

El Mundo, Inc. and Puerto Rico Newspaper Guild Local 225, American Newspaper Guild, AFL-CIO, and Canadian Labor Congress, Petitioner. Case 24-RC-3016

October 13, 1967

DECISION ON REVIEW AND DIRECTION
OF ELECTION

BY MEMBERS BROWN, JENKINS, AND ZAGORIA

On March 14, 1967, the Regional Director for Region 24 issued a Decision and Order in which he dismissed the petition on the ground that the newspaper dealers sought to be represented by the Petitioner were independent contractors and not employees of the Employer. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review on the ground that the Regional Director erred in concluding that the dealers were independent contractors. The Employer filed a brief in opposition.

On May 9, 1967, the National Labor Relations Board by telegraphic order granted the request for review. Thereafter, the Petitioner filed a brief on review. The Employer also filed a brief on review and a motion for oral argument.

The Board¹ has considered the entire record in this case with respect to the issues under review,² together with the parties' briefs, and makes the following findings:

The Petitioner seeks to represent a unit of newspaper dealers who, pursuant to individual written agreements, distribute and sell the Employer's newspaper *El Mundo* to stores, newsstands, and newsboys and by means of vending machines in the metropolitan area of San Juan, Puerto Rico.

Applicants for dealerships apply directly to the Employer's circulation department instead of through the personnel department. Under the terms of these agreements, the dealers agree to sell the newspaper *El Mundo* within an agency or territory assigned by the Employer and are bound to give their full attention to the assigned territory without interfering with other territories. The dealers also have the right to report any intrusions by other dealers into their territories. Dealers are not allowed to interfere with the subscription system established by the Employer, nor solicit deliveries of domicile subscriptions unless approved in writing by the Employer.

The contract sets the price which the dealers must pay the Employer; i.e., 6 cents for the daily edition, 10 cents for the Saturday edition. It also provides that the Employer may increase or change the price of the newspaper both to the dealer and to the public whenever necessary or convenient.³ Dealers are required to pay the amount due for newspapers sold to them every week at the end of the week. Failure on the part of a dealer to fulfill this obligation gives the Employer the right to terminate its contract immediately and the dealer will be obligated to make immediate payment of any money due the Employer. The contract also provides that dealers should inform the circulation department of their daily and weekly operations in order to determine changes in the number of papers delivered in the territory. Failure on the part of the dealer to provide this information and to place orders for papers in timely fashion gives the Employer the right to fix the number of newspapers sent to the dealer, based on sales for the 3 previous days. Furthermore, the dealers' orders for newspapers must conform to the present demand, as credit for unsold papers (returns) is given only when expressly authorized.

The dealers are not permitted, by contract, to engage in the sale of competing newspapers without written authorization.⁴ These contracts may be rescinded by either party on 1 week's written notice.

The record shows that dealers own and maintain their own transportation facilities. The Employer makes no deductions for income tax, social security, workmen's compensation, or unemployment insurance for the dealers, and provides no fringe benefits for them. The Employer provides no written manual or instructions and dealers are not required to attend any meetings. However, the Employer's supervisors train new dealers and accompany them on their routes for several days, then follow up with daily visits to dropoff points, where bundles of newspapers are delivered to the dealers, to assure that all matters relating to the distribution of the newspaper are handled in an expeditious manner. In this connection, the supervisors make sure that the dealers are at the dropoff points to receive the newspapers, to make sure that dealers pick up exactly the number of papers sent and to resolve any discrepancies. They also check delays of the dealers in getting to the dropoff points and stay at the dropoff points to receive the newspapers in cases of delays in deliveries by the truckdrivers. They see to it that the dealer has a substitute to

¹ Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel

² As the record and briefs adequately present the issues and the positions of the parties, the Employer's request for oral argument is denied.

³ It does not appear that the price which the dealer charges its sub-agents, either street vendors or carrier boys, is established by the Employer. However, the record indicates that, in practice, dealers generally charge 7 cents and 11 cents to carrier boys and 8 cents and 12 cents to

newsstands for daily and Saturday editions, respectively

⁴ This restriction applies to the dealers who are under contract with the Employer. The record indicates that "sub-agents," such as newsstand vendors and carrier boys, do engage in the sale of competing newspapers, periodicals, and other articles. As for the dealers, it appears that this restriction is enforced as the record shows that only one dealer sells magazines - but not competing newspapers

receive the paper, in case the dealer is absent. They discuss with dealers any matter concerning the newspaper distribution or the administration of the agreements and they transmit to the dealers and follow up on customer complaints.

The dealers make their own arrangements for the hire of carrier boys and substitutes, establish their rates of pay, and fire them without knowledge or approval of the Employer. Eight of the 14 dealers receive a "rate adjustment" of \$15 or \$25 per week, which is a credit granted by the Employer as an incentive to those dealers whose territories have a small sales potential. The Employer provides dealers with rope and recordkeeping forms, and, on occasion, soft drinks and tickets to sports events for distribution to their carrier boys. The dealers' total compensation consists of the difference between the price he pays the Employer, less the "rate adjustment," where applicable, and the price at which he sells the paper to his customers, less operating expenses. In this connection, dealers are responsible for making their own collections of money due from their customers.

In determining the status of persons alleged to be independent contractors, the Board applies the "right of control" test,⁵ which turns essentially on whether the person for whom the services are performed retains the right to control the *manner and means* by which the result is to be accomplished, or whether he controls *only* the result. In the latter situation, the status is that of an independent contractor. The resolution of this question depends on the facts in each case. No one factor is determinative.

In the instant case, we are satisfied that the dealers are employees of the Employer. We are mindful that the evidence discloses several factors usually present in independent-contractor relationships. However, these factors are not peculiar to such status and are not uncommon in employment relationships. Thus, we are not persuaded by and do not regard as controlling the facts that the dealers provide their own equipment; that the Employer makes arrangements for the dealerships through its circulation department instead of its personnel department; that it does not place the dealers on its payroll or make the usual payroll deductions for them; that dealers hire, fire, and establish rates of pay for their carrier boys and substitutes; that they make their own collections; or that the Employer's supervisors do not regularly accompany the dealers on their routes.⁶ The result to be accomplished is, of course, the circulation and sale of the Employer's newspapers. In accomplishing this result, the

dealers herein bear slight resemblance to the independent businessman whose earnings are controlled by self-determined policies and personal investment, for the record shows that the dealers must purchase their newspapers at a price fixed by the Employer and sell them at a price effectively determined by the Employer-set retail price within territories defined and controlled by the Employer.

Moreover, the dealers' risk of loss and capacity to draw upon personal initiative to increase their earnings are minimized to a significant extent by the Employer's practices and policies which are calculated to prevent competition between dealers; its practice of adjusting the wholesale rate to compensate for fluctuations within a territory affecting a dealer's earnings; its reserved right to change unilaterally the price of the newspaper both to the dealer as well as to the general public whenever the Employer deems it necessary or convenient; and its control over the number of newspapers which dealers may receive.

Further, the dealers have no proprietary interest in their routes and, on termination of the contract, the route reverts to the Employer. The dealers are forbidden by the contract to engage in any other business or to distribute publications other than the Employer's newspapers, and, if they breach any of the terms of the agreement, the Employer has the right to terminate the agreement immediately upon notification.⁷

On these facts, and the record as a whole, we cannot accept the Employer's contention that its control is limited to the end to be achieved. We find that the dealer's opportunities for profits are limited by the Employer's regulation and control of important aspects of the dealer's work.

Consequently, unlike the Regional Director, as the Employer has to a large extent reserved the right to control the manner and means, in addition to the result of a dealer's work, we conclude that the dealers are not independent contractors but employees within the meaning of the Act.⁸

The Employer also contended that the dealers are supervisors within the meaning of the Act. We find no merit in this contention, as the record fails to establish that the substitutes and carrier boys hired by the dealers are employees of the Employer. Therefore, as it appears that the dealers do not exercise supervisory authority over any employees of the Employer, we find that in their employment relationship with the Employer, which is alone relevant here, the dealers are not supervisors within the meaning of the Act.⁹

Accordingly, we find that a question affecting

⁵ See *Eureka Newspapers, Inc.*, 154 NLRB 1181, *The Sacramento Union, Inc.*, 160 NLRB 1515

⁶ Unlike the Regional Director, we do not regard the daily visits of the Employer's four supervisors at the "drop-off points" as merely "the normal policing of the contract." The extent to which these supervisors involve themselves in the manner in which these 14 dealers are engaged in the distribution of the Employer's newspaper indicates to us that the su-

pervisors direct the work of the dealers and are not merely policing the Employer's contracts with them

⁷ *Site Oil Company of Missouri*, 137 NLRB 1274, 1287

⁸ See *The Sacramento Union, Inc.*, *supra*, *The Vindicator Printing Company*, 146 NLRB 871, 875, 876

⁹ *Buffalo Courier-Express, Inc.*, 129 NLRB 932, 937, *Textile Workers Union of America*, 139 NLRB 800, 802

commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act, and that a unit of the following employees is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act;

All distributors of newspapers employed in the

¹⁰ An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 24 within 7 days after the date of this Decision on Review and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this

circulation department of the Employer's San Juan, Puerto Rico, newspaper *El Mundo*, excluding all other employees, professionals, office clerical employees, and supervisors as defined in the Act.

[Direction of Election¹⁰ omitted from publication.]

list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelstor Underwear Inc.*, 156 NLRB 1236