

A. S. Abell Company and Truckdrivers and Helpers Local Union 355, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 5-RC-6878

August 26, 1970

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
MCCULLOCH AND JENKINS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Harvey A. Holzman. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, and by direction of the Regional Director for Region 5, this case was transferred to the National Labor Relations Board for decision. Both the Employer and the Petitioner filed briefs.

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.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds no prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons.

The Employer, in distributing its newspapers to customers' homes, utilizes, *inter alia*, the services of approximately 77 city home circulation employees, called district advisors, and of about 800 carrier newsboys. The Petitioner seeks a unit of district advisors. The Employer contends and the Petitioner denies that the district advisors are supervisors of the newsboys.¹

The district advisors and newsboys work through seven service centers in various parts of the city, operated by six admitted supervisors who supervise the district advisors. Operating through these service

centers, the Employer utilizes four methods of distribution, all four of these methods involve the services of district advisors, but only two involve the use of carrier newsboys.

First, the Employer uses conceded independent contractors for rural noncity deliveries and certain city routes. There are six district advisors who coordinate work with them and who the parties agree are not supervisors.

The second system consists of approximately 400 company route newsboys and 57 district advisors who work with them.

The district advisors are on straight salary; receive life insurance, medical insurance, workmen's compensation, sick leave, and vacation and holiday benefits; have company cars or receive a vehicle allowance; and have a pension plan. Their starting salaries are the same; they receive promotions based on time and merit and are interviewed and hired at the main office by the Employer's circulation manager. Each district advisor is assigned a territory and a specific number of boys. He assigns the work, recruits, hires, fires, trains, adjusts grievances, and disciplines the boys, and adjusts customer complaints.

The company route boys are assigned a specific number of customers and must accept them. They are paid by the district advisors, the amount depending on the number of papers they deliver. The boys collect money from customers and give it to the district advisors. The boys when paid give a receipt with their names on it to the district advisor who turns it in to the service center. In addition, the boys receive a bonus for securing new subscribers and for speedy collection and good service. The district advisor gives one voucher covering all his boys to the company treasury department, which in turn pays the district advisor.

In case a boy is sick he must get a replacement. The manner of delivery, including time of day and method of delivery, as well as method and manner of collection, is set by the district advisor. If some customer fails to pay the boy, the Employer absorbs the losses. The boys do not receive any social security, workmen's compensation,² vacation, sick leave, holidays, or pensions. However, the record reveals that if they are injured on the job the Employer pays for medical and hospital care.

The third system consists of approximately 400 junior route newsboys and 14 district advisors who work with them. These district advisors have basically the same duties, authorities, responsibilities, and working conditions as the company route district advisors. However, when they recruit a boy for a route they sign him to a contract

¹ The Employer asserts that if the carrier newsboys are employees, they should be included in the appropriate unit. The Petitioner does not seek carrier newsboys and, in any event, has an insufficient showing of interest for any unit which includes carrier newsboys.

² By statute they are not covered by social security, workmen's compensation, or minimum wage laws.

The boys post a bond and sign a contract, and their parents fill out a form which is returned to the Employer. The boys are given a list of customers in a specific area and must accept all customers. They do not have a choice of areas and cannot service anyone outside their area. They are required to keep a customer collection book furnished by the district advisor and to return it to him when they leave the Company. Further, they must maintain a subscriber list at all times and prepare one on a special form for the Employer. They buy the papers from the Employer and sell them to subscribers at prices set by the Employer, keeping the difference as compensation. Any losses are assumed by the boys. However, they are not permitted to allow customers to accumulate credit. In addition, if the route is small, the district advisor gives the boy a territorial allowance as additional compensation. The boys receive a bonus for new subscribers as well as for speedy collection and good service. If one of their routes in the judgment of the district advisor is too large, part of it is switched to another boy. The boys are not allowed to sell papers in the streets. Further, the boys have no proprietary interest in their routes, and on termination of the contract the route reverts to the Employer. The boys are forbidden to engage in any other business or distribute publications other than the Employer's newspapers, and, if they breach any terms of the agreement, the Employer has the right to terminate the contract immediately upon notification.³ As with the company route boys, they are trained by the district advisor, and the means and method of delivery and collection are set by the district advisor. In case of injury on the job the Employer pays for hospital and medical care. Both company route boys and junior route boys are issued company I.D. cards.

The last method of delivery is direct service. The Petitioner claims that 20 of the 57 company route carrier district advisors, *supra*, are part-time direct service people who, assertedly, are paid the same as other district advisors and are supervised by either another district advisor or by someone in the service centers. These people are, assertedly, usually newly hired, deliver papers, and have no one working under them. The total number of direct service people cannot be determined from the record; nor is it clear whether they work only part-time for the Employer or work full-time for the Employer, spending part of such time delivering papers and part as district advisors for company route boys. In view of our determination herein, however, we do not have to reach these issues.

Finally, there are six other employees who fill in for district advisors when they are sick or on vacation.

From the facts recited above, it is clear beyond doubt that if the newsboys are employees of the Employer, the district advisors who work with them are supervisors. The Petitioner contends that the newsboys are not employees of the Employer either because they are independent contractors, or because their relationship to the Employer is too casual to warrant a finding that an employment relationship exists.

In determining the status of persons alleged to be independent contractors, the Board applies the "right of control" test, 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 independent contractor. The resolution of this question depends on the facts in each case. No one factor is determinative. Here, as seems typical in cases of this kind, there are present factors supporting the position taken by both parties with respect to the carrier boys status.

In the instant case, we are satisfied that both groups of carrier boys are employees of the Employer.⁴ We are aware that the evidence reveals 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 and do not regard as controlling the facts that the Employer does not place the carrier boys on its payroll or make the usual payroll deductions for them; that they do not receive paid vacations, holidays, or severance pay; that the carrier boys make their own collections and obtain replacements when they are unable to service their routes; or that the district advisors do not regularly accompany the carrier boys on their routes. The result to be accomplished is, of course, the circulation of the Employer's newspapers. In accomplishing this result, the carrier boys bear slight resemblance to the independent businessman whose earnings are controlled by self-determined policies and personal investment, for the record shows that the carrier boys must sell the newspapers at a price determined by the Employer within territories defined and controlled by the Employer. Moreover, the carrier boys' risk of loss and capacity to draw on personal initiative to increase their earnings are minimized

³ In addition, the Employer may terminate the contract by giving 2 weeks' notice

⁴ Although the junior route newsboys sign a contract and the company route newsboys do not, there is in fact no meaningful distinction between the two groups of newsboys with respect to their relationships to the Employer and the district advisors

to a significant extent by the Employer's practices and policies which are calculated to prevent competition between carrier boys; its practice of territorial allowance to compensate for small routes; its right to change unilaterally the size of the routes; and its control over the number of newspapers which carrier boys may receive. Further, the carrier boys have no proprietary interest in their routes.

On these facts, and the record as a whole, we find that the carrier boys' opportunities for profits are limited by the Employer's regulation and control of important aspects of the carrier boys' work. Consequently, as the Employer has to a large extent reserved the right to control the manner and means, in addition to the result, of a carrier boy's work, we conclude that the carrier boys are not independent contractors but employees within the meaning of the Act.⁵

It is true, as the Petitioner asserts, that the Board has generally held that carrier boys are not employees of the newspaper for whom they make deliveries. Such findings have, however, been predicated on the evidence adduced and the parties' positions in the specific cases;⁶ and when as here the evidence preponderates in favor of finding that the newsboys are employees, the Board has made such finding.⁷

Having found that the carrier boys are employees of the Employer, and because the district advisors who direct them possess *inter alia* authority to hire, discharge, and responsibly direct the carrier boys under them, we find that such district advisors are

supervisors within the meaning of Section 2(11) of the Act.

As noted above, there are six district advisors who the parties agree are not supervisors; in addition there are approximately 20 part-time direct service people who may fall into the same category as the six district advisors. The record is, however, inconclusive with respect to their status or to the question whether other employees perform "direct service" work similar to that apparently performed by those latter district advisors. The Petitioner, although requested at the hearing, did not take a clear position on any other unit except one encompassing the approximately 77 district advisors. Taking these factors into consideration, we find that the evidence in the record is insufficient to permit determination concerning the appropriateness of any unit other than the one petitioned for.

Accordingly, in view of the foregoing and on the record as a whole, we shall dismiss the petition herein.

ORDER

It is hereby ordered that the petition in this case be, and it hereby is, dismissed.

⁵ See *Citizen News Company, Inc.*, 97 NLRB 428

⁶ See e.g., *Buffalo Courier Express, Inc.*, 129 NLRB 932, *San Antonio Light Division, Hearst Publications*, 130 NLRB 619, *Eureka Newspaper, Inc.*, 154 NLRB 1181, *News Syndicate Co., Inc.*, 164 NLRB 422

⁷ *Citizen News Company, Inc.*, 97 NLRB 428. Nor is there merit to the contention that the newsboys are in effect casual employees. Although there may be substantial turnover, the newsboys' work is neither irregular, intermittent, sporadic, nor occasional.