Joyce Sportswear Company, Employer-Petitioner *and* District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America. Case 13–UC–79

December 1, 1976

DECISION ON REVIEW AND ORDER CLARIFYING CERTIFICATION [1]

BY MEMBERS FANNING, PENELLO, AND WALTHER

On May 22, 1975, Joyce Sportswear Company (hereinafter the Employer or Joyce) filed the petition herein to clarify the status of a previously recognized but uncertified unit consisting of straight commission salesmen. On July 10, 1975, the Regional Director for Region 13 issued a notice of representation hearing. Thereafter, a hearing was held on various dates in Chicago between August 11 and 23, 1975. On January 19, 1976, the Regional Director issued a Decision and Order dismissing the petition on the ground that the salesmen involved herein are not independent contractors but employees within the meaning of the Act. On February 18, 1976, the Employer filed a request for review, which the National Labor Relations Board, by telegraphic order, granted on May 26, 1976. Thereafter, District 65 (or 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 and request for oral argument.

In September 1969, the Employer extended voluntary recognition to the Union. In January 1971, the parties executed a collective-bargaining agreement with the aid of an arbitrator. The 1971 contract was retroactive to September 15, 1969, and expired on September 14, 1972. On February 28, 1973, the Board issued a complaint and a notice of hearing on charges filed by the Union in Case 13–CA–11736. The charges alleged violations of Section 8(a)(1) and (5) of the Act. On March 27, 1973, the parties entered into a settlement agreement which extended the 1971 contract, with some changes, to September 14, 1975. The Employer's recognition of the Union remained in full force and effect. However, on March 22, 1975, as stated above, the Employer filed a petition to clarify the unit of straight commission salesmen, the same unit it had recognized and had been bargaining with since 1969.

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

The Board has considered the Regional Director's decision, the Employer's request for review and oral argument, the Union's opposition to request for review, and its memorandum, and the entire record in the case, and finds as follows:

The Employer, an Illinois corporation, is a manufacturer engaged in the wholesale distribution of ladies' sportswear. It maintains an office at 920 Merchandise Mart, Chicago, Illinois, and a factory in Gary, Indiana. There are showrooms in New York, Minneapolis, and Los Angeles. Jack Goodman is the president of Joyce. Ray Cell, national sales representative, is Goodman's son-in-law, and assists him in the design and merchandising of ladies' sportswear. Ira Green is the controller. Salesmen throughout the United States make calls on buyers or other personnel of retail establishments in an effort to sell the Employer's product. It is the status of these salesmen which is in contention in the instant proceeding.

The Employer's salesmen (outside sales representatives) are assigned geographic areas which are designated their territories, and in which they are required to live. At the time of the hearing, Joyce had 15 salesmen, who in the aggregate represented 27 States. Each salesman is the exclusive representative of his territory. This means that, in addition to the fact that another Joyce salesman cannot encroach on that territory, the Employer itself cannot directly or indirectly sell there. This method of selling through its salesmen is the sole means by which Joyce sells ladies' sportswear, which is its only product.

Joyce sells ladies' sportswear using the concept of the "line," which is commonly accepted in the industry. A "line" consists of three or four coordinate groups, which may include within each group trousers, skirts, jackets, blouses, vests, or culottes. There may be 12 to 15 styles within each group. In addition, each group has a range of three to six color "stories."

The line, however, must be understood in terms of seasons. There are four selling seasons: spring, summer, fall, and holiday; and a line is designated for each. A new season brings new fabrics, new styles, and new colors. Each season lasts for approximately 6 to 8 weeks. The summer season runs from January to March; fall, from April to June; holiday, from August through September; and spring, from October to December. Months of advance preparation are required prior to each season. Choice of style and color, for example, must be determined. These decisions are made by Goodman, Cell, and the designer. Before the season begins, the Employer must make initial commitments to the mills with respect to the

[1] Joyce's motion for oral argument is hereby denied, since the testimony at the hearing, the briefs, and the exhibits together form a record complete enough to permit the Board to dispose of this dispute

number of goods it will need, which generally amounts to 35 to 40 percent of Joyce's requirement. After Joyce comes out with its line, it then makes its final commitments based on orders submitted by its salesmen. The Employer uses the sales data it has to project its sales for the season, so that it will not grossly overestimate or underestimate the demand for its product.

Once Joyce develops its new line, it must acquaint the salesmen with it. For this purpose, Joyce holds sales meetings about a week prior to the release of the line at its Gary, Indiana, factory. All salesmen must come to these meetings, and the Employer bears all their expenses in doing so. Cell, with Goodman present, conducts the meetings. His purpose is to familiarize the salesmen with the line that they are going to sell. In addition, Cell recommends what he thinks is a good method to sell the line. Cell, however, cannot do more than recommend, since each salesman can develop a sales presentation as he sees fit in his territory. Cell indicates to the salesmen that his recommendation is only an option.

At each meeting, every salesman is provided with samples, for which he must pay 50 percent of the wholesale price. The approximate wholesale value of each set of samples is $4,000. Salesmen may purchase, at their option, additional samples if they feel that showing a greater variety of colors is to their advantage.

After the seasonal sales meeting, each salesman returns to his territory to call on his accounts. Salesmen, in order to sell the line, must develop new accounts as well as service old accounts. Once he is successul in selling his line to a particular customer, the salesman writes up an order from the Employer's forms and sends it as soon as possible to Joyce's Gary facility. The salesman sends both the original and a copy of the order to Gary; Gary sends the copy to the Chicago head office. At this point, Ira Green, the controller, checks the customer's credit which, if acceptable, enables the order to be filled. The order then is shipped out of Gary to the customer. The Employer, from its Gary factory, then sends a bill to the customer. If, however, the customer's credit is not approved, the salesman and his customer are notified. In the event that Joyce is out of stock on a particular item, the salesman will be similarly notified, so that he can take substitute orders. Green also handles this operation. Green is also in charge of returned merchandise.

In order for the retailer to produce greater sales, the Employer's salesmen grant their customers advertising allowances, which are handled in total by the salesman. Salesmen usually bear the cost of such advertising. If a retailer finds himself in the position of having a large inventory of Joyce goods towards the end of a season, he sometimes requests a markdown from the salesman in order to move the inventory from the racks. The salesman would in this case assume the cost of the markdown. However, in several situations Joyce has agreed to share part of the cost of the markdown with its salesmen.

During the selling season, the head office in Chicago also communicates with its salesmen for a variety of reasons. First, a salesman might make inquiries as to the availability of certain styles or colors. Second, Cell reviews the sales record of each salesman, and periodically informs each of his performance, particularly if sales fall behind the amount sold for the same season in the previous year. Third, Cell or Goodman might communicate with a salesman to iron out a misunderstanding between Joyce and the salesman, or to exhort the salesman to make more appointments or to work harder to boost sales. Cell or Goodman might also suggest a new account to call on. It is, however, the salesman's decision as to which accounts to call on and when. In order for Joyce to predict its production requirements, salesmen are also required to submit weekly reports on their progress in selling the line.

In selling the line, salesmen have several alternative approaches to retailers. First, they can go to the customers at their stores. Second, salesmen have the option to invite buyers to view displays of Joyce's line at some hotel or motel. Third, they can invite buyers to their own homes to look at the line. Finally, salesmen can utilize industrywide markets (exhibitions of various salesmen's lines). These trade markets are sponsored by the National Association of Women's and Children's Apparel Salesmen, Inc. (NAWCAS), an organization which is discussed below.[2]

Salesmen assume the cost of selling, whatever approach they use. Salesmen pay for participating in the trade shows, and for the hotel or motel rooms in which they set up their displays. They pay for transportation costs in order to see their customers. In fact, each salesman assumes all of the ordinary and necessary business expenses of a traveling salesman: room, meals, gas, and entertainment of customers. In addition, salesmen pay the cost of setting up their own offices. They also pay for stationery and office supplies. The initiative belongs with the salesman to book his space in shows or to rent a motel room, for example.

Generally, salesmen are left to sell the Joyce line as they see fit. Thus, Cell and Goodman do not inter-

[2] For the status of NAWCAS as a labor organization, see *Bambury Fashions, Inc*, 179 NLRB 447 (1969)

fere with how they sell the line; for example, unless asked by a salesman, Cell or Goodman will not come into his territory to help him call on accounts. Occasionally, as in the cases of salesmen Jack Cohen and Walter Kane, Cell would go with the salesman to certain customers who might be sold with some help. Cell and Goodman, however, do become involved with a salesman when his sales are disappointing. Very often, they will exhort a salesman to do better and inquire in order to explore problem areas which may be worked out.

Joyce has the right, pursuant to article VI of its contract with the Union, to replace salesmen for just cause. Joyce exercised that right in late 1973 when it replaced Phil Silverman after his heart attack, and in June 1971 when it discharged Don Wilk for his alleged lack of cooperation at the 1971 Style Exhibitor Show in Chicago. Silverman was reinstated by an arbitration award in 1974. Wilk was reinstated pursuant to an agreement between Joyce and the Union.

With respect to the salesmen's hours and compensation, Joyce keeps records of their salesmen's performance. In the weekly statement to their representatives, Joyce compensates them on a basis of 7 percent of gross sales on items actually shipped to customers. Joyce guarantees, however, that salesmen will receive 80 percent of all business they book. Periodically, then, a salesman receives commission less the drawing account payments credited to him previously. Joyce makes no deductions for social security, Federal, or state taxes, nor are payments made to the various states involved for unemployment compensation. As for hours, salesmen often work longer than 12 hours per day, but the time they put in varies with the number of appointments in a given day. The appointment schedule is made by the salesman. In regard to vacations, salesmen are limited by the fact that their free time is restricted to off-season periods. Thus, if the selling seasons combined total about 32 weeks, and taking into account preparation for each season, a salesman might have 12 to 16 weeks a year vacation.

Several salesmen utilize their spare time either by selling lines other than the Joyce line or in running their own businesses. For example, salesman David Dianus has developed a handcream and lotion line which all the other salesmen carry. Salesman Lynn Victor carries a line of gloves, scarves, and hats. Salesman Bob Weisdorf, doing business as Bob Weisdorf & Associates, carries another line called California Patterns. Weisdorf is Joyce's representative in California, Arizona, Nevada, Washington, and Oregon. The "Associates" in Bob Weisdorf & Associates are five persons whom Weisdorf employs, two of whom are full-time salesmaen. Weisdorf also hires two saleswomen to administer his two showrooms, one in Los Angeles, the other in San Francisco. Weisdorf hires and pays these people. Salesman Clayton Ellsworth is a 50 percent owner of a women's apparel store in Smithville, Ohio, which sells, among other lines, the Joyce line. In addition, Ellsworth is also an agent for the Wooster-Wayne Industrial Park in Wooster, Ohio. His job is to obtain buyers or lessees for certain property.

It is the status of this unit of straight commission salesmen, then, that is the principal issue in this case. The Employer contends that the salesmen are in fact not employees but rather independent contractors. The Union, on the other hand, would retain the present calssification as employees. The Employer contends that the Board has decided this issue in its favor in *Bambury Fashions, Inc.*, 179 NLRB 447 (1969). Furthermore, the Employer argues that the Regional Director failed to apply properly the "right to control" test, which embraces common law agency principles, by ignoring certain facts and by minimizing others. The Union takes the contrary position that *Bambury* is inapplicable insofar as it dealt with the status of NAWCAS as a labor organization. Furthermore, the Union contends that even assuming *arguendo* that the facts on their face support a finding that these salesmen are independent contractors, a closer look at the relationship between Joyce and its salesmen indicates an employer-employee relationship.

The Board has established a clear standard by which the status of Joyce salesmen can be determined: this is the "right to control" test,[3] which embraces common law agency principles.[4] An employer-employee relationship exists "when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. On the other hand, where control is reserved only as to the result sought, an independent contractor relationship exists."[5] Thus, merely because Goodman or Cell would exhort the salesmen to see more accounts, or would recommend a good method to show the line, the salesmen's status as independent contractors is not necessarily vitiated.[6] Both Joyce and its salesmen have a mutually beneficial relationship which is directed toward a common goal: selling.[7]

[3] *Pure Seal Dairy Company*, 135 NLRB 76, 79 (1962)

[4] *N L R B v United Insurance Co*, 390 U S 254, 256, reversing 371 F 2d 316 (C A 7, 1966), denying enforcement 154 NLRB 38 (1965)

[5] *Gold Medal Baking Co, Inc*, 199 NLRB 895, 896 (1972)

[6] *SIDA of Hawaii, Inc v N L R B*, 512 F 2d 354, 357 (C A 9, 1975), denying enforcement 205 NLRB 734 (1973).

[7] *Las Vegas Sun, Inc*, 219 NLRB 889, 891 (1975)

The Board applied these rules in *Hunt & Mottet Company*,[8] and held the commission salesmen involved there to be independent contractors. The facts in *Hunt & Mottet* are very similar to the present case, for in both cases salesmen were not paid on a salary basis, had paid their own expenses, and did not have taxes and social security deducted from their periodic commission checks. Nor were salesmen in both cases prohibited from carrying other lines, or from engaging in other business activities, or from hiring employees to help them. Furthermore, salesmen for Joyce have the sole right to determine when and where they will see their accounts, which are serviced at their discretion. The salesmen decide which samples will be shown and in what manner. There is no day-to-day control over the salesmen such as we would find in an employer-employee relationship. Although various union exhibits show much correspondence between the Employer and certain salesmen, which the Union relies on to show control by Goodman and Cell, they merely illustrate the basic nature of the relationship; i.e., Joyce loses when its salesmen lose business and *vice versa.* Therefore, it is in the interest of Joyce *and* its salesmen for Goodman to concern himself with the volume of sales. Furthermore, Joyce's manufacturing requirements are gauged by being informed of the progress its line is having in the different territories

In addition to the lack of control exercised by Joyce as to the manner and means of selling by its salesmen, we also note our prior decision in *Bambury Fashions.*[9] Although the holding of *Bambury* was that NAWCAS, which had been associated with District 65, was disqualified to act as a labor organization, the Board also specifically ruled that "traveling salesmen who participate in NAWCAS trade shows are independent contractors." [10] The Board found that, under the then existing standard NAWCAS contract and "the practice thereunder," salesmen were granted the right to control the means of their livelihood. Although the standard NAWCAS contract is in disuse, the last contract was based on the NAWCAS model. In addition, salesmen still attend NAWCAS-sponsored trade shows.

Accordingly, we conclude that all of the straight commission salesmen, who constitute the unit involved herein, are independent contractors. Therefore, we shall clarify the unit in this case to exclude all straight commission salesmen who perform work for Joyce.

ORDER

It is hereby ordered that the unit herein be, and it hereby is, clarified to exclude all individuals performing the work of straight commission salesmen for Joyce Sportswear Company, who had heretofore been represented by District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America.[11]

MEMBER FANNING, dissenting:

I disagree with my colleagues' conclusion that salesmen working for Joyce are independent contractors. I find them to be employees essentially for two reasons· First, the Employer has the right to and does in fact exercise considerable control over the manner in which each salesman does his job. Second, and more importantly, the Employer has recognized District 65 since 1969, and executed its first collective-bargaining agreement with the Union in 1971.

From the evidence at the hearing, particularly the testimony of salesmen Phil Silverman, Jack Cohen, and Don Wilk, and from the myriad of exhibits placed into evidence, notably the correspondence between Joyce and its salesmen, it is apparent that both Goodman and Cell exhort, criticize, and direct their salesmen to sell not only more but to sell in a manner determined by Joyce. Goodman and Cell jointly determine Joyce sales policy. Through frequent communication by telephone or letter, they insist that their salesmen sell the Joyce line the Joyce way. The Employer would have us believe that it is merely directing its efforts towards achieving a greater sales volume. Even if that were the case, there is a fine line between mere exhortation to achieve a better result, and interference, such as only an employer can exercise over an employee over the manner in which the result is achieved. In this case, the Employer has crossed that line; it cannot now claim that its salesmen are independent contractors.

More important than the above considerations, however, is the obvious fact that the Employer has in every respect recognized and bargained with its salesmen for 6 years as employees. To this date, the Employer recognizes the Union, and until September 1975, both parties lived under a collective-bargaining agreement This agreement was in full force and effect at the time Joyce filed the unit clarification petition herein.

The Employer has produced no evidence to prove that its method of operations has changed in any way

[8] 206 NLRB 285 (1973)

[9] 179 NLRB 447 (1969)

[10] *Id* at 450, see *R & M Kaufmann* v *N L R B*, 471 F 2d 301, 302 (C A 7, 1972), denying enforcement 192 NLRB 49 (1971)

[11] On September 8 1976, Joyce filed a motion to consolidate this case with *Melcher & Landau, Inc*, Case 13–RC–14045 District 65 and Melcher & Landau, Inc, filed separate responses to Joyce's motion Inasmuch as each case presents facts too dissimilar to warrant consolidation, and since Melcher does not support Joyce's motion, the motion to consolidate is hereby denied

since 1969, nor has it shown that its salesmen's duties differ or that its product has changed. In reality, Joyce is asking the Board to reverse a bargaining history between itself and District 65 which it now finds inconvenient. Through the artifice of citing *Bambury Fashions, supra,* as support, the Employer hoped, not without reason it seems, that the Board would accord precedence to a wholly distinguishable decision. *Bambury* held that NAWCAS is disqualified from acting as a labor organization. In the case at bar, we are not dealing with salesmen who are either full members of NAWCAS or who operate under a NAWCAS-approved contract. That is all we decided in *Bambury,* and no more.

In short, then, we have a situation where an employer has decided to attempt to decertify a union via the unit clarification route based on specious precedent. Neither the bargaining history of the relationship herein nor the peculiar facts of the relationship warrant upsetting the present scope of the unit. I therefore dissent.