

Glens Falls Newspapers, Inc. and Newspaper Guild of Albany, Local 34, American Newspaper Guild, AFL-CIO and Teamsters Local 294, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Cases 3-CA-14819, 3-CA-15148, and 3-CA-14854

June 28, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On May 23, 1990, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and an answering brief. The Respondent filed a brief in opposition to the General Counsel's cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that motor route carriers and bundle droppers were employees and that the Respondent violated the Act by subcontracting the bundle dropping operation to a commercial delivery business and discharging 12 bundle droppers. The judge also found that certain conduct directed to motor route carriers and bundle droppers was violative of Section 8(a)(1) of the Act. Finally, the judge concluded that the evidence was insufficient to establish that the discharge of mail-room employee Kendra Whiting was unlawful under Section 8(a)(3) of the Act.

We disagree with the judge's conclusion that the motor route carriers and the bundle droppers are employees rather than independent contractors. Accordingly, we dismiss all the complaint allegations concerning the conduct directed to these individuals. We agree with the judge with respect to his conclusion regarding Whiting.

I. MOTOR ROUTE CARRIERS

A. *Background*

The Respondent publishes *The Post-Star*, a morning newspaper, 7 days a week. It is distributed by approximately 300 youth carriers, 32 motor route carriers, and 3 distributors. Motor route carriers deliver the paper to subscribers in rural areas. Some also drop bundles of newspapers at stores. Each motor route carrier signs an independent contractor agreement with the Respondent. The agreement provides, inter alia, that: (1) motor

route carrier territories are not exclusive; (2) motor route carriers have the responsibility to determine the order, timing, and method of delivery; and (3) motor route carriers are responsible for all customer relations, including billing.

A new motor route carrier is usually chosen and trained by his predecessor. If no replacement is provided, the Respondent will advertise for the position. Once hired, the Respondent will familiarize the new motor route carrier with the predecessor's route. Motor route carriers have been hired initially at an hourly rate and then have signed an independent contractor agreement.

Motor route carriers buy *The Post-Star* from the Respondent at a wholesale rate ranging from 8 to 22 cents per paper and resell them to home delivery customers at a higher retail rate. The Respondent pays a flat rate for store delivery service. The difference between the wholesale and retail prices determines the carrier's gross profit from home deliveries. The wholesale rate is negotiated between the Respondent and each motor route carrier. In October 1988 the Respondent canceled and then renegotiated all motor route carrier contracts.¹ Motor route carriers are required to purchase papers each day for every customer, even if a customer takes less than a full-week subscription. The Respondent does not credit the carrier for unsold papers. Motor route carriers determine the retail rate that they charge their customers. The Respondent does not limit the retail amount a motor route carrier may charge a customer, and a carrier has never been disciplined for charging too much. Often the Respondent does not know what rate a carrier charges the customers. As required by postal regulations, *The Post-Star* contains a rate box which includes a suggested motor route rate. Motor route carriers, however, are free to charge retail rates higher than the suggested rate and many do. Motor route carriers control their own billing arrangements and provide their own envelopes and billing forms. They collect the moneys from their customers, are responsible for bad debts, and decide on their own initiative whether to extend credit to customers. Since at least June 1987 the Respondent has not required that motor route carriers be bonded. Most customers pay the carrier directly, some, however, are on a paid-in-advance plan in which they pay for several months in advance directly to the Respondent. These customers are charged the suggested motor rate for Respondent's administrative and bookkeeping convenience but motor route carriers have surcharged these customers above the suggested rate.

As stated in the independent contractor agreement, motor route carrier territories are not exclusive and many carriers deliver outside their primary delivery

¹ The recitation of facts herein describes the situation after this change. The allegedly unlawful conduct in this case occurred after the change.

area. Motor route carriers are free to add or drop customers without notice to the Respondent. Motor route carriers have exchanged customers among themselves and have reconfigured their routes to make them more convenient. Motor route carriers have also combined and split routes. While the Respondent, as a rule, does not unilaterally reassign or take away customers from motor route carriers, there have been at least two occasions when it did so.

In July 1988, the Respondent engaged a telemarketing service to solicit new customers. Motor route carriers can, however, refuse to deliver to a telemarketing-solicited customer. When a telemarketing "start" is refused it is charged back to the telemarketing company and the Respondent receives a credit.

The Respondent's newspapers are picked up at its loading dock. The circulation manager prepares a load list showing the order in which the mailroom prepares the bundles of newspapers for pickup. In November 1988 the Respondent sent motor route carriers (and bundle droppers) a letter giving them an estimated time that their bundles would be available for pickup. The letter stated that the papers could be picked up "any time after printing." The Respondent does not have a set time by which it requires that motor route deliveries be completed. Motor route carriers operate their routes without supervision.

Motor route carriers are free to use substitutes and helpers and are required to provide a substitute if they cannot deliver their route. Motor route carriers set the compensation they pay their substitutes and helpers and are not required to advise the Respondent when they use a substitute. Most carriers have used substitutes and some use helpers. Several motor carrier routes are delivered by someone other than the motor route carrier named in the contract with the Respondent.

Motor route carrier customers normally complain directly to the carrier. If they do call the Respondent, the complaint is relayed to the carrier with no instructions from the Respondent. When a customer complains to the Respondent about billing rates, the customer is advised that motor route carriers are independent contractors and can charge above the suggested rate.

The Respondent does not keep records of motor route carrier earnings. No taxes or social security payments are withheld from motor route carriers. The Respondent does not provide workers' compensation, vacation pay, holiday pay, insurance, or any other fringe benefits. Motor route carriers supply their own vehicles and are responsible for all taxes, gasoline, and insurance on the vehicles. The Respondent does not require the motor route carriers to have insurance on their vehicles to protect the Respondent from liability. Motor

route carrier vehicles do not have company insignia and carriers are not required to wear uniforms.

There are no work rules and no progressive discipline system for motor route carriers. On occasion, the Respondent has circulated memos to motor route carriers advising them, inter alia, about the printing of a holiday paper, where to pick up comics, and the expiration of accounts. Motor route carriers have been terminated. The Respondent usually provided the 30-day notice as specified in the independent contractor agreement. On at least two occasions, however, motor route carriers were terminated under the contractual provision for termination without notice when their payment of bills became seriously delinquent.

Motor route carriers are free to hold other jobs and most do. They are also free to engage in other business activities while delivering *The Post-Star*, including delivery of other papers. Motor route carriers can distribute other materials along with the paper if it is clear that the materials are not part of, or endorsed by, *The Post-Star*.

B. Judge's Decision

The judge concluded that motor route carriers are employees. In support, the judge found: the Respondent used a load order list to control the motor route carriers' work schedules; motor route carriers rarely delivered outside their assigned area; the Respondent, on occasion, unilaterally revised their territories; they were required to purchase papers for each customer, 7 days a week, whether the customer wanted them or not; the Respondent terminated all motor route carrier contracts in October 1988 and offered new agreements which included a substantial increase in the wholesale cost per paper to the carriers; the routes were unilaterally established by the Respondent; motor route carriers did not buy or sell their routes; and the Respondent had previously required carriers to be bonded.

The judge, applying the "right to control"² test, found that the Respondent reserved not only the right to control the results of the motor route carriers' work but also the manner and means by which those results were accomplished. The judge rejected the argument that motor route carriers were entrepreneurs because their earnings depended on a net profit and they risked monetary loss. The judge found the significant issue to be whether the Respondent had withdrawn its reservation of the right to set the earnings of the carriers. He found that the Respondent had not relinquished that right nor the right to control the amounts carriers charged. The judge found that the requirement that motor route carriers use their own cars, pay their own taxes, and hire their own substitutes did not establish

² *Operating Engineers Local 701 (Lease Co.)*, 276 NLRB 597 (1985); *Fort Wayne Newspapers*, 263 NLRB 854 (1982); *Standard Oil Co.*, 230 NLRB 967 (1977). See also *Gary Enterprises*, 300 NLRB 1111 (1990).

that the Respondent had relinquished the right to control. He found that the Respondent's "absolving" itself from making social security contributions, deducting taxes, or providing fringe benefits for the carriers did not make motor route carriers independent contractors. The judge held that these were matters of form that in no way indicated that the Respondent could not change them or that the Respondent had not reserved the right to do so. Thus, he concluded that the motor route carriers were employees. We disagree.

C. Analysis

While some factors support the judge's finding that motor route carriers are employees, we find those factors outweighed by factors showing independent contractor status. In *Thomson Newspapers*, 273 NLRB 350 (1984), the Board found motor route drivers who dropped off bundles to carriers and dealers and delivered newspapers to home customers were independent contractors. The similarities between *Thomson* and the present case are striking. In *Thomson*, as here: the employer determined the initial composition of the drivers routes; prospective drivers were solicited through advertisements; drivers supplied their own vehicles and were responsible for all expenses related to the vehicle; the employer reserved the right to change the composition of routes; a district manager accompanied a new driver on his route and, after training, the driver worked without supervision; drivers were free to hire substitutes and helpers without the employer's approval and made their own financial arrangements with their substitutes; the employer did not require that any particular kind of vehicle be used to make deliveries; drivers did not have work rules and were not required to display company insignia or wear uniforms; drivers were free to hold other jobs and make deliveries in addition to the newspaper; and the employer did not withhold taxes, make social security contributions, or provide any benefits.

In addition to the foregoing, the following factors, which were not present in the *Thomson* case, are also evidence of independent contractor status: motor route carriers sign an independent contractor agreement; carriers are not paid a flat rate (except in the minor instances noted above); carriers assume the financial risk of buying a certain number of papers which they must resell or lose money; carriers are given an estimated time their papers will be ready, but are free to pick up their papers any time after that; the Respondent has no "target completion time" for delivery; and most customer complaints are made to the carriers, who are free to remedy the complaints as they wish with virtually no input from the Respondent.

The present case is an even stronger one for finding independent contractor status than was *Thomson*. In *Thomson* the drivers were paid a lump sum plus bo-

nuses. In the present case, motor route carriers purchase papers from the Respondent and assume the entrepreneurial risk associated with trying to resell them. Also, motor route carriers in this case have demonstrated a proprietary interest in their routes. Some motor route carriers have essentially "purchased" their routes by paying off a predecessor's overdue bills and then securing payment for those bills from delinquent customers. Additionally, some motor route carriers have retained customers from former routes after obtaining a new route.

For all these reasons we find that motor route carriers are independent contractors, not employees, and thus are excluded from coverage under the Act. Accordingly that portion of the complaint relating to the motor route carriers is dismissed.

II. BUNDLE DROPPERS

A. Background

Bundle droppers delivered bundles of newspapers to youth carriers and stores at a daily flat rate which they negotiated with the Respondent. In January 1989 the Respondent subcontracted its bundle dropping operation to L.E.D.F.O.O.T. Express, an independent delivery company, and discharged the bundle droppers. Both the subcontracting and the discharges were found by the judge to violate the Act.

Most bundle droppers had oral agreements with the Respondent, but two bundle droppers had signed independent contractor agreements. Bundle droppers used their own vehicles to deliver bundles. The Respondent did not require that: (1) any particular kind of vehicle to be used; (2) company insignia be displayed; or (3) bundle droppers wear uniforms. Bundle droppers received no fringe benefits, vacation pay, insurance coverage, or overtime pay. No taxes or social security payments were withheld from their salary. Bundle droppers did not report their mileage to the Respondent and the Respondent did not reimburse them for any expenses.

Bundle droppers frequently provided their own successors. When they did not, applicants filled out a standard application for employment with the Respondent. According to the Respondent, it needed the information on the application to enable it to file IRS Form 1099. The Respondent did not check the references, employment background, or driver's licenses of applicants. Bundle droppers who were not trained by their predecessor would be trained by circulation department employees.

Bundle droppers delivered in defined geographical areas but their territories were not exclusive. Bundle droppers decided the order and method of delivery, and were unsupervised on their routes. The drop locations for each run were on a computer manifest which was given to each bundle dropper with each bundle.

Bundle droppers were free to reorganize the order of their drops and each worked with their youth carriers to determine the best drop location. The routes were rarely changed, however, when there was a significant change, the bundle dropper's flat rate would be renegotiated. Although bundle droppers had no set time by which they had to deliver their bundles, they did have to drop the newspapers to the youth carriers in time for the carriers to make the deliveries and still get to school on time. The Respondent would occasionally talk to a bundle dropper about lateness, but there was no progressive disciplinary system.

Bundle droppers were required to provide their own substitutes and used substitutes and helpers on their routes. Several bundle droppers who had agreements with, and received payment from, the Respondent had other individuals delivering the bundles. Those droppers set the terms and conditions of employment for those individuals who delivered for them and were not required to notify or obtain the Respondent's approval to employ those individuals. Bundle droppers were also free to engage in other business activities during the time they were delivering bundles.

On occasion, the Respondent requested that bundle droppers deliver certain items to youth carriers such as memos from the Respondent and computer sheets. Bundle droppers also occasionally received memos from the Respondent regarding paper shortages, packing the papers, and changes in drops.

B. Judge's Decision

As with the motor route carriers, the judge found bundle droppers to be employees because the Respondent reserved the right to control the manner and means of their delivery of the newspaper. The judge found that the Respondent: required bundle droppers to complete application forms; designated their routes; trained them; set the starting times and the order in which they picked up bundles; kept a record of the times bundles were picked up; issued instructions to bundle droppers and warned them of the failure to comply with the instructions; disciplined bundle droppers; changed the number and location of bundle drops; and "manifested a clear disinclination" to waive the reservation of the right to control the manner and means of bundle droppers work. The judge found that the Respondent reserved the right to dictate the roads used even if it chose not to exercise the right. The judge also found that the bundle droppers were on such a tight schedule that they had to use the most direct routes, which effectively determined the streets they used in making their drops. Additionally, the judge found that by requiring them to work everyday of the year, the Respondent virtually compelled the bundle droppers to use substitutes. The judge found that the Respondent thus delegated to bundle droppers the authority to spo-

radically exercise a supervisory function but also retained the right to revoke that authority.

The judge found unpersuasive the alleged "arms-length negotiations" between the Respondent and bundle droppers as to the bundle droppers flat rates. He found that the rates were unilaterally set by the Respondent. The judge also was not persuaded that because the bundle droppers were paid a flat rate, received no benefits, and had no taxes withheld they were independent contractors. He found that the terms of employment for bundle droppers were controlled by the Respondent and that the Respondent had done nothing to surrender that control.

C. Analysis

We disagree with the judge's findings for much the same reasons as with regard to the motor route carriers. We find that the Respondent exercised little control over the manner and means by which bundle droppers accomplished their deliveries. While their routes were initially set by the Respondent, the bundle droppers were free to restructure them as they wished. Bundle droppers were unsupervised on their routes, used their own vehicles, received no benefits, and had no taxes or social security payments withheld. They arranged with their youth carriers where to drop bundles. They were free to use substitutes and helpers and to make their own financial arrangements with them. The Respondent was usually unaware whether a substitute was being used and, in some cases, bundle droppers had other persons regularly delivering their routes.

As with the motor route carriers, we find *Thomson* to be controlling. In *Thomson*, individuals (motor route drivers) who dropped off bundles of newspapers to dealers and carriers were found to be independent contractors. In *Thomson*, the drivers' routes were established initially by the employer; there were no written agreements between the employer and the drivers; the drivers used their own vehicles; they paid their own expenses; no taxes were withheld; the newspapers were picked up at the employer's loading dock; the employer could change the drivers' routes; the drivers were free to use substitutes and make their own financial arrangements with the substitutes; there were no work rules or dress code for drivers; and the drivers were free to hold other jobs and make other deliveries. All these factors are present in this case. In *Thomson*, the drivers were paid a lump sum; in the present case, a flat rate. As noted by the Board in *Thomson*, "[w]e are mindful that there are factors absent in this case that, if present, would more strongly compel a finding that the drivers are independent contractors." 273 NLRB at 352. However, as was true in *Thomson*, and is true here, the factors suggesting employee status are outweighed by the factors supporting the conclusion that these individuals are independent contractors.

Thus, while the bundle droppers do not undertake quite the same entrepreneurial risk as do motor route carriers, we find that they nonetheless exercise significant autonomy in their work. We find this autonomy outweighs any control that the Respondent may exercise over the bundle droppers' duties.

In view of our determination that motor route carriers and bundle droppers are independent contractors, not employees, and thus not covered by the Act, we will dismiss the complaint.

ORDER

The complaint is dismissed.

Robert A. Ellison, Esq., for the General Counsel.
Nicholas J. D'Ambrosio Jr., Esq. and Arthur J. Siegel, Esq. (Bond, Schoeneck & King), of Albany, New York, for Glens Falls Newspapers, Inc.
Mr. Timothy F. Schick, President, Newspaper Guild of Albany, Local 34, American Newspaper Guild, AFL-CIO.
Bruce Bramley, Esq. (Prozefsky, Bramley & Murphy), of Albany, New York, for Teamsters Local 294, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint, as amended, in these consolidated cases, alleges that Glens Falls Newspapers, Inc. (Respondent) for the reason stated below, selected two mailroom employees for layoff and later terminated one of them; subcontracted a newspaper delivery operation which resulted in the discharge of 12 employees classified as bundle drop drivers; moved back on a loading list the times the 2 employees, classified as motor route drivers, were able to pick up their newspapers in order to start their routes; and interrogated employees, engaged in surveillance of their union activities, threatened them with discharge and also created the impression that it kept those activities under surveillance. Respondent is alleged to have engaged in those acts in order to discourage its employees from supporting the Newspaper Guild of Albany, Local 34, American Newspaper Guild, AFL-CIO (Guild) or Teamsters Local 294, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Teamsters) and that it thereby has committed unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Respondent, in its amended answer, asserts that the bundle drop drivers and also the motor route drivers are independent contractors and not employees protected by Section 7 of the Act. It denies that the two mailroom employees named in the complaint were discriminatorily selected for layoff or that one of those two was later discriminatorily discharged. It contends they and many other mailroom employees were selected for layoff, because they were not as able as those employees who were not laid off. Respondent also denies that it engaged in any act which interfered with, restrained, or co-

erced any of its employees in the exercise of their rights under Section 7 of the Act.

The hearing was held in October 1989 in Albany, New York. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Guild, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent publishes a daily newspaper, *Post-Star*, in Glens Falls, New York, and vicinity. Its operations meet the Board's newspaper standard for asserting jurisdiction. The Guild and the Teamsters are labor organizations as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Layoff of Kendra Whiting

The General Counsel alleges that Respondent selected Kendra Whiting for layoff because she obtained the Guild's assistance in her efforts to redress her complaints that she had been subjected to sexual harassment by her supervisor.

Whiting began working for Respondent in July 1987 in the pressroom. For a 2-month period in the fall of 1987, she served as the Guild steward for the pressroom employees, who are part of the collective-bargaining unit represented by the Guild.

On November 2, 1987, John Sillero, then the supervisor of the pressroom, issued a "formal notice of warning" to Whiting, which referred to "repeated failures" to follow instructions. She protested the warning to the Guild, and told the Guild that Sillero had given her the warning because she had, several months before, resisted his sexual advances. She also told the Guild that, on the same day she was given the formal notice of warning, Sillero had used a forklift truck to raise part of her car off the ground while she was sitting in it. After hearing her complaints, Guild representatives went with her to talk with Respondent's publisher, James Marshall.

After meeting with Whiting and the Guild representatives, Marshall interviewed Sillero and others but was unable to decide whether to believe Whiting's account or Sillero's denial. He then met with Guild representatives and, at its request, the November 2 warning was removed from Whiting's personnel file. However, it was retained elsewhere by Respondent.

Respondent's managers were sent to attend classes on the subject of sexual harassment and awareness. A notice as to Respondent's policy concerning that subject was posted on each of Respondent's bulletin boards and Sillero was warned that he would be discharged if there were any more complaints against him for sexual harassment. Marshall offered to transfer Whiting away from Sillero's supervision to a clerical position in the circulation department. Although she had, in her initial employment application to Respondent, sought a clerical job, she declined Marshall's offer. None of these actions satisfied the Guild. Only Sillero's discharge would.

In the next few months, the Guild filed, or assisted Whiting in filing, a grievance, EEOC charge, Municipal Court complaints, and a U.S. District Court suit—all seeking re-

dress against Sillero and against Respondent. Respondent was charged with not having taken appropriate steps to punish Sillero for his alleged harassment of Whiting.

In early June 1988, Whiting and the Guild complained to Respondent that Sillero had attempted to disengage a safety device on a machine which Whiting operated. Respondent's production manager, Sam Gayle, investigated the complaint and interviewed Sillero. Sillero told him that he was only joking. Sillero was discharged on June 8, 1988. The Guild and Whiting have continued their legal proceedings against Respondent for its asserted indifference to Whiting's initial grievance as to Sillero's alleged sexual harassment of Whiting.

In December 1988 Whiting was selected for layoff when the mailroom employee complement was being reduced because new machinery was being installed. The General Counsel contends that she was one of the better employees in the mailroom and that she would not have been laid off but for her protected activities. In that regard, the General Counsel offered testimony that she was proficient on certain machine operations.

Respondent asserts that Whiting was laid off along with many other mailroom employees solely because, in the judgment of its production manager, the employees retained were more qualified to operate the new equipment. Relevant background evidence discloses that, in the latter part of 1988, Respondent obtained approval from its parent company to invest about \$800,000 to modernize its pressroom machinery and that the new machinery could operate faster and would require about one-third the size then of its work force. The new machinery was scheduled for installation in January 1989. Respondent's contract with the Guild allowed it, in laying off employees, to retain the ones it deemed best qualified.

The record before me discloses the following respecting Whiting's work performance while in Respondent's employ. She performed a variety of mailroom tasks, including operating an insert machine and carrying bundles of newspapers. In early February 1988, she obtained a medical leave of absence from which she returned in early April 1988. In June 1988, her wrist began to bother her. As a consequence, she had some difficulty in performing her duties in the mailroom.

On October 6, 1988, she brought in a doctor's note which stated simply, "Out of work 2 weeks." As a result, she was given a leave of absence. On November 1, 1988, she brought in another doctor's note which read, "No work for 2 weeks starting 10/17." Gayle entered a personnel notation to the effect that he had assumed, when Whiting did not return to work on about October 20, that she had quit. In any event, Gayle told Whiting on November 1, that she had to keep her doctor's excuses current so that her status as an employee would not be jeopardized.

Whiting did not return to work on November 1. In fact she has not been able to work because of her wrist injury, since she took leave on October 5, 1988. Instead, she has undergone surgical and related treatment and has been receiving workers' compensation benefits.

Whiting acknowledged that Sam Gayle, production manager in charge of the mailroom, has treated her fairly. The evidence in the record respecting the selection of those mailroom employees to be laid off and those to be retained is as follows.

On October 17, 1988 (while Whiting was on leave of absence as discussed above) Respondent informed the Guild that it was going to install new, more efficient machinery in the mailroom which would require fewer employees. Respondent further told the Guild that it would keep only those employees it judged to be best able to operate the new machines. On October 26, Production Manager Gayle began an evaluation of the abilities of the mailroom employees and concluded it on December 22, 1988. The new machinery was due to be installed in early 1989. On December 26, 1988, the Guild was given a memorandum, dated several days earlier, which listed the names of the 20 mailroom employees who were selected to be laid off and of the 8 who would be retained. Whiting's name was among those to be laid off. On January 11, 1989, Production Manager Gayle wrote a letter to the Guild which stated that the nine employees named in the letter had been laid off the previous night and which also stated that those nine names were "listed in the official call back order." Whiting's name was not on the list. At the Guild's request Gayle added Whiting's name to that list. It was placed at the end of the list as the Guild advised that Whiting was not able to return to work soon and may never be able to return. All 10 of the employees named in the January 11, letter, including Whiting, were later sent checks from Respondent for severance and vacation pay which had accrued under the provisions of the contract between Respondent and the Guild.

The General Counsel's witnesses testified that Whiting was very proficient at the insert machine. Whiting acknowledged however that her efficiency overall was impaired since about June 1988 by her wrist injury. Production Manager Gayle testified respecting his observation as to the abilities of the mailroom employees during the period in which he evaluated their respective job performances.

The General Counsel offered the testimony of James Dean to support the allegation that Whiting was discriminatorily selected for layoff. Dean had been assistant foreman in the mailroom a position included in the unit represented by (the Guild) and became foreman there on Sillero's discharge on June 8, 1988.

Dean testified as follows. Production Manager Gayle had asked him in about August or September 1988 to give him a list of the names of 12 mailroom employees whom he, Dean, would recommend for retention when the new machinery was installed. Dean testified that he prepared several such lists, that he told Gayle that Whiting should be retained, and that he has since thrown out the lists he had prepared. When Dean showed Gayle the list which had Whiting's name on it, Gayle told him that he could not keep her because Respondent's publisher, Marshall, "would never go for it." Gayle did not explain that remark. Dean could not remember the discussion in detail. (He was then shown his pretrial affidavit.) That refreshed his memory. Gayle also had told him that Marshall would not agree to keep Whiting because of all the trouble she had caused.

Dean had himself been discharged in November 1988 because Gayle was dissatisfied with the way he supervised the mailroom. Dean testified that he "may have" told Respondent's publisher then that he would "hurt (Respondent) legally." Dean also conceded that, in April 1988, he urged Gayle to discharge Whiting and that Whiting had had difficulty in doing certain jobs because she had hurt her wrist.

Respondent's publisher, Marshall, testified that Dean had said that he would "sabotage [Respondent] legally."

Gayle denied that he had ever asked Dean for a recommendation as to which employees were to be retained or that he ever had told Dean that Marshall would not approve of Whiting's retention because of the trouble she caused.

The General Counsel's evidence fails to persuade me that Dean's account is more probably true than Gayle's. The General Counsel's brief simply quotes Dean's testimony on direct examination. Respondent's brief, on the other hand, discusses a number of factors, including several noted above, which raise substantial questions as to the reliability of Dean's testimony. I am unable to accept his account. I credit Gayle's testimony.

In examining the foregoing facts, it is obvious that Whiting invoked the Guild's assistance respecting her grievances against her supervisor, Sillero. Her activities in that regard are clearly protected by the Act. There is no question either that Respondent was cognizant of those activities or that Whiting had caused Respondent trouble as Respondent, in addressing Whiting's complaints, expended time and effort and incurred related expense. There is, however, a lengthy time hiatus between the incidents involving Sillero and Whiting and her selection for layoff at the end of 1988. There is also no credible independent evidence of animus towards Whiting on Respondent's part. There is further a dearth of evidence that the reason proffered by Respondent for having selected Whiting for layoff, among with others, was clearly pretextual. I find that the evidence is insufficient to establish that Whiting was selected for layoff because of her Guild activities. Cf. *Mobile Home Estates*, 292 NLRB 691 (1989).

B. Whiting's Discharge

As noted above, Whiting's name had been added to the bottom of the recall list with the Guild's consent. Shortly afterwards, many of the mailroom employees who had been retained to operate the new, faster machinery, left Respondent's employ. Respondent then had openings to recall all 10 employees who were on the recall list.

On February 8, 1989, Whiting received a call from the then supervisor of the mailroom who asked her if she intended to come back to work. She replied that she was unsure because of her injured wrist. On February 10, Respondent sent her a certified letter which stated that the laid-off employees were being recalled and asked her to call Respondent to get her work schedule. The letter further stated that, if she did not call within 24 hours of receiving the letter, Respondent will assume she does not wish to return and that her name would be removed from the call back list.

That letter was returned to Respondent unclaimed; it had been sent to the same address as Respondent's earlier letter to her, with which was enclosed a check for her severance and vacation pay, a check she had cashed.

On March 6, 1989, Respondent's attorney sent a letter to the attorney who represented both Whiting and the Guild. Enclosed with that letter was a copy of the February 10 letter referred to above. Respondent asked that the February 10 letter be forwarded to Whiting. Nothing was heard from Whiting until she wrote Respondent on May 15, 1989, to state that she learned from Respondent's workers' compensation insurance carrier that she had to notify Respondent of her disability status. She also stated in the letter that she was

scheduled to undergo wrist surgery on May 18 and that she will return when released by her physicians.

Respondent's publisher, James Marshall, wrote her on May 18, at the address listed on her May 15 letter, to state that she had waived any right to be rehired when she failed to return to work after being recalled in February 1989. The collective-bargaining agreement between Respondent and the Guild refers to reductions in force and to recalls from layoff but it does not specify how laid-off employees are to be notified of their recall or a time period during which they must accept the recall before forfeiting their recall rights.

On August 24, 1989, Whiting's attorney wrote Respondent's counsel to state that she would report for work on August 26 and that her doctor limited her to light duty work which would require no sudden movements or her handling any weights exceeding 20 pounds. Respondent's attorney wrote back to restate the substance of the May 18 letter, discussed above, and to further state that Respondent will consider Whiting for any opening upon submission by her of a job application together with a medical statement that she is able to perform the mailroom duties as specified in that letter.

The General Counsel contends that Respondent, by its May 18 letter described above in which it stated that Whiting had earlier waived her recall rights, had unlawfully discharged her. The General Counsel's theory is that Respondent's assertion of a waiver by Whiting of her recall rights was a clear pretext as Respondent knew that Whiting was receiving treatment and benefits under workers' compensation, and from this showing of pretext, an unlawful motive is to be inferred. Respondent asserts that it has made every reasonable effort to comply with the recall provisions of the collective-bargaining agreement it has with the Guild and that its position is consistent with those provisions.

Respondent's position has at least a colorable basis under the provisions of the agreement. I am unable, thus, to find that its waiver assertion is a clear pretext nor can I draw an inference of unlawful motivation on Respondent's part respecting its termination of Whiting's recall rights.¹ I therefore find that the evidence is insufficient to establish that Respondent terminated Whiting's employment status because of the activities she engaged in which were protected by the Act.

C. Layoff of Stephen Waters

The General Counsel contends that, in December 1988, Respondent selected Stephen Waters for layoff because he assisted both the Guild and also Whiting in their claims that Respondent's supervisor, Sillero, had engaged in sexual harassment of unit employees.

Waters lives with Whiting and Respondent was aware of this. He began working for Respondent in May 1985. In connection with Whiting's complaints against Sillero, Waters furnished an affidavit to the Board's Regional Office. He had reported to the Guild in March 1988 an instance where Sillero had taken a female employee to Respondent's warehouse, contrary to orders purportedly given Sillero. He also

¹ A related question arose as to whether Respondent reasonably relied on its assertion also that Whiting had failed to comply with the contract provisions governing medical leaves of absence. That question and the issue as to whether there was a waiver of her recall rights are matters more properly of contract construction, to be resolved as otherwise provided for in that contract.

had talked to Respondent's publisher, Marshall, in support of the Guild's grievance, discussed above, that Sillero had raised Whiting's car into the air with a forklift truck, while she was in it.

Before the layoffs in January 1989, Waters has worked principally as a mailer, handling manifests. He was among the 20 employees named in Respondent's letter to the Guild as those to be laid off. He was laid off in January 1989. With the high turnover of the retained employees, he was recalled in February 1989. In March 1989 he became a full-time machine operator and received a 50-cent-an-hour increase.

Waters was told by all his supervisors—Sillero, Dean, Bruce Senecal, and Dave Moore—that he was one of the best employees in the mailroom. Senecal also had told him that his being selected for layoff was a mistake that would be corrected. To counter that testimony, Respondent offered production manager Gayle's testimony. He related that he placed little weight on Senecal's views as he was dissatisfied with his work as a temporary supervisor. Also, as noted above, Dean had himself been discharged for incompetence. Moore did not begin working for Respondent until after Waters was selected for layoff. Gayle's testimony is plausible as he had spent considerable time in the mailroom during a 2-month period when he evaluated the performance of the employees there.

Waters also testified that mailroom supervisor, Dave Moore, had told him in June 1989 that he had been laid off earlier because of his involvement in the lawsuits instituted by the Guild against Respondent. As just noted, Moore joined Respondent after Waters had been selected for layoff. Moore left Respondent's employ in mid-1989 and reportedly is now somewhere in the southwest United States. Moore's statement to Waters is not alleged as independently violative of the Act.

It is possible that Moore's statement was but surmise on his part. Further, there is a serious question as to whether Waters' account of that statement should be credited. Waters testified as to that statement only after he was asked a somewhat leading question and the General Counsel did not show the context in which the statement was purportedly made. It does not seem plausible that Moore would have blurted out so conclusory a statement to Waters months after Waters had been recalled. Colloquially speaking, the statement sounds too pat. I am not disposed to credit it. I also note, in that regard, that Waters gave other testimony which proved unreliable. He had denied ever being warned as to his attendance but recanted that denial when shown two written warnings given him and which he had signed. Those warnings are discussed separately below.

Production Manager Gayle testified that he had spent 2 months in late 1988 making personal observations of the work performance of all the mailroom employees and that he did this in order to gauge which employees should be retained to operate the new machinery upon its installation. He testified that the mailroom employees were switched to different assignments to enable him to make a full evaluation. The General Counsel's witnesses confirmed that the mailroom employees were shifted among the mailroom machines in that interval. Waters had received written warnings in April and September 1988 as to his attendance; the latter

noted that Waters would be discharged if there was a recurrence.

Gayle testified that he personally selected for retention the employees whom he deemed would be best able to operate the new machinery. The General Counsel's brief notes that many of those employees left Respondent's employ after working on the new machinery for a very short time and that Waters has proved to be quite capable on his recall. One inference to which this may point is that Waters was discriminatorily passed over for retention. Nonetheless, it is unlikely that Gayle would have purposely chosen a less qualified employee to operate new machinery on which Respondent invested \$800,000. I cannot find, on the totality of the evidence, that Waters' selection for layoff was discriminatorily motivated.

D. Alleged Independent Acts of Coercion

1. Alleged surveillance

The Guild's president Timothy Schick, distributed leaflets in October 1988 at Respondent's plant urging drivers to attend a meeting at the Queensbury hotel in early November 1988. Respondent's circulation manager saw a copy of that leaflet the same day it was distributed.

The General Counsel called three drivers as witnesses to support the complaint allegation that Respondent, by its Mailroom Foreman James Dean, engaged in unlawful surveillance of that meeting. The accounts given by those drivers, however, were somewhat vague and imprecise. At best, they permit an inference that Dean, toward the end of the meeting, drove his car either on the street adjacent to the hotel or through the hotel parking lot. I am not persuaded that Respondent engaged in the alleged unlawful surveillance. Further, other record evidence tends to negate a finding of unlawful surveillance. Thus, Dean himself was discharged a few days after that meeting. Also and as discussed further below, Respondent's circulation manager questioned a driver several days after the meeting, as to which drivers had attended it. I shall recommend dismissal of this allegation.

2. Alleged coercive interrogation

Cheryl Kay, a bundle drop driver whose status as an employee is discussed in a separate section of this decision, testified that she attended the Guild meeting referred to just above. She related further that Respondent's circulation manager, William Sara, called her at home on the Monday following that meeting, and asked her if she had gone to it. When she responded that she did, he asked what went on there and who was there. She testified that "in the back of [her] head, [she was] not going to tell him [anything] . . . and that, instead, she told him that a handful of people were there and that they talked about whether they were self-employed or employees."

Sara testified that Kay had volunteered to him that she planned on attending that Guild meeting and that she told him then that he could "give her a call" if he was interested in knowing what went on at that meeting.

Respondent argues that Sara's testimony should be credited as Kay did not deny it. However, Kay's account makes clear that she purposely evaded Sara's questions. The obvious inference is that she had not previously told him to give

her a call if he was interested in hearing about the meeting. I find Sara's account improbable and reject it. Instead, I credit Kay's account.

The merits of the General Counsel's complaint allegation must await analysis of, among other considerations, the issue as to Kay's status as an employee or as an independent contractor.

3. Alleged unlawful threat

Roger Rock, a bundle drop driver, testified that about 12 hours after the Guild meeting discussed above, Respondent's mailroom supervisor, Dean, told a group of drivers that their jobs "would be done" if they signed union cards. Rock also testified that the remark "was a laughable matter to [him]" and that he "laughed it off." Respondent argues that Rock's testimony indicates that the statement had no coercive effect. However, the remark by Dean, in context with Roger Rock's other testimony and his general demeanor, shows just the opposite. Rock related that the remark was "typical of [Dean] . . . a company man [who] meant to make points for himself." Rock's laughter was one of contempt and not at any joke that Dean made. Respondent urges also that Dean's statement was noncoercive as Dean had no authority to dismiss any driver and that, in any event, Rock later signed union cards. The merits of those contentions and the matter of the status of the drivers as employees or independent contractors are considered in separate sections below.

4. Allegation that Respondent created the impression of surveillance of Teamsters' organizational efforts

Roger Rock testified that Respondent's assistant circulation manager, Philip Winslow, wished him "good luck with your meeting with the Teamsters at Charlene's house," a reference to an organizational meeting to be held by the Teamsters at the home of one of the drivers.

Another driver, Beverly Packard, testified that Winslow asked her if he could join the Teamsters and that this occurred before the first Teamsters meeting and at a time when she was unaware that the Teamsters were "being brought into this."

The Teamsters had been approached by some drivers soon after the Guild had begun its organizational effort. The Guild withdrew from its attempt to organize the drivers when they informed the Guild that they wanted to be represented by the Teamsters.

Winslow testified for Respondent to counter the testimony given by Rock and Packard. He was asked by Respondent's counsel if he engaged in the conduct attributed to him by them and he responded in the negative.

I credit Rock's and Packard's accounts over Winslow's conclusory denials.

5. Other purportedly coercive acts

The General Counsel contends that Respondent engaged in other coercive acts and offered testimony thereon, not as separate unfair labor practices as they were not so alleged in the complaint, but as background evidence, demonstrating Respondent's union animus.

The General Counsel asserted that, when the drivers became interested in joining a union in late 1988, Respondent discriminatorily restricted their access to rest and break areas,

located in the mailroom. The testimony offered in support of that assertion indicates that, in late 1988, mailroom employees were issued employee ID badges which entitled them to access to Respondent's facility and that the drivers involved in this case were not issued ID cards. Nonetheless, the evidence is that, except for some heated words exchanged with the mailroom employees themselves, the drivers nonetheless continued to have access to those rest and break areas. I can find no union animus on Respondent's part based on the proffered testimony, which was, in good part, conclusory.

The General Counsel also asserts that Respondent, in retaliation for the drivers' interest in organizing, tightened up collection procedures for those who operated motor routes—their duties are discussed in a separate section below. The testimony relied on by the General Counsel is too conclusory to support a finding that Respondent used retaliatory collection procedures.

The General Counsel also cites instructions given mailroom supervisor Dean after Timothy Schick, the president of the Guild and who is not in Respondent's employ, had distributed organizational leaflets at Respondent's facility in late 1988. Respondent instructed Dean to see to it that Schick would not be on Respondent's property, should he attempt to distribute leaflets there again. Those instructions hardly demonstrate that Respondent had union animus; they show merely that Respondent was not disposed to let its premises be used for organizational purposes by a union.

E. The Bundle Drop Drivers

1. Their status

a. The evidence

The complaint, as amended, alleges that Respondent unlawfully discharged 12 employees classified as bundle drop drivers. Respondent contends that those bundle drop drivers had been independent contractors, not employees protected by the Act. Respondent further denies that its decision to subcontract was unlawfully motivated.

The work done by the bundle drop drivers consisted of their picking up, in the early morning hours, bundles of newspapers which had been prepared by Respondent's mailroom employees. These drivers dropped those bundles at or near the homes of youth carriers, who later delivered the papers to the homes of subscribers. In addition, some of the bundle drop drivers left bundles outside stores, for later retail sale.

Bundle drop drivers applied for those positions with Respondent by filling out the same job application forms used by applicants for clerical positions, mailroom jobs and other openings on Respondent's regular payroll. Two of the twelve bundle drop drivers signed documents, each captioned "Independent Contractor Agreement." Those documents however contained provisions clearly irrelevant to the bundle dropping operation. The documents pertained to the sale of newspapers, to the furnishing of a security bond, and to guarantee that Respondent would get money collected from subscribers. Bundle drop drivers perform no selling or collecting functions.

One bundle drop driver referred to herself as an independent contractor because she was one of the drivers who signed one of the two documents just discussed. She, however, had

been told by one of Respondent's supervisors that the bundle drop drivers were in a "miscellaneous category."

Respondent maintained a load order list which contained the names of bundle drop drivers and also of motor route drivers (a separate category discussed below). The names were listed according to the order that the drivers were to pick up their respective bundles of newspapers at the loading dock outside the mailroom. The mailroom employees had, up until the Guild made its appearance in November 1988, recorded the actual times that these drivers picked up their bundles. These records had been used in discussions Respondent's supervisors had with the drivers concerning complaints of late deliveries of the newspaper. Respondent discontinued the practice of recording the times on the loading list. It had, for several months beginning with the Guild's initial organizing effort, discontinued the load order list itself but later reinstated its use.

These drivers had their own cars and were paid daily rates which varied according to the amount each agreed upon in discussions with Respondent's circulation manager. One driver, however, had received \$5 an hour plus 18 cents for each mile when he began working for Respondent; he was told several weeks later that this was a mistake and then agreed to accept \$22 a day with no deductions for taxes and no deductions for taxes and no mileage reimbursement. In his view, the \$22 amount was comparable to his earnings based in the hourly rate plus mileage he had previously received. There were no tax or other deductions taken by Respondent from the daily rate.

These drivers each operate in a defined geographical area. Their routes were numbered by Respondent. They frequently were familiar with the routes to which they were assigned, having driven them initially as substitutes for the regular drivers. Occasionally, one of Respondent's managers spent 2 days or so accompanying a new driver to familiarize the driver with the route and with delivery procedures. Respondent has not required that these drivers use any specific roads in making their rounds.

Respondent had added and deleted drops from the routes, usually without any change in a driver's flat rate. The drivers are regularly required by Respondent to also deliver to the youth carriers messages, material and other items.

The General Counsel offered the testimony of four former bundle drop drivers as to their experiences. One, Gayle Rock, related that her route and others had been rearranged by Respondent to insure that two drivers were not "going on the same streets" and that, as a consequence she was given more papers to deliver. She then asked for, and received, a \$3 increase in her daily flat rate.

She also testified credibly that Respondent's then assistant manager (now have delivery manager), Thomas Butterfield, told her that if drivers did not put the bundles where the youth carriers wanted them placed, the drivers would be replaced.

Roger Rock, another of the bundle drop drivers, testified that a former circulation manager of Respondent had told him, when he balked at delivering computer sheets to the youth carriers, that he would be fired if he did not deliver them.

Gayle Rock testified that, in March 1988, circulation manager Sara told her and her husband, Robert, that they were replaced based on information he received that they had been

stopping for breakfast in the middle of their routes. Her husband's account of that discussion is essentially corroborative. Sara testified that he "terminated their contract" because they were repeatedly late in making deliveries and not because they were having breakfast before completing their routes. I credit the Rock's account as Sara's account was summary and as his account indicates that the matter of the Rock's having breakfast was discussed when they were terminated in March 1988.

Gayle Rock further related that she and her husband were "rehired" about 6 minutes later after they had made an appeal to an official of Respondent's corporate parent. She testified that, on their return, they were told that the routes had been revised so that they would no longer deliver bundles to youth carriers but would make drops only at retail stores. She testified that Sara offered \$196 for a 2-week period. They accepted reluctantly. She then asked for a contract and was told that there was no such thing.

Gayle Rock also testified that she was instructed by one of Respondent's managers that she was not to deliver comics to the youth carriers on Saturday mornings because Respondent wanted the comics delivered with the Sunday edition and not on Saturdays. The drivers are given an extra day's pay for delivering the comics. She also testified credibly that she was told by Respondent's assistant manager, Winslow, to come to him whenever she has a problem.

Roger Rock, Gayle's husband, testified that he was prevented by Respondent from giving another bundle drop driver some of his bundles to be dropped.

Respondent has distributed memorandums to its drivers, some of which contain detailed instructions as to their duties. For example, on December 17, 1987, Circulation Manager Sara issued a memorandum informing them that they are "to observe the following guidelines." These guidelines directed them as to what they were to do whenever they found, while enroute, that they were short of papers. These guidelines included directions that drivers were not to short youth carriers, that they were to leave explanatory notes at retail stops, and that they were to call Respondent to advise why the shortage occurred.

Bundle drop drivers furnished their own substitute drivers and made their own arrangements with these substitutes as to how much they were to be paid. There was, however, one occasion when Respondent objected to the substitute whom one driver had retained.

The General Counsel placed in evidence New York State Department of Labor decisions which issued in 1986 and which held that a driver who performed bundle dropping duties, was an employee entitled to benefits from the Unemployment Insurance fund and was not an independent contractor, as Respondent had urged.

b. Analysis as to status of the bundle drop drivers

In *Operating Engineers Local 701 (Howard Co.)*, 276 NLRB 597, 600-601 fn. 14 (1985), the Board stated:

In determining whether individuals are employees or independent contractors under the [Act], the Board is required to apply common law agency principles. See *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). Under this approach, "there is no shorthand formula or magic phrase that can be applied to find the answer, but

all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” Id. at 258. The predominant consideration is whether the employer reserves not only the right to control the results of the work in question, but also the manner and means by which those results are accomplished. Other relevant factors are set forth in Restatement 2d, *Agency*.

. . . .
[Sec. 220(2) (1958) which] sets forth the following factors, which among others, are considered in determining whether an individual is an employee or 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;
- (d) the skill required in the particular occupation;
- (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;
- (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.

It is the right to control, not the exercise of control, that is the governing consideration. *Nevada Resorts Assn.*, 250 NLRB 626, 645 (1980). Moreover, the test is not to be mechanically applied. *A. Paladini, Inc.*, 168 NLRB 952 (1967). The determination of an individual’s status depends on the facts of each case; the factors favoring employee status must be weighed against those favoring independent contractor status. *Fort Wayne Newspapers*, 263 NLRB 854 (1982). Pure agency law governs such a determination; no special administrative expertise is involved. *NLRB v. United Insurance Co.*, supra. Nonetheless, the Board’s determination cannot be set aside where there are two fairly conflicting views, notwithstanding that a reviewing court would have decided differently. Id.

The common law agency principles were taken by the Board from the holding in *Singer Mfg. Co. v. Rahn*, 132 U.S. 518 (1889). See *San Marcus Telephone Co.*, 81 NLRB 315 (1949). *Singer Mfg.* was a negligence case where plaintiff was injured by a route salesman’s vehicle. The trial court ruled, apparently as a matter of law, that the salesman was an employee, not an independent contractor, and directed the jury to consider only the question of damages. The Supreme Court, after reviewing the common law principles, affirmed.

On a much more recent note, the Board’s decision in *Camsco Produce Co.*, 297 NLRB 905 (1990), appears to have more than passing relevance to the employee-independent contractor issue. There, the Board held that *Camsco* had the burden of showing that individuals were agricultural

laborers and not employees as it was the party who was seeking to exclude those individuals from the Act’s coverage.

An examination of Board cases over the years discloses that there really has been “no shorthand formula or magic phrase” that provided a ready answer to the question now under consideration. See, for example, *Teamsters Local 921 (San Francisco Newspaper)*, 194 NLRB 37 (1971), and particularly the statement in the dissenting opinion that the majority opinion failed to give proper weight to numerous entrepreneurial aspects; the majority had observed that those aspects were common in the industry and were outweighed by other cited factors. See also *Las Vegas Sun, Inc.*, 219 NLRB 889 (1975), where a panel majority stressed the opportunities for profit and loss over the absence of proprietary interests. A different result involving those same considerations, however, was obtained in *Thomson Newspapers*, 227 NLRB 505, 506–507 (1976); there, the majority discounted certain entrepreneurial factors which the dissent would have stressed. Contrast *Drukker Communications*, 258 NLRB 734 (1981), with the result in that case after remand, 277 NLRB 418 (1985).

Ultimately, the question to be kept in focus in evaluating the facts in the instant case is—Did Respondent reserve the right to control the manner and means by which the bundle drop drivers accomplished the results of their work?

The fact that these drivers filled out standard employee job application forms when they sought work as bundle drop drivers indicates to me that Respondent did reserve its right to control the various aspects of their work. Other evidence strongly points towards a finding that Respondent had retained that right. Thus, it set the starting times of these drivers and the related order in which they picked up their bundles; it has regularly issued detailed instructions to them; it has warned them of these consequences of any failure on their part to comply with its instructions; it has imposed discipline; it has changed the location and the number of drops, and it has, in other ways manifested a clear disinclination on its part to waive the reservation of its right of control of the manner and means of their work. Respondent’s brief notes that these drivers were free to run their routes in whatever order they wished. Nonetheless, the evidence before me makes clear that Respondent reserved to itself the power to dictate what roads they were to take; the fact that it may have chosen not to exercise it as of the moment. In any event, these drivers seem to have been so closely scheduled as to time that they had to take the most direct roads in going from one drop to another; in other words, the structure of their work as scheduled by Respondent effectively controlled as to what streets they would use in making drops. Respondent notes also that these drivers were free to hire substitutes. It might be more precise to say that Respondent’s requiring them to work 365 days a year thereby compelled them at times to use substitutes and that Respondent thus has delegated to them the authority to exercise on a sporadic basis a supervisory function. The fact that Respondent so empowered them does little to convince me that it has not reserved its power to, whenever it so chose, relieve them of that function. Nor do I find persuasive Respondent’s other assertion that the flat rates paid these drivers were the product of arms-length negotiations to support its contention that these drivers are independent contractors. Circulation Manager Sara set these rates himself, except for one occasion

when he granted a driver's request for a \$3 raise after having assigned extra duties to that driver.

Respondent also relies on its having paid bundle drop drivers flat rates, with no tax deductions, and its not having provided them with any fringe benefits or vehicles. While those arrangements have their analogues in business clearly run by entrepreneurs, they do not, in the particular circumstances of this case, warrant a finding that the bundle drop drivers are likewise entrepreneurs. These arrangements have, from my evaluation of the evidence, always been controlled by Respondent; there is nothing to indicate that it ever had surrendered that control.

Rather, the totality of the evidence establishes, and I find, that Respondent had reserved its right to control the manner and means whereby the bundle drop drivers effected the timely delivery of Respondent's newspaper.

2. Alleged discriminatory discharge of 12 bundle drop drivers

The complaint, as amended, alleges that Respondent, on January 20, 1989, subcontracted its bundle drop work and thereby discharged its bundle drop drivers, named below, because they supported the Guild and the Teamsters:

Christine Adams	Jay Markwell
Kathleen Austin	Gayle Rock
Heidi Corlew	Robert Rock
Roger Jackson	Roger Rock;
Carlton Johnson	Gerald Sayers
Cheryl Kay	Peggy Smith

The General Counsel presented the following evidence thereon, some of which is discussed elsewhere in this decision.

Timothy Schick, the Guild's president, had been approached in October 1988 by drivers who expressed interest in being represented by the Guild. Schick distributed organizational leaflets, just outside Respondent's plant, urging drivers to attend a Guild meeting on November 5, 1988, at the Queensbury hotel. Respondent's circulation manager, Sara, instructed Mailroom Supervisor Dean to keep Schick off Respondent's property when leafletting. Respondent also distributed to the drivers its own leaflet, advising them that they are independent contractors not entitled to union representation and that the Guild does not have their best interests in mind. A number of drivers attended the November 5 meeting and, as recounted above, Sara questioned one of them about that meeting.

In mid-November 1988 the drivers told Schick that they preferred to have the Teamsters represent them. The Teamsters entered the picture and scheduled a meeting of the drivers for November 13. As noted above, Respondent's assistant circulation manager, Winslow, asked a driver if he was going to the meeting. About 15 to 20 drivers, some of whom were motor route drivers whose status is discussed in a separate section below, attended that meeting. The four bundle drop drivers who testified for the General Counsel signed Teamsters authorization cards at that meeting.

On December 22, 1988, the Teamsters wrote Respondent demanding recognition as bargaining representative of the drivers. That same day, the Teamsters filed a petition in Case 3-RC-9348 for an election among Respondent's "bundle droppers and route delivery people." Respondent answered

by letter of December 23, declining to recognize the Teamsters.

On January 4, 1989, Respondent's circulation manager, Sara, telephoned Adirondack Presort Enterprises (Adirondack) to inquire if it would be interested in taking over most of the bundle dropping operations. He met later that day with its officials and, on January 10, signed an agreement with Adirondack for it to do most of the bundle dropping. Sara, on January 12, approved Adirondack's request to assign the contract to an affiliated company, L.E.D.F.O.O.T. Express (Ledfoot).

Sara, on January 10, notified the 12 bundle drivers named above that their services would be terminated as of January 20 and that they would receive "a two week contract termination payment" if they continued to perform their services until then. On January 20, Ledfoot drivers took over the bundle dropping work done by the twelve named above. These 12 bundle drop drivers were then discharged.

The evidence proffered by the General Counsel makes out a prima facie showing that the 12 bundle drop drivers were discharged on January 20, 1989, because of their union activities. Respondent's precipitate action in contracting their work to Adirondack/Ledfoot which they performed for years, the timing of that contract relative to the Teamsters demand, the evidence of union animus discussed above and of course Respondent's awareness throughout of the drivers' interest in the Guild and in the Teamsters, all strongly support that showing. See *B & P Trucking*, 279 NLRB 693, 700 (1986). The burden has shifted to Respondent to demonstrate that it would have, absent the appearance of the Guild and the Teamsters, contracted with Adirondack/Ledfoot in January 1989. See *Wright Line*, 251 NLRB 1083, 1089 (1980).

Respondent presented evidence to show that the Adirondack/Ledfoot contract was the culmination of a decision it made in mid-1988 to turn its bundle dropping work over to one company, rather than to continue to subcontract it to 12 separate persons. Respondent offered the following evidence thereon.

According to Sara and other of Respondent's managers, Respondent had been experiencing considerable difficulty for some time in its bundle dropping operations and that this became exacerbated in the spring of 1988. As discussed above, Sara had discharged Gayle and Robert Rock in March 1988. There had been more than 37 separate bundle drop drivers in a period of less than 2 years. In March 1988, Respondent hired Christopher Mason as its home delivery manager and made him responsible for the bundle dropping work, along with that of five district managers who, in turn, were responsible for the work of 350 youth carriers. Mason testified that, about once a week, a bundle drop driver failed to show up for work and that he had the burden of finding a replacement and of doing so in the middle of the night. He further testified that he spoke with Sara about his problem and that Sara informed him in June 1988 that a decision was made to turn the bundle drop work over to one individual, instead of 12. Mason testified that he did not have a clear recollection as to the details of that conversation. Mason also testified that the decision was not implemented in June because one of the district managers had just been terminated and that he had to take over his job and also to face the many problems that arise each summer when many of the youth carriers go to camp and are not able then to deliver papers on their routes.

Sara testified he and Mason chatted back and forth about these problems and that he threw at Mason the idea of subcontracting so that they would have to deal with only one individual, instead of 12 separate drivers. Sara testified further that, in June, he had a good chat with Respondent's publisher who then authorized him to arrange the subcontracting. Sara's testimony, as to why that decision was not then acted on, paralleled Mason's.

In August 1988, Sara approached William Ringle, the husband of one of the bundle drop drivers, to inquire if he were interested in having all the bundle dropping subcontracted to him. Ringle was interested but indicated that he would not give up his full-time job at another company. Sara did not pursue the matter further with him.

In mid-September, Sara offered the job of handling the bundle dropping work to one of the district managers, who declined it a week or two later. Another of the district managers expressed interest in that job but Sara preferred that that individual continue to work as a district manager.

On November 9, 1988, Mason left Respondent's employ. He was replaced by Tom Glover, who, according to Sara, agreed that shifting the bundle dropping to an outside contractor made a lot of sense. At about this same time, an individual named Tim Ringer filled out an application for a district manager's position. Sara testified that he was so impressed with Ringer's qualifications that he talked to him about his taking over the bundle dropping operation. Sara testified further that Ringer, who had recently moved back to the Glens Falls area, was extremely interested and that he, Sara, then drafted a contract which, inter alia, would obligate "the Contractor" to furnish, maintain and operate the motor vehicles to be used, to agree to indemnify Respondent against any losses and to provide a \$1 million insurance policy. At about this same time, i.e.,—about mid-November 1988, according to Sara, he called Burns News Agency (Burns), a company which delivers New York City newspapers in the Glens Falls area. It was not until December 6, 1988, that Sara was able to meet with an official of Burns. Sara met again with Burns on December 13 and discussed the routes and tentative prices. It was about this time, according to Sara, that he reached the conclusion that Ringer would not be suitable to take over the bundle dropping as he did not have any trucks and did not know many people because he had been away from the Glens Falls area for quite some time.

Sara related that, on December 22, Burns agreed to take over the bundle dropping work but backed off the next day when it learned of the Teamsters' petition, discussed above. Sara called Adirondack on January 4 and, as discussed above, signed a contract with it on January 10.

Respondent pays Adirondack/Ledfoot \$2800 a week. It had cost Respondent about \$1900 a week for the bundle dropping work before January 20, 1989. Sara testified that it would cost Respondent over \$3000 a week to provide service comparable to that given by Adirondack/Ledfoot if it carried the drivers on its own payroll.

The evidence presented by Respondent to demonstrate that it would have in January 1989, absent the union activities of the bundle drop drivers, subcontracted their work to Adirondack/Ledfoot is unconvincing. It took but two short sessions in January 1989 for Respondent to arrange the subcontract and that was at a time when Respondent's manage-

rial staff apparently did not need urgent relief. Yet Respondent's evidence is that it could not find time in the summer of 1988 to conduct similar brief negotiations to relieve what Respondent asserts was then a most urgent situation. Nor is Sara's account of his interest in subcontracting the work to Ringer persuasive. It seems unlikely that Sara would have seriously considered contracting out a major aspect of the delivery operations to someone who had just returned to the Glens Falls area and who was applying for a job as a district manager. It is even more implausible that it took Sara several months before he realized that Ringer was unsuitable as a subcontractor because he had no trucks and few personal contacts in the area.

I also have more than substantial doubts that Respondent's publisher, Marshall, in the course of several "good chats" with Sara, gave him carte blanche to add about \$1000 a week to Respondent's costs. Marshall impressed me as a hands-on manager who would have to be shown in detail how it was operationally more advantageous to incur such extra expense and that there was no feasible alternative. In these circumstances, I do not accept the proffered testimony by Respondent that Marshall and Sara months before January 1989, reached a decision to contract the bundle dropping work to one individual or company.

Rather, the evidence submitted by Respondent indicates that it did not undertake vigorous steps to subcontract until December 6 when Sara met face-to-face with Burns; that was the day after the Guild had its meeting of drivers at the Queensbury hotel. Respondent's testimony indicates that Sara made preliminary overtures via telephone to Burns in mid-November 1988. That was after Schick had distributed the Guild leaflets at Respondent's premises. The timing of Respondent's with Burns and Adirondack/Ledfoot does little to support that those discussions were unrelated to the drivers' interest in first the Guild and later the Teamsters.

I find that Respondent has not rebutted the General Counsel's prima facie case and I thus further find that Respondent, in subcontracting most of the bundle drop operations in January 20, 1989, discharged 12 bundle drop drivers because of their support for the Guild and the Teamsters.

F. *The Motor Route Drivers*

1. Their status as employees or independent contractors

a. *Contentions and evidence*

The General Counsel alleges that Respondent unlawfully discriminated against two employees, classified as motor route drivers, by lowering their placement in the order in which drivers load their trucks. Respondent asserts first that motor route drivers are independent contractors, not employees protected by the Act.

There are about 30 motor route drivers who deliver Respondent's newspaper which is published every day of the year. These drivers use their own cars and, whenever they take a day off, they are required to furnish a substitute driver. Respondent does not inquire into how the substitutes are paid.

Respondent schedules the pickup times for motor route drivers in the same manner that it does for bundle drop drivers. Generally, they deliver to outlying areas on numbered routes in geographical areas defined by Respondent. As dis-

cussed further below, Respondent charges them for each newspaper and they in turn charge route customers. At one time, some of their customers were retail stores. Now, they deliver to stores and are paid flat rates therefor, the same as bundle drop drivers.

Motor route drivers fill out regular employee job application forms. Many had worked as substitutes and knew the routes before they became regular drivers. Some began after having answered Respondent's advertisements for motor route drivers; they were accompanied by a district manager for a few days while learning. There are also several who transferred from Respondent's regular payroll. The most recent drivers were paid hourly rates plus mileage until they learned their routes.

All motor route drivers have signed a form given them by Respondent entitled, "Independent Contractor Agreement." That form specifies that they purchase copies of Respondent's newspaper at a certain price for resale by them to route customers. Several new motor route drivers initially were paid at an hourly rate, plus a mileage allowance because there was confusion, when they started, as to which route customers owed money and which did not. When those accounts were straightened out, they too signed the Independent Contractor Agreement form.

That form, prior to early 1988, recited that Respondent agreed to sell to the motor route driver as many copies of the newspaper as the driver requested, that the driver will pay Respondent a rate as stated thereon for each copy, that the driver is an independent contractor and not an employee, that the end result of the relationship is sales and or the timely delivery of the paper, that the agreement may be terminated by either upon 30-day notice or for cause and that the driver will furnish a bond to insure that Respondent will be paid in full for all copies of the newspaper purchased by the driver and also to insure faithful performance of the agreement. Respondent revised that form in March 1988 to address certain adverse findings made by the New York State Unemployment Insurance Appeals Board in cases filed by former motor route drivers. The Appeals Board had rejected Respondent's contention that motor route drivers, whose agreements it had terminated and who were seeking unemployment compensation benefits, were independent contractors and thus not employees eligible for those benefits. The revisions consisted in part of Respondent's adding a clause that a motor route driver may pick up his or her bundles at any time after printing. In practice, Respondent continued its use of the load order list, as described above. In controlling the order in which it placed the drivers' names on that list, Respondent effectively controlled their work schedules. As discussed below, Sara dropped two drivers down on that list and thereby delayed their starting time for about one-and-a-half hours. Respondent further revised the independent contractor agreement form, in response to the Unemployment Compensation Appeals Board rulings, by stating therein that drivers are free to deliver outside their territory. Such deliveries happen on occasion; conversely, Respondent occasionally has seen fit to revise their territories.

The agreements signed by these drivers contained the respective rates they were charged per newspaper copy. The General Counsel offered the testimony discussed next respecting these rates.

Motor route drivers are required to purchase, for each customer, a newspaper for each of the 7 days of the week, even if the customer wants only deliveries on 5 or 6 days. Until the time that the Guild began its organizational effort in late 1988, these drivers routinely notified Respondent's office employees of the names and addresses of new customers obtained by these drivers; at one point Respondent had distributed a form on which each motor route driver listed the name, address, and telephone number of the substitute drivers they used.

Beverly Packard, a motor route driver, began with Respondent in May 1987. She was charged then 8 cents by Respondent for each newspaper she delivered. She testified that she had no idea then how that figure was arrived at but was told later by a former circulation manager that the rates charged motor route drivers take into account the number of papers on a route and mileage. In July 1987, she signed her first independent contractor agreement form which specified that she would be charged \$.083 per newspaper copy. In March 1988, she signed a second agreement which raised her cost to .1187-cent per copy. She testified that she again had no idea how Respondent arrived at that figure.

In July 1988, Sara sent a notice to all motor route drivers informing them that, effective July 25, the new suggested rate to be paid by customers on routes serviced by motor route carriers will be \$2.30 per week. Several months later, it notified subscribers that if they receive their papers by motor route drivers, their new delivery rate will be \$2.50 a week as of November 19, 1988.

In October 1988, during the interval of the July and November increases to the subscribers, Sara called in all the motor route drivers. He gave each 30 days' notice that their respective agreements were being terminated and that new agreements would be offered with substantial increases in the amount each would be charged per copy.

Sara, in speaking with Packard and another driver then, told them that their new rate would be 23 cents, almost double the rate they were then paying. When she balked, Sara reduced the rate to .1987 cents. She accepted. She volunteered, while testifying as to the increase, that it is "not easy when you have a family, just to quit."

Sara testified that the rates be set for the motor route drivers in October 1988 were based on his arbitrary determination and that there were no factors involved.

Motor route driver Katherine Barlow testified that Sara increased her copy charge in October 1988 from .1265 cents to .2365 and she signed an agreement reflecting that increase. She testified that, several days later, after she had learned that her rate increase was larger than those of other drivers, she called Sara and he lowered her rate to .2065 cents.

Harvey Wilson, a motor route driver, refused to accept either Sara's initial increase to 25 cents per copy or his second offer, 21 cents. Wilson furnished a substitute driver who serviced his route for the next 30 days at which point his contract with Respondent was terminated.

The charges to the motor route carriers to be effective in November 1988, ranged from a low of .0805 cents to a high of .2187 cents. The increases encompassed in these new rates were instrumental in these drivers seeking Guild representation.

These drivers usually charge the suggested amount, as advertised in Respondent's paper,—i.e.,—\$2.50 for a 7-day de-

livery. Respondent also has set up a program whereby subscribers can pay it in advance for delivery over a long period. That paid in advance charge averages out to a substantial savings for subscribers. Respondent credits the drivers with the amounts so paid in advance by subscribers on the respective routes. In some cases, subscribers who had been paying the suggested rate availed themselves of the paid-in-advance arrangement. The motor route driver who deliver to such a subscriber obviously received less money but was saved the hassle, if any, of collecting each week. Infrequently, a driver refused to deliver to a new customers who had accepted Respondent's paid-in-advance plan, because that customer usually had earlier reneged on paying for home delivery. There was at least one instance where a driver refused to deliver to a paid-in-advance customer because the customer lived too far away.

While these drivers usually either charge subscribers the suggested rate or accept the paid-in-advance amount as advertised by Respondent, they occasionally charge subscribers more. Sara has told them that they should be careful not to charge so much as to discourage subscribers. These drivers also have to consider that Sara can increase the amount Respondent charges them and that Sara can take customers from them and assign them to another driver.

Respondent used to charge, motor route drivers who delivered to retail stores, a lower rate for those papers, than it charged them for the papers they delivered to homes. Sara suspected at one point that some drivers were delivering papers which they had paid for at the lower retail store rate, to home customers. He put a stop to that practice by making the stores direct customers of Respondent and by paying the driver a flat rate for dropping bundles at the stores—the same arrangement as had been followed with the bundle drop drivers discussed above.

General Counsel's witnesses testified credibly that Sara has stated that Respondent tries to limit a driver to a maximum of 400 customers. In mid-1987 Sara took 60 customers from Barlow. She asked him not to take any more away. He replied that he probably would not, for the next year. Sara offered her then bonuses if she "generated" new customers over her revised base of 379.

The motor route drivers have established routes. On one occasion, Sara split one route into two. Respondent does not require that they deliver to subscribers in any particular order but, as one driver put it, "it's just not believable that [we] would go out of our way" in making deliveries. There have been infrequent occasions where a driver delivers to a customer living in an adjacent area serviced by another driver.

Motor route drivers do not buy or sell their route. When one takes over a route, payments collected from subscribers are allocated between the former driver to cover papers he delivered prior to leaving and the new driver for papers delivered since.

Most of these drivers appear to have full-time employment on other jobs during the daytime. At one point, Respondent required a bond of these drivers to ensure that Respondent would be paid for the papers they gave to the motor route drivers each night. It has discontinued that requirement. That discontinuance may be related to the marketing technique Respondent has adopted and referred to above. Respondent used a company to solicit customers by phone to subscribe to its newspaper at a substantial discount by agreeing to pay

in advance. The parties have referred to that solicitation as telemarketing. When a prospective customer agreed orally to the plan, Respondent notified the driver on which route that prospective customer lived of the "new start" on occasion, a driver may refuse to service the new start because of earlier payment problems with that prospective customer or because the new start is located too far away. Drivers are questioned as to the reasons for refusing delivery and Respondent uses these reasons to avoid having to pay a commission to the telemarketing company for not accepting these referrals.

Respondent furnishes posts, and tubes to be placed on them, which these drivers secure outside subscribers' homes to facilitate delivery.

b. Analysis

The same principles, set forth above in the section dealing with the bundle drop drivers, govern the determination as to whether these motor route drivers are employees or independent contractors. In applying these principles, I note, at the outset, that the work they do is a part of Respondent's regular business. Respondent thus did not have to make any extra effort in order to reserve to itself the right to control the manner and means by which these drivers accomplished results. The key question, then, is what has Respondent done to divest itself of the reservation of that right.

A great deal of the evidence presented by the parties had to do with whether or not Respondent exercised that right. Such evidence is, of course, relevant to rebut evidence which tends to show that Respondent had not reserved its right. The existence of the right, itself, is inherent in the status of a respondent as it is the party who has engaged the drivers. It is not, then, for the purpose of establishing the existence of the right that evidence of its exercise is admissible. Rather, as just noted, evidence as to the exercise of the right to control the manner and means by which a driver accomplishes the result is essentially rebuttal evidence which would show that a respondent has retained it and not surrendered it. The General Counsel has presented considerable evidence to that end. Thus, Respondent was shown to have required individuals, who wanted to be motor route carriers, to fill out employee job application forms. When accepted, they are paid initially on a hourly basis plus mileage. The General Counsel also adduced evidence that Respondent, on retail store accounts, converted motor route drivers to bundle dropping work. Further, Respondent was shown to have set and revised the starting times of the motor route drivers in establishing their loading sequence, to have revised routes of these drivers, to have issued written instructions to them and to have taken away customers.

Respondent presented the following matters for consideration to show that it has not retained the right to control the functions of these drivers. It urges that material weight should be given to the fact that these drivers have each signed a document, termed Independent Contractor Agreement. That document provides, among other things, that the signatory motor route driver acknowledges that he or she is not an employee. The very fact that Respondent has drafted that form, and revised it in efforts to neutralize holding on the independent contractor-employee issue which were adverse to its interest, does nothing to show that it no longer retained its right to control the manner and means of the drivers' work. Moreover, it may not even be appropriate to

give evidentiary weight to a document that a motor route driver must sign and which, by clear implication, requires him to state that he or she is not entitled to the protection afforded by the Act.

Respondent also contends that these motor route drivers possess entrepreneurial qualities in that their earnings are dependent on the net profit they derive and in that they risk incurring monetary losses. There are cases that adopt that view and other cases which equate such earnings to piece-work payments or sales commissions. The significant point, however, is not what analogy may be drawn but whether or not there is evidence that Respondent has withdrawn its reservation of the right to set the earnings of these drivers. I have already noted that Respondent initially pays inexperienced drivers on an hourly basis plus mileage and decides when to begin charging on a per copy basis. I note too that the copy charges are based on volume and mileage factors. Respondent, except for the rate raises in October 1988, had unilaterally set the charges per copy; there is no evidence that the drivers ever initiated any attempt at reducing them. In October 1988, Respondent gave them the option of accepting huge rate increases or of leaving. I am not disposed to view those increases as probative evidence that Respondent has no interest in controlling the manner and means of their work as some part of their earnings has to go to the operation and maintenance of their cars.

Nor does the evidence support a finding that Respondent has relinquished its right to control the amounts they charge. Some drivers charge customers in excess of the subscription recommended by Respondent. That alone may show that Respondent, on those occasions, chose not to exercise a right and, as earlier noted, that is insufficient to support a finding that its right no longer exists. Rather, the evidence is quite clear that Respondent never gave up the reservation of its right to control the charges to its subscribers. The telemarketing campaign it undertook materially affected the earnings of these drivers and they were not privy to that arrangement. The published suggested rates and memos sent by Respondent to its motor route drivers also compel a finding that Respondent never abandoned the reservation of its right to influence those prices.

Respondent requires that its motor route drivers furnish their own cars, pay their own taxes, provide their own fringe benefits if any, and furnish substitutes on whatever of the 365 days each year they do now work. I find it difficult to accept those considerations as convincing evidence that Respondent has no longer reserved its right to control delivery functions vital to its business. Simply by not supplying the delivery vehicle or paying a specific amount expressly designated as a mileage compensation does little to demonstrate that it abandoned its authority to set different terms. It is quite obvious also that the difference between the rate charged drivers by Respondent and the suggested customer rate takes into account the drivers' operating costs. More importantly, there seems to be no question that Respondent can change the payment device; or to state it directly, Respondent reserves the power to do so. I have already made observations, in the discussion above relating to the status of the bundle drop drivers, as to Respondent's requirement that the drivers have the obligation to furnish substitute drivers.

Respondent has absolved itself of making social security contributions on behalf of their drivers, of deducting other

taxes from their earnings, and of providing fringe benefits. Analogously, independent contractors pay their own taxes and provide their own fringe benefits. It is, however, an inversion of logic to conclude, from these tax and benefits considerations, that the motor route drivers are also independent contractors. Again, what is of significance is that these considerations are matters of form and in no way are they indicative that Respondent cannot change them or that Respondent has not reserved the right to do so.

Based on the record before me, I find that Respondent has reserved the right to control the manner and means by which the motor route drivers effect and promote timely delivery of Respondent's newspaper.

c. Alleged discrimination against two motor route drivers

The complaint alleges that Respondent, to discourage support for the Guild and the Teamsters, moved two motor route drivers, Beverly Packard and Michael Donovan, down in the order in which drivers can pick up their newspapers. Respondent's answer denies that allegation.

Packard testified as follows respecting this matter. She and Donovan, along with about 25 other drivers, attended the Guild meeting on November 5, 1988, at the Queensbury hotel. Two days later Sara sent memos to all the drivers advising them of their starting times. The notes he sent to Packard and Donovan stated that their newspapers would be ready for pickup at 3:25 a.m. They had been getting them at 2 a.m. in order to deliver them to farmers who were used to getting the paper before they began work. Packard then drafted a letter to be given to these farmers which urged them to call Respondent's publisher to complain and not to call Sara. She showed the draft of that letter to Sara and he became upset. She told him that she had heard that he believed that she and Donovan were the ones who had contacted the Guild. She also told him that she felt that that was the reason why he moved Donovan's and her starting time down to 3:25 a.m. Sara replied by asking, "Well, you were at the meeting, weren't you?" She told him that she would not discuss the meeting. She also said that she would lose a lot of customers if she was not moved up on the loading list. Sara said that he needed a couple of days to do this. A few days later, she and Donovan were moved up to a starting time which was within 10 minutes of their previous starting times.

During her cross-examination, she testified that she also had told Sara that she had tape recorded that conversation. However, she also related that she later played that tape for several drivers she named and that she no longer had the tape. None of the drivers she named testified.

Sara testified that Packard and Donovan had been moved down in the loading order in early October 1988 solely to correct various circulation problems and that his memos to them on November 7 respectively, the 3:25 a.m. start time did not change that starting time. He also denied that he asked Packard, as to whether she was at the Guild meeting, during his discussion with her about the draft letter she prepared. He testified that when she accused him of picking on them because of the Guild, he told her that that was untrue.

Respecting Sara's testimony that her starting time had been changed in October, Packard too conceded that, for many weeks prior to November 7, she had been getting her

papers very late and that she attributed those delays to press-room problems.

I am not persuaded that Sara asked Packard whether she attended the Guild meeting on November 5 particularly as she was unable to produce the recording she said she made of that very statement. The timing of the notices sent her and Donovan is suspicious but that suspicion is offset by the fact that, for some time prior to November 7, Packard and Donovan apparently were no longer getting their papers at 2 a.m. More significantly, I find it difficult to believe that Sara would have issued notices to all the drivers in order to discriminate against only Packard and Donovan.

The credited evidence² is insufficient to establish that Respondent discriminatorily moved Packard and Donovan down in the loading order on November 7, 1988.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent's bundle drop drivers and its motor route drivers are employees as defined in Section 2(3) of the Act.

3. The Guild and the Teamsters are labor organizations as defined in Section 2(5) of the Act.

4. Respondent did not engage in any unfair labor practice by its having selected Kendra Whiting or Stephen Waters for layoff or by its later discharge of Kendra Whiting.

5. Respondent interfered with restrained and coerced employees with respect to the exercise of their rights under Section 7 of the Act and committed unfair labor practices as defined in Section 8(a)(1) of the Act by having:

(a) coercively interrogated employees as to their support for the Guild.

(b) threatened employees with discharge if they supported the Guild.³

²Former mailroom supervisor Dean testified that Sara had told him that he would drop drivers down in the loading order so that they would not be at the mailroom dock at the same and that he would do this so the drivers would not be able to discuss unions while picking up their papers. Dean also testified that Sara told him that he knew that Packard and Donovan had attended the Guild meeting. I do not credit Dean's account. He was discharged by Respondent and stated then that he would "get" Respondent legally for having discharged him. Dean impressed me as one who was still hostile. I reject his testimony.

³Dean's threat is chargeable to Respondent as he was a supervisor and is coercive notwithstanding Rock's sarcastic laugh. See *Great Dane Trailers*, 293 NLRB 384 (1989).

(c) created the impression among its employees that it has kept under surveillance their activities in support of the Teamsters.

(d) engaged in the conduct described below in paragraph 6.

6. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act by having discharged on January 20, 1989, the employees named below in order to discourage them and other employees from joining or supporting the Teamsters:

Christine Adams	Jay Markwell
Kathleen Austin	Gayle Rock
Heidi Corlew	Robert Rock
Roger Jackson	Roger Rock
Carlton Johnson	Gerald Sayers
Cheryl Kay	Peggy Smith

7. Respondent did not engage in any unfair labor practice when it notified Beverly Packard and Michael Donovan on November 7, 1988, as to the time they could pick up their newspapers.

8. The unfair labor practices found above in paragraphs 5 and 6 affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily discharged 12 employees, I find it necessary to order it to offer them reinstatement to their former jobs, replacing if necessary bundle drop drivers employed by Adirondack/Ledfoot, or, if those jobs no longer exist, to substantially equivalent positions and to make them whole for any loss of earnings they have suffered as a result of their discriminatory discharges. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]