

DIC Animation City, Inc. and Animation Writers of America, Petitioner. Case 31-RC-6444

July 14, 1989

DECISION ON REVIEW AND ORDER

**BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND HIGGINS**

On November 17, 1988, the Regional Director for Region 31 issued a Decision and Direction of Election in which he found that the Employer's freelance animation writers¹ were employees within the meaning of Section 2(3) of the National Labor Relations Act.

In accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision and Direction of Election, contending that the writers are independent contractors and not employees within the meaning of the Act. The Board, by unpublished Order dated January 4, 1989, granted the request for review.

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

We have considered the entire record in this case, including the briefs on review filed by the Petitioner and by the Employer. We conclude, contrary to the Regional Director, that the writers sought in the petition are independent contractors, and not employees within the meaning of Section 2(3) of the Act.

I. THE RECORD EVIDENCE

The Employer is engaged in the production of animated television and other motion picture productions. In the 12 months preceding the hearing, the Employer produced 8 animated series with 151 half-hour episodes, and hired approximately 60 writers. Four of these writers were involved in development work, while the remainder were involved in script writing. Though development writing differs from script writing, those performing these functions have similar relationships with the Employer.

After a client² and the Employer agree to produce a series, the Employer hires a story editor.³ The editor or a development writer writes a "developmental bible."⁴ The "bible" contains

drawings of the regular characters, their vehicles, their weapons, and the constant backgrounds. It also contains detailed descriptions of the regular characters' personalities. It may set forth the series goals and tone, e.g., a comedy or an adventure series. It may also emphasize that the series is attempting to appeal to a certain age group, and may report the comments and suggestions made by its viewers. The "bible" designates the required length of the scripts to ensure that each will produce a 30-minute episode. The editor may attach his or her writer's guide to the "bible." The writer's guide provides the editor's further comments, general story ideas desired, and bad story ideas; and it may contain the desired margins, number of lines per page, and type styles for the writer's work.

There are essentially four steps to the production process of an episode: the informational, the premise, the outline, and the script. The informational step involves the initial contacts between the editor and the potential writers. These contacts can come about in one of four ways. The usual way is that the writers who are interested in writing for a particular series contact the story editor. The second is that the editor contacts those writers the editor has previously worked with on the same series or on similar series, and who the editor feels would be perfect for the series. The third method is the announcement of a "cattle call," through which the editor contacts more writers than needed in the hope that a few will work out. The fourth method is that the client will tell the editor who to contact.

Half of the writers have agents, and a smaller percent have business managers. Some writers form their own "loan out" companies, but do not usually hire any other employees on a long-term basis. In these cases, the Employer contracts with the company to provide the writer's services, and pays the company rather than the writer directly. The writers may hire someone to type their work. Some writers work individually, while others form their own writing teams for a particular project or may always write as a team. In the case of teams, the writers decide which work each writer will perform, how each member is to be paid, and in what proportion. The Employer and the writers negotiate the number of scripts, residuals, royalties, and any guaranteed work on future series. In one case described in the record, they negotiated that the writer would be supervised only by the client and not by the Employer or editors. Usually, there is no negotiation over fees, because the fees are set per series. Occasionally, however, when a client wants a specific writer, the Employer may have to negotiate the fees to get that writer.

¹ Freelance animation writers will be referred to as writers

² The client is usually a TV network, a toy company, or the series producers.

³ Story editors will be referred to as editors

⁴ "Developmental bibles" will be referred to as "bibles."

The editor and writer first meet at an informational meeting, where the editor discusses the series, tone, audience, characters, and type of desired stories. The editor may specify the desired premise length and the desired outline length. The length relates to what the editor perceives as required to produce a 30-minute episode. A premise is a brief description of a writer's story idea. The outline is a longer formulation of the story idea to give the editor and client more information about what will happen in each act. The outline can be in a narrative or beat⁵ form. The editor may specify which form is preferred. The editor may also inform the writer about the desired margins, number of lines per page, and type styles.⁶ At the informational meeting, the editor usually provides sample premises, outlines and scripts, a previous story list, and a series "bible."

After the meeting, the writer prepares as many premises as the writer desires. The writer works at home, sets his or her own hours, and uses his or her own equipment and supplies. The writer may discuss ideas with the editor before submitting any premise. The writer submits work by modem, floppy disk, or hard copy.⁷ The editor may reject or accept one, all, or none of the premises. The editor only gives the premises the editor accepts to the client for approval. The writer is not paid for the premises whether accepted or rejected. The client may write notes on the premise requesting that the script contain certain characters or scenes. The editor may also request that certain changes be made or make suggestions about the story. Usually, the writer abides by the client's and editor's changes, but the writer can argue for his or her approach, and in one case described in the record, the writer's opinion prevailed. The Employer and the writer contract that the approved premises and all further writing produced on the basis of the premises are the sole property of the Employer.

Approximately a week after a premise is accepted, the writer submits an outline. The editor either approves the outline and gives it to the client or requests changes. The writer incorporates the changes in a second outline draft, which is submitted to the client. The Employer can only require that the writer create one rewrite. After the one re-

write, it cannot require that the writer write the outline a third time. However, the editor discusses any client requests and changes for the script with the writer. The Employer pays a flat fee for the outline.

Once the outline process is completed, the writer is expected to submit a script in approximately 2 weeks. The script process is similar to the outline process. Clients request such changes as a different ending, less sarcasm, more panic, more humor, and even some very specific changes such as a requirement that the character run down a tunnel. Editors request changes in grammar, camera directions, dialogue, language, humor, action scenes, and other modifications. Again, the Employer pays a flat fee for the script and can require only one rewrite. By contract, the script is the sole property of the Employer. Therefore, if the Employer determines that the script needs further revisions, the editor usually makes them or hires another writer to make the changes.

The writers receive no benefits, overtime pay, or expense reimbursements. They may turn in late work, and may turn down assignments without forfeiture of future work on other series. There are two circumstances when writers may turn down assignments, neither of which occurs with any frequency. The writer, after having a premise accepted, may decide not to write an outline or script. This is an unlikely occurrence, because by that stage the writer has expended considerable effort on the job that is uncompensated up to this point. The second circumstance arises when the Employer requests that a writer write an outline and script without having to present a story premise. This too usually only occurs when a script needs further revisions or when the client or editor comes up with a story idea, and the editor and staff writers do not have time to do the writing. Therefore, the majority of writers do not turn down assignments.

The Employer does not require the writers to work for it exclusively. The majority of writers do not work exclusively for the Employer during the year, though they generally do so while writing a particular outline and script. Even in those cases, the writers will have projects from other companies that overlap with their work for the Employer.

II. ANALYSIS

Section 2(3) of the Act excludes "any individual having the status of an independent contractor" from the definition of employee. The Supreme Court in *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968), relied on the legislative history of the 1947 amendment to Section 2(3), and conclud-

⁵ A narrative outline describes the story idea in a narrative form. A beat outline contains numbered paragraphs of each story step. Some editors do not have a preference for either outline type.

⁶ Margins, number of lines per page, and desired type styles for scanning may also appear in the "bible," in instruction sheets, or be inferred from the samples. These requirements ensure that the work will still produce the 30-minute episode, and the Employer will be able to use the work.

⁷ The editor may specify a preference for how the work is to be submitted, but the Employer will accept work in any format, and if needed will retype the work if its equipment cannot scan the hard copy.

ed that independent contractor status is to be determined by assessing "the total factual context . . . in light of the pertinent common law agency principles." Among such principles is the "right to control" test, which the Board described in *News Syndicate Co.*, 164 NLRB 422, 423-424 (1967):

Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

The Regional Director found that the Employer controls the manner and means of the writing process from premise to final script draft because the editors supervise and dictate the story direction, the bible and samples control creativity, and the editor and client control how the results are achieved. The Regional Director deemed it insignificant that the writers work at home and own their equipment, because they have regular contact with the Employer at its premises. He also found "practical exclusivity," because 9 out of 10 writers work for the Employer exclusively until a project is completed. He found no actual right of refusal, because 95 percent of the writers take every assignment.

Contrary to the Regional Director, we find that the Employer does not substantially control the manner and means of the writing process. The writer creates the story idea, the premise, the outline, and the script. The writer determines where and when to work, and owns the equipment used. The writer also determines whether to write stories as part of a team, and if the work is done on a team basis, which part each member writes, and how much each member is paid. The writer may also decide whether to form and work through a "loan out" company. Finally, the writer negotiates the number of scripts, residuals, royalties, and any guaranteed work on future series.

The Employer does control certain aspects of the writer's work. However, the control relates primarily to the end product. The Employer specifies script length, outline length, premise length, margins, and lines per page, which relate to the 30-minute time limitations per episode. Although the Employer also edits the writer's work for content,

the changes are made to ensure that the script fits within the time limitations, is consistent with the series tone, and is appropriate for the audience.

Unlike the Regional Director, we find that there is no "practical exclusivity." The Employer does not require the writers to work for it exclusively. Rather, the writers work for the Employer on an average of only two assignments per year. Each assignment takes approximately 3 to 4 weeks, and even during these weeks, some writers work for other companies. Therefore, for 10 months out of the year, the writers do not work for the Employer and do work for other companies.

The writers bear some of the risks and enjoy some of the opportunities for gain associated with an entrepreneurial enterprise. The writers exert time, effort, and travel to solicit work, but may have their ideas rejected. If the Employer rejects the ideas, the writers do not get paid. The writers invest in their own offices, computers, equipment, software, and supplies. This investment is significant both because of the dollar amount of the investment and because it determines how much work a writer can do in a given time for the Employer and other companies. The writers can hire someone to type their work. The writers receive no fringe benefits from the Employer, nor are they reimbursed for expenses.

We conclude that the writers are independent contractors, because they control the manner and means by which the results are accomplished and are subject to certain risks involved in an entrepreneurial enterprise. Although the Employer does provide some direction, that limited control is insufficient to warrant a finding that the writers are employees. The end product remains primarily the independent work of the writers.⁸ Therefore, we shall dismiss the petition.

ORDER

It is ordered that the petition be dismissed.

⁸ *Boston After Dark*, 210 NLRB 38 (1974). The Regional Director attempts to distinguish *Boston*, supra at 38, because in that case the freelance contributors to a weekly newspaper only had contact with the employer when they were assigned and turned in work, and editing occurred after the work was completed, while he finds that here the Employer exercises a great deal of control over the process of writing, as well as the result. The employer in *Boston*, supra at 42, as here, corrected and edited the work for content. Further, some contributors went to weekly staff meetings, worked on the employer's premises, received mail and phone calls there, and derived their total income from the employer. They in fact had more contact with the employer than the writers in the instant case, and the Board still found that they were independent contractors.