

**Asheville Citizen-Times Publishing Company and Drivers Local Union No. 61, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Petitioner. Case 11-RC-5602**

June 28, 1990

**DECISION ON REVIEW AND ORDER**

**BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY**

On June 1, 1989, the Acting Regional Director for Region 11 issued a Decision and Order, pertinent portions of which are attached. On August 18, 1989, the National Labor Relations Board granted the Union's request for review.<sup>1</sup>

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

On review and consideration of the entire record, the Board has decided to affirm the Acting Regional Director's findings that the home delivery, single issue (rack), and combination home delivery and single issue (rack) carriers are independent contractors<sup>2</sup> and that, accordingly, the petition raises no question concerning representation.<sup>3</sup>

<sup>1</sup> The Employer filed a brief in opposition to the Petitioner's request for review

<sup>2</sup> This case is distinguishable from *Roadway Package System*, 288 NLRB 196 (1988), in which the Board found that the employer's pickup and delivery drivers were employees. In *Roadway*, the employer's control over the manner of performing work was more extensive than in the present case. In contrast to the Employer here, the employer in *Roadway* required, for example, that drivers wear uniforms and carry the company logo on their vehicles, that drivers use vehicles of certain colors, and that drivers maintain detailed records for the employer's own use. In addition, the *Roadway* drivers had less control over the amount of profit they could realize from their work and took less financial risk than the carriers in this case. Nearly all drivers in *Roadway* purchased and financed or leased their vehicles through an employer-sponsored program and when a driver was terminated the employer assumed the liability on the vehicle; the employer made start-up loans to guarantee a minimum level of gross income during the early weeks of employment, and the employer controlled the cost to all customers. In this case, carriers independently locate, purchase, and finance their own vehicles, which are strictly of their own choosing, receive no "start-up" money, and are relieved of no financial obligations if terminated. Further, among those factors relied on by the Acting Regional Director, we note that the carriers bear the risk of loss for stolen or damaged papers, are responsible for collecting payment from customers, can contract for more than one route, and, although the record indicates that their freedom to set prices to customers is not unlimited, in some cases they have altered the prices charged to customers or imposed extra fees for personal service.

<sup>3</sup> After the hearing closed, the Union filed a motion to reopen the record for purposes of receiving evidence that the Employer limited the right of rack carriers to alter the price charged customers for newspapers. The Acting Regional Director denied the motion. As the Acting Regional Director found, even assuming the facts alleged by the Petitioner, the weight of the evidence supports the result he reached. Therefore, we affirm the Acting Regional Director's denial of the motion.

**ORDER**

It is ordered that the Acting Regional Director's Decision and Order is affirmed and the petition is dismissed.

**APPENDIX**

The Employer is a South Carolina corporation with a facility located in Asheville, North Carolina, where it is engaged in the business of newspaper publication. The Employer utilizes the services of approximately ninety-eight home delivery carriers, twenty-eight single issue (rack) carriers, and seventy-six combination of home delivery and rack carriers in the distribution of its newspaper. The Employer maintains that home delivery and rack carriers are independent contractors while the Petitioner, on the other hand, contends that all the carriers are employees and should be granted a representation election. Both parties have filed briefs which have been carefully considered.

The evidence indicates that the Employer advertises in its newspaper for both home delivery and rack carriers, who upon being hired, sign a contract with the Employer, which states that the carrier is an independent contractor whose contract can be terminated by either party provided that the terminating party gives thirty days notice. All the carriers are given a primary area of responsibility by the Employer who reserves the right to alter that area at will. A District Manager trains a new carrier, but after a short period of time the carrier is no longer supervised on a daily basis. Carriers purchase newspapers from the Employer on a weekly basis at a wholesale price established by the Employer.

Home delivery carriers can purchase any amount of newspapers they desire, but must pay for any unsold newspapers, while rack carriers, on the other hand, receive a credit for unsold newspapers provided that the number of unsold newspapers does not exceed fifteen percent of the number purchased. In addition, carriers must absorb the cost of lost or damaged newspapers after they have been delivered to the carrier at an Employer designated drop off point.

Home delivery carriers collect money on a monthly basis from their customers, who are not participating in a pay in advance subscription. The evidence indicates that some carriers charge a higher rate than that set by the Employer as well as being required to absorb the cost of customers' bounced checks. Rack carriers lease racks from the Employer with the agreement that they will be left at certain Employer designated locations and collect money from them everyday. However, the record reflects that rack carriers can and have leased additional racks and placed them wherever they choose without consulting the Employer, and some carriers have charged a higher rate than the Employer's price.

The record shows that from the checks the Employer gives to the carriers it does not withhold any income taxes, social security taxes, or workman's compensation taxes, nor does it provide any fringe benefits for the carriers. The evidence further indicates that carriers are allowed to and have hired and trained substitutes and/or

helpers without consulting with the Employer as well as having engaged in other employment while under contract to deliver newspapers for the Employer. The Employer requires carriers to purchase, maintain, and insure at their own expense, a vehicle to deliver newspapers while the Employer waives any liability for damage caused by the driver while delivering newspapers. The Employer prohibits the use of its logo on the carriers' delivery vehicles.

The evidence indicates that the carriers are not subject to a dress code and can purchase supplies such as rubber bands, plastic bags, and ledger books from any source; but most carriers purchase them from the Employer through the District Manager whom they generally meet with for such purposes. The Employer requires each carrier to submit a list of customers or rack locations as well as sales from each source. In addition, the Employer prohibits its carriers from inserting any unauthorized material with the newspapers.

The home delivery carriers and rack carriers in the instant matter hold positions which are similar to those of the newspaper distributors in *Fort Wayne Newspapers Inc.*, 263 NLRB 854 (1982), in which the Board concluded that the distributors were independent contractors based upon a right to control test where the results rather than the means are controlled by the Employer. See *The Daily Mining Gazette, A Division of Thomson Newspaper, Inc.*, 273 NLRB 350, 351-52 (1984); *Donrey, Inc.*, 223 NLRB 744, 746-47 (1976).

In *Fort Wayne Newspapers*, supra at 855, the newspaper distributors, who delivered newspapers to dealers, stores, and coin operated newsracks, worked without day-to-day performance supervision by the employer; purchased papers directly from the employer at its set rate and received a credit for unsold papers while absorbing the loss for any lost or stolen newspapers; hired, trained, and fired helpers and substitutes as well as having the permission to and holding outside employment; were required to purchase, maintain, and insure their own vehicles for newspaper delivery; and had no taxes what-so-ever withheld or fringe benefits provided for them by the employer. The Board held that such distributors were independent contractors even though there were factors that indicated that the distributors were employees rather than independent contractors, such as that: the employer controlled the wholesale and retail price of newspapers sold, had a terminable at will contract with the distributors, minimized the distributors entrepreneurial risk by allowing unsold papers to be returned for credit, and owned

and determined the location of the racks as well as granted no proprietary interest in the racks to the distributors.

The facts supporting the Board's decision in *Fort Wayne Newspapers*, supra, are present in the instant case inasmuch as the carriers are not under the daily supervision of their District Manager; purchase newspapers in advance at rates set by the Employer, but can and do sell the newspapers at higher rates; can and do hire and train helpers and substitutes without consulting the Employer; are required to purchase, maintain and insure their delivery vehicles as well as being prohibited from using the Employer's logo on their vehicle; can and do have other outside employment; have not taxes whatsoever withheld nor do they receive any fringe benefits from the Employer; and, unlike in *Fort Wayne Newspapers*, supra, the rack carriers in the instant matter can and have leased additional racks.

The Petitioner contends in its brief that the Employer controls the means by which the carriers deliver newspapers and thus the Board's decision in *The Herald Star, Canton Division, Thomson Newspapers, Inc.*, 227 NLRB 505 (1976), should control the instant case. However, the instant matter is distinguishable from *The Herald Star*, supra, inasmuch as the carriers can and do charge higher prices for newspapers than the Employer recommends, and the Employer does not assist carriers with their deliveries which indicates that the Employer does not control the means by which the carriers deliver their newspapers. In light of the forgoing and the record as a whole, I find the home delivery carriers and rack carriers are independent contractors. Accordingly, as the Petitioner seeks to represent only newspaper carriers, the petition is hereby dismissed inasmuch as Section 2(3) of the National Labor Relations Act prohibits the assertion of jurisdiction over independent contractors.

With regard to the Petitioner's Motion to Reopen the Record, even assuming *arguendo*, that the Employer removed a rack carrier from a particular customer because that customer had complained to the Employer about the rack carrier increasing the newspaper prices, the record evidence indicates that the aforementioned event is an isolated one. Specifically, the evidence adduced at hearing reflects that, contrary to the Petitioner's assertions in its Motion, other carriers have similarly raised their newspaper prices and the Employer has not interfered in such actions. Thus despite the contentions of the Petitioner in its post hearing motion, I find that the weight of the record evidence clearly supports my findings in this matter; and therefore, I hereby deny in its entirety the Petitioner's Motion to Reopen the Record.