

Twin Coast Newspapers, Inc. d/b/a Long Beach Press-Telegram and Los Angeles Newspaper Guild, Local 69, AFL-CIO, Petitioner. Case 21-UC-337

October 11, 1991

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On August 31, 1989, the Acting Regional Director for Region 21, issued a Decision and Clarification of Bargaining Unit in the above-entitled proceeding, in which he found that the area managers and district advisors employed in the Employer's home delivery department are not managerial employees, nor are they statutory supervisors of the Employer's newspaper carriers. The Acting Regional Director further found that the carriers are independent contractors, that the area managers are not supervisors of the district advisors, but that the photo editor and regional editor are statutory supervisors and, therefore, excluded from the bargaining unit.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's decision on the managerial and supervisory issues with respect to the area managers and district advisors, and the independent contractor issue. The Board, by Order dated March 25, 1991, granted the Employer's request for review, solely with respect to the managerial status of the area managers and district advisors.¹

The Board has considered the decision and the entire record in this case in light of the Employer's contentions and the parties' briefs, and has decided to affirm and adopt the Acting Regional Director's Decision and Clarification of Bargaining Unit, for the reasons set forth therein.

The Acting Regional Director's decision (relevant portions of which are attached as an appendix) finds that the duties and responsibilities of the area managers and the district advisors are either subjected to independent investigation by their superiors, or performed within a narrow framework of established company policy from which they have no authority to deviate. Significantly, as detailed in the decision, there is no evidence that, in performing their various duties and responsibilities, these employees have the authority substantially to affect the economic terms of employ-

¹ The Board, however, did not reach the issue of whether the area managers and district advisors are statutory supervisors of the carriers as it denied review of the Acting Regional Director's finding that the carriers are independent contractors. Member Oviatt, dissenting in part, also would have granted review as to the Acting Regional Director's finding that the carriers are independent contractors.

ment of the carriers. Thus, unlike the county district supervisors in *Eugene Register Guard*,² the Employer's area managers and district advisors do not negotiate the *terms* of carrier contracts or determine the number of carrier positions to be filled; do not independently determine if and when routes should be split or consolidated or extend credit to carriers; and although they can recommend that a carrier's compensation be increased, such recommendations are not accepted routinely but are independently reviewed by their superiors. We also note that the area managers and district advisors play no role in collections, as the Employer does its own billing; nor do they establish the rates at which carriers purchase papers, as the carriers do not buy and resell the Employer's papers. Thus, the Board agrees with the Acting Regional Director that the area managers and district advisors do not formulate or develop the Employer's policies or effectuate them with sufficient independent judgment or discretion in performing their duties and, therefore, they are not managerial employees.

ORDER

The National Labor Relations Board adopts the Decision and Clarification of Bargaining Unit of the Acting Regional Director.

² 237 NLRB 205 (1978).

APPENDIX

Area Managers and District Advisors

The Employer is engaged in the business of publishing a daily newspaper in Long Beach, California. It provides home delivery to subscribers as part of its operation. This function is the responsibility of the home delivery department within the circulation department.

The Employer's home delivery department is structured in a highly stratified manner to ensure timely newspaper delivery. Thus, a home delivery manager, Jack Borland, is in charge of the department. His supervisor is Patrick Elster, vice-president-circulation. Three regional home delivery managers (RHDs herein), with responsibility over geographic areas, report to Borland. The newspaper delivery area is further divided into seven "areas," each of which has an area manager ("AMs"); these managers report to one of the RHDs with responsibility over the particular area. The areas are further divided into districts, each of which is to have a district advisor ("DA"). The smallest distribution unit, each of which is part of a district, is the route. Actual newspaper delivery within these routes is the primary responsibility of the approximately 400-430 carriers or distributors. There are seven "satellite" offices which AMs and DAs operate out of and where carriers pick up the newspapers for delivery.

The present structure was instituted in early 1983. In a process it referred to as "a.m. conversion," the Employer discontinued afternoon home delivery and restructured its distribution system. Prior to conversion, the responsibility for overseeing carrier delivery rested with the district managers.

Preexisting district boundaries were realigned after conversion and the seven "areas" were superimposed over districts. The new classifications of area manager and district advisor were created in connection with this reorganization. In addition to that of district manager, the relief district manager classification was abandoned. Also, as a result of conversion, the number of full-time positions was decreased, with AMs the only positions to remain on this basis. Individuals who worked as full-time district managers, however, did not suffer any reduction of hours or benefits, as the number of full-time positions was actually reduced by attrition. Former district managers were gradually assimilated into the new positions, either becoming AMs or DAs. Since the DA positions are to be filled by employees working less than 40 hours per week, the full-time DAs are sometimes referred to as "area managers in waiting." Final boundary adjustments were made in the summer of 1987, at which time the Union and the Employer agreed to a one-time bidding process to allow AMs and DAs affected by the reorganization to bid for areas and districts of their choice.

Distribution of the newspaper is performed by the carriers, who are signed to a "Newspaper Distribution Agreement" with the Employer. By entering into such agreement, they agree to deliver promptly to each subscriber a complete newspaper in a dry condition and in a convenient and proper place; not to stamp upon, insert within, or attach to copies of the newspaper any material not furnished by the Employer; to pay a security deposit; to hold the Employer harmless from any liabilities, claims, costs, taxes, or expenses incidental to and arising out of the delivery and sale of the newspapers; to provide workmen's compensation insurance for the benefit of its employees; to maintain adequate automotive insurance; to pay all payroll taxes, and all other state and federal employee contributions that are measured by compensation paid by the distributor; to file its own tax returns on the basis of his/her status as an independent contractor and to reimburse the Employer for any and all taxes, payments or contributions it may be required by law to pay on the distributor's behalf; and, to provide any pay for a satisfactory substitute whenever it is unable to fulfill the terms of the agreement. The Employer, in turn, agrees to suggest and give advice and assistance concerning matters of promotion, sale, distribution, collection, and subscriber service. Both parties agree, as stated in paragraph 1 of Section C, that:

1. The Distributor is a self-employed independent contractor, not an employee, for federal tax purposes. The manner and means to be employed by the Distributor in the operation of his/her business are matters entirely within the Distributor's authority and discretion. The Distributor is free to engage in other business activities, including the delivery or sale of other publications or products, so long as such other business activities do not interfere with the performance of this agreement or violate the provisions of paragraph A.4 or A.6 above. The Distributor will be responsible for all costs of conducting and operating his/her business and will comply with all applicable laws.

Portions of the Agreement have become obsolete due to changes in the Employer's operations, namely, those that

pertain to the manner of carrier compensation and customer billing.

Carrier compensation is based on a formula which seeks to guarantee the equivalent of a \$4.30/hr. wage rate. A Route Profit Analysis is prepared by an AM or a DA, usually when the route "turns over," for the approval of the RHDM. A "profit" is calculated based on the number of newspapers expected to be delivered. Expenses, i.e., supply charges, distribution copy, and auto expenses, are subtracted to arrive at a net profit. If this net figure is less than the equivalent of \$4.30/hr, a "subsidy" is added. The subsidy is given, and on occasion increased, in order to make the route sufficiently profitable for a carrier to take. An AM or a DA can recommend that this subsidy be increased. This recommendation, however, is closely scrutinized by the RHDM who conducts his own independent investigation to determine if the increase is warranted; the RHDM must also decide if the particular subsidy is appropriate in light of overall budgetary considerations. The home delivery manager further reviews the recommendation, observing maps of the route in question, talking to the RHDM as necessary, and touring the route if desired. No withholdings are made from the payments to the carriers, which are listed in year-end tax forms as "direct sales . . . to a buyer (recipient) for resale." Carriers receive no other company compensation or fringe benefit.

All billing is done by the Employer by mail. Carriers are not charged for subscriber delinquencies. They are not expected to solicit new subscribers, but if they are responsible for a "new start," distributors receive the premium, or "finder's fee," any other person responsible for a new start receives.

Carriers are free to choose the manner in which they will deliver the papers. They own their automobiles and carry their own insurance. They can hire employees or use others to help them make deliveries. Distributors can allow another person to substitute for them, but these substitutes must be acceptable to the Employer; if substitutes perform the work, carriers still receive the payment. Although the Employer provides a detailed route list, it is up to the carrier to follow or disregard the order of distribution contained in the list. Carriers can choose to place the newspapers in bags even though not required by the Employer. They can also place the inserts in the newspapers at the satellite facility or in their cars. Subscribers can make special service requests to the Employer; carriers can contact the customer to make their own arrangements regarding delivery of the newspaper. Carriers are free to deliver other newspapers as long as it does not interfere with the delivery of the Employer's newspaper.

Carriers work the route(s) they have been contracted to work. They cannot buy, sell, or otherwise transfer their route(s). The Distribution Agreement provides that the rights and obligations under the agreement may be assigned subject to the Employer's approval, which cannot be unreasonably withheld. Distributors cannot split or consolidate routes.

Carriers must report to the satellite office to pick up the newspapers. There is no companywide arrival time, although all papers must be delivered by a specified time. If delivery problems have occurred, the DAs, AMs, or RHDMs can set the arrival time for carriers within the particular area. They are not required to return to the office at the completion of the route(s).

Customer service representatives are available at the Employer's headquarters to answer delivery complaints from subscribers. These complaints are relayed to the field offices. Replacement newspapers are then generally delivered by complaint carriers or by AMS or DAs, who also are the ones who communicate with subscribers about the complaints. Carriers cannot bypass this complaint-handling system, although at times they speak to subscribers about the complaints. The Employer deducts 25 cents per missed newspaper from the carrier's compensation.

The Employer sets certain standards and implements various policies intended to ensure timely and satisfactory delivery. Thus, delivery must be completed by 6 a.m. on weekdays and 7 a.m. on weekends. Newspapers are to be bagged if there is a 20 percent chance of rain. To keep down the number of complaints, "minimum service requirements," measured in terms of number of complaints per thousand deliveries, are set for various delivery areas.

In the Employer's highly stratified delivery system, the DAs and AMs have initial responsibility for ensuring that the Company's policies are followed and that the newspaper is properly delivered. Although organizationally one echelon higher than the DAs, the AMs perform essentially the same tasks as the DAs. They are each responsible for servicing certain geographic areas. In some areas, there are "open" districts, i.e., districts without a DA, which are covered by other DAs, the AM, or both. Area managers regularly substitute for DAs on their days off and, conversely, the DAs act as AMs on their days off. They all start work at the satellite stations during the early morning hours and prepare to receive the carriers, i.e., they help unload newspapers and distribute mail. Once the carriers start arriving, DAs and AMs communicate delivery instructions if necessary, answer questions, and help prepare the newspaper. If necessary, both AMs and DAs deliver the newspaper in "down" routes, namely those for which a carrier or substitute are not available on any given day. The DAs and AMs also regularly deliver "complaint," or missed, copies, especially in areas where the classification whose primary function is to deliver them, complaint carrier, is nonexistent. They also respond to customer complaints.

The AMs' and DAs' performance is judged by how well they uphold company service standards, particularly the "minimum service requirement." In monthly written performance evaluations, which are prepared by the RHDMs for each AM and DA, problems are pointed out, e.g., below-standard delivery levels, and potential causes for these problems are noted, e.g., weak substitutes, "doubled up" routes, leaving it to the AM or DA to investigate the actual causes and to take steps to improve delivery in the area or district. On some occasions the RHDM requires that a plan of action be prepared. In some instances, discipline, or the threat of discipline is conveyed by memoranda for the failure to maintain desired performance levels.

Area managers and DAs can also take steps on their own to improve delivery and to maintain good numbers. In addition to companywide bonuses or other incentives, money is given to them, based on the number of carriers in their areas, so that contests can be arranged to motivate carriers to perform better. Area managers and DAs must participate in these programs, but they can devise their particular contests generally based on "minimum service requirements" num-

bers. The RHDMs often provide suggestions and other input into the contest process. Area managers and DAs can also elect to "bag" newspaper in situations where the chance of rain is less than the companywide 20 percent.

The record evidence does not establish that either AMs or DAs have the authority to split or consolidate routes. On one occasion, Area Manager Violet Moea'i testified, a DA came to her and complained that the route was too difficult for one carrier. She spoke with the carrier and agreed with the need to split the route, something she did without checking with her RHDM. A DA, Lisa Begley, testified that she split a route on her own, only showing the end result to her AM to ask him if it had been done right. Several other witnesses, however, testified that DAs and AMs did not have the authority to independently split or consolidate routes. The Employer has not communicated to the employees whether they have such authority. On the contrary, the vice president of circulation, whose responsibility includes home delivery, testified that he split or consolidation of routes was something for the AM and DA to work out with the RHDMs.

Area managers and district advisors possess similar authority over carriers. Once they receive completed applications from the personnel office, they interview prospective carriers. If the individual has an acceptable vehicle and is agreeable to the terms of the contract, a Distributor Agreement is signed by the carrier and the DA or AM, subject to the further signature of the home delivery manager. The latter signature is routinely affixed to the contract in most cases without any independent or additional inquiry into the distributor's qualifications. Carriers are in regular contact with the AMs and DAs and receive work instructions from them. These instructions generally embody company policy regarding delivery of the newspapers. The penalty for disobedience is termination. Warnings or counseling can precede the termination, but the Employer has no formal warning system that applies to distributors. The decision to warn or terminate is made by the AM or DA without the need to obtain prior approval from anyone else. The amount of time carriers and AMs or DAs spend talking to each other is relatively small, an average of 5 minutes per day.

Area managers and DAs train new carriers, a task which is sometimes performed by the prior carrier, and which generally consists of showing him the new route. Spot checks are later made to see if the new carrier has learned the route. Checks are also made in instances where there have been numerous complaints about a particular distributor. An area manager testified that he also follows carriers on some occasions if he is concerned about their personal safety.

Compliance with company policies is closely monitored by the RHDMs and the home delivery manager. Service statistics are constantly reviewed. As noted above, performance reviews are used to point out specific deficiencies and to offer specific suggestions or directions, as well as to praise good service. Regional home delivery managers are in daily contact with the field offices, either visiting them or providing them with written messages. The written communications range from those dealing with specific customer complaints to those stating general company policy. Field employees are also frequently provided with annotated statistical summaries of their performance. Each day, usually after the RHDMs have visited the stations within their region, the home deliv-

ery manager meets with the RHDMs to discuss the delivery operation.

The Employer initially argues that AMs and DAs are managerial employees and that, therefore, they should be excluded from the unit. The Board defines managerial employees as those who make and implement significant management policy and those who have discretion in important matters independent of established policy. *Eugene Register Guard*, 237 NLRB 205, 206 (1978). The Employer relies on several factors it argues demonstrate the existence of managerial status, including the authority to hire and fire carriers; the ability to enter into and cancel contracts; the ability to split or consolidate routes; the ability to make suggestions to improve the quality of customer service; the ability to set distribution policy, i.e., bagging and porching; and the authority to develop contests. The record reveals, however, that the above and similar actions of the AMs and DAs are either subjected to independent investigation by their superiors, or made within a narrow framework of allowable company policy. They have no authority to deviate from established pol-

icy. Their superiors issue memoranda and other written directives encompassing virtually every item over which the AMs and DAs are to exercise discretion, closely oversee the implementation, and review the results in a very systematic and regular fashion. I therefore find that the employees in question do not make or implement significant policy or have discretion in important matters of established policy as required by the Board in order for them to be managers. *Sampson Steel and Supply, Inc.*, 289 NLRB 481, 482 (1988); *The Washington Post Co.*, 254 NLRB 168, 181-183 (1981). Cf. *Eugene Register Guard*, supra, in which the county district supervisors at issue had authority not only to contract and terminate carriers, but also to establish independently the number of such positions which would exist, the boundaries and number of routes, and the size of the carriers' commissions. The fact that AMs and DAs enter into contracts with the carriers is not sufficient to alter the foregoing conclusion, as they do not negotiate the terms of the contracts, which contracts must also be signed by their superiors. *Trial Management Corp.*, 287 NLRB 1239 (1988).