

BKN, Inc. and Local 839 of The International Alliance of Theatrical Stage Employees, Technicians, Artists and Allied Crafts of the United States and Canada, AFL-CIO, CLC. Case 31-RC-7716

January 31, 2001

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND WALSH

On May 26, 1999, the Board granted the Employer's Request for Review of the Regional Director's Decision and Direction of Election in this case solely with regard to his finding that the Employer's freelance writers, artists, and designers are employees, and not independent contractors, within the meaning of Section 2(3) of the Act. A mail ballot election was conducted beginning on May 21, 1999, and the ballots were impounded.

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

Having carefully considered the entire record and the briefs on review, we affirm the Regional Director's findings that the individuals in dispute are employees under the Act.

I. FACTUAL BACKGROUND

The Employer is engaged, among other things, in the production of an animated series for television, titled *Roswell Conspiracy*. The Employer will produce approximately 30 of the 40 one-half hour episodes of *Roswell Conspiracy* for television syndication.¹ This case involves the Union's petition for an election in a unit of individuals working on the pre-production phase of *Roswell Conspiracy*. The petitioned-for unit includes various designers and artists who are permanent employees on the Employer's payroll. The Union, however, also seeks to represent writers, artists, and designers who are labeled "freelance" by the Employer. The Employer contends that all of these employees are independent contractors, and therefore should not be included in the unit. Because their roles and circumstances are distinct from each other, we will first address separately the status of the freelance writers, and then proceed to a consideration of the freelance artists and designers.

The Employer's hierarchy of authority responsible for the production of *Roswell Conspiracy* has the executive producer at the top, with the two line producers and the art director directly below the executive producer. The process of creating each one-half hour *Roswell Conspiracy* show begins with a script written by a freelance

writer (hereinafter writer). The writers are hired by and work under the direction of two story editors (editors), whom the Regional Director properly found to be supervisors within the meaning of the Act. The editors were hired by and report to the two line producers.

There is a common thread of a story line that will run through all 40 episodes of the *Roswell Conspiracy*, but each episode is intended to be an individual story that stands alone. It is the editors' responsibility to ensure that the scripts that are being developed follow the thematic thread that is supposed to flow through all the episodes. The script-writing process begins with the writer or editor creating a premise, which is an idea behind a specific episode that is in keeping with the direction of the series. This premise, which can be as short as two lines or as long as a half a page, is submitted to the producers for their review. The producers decide whether the premise is a viable one for the series, and if it is, they return it to the editors with comments for the next step.

After an editor has reviewed with a writer the producers' suggestions regarding the premise, the writer prepares a script outline, which expands on the premise by setting out in general terms the characters and events that will take place within the script. The outline can range from two to eight pages in length.

Based on this outline, the writer next produces a first draft script (also known as a teleplay), which is approximately 30-36 pages long. This script is submitted to the editors, who regularly note changes that they would like to see made to the script. The script is then sent to the producers, who mark desired changes on the script and send it back to the writer or editor to be revised. On occasion, these requested revisions are made by the editors, but ordinarily the editors ask the writers to make the changes. Thus, the final step of the script-writing process is the production of a revised script by the writer, which is submitted to the editors for their approval and transmission to the producers. At each of the four steps of this process, the editors and the producers give suggestions and directions to the writers regarding the style of writing that is being used to ensure that it is consistent with the overall tenor of the series. This includes suggestions concerning characters or backgrounds that could be utilized in the episodes being developed. Although the executive producer and the line producers oversee the entire script-writing process, they do not have any direct communication or contact with the writers who work under the two editors. Instead, the producers communicate with the editors, usually only by telephone.

The writers are paid \$6500 per episode script. They receive their payments directly from the Employer, based on invoices that they submit to it. The writers set their

¹ Additional episodes will be produced by separate companies not involved in this proceeding.

own hours, decide where to work (many work out of their homes), and provide and use their own equipment and materials. The writers are not subject to any type of discipline from the Employer's management personnel. The Employer does not require the writers to work for it exclusively. The writers do not receive any fringe benefits from the Employer, and the Employer does not withhold payroll deductions or workers' compensation insurance premiums from the invoiced payments made to the writers.

II. ANALYSIS

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." In determining whether an individual is an employee or an independent contractor under Section 2(3), the Board applies the common-law agency test and considers all the incidents of the individual's relationship to the employing entity. *Roadway Package System*, 326 NLRB 842 (1998). The multifactor analysis set forth in Restatement (Second) of Agency, Section 220 includes the following factors to be examined:

- (1) The control that the employing entity exercises over the details of the work;
- (2) Whether the individual is engaged in a distinct occupation or work;
- (3) The kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision;
- (4) The skill required in the particular occupation;
- (5) Whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (6) The length of time the individual is employed;
- (7) The method of payment, whether by the time or by the job;
- (8) Whether the work in question is part of the employer's regular business;
- (9) Whether the parties believe they are creating an employment relationship; and
- (10) Whether the principal is in the business.

Thus, no single factor is controlling in making this determination. For example, in *Roadway*, the Board found that the drivers in dispute were employees based on the following factors: (i) the drivers did not operate independent businesses, but rather performed functions that were an essential part of one company's normal operations; (ii) they constituted an integral part of the company's business under its substantial control; (iii) they had no substantial proprietary interest; and (iv) they had

no significant entrepreneurial opportunity for gain or loss.

Here, the Regional Director found that there is no doubt that the work tasks performed by the writers are governed by the Employer, and that the BKN production team is responsible for the supervision of the script writing. The Regional Director noted it was the norm in this industry for the writers to work out of their homes and to be paid on a project-by-project basis. He concluded that given the frequency of the "freelance" working arrangement in the animation entertainment industry, and "the Board's public policy interest in not disenfranchising workers simply because of the peculiarities of their trade," the "Restatement scales" tipped in favor of finding the writers to be statutory employees. We agree with the Regional Director's reasoning and findings, but wish to emphasize certain factors that support the conclusion that the writers are employees, not independent contractors.

Just as a party seeking to assert that an individual is a supervisor within the meaning of Section 2(3) has the burden of proof,² the party asserting that an individual is an independent contractor has the burden of establishing that status.³ Based on the record in this case, we find that the Employer has failed to carry its burden of proving that the writers are independent contractors who must be excluded from the unit.

There are, to be sure, a number of factors that militate in favor of a finding that the writers are independent contractors. These factors are that the writers work out of their homes; set their own hours; provide their own equipment and materials; are not subject to discipline; sign agreements to work on each episode; are paid per episode pursuant to invoices submitted to the Employer; may work for other employers; receive no benefits; and have no taxes or other payroll deductions withheld.

Nevertheless, we find that viewed in its entirety, the record establishes that there exists an employer-employee relationship between the writers and the Employer. A significant factor leading to this finding is the degree of supervision that the editors exercise over the writers' creation of the scripts. Although the writers work out of their homes, they are held accountable to the editors, who set deadlines and edit the script. This supervision is, in turn, vitally affected by the significant role that the producers play in the development of a script. Through the revisions and suggestions made by the editors and producers, the Employer exercises extensive control over the details of the writers' work.

² *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982), enfd. 703 F.2d 577 (9th Cir. 1983); *Tuscon Gas & Electric*, 241 NLRB 181 (1979).

³ *Central Transport, Inc.*, 247 NLRB 1482-1483, JD fn. 1 (1980).

The record clearly demonstrates that it is the editors' responsibility to make sure that the scripts that are being developed follow the story line that is supposed to flow through all 40 episodes of *Roswell Conspiracy*. Thus, the Employer specifies what the writers are to produce from the beginning of the script-writing process until its end, and the Employer's production team guides the writers' performance of their work at every step of the process, and oversees the writers' creation of their final products.

Further, the writers clearly perform functions that are an essential part of the Employer's normal operations, and they constitute an integral part of the Employer's business under its substantial control. Although afforded much autonomy in performing their work, the writers do not operate as independent entrepreneurs. Instead, when writing scripts for the *Roswell Conspiracy*, they are working exclusively for the Employer, and the scripts that they produce must conform to the Employer's specifications.

The situation in this case is distinguishable from that in *DIC Animation City*, 295 NLRB 989 (1989), relied on by the Employer, where the Board found that freelance animation writers hired by an employer were independent contractors within the meaning of Section 2(3). Unlike the writers here, some of the writers in *DIC* formed their own "loan out" companies, with which the employer contracted for the writers' services. Other writers in *DIC* formed their own writing teams, and decided which part of the script each member of the team would write, and how much each member would be paid. Further, the *DIC* writers negotiated the number of scripts, residuals, royalties, and any guaranteed work on future projects. Here, the Employer has failed to show that the writers hired for *Roswell Conspiracy* share any of these characteristics. Instead, the record evidence demonstrates that BKN's editors have far greater control over the writers' work than did the editors in *DIC*.

Significantly, the Board found that the writers in *DIC* bore some of the risks and enjoyed some of the opportunities for gain associated with an entrepreneurial enterprise, inasmuch as they exerted time, effort, and travel to solicit work, and faced the possibility that their ideas could be rejected, with the result that they would not be paid. That is not the case here, where the writers do not operate independent businesses, but rather perform functions that are an essential part of the Employer's normal operations. The writers have no substantial proprietary interest and no significant entrepreneurial opportunity for gain or loss when they are writing scripts for the Employer for the *Roswell Conspiracy*. Rather, the writers

are paid the per script fee set by the Employer, and they have no ability to increase their compensation through the exercise of discretion in how they perform their work.

We agree with the Regional Director that the animation industry's irregular patterns of employment must be taken into account in determining the writers' status under the Act. The fact that the writers are hired and work on a script-by-script basis explains the absence of some of the usual indicia of employee status here, but this industry's working arrangements do not diminish the central fact that the record establishes that the Employer closely directs the writers' work performance.⁴

We now turn to a consideration of the so-called freelance artists and designers. Our review of the record convinces us that the Regional Director was clearly correct in finding that these individuals are statutory employees, not independent contractors. Thus, there is ample evidence that the freelance artists and designers work side-by-side with the Employer's other artists and designers who are classified as regular employees. All of the artists and designers—both freelance and regular—share common terms and conditions of employment, work at the same location, engage in similar artistic work on the same project using the same equipment, and have common supervision. Although the freelance artists and designers apparently are free to work for other employers while employed by the Employer, they are required to sign confidentiality agreements regarding their work for the Employer. The Employer has failed to show that the freelance artists and designers possess the entrepreneurial discretion to perform their work by their own methods or the ability to increase the compensation received from the Employer while working on projects connected with the production of *Roswell Conspiracy*.

Accordingly, we affirm the Regional Director's findings that the individuals designated by the Employer as freelance writers, artists, and designers are employees within the meaning of Section 2(3) of the Act, and we sustain his direction of election.

ORDER

The Regional Director's Decision and Direction of Election is affirmed. This proceeding is remanded to the Regional Director for further appropriate action.

⁴ Chairman Truesdale agrees with his colleagues that the freelance writers are employees. Although the evidence regarding some factors prescribed by the Restatement favors a finding of independent contractor status, Chairman Truesdale finds that the Employer has failed to satisfy its burden of proof that the writers are not employees within the coverage of the Act.