

**Fort Wayne Newspapers, Inc. and Local Union 19,
Subordinate to the International Printing and
Graphic Communications Union, AFL-CIO-
CLC, Petitioner. Case 25-RC-7759**

August 31, 1982

DECISION ON REVIEW AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER

On November 27, 1981, the Acting Regional Director for Region 25 issued a Decision and Direction of Election in the above-entitled proceeding in which he directed an election in a unit of all single-copy route distributors at the Employer's Fort Wayne, Indiana, facility.¹ Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Acting Regional Director's decision, contending that the Acting Regional Director erred in failing to find that the single-copy route distributors are independent contractors and not employees within the meaning of Section 2(3) of the Act or, alternatively, that the distributors are supervisors or managerial employees and that in any case the petition should be dismissed.

By telegraphic order dated December 29, 1981, the National Labor Relations Board granted the Employer's request for review. Thereafter, the Petitioner filed a brief on review.

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 entire record in this case, including the brief of the Petitioner, and makes the following findings:

Fort Wayne Newspapers, Inc.,² is engaged in the publication and distribution of a morning and Sunday newspaper known as the *Journal Gazette* and an afternoon newspaper known as the *News Sentinel*.

The unit sought herein consists of approximately 15 single-copy route distributors.³ Each of these individuals has entered into a contract with the Company called the "Newspaper Single-Copy Distribution Agreement." According to the terms of the contract the distributor is responsible for delivering papers to dealers such as newsstands and drug-

stores and to coin-operated newsracks. The Company retains the right under the contract to assign distributors to a particular route and to change the route at any time as well as to add or subtract dealers and racks. The contract specifically states that "the Contractor has no 'ownership' rights in the route." The contract is also terminable by either party upon notice within a negotiated number of days.

Each distributor's contract with the Company sets forth a sum of money to be paid to the distributor weekly. This sum is arrived at through negotiation, considering the amount of time reasonably needed to complete a route, the distance traveled, and the number of newspapers delivered.⁴ In addition to this sum, distributors earn a profit from the sale of papers from the newsracks. Each distributor determines how many papers are placed in each rack. The Company bills the distributors weekly or biweekly at 20-1/2 cents per copy, and customers pay 25 cents per copy. All of the money deposited in the racks by customers is kept by the distributors, who make no accounting therefor to the Company. The distributors may return unsold papers to the Company for credit, but they absorb any losses from theft. Papers delivered to dealers, however, are not bought and sold by the distributors. Every day, each distributor receives a set of computer tickets which tell how many papers should be delivered to each dealer. The dealers pay the Company directly for these papers. The Company provides financial record forms to the distributors free of charge, but it does not require distributors to submit any records.

In order to perform their duties, distributors purchase, maintain, and insure their own vehicles, which bear an insignia identifying them with the Company. Indeed, under the terms of the contract, distributors agree to hold the Newspaper harmless from any liability incurred while performing their duties. The Company owns the newsracks and the padlocks that are placed on each of them, and it keeps copies of the padlock keys. The Company also has unilateral control over the location of the racks by virtue of the contract, although there is some evidence that distributors have made minor changes in their placement. The Company's metro

¹ The unit found appropriate excluded "all other individuals having contracts with or employed by the Employer, truck drivers, bundle dropers, professional employees, guards, and supervisors as defined in the Act."

² Herein also referred to as the Employer, the Company, or the Newspaper.

³ Hereinafter referred to as the distributors or contractors.

⁴ Record testimony as to whether losses from theft are also considered in setting the weekly allowance is unclear. According to one distributor, a company official told him that losses from theft were also considered in determining the weekly allowance or the difference between the wholesale and retail prices. However, the Company's metro circulation manager testified that losses from theft are not considered in setting the weekly allowance, except perhaps in those instances when routes have unusually large losses, but in any event the difference between the wholesale and retail prices left distributors with "more than enough to absorb the loss."

circulation manager testified that a distributor would not be required to service a rack that was losing money. One distributor testified that an unprofitable rack was dropped by mutual agreement, but another testified that the Company refused his request to drop several such racks.

The distributors regularly are required to insert advertising supplements and other special sections into each newspaper. They also must attach advertisements to the newsracks. The Company is responsible for maintaining and repairing the racks, but distributors sometimes perform minor repairs themselves. Distributors receive no specific additional compensation for these services.

Many distributors employ helpers and substitutes. All decisions regarding the hiring, firing, and compensation of helpers and substitutes are made by the distributors. Although some distributors inform the Company when a new helper or substitute is hired, they are not required to do so, and the Company does not in any way interfere with the relationship between distributors and the helpers and substitutes.

The Company withholds no taxes and pays neither social security nor workmen's compensation for the distributors. There are no paid vacations or holidays, pensions, or insurance benefits.

The Newspaper does not impose deadlines for the delivery of papers to racks or dealers. The contract only calls for delivery "as soon as possible after delivery of the newspaper to the Contractor by the Company each day." Although the Company has established a loading order for the pickup of papers by distributors at its facility, distributors are not penalized for lateness. Also, there is no requirement that the distributors follow a specific route. Complaints from dealers or newsrack customers regarding lateness are made to the Company, not to the distributors. Newspaper officials relay these complaints to the distributors, but the distributors are not disciplined or required to make any changes to accommodate the complaining customer.

The Company does not prohibit the distributors from holding other jobs. Two of the routes are operated by a small family corporation which owns several vehicles and performs work for entities other than the Newspaper.

The distributors' day-to-day performance is not regularly supervised or monitored by the Newspaper.⁵ When the Newspaper's officials become

aware that a distributor is engaging in conduct that violates the terms of the contract or that is otherwise undesirable, they discuss the problem with the distributor and ask him or her to correct the problem. The only adverse action that the Company can take against a distributor is termination of the contract, and there is no evidence that the Company has ever done so.

In determining the status of persons alleged to be independent contractors, the Board applies a "right of control" test.⁶ If the person for whom the services are performed retains the right to control the manner and means by which the results are to be accomplished, the person who performs the services is an employee. If only the results are controlled, the person who performs the services is an independent contractor.

As is typical in cases of this kind, there are factors present here which support the positions of both parties as to the distributors' status. Thus, the Company controls the wholesale and retail prices of the papers sold from newsracks, provides no opportunity for profit in the delivery of papers to dealers, can terminate the contracts at will, minimizes entrepreneurial risks by allowing distributors to return unsold papers for credit, owns and determines the location of the racks, and grants no proprietary interest in the routes, all of which suggests an employee-employer relationship. However, in our view, these factors are outweighed by the evidence demonstrating independent contractor status. Thus, the distributors unilaterally decide whether to hire helpers and substitutes, set all terms and conditions of employment of the helpers and substitutes, and decide who will be hired. The Newspaper does not train, supervise, discipline, or monitor distributors or their helpers and substitutes. The contracts refer to the distributors as contractors and require them to carry insurance and hold the Company harmless from liability incurred by them while performing their duties. The Company makes no deductions for social security or income taxes and provides no fringe benefits. No financial records are submitted to the Company. Distributors are permitted to, and in fact do, hold outside jobs. Distributors can maximize their profits by deciding how many papers to buy from the Company and how many papers to place in each rack. They alone are responsible for providing and maintaining the vehicles used to deliver the Company's product.

Thus, it is clear that a distributor's income is, to a large extent, based on the difference between the

⁵ One distributor testified that a company supervisor accompanied him while servicing his route one day shortly before the hearing in the instant case in order to evaluate his performance. The Newspaper's metro circulation manager testified that the supervisor rode with the distributor only to examine the condition of the Newspaper's newsracks, and that only three such incidents have occurred.

⁶ *The Herald Star, Canton Division, Thomson Newspapers Inc.*, 227 NLRB 505, 507 (1976); *El Mundo, Inc.*, 167 NLRB 760, 761 (1967).

price at which he sells the papers, less the price he pays the Company for the papers and the labor and operating expenses incurred.⁷ Although a distributor does not have a proprietary interest in the route, he makes a substantial investment in its operation by buying and maintaining delivery vehicles. Furthermore, as shown above, it is the distributor who makes the essential business decisions involved in serving the route.

Accordingly, we find that the distributors are not "employees" within the meaning of the Act, but are independent contractors who control the manner and means of performing their tasks.⁸ The limited control exercised by the Newspaper is directed solely toward accomplishing the ultimate goal; i.e., the delivery of papers to dealers and the sale of newspapers to the general public.

As we have concluded that the distributors sought herein are independent contractors, we shall dismiss the petition.⁹

ORDER

It is hereby ordered that the petition herein be, and it hereby is, dismissed.

MEMBER JENKINS, dissenting:

In the first case of which I am aware in which the Board had before it the question of the "employee" status of contract drivers who deliver newspapers exclusively to retail outlets and coin-operated newsracks, it found them to be employees. *San Antonio Light Division, The Hearst Corporation*, 167 NLRB 689 (1967), reaffirmed at 174 NLRB 934 (1969). However, in *Donrey, Inc., d/b/a Las Vegas Review-Journal*, 223 NLRB 744, another panel of the Board purported to distinguish the drivers sought there from those in *San Antonio Light* on the ground that the *Donrey* drivers had some opportunity to negotiate the price per copy

they paid the newspaper company. In the instant case, on facts that are almost identical with those in *San Antonio Light*, but, if anything, are more compelling of an "employee" finding, the majority goes well beyond *Donrey* and holds, in effect, that contract drivers who deliver newspapers to retail outlets and vending racks are excluded from the Act's protection no matter how limited their opportunity for entrepreneurial discretion.

With respect to deliveries made to retail outlets, apparently a significant part of the job of the "distributors," they simply are given a quantity of newspapers determined by the Employer and paid to deliver them. The distributors can do nothing to increase the income they receive for this except to bargain with the Employer for more pay. Nominally, the distributors receive a "profit" from their deliveries to newsracks. However, the newsracks are owned and controlled by the Newspaper, and the "profit" margin is determined by the Newspaper. The only decision the distributors can make is how many copies to place in the racks. A decision to place more copies involves little risk to the distributors, since they may return unsold copies for credit. Distributors may not eliminate deliveries to any racks without permission from the Newspaper, which is not routinely given, thus limiting their discretion to accept fewer copies.

In short, the distributors are drivers who get paid whatever the Newspaper agrees to pay, for doing whatever the Newspaper tells them to do. And the slight opportunity for discretion in "purchasing" newspapers for vending machines affects not at all the distributors' status with respect to their deliveries to retail outlets. The proclaimed differences between the relationship of an employer and its avowed employee-drivers, on the one hand, and the relationship of the Newspaper and its "singly copy route distributors" on the other, are as transparent as the emperor's new clothes. I would adhere to *San Antonio Light* and affirm the Regional Director's finding that these drivers are employees. Accord: *Herald Star, Canton Division, Thomson Newspapers, Inc.*, 227 NLRB 505 (1976).

⁷ See *Las Vegas Sun, Inc.*, 219 NLRB 889, 891 (1975).

⁸ *Donrey, Inc., d/b/a Las Vegas Review-Journal*, 223 NLRB 744 (1976); *Las Vegas Sun, supra*.

⁹ Having found that the distributors are independent contractors, we need not address the Company's alternative contentions that the distributors are supervisors or managerial employees.