The Arizona Republic, a Division of Phoenix Newspapers, Inc. *and* Graphic and Communications International Union, Local 58-M, AFL–CIO. Case 28–RC–6304

May 8, 2007

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 23, 2004, the Regional Director for Region 28 issued a Decision and Direction of Election, finding that newspaper carriers were statutory employees—not independent contractors—and directing an election in the petitioned-for carrier unit.

The Employer filed a request for review, arguing that the petition should have been dismissed because its newspaper carriers are independent contractors. The Petitioner filed a brief in opposition to the Employer's request for review, arguing that the Regional Director correctly found the carriers to be employees.

On October 22, 2004, the Board granted the Employer's request for review. On August 27, 2005, the Board issued its Decision and Order in *St. Joseph News-Press*, 345 NLRB 474 (2005) (*News-Press*), finding that the company's newspaper carriers and haulers were independent contractors rather than statutory employees. That same day, the Board remanded this case to the Regional Director for further consideration in light of its decision in *News-Press*.

On November 3, 2005, the Regional Director issued his Supplemental Decision, finding that the facts in *News-Press* were significantly different from those in this case, and thus adhering to his original determination that the newspaper carriers are statutory employees within the meaning of Section 2(3) of the Act. The Employer requested review of this supplemental decision, and the Petitioner filed an opposition.

On January 18, 2006, the Board granted the Employer's request for review of the Regional Director's Supplemental Decision.[1] The Petitioner filed a Brief on Review in Support of the Regional Director's Supplemental Decision. An amicus brief was filed by Cal-Western Circulation Managers Association, Northwest International Circulation Executives, Media News, Inc. Lee Enterprises, Inc., Santa Cruz Sentinel, Stephens Media Group, The Columbian, The Register-Guard, Swift Newspapers, Inc. and Wilson Gregory Agency, Inc.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] Member Liebman, dissenting, would have denied the Employer's request for review of the Regional Director's Supplemental Decision.

The issue in this case is whether the Regional Director erred in finding, on remand, that the Employer's newspaper carriers were statutory employees, and not independent contractors. We have carefully reviewed the record, including the brief on review and the amicus brief, and find, contrary to the Regional Director, that under the standards of *News-Press*, the Employer's newspaper carriers are not employees, but rather are independent contractors excluded from the protection of the Act.[2]

I. FACTUAL BACKGROUND

The Employer publishes daily and Sunday editions of the The Arizona Republic (The Republic). Each day, the Employer uses approximately 1260 carriers on 1800 routes to deliver The Republic to subscribers throughout the Phoenix metropolitan area.[3] Depending on the season and the day of the week, metro home delivery could include anywhere from 290,000 to 395,000 subscribers. In addition to The Republic, the Employer uses its carriers to distribute seven other publications: The New York Times, The Wall Street Journal, Investor's Business Daily, Financial Times, USA Today, La Voz, and Baron's.

The Employer operates nine distribution centers, which are large warehouses where carriers pick up the newspapers before going out on their delivery routes. Each distribution center is managed by one area operations manager. Under the area operations manager, there are 4 or 5 district managers, each of whom manages between 35 and 60 carriers. The district managers are responsible for contracting with carriers and ensuring that they satisfactorily perform their obligations. District managers also supervise district service assistants (DSAs) and field service representatives (FSRs). DSAs deliver routes if no carrier is available, assemble papers, complete administrative tasks, check carrier service, and talk to carriers about delivery issues. FSRs primarily redeliver missing or damaged papers and collect payments from subscribers. Area operations managers, district managers, DSAs, and FSRs are all employees of the Employer.

Before becoming a carrier, an individual must submit an application, proof of insurance and driver's license, and a motor vehicle report from the State Department of Motor Vehicles. Thereafter, the individual and the district manager sign an "Independent Contractor Agree-

[2] As discussed below, we find that some of the Regional Director's factual conclusions are not adequately supported by the record.

[3] The Employer also uses approximately 80 "single copy" carriers to deliver to stores and newspaper racks statewide, and 245 "state home delivery" carriers to deliver to subscribers outside of the Phoenix metropolitan area. Those carriers are not the subject of this petition.

ment." Some carriers contract in corporate or business names, and approximately 363 carriers hold contracts on multiple routes. Carriers must put down a nonnegotiable $300 security deposit, and are prohibited from displaying Employer logos or insignia. Either the carrier or the Employer can terminate the contract for any reason upon 30-days notice, and can immediately terminate the contract upon the other party's material breach. New carriers usually learn their routes by riding with a district manager, but can also learn by riding with the carrier who previously delivered the route.

District managers communicate with their carriers via written memos, dry-erase boards, and "Soft Books," which are small read-only computers. The Employer rents the Soft Books to the carriers for $1.50 per week, and carriers must have one Soft Book for each route. Each night, carriers download route information into their Soft Books, either over their home phone line or at downloading facilities located in each distribution center. This information includes subscription starts and stops, subscriber special requests, and delivery sequence.

Distribution centers open at 1 a.m. Monday through Saturday, and at 11 p.m. Saturday night for preparation of the large Sunday paper. Most sections of the paper are pre-run and delivered to the distribution center before the carriers arrive. Warehouse employees then place the appropriate number of "pre-run" sections on each route table. The front pages, or "heads," then arrive by truck at around 2:30 a.m. Depending on the distribution center and the season, there may be a second truckload of heads that arrives 45–60 minutes later.

Carriers arrive at the distribution center sometime between 2 and 3:30 a.m., depending on whether they are assigned to the first or second delivery truck. If the carrier arrives at the distribution center before the delivery truck, he or she can go to the assigned route table and begin assembling the pre-run parts of the paper.

After the truck arrives and the carrier has received the heads, the carrier is free to assemble the papers at the route table, at home, in a vehicle while delivering the route, or in another location of the carrier's choice. On most days, carriers may choose to either place the newspapers in plastic bags or bind them with a rubber band. If the Employer determines there is a risk of rain, however, it requires that carriers bag the papers. The Employer provides free plastic bags on these "rain days" and on Sundays, when the paper is particularly large and unwieldy. On other days, the carrier must purchase bags or rubber bands.

Once the newspapers are assembled, the actual delivery of a route can take anywhere from 1-1/2 to 2-1/2 hours. Under the contract, carriers must complete delivery to homes by 5:30 a.m. Monday through Friday, 6 a.m. on Saturday, and 6:30 a.m. on Sunday. Carriers must complete delivery to schools by 8 a.m., and must complete delivery to businesses by 9 a.m.

Most carriers occasionally use "helpers" and "substitutes." Helpers assist with assembling the newspapers before the carrier delivers them, and substitutes deliver the carrier's route if the carrier is unavailable. Helpers and substitutes are paid by carriers, not the Employer. Carriers determine what they will pay helpers and substitutes. The parties' contract requires that carriers ensure that substitutes have valid Arizona driver's licenses and vehicle insurance, and the carrier must furnish the Employer with proof of that upon request.

Carriers are paid weekly through the Employer's accounts payable department; all other Employer employees are paid through the payroll department. When paid, carriers receive a statement showing the number of papers delivered and the piece rates for each item. The piece rate for The Republic can range from 10–30 cents per delivery. For delivery of all other papers—such as The Wall Street Journal or USA Today—the piece rate is 10 cents per delivery. Carriers receive 5 cents for each paper delivered to a school, and 2–5 cents for various pieces of advertising included with the paper. A carrier may attempt to negotiate the piece rate for delivering The Republic, but all other rates are nonnegotiable. The carriers' statements also include deductions for Soft Book rentals and any plastic bags or rubber bands purchased from the Employer. A carrier's average income is between $175 and $225 per week for each route. The Employer does not deduct taxes or pay worker's compensation for carriers. Carriers receive no fringe benefits, and at the end of the year they are issued a 1099 form.

II. THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION

On remand, the Regional Director applied the factors set out in *News-Press*, supra, to find that the newspaper carriers are statutory employees within the meaning of Section 2(3) of the Act, and not independent contractors. The Regional Director determined that the facts in *News-Press* were "significantly different" from those in this case, and that all of the *News-Press* factors weighed in favor of finding employee status. Having found that the carriers were employees under the Act, the Regional Director reaffirmed his original conclusion that the petitioned-for unit was appropriate.

III. POSITIONS OF THE PARTIES

In its request for review of the Regional Director's Supplemental Decision, the Employer argues that the Regional Director should have found that the carriers are independent contractors, not employees. The Employer

claims that the facts in *News-Press*—where the Board found carriers to be independent contractors—are nearly identical to the facts in this case. The Employer also asserts that the Regional Director erred in finding the carriers to be like the employees in *Roadway Package System*, 326 NLRB 842 (1998) (*Roadway*), rather than the independent contractors in *Dial-A-Mattress Operating System*, 326 NLRB 884 (1998) (*Dial-A-Mattress*), and by ignoring the newspaper carrier cases decided before *Roadway* and *Dial-A-Mattress*. Finally, the Employer claims that several of the Regional Director's factual findings are erroneous and contrary to the weight of the record as a whole.

In their brief, amici argue that the Regional Director failed to faithfully apply the Board's reasoning in *News-Press*, and thus that the Supplemental Decision must be overturned. Specifically, amici argued that the Regional Director failed to give any weight to the intent of the parties in creating an independent contractor relationship; that the optional accident insurance, and the carriers' ability to contract as a business, are consistent with independent contractor status; and that there was extensive evidence of the carrier's entrepreneurial potential.

In its brief on review in support of the Regional Director's Supplemental Decision, the Petitioner contends that the Regional Director properly applied the common-law criteria of agency and correctly found that the carriers were statutory employees.

IV. LEGAL PRINCIPLES

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The Supreme Court has found that the common-law agency test applies when determining whether an individual is an employee or an independent contractor. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322–323 (1992) (where Congress has used the term "employee" without defining it, it intended that the common-law agency doctrine would apply). See also Restatement (Second) of Agency § 220(2) (setting out standards for analysis under the common law of agency).

In 1998, the Board reconsidered its standards for determining independent contractor and employee status in two companion cases, *Roadway*, supra at 842, and *Dial-A-Mattress*, supra at 884. In both cases, the Board applied the common-law test for an agency to determine whether the companies' delivery drivers were statutory employees or independent contractors. This test, set forth in Restatement (Second) of Agency § 220(2), includes the following factors for determining whether a servant is an independent contractor:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
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> (d) the skill required in the particular occupation;
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> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
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> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

The Board cautioned, however, that this list of factors is not exclusive or exhaustive, and that, in applying the common-law agency test, it will consider "*all* the incidents of the individual's relationship to the employing entity." *Roadway*, supra at 850. See also *Slay Transportation Co.*, 331 NLRB 1292, 1293 (2000). After applying this test, the Board concluded that the drivers in *Roadway* were employees, while the drivers in *Dial-A-Mattress* were independent contractors.

More recently, the Board applied the reasoning in *Roadway* and *Dial-A-Mattress* to conclude that the newspaper carriers in *St. Joseph News-Press*, 345 NLRB 474 (2005), were independent contractors. In making this determination, the Board found that five of the common-law factors weighed in favor of independent contractor status: (1) the company exercised little control over the carriers; (2) the carriers, not the company, provided the tools necessary to perform the work at issue; (3) the carriers had entrepreneurial control over the amount of compensation; (4) the carriers performed their duties with little company supervision; and (5) the parties intended to create an independent contractor relationship. The Board found that four factors weighed in favor of finding that the carriers were employees: (1) the carriers' work was an integral part of the company's business; (2) the work was unskilled, (3) the parties' relationship was for an indefinite period; and (4) the company performed similar—though not identical—work. The Board concluded that, on balance, the factors weighed in favor of finding independent contractor status. The Board also

noted that this finding was consistent with cases decided before *Roadway* and *Dial-A-Mattress*, in which it found newspaper carriers to be independent contractors. See, e.g., *The Evening News*, 308 NLRB 563 (1992); *Thomson Newspapers*, 273 NLRB 350 (1984).

In determining the status of the carriers in this case, we rely on the Board's analysis of the common-law factors as applied to the newspaper carriers in *News-Press*.[4]

V. APPLICATION OF THE *NEWS-PRESS* FACTORS

We find that a comparison of the common-law factors in this case with those factors in *News-Press* demonstrates, on balance, that the Employer's newspaper carriers are independent contractors. Moreover, our finding here is consistent with the pre-*Roadway* cases finding newspaper carriers to be independent contractors.

1. The hiring party's degree of control over details of work

In *News-Press*, the Board found that the company exercised little control over the carriers, and thus that this factor weighed in favor of finding that the carriers were independent contractors. Id. at 478–479. Specifically, the Board found that carriers could change the order of newspaper deliveries, disregard customer's delivery requests without fear of discipline, and refuse to deliver to customers they deemed unlikely to pay or to whom it would not be economically feasible to deliver. Id. We find that the Employer in this case also exercises little control over the manner by which its carriers perform their duties.

Our review of the record indicates that, contrary to the Regional Director's findings, the Employer does not strictly dictate the carriers' delivery sequences. Although the carriers' Soft Books do list the deliveries in a particular order, management representatives testified that carriers can deliver newspapers in whatever order they wish, and that carriers can and do change delivery sequence in their Soft Books simply by notifying their district managers. The carriers testified alternately that they do not follow the sequence in their Soft Books, that they deliver papers in any order they choose, or that they have had their Soft Books resequenced. Thus, the Regional Director's finding that carriers were required to follow the route sequence "strictly as defined in the Employer-issued Soft Book" was in error.

The Regional Director and our dissenting colleague correctly note that, unlike the *News-Press* carriers, the Employer's carriers do not bill customers, extend credit, or collect payments from subscribers. But the Regional Director and our dissenting colleague fail to recognize that the carriers in *News-Press* only billed some of the subscribers, while the majority of subscribers paid the company directly. Id.. For the foregoing reasons, we find that this factor weighs in favor of finding that the carriers are independent contractors.

2. Hiring party's supervision of hired party

In *News-Press*, the Board found that the carriers were not subject to discipline, an employee handbook, or other work rules. Id. at 479. Thus, the Board found that the carriers performed their duties without the company's supervision and that this factor weighed in favor of finding independent contractor status. Id. Here, however, the Regional Director found that the carriers are subject to a "progressive discipline system" for problems with deliveries, and that carriers must adhere to a list of rules applicable to the distribution center and other rules established on an ad-hoc basis. We find that some of the Regional Director's factual conclusions are unsupported by the record, and, consequently, that this factor weighs in favor of finding that the carriers are independent contractors.

Contrary to the Regional Director's findings, the Employer does not subject carriers to a "progressive discipline system" for problems with deliveries. It is true that the Employer relays customer complaints to its carriers, and may follow a carrier on his or her route if complaints are consistent. But the Employer does not take any adverse action against a carrier for failure to adequately perform his or her duties, other than terminating the contract. Indeed, almost all of the witnesses agreed that the Employer did not maintain a discipline system applicable to the carriers. One carrier, however, testified that his district manager would relay complaints either orally or via written forms, and that he believed that carriers would be "officially reprimanded" if they received too many customer complaints. But there was no evidence that any carrier had ever received an "official reprimand" or other discipline short of contract termination. Thus, the overwhelming weight of the testimony establishes that the Employer, in fact, does not have a "formal discipline system" applicable to the carriers.

Moreover, although the carriers are subject to work rules entitled "PNI Safety Standards/Guidelines," we disagree with the Regional Director's characterization of these rules. The safety standards apply to anyone who enters the distribution center, including carriers, employees, and visitors. The rules state, among other things, that no alcohol, drugs, or weapons are allowed on Employer property; smoking, children, and pets are prohib-

[4] We respectfully disagree with our dissenting colleague's argument that the common-law test requires an analysis of the carrier's economic dependence on the newspaper. Rather, as we fully discussed in *News-Press*, a separate analysis of the parties' relative bargaining strength would be contrary to statute, precedent, and the common law.

ited within the distribution center; and that closed-toed shoes and shirts must be worn at all times in the distribution center. The safety standards do contain some carrier-specific rules, such as the rule stating that "[i]ndependent [c]ontractors will only be allowed to pick up their own route" from the head truck, or the rule limiting use of newspaper carts to "one per route." However, these rules—like all of those contained in the safety standards—simply ensure the safe and efficient operation of the distribution center; they do not dictate how the carrier is to perform his or her duties. Moreover, these rules would, presumably, also apply to the carriers' substitutes, who certainly are not the Employer's employees. As such, we do not find that these safety standards indicate that the carriers were more closely supervised than those in *News-Press*.

As our dissenting colleague points out, the Employer's district managers do occasionally follow carriers on their routes. It appears, however, that these service checks are simply an informal means for investigating customer complaints in order to determine whether to terminate the carrier's contract for noncompliance. Contrary to the dissent's implication, the carriers are not converted to employees simply because the Employer ensures that they adequately fulfill their contractual duties, especially when the carriers remain free to perform those duties in any manner they wish.

Therefore, we find that the carriers here—like those in *News-Press*—are not subject to discipline, nor are they bound by work rules other than the Employer's basic safety standards. Accordingly, we find that this factor weighs in favor of a finding that the carriers are independent contractors.

3. Provision of supplies, instrumentalities, and places of work

In *News-Press*, the Board found that this factor weighed in favor of finding independent contractor status, because the carriers owned, controlled, and maintained the vehicle used to perform their duties under the contract. Id. at 474, 479. Here, too, the carriers own, control, and maintain their own vehicles. In addition, the carriers sometimes provide their own plastic bags and rubber bands, and can assemble their newspapers anywhere they wish, such as in their vehicles or at their own homes. As such, we find that this factor weighs in favor of independent contractor status.

In finding that this factor weighed in favor of finding employee status, the Regional Director relied heavily on the fact that the Employer occasionally provided some minor supplies, such as plastic bags and Soft Books. While it is true that the Employer does provide free bags on rainy days and Sundays, on all other days the carriers must purchase any necessary bags or rubber bands themselves. And, while the Employer also provides Soft Books, the carriers are required to pay a weekly $1.50 rental fee and reimburse the Employer if the Soft Book is damaged.

The dissent places undue emphasis on the fact that the Employer maintains distribution centers with route tables and downloading facilities for the Soft Books. It is clear that, once the carriers have collected the newspaper sections, they are in no way obligated to stay at the distribution center. On the contrary, carriers are free to assemble the newspapers anywhere they wish, such as at their vehicles, on the road, or at home. And carriers can, and many do, download information to their Soft Books at home via their personal telephone lines. As such, we do not believe that the Employer-provided distribution centers are a significant or necessary supply or place of work.

In sum, we find that the Employer's provision of limited supplies is insufficient to support a finding of employee status, especially when compared to the carrier's obligation to provide and maintain the vehicle necessary for fulfilling his or her contractual obligations. Accordingly, we find that this factor weighs in favor of finding independent contractor status.

4. Method of compensation and entrepreneurial potential

In *News-Press*, the Board found that the carriers had a degree of entrepreneurial control over their compensation, and thus that this factor weighed in favor of finding them to be independent contractors. Id. at 479. Specifically, carriers could hire full-time substitutes without notifying the company, and carriers had complete control over the substitute's terms and conditions of employment. Id. Carriers could also hold contracts on multiple routes, deliver other products during their route, hold other jobs, and solicit new customers using free newspapers provided by the company. Id.

All of these facts, and more, are present in this case. Carriers are allowed to hire full-time substitutes, although some carriers testified that they were required to inform their district managers who these substitutes would be. Close to 29 percent of the Employer's carriers have multiple routes, and several carriers deliver other papers in addition to those distributed by the Employer.[5] Additionally,

[5] Our dissenting colleague emphasizes that district managers "monitor performance and will not give more routes to carriers who they believe do not have time for another route." But the fact that district managers exercise common sense when deciding whether to enter into a contract—i.e., by refusing to contract with a carrier who obviously cannot meet the terms of the agreement—hardly undermines the fact that carriers who are able to perform their duties can, presumably, contract multiple routes. Indeed, close to one-third of the carriers have done just that.

some carriers have formed their own corporations, and enter into their contract in the corporate or business name. Many carriers hold other jobs. Moreover, carriers can negotiate the piece rate for delivering *The Republic*, and are paid a commission for every new subscription they solicit. Finally, carriers can receive tips from subscribers and serve as helpers or substitutes for other carriers.

Nevertheless, the Regional Director erroneously found that this factor weighed in favor of finding that carriers are statutory employees, rather than independent contractors. The Regional Director failed to consider that the carriers could negotiate their piece rates, and underestimated the percentage of carriers who held multiple routes.[6] The Regional Director also relied on the fact that only 40 percent of the carriers actually solicited new subscriptions, and that many of those carriers only solicited a small number of subscriptions. But the fact that many carriers choose not to take advantage of this opportunity to increase their income does not mean that they do not have the entrepreneurial *potential* to do so. Indeed, some carriers contract in a corporate or business name, indicating they have exercised an entrepreneurial opportunity. As such, the Regional Director erroneously found that this evidence weighs in favor of finding that the carriers are employees.

Our dissenting colleague takes out of context the fact that the Employer sets the piece rate for some products, including additional publications, papers delivered to schools, or various advertising materials. For example, it is clear that the carriers are paid a piece rate for advertising materials *in addition to* their negotiable piece rates for delivering *The Republic*. And it appears that carriers receive a lower piece rate for newspapers delivered to schools because they may require less work: the papers are simply dropped off in bulk to a single delivery spot at the school.

The Regional Director also relied heavily on the fact that some carriers provided their district managers with information about their substitutes;[7] that at least some district managers included substitutes on lists of carrier names and phone numbers; and that some district managers told carriers that they could not use the substitute of their choice. But we find these facts, and those relied on by the dissent, to be less probative in light of the evidence establishing that the carriers could negotiate their own piece rates, hold multiple routes and other jobs, deliver other products while on their routes, hire substitutes, and earn commissions for new subscriptions. Thus, on balance, we find that this factor weighs in favor of finding that the carriers are independent contractors.

5. Parties' intent

In *St. Joseph News-Press*, 345 NLRB 474 (2005), the Board found that the parties intended to form an independent contractor relationship, because this was expressly stated in the carrier's contract and because the carriers were not covered by any employee programs. Id. 479. Here, too, the parties' contract clearly states that they are forming an independent contractor agreement, and the carriers are not subject to employee programs. As such, we find that this factor weighs in favor of finding that the carriers are independent contractors.

The Regional Director found, and our dissenting colleague agrees, that this factor weighs in favor of finding employee status because the carriers cannot negotiate the contract provisions declaring them to be independent contractors. But the Regional Director and the dissent fail to recognize that the independent contractor provision in *News-Press* appears to have been similarly nonnegotiable. In *News-Press*, the Board found that carriers sign a contract "expressly describing them as independent contractors." Id. 474. There is no mention that some carriers signed contracts with different provisions, or that they were given the option to do so. Thus, the fact that this provision may be nonnegotiable does not distinguish this case from *News-Press*.[8]

Moreover, contrary to the Regional Director's finding, the optional accident insurance is not a "significant insurance benefit." That insurance provides coverage for accidental injuries, including medical expense benefits, a disability benefit, and accidental death benefits. Should a carrier opt to enroll, that insurance covers accidents only, not illnesses or other medical needs. Importantly, the carrier pays the entire premium with no contribution from the Employer. The Employer's employees, meanwhile, are not eligible for that accident insurance, and the carriers are not eligible for any insurance or other fringe benefits offered to employees. As such, we disagree that the insurance is a significant benefit, and in light of the clear indication in the parties' contract, we conclude that this factor weighs in favor of finding that the carriers are independent contractors.

[6] Approximately 363 of the Employer's 1262 carriers, or roughly 29 percent, had multiple routes, but the Regional Director mistakenly stated that this percentage was only 20 percent.

[7] As the Regional Director noted, some carriers testified that they are required to provide this information to their district managers, while some testified that they simply do so as a courtesy.

[8] The Regional Director also observed that many of the Employer's employees speak only Spanish, but the contract is in English. However, both of the district managers that testified stated that they orally translate contracts for Spanish-speaking carriers, and make sure that they understood the provisions. Although one Spanish-speaking carrier testified that her contract was not translated for her before she was told to sign it, her district manager testified that she remembers going over contracts with that carrier, in Spanish, between five and eight times.

6. Whether the hired party is performing an integral part of business; the level of skill required; the duration of relationship; and whether the principle performs the same work

Finally, here, as in *News-Press*, the remaining four common-law factors weigh in favor finding that the carriers are statutory employees. The distribution of newspapers is an integral part of the Employer's business. The carriers are performing unskilled work, and are hired for an indefinite period.[9] Finally, district managers, DSAs, and other Employer employees perform work that is similar to the work performed by the carriers, by delivering open routes and redelivering missing or damaged papers.

VI. CONCLUSION

Application of the *News-Press* standard to the facts in this case establishes that the carriers are independent contractors, and not employees. Contrary to the Regional Director's observation, the facts in this case are remarkably similar to those in *News-Press*. As in *News-Press*, the Employer here did not exercise control over the carriers' details of work, such as the order in which carriers made their deliveries, nor did the Employer supervise the carriers by subjecting them to discipline or other employee work rules. Moreover, carriers provided and maintained vehicles and other tools necessary to perform their duties under the contract, and they had the opportunity to increase their compensation by, among other things, holding multiple routes, delivering other products, and soliciting new subscriptions. Finally, as evidenced by the contract, the parties clearly intended to form an independent contractor relationship. Thus, although there is some evidence that weighs in favor of finding the carriers are employees, the bulk of the evidence establishes that the carriers are independent contractors. We note, moreover, that this finding is consistent with previous cases, where the Board has found that newspaper carriers are independent contractors. See, e.g., *The Evening News*, 308 NLRB 563 (1992); *Thomson Newspapers*, 273 NLRB 350 (1984).

Accordingly, because the carriers are not employees protected by the Act, we reverse the Regional Director and dismiss the petition for election.

MEMBER LIEBMAN, dissenting.

Contrary to the majority's view, economic dependence is a relevant factor in determining employee status under the common-law test incorporated by the National Labor Relations Act. By refusing to consider this factor, the majority wrongly ignores economic realities and present legal trends, as fully discussed in my dissent in *St. Joseph News-Press*, 345 NLRB 474 (2005). Here, based on their economic dependence on the newspaper, together with other relevant factors, I would find that the carriers were statutory employees, and not independent contractors. But even under the majority's view of the common-law test, I would reach the same conclusion, in agreement with the Regional Director.[1]

As the majority concedes, four of the nine *News-Press* factors indisputably weigh in favor of finding employee status:

(1) the distribution of newspapers is an integral part of the Employer's business;
(2) the carriers are performing unskilled work;
(3) carriers are hired for an indefinite period; and
(4) other employees perform work that is similar to the work performed by the carriers.

Contrary to the majority's conclusion, however, none of the remaining five factors—degree of control, supervision, provision of tools and a workplace, method of compensation and entrepreneurial potential, and the parties' intent as to the nature of the relationship—tip the balance in favor of finding that the carriers are independent contractors.

Degree of Control. As the Regional Director found, the Employer exercises more control over the carriers' details of work than did the employer in *News-Press*. The Employer requires carriers to deliver to all subscribers within their route boundaries and to honor all reasonable subscriber requests. The carriers, moreover, do not issue bills, extend credit, or collect payments. Instead, the Employer's circulation department bills the subscribers, and, if necessary, employees go to subscriber residences to pick up payments. The *News-Press* carriers, by contrast, purchased newspapers at wholesale and sold them at retail, billed some subscribers, and were free to extend credit and terminate subscriptions for nonpayment. Id. at 474–475, 478–479. The *News-Press* carriers were also free to disregard delivery requests without fear of discipline, and could refuse to deliver to new subscribers whose homes were too far from the carrier's route. Id. Accordingly, this factor weighs in favor of a finding that the carriers are employees.

Supervision. The Employer's carriers are also more closely supervised than the *News-Press* carriers. Here, as in *News-Press*, district managers relay customer complaints to carriers and sometimes terminate contracts if complaints are excessive. But the Employer's district

[9] The carriers' contracts could be for a duration of 3 to 12 months, and were often renewed. For instance, the carriers who testified had been working for the Employer for anywhere from 2–11 years.

[1] I recognize, as do my colleagues, that the Regional Director made several factual errors. These errors do not affect the correctness of his ruling, however.

managers will sometimes take the additional step of following carriers on their routes or checking the delivery of a given paper. District managers will also occasionally call carriers if they are late arriving at the distribution center. In addition, district managers and carriers are at the distribution center at the same time, and the district managers usually spend the early morning hours on the floor, talking to carriers. In *News-Press*, by contrast, the carriers picked up their papers at drop points or at the plant at around 2 a.m., while the district managers generally worked at the plant from 9 a.m. to 5 p.m. 345 NLRB at 474–475. These various measures show that the carriers here are more closely monitored than the carriers in *News-Press*, and that this factor also weighs in favor of employee status.

Provision of Supplies and Place of Work. It is also clear that the Employer provides supplies and a place of work. The Employer furnishes the Soft Books necessary for delivering a route, albeit it charges the carriers a nominal weekly rental fee. The Employer also maintains distribution centers complete with route tables, cubby holes, and downloading facilities for the Soft Books. The carriers must report to a distribution center in order to obtain their newspapers. Contrary to the majority's findings, that the carriers are not required to remain there for any particular length of time does not undermine the fact that the Employer's provision of the distribution center—and its attendant resources—is significant. Indeed, in *News-Press*, by contrast, the employer did not have distribution centers; rather, the carriers picked up their papers at common drop points or at the printing plant itself. Id.

Method of Compensation and Entrepreneurial Potential. The carrier's method of compensation and entrepreneurial potential also weigh in favor of a finding of employee status. Although the carriers can negotiate the piece rate for delivery of *The Republic*, the Employer requires its carriers to deliver seven other newspapers at a nonnegotiable piece rate. The Employer, moreover, unilaterally determines the piece rates for papers delivered to schools, and for any additional advertising products, such as post-it notes, samples, and flyers. There is also evidence that the district managers monitor performance and will not give more routes to carriers who they believe do not have time for another route.[2] Thus, the carriers' entrepreneurial potential is limited.

Parties' Intent. Finally, an analysis of the parties' intent fails to support a finding of independent contractor status. The majority relies heavily on the language of the parties' contract, which states that they are forming an independent-contractor agreement. But it is clear that the carriers have no choice in whether they are considered independent contractors or employees; rather, the Employer simply defines them as such in what amounts to a contract of adhesion. To say that this contract evidences the carriers' intent is therefore dubious at best.

In sum, I would find that the carriers here are employees and not independent contractors, even under the overly-narrow analysis set forth in *News-Press*. Accordingly, I would affirm the Regional Director's Supplemental Decision (pertinent portions of which are attached as an appendix).

APPENDIX

SUPPLEMENTAL DECISION

Pursuant to the Board's Order dated August 27, 2005, remanding this case for my further consideration in light of the Board's decision in *St. Joseph News-Press*, 345 NLRB 474 (2005) (*News-Press*), I issue this Supplemental Decision and Direction of Election in the above matter. The issue presented is whether the newspaper carriers are independent contractors or statutory employees within the meaning of Section 2(3) of the Act. Addressing the Board's decision in *News-Press*, I find the facts of *News-Press* to be significantly different from those in this case. These facts include the Employer's carriers' lack of opportunity for any significant entrepreneurial gain or loss; the Employer's exercise of substantial control over carriers' details of work, including the direction and supervision of carrier work; the Employer's providing its carriers with most supplies they need to perform their jobs; and its involvement in providing and administering certain benefits to carriers in a manner absent in *News-Press*. Thus, I adhere to my original determination that the newspaper carriers are statutory employees within the meaning of Section 2(3) of the Act and not independent contractors.

Procedural Background

The Petitioner filed a petition on July 28, 2004, under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of newspaper carriers employed by the Employer in the Phoenix, Arizona metropolitan area. The Employer contended that the petition should have been dismissed because its newspaper carriers are independent contractors and not statutory employees within the meaning of Section 2(3) of the Act. A hearing was held in Phoenix, Arizona, before a hearing officer on August 4, 5, 10, 11, 12, 17, and 18, 2004. I issued my Decision and Direction of Election on September 23, 2004, finding that the newspaper carriers are statutory employees rather than independent contractors and directing an election in the petitioned-for unit. The Board granted the Employer's

[2] The majority acknowledges that district managers will sometimes follow carriers on their routes and limit the number of routes a carrier can contract. In doing so, the majority claims, the district managers are merely ensuring that the carriers are performing their contractual obligations. But, in my view, the district managers' actions are more like those of supervisors monitoring the performance of employees, and thus they weigh in favor of employee status.

request for review of my decision on October 20, 2004. On August 27, 2005, the Board issued a Decision and Order in *News-Press*, finding that the employer's newspaper carriers and haulers were independent contractors rather than statutory employees, and issued an Order Remanding the instant case for my further consideration and issuance of a supplemental decision in light of its *News-Press* decision.

The Board's Decision in *News-Press*

The Board in *News-Press* held that the common law of agency was the appropriate test to determine the distinction between an employee and an independent contractor under Section 2(3) of the Act. The Board rejected the employer's contention that the right-of-control test subsumed all other factors under the common-law agency test and the argument of the union that the common-law agency test should include an analysis of the economic leverage that newspaper carriers bring to the employment relationship in determining whether the Act's purposes would be served by finding independent contractor status. Using its decisions in *Roadway Package System*, 326 NLRB 842 (1998) (*Roadway*), and *Dial-A Mattress Operating Corp.*, 326 NLRB 884 (1998) (*Dial-A-Mattress*), as guideposts, the Board applied the common-law agency test to the employer's newspaper carriers and found that, on balance, the factors weighed in favor of finding independent contractor status. Restatement (Second) of Agency § 220(2) sets forth a nonexhaustive list of 10 factors to consider under the common-law agency test relevant to the employee/inde-pendent contractor inquiry: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is part of the regular business of the employer; (9) whether or not the parties believe they are creating the relation of master and servant; and (10) whether the principal is or is not in the business.

In *News-Press*, the Board found that the following factors weighed in favor of finding independent contractor status for the newspaper carriers: the employer did not exercise substantial control over how the carriers performed their jobs; the employer did not provide supplies to the carriers; the carriers' method of compensation allowed for a degree of entrepreneurial control; carriers performed their duties without the supervision of the employer; and the employer and its carriers believed they were creating an independent contractor relationship. The Board found that the following factors weighed in favor of finding employee status for the newspaper carriers: the carriers' work was an integral part of the employer's business; the carriers did not perform particularly skilled work; carriers were hired for an indefinite length of time; and the carriers' work was similar to the work of other of the employer's employees. Concerning this last factor, the Board noted that although the employer hired some employees to deliver newspapers, which is the same task the carriers performed, the employees only delivered newspapers to customers who failed to receive normal delivery. Therefore, the Board concluded that the employees did similar work, not the same work, as the employer's carriers. On whole, the Board found the factors in favor of independent contractor status outweighed those factors supporting employee status.

Supplemental Analysis and Conclusion

In my September 23, 2004 Decision and Direction of Election, I found that the Employer's newspaper carriers were employees rather than independent contractors, relying on the following factors which weigh strongly in favor of finding employee status: the Employer exercises substantial control over the work details of carriers, by restricting carriers from engaging in significant entrepreneurial activities, thereby preventing the carriers from incurring any risk of gain or loss; the carriers perform some of their work activities under the supervision of district managers; the carriers require no specialized training or skills to perform the job; the Employer provides the carriers with most of the supplies needed to perform the job; carriers have worked for the Employer for many years; the Employer's compensation scheme for the carriers provides them with little opportunity for entrepreneurial gain or loss; the Employer is in the business of publishing, printing, and delivering newspapers and the delivery of newspapers is part of the Employer's regular business. I also found that the employees' belief that they were either employees or independent contractors was less probative than the other factors.

In reviewing my decision in light of the Board's teachings in *News-Press*, I find that the facts in the instant case differ from the facts of *News-Press* and lead me to conclude that the Employer's newspaper carriers, unlike the *News-Press* carriers, are employees rather than independent contractors. I find the Employer exercises substantial control over carriers' details of work; the Employer directs and supervises carriers' work; carriers have little opportunity for any significant entrepreneurial gain or loss; the Employer provides its carriers with most supplies needed to perform their jobs; and the Employer is involved in providing and administering certain benefits to its carriers in a manner absent in *News-Press*.

The Employer's Substantial Control Over Details of Work

The employer in *News-Press* did not exercise substantial control over how the carriers performed their jobs. For example, *News-Press* carriers received information about new subscriptions, cancellations, or where the customer wanted the newspaper delivered, through daily instructions attached to their newspapers; yet, they were free to change the newspaper delivery order on their routes. In contrast, the Employer's carriers receive specific route sequences, subscriber information, and subscriber special requests via an electronic computer called a Soft Book. They are required to deliver newspapers according to the Soft Book sequence and to follow the special requests noted in the Soft Book. *News-Press* carriers billed some customers directly, and carriers had the discretion to ex-

tend credit to a nonpaying subscriber or to terminate the subscription for nonpayment. In contrast, the Employer's carriers cannot extend credit to any subscribers and cannot terminate any subscriptions for nonpayment. The Employer's circulation department, not the carriers, bills the customers. The only exception occurs when a carrier has solicited a new subscription and the new subscriber elects to make the first payment directly to the carrier. After the initial payment, the Employer, not the carriers, bills the new subscriber for all future payments. The Employer sends field-support representatives, not carriers, to subscribers' residences to pick up payments if subscribers so request. Significantly, *News-Press* carriers had discretion to decide whether to deliver or decline to deliver newspapers under certain conditions. They could choose to refuse to deliver newspapers to new subscribers who lived too far from the carrier's route or whose homes were inaccessible. If the *News-Press* solicited a new subscription from a customer whose subscription a *carrier* had previously terminated for nonpayment, the carrier could refuse to deliver to that customer. Unlike *News-Press* carriers, the Employer's carriers are required to deliver newspapers to all customers on the carrier's route regardless of any of the above considerations and to follow the route sequence strictly as defined in the Employer-issued Soft Book.

Carriers' Work Performed Under Employer's Direction or Supervision

The Board found that *News-Press* carriers were neither subject to discipline nor subject to an employee handbook or other work rules. In contrast, the Employer's carriers are subject to a progressive discipline system for problems with newspaper deliveries. The discipline the Employer issues ranges from a verbal warning to a written warning to a 30-day notice of termination of the carrier's contract. In addition, the Employer's carriers are subject to a list of rules—part of the carriers' contract with the Employer—applicable at the Employer's distribution centers. These rules prohibit alcohol, drugs, weapons, and pets; establish a dress code; and specify safety and parking rules. The Employer implements other work rules on an ad hoc basis, such as a no-solicitation rule implemented in June 2004. District managers (DMs) have established work rules that limit some carriers to one route, prohibit pets in carrier vehicles during delivery, and once prohibited a carrier from calling the police following a carrier's car accident with a customer's vehicle. DMs have threatened carriers with loss of contracts if carriers received more than five customer complaints per week, or failed to arrive significantly earlier than the delivery trucks. On one occasion, a carrier refused to deliver a newspaper to a customer who brandished a baseball bat, and a DM threatened him with contract termination. One DM posted notices in the distribution center and told carriers assigned to the early delivery truck that they were required to arrive by 2 a.m. at the distribution center or face reassignment to the later main delivery truck. In addition to implementing work rules for carriers, DMs directly supervise many aspects of Employer carrier work. The Employer routes customer complaints about carriers to DMs, who input complaints into the carriers' Soft Book computer. DMs discuss complaints with carriers, and sometimes drive to customer residences to verify complaints, or follow carriers on their routes. A DM also may assign field-support representatives to follow carriers on their routes and check on their performance. DMs let carriers know if they assemble newspapers too slowly, arrive late at distribution centers, use too many carts, violate dress code, or have a pet in their vehicles. If carriers want to purchase their own Christmas cards to distribute to subscribers, the Employer must pre-approve the cards to assure they are not potentially offensive to religious or nonreligious convictions of customers.

Entrepreneurial Potential and Method of Payment

News-Press carriers could impact their own compensation by hiring full-time substitutes; exercising complete control over the substitutes' terms and conditions of employment; holding contracts on multiple routes; and soliciting new subscriptions. Although the Employer's carriers also can hire substitutes, the DMs, not the carriers, exercise significant control over a substitute's terms and conditions of employment. When using substitutes, carriers provide DMs with the substitute's name, phone number, and the dates of substitution. Most carriers are required to provide this information though some carriers claim they do so as a matter of courtesy. DMs maintain lists of carriers in their district, and many of these lists include the names of substitutes and their telephone numbers. At least two DMs have told carriers that they cannot use the substitutes of their choice. If a carrier or substitute fails to arrive at the distribution center within a DM's determined time frame, the DM calls the carrier, or the substitute, if known, to address the problem. As to carriers' routes, some *News-Press* carriers had multiple routes, although it is not indicated in the decision on what basis *News-Press* carriers were chosen to receive multiple routes. The Employer, however, permits only certain carriers to receive multiple routes with about 20 percent of the Employer's carriers operating multiple routes. The DMs monitor carriers' performance and will not award more routes to carriers whom they believe do not have sufficient time to deliver more than their current number of assigned routes. Thus, the Employer's carriers are significantly restricted in their entrepreneurial potential through having multiple routes.

The amount received by carriers for soliciting new subscriptions was not indicated in the *News-Press* decision. The Employer's carriers are paid $15 for each new solicited subscription. Although both *News-Press* and the Employer's carriers compete for new subscribers with dedicated sales teams, only some of the Employer's carriers have access to the same special subscription offers as the sales teams. The income the Employer's carriers receive from the solicitation of new subscriptions is only a small fraction of their income, and only 40 percent of all carriers sell any new subscriptions at all. Of carriers who do sell subscriptions, the Employer estimates that each carrier sells about 12 new subscriptions per contract. The duration of a carrier contract is typically 3 or 6 months and may be 1 year for more experienced carriers. A carrier with a contract 3 months in duration would receive $60 per month ($15 per new subscription) from the sale of new subscriptions. Given that carriers earn about $800 every 4 weeks from the delivery of newspapers, that carrier's new subscription income would

amount to about 7.5 percent of the carrier's newspaper delivery pay. Using the same subscription per contract average, a carrier with a contract 6 months in duration would receive $30 per month from the sale of new subscriptions, and the carrier's new subscription income would be about 3.8 percent of the carrier's pay. A carrier with a contract 1 year in duration would receive $15 per month from the sale of new subscriptions, and the carrier's new subscription income would be about 1.9 percent of the carrier's pay. If the Employer's carrier solicits a new subscriber outside his or her geographical route area, the new subscriber is not assigned to the carrier, and thus receives no continuing revenue for his or her efforts. Rather, the carrier who is assigned to the route that covers the new subscriber's location delivers to the new subscriber, and receives the resultant revenue from the subscription. It is not clear whether a *News-Press* carrier who solicited a new subscriber outside the carrier's geographical route area had the option to deliver to the new subscriber. However, some *News-Press* carriers did deliver to racks or dealers located within another carrier's route. To the extent that *News-Press* carriers delivered to new subscribers solicited within another carrier's geographical area, *News-Press* carriers had a greater incentive than the Employer's carriers to solicit new customers in a broader geographical area.

News-Press carriers had a greater degree of entrepreneurial discretion inasmuch as they had the option of redelivering a missed or damaged newspaper. If they did not redeliver, the *News-Press* delivered the newspaper and charged carriers for the delivery. In contrast, the Employer does not charge carriers for missed or damaged newspapers and will redeliver the newspaper if feasible.

Provision of Supplies, Instrumentalities, and Places of Work

The Board found that the *News-Press* carriers provide their own vehicles necessary to perform the work at issue. Although carriers for both the *News-Press* and Employer provide their own vehicles for newspaper delivery, the Employer provides to carriers critical supplies that are necessary to perform the work at issue. Unlike the *News-Press*, for example, the Employer imposes on its carriers requirements concerning plastic bags and rubber bands and provides some plastic bags free of charge to carriers. The Employer requires its carriers to bag non-*Arizona Republic* newspapers and to do so in color-coded bags provided at no cost to the carriers; to bag all newspapers when the Employer determines it may rain, in bags provided at no cost to the carriers; and to bag any newspaper if the customer so requests, in which case the carrier must purchase the bags. In other circumstances, the Employer's carriers can choose to bag newspapers or not to do so, but are required to purchase Employer bags if they choose to use bags. One carrier sought to use less expensive plastic bags purchased from another source but was prohibited from doing so. The Employer's carriers also choose whether to use rubber bands to bind newspapers. In this case, they may purchase rubber bands from the Employer or another source. The Employer keeps bags and rubber bands available in storage areas at its distribution centers where carriers receive their newspapers. At these distribution centers, the Employer provides Soft Books, assigned route tables, and downloading facilities for Soft Books. The *News-Press* did not provide any of these items to its carriers, except *News-Press* sold supplies such as plastic bags and rubber bands to carriers.

Intent of Employer and Carrier Regarding the Nature of Their Relationship

In *News-Press,* the Board weighed the parties' belief that they were creating an independent contractor relationship heavily in favor of finding independent contractor status. Evidence of this belief was contained in the language of *News-Press* contracts that specified the parties creation of an independent contractor relationship, and in the carriers' ineligibility for any of the *News-Press* employee programs. As to the language in the contract, like *News-Press* contracts, Employer carrier contracts specify that they are independent contractors. Although it is unclear whether *News-Press* carriers could negotiate about the provision in the *News-Press* contracts that declared them to be independent contractors, this contract provision is nonnegotiable for the Employer's carriers. In addition, between 25 and 50 percent of carriers at some distribution centers are Spanish-only speakers, and carrier contracts are written in English only. These factors suggest that the Employer's carriers are labeled as independent contractors, but carriers had no choice in the matter.

In contrast to *News-Press* carriers' ineligibility for participation in employee benefit programs, the Employer does offer its carriers a significant insurance benefit. While the Employer does not offer its carriers the same benefits it offers to its employees, it does offer carriers, usually at the time carriers sign contracts, the opportunity to purchase one of two insurance policies through an independent insurance carrier covering medical expenses as well as disability and death benefits as a result of accidents. The Employer participates in the administration of this benefit by deducting weekly premiums of either $1.25 or $1.75 directly from the carrier's pay. None of the carriers who selected this insurance received a copy of the policy or an explanation about the policy. However, the Employer participates in the claims process by furnishing claim forms through the DMs on request of the carriers.

The Employer's Carriers Resemble *Roadway Drivers* More Than *Dial-A-Mattress* Drivers

In *News-Press* the Board compared the common law of agency factors present in *News-Press* with the factors in *Roadway* and *Dial-A-Mattress* to conclude that, on balance, the *News-Press* carriers were independent contractors. In the instant case, however, Employer's carriers more closely resemble the drivers in *Roadway* whom the Board found to be employees rather than the drivers in *Dial-A-Mattress* whom the Board found to be independent contractors. In *Roadway*, the Board applied the common-law agency test and held that the drivers, who delivered and picked up packages were statutory employees: As in *United Insurance* (*NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968)), the drivers here do not operate independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its

substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. 326 NLRB supra, at 851. These factors apply to the Employer's carriers as well. Carriers do not operate an independent business; rather, they deliver newspapers, an essential part of Employer operations. The Employer does not require any prior training or experience for the carriers, and none is necessary. Carriers receive training on how to use the Soft Book and how to drive their routes from DMs. The Employer substantially controls, assists, and guides the carriers in many performance aspects of their jobs. Like the *Roadway* drivers, for example, to whom the Employer assigned primary service areas and who could not refuse to accept merchandise for pick-up or delivery in these areas, the Employer's carriers cannot refuse to deliver newspapers in their assigned geographical route area. Like the *Roadway* drivers, whom the employer required to use an electronic device to transmit information about pickups and deliveries, the Employer's carriers are required to follow the Soft Book's sequence of delivery on their routes. Carriers do business as the Employer's newspaper carriers even though their contracts do not permit them to identify their vehicles as being associated with the Employer. The Employer's carriers do not ordinarily engage in outside business; very few deliver competing newspapers on their routes. Carriers have little substantial proprietary interest beyond their vehicle investment, and the Employer compensation scheme offers carriers little entrepreneurial opportunity for gain or loss. Certain facts suggest that the *Roadway* drivers are closer to independent contractor status than the Employer's carriers. For instance, *Roadway* drivers could use helpers or replacement drivers on their routes without prior approval from *Roadway*, whereas the Employer, through DMs, sometimes controls the selection of substitutes, keeps lists of substitutes, and apparently requires carriers to submit to DMs the dates when substitutes will replace carriers. In addition, in contrast to the Employer's carriers, *Roadway* drivers were not subject to a discipline system. Furthermore, unlike the employer in *Roadway*, who did not set a particular starting time for the drivers, the Employer requires its carriers to arrive at a certain time at the distribution centers to pick up newspapers. The *Roadway* drivers' contract also gave them a proprietary interest in their service areas and the right to sell their service. The Board found, however, that the employer controlled and limited this right. The Employer's carriers have an even more Employer controlled and limited proprietary interest in their routes.

Employer's carriers bear little resemblance to the *Dial-A-Mattress* drivers. *Dial-A Mattress* drivers were owner-operators who owned their own trucking companies: one owner-operator owned 10 trucks; two others owned 6 trucks; and six others owned 2 trucks. At least three of the drivers acted solely as entrepreneurs and did not even drive. The Board in *Dial-A-Mattress* applied the common-law agency test and held that the drivers were independent contractors:

> Applying the common-law agency test to the facts of this case, we find that the factors weigh more strongly in favor of independent contractor status for Dial's owner-operators. In the process of outsourcing its delivery functions, Dial has structured its relationship with the owner-operators to allow them (with very little external controls) to make an entrepreneurial profit beyond a return on their labor and their capital investment. The owner-operators arrange their own training, hire their own employees, and have sole control over and complete responsibility for their employees, including setting their terms and conditions of employment. Dial also plays no part in the selection, acquisition, ownership, financing, inspection, or maintenance of the vehicles used by the owner-operators. There is no minimum compensation guaranteed the owner-operators to minimize their risk of performing deliveries for Dial, and they can decline orders without penalty. The owner-operators are not required to provide delivery services each scheduled workday. In short, their separateness from Dial is manifested in many ways, including significant entrepreneurial opportunity for gain or loss.
>
> The owner-operators have a separate identity from Dial that suggests independent contractor status. They have formed their own trucking companies and have filed applications with the state to transport Dial's products. Many have state business certificates for their companies, while several of them function in the corporate form. The owner-operators maintain business checking accounts, often have their own company work uniforms, and file corporate tax returns. They also maintain workers' compensation insurance and have business tax identification numbers. [Id. at 891.]

Unlike *Dial-A-Mattress* drivers, the Employer's carriers have little opportunity for entrepreneurial gain or loss. Some carriers use substitutes, but unlike the employer in *Dial-A-Mattress*, the Employer herein exercises significant control over substitutes. The Employer's carriers are required to deliver newspapers every day of the year and cannot decline to deliver newspapers in their assigned route area. Only 3 of approximately 1262 carriers have formed business associations, and carriers do not provide workers' compensation insurance. Unlike the Employer's carriers, *Dial-A-Mattress* drivers were assigned different geographical areas for delivery and were not required to follow a certain route on their deliveries. Unlike the Employer's carriers, *Dial-A-Mattress* drivers collected payment from customers and bore the risk of loss if a customer's payment method was disapproved. Moreover, the record provides no evidence that there is any opportunity to make an entrepreneurial profit beyond a return on their labor and their capital investment.

In sum, after further analyzing the facts of this case based on the Board's remand and instruction to take into account its recent holding in *News-Press*, I reaffirm my conclusion that the Employer has failed to meet the burden of establishing that the carriers are independent contractors. Accordingly, I conclude that the carriers are employees within the meaning of Section 2(3) of the Act and should enjoy all of the rights and protections of the Act.