

Film & Dubbing Productions, Inc. and Asociacion Puertorriquena de Artistas Y Tecnicos Del Espectaculo, Petitioner. Case 24-RC-3783

March 6, 1970

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY CHAIRMAN McCULLOCH AND MEMBERS
BROWN AND JENKINS

On July 24, 1969, the Regional Director for Region 24 issued his Decision and Order in the above-entitled proceeding, in which he dismissed the petition on the ground that the translators sought to be represented were independent contractors within the meaning of Section 2(3) of the National Labor Relations Act, as amended. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's Decision contending that the translators are employees. The Employer filed an opposition to the Request for Review.

On October 28, 1969, the National Labor Relations Board by telegraphic Order granted the request for review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the entire record in this case with respect to the issues under review, and makes the following findings.

The Petitioner seeks to represent approximately five individuals who do translation work for the Employer. The Regional Director, in agreement with the Employer, found that these individuals are independent contractors and, accordingly, dismissed the petition.

These five individuals translate film dialogues for the Employer who in turn supplies the translations to Telemundo, Inc., for television broadcast. The translator, upon being assigned a film, views the film at the Employer's premises so as to acquaint himself with the type of film involved and the numbers and types of dialogues used by the actors. The translator then is given a tape on which he is to write the translation. This tape has been prepared by an employee of the Employer, called a detector, who indicates with appropriate markings on the tape the beginnings and endings of the actors' spoken words and whether the words involve open mouth or half closed mouth movements of the actors. The translator's job is to write, with a dark-lead pencil, the translation on the spaces indicated by the detector's markings. This is "adjusting" the actors' dialogue. The translator also fits, i.e., synchronizes, the translations to the actors' mouth movements. The translators do the actual translation work in

their own homes at their own convenience without any direct supervision.

The completed tape is subjected to an inspection by the Employer's verifier. The verifier indicates what he believes to be errors with respect to grammar, idiomatic expressions, translation, dialogue adjustment, and synchronization. The translator makes any necessary corrections.

Prior to retention of a translator, the Employer administers a test to determine the translator's abilities. Translators are paid a fee for each film translated and are free to accept or reject any job offered. Translators are also free to work for other employers. The Employer makes no deductions for social security or income tax and does not provide workman's compensation insurance. Further, the Employer can terminate the relationship at any time.

On the basis of the above facts, the Regional Director found that the translators are independent contractors. We disagree.

It is well established that the existence of an employment relationship, as opposed to that of independent contractor, depends upon whether the principal has retained the right to control the manner and means by which a result is to be accomplished by the individual performing the service. Where the control is limited to the result sought, the relationship between the individual performing the service and the principal is that of independent contractor. In determining whether an individual is an employee or independent contractor "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 258. And while some factors will point unmistakably to either an independent contractor relationship or to an employee-employer relationship, other factors may be indicative of neither.

Consistent with this approach we find here, contrary to the Regional Director,¹ that the Employer has retained the right to control the manner and means by which the translators perform their work. Thus, while the Regional Director found that the translators are free to work at their own

¹ Among the cases cited by the Regional Director is the Board's decision in *El Mundo, Inc.*, 127 NLRB 538, involving the predecessor of this Employer's parent corporation. The Board found there that translators were independent contractors.

The Employer contends that the translators sought in the present case are the same as those dealt with in *El Mundo, Inc.*, *supra*. Assuming the Employer to be correct in this contention, an assumption not supported by the record, the Board is not thereby precluded from again considering the status of these individuals as it may appear from the present record. *Cement Transport Inc.*, 162 NLRB 1261, see also *Chrysler Corporation*, 173 NLRB No 160 at fn 3, and *The Maxwell Company*, 164 NLRB 713.

The Regional Director also relies on *Twentieth Century Fox Film Corp.*, 89 NLRB 102 at 112, fn 5, and *Twentieth Century Fox and Movietone News, Inc.*, 39 NLRB 579 at 581, fn 2. We find these two cases inapposite. In the former the petitioner did not seek to represent translators, and in the latter the election was directed in an agreed-upon unit which excluded translators.

speed and convenience, the record makes clear that the work performed by the translators is a necessary and continuous part of the Employer's business. Further each translator is given a fixed day every week to submit his or her film for inspection and verification.² In addition, on at least one occasion, the Employer has withheld work where a translator overstayed a vacation. The Employer determines qualifications of translators and tests prospective translators. Translators are paid fees, as found by the Regional Director, rather than wages, but these fees are determined by the Employer and are not subject to negotiation, and the Employer is also able to control a translator's earnings by determining the number and type of the translator's assignments. Though translators are free to perform the translation at a place other than the Employer's premises, the translators must initially view the film and later verify the translation at those premises. And while the translators perform the actual work of translating without contemporaneous supervision that work is circumscribed and controlled by the tape prepared by the Employer's detector and by the inspection procedure performed under the supervision of the Employer's verifier. In all these

²While translators can and do make arrangements among themselves for submitting their tapes for verification the Employer is notified. Whether or not the Employer must authorize the schedule change is not clear from the testimony. However, an inter-office memorandum dealing with the schedule states that "any change that may arise because of problems of the translator should be consulted directly with the Manager's office."

circumstances we find that the translators are employees.³

Accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

We find that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of:

All translators employed by the Employer at its place of business at El Mundo Building, Hato Rey, Puerto Rico, excluding all other employees, administrative personnel, guards and supervisors as defined in the Act.⁴

[Direction of Election⁵ omitted from publication.]

³Cf *J R Osherenko*, 73 NLRB 670

⁴The parties stipulated that, in the event the translators were found to be employees, a unit limited to translators is appropriate.

⁵In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236, *NLRB v Wyman-Gordon Company*, 394 US 759. Accordingly, it is hereby directed that 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 of 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 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.