

## THE MEAN TEAM

It is tenacious and favors the take-no-prisoners approach to litigating and lobbying. The Associated Builders and Contractors Inc. (ABC), the construction industry's trade association, gets far less news media attention than other business trade groups, but its tough message is resounding on Capitol Hill. And lawmakers are taking notice.

These days, the association's lobbyists and lawyers have been manning the battle stations and taking aim at organized labor. They are fighting for legislation to rein in the Occupational Safety and Health Administration, to chop the budget of what they see as an all-too-union-friendly National Labor Relations Board (NLRB) and to stop the Clinton Administration from enforcing its executive order that would bar the government from doing business with firms that use permanent replacements for striking workers.

But nothing seems to get under the skin of the construction group's hired guns more than an increasingly used labor tactic in which paid union officials seek employment with nonunion contractors to wage organizing campaigns.

Under federal labor laws, workers cannot be fired or discriminated against for engaging in union activity. But contractors argue that these union members are not really employees because they work for—and are paid by—the union.

The NLRB has upheld the tactic, finding that a paid union organizer who is hired by a construction firm or, for that matter, by any employer, is nonetheless an "employee" entitled to the protections of the National Labor Relations Act.

As unions fight to prevent further erosion in their share of the construction workforce, they have taken advantage of the NLRB's ruling by stepping up their use of the tactic. The approach is simple—if their members get the boot for entering a company's workforce and starting an organizing campaign, unions file unfair labor practice charges at the NLRB.

The construction association is waging a two-front war against the practice—in the courts and in Congress. The Supreme Court heard arguments in a case (*NLRB v. Town & Country Electric Inc.*) raising the issue on Oct. 10. Maurice Baskin, a Washington attorney with Baltimore-based Venable, Baetjer, Howard & Civiletti, who has represented the association for years, filed a brief on its behalf, arguing that employers should not be compelled to hire workers who are already on the union payroll.

"When you go up to a contractor who has never heard of this issue and you tell him what the NLRB law is on this, they think you're crazy—that you're kidding," Baskin said. "It's counterintuitive. It's nonsensical."

Another business lawyer, Daniel V. Yager of Washington's McGuiness & Williams, is equally adamant. "This has got to be one of the most outrageous lines of cases from the NLRB in years—they're saying you are required to hire somebody who is avowedly not there really to work for you," he said.

Charles E. Hawkins III, the ABC's senior vice president, added that "they're not really organizing—they're trying to harass contractors and put them out of business or tie their



hands so they won't be competitive." Their goal, he said, is simple: reduce the number of nonunion contractors.

Union attorneys see the ABC's attack as just another effort to shut down legitimate organizing activities. "What you're looking at here is an attempt to undermine one of the truly innovative programs that organized labor, and in particular the building trades, have come up with in the last few years," Charles W. Gilligan, an attorney with the Washington law firm of O'Donoghue & O'Donoghue, said. The union tactic exposes "the widespread level at which employees are discriminated against for union activities," he

added. "People walk into a job interview, indicate that they have union affiliation or union sympathy, and they are being denied employment—well, that's illegal."

In the case before the Supreme Court, about a dozen unemployed members of the International Brotherhood of Electrical Workers (IBEW), including two full-time, union-paid officials, sought positions with a nonunion electrical contractor. Only one of the unemployed union members was hired. The others were not interviewed despite the company's need for more than one licensed electrician.

On his first day on the job, the IBEW member told the other workers that he was out to organize the workforce. Within two days he was dismissed. The NLRB rejected the company's claim that he had been fired for violating the rules against conducting union organizing activities during work time. Instead, the agency found that he was axed simply for engaging in union activities. It also found the other IBEW members were denied interviews because of their union membership.

A federal circuit court of appeals overruled the board, finding that the union officials were not "employees" and therefore not entitled to protection under the labor laws. Some appellate courts have disagreed. Given the split between the circuit courts on the issue of whether such union members are "employees," the Supreme Court agreed to resolve the issue.

If the Court upholds the NLRB's position—and there is a legal principle that courts owe deference to the expert agency—the ABC and others in the business community vow not to throw in the towel. "If the court rules the wrong way, the issue will not go away," Baskin said. "There is certainly going to be a strong reaction and an attempt to get it changed in Congress."

The ABC has successfully lobbied the House for language in an appropriations rider that would forbid the NLRB from spending money on investigating or prosecuting unfair labor charges involving this tactic until the Supreme Court rules. There is no comparable language in the Senate, but the issue will be taken up in an upcoming House-Senate conference.

"In essence, they are threatening to cut an agency's budget if it goes out and enforces the law," Gilligan said. "That strikes me as an unprecedented attempt—a backdoor way of trying to amend the National Labor Relations Act."

Unprecedented or not, it's just another day at the office for the ABC's pugnaeous team. ■