention that this was justified
13 discrimination was never raised before the board in this
14 case, and it would have been hard to raise it in this case
15 because at the time the adverse action was taken, the
16 employer here did not know of the salting resolution, did
17 not know of the union compensation.

18 QUESTION: I'm not sure, Mr. Wallace, that I
19 fully understand your example, or your statement, or your
20 concession that an employer with a neutral purpose, let's
21 say, can ask, do you have any conflicting obligations to
22 any other employer or organization?

23 Now, suppose the answer to that is yes, I'm a
24 member of the union, and I'll strike if they tell me to do
25 that. I suppose he's mandatorily entitled to employment.

1 MR. WALLACE: That is not a conflicting
2 obligation, because the union --

3 QUESTION: Well, suppose an employer interprets
4 it that way. It isn't because of the labor laws, the
5 National Labor Relations Act.

6 MR. WALLACE: That is correct, and --

7 QUESTION: So I think you have to amend your
8 statement to say that if the reason for an affirmative
9 answer to the question, do you have a conflicting
10 obligation, is a primary loyalty to the union that that is
11 a supervening reason that entitles the employee to be
12 hired, I should think.

13 MR. WALLACE: That is a question for the board,
14 and it reached the opposite conclusion in Sunland
15 Construction, which is the only case in which it has
16 reached the opposite conclusion in the discrete context of
17 an ongoing strike.

18 QUESTION: Oh, that would be an ongoing strike.

19 MR. WALLACE: Yes. Yes, so --

20 QUESTION: Surely you don't mean that union
21 membership, which imposes certain duties which can be
22 enforced, I take it, by a cause of action for damages, et
23 cetera, is grounds for nonemployment?

24 MR. WALLACE: I would not anticipate that the
25 board would readily expand Sunland Construction.

1 QUESTION: Well, I would not anticipate the
2 board could do that consistently with the National Labor
3 Relations Act.

4 MR. WALLACE: Well, of course, that question
5 would be subject to judicial review if the board attempted
6 to do it.

7 What I'm trying to point out is that that is the
8 proper analytical approach to questions of whether refusal
9 to hire a particular person would be justified, but
10 instead, this case has been litigated on a theory that
11 these people are sort of outlaws ab initio, they're not
12 even employees within the meaning of the act, even though
13 the employer did not know of the salting resolution or the
14 compensation at the time it took the adverse action.

15 This is a way to get around the McKennon v.
16 National Banner analysis for after-acquired knowledge.
17 You just say, well, they're outlaws ab initio, now that we
18 know this knowledge, and of course the knowledge itself
19 has to be something disqualifying in order for the after-
20 acquired knowledge to affect the remedy under McKennon v.
21 National Banner, which the board said is not the case here
22 anyway.

23 QUESTION: In deciding the definition of
24 employee, should we defer to the board?

25 That is, I know Hearst did defer, and then in

1 United Insurance, it said Congress amended the statute,
2 but it amended the statute only in respect to an
3 independent contractor, and the particular aspect of the
4 employee definition here doesn't involve that, and United
5 Insurance talks about that, and so I was wondering, do you
6 think maybe we should -- maybe that deference notion is
7 still alive, and I don't know why it wouldn't be in
8 respect to other aspects of the definition.

9 MR. WALLACE: We argue that deference is
10 appropriate here, as the Court stated quite explicitly in
11 Sure-Tan. We are dealing here with a situation in which
12 both the board and the court of appeals looked toward
13 various provisions of the Restatement of Agency to say
14 what common law principles would shed light here.

15 The difference between them was not so much
16 about what the common law principles are. It was a
17 difference about how those principles should be applied to
18 a question of labor management relations in the context of
19 the National Labor Relations Act.

20 QUESTION: Yes, but that's exactly what's
21 bothering me. I don't want to say, if it's not right,
22 that the Restatement automatically governs in these
23 nonindependent contractor-related areas. If the board
24 were to choose to go beyond it, I mean, a holding of this
25 court that they couldn't might be a problem, and that's

1 why I asked the question.

2 MR. WALLACE: Well, the common law of agency
3 really does not answer the question of how do you apply
4 these principles in the context of a labor management
5 question under the National Labor Relations Act with its
6 section 7 rights and its rights under section 8. That is
7 a question that implicates the board's expertise.

8 There wasn't a dispute about what are those
9 principles. They were both getting them out of the
10 Restatement of Agency.

11 QUESTION: Mr. Wallace, I thought your first
12 argument, though, was that this statute has a plain
13 meaning that everything that isn't excluded is included.

14 If that's the case, then you don't have any
15 question of deference, right?

16 MR. WALLACE: Well, I did point out one implied
17 exception that the Court found in the Bell Aerospace case,
18 and what I was about to say at that point in my argument
19 was that the Court's opinion in Sure-Tan, after saying
20 that the undocumented aliens fall within the plain
21 meaning, then went on to analyze whether the board's
22 interpretation that they should therefore be covered was
23 consistent with the purposes of the act and entitled to
24 deference, and agreed, after some discussion, that it was
25 consistent with the purposes of the act.

1 QUESTION: Is it Chevron deference, or some
2 other kind of deference?

3 MR. WALLACE: Well, we like to think of it as
4 equivalent to Chevron deference. It is --

5 QUESTION: But what is equivalent -- you seem to
6 be not wanting to put the Chevron label on it.

7 MR. WALLACE: I'm very happy with what the Court
8 said in Sure-Tan. The task of defining the term
9 employee -- and I'm looking at page 891 of that opinion --
10 is one that "has been assigned primarily to the agency
11 created by Congress to administer the act," and the Court
12 went on to say, and I'm quoting from the Court's opinion,
13 "the board's construction of that term is entitled to
14 considerable deference and we will uphold any
15 interpretation that is reasonably defensible."

16 QUESTION: Did Sure-Tan come down before or
17 after Chevron?

18 MR. WALLACE: That was before Chevron.

19 QUESTION: Well, do you think Chevron has
20 changed that principle at all?

21 MR. WALLACE: Well, only in it's emphasis --

22 QUESTION: And if so, in what direction?

23 MR. WALLACE: -- on the step 1 analysis that a
24 statute may definitively answer the question on its face,
25 which if that applies here would apply in our favor.

1 If I may reserve the balance of my time --

2 QUESTION: Very well, Mr. Wallace.

3 Mr. Pease, we'll hear from you.

4 ORAL ARGUMENT OF JAMES K. PEASE, JR.

5 ON BEHALF OF THE RESPONDENT

6 MR. PEASE: Mr. Chief Justice, and may it please
7 the Court:

8 This case involves a question of whether the
9 board, instead of protecting the freedom of employees to
10 choose to be unionized or not to be unionized, departed
11 from its role as impartial referee in the contest or
12 conflict between employers and unions for the votes of
13 employees, and interpreted section 2(3) of the act to give
14 protected status to -- of employee to union agents whose
15 job was to be the arms, the eyes, the ears, and the voice
16 of the union on the employer's crew, and who were
17 prohibited by contract from exercising --

18 QUESTION: Why is that inconsistent with the
19 duty of the employer? I mean, I thought that the whole
20 theory of the National Labor Relations Act is that you can
21 be a good employee and a loyal union member at the same
22 time.

23 MR. PEASE: That's correct.

24 QUESTION: I can understand if you have a duty
25 to two employers with respect to the same act, you have a

1 problem, but his duty to the employer related to one act,
2 his duty to the union related to other acts, namely, his
3 off-duty time in which he would be hire -- be recruiting
4 people to the union. What's bad about that?

5 MR. PEASE: Your Honor, the -- in the first
6 place, the conduct was not limited to off duty.
7 Secondly --

8 QUESTION: Well, wait. Doesn't it have to be,
9 under the Labor Relations Act? I mean, you can fire them
10 for that, can't you? Can he --

11 MR. PEASE: No.

12 QUESTION: -- use his --

13 MR. PEASE: In the first place, that distinction
14 is only material if that person is an employee within the
15 meaning of the act. If a supervisor does it at any time,
16 that person can be fired. If someone is not -- does not
17 have the status of employee --

18 QUESTION: Right.

19 MR. PEASE: -- they are not entitled to the
20 protection of the act at any --

21 QUESTION: I understand. I understand that.
22 Okay. Well, go on.

23 MR. PEASE: The --

24 QUESTION: Are you saying, then, if the
25 identical arrangement were made between someone who was

1 already hired by the employer, somebody who's on the job,
2 then becomes a paid organizer for the union in addition,
3 that that person at that point would lose employee status?

4 MR. PEASE: I believe it would be a question of
5 whether or not that person had agreed to subject
6 themselves to the control of the union just like --

7 QUESTION: Same thing -- same thing, except it's
8 someone who is already on the payroll.

9 MR. PEASE: Yes, ma'am.

10 QUESTION: In every other respect it's the same.

11 MR. PEASE: Yes, Your Honor. I believe that
12 the -- it's very similar to the issue of a worker who
13 accepts the responsibilities of a foreman. The question
14 then becomes, have they taken on a different status, and
15 it depends upon whether the control -- whether the -- this
16 person who had been working as an employee agreed to
17 change their job, to take as their primary function --

18 QUESTION: Let's not talk in the abstract. The
19 worker is doing the job, becomes a convert to the union,
20 takes money from the union to organize during lunch time
21 and work breaks, and that's it, compensated for attempting
22 to organize the shop. Is that person no longer an
23 employee?

24 MR. PEASE: I would submit that if that person
25 had subjected themselves to the control of the union and

1 had similar -- had obligations similar to those that were
2 imposed by the salting resolution in this case that would
3 give the union primary control over what the person did --

4 QUESTION: Let's take the salting resolution out
5 of it, and just have the compensation for organizing the
6 shop, using -- within the rules of shop using free time
7 and lunch breaks.

8 MR. PEASE: I think that would be very much like
9 the conflict of interest that a lawyer would have if they
10 were trying to suspend their representation of one client
11 to represent the opponent for a meeting or for a hearing.
12 I don't --

13 QUESTION: Well, you're basically saying that
14 even under those circumstances, the person could no longer
15 be an employee within the meaning of the act. I mean,
16 that's what it sounds like in your response.

17 MR. PEASE: If they accepted the -- submitted --

18 QUESTION: Well, what about a striking worker
19 who accepts union -- follows the union order to strike,
20 accepts benefits from the union, and so forth, not an
21 employee under your theory.

22 MR. PEASE: I disagree, Your Honor. I believe
23 that because that person was -- had withdrawn his services
24 from the employer, that there's nothing -- there is not a
25 conflicting obligation on the employee.

1 QUESTION: Well, how about the rank and file
2 employee who is a union member, and who has already agreed
3 in advance by being a union member that if the union
4 requires him to strike, he will, and furthermore, if the
5 union provides benefits during a strike, he'll take them.

6 MR. PEASE: I don't -- I believe that that's an
7 entirely different situation. I don't think that has
8 anything to do with the type of situation that we have in
9 here, where you have someone who is to be working for the
10 union while working for the -- actually on the job for the
11 employer.

12 QUESTION: Well, in any case, I take it your
13 answer, earlier answer that it's the failure to limit his
14 activities to off-duty time, I take it you withdraw that
15 answer. That hasn't anything to do with your position --

16 MR. PEASE: Your Honor, I didn't mean --

17 QUESTION: -- because -- well, if I
18 understood -- I thought your answered Justice Ginsburg by
19 saying, what if the employee comes -- is already hired,
20 the union says, we'll pay you money to organize during the
21 lunch breaks and the off time. I understood you to say
22 that that, in fact, would remove the person from employee
23 status.

24 MR. PEASE: That's correct.

25 QUESTION: Okay. So there's nothing about off-

1 time or on-time which is essential to your position. Your
2 position is, no matter when he exercises these
3 responsibilities to the union, the fact that he has them
4 precludes his employee status.

5 MR. PEASE: As long as that agency relationship
6 and control exists, yes.

7 QUESTION: Right, so it's got nothing to do,
8 then, with on-time or off-time.

9 MR. PEASE: Correct.

10 QUESTION: Why is that so? All those shop
11 stewards who have obligations to the union, do they remain
12 employees, or not?

13 MR. PEASE: If they are acting within the
14 consensual relationship of the collective bargaining
15 relationship, that's --

16 QUESTION: But they're doing work for the union,
17 aren't they?

18 MR. PEASE: That's true, but that is normally
19 covered by the collective bargaining relationship. I
20 believe there's a Sixth Circuit case in Bechtel that said
21 that where, in fact, the union controlled the steward,
22 that it was a violation of 302 for the employer --

23 QUESTION: It seems to me that the theory of the
24 act is that there's no inherent incompatibility between
25 obligations to the union and obligation to the employer,

1 and I don't know how to make the act work without adopting
2 that --

3 MR. PEASE: I think that the distinction is
4 based on, going back to the definition of employee.

5 The statute starts, the foundation of it is the
6 word employee. The circular definition incorporates the
7 concept of the employment relationship, the agency
8 relationship, and I believe that's the distinction that
9 Congress is making, is where there is this agency
10 relationship that's inconsistent --

11 QUESTION: Why is it inconsistent? I mean,
12 that's the problem. It's not inconsistent as to the work
13 he's doing for the employer.

14 MR. PEASE: It is, because --

15 QUESTION: If the union's telling him to
16 sabotage, you know, the machinery he's working on, yes,
17 that's inconsistent, but the union's not directing his
18 work as to what he's doing for the employer.

19 MR. PEASE: In the first instance, Your Honor, I
20 believe that the motivation of the employee differs from
21 the motivation of this -- these union agents. Union
22 agents have no concern whatsoever about whether or not the
23 employer likes them, or whether they're doing good work
24 for that employer, because they're not dependent upon that
25 employer's compensation.

1 QUESTION: Well, so all employees of General
2 Motors are really concerned whether the employer likes
3 them or not?

4 MR. PEASE: No, Your Honor.

5 QUESTION: That's not an ordinary attribute of
6 industrial employment, is it, is concern that the employer
7 like you?

8 MR. PEASE: No. I -- I don't mean to say that.
9 What I was -- meant to say was that the employee is
10 amenable to discipline because they want to keep their
11 job, and they're concerned about getting a reference in
12 the future, so they're concerned about what the employer
13 thinks about them, and they are amenable to --

14 QUESTION: But you could say that about anybody
15 who has a second job, whether it's with the union or not.
16 Indeed, you could say it about people who are
17 independently wealthy and are working at GM just for the
18 fun of it. That doesn't make them nonemployees, does it?

19 MR. PEASE: But I think that because you're
20 having them focus on simultaneously doing and serving
21 conflicting interests, I think it's that simultaneous
22 conflict --

23 QUESTION: But why is it necessarily --

24 QUESTION: And that's true even if they work
25 full-time and perform all the duties the employers want

1 them to perform, and earn their money.

2 MR. PEASE: Yes, sir.

3 QUESTION: Even if the employer never -- it's
4 true if the employer doesn't know about it, too?

5 MR. PEASE: Yes.

6 QUESTION: If the guy never was an employee. He
7 worked there 5 years, he got paid every day, and build all
8 the things he was supposed to build, he never was an
9 employee because he had this secret loyalty to some other
10 person.

11 MR. PEASE: He never had been employed under the
12 National Labor Relations Act because of that conflict, and
13 that also points out the fact that he could very well --

14 QUESTION: Is it essential to your position that
15 the conflict be with the union, or -- say it was a
16 competitor.

17 MR. PEASE: It's the same conflict.

18 QUESTION: And what if he promised his wife he'd
19 quit as soon as she told him to.

20 (Laughter.)

21 QUESTION: It's a dangerous job. It could
22 happen. he's a pilot.

23 MR. PEASE: I don't have a good answer for that,
24 Your Honor.

25 (Laughter.)

1 QUESTION: It seems to me it would be the same.
2 He's not an employee.

3 QUESTION: Wouldn't it be a rather bad
4 organizer -- if the organizer came there and didn't do a
5 good job, isn't there -- matching your incentive, I don't
6 care because I'm being paid by somebody else, in fact,
7 isn't there a harmony of these interests, because in order
8 to organize, the union person has got to keep that job,
9 and if he gives cause to be discharged, he's not going to
10 be a very effective organizer?

11 MR. PEASE: I would submit that frequently it is
12 the purpose of the union to have the organizer fired, so
13 that they can file unfair labor practices, because if they
14 can get the National Labor Relations Board to find that
15 the employer is a violator and that there is substantial
16 monetary damages, they can much more effectively and much
17 more quickly get what their goal is, which is a labor
18 agreement, than they can if they go through the democratic
19 processes of the act.

20 QUESTION: They're not going to do that very
21 effectively if he is plausibly fired for bad work.

22 MR. PEASE: Well -- well, that may be true,
23 that's what happened in this case.

24 QUESTION: They want him to do good work but be
25 obnoxious, isn't that --

1 (Laughter.)

2 QUESTION: I mean, isn't that the way it works?

3 MR. PEASE: I don't think so.

4 QUESTION: No?

5 MR. PEASE: I think that in this case there was
6 substantial evidence that he did work poorly. The
7 administrative law judge discredited that --

8 QUESTION: And that would have been cause for
9 discharge --

10 MR. PEASE: Well --

11 QUESTION: -- and that's a question of fact.

12 MR. PEASE: And the -- the NLRB ruled against
13 the employer, as they generally would in this sort of a
14 case where there's an overt organizer, because they would
15 say that the employer is discriminating on the basis of
16 known union activity.

17 QUESTION: Well, Mr. Pease, presumably the
18 employer could make a broad policy in hiring people that
19 the employer won't hire anyone who has a second job.

20 MR. PEASE: That's true, Your Honor, but --

21 QUESTION: This employer didn't have that rule.

22 MR. PEASE: That's correct. That is, in this
23 day of limited skilled and technical people, that's a very
24 difficult policy to maintain, because there are many
25 people who have no conflict of interest who would work,

1 and be willing to work, and would perform a valuable
2 service to the employer, and the employer is unable to
3 utilize them if they have this broad, sweeping rule.

4 There's also the problem of temporary employment
5 agencies that frequently provide employees, or people to
6 work, supplement the crews. You'd be precluded from using
7 them.

8 QUESTION: I'd like to clear up just one small
9 point.

10 Did I understand you to say that there is no
11 such thing as a shop steward unless there's a collective
12 bargaining agreement?

13 MR. PEASE: No, Your Honor, I didn't.

14 QUESTION: Suppose you had somebody who was a
15 zealous union person, didn't take a penny because he was
16 just so devoted to the union, doesn't want to take
17 anything from the union treasury, doing the same thing
18 that this person did, undertakes the job, said union, I'm
19 going to use all my free time to proselytize for you, does
20 that person lose employee status?

21 MR. PEASE: No, Your Honor, I don't think so. I
22 think Congress made that distinction by incorporating the
23 law of agency into the definition of employee. That
24 zealot, as I understand your fact situation, would not be
25 acting as an agent of another party, and therefore would

1 not be outside the definition of employee.

2 QUESTION: Why can't you be an unpaid agent?

3 MR. PEASE: You could be.

4 QUESTION: Well, then the answer to Justice
5 Ginsburg's question would be different, wouldn't it?

6 MR. PEASE: But I think there has to be the --

7 QUESTION: This is a zealot. If the unpaid
8 zealot doesn't --

9 QUESTION: Okay, it has to be a zealot with a
10 contract, right?

11 (Laughter.)

12 MR. PEASE: It has to be a contract.

13 QUESTION: Even if the contract is a peppercorn
14 or nothing at all -- a zealot with a contract.

15 MR. PEASE: I believe --

16 QUESTION: Then you'd change your answer.

17 MR. PEASE: Yes.

18 QUESTION: Okay.

19 QUESTION: Are you going to stand on that?

20 MR. PEASE: Yes.

21 QUESTION: Okay.

22 (Laughter.)

23 QUESTION: You better be careful.

24 (Laughter.)

25 MR. PEASE: I believe that the -- under the

1 Darden case, that this Court has held that when Congress
2 uses a circular definition of employee, they intend to
3 incorporate the law of agency into that definition, and I
4 think that's what they did in this case.

5 QUESTION: What do you find in the law of agency
6 that contradicts -- I mean, the Restatement? I have the
7 Restatement here somewhere. I don't find it inconsistent.

8 It says, a person may be the servant of two
9 masters not joint employers at one time as to one act, if
10 the service to one does not involve abandonment of the
11 service to the other.

12 MR. PEASE: That's correct.

13 QUESTION: And you say here the one does
14 involve -- but you leave out the fact that it says, as to
15 one act. You can easily be the servant of two masters as
16 to different acts.

17 MR. PEASE: I believe that the concept there,
18 though, is if that is a pervasive -- if it is a general
19 control that is being exercised by the union --

20 QUESTION: So long as it's not a control over
21 the act that he's doing from the employer, for the
22 employer -- what control does the union exercise over the
23 act that he is doing for the employer?

24 MR. PEASE: Okay, there are several areas of
25 control. First of all -- and these, I think, illustrate

1 the conflict. One has already been mentioned -- leaving.
2 It's a critical time. The salt must leave, the zealous
3 union organizer at least may be amenable to a plea by the
4 employer to stay, at least during the critical time, so
5 they don't get a bad reputation and have --

6 QUESTION: He has no obligation to the employer
7 to stay. I mean, if it were a term contract, yes. Then
8 he'd have a duty to the employer. But all -- by
9 definition, the person who's in an at-will contract has no
10 duty to the employer to stay.

11 MR. PEASE: That's correct, but they're
12 exercising their free will in making the change. Here,
13 it's an order from the union. I think that's the basic
14 distinction that Congress is making by their use of the
15 circular definition.

16 QUESTION: So long as it's not an order from the
17 union that causes him to violate a duty to the employer, I
18 don't see how that changes his employee status.

19 MR. PEASE: I don't -- I believe that it's
20 because it's contrary to the interests of the employer.
21 It's to the interests of the employer to have that
22 employee continue to work during a concrete pour, or some
23 other critical stage of the work.

24 If this is just a voluntary union organizer,
25 that person may be amenable to persuasion from the

1 employer about how critical that work is. If it's an
2 agent of the union, they have no choice. They have to
3 leave immediately, and I believe that's -- I think that's
4 the distinction.

5 The board argues that the statute includes the
6 entire class of workers. I don't believe that's the case.
7 I think that the board routinely makes distinctions
8 between employees and nonemployees in enforcing, or
9 interpreting this Court's decision in Lechmere, and I
10 think the Hearst case, referred to by the board, holds
11 that Congress didn't intend to have a sweeping inclusion
12 of a class of employees, and I think that the Sunland
13 exceptions that was discussed earlier is really
14 insupportable. I don't think that there's a valid
15 distinction between what the union agent can do in a
16 nonstrike setting as compared to what they would do in a
17 strike setting. I think that the analysis is the same,
18 and I think that that illustrates the invalidity of the
19 board's position in this case, and indeed --

20 QUESTION: Would you tell me about the Sunland
21 case? Did the Sunland case hold that the people involved
22 were not employees, or that it was not an unfair labor
23 practice to discriminate against --

24 MR. PEASE: It was that the employer had no
25 duty, they did not specifically say that they were not

1 employees, but I believe that the analysis is the same
2 analysis that I'm urging. It's essentially an agency
3 relationship.

4 QUESTION: Let me also clarify one thing in my
5 own mind.

6 In this case, there was one person who actually
7 went to work for the employer, and there are seven or
8 eight who never got hired, as I remember it. You don't
9 draw a distinction between those two. You don't challenge
10 the Phelps Dodge case, in other words.

11 MR. PEASE: No, I -- the Phelps Dodge case, I
12 think that if they would have been a bona fide employee
13 as --

14 QUESTION: If they'd been hired.

15 MR. PEASE: If they were employed, they would be
16 bona fide applicants. If they're not -- they wouldn't be,
17 then they wouldn't be bona fide.

18 QUESTION: So it's the same rule as to both
19 groups.

20 MR. PEASE: Yes.

21 QUESTION: Yes.

22 MR. PEASE: Yes, Your Honor.

23 QUESTION: But it is the Government's position
24 that you not only -- well, you cannot refuse to hire these
25 salts. Isn't that the Government's position?

1 MR. PEASE: Yes, Your Honor.

2 QUESTION: That going in you shouldn't -- you
3 can't turn down the other seven just because you know that
4 they're union salts.

5 MR. PEASE: That is my understanding of their
6 position.

7 QUESTION: Well, what is your position on
8 whether any deference is owed to the NLRB in defining a
9 term used in the NLRA? In this case, the term is
10 employee.

11 MR. PEASE: I believe that the board is due
12 deference when their interpretation is reasonable and
13 consistent with the policies of the act. I do not believe
14 that it's reasonable for the board to exclude the
15 definition -- from the definition of employee the law of
16 agency.

17 I believe if you read the definition of the law
18 of agency, the Congress intended to retain the core of the
19 employment relationship as the basis for protection under
20 the act, and I think that the analysis that they have used
21 in effect would even exclude the managerial employee, and
22 I don't see that as being --

23 QUESTION: But you said that employee is not
24 self-defining. Have you said that? The word, employee.

25 MR. PEASE: I believe that by including a

1 circular definition, they did intend to include the law of
2 agency into the definition of employee, and I --

3 QUESTION: Is there room for -- any room for
4 interpretation, or does the word employee have a plain
5 meaning?

6 MR. PEASE: I do believe there is room for
7 interpretation, and I believe that Congress did intend to
8 expand on the law -- on the law of agency by adding the
9 language that it's not limited to an employee of any
10 particular employer, because I think they wanted to
11 include employees in several different -- with several
12 different employers in an industry.

13 QUESTION: So your position is, there's room for
14 interpretation, but this particular interpretation is
15 unreasonable.

16 MR. PEASE: That's correct, and I believe -- one
17 of the reasons that I think it is is that when Congress
18 went on to explain in the definition of employee, they
19 said that it included individuals who were out of work, or
20 whose work ceased because of a current labor dispute, or
21 an unfair labor practice, and who had not obtained regular
22 and substantially equivalent employment, which implies
23 that there are other situations which would not be
24 included, and it seems to me that what it does is, it
25 shows that they were trying to take -- retain the core.

1 Plus I believe that I think that the board's
2 decision in this case is inconsistent with the policies of
3 the act. I believe that the act says that the purpose --
4 its purpose is to protect the right to organize, and the
5 board at page 8 of its brief says that they interpret it
6 as, that it's to promote organization, and I would submit
7 that what the board is doing in that situation is it is
8 saying that there is a preferred choice, and that they are
9 going to go out and support that, and to give the status
10 of employee to a person who's contractually prohibited
11 from exercising the rights of an employee under section 7
12 of the act, and I think that that's inconsistent with the
13 1947 amendments to the act that said that employees had
14 the right to refrain from any of those activities.

15 I think that that set up two equally acceptable
16 choices, and the board was supposed to be an impartial
17 referee, and I believe in this case, they have moved from
18 that position, and for that reason I don't think that they
19 have due deference.

20 QUESTION: How again do you think the board is
21 partial here, as opposed to being neutral between
22 organizing and nonorganizing?

23 MR. PEASE: Well, I think that what they're
24 doing is, they're giving their stamp of approval in
25 requiring the employer to put the union on the employer's

1 crew. This person is an agent of the union, and they're
2 requiring to put him on the crew, which could mean that if
3 he's not detected, he could pack the unit, or they
4 could -- the union in effect is buying votes, or the
5 employees are deceived into believing that this is someone
6 who is sincerely expressing their own personal convictions
7 and in fact they're doing it for pay, or this person may
8 even engage in --

9 QUESTION: What if some person who seeks
10 employment wants to try to decertify the union? He's not
11 a member of the union. He's just trying to decertify it.
12 if the board applied the same standard to them as they do
13 to the salted organizer, they would be impartial, would
14 they not? Granted there may not be too many of the former
15 species.

16 (Laughter.)

17 MR. PEASE: Well, I think the issue would only
18 come up if this person was acting on behalf of some third
19 party and there was an agency relationship --

20 QUESTION: A rival union, perhaps.

21 MR. PEASE: I'm sorry?

22 QUESTION: A rival union, perhaps.

23 MR. PEASE: That's true, very possible, and that
24 is a point I would like to make. This is something that
25 doesn't just apply, or the holding in this case will not

1 just apply in the construction industry, if I'm
2 understanding the board's position. This could apply in
3 all industries, and it could apply in a situation where
4 the fact -- the employer was already unionized by one
5 union and it could be another union that's coming in to
6 try to take it away.

7 I think that the point that has been made --
8 it's made in Willmar, and it's a point that I would like
9 to address. I touched on it earlier. I believe that the
10 board is assuming that the union agents are entitled to
11 the protection of the act, and that their analysis begins
12 with the premise that these people are employees and
13 entitled to the protection of the act, and then the
14 question becomes, have they done something to lose that
15 protection?

16 I would submit to you that it is inappropriate
17 to assume that they are employees and to make this status
18 determination as we make it in other instances of
19 supervisors, independent contractors, make that
20 independent of the presumptions of protected activity,
21 independent of the motive of the employer for engaging in
22 activity that raises the question. It's a status
23 question, and therefore we would submit that it's
24 inappropriate.

25 Oh, just one more comment. I think that the

1 control that the union exercised over the union agent in
2 this case is illustrated by the supernatural persistence
3 he displayed in soliciting Town & Country employees in the
4 face of repeated rejection.

5 These employees were so upset by the pressure
6 that the union agent was putting on them that they were on
7 the verge of quitting, and this is another way that the
8 union can be effective without going the high road,
9 because they can focus on those employees who are opposed
10 to unionization and in effect force them off the work
11 force, which means either that they will be replaced by
12 someone who might be more favorable, or that they may make
13 it impossible for the employer to perform, and that
14 nonunion employer is off the job.

15 QUESTION: That requires a thoroughly obnoxious
16 organizer, I guess --

17 (Laughter.)

18 QUESTION: -- who is apt not to have much
19 success, I would think, in organizing for the union.

20 MR. PEASE: But the problem is, Your Honor, that
21 frequently the objective is not to organize in the
22 classical sense. I think that is another fallacy. It is
23 not appropriate to assume that the objective may be to
24 organize. The objective may be, as suggested by Joel
25 Harmatz in the Sunland case, to inflict economic pain, so

1 that they can get leverage on the employer to force them
2 to sign a contract or keep them out of the area, and that
3 unfortunately is what we find frequently happens
4 throughout the case.

5 I do want to emphasize that I believe the
6 Sunland case, the board's analysis in that case is
7 insupportable, and I believe that using a similar
8 analysis, an analysis that we espouse, that the law of
9 agency should be used to interpret the status of people
10 and determine whether they're entitled to the protection
11 of the employees, and that the board should abandon this
12 position and should return to a position of impartiality
13 that was intended by Congress.

14 Thank you.

15 QUESTION: Thank you, Mr. Pease.

16 Mr. Wallace, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

18 ON BEHALF OF THE PETITIONER

19 MR. WALLACE: Thank you.

20 QUESTION: Mr. Wallace, before you even start, I
21 have -- the one thing that sticks in my craw a little bit
22 about this case is not the necessity of treating this
23 person as an employee, that's fine, but the inability not
24 only not to fire the person knowing that he's on the union
25 payroll, but even the inability to refuse to hire the

1 person knowing that he's on the union payroll.

2 Why must they be the same question? Is there
3 any way that I can agree with you on the employee question
4 but not necessarily believe that the salt has to be hired
5 if the employer knows going in that this person who wants
6 to be his employee is on the union payroll?

7 MR. WALLACE: Well --

8 QUESTION: What would make it unlawful to refuse
9 to hire him, or to fire him, for that matter?

10 MR. WALLACE: 8(a)(1) and 8(a)(3) protect
11 against coercion or intimidation in the exercise of the
12 rights --

13 QUESTION: -- the rights guaranteed in section
14 157.

15 MR. WALLACE: Right. Right.

16 QUESTION: Does that include the right to be
17 employed by a labor union?

18 MR. WALLACE: Well, it includes the right to
19 participate in the union and to comply with its voluntary
20 rules, so --

21 QUESTION: He has no problem with that.

22 MR. WALLACE: -- long as the member wants to do
23 that.

24 QUESTION: He has no problem with all that. The
25 employer says, you know, I have no problem with all that.

1 I just don't want you to be on the union payroll.

2 MR. WALLACE: Organizational activity is an
3 important part of a union's functions.

4 QUESTION: I have no problem with that. I just
5 don't want you to be on the union payroll.

6 MR. WALLACE: Well, that is --

7 QUESTION: You want to conduct organizational
8 activity, you know, God bless you, but I do not want a
9 worker who is on the union payroll.

10 MR. WALLACE: That --

11 QUESTION: It seems to me a perfectly reasonable
12 position for an employer to take.

13 MR. WALLACE: It may be a reasonable position,
14 but it is a position that interferes with the union's
15 ability to conduct its protected activities. In any
16 event, that question wasn't even put to the board by the
17 respondent in this case.

18 QUESTION: That's a separate question, though,
19 from whether he's an employee.

20 MR. WALLACE: That's correct --

21 QUESTION: Once he's hired.

22 MR. WALLACE: -- it is a separate question, as
23 the Sunland decision illustrates, but the board made its
24 views on that question quite clear in this case.

25 I do want to mention that there is one paragraph

1 in the board's opinion, and this is not the ALJ's opinion,
2 it's the board's own opinion on page 37a of the appendix
3 to our petition, that responds very succinctly to the
4 contentions made by the respondent and its amici which
5 were made before the board that paid union organizers will
6 engage in activities to the detriment of work assigned by
7 the employer or will embark on acts inimical to the
8 employer's legitimate interests, and the board said, we do
9 not agree, and then there are several more sentences that
10 specifically reflect the judgment of the board in response
11 to this, and the complete lack of evidentiary support for
12 the speculations in this case.

13 And one is left with the question in this case
14 that first occurred to me when the case came to our
15 office, if a journeyman electrician working under the
16 direction and control and according to the work rules and
17 on the payroll of an employer covered by the act is not an
18 employee, what in the world is he? He's not in domestic
19 service or an independent contractor or supervisor.

20 CHIEF JUSTICE REHNQUIST: Thank you,
21 Mr. Wallace.

22 The case is submitted.

23 (Whereupon, at 12:03 p.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

NATIONAL LABOR RELATIONS BOARD, Petitioner
v. TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.

CASE NO. : 94-947

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)