

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 17, 2000

TO : F. Rozier Sharp, Regional Director
Region 17

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: St. Joseph News-Press
Case 17-CA-20534

177-2414
177-2484-5000
177-2484-5067-8000

This Section 8(a)(3) and (1) case was submitted for advice as to whether the Employer's carriers and haulers are statutory employees or exempted independent contractors.

FACTS

In October 1999, Teamsters Local 460 ("the Union") began a campaign to organize the route carriers and haulers of St. Joseph News-Press ("the Employer"). The Union filed a charge on February 4, 2000, alleging that the Employer terminated some or all of the contracts of four carrier/haulers because of their Union activities. The Union argues that the carriers and haulers are statutory employees protected by the Act, whereas the Employer contends that they are independent contractors.

The haulers pick up bundles of newspapers at the Employer's loading dock and haul them to designated drop points, from which they are picked up by carriers, who deliver them to customers or to the Employer's vending machines. Many haulers are also carriers.

Each hauler and carrier has at least one contract with the Employer to deliver the newspaper in a certain area. The standard terms used by the Employer in contracts with haulers and carriers refer to them as independent contractors. The contracts provide that the routes are "non-exclusive"¹ and not assignable by the Contractor, and that the Contractor will "personally devote such time as is necessary to fulfill Contractor's obligations." The contracts also contain a "product integrity" clause that provides that the Contractor will not "stamp or write upon,

¹ The Employer can deliver or mail newspapers to locations along the routes.

insert into or attach to copies of newspapers any advertising, or other matter which is not furnished to Contractor by the Company, except with the prior written agreement of the Company." It appears that there is little negotiation of contracts, but rather that the Employer unilaterally sets the remuneration, or rate of remuneration, that the carriers and haulers must accept for handling a route.² The standard contract lasts for one year unless terminated by either party upon 30 days notice, and is renewed for another year if neither party gives notice of intent to terminate. Terminations are frequent, and turnover is high. When a contract ends, the carrier cannot sell his or her route to a successor. Rather, the Employer awards the contract to someone else. In addition, the contract contains numerous "hold harmless" provisions protecting the Employer.

The Employer does not withhold income taxes, social security or FICA on behalf of the carriers and haulers. At least some of the carriers and haulers are required to be bonded. The Employer requires them to pay their own insurance and bonds and to have valid drivers' licenses. The haulers and carriers use their own vehicles, which are not marked with any Employer logo, and they do not wear uniforms. They have no special equipment or business licenses, and apparently none of them is incorporated. They are not required to keep records, although they must report the number of unsold papers from racks in order to obtain reimbursement. The haulers are permitted in the dock area of the Employer's premises at night during a pick-up period set for them by the Employer. They are also allowed into restrooms next to the dock and a hallway with a vending machine, but they are asked not to cross a yellow line marking off the rest of the Employer's property.

Carriers and haulers appear to be free to choose their substitutes.³ The Region does not know whether there is

² The Region's submission showed only one example of negotiation of a contract, in which case the carrier asked for and received a higher rate of pay. That contract lasted only a month or two (apparently because neither party wished to continue it), and the rate paid to the next carrier on the route was much lower.

³ The Region's investigation revealed, however, that the Employer asked the cousin of a carrier not to go onto the Employer's property to pick up papers as the haulers do, but allowed that person to perform the off-site work of delivering papers.

currently anyone having a substitute perform his or her work on a regular basis with the Employer's knowledge.⁴

The Employer determines the boundaries of the routes, the number of racks in the routes, how many papers are to be put in racks, what time the hauler picks up the papers and when the carrier must have them delivered. The Employer has added drops, throws, and miles to routes, sometimes without extra compensation. The Employer also assigns additional tasks such as extra collating work, and unilaterally decides the amounts it will pay for this work. The Employer determines what the carriers are to insert into the papers and on what day the inserts are to be included. The Employer unilaterally decides, on occasion, to pay the carriers an extra amount per insertion. The carrier can decide on any given day whether to use plastic bags or rubber bands, but the contract provides that the papers must be delivered dry and in good condition. In addition, the Employer decides when extra bundles need to be delivered by haulers to carriers, when low-selling vending machines can be closed and when customers can be cut. The Employer notifies carriers and haulers when parts of routes are eliminated or added to the route of a different carrier and when it is ending a contract.

The Employer sets both the retail price of the papers and the amount paid by the carriers for each paper they receive. The carriers receive credit for papers remaining unsold from their assigned vending machines. The carriers also receive credit for papers delivered to potential customers free of charge during promotions run by the Employer. The Employer pays a mileage subsidy to some of the carriers/haulers with high mileage rural routes. The Employer also pays several carriers an additional monthly "route subsidy" to run some less profitable routes. Carriers and haulers often seek larger routes. If the Employer approves a larger route, the contract on the old route is terminated and the parties execute a new contract.

⁴ One carrier/hauler, Brad O'Dell, contracted for a number of routes and then arranged for others to carry those routes. This arrangement was ended in October 1999 when the Employer terminated O'Dell's contracts and contracted directly with those people who had been carrying the routes. In addition, Regina Whitaker carries a route for which her son signed a contract, but it is unclear whether the Employer knows the son is no longer performing the work.

The carriers can make more money if they acquire additional customers on existing routes, but the Employer apparently unilaterally splits a carrier's route into smaller routes if it believes the route has become too large. The haulers and carriers have reason to believe that they cannot deliver other publications or items when they deliver the newspapers.⁵

Although the Employer gives the haulers and carriers lists of customer names and addresses, determines when the newspapers are ready for pick-up, and sets deadlines for delivery (i.e., 6:00 a.m. on weekdays and 6:30 a.m. on weekends), the haulers and carriers generally determine how they will run their routes within these parameters. However, when delays occur, the Employer suggests the order of delivery and the route. It is unclear whether the haulers and carriers receive any training. The Employer has provided at least two carriers either a map or an audiotape telling them the addresses of the customers on the route, suggesting a delivery sequence and conveying any special customer requests.⁶ It appears that instruction received by different carriers varies both in its detail and in whether it is given orally, in writing, or on tape.

Customer complaints called in to the Employer are put in writing and placed on top of the newspaper bundles for the hauler or carrier involved. The Employer also uses this method to communicate special customer requests, such as "temporary stops" for vacations and requests to put the paper on the porch or in the mailbox. Compliance with such requests, however, is not enforced. Sometimes requests and messages are conveyed directly by a district manager. The Employer does not require specific resolutions of

⁵ Two managers told one carrier, for example, that she could not deliver anything other than the News-Press. The Employer contends, however, that the distributors have the right to deliver any other product they wish.

The only exception to this rule appears to have been the New York Times, which apparently was distributed by the carriers on a limited basis. According to the Union, however, the owner of the Employer also holds the contract to deliver the New York Times in the St. Joseph area.

⁶ The Union recently provided the Region with an audiotape that was made by a district manager and given to a carrier, as well as a "route description" (a spiral bound notebook) that was given to another carrier.

complaints, although the carriers and haulers are generally expected to keep the customers satisfied. If a customer does not receive a paper, the Employer will deliver it, determine who was at fault (i.e., the hauler or carrier), and deduct a delivery charge that it sets.

Most customers pay the News-Press directly for their subscriptions. A few prefer to pay the carrier directly, but most "carrier pay" customers are those from whom the Employer could not collect. After 21 days of non-payment, the Employer puts a "final notice" sticker on the paper, and after another seven days of non-payment, the Employer turns the customer over to the carrier as a "carrier pay" customer. The carriers use forms provided by the Employer (entitled "St. Joseph News-Press Subscription Statement") to submit bills to their carrier-collect customers. The carrier must either collect the money or notify the Employer that he or she is canceling the subscription. Several simultaneous cancellations have to be approved by a district manager, and at least one contract was cancelled because the carrier cut off too many customers.

ACTION

We conclude that the carriers and haulers are statutory employees of St. Joseph News-Press.

Section 2(3) of the Act excludes from the definition of employee "any individual having the status of an independent contractor." Exclusions from coverage are to be narrowly construed to achieve the remedial purposes of the Act.⁷ Also, the burden of proof falls upon the party arguing for statutory exclusion.⁸

In determining whether individuals are employees or independent contractors, the Board applies the common law test of agency. Under this test, the Board examines all incidents of the parties' relationship, including those factors relevant to whether an employer has a "right to control" the manner and means of the work,⁹ with no one

⁷ See, e.g., Brennan v. Valley Towing Co., Inc., 515 F.2d 100 (1975).

⁸ See U.S. v. First City Natl. Bank, 386 U.S. 361 (1967).

⁹ Under the "right-to-control" test, "an employer-employee relationship exists when the employer reserves the right to control not only the result to be achieved but also the

factor being decisive. Of equal importance to considerations involving the employer's "right to control" is the "entrepreneurial risk" undertaken by the parties performing the service. Thus, the Board determines "whether they have a proprietary interest in the work in which they are engaged" and "whether they have the opportunity to make decisions [that] involve risks taken by the independent businessman [that] may result in profit or loss."¹⁰

In examining the employee versus independent contractor issue in newspaper industry cases, the Board has looked to numerous factors, including, *inter alia*: (1) whether the employer sets the purchase and selling prices, controls the composition of routes, withholds taxes, subsidizes the distributors' pay and assumes the risk of loss;¹¹ (2) the employer's methods of applying corrective and disciplinary measures;¹² and (3) whether the distributors own their own vehicles, receive fringe benefits, have a proprietary interest in their routes, hire people to substitute for them, set their own working hours and determine the manner and means of delivery.¹³

The Board also looks to the carriers' opportunities to control earnings and whether entrepreneurial risks are involved. This inquiry includes whether the carriers can realize additional profit by reselling the newspapers at a profit, securing new subscribers or making deliveries for

means to be used in attaining that result." The Oakland Press Co., 249 NLRB 1081, 1082 (1980). The Board has recently reiterated its position that the common-law agency test encompasses a careful examination of *all* factors and not just those that involve a right of control. Roadway Package System, 326 NLRB No. 72, slip op. at 12 (1998). See also Standard Oil Co., 230 NLRB 967, 968 (1977).

¹⁰ Standard Oil, 230 NLRB at 968, citing NLRB v. United Insurance Co., 390 U.S. 254, 259 (1968), NLRB v. Pepsi Cola Bottling Co. of Mansfield, Ohio, 455 F.2d 1134, 1141 (6th Cir. 1972), and Restatement (Second) Agency §220(2) (1958).

¹¹ See, e.g., Oakland Press, 249 NLRB at 1083; Philadelphia Newspapers, Inc., 238 NLRB 835, 837 (1978).

¹² See, e.g., Evening News, 308 NLRB 563, 564 (1992).

¹³ See, e.g., Thomson Newspaper, 273 NLRB 350, 352 (1984).

clients other than the employer while on their routes; and whether they assume the financial risk of trying to resell papers purchased from the employer.¹⁴

We are aware that certain factors in this case point toward a finding of independent contractor status: (1) the Employer does not withhold social security or FICA on behalf of the carriers and haulers; (2) the carriers and haulers do not receive fringe benefits and are required to pay their own insurance, purchase their own bonds, and use their own vehicles; (3) the contract describes the carriers and haulers as independent contractors; (4) the carriers and haulers are free to select and hire their own substitutes; (5) they are allowed (to some extent) to increase their income by obtaining new subscribers; (6) they are permitted into only a limited part of the Employer's property; (7) they are unsupervised on their routes and can generally decide how the routes are to be run; (8) they are not subject to discipline short of discharge; and (9) they can generally determine when to drop delinquent "carrier-collect" customers.¹⁵

These are not strong indicia of independent contractors status and several of these factors, e.g., the Employer's failure to make payroll deductions, pay fringe benefits, provide vehicles, or assign substitutes, are not at all inconsistent with employee status. In addition, the Employer may not closely supervise delivery routes merely because such repetitive work is completely routine, requiring virtually no supervision. There are only a few factors indicating that the carriers undertake entrepreneurial risk, and these factors are substantially, limited, viz., the carriers' ability to add new subscribers or to drop delinquent customers.

In our view, the above evidence suggesting independent contractor status is outweighed by the following factors more clearly indicating that the haulers and carriers are

¹⁴ See, e.g., Thomson Newspaper, 273 NLRB at 352; Evening News, 308 NLRB at 564-565; Glen Falls Newspapers, 303 NLRB 614, 616 (1991); Asheville Publishing Co., 298 NLRB 949, 950 (1990); Beacon Journal Publishing Co., 188 NLRB 218, 220 (1971).

¹⁵ On the other hand, the Employer must approve simultaneous cancellations and has in at least one case terminated a contract where it believed the carrier had dropped too many customers.

employees: (1) the Employer establishes both the retail price of the papers and the amount paid by the carriers for each paper they receive, thereby controlling to a great extent the carriers' income; (2) the opportunity for additional income through the carriers' efforts to obtain new subscribers is limited by the Employer's unilateral right to subdivide a route if it feels the route has become too large; (3) the carriers are apparently not permitted to make deliveries for clients other than the Employer without the Employer's permission; (4) the drivers have no proprietary interest in their routes, and the Employer reserves the right to add to or subtract from them; (5) the Employer determines the boundaries of the routes, the number of racks in a route and the number of papers per rack, and sets the pick-up times and delivery deadlines; (6) the Employer adds drops, throws and miles to routes and assigns additional tasks, and unilaterally decides the amounts, if any, it will pay for this extra work; (7) the Employer insulates the carriers from various risks by crediting the carriers for papers remaining unsold from their assigned vending machines and by paying mileage and route subsidies to some of the carriers and haulers. Many of these factors directly control the carriers' work and substantially circumscribe their entrepreneurial risk. A few factors, e.g., the Employer's unilateral control of additional work and any remuneration therefrom, eliminate entrepreneurial risk and are antithetical to independent contractor status.

The Board's recent Dial-A-Mattress¹⁶ decision is distinguishable. Although the owner-operators in Dial-A-Mattress, (the carriers and haulers in this case), control many aspects of their day-to-day delivery operations, the precise manner of delivering newspapers requires comparatively less significant decision making or judgment. Further, as discussed above, most telling in the present case are the factors demonstrating lack of entrepreneurial status. We cannot find here, as did the Board in Dial-A-Mattress, that the individuals in question "enjoy certain freedoms and bear certain risks ... more consistent with the operation of an independent business."¹⁷ The haulers and carriers here bear very little risk of loss and have minimal opportunity to significantly increase their income.¹⁸ Thus we believe that the Employer's haulers and

¹⁶ 326 NLRB No. 75 (1998).

¹⁷ Id., slip op. at 15.

¹⁸ Cf. Thomson Newspaper, 273 NLRB at 352 (drivers free to make deliveries for other clients while on their routes);

carriers "bear[] slight resemblance to the independent businessman whose earnings are controlled by self-determined policies, personal investment and expenditure, and market conditions."¹⁹ Our conclusion is consistent with the Board's holdings in factually similar newspaper cases cited above.

In these circumstances, we conclude that the factors supporting a conclusion that the carriers and haulers are statutory employees outweigh the factors suggesting that they are independent contractors. Accordingly, we conclude that they are statutory employees.

B.J.K.

Evening News, 308 NLRB at 564-565 (same); Glen Falls Newspapers, 303 NLRB at 616 (same; also, carriers purchase papers from employer and "assume the entrepreneurial risk associated with trying to resell them"); Asheville Publishing Co., 298 NLRB at 950 (carriers free to alter prices charged and impose extra fees for personal service).

¹⁹ Herald Star, Canton Division, 227 NLRB 505, 507 (1976). See also Beacon Journal Publishing Co., 188 NLRB at 220.