

Peerless Publications, Inc., Employer-Petitioner and Newspaper Guild of Greater Philadelphia, Local 10, American Newspaper Guild, AFL-CIO. Case 4-UC-36

May 28, 1971

**DECISION ON REVIEW AND ORDER
CLARIFYING CERTIFICATION**

BY CHAIRMAN MILLER AND MEMBERS BROWN
AND JENKINS

On September 8, 1970, the Regional Director for Region 4 issued a Decision and Order in the above-entitled proceeding, in which he dismissed the petition on the ground that it raised an issue of contract interpretation rather than of clarification of the certified bargaining unit. On November 17, 1970, the National Labor Relations Board, by telegraphic order, granted the Employer's request for review of the Regional Director's Decision and Order and directed that a hearing be held. Pursuant to this order, a hearing was held on December 9, 1970, before Hearing Officer Milton S. Maclasky. On January 8, 1971, the Regional Director transferred the case to the National Labor Relations Board for decision. Thereafter, the Union filed a brief in support of its motion to dismiss the petition, and the Employer filed a brief in support of its request for unit clarification.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations 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 that they are free from prejudicial error. They are hereby affirmed. Upon the entire record in this case, the Board finds:

The Employer is a Pennsylvania corporation located in Pottstown, Pennsylvania, where it is engaged in the publication of a daily newspaper, the Pottstown Mercury. The Employer filed the petition herein, requesting that the certified bargaining unit be clarified by specifically excluding two named individuals, Arthur C. Jaynes and Louise Ouilette, on the ground that they are independent contractors rather than employees of the Employer. The Union has moved to dismiss the petition on the grounds that the issue involved is one of contract interpretation rather than of clarification of the certified bargaining unit, and that the matter has already been disposed of in an arbitration proceeding in which it was found that Jaynes and Ouilette were employees of the Employer.

On August 15, 1966, the Board certified the Union as the exclusive representative for two separate units of employees of the Employer, one unit consisting of employees in the editorial department and the other of

employees in the advertising department. The parties subsequently executed a collective-bargaining agreement combining the two units; a supplemental agreement, executed in July 1967, added the circulation, maintenance, and telephone operator departments to the combined unit. The initial contract also expressly excluded, *inter alia*, commission advertising salesmen, defined in a letter agreement executed by the parties as persons who produced three named publications.¹ Article 1, section 1.2, of the contract read:

The Publisher will not enter into any agreement inconsistent with the provisions of this contract with any individual employee or group of employees covered by this Agreement affecting the conditions or terms of employment of said employee, or group of employees.

These provisions, including the definition of "commission advertising salesmen," were retained unchanged in the parties' next contract, executed in 1968, and in their current contract, executed on September 15, 1970, after the filing of the petition herein.²

Arthur C. Jaynes operates a newspaper advertising business under the style of JADCO and sells special pages for the Pottstown Mercury and several Massachusetts newspapers. In October 1969, he entered into a contract with the Employer, in which he agreed to produce a feature called the "Weekly Business Review" under a name and style copyrighted by him, and to furnish one page per week for 52 weeks.

Jaynes has an office in Massachusetts, where he has lived all his life. His editorial, pictorial, and layout work on the feature for the Mercury is done almost entirely in his office; he has gone to the Mercury's office only a few times, to search for a type of illustration which he did not have, and has spent a total of about 2 hours there. On the other hand, the sales work is done in Pottstown; in all, Jaynes spends about two-thirds of his time in Massachusetts. He comes to Pottstown when his schedule elsewhere permits; the exact time when he sees a particular advertiser is determined by the advertiser. In soliciting advertisements, he has made use of a list of persons compiled by the advertising department of the Pottstown Mercury, as well as the telephone directory and other sources. About 20 percent of the persons he solicits are also solicited by employees in the Mercury's advertising department, but the Employer has never instructed him to call on a particular person. Jaynes buys the space for his feature at a rate set by the Employer, but he sets the rate at which he sells the space to advertisers. In preparing this feature, Jaynes, or someone associated with his

¹ The three publications were "Pottstown on Parade," "Petticoat Chatter," and the "Church Directory Advertisements." It appears that only "Pottstown on Parade" is still being published in the Pottstown Mercury.

² The current contract is not due to expire until September 15, 1972.

operations, takes the pictures, writes the stories, sells and writes the advertising, and prepares the page in a layout form ready for the composing room. He pays for his own illustration service and his own writing kit, as well as for the form he uses for his advertising contract. Occasionally, he has hired private photographers to take pictures for him. The publisher has the right to accept or reject, but not to edit, any advertising submitted by Jaynes.

The Employer pays Jaynes 50 percent of the revenues collected from the sale of these advertisements, with 25 percent being paid when he turns in the advertisements and the remaining 25 percent when the bills are collected. The Employer normally collects the bills, but Jaynes seeks payment from delinquent accounts. Taxes and social security are not withheld from payments to Jaynes, and he does not receive the benefits enjoyed by conceded employees of the Employer. Jaynes is free to, and does, perform similar work for other publications; receipts from his work for the Pottstown Mercury account for about one-third of his total income. He pays and trains persons working for him, and has the right to hire and fire them. Louise Ouilette, the other individual involved in this proceeding, sold advertising for Jaynes for 2 months; Jaynes wrote the advertisements after Ouilette had made the sales, and he paid her 10 percent of the amount of total sales.

Shortly after Jaynes and Ouilette began soliciting advertisements for the Business Review feature, the Union, in bargaining with the Employer, contended that Jaynes and Ouilette were employees of the advertising department and that the Employer was violating its contract with the Union by not applying the terms of the contract to them "as well as to any other persons soliciting advertising for the publisher's 'Weekly Business Review' section." The Employer replied that Jaynes and Ouilette were independent contractors and were not covered by the contract.

The Union demanded arbitration of this dispute, and on July 14, 1970, a hearing was held before an arbitrator. The Employer took the position that the arbitrator was without jurisdiction to hear this dispute because, *inter alia*, Jaynes and Ouilette were independent contractors not covered by the contract or the Board certification, and the issue was a representation matter involving the scope of the certified unit and was within the exclusive jurisdiction of the Board. When the arbitrator rejected these contentions and announced that he would proceed to hear testimony on the merits of the dispute, the Employer refused to participate further in the hearing, but it later submitted a letter in lieu of a formal brief in which it reiterated its contention that Jaynes and Ouilette were independent contractors. Jaynes and Ouilette did not appear, and were not represented, at the arbitration hearing. On August 21, the Employer filed the petition herein. On August 29, the

arbitrator rendered his award, finding that Jaynes and Ouilette were employees of the Employer's advertising department and that all terms of the collective-bargaining agreement should be applied to them.

The Union contends that the Board should dismiss the petition filed herein without determining the status of the two individuals in question on the grounds that (1) the petition is an attempt to have the Board interpret, if not invalidate, the agreement made by the parties with respect to the scope of the bargaining unit, and (2) the matter has already been disposed of in an arbitration proceeding. We find no merit in these contentions, and therefore deny the Union's motion to dismiss.

As to the first contention, it is well settled that the Board has the authority to clarify bargaining units which have never been certified and which were established solely by agreement of the parties. *Brotherhood of Locomotive Firemen and Enginemen*, 145 NLRB 1521, 1523-24. In our view, the factors justifying clarification in such a case are equally applicable where, after the Board has certified a bargaining representative for a particular unit, that representative and the employer agree to modify the unit, and there is no contention or basis for finding that the contractual unit, as distinguished from the inclusion of the disputed individuals therein, is repugnant to the policies of the Act.³ If, on the other hand, the parties have included in the unit individuals whose inclusion is contrary to the statute, it is appropriate for the Board to clarify the unit to exclude the improperly included individuals.⁴

The Union argues that, even if Jaynes and Ouilette are independent contractors, the question in dispute is whether, under the contract between the parties, the Employer had the right to use independent contractors in positions not expressly excluded from the coverage of the contract. However, in order to clarify the bargaining unit, we need only determine whether these two individuals are in fact employees of the Employer, a question clearly within our province to decide. If they are not employees within the meaning of Section 2(3) of the Act, such status cannot be conferred upon them by private agreement of the parties. We are not called upon to decide whether the contract prohibits the use of independent contractors in producing the "Weekly Business Review" or whether the Employer has violated such a prohibition, and our decision herein does not preclude the Union from raising this issue in an appropriate forum.

³ Cf. *New Deal Cab Co.*, 159 NLRB 1838 (contractual units based on race)

⁴ See, e.g., *Libbey-Owned-Ford Glass Co.*, 169 NLRB 126, 127, fn 14 and accompanying text, and 129 (the Board was unanimous on this holding), *Briggs Mfg Co.*, 101 NLRB 74, 76, fn 4

The Union contends that, in any event, the Board should not resolve this dispute because the issue has already been decided by an arbitrator. While the Board, under appropriate circumstances, has honored arbitration awards in representation proceedings,⁵ we are of the opinion that it would not effectuate the policies of the Act to do so in this case. The arbitrator, while finding that "the indicia of actual control by the Publisher over the manner in which commission advertising solicitors perform their work is [sic] not manifest or obvious," concluded that Jaynes and Ouilette were employees within the meaning of the contract, since the parties had specifically defined the excluded "commission advertising salesmen" and had not negotiated the exclusion of Jaynes and Ouilette. However, the issue is not whether the parties intended to include these individuals in the bargaining unit, but whether their status is such that the Act requires their exclusion. This question cannot be resolved through an interpretation of contractual provisions by either an arbitrator or the Board. It involves definition of statutory terms and application of Board standards used in making unit determinations. Under Section 2(3) of the Act, any individual having the status of an independent contractor is not an "employee" and cannot be made one or included in a unit of "employees" by agreement of the parties. Thus, where, as here, an arbitrator's award purports to require treatment of such an individual as an "employee," it is, contrary to the position of our dissenting colleague, repugnant to the purposes and policies of the Act, and the Board is required to reject it.⁶ Accordingly, we conclude that the issue herein is one for Board determination.⁷

In determining whether an individual is an independent contractor rather than an employee, the Board uses the "right-of-control" test, under which the critical question is whether the person for whom the individual performs services controls not only the result to be achieved but the manner of achieving it. On the basis of the facts set forth *supra*, it is clear that the only control the Employer has retained over Jaynes is the right to reject advertising submitted by him. This right only enables the Employer to control the result achieved by Jaynes; the latter retains full control over

the manner of achieving the result. Accordingly, we find that Jaynes is an independent contractor and must be excluded from the bargaining unit. Whether Ouilette was performing work for Jaynes as his employee or as an independent contractor, she clearly was not an employee of the Employer and therefore could not be included in the bargaining unit, since there is no evidence of a joint or single employer relationship between the Employer and Jaynes as to her. Accordingly, we shall clarify the certification in Case 4-RC-6838 to exclude Jaynes and any individuals performing work for him either as his employees or as independent contractors.⁸

ORDER

It is hereby ordered that the certification in Case 4-RC-6838 heretofore issued to the Newspaper Guild of Greater Philadelphia, Local 10, American Newspaper Guild, AFL-CIO, be, and it hereby is, clarified by specifically excluding therefrom Arthur C. Jaynes and any other individuals writing, soliciting, or selling advertisements for the "Business Review" feature appearing in the Pottstown Mercury, where such individuals are independent contractors or employees of independent contractors.

CHAIRMAN MILLER, dissenting:

Under the particular facts of this case, I would not rule at this time on the Employer's petition for unit clarification.

The real dispute between the parties is whether the collective agreement applies to the two individuals involved. That dispute has been settled by an arbitration proceeding in which the Employer, at its peril, chose not to participate. The decision is in no sense repugnant to our Act. Parties may, by agreement, cover persons in a collective agreement who are not, under our statute, "employees," even though the law would not *require* either party to cover them or even to bargain about covering them. The arbitrator here has held that these parties did agree to cover the two employees under the current agreement, and that leaves no dispute to be resolved, unless we choose to let the Employer create one by not complying with a valid arbitration award. I would not do so.

⁵ *Raley's, Inc.*, 143 NLRB 256, *Insulation & Specialties, Inc.*, 144 NLRB 1540, *Goodyear Tire & Rubber Co.*, 147 NLRB 1233

⁶ Cf. *Hotel Employers Association of San Francisco*, 159 NLRB 143, 148-149, *Monsanto Chemical Co.*, 97 NLRB 517, 520

⁷ See *Warm Springs Lumber Co.*, 181 NLRB No. 90

⁸ The record indicates that Ouilette quit when the Union filed its grievance. In view of the possible recurrence of the dispute if Jaynes utilizes anyone to do work similar to that performed by Ouilette, the clarification herein will be applicable to any such individual.