

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

CIRCULAR EXPRESS ADVERTISING  
DISTRIBUTORS, INC.

Employer

and

Case No. 29-RC-9297

DISTRICT LODGE 15, INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS, AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Roslyn Rowen, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned:

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The Employer, a corporation with its principal office and place of business located at 464 East 99<sup>th</sup> Street, Brooklyn, New York, is engaged in the distribution of circulars and other printed advertisements to private residences throughout the New York City area. During the past 12 months, the Employer received at its Brooklyn, New York facility printed materials valued in excess of

\$50,000 from businesses located within the state of New York, which businesses had received said materials directly from points located outside the State of New York.

Based upon the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks an election in a unit of all hourly paid drivers, carriers and reloaders. The Employer contends that these individuals are independent contractors. With regard to the drivers, it maintains that even assuming they are not independent contractors, they are statutory supervisors excluded from the Act's coverage.

#### Overview of the Employer's Operation

The Employer is engaged in the distribution of free pennysaver publications to Brooklyn and Staten Island, New York residences. The largest such publication is a newspaper named "The Marketeer." The Marketeer, a subsidiary of Newsday, advertises sales at various retail establishments within the area in which it is distributed. A different version of The Marketeer is distributed to each of the neighborhoods this publication serves. In addition to The Marketeer, the

Employer distributes advertising circulars for other retail establishments. The number of circulars distributed varies according to the neighborhood.

It appears that a copy of The Marketeer and the additional circulars that the Employer delivers are collated by and packed in plastic bags by hand inserters, piece workers employed at the Brooklyn facility.<sup>1</sup> Each morning carriers appear at the Employer's warehouse and solicit work from the various drivers. After a driver selects a crew of carriers for the day, the crew, generally numbering from four to ten employees, loads the circulars into the driver's van. The driver then transports the crew to the neighborhood in which the publications are to be distributed. When he reaches his destination, he deploys the carriers, generally two to a block, to deliver the circulars. The carriers, one wheeling a shopping cart and the other carrying a two by three foot bag, deliver the plastic bags containing the circulars at the residences. If the driver and his crew of carriers run out of circulars, a reloader is dispatched from the warehouse to replenish their supply.<sup>2</sup> Throughout the day, four or five checkers, each responsible for six to eight crews, drive through the neighborhoods serviced by the Employer to assure that the circulars are being delivered in the manner prescribed by The Marketeer. The Marketeer also employs checkers who perform the same function.

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<sup>1</sup> The Petitioner is not seeking to represent the hand inserters.

<sup>2</sup> As will be discussed shortly, at least one driver employs his own reloader.

## The drivers

Approximately 50 drivers deliver circulars for the Employer.<sup>3</sup> Until February, 1999, all the drivers were paid on an hourly basis. In February, 1999, the Employer's President, Louis Levine, informed his drivers that the Employer intended to formally convert them into independent contractors by the end of the year. Shortly thereafter, several drivers began entering into identical independent contractor agreements with the Employer. These agreements provided that the driver would be solely responsible for, inter alia, obtaining and maintaining their vehicles, and hiring, compensating and discharging their employees. Many drivers refused to execute these agreements, and on about May 10, 1999, these drivers commenced a strike over the Employer's demand that they do so. The strike ended on about May 13, 1999, after Levine executed the following handwritten document.

To whom it may concern,

All drivers do not have to go on contract if they do not want to.  
They can continue to work at Circular Express.

Notwithstanding this letter, which Levine asserted was signed under duress, the Employer maintains that it intends to have all its drivers signed on as independent contractors by the end of 1999, and some drivers have entered into independent contractor agreements since the execution of the May 13 letter. At the time of the hearing, approximately 32 of the Employer's 50 drivers had signed these agreements. However, it appears that some of these drivers may be newly

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<sup>3</sup> During his testimony, the Employer's President, Louis Levine, asserted that there were between 30 and 40 drivers. However, he appears to have underestimated the number of drivers that the Employer utilizes.

employed and do not perform services with the regularity worked by the hourly drivers.

Since the close of the hearing, the Petitioner has conceded that the drivers who have executed independent contractor agreements (contract drivers) are independent contractors. The record shows that the contract driver and the Employer negotiate a price for which the driver will cover the route, depending upon such factors as its size and difficulty. Contract drivers and the Employer can also negotiate to enlarge or contract a route. The contract driver determines the number of carriers he or she will use, with no input from the Employer. Although it appears that all carriers are screened by the Employer before they are allowed to shape at its warehouse, it is the contract driver who decides which carriers to employ on any given day.<sup>4</sup> The contract driver is solely responsible for compensating his or her carriers and sets their rate of pay without consulting the Employer. At least one contract driver, Herbert Knight, has also hired his own reloader. These individuals are responsible for deciding where to deploy their carriers. If a contract driver is given more than one assignment, the order in which assignments are completed is left to his discretion. Knight owns his own business, Royal Transportation, and uses his van to perform personal transportation services for another employer, Services for the Blind.

Like the contract drivers, the hourly paid drivers own their passenger vans. There is no evidence that the Employer financed the purchase of any of these vehicles. The hourly drivers are required to purchase insurance and are

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<sup>4</sup> It appears that all carriers who shape at the warehouse are issued identification cards by the Employer. It is not clear how often, if at all, the Employer has refused to issue a carrier an identification card.

generally responsible for the upkeep of their vehicles, including gasoline expenses. However, George Sukhram, an hourly driver, testified that Louis Levine, the Employer's President, has helped cover the costs of repairs and towing expenses. In addition to owning a vehicle, all drivers are required to carry a beeper. Drivers may purchase these beepers on their own, or purchase them from the Employer, having their cost garnished from their pay on an installment basis.

Each morning, both the contract drivers and the hourly drivers call or appear at the facility to see what work is available. Drivers may work anywhere from one to six days per week. There is evidence that suggests that the ability of hourly drivers to set their own schedules is limited. Sukhram testified that Levine ordered him to report to work at 7:30 a.m. every morning. He also asserted that there have been occasions in the past where he has been threatened with suspension if he took time off. However, although he recalled being ordered to come to work and drive another van when his own vehicle had broken down, he could not recall the specifics of any incidents in which such threats were made. Hourly drivers may not obtain substitutes to work in their place when they are unavailable.

When a driver appears at the warehouse, he is given a head sheet showing the area or areas in which circulars are to be delivered. The head sheet may contain specific delivery instructions detailing how and where the circulars should be delivered (i.e. they should be rolled together and left downstairs, they should be placed in the railings outside residences, etc.) It also may contain the

addresses of specific residences that have called The Marketeer to request its newspaper, and the addresses of residences that have informed The Marketeer that they do not wish to receive it. The sheet shows the start time and finish time of the job. In addition, it shows the anticipated toll expenses and contains a section in which the driver is expected to fill in the names of the carriers and their start and finish times. Along with the head sheet, the driver is given computer generated start and stop sheets produced by the Marketeer which contain more detailed listings of residents who have called to request circulars or called to request that they not be delivered.

The freedom of hourly drivers to reject assignments was not completely clear from the record. Sukhram testified that in the past, when he has expressed a reluctance to cover a route, the Employer has told him that if he refuses the assignment, he may go home as no other work is available. However, he admitted having refused to deliver telephone books.

It appears that at the same time that the drivers are being given their head sheets, start sheets and stop sheets, they are also fielding requests from carriers for work. According to Sukhram, the number of carriers that an hourly driver is expected to use, along with the number of hours they will be paid for, is specified on the head sheet. If the head sheet calls for eight carriers, and the driver is only able to obtain six, he tells the checker or dispatcher who gave him the head sheet, and the checker revises the number of hours they will be paid for accordingly.<sup>5</sup>

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<sup>5</sup> Levine asserted that hourly drivers determine the number of carriers to use on their own. However, he did not appear to be intimately familiar with the day to day working conditions of the petitioned-for employees.

As earlier noted, it appears that it is the Employer that initially screens the carriers and determines whether they will be allowed to shape at its warehouse. It is not clear whether the Employer interviews or them or whether it has ever refused to employ a carrier. However, it does issue them identification cards before they begin shaping at the warehouse. An hourly driver may only utilize the services of a carrier who has been issued an identification card, and may request that the carrier produce one if he does not recognize him. The decision as to which carriers to work with is left to the driver, regardless of whether he is under contract or is paid on an hourly basis. Sukhram testified that he generally employs the carriers who ask him for work. However, he, like the contract drivers, has refused to utilize the services of carriers who have given him problems in the past.

If a driver refuses to employ a carrier, the carrier may continue to solicit work from other drivers. However, there is no guarantee that he will be given work for the day. It appears that a small number of carriers are generally left at the warehouse without any work.

After the driver has selected a crew, he transports the carriers to the neighborhood in which circulars are to be delivered. If the circulars that have

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He admitted that he knew nothing of the daily responsibilities of the reloaders, who appear to work closely with the drivers, and he did not set forth the basis for his conclusion that drivers independently decide how many carriers to use. At one point, he also appeared to assert that there are some routes for which the Employer does not prescribe the amount of time they are to be finished in. However, when asked if the hourly drivers would be paid for the number of hours they charged, Levine stated that it "depends." Knight, the contract driver who testified, asserted that when he was an hourly driver, the number of carriers to use was left to his discretion. However, there is evidence to suggest that he may have enjoyed more freedom in this area than other hourly drivers. Prior to working as a driver, he had worked for the Employer as a checker and eventually formed his own company. No other driver, hourly or under contract, has done so. Thus, the testimony adduced by the Employer does not unequivocally establish that any of the *current* hourly drivers independently decide how many carriers to employ.

been loaded into the van leave no room for the carriers, they are driven to the area by a reloader. Although contract drivers may cover the area in the manner they deem most efficient, it appears that the Employer dictates the point at which the hourly drivers are expected to start deploying carriers. Sukhram testified that the Employer attaches a map to the head sheet he is given in the morning, and an arrow on the map indicates where he is expected to begin covering his route. If he wishes to begin at a different point, he must obtain Levine's permission.

The decision as to which carriers to pair together is left to the driver's discretion, as is the decision as to which blocks to have each pair cover. While deploying the carriers, the driver communicates the delivery instructions contained on the head sheet and stop and start sheets.

After deploying the carriers, the driver drives around the neighborhood to assure that the carriers are delivering the circulars in the manner prescribed. If he sees that a carrier has missed a residence, the driver may deliver the circulars himself. Sukhram testified that he often tells his carriers to pick up the pace, reminding them that the entire crew may be "docked" if it does not finish within the number of hours the Employer has allotted for the assignment. He has also warned them that if they work slowly, he may cease using their services in the future. Sukhram does not give his carriers a lunch break, and he routinely denies requests from individual carriers to be allowed to go home early, telling them they should have warned him they would be making such a request while they were at the warehouse. Sukhram has sent carriers home for refusing to carry circulars up flights of stairs. However, he stated that this was done at the checker's

request, after Sukhram had reported the problem to him. He denied having sent checkers home on his own. He asserted that on one occasion, after a checker had instructed him to send a carrier home, he persuaded the checker to allow the carrier to continue working.

As earlier noted, the work of the entire crew, including the driver, is overseen by checkers employed by both the Employer and The Marketeer. These individuals drive through the various neighborhoods inspecting the work that is being done. Each of the Employer's checker is responsible for six to eight crews. If a checker sees that circulars are not being delivered in the manner prescribed, he generally discusses the matter with the driver rather than the carriers. The drivers, who, as earlier noted carry beepers, speak to their checker three or four times a day. According to Sukhram, the failure of a driver to respond to a page can result in a \$5.00 or \$10.00 fine.

If a crew has not completed a route within the time prescribed on the head sheet, it appears that the driver may contact the checker or dispatcher. At that point, the checker or dispatcher may authorize the crew to complete the job or send the crew home for the day. It appears that the decision as to whether to pay the crew for the additional hours is left to the Employer's discretion, and that if the Employer determines that the failure to complete the assignment within the number of hours allotted was caused by the crew's own lack of dispatch, the crew is not compensated for the additional time worked. Neither the drivers nor their carriers earn a bonus for completing an assignment early. When this occurs, the driver may contact the checker or dispatcher. Occasionally, these

individuals give the crew an additional assignment. If the crew has to wait for a reloader to bring them circulars it is not compensated for the time it remains idle.

At one point during his testimony, Levine appeared to state that the hourly rate a driver is paid varies according to the difficulty of the route, and that drivers can earn higher hourly rates for difficult routes. However, he did not provide any examples of instances in which this has occurred, and did not provide any records to support this assertion. Knight asserted that when he was an hourly driver, he and the Employer would negotiate an hourly price for each job. He provided no information concerning these negotiations or as to whether the price would vary from job to job. Sukhram, on the other hand, testified that he is paid \$12.50 per hour regardless of the area being covered and the number of circulars being delivered. He was also paid an hourly wage rate, at the time much less, when he was initially trained by one of the Employer's checkers for the position. However, he himself has trained other drivers, and was not paid for the time he spent training them. Over the years, he has often requested wage increases. The decision as to whether to grant them has been left to the Employer's discretion. Drivers do not receive any fringe benefits and no taxes are deducted from their pay.

With regard to their freedom to contract their services for other companies, there is no evidence that any drivers deliver circulars for any other employer. Sukhram testified that he had been told that he could not distribute pennysavers for another company at the same time that he was delivering them for the Employer.

A finding of supervisory or independent contractor status effectively denies the individual for whom such a finding is made coverage under the Act. Accordingly, the burden of establishing supervisory or independent contractor status rests with the party alleging it. Benchman Mechanical Contractors, Inc., 327 NLRB No. 151 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107 (1997); North American Van Lines, 288 NLRB 38, 42 (1988). I will separately examine the Board's standards for determining independent contractor and supervisory status to determine whether the Employer has met this burden.

In Roadway Package System, Inc., 326 NLRB No. 72 (1998); and Dial-A-Mattress Operating Corp., 326 NLRB No. 75 (1998), the Board stated that it would determine whether an individual was an independent contractor through the application of common law criteria, paying particular attention to those dealing with the definition of a servant (Restatement (Second) of Agency, Section 220). These criteria include whether the work is done under the direction of the employing entity or is done without supervision; whether the individual is engaged in a distinct occupation or business; the skill required of the particular occupation; the length of time for which the individual is employed; whether the employing entity provides the tools for the individual performing the work; whether the work being done is part of the regular business of the employer; the length of the employment relationship; and the method of payment. No single factor is dispositive. In the newspaper delivery industry, the Board pays particular attention to both the opportunity for profit and the degree of financial risk assumed by the individual in question. Newsday, Inc., 171 NLRB 1456

(1968); Fort Wayne Newspapers, Inc., 263 NLRB 854 (198 ); Glen Falls Newspaper, Inc., 303 NLRB 614 (1991).

Applying these criteria, I find that the Employer has failed to meet its burden of establishing that the hourly drivers are independent contractors. Initially, I note that the hourly drivers exercise little control over the manner in which they perform the work. Rather, it is the Employer that by and large determines the manner in which their work is performed. It tells them when to begin work. It determines the number of carriers they will utilize and the point at which they must begin deploying carriers. It provides them with specific delivery instructions before they leave the warehouse, and deploys its own checkers to assure that these delivery instructions are being followed. To enable it to closely supervise their work, the Employer requires the drivers to carry pagers and maintains frequent contact with the checkers. Their failure to respond to a page can result in a fine. It has determined that the circulars will be placed in plastic bags and delivered in them. Apart from deciding which carriers to use, the hourly drivers have little control over their other terms of employment.<sup>6</sup> It is the employer that establishes their rates of pay, and they may not obtain substitutes to work in their place.<sup>7</sup> Moreover, the work of the drivers requires little if any skill.

Further, in undertaking the delivery of circulars, the hourly drivers assume little if any financial risk. In many of the cases involving newspaper deliverers in which independent contractor status was found, the individuals in question

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<sup>6</sup> As earlier noted, even in this regard, it is the Employer that initially screens carriers and issues them identification badges before they begin shaping at its warehouse.

<sup>7</sup> Cf. Fort Wayne Newspapers, Inc., supra.

purchased and resold newspapers.<sup>8</sup> They often did not receive credit for unsold newspapers.<sup>9</sup> Since these cases involved publications that customers paid for, the individuals in question invariably came into contact with these customers, and occasionally entered into individual arrangements with them.<sup>10</sup> In the instant matter, the drivers are guaranteed payment regardless of the number of circulars they deliver and they have virtually no contact with the residents receiving them. Rather, it is The Marketeer that fields customer complaints regarding the manner in which they are being delivered.

In contrast, the conditions under which the contract drivers deliver circulars allows for considerable entrepreneurial initiative. Since they charge a fixed price for each job and are responsible for compensating their carriers, who are paid on an hourly basis, their profit is in large part determined by how quickly the area is covered. The contract drivers are given considerable control over the manner in which they complete assignments, deciding how many carriers to use and where to deploy them. In contrast to the hourly drivers, the contact between the Employer and the contract drivers is more typical of the interaction between businesses than of the relationship between employer and employee. They negotiate a price for each route, and can negotiate to enlarge or contract routes. The compensation received by the hourly drivers, on the other hand, is unilaterally determined by the Employer. Thus, although the record supports the parties' apparent agreement that the contract drivers are independent

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<sup>8</sup> Newsday, supra.; Drukker Communications, 277 NLRB 418 (1985); Denver Post, 196 NLRB 1162 (1972); Ashville Citizen Times Publishing, 298 NLRB 949 (1990); Glen Falls Newspaper, Inc., supra. .

<sup>9</sup> Newsday, supra.; Drukker Communications, supra.; Glen Falls Newspaper, supra..

contractors,<sup>11</sup> it does not support such a finding with respect to the hourly drivers. The fact that they own their own vehicles is insufficient to confer independent contractor status.<sup>12</sup> Nor does their limited control over their schedules elevate them to the level of independent businessmen.<sup>13</sup> While their discretion in deciding which carriers to utilize is a factor in favor of a finding of independent contractor status, it is not the type of entrepreneurial discretion that involves the overall direction of one's business. Rather, it is more akin to the authority of a supervisor to decide which employees to lay off. Nor is the drivers' authority in this regard unfettered since the Employer initially determines the pool of carriers who may apply for employment with the drivers. Accordingly, I find that the Employer has failed to sustain its burden of establishing that the hourly drivers are independent contractors.

However, I find that the Employer has met its burden of demonstrating that they are statutory supervisors. Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interests of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in the connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Thus, whereas independent contractor status requires an examination of an individual's control over his or her *own* working conditions, Section 2(11)

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<sup>10</sup> Newsday, supra; Drukker Communications, supra; Glen Falls Newspaper, supra; Ashville Citizen Times, supra; American Publishing, 308 NLRB 453 (1992).

<sup>11</sup> Fort Wayne Newspapers, Inc., supra; American Publishing, supra.

<sup>12</sup> Elite Limousine, 324 NLRB No. 182 (1997)

<sup>13</sup> Elite Limousine Plus, Inc., supra; NLRB v. United Insurance Co., 390 U.S. 254 (1968).

defines an individual's supervisory status solely through an appraisal of his or her authority to determine the working conditions or employment status of *others*. Section 2 (11) is to be read in the disjunctive, and the possession of any of the above indicia is sufficient to confer supervisory status. However, as Section 2(11) provides, the exercise of such authority must involve the use of independent judgment. Mississippi Power and Light Company, 328 NLRB No. 146 (1999). Thus, a determination of the hourly drivers' supervisory status requires an examination of the manner in which they interact with their carriers. In my view, much of their daily interaction with the carriers does not involve the exercise of independent judgment.

They assign work to the carriers in accordance with a set protocol. Carriers are paired together. One wheels a shopping cart and the other carries a bag. With regard to the actual delivery instructions, they act as no more than a conduit between The Marketeer and the carriers. As earlier noted, the location at which they begin deploying carriers is determined by the checkers or dispatchers. Since the work of the carriers is unskilled, the decision as to which carriers to pair together does not, in my view, require the use of independent judgment.<sup>14</sup> A decision to separate two carriers who do not get along requires little more than common sense.

On the other hand, their daily interaction with carriers contains other elements that lead me to conclude that their interests are more closely aligned with those of management. As earlier noted, the drivers work primarily consists

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<sup>14</sup> Jordan Marsh Stores Corp., 317 NLRB 460, 467 (1995); Quadrex Environmental Company, Inc., 308 NLRB 101 (1992); Hydro Conduit Corp., 254 NLRB 433 (1981).

of overseeing the work of the carriers, and they themselves spend little if any time delivering circulars. Sukhram testified that he frequently rushes the carriers. On one occasion, he persuaded a checker to allow a carrier who had made a mistake to continue working. In addition he routinely denies their requests for time off. That the carriers apparently direct their requests for time off to the drivers suggests that they regard the drivers as their immediate supervisors. The fact that Sukhram denies these requests rather than referring them to the Employer or directing the carriers to do so, suggests that he views himself as having the authority to grant or deny requests to leave work early. In this regard it is noted that Knight, the contract driver who testified, asserted that he grants the requests of some of his carriers for time off, in particular the requests of one carrier who finishes early to attend English classes.

I am mindful that the Board does not construe supervisory status broadly, and I am not basing my determination that drivers are Section 2(11) supervisors solely upon their apparent authority to grant time off. Rather, I am basing it primarily upon their authority to select their crews each morning (despite the Employer's role in this, as noted above.) They decide which carriers will form their crew without consulting the Employer. Sukhram admitted that he has refused to employ certain carriers in the past. Although he maintained that most carriers who report to work are ultimately placed on a crew, he admitted that there are some who are not. Thus, the drivers play a role in determining whether carriers will ultimately receive work. Further, they are solely responsible for determining which crew the carriers will serve on and which route they will cover.

Because the Employer allots a certain number of hours of pay for each route, and this number varies according to the particular route, the drivers' role in determining which route the carriers will work on effectively determines how much compensation the carriers receive.

Various secondary indicia support the conclusion that the hourly drivers are statutory supervisors. They apparently receive a considerably higher rate of pay than that enjoyed by the carriers. In addition, it is apparently their responsibility to record the carriers' hours on the headsheets they turn in.

Accordingly, in view of the control drivers have over the working conditions of the carriers, I find that they are supervisors as defined in Section 2(11) of the Act.<sup>15</sup>

Inasmuch as the Petitioner has indicated that it is willing to proceed to an election in any unit found appropriate, I will consider the status of the carriers and the reloaders.

#### The carriers

As earlier noted, it appears that it is the Employer that initially screens the carriers and clears them to shape at its warehouse. However, the record contained little information about the screening process. After approving the use of a carrier, the Employer issues him an identification badge. It appears that the carrier is also required to purchase a two by three foot carrying bag from the Employer, for which he pays \$7.00. They also pay an unknown amount for the photograph that is placed on their identification card.

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<sup>15</sup> Hoffman Plastic Compounds, 306 NLRB 100, 105 (1992); La Reina, Inc., 279 NLRB 791, 794 (1986).

As set forth earlier, every morning carriers appear at the warehouse to solicit work from the drivers. If a driver does not recognize a carrier, he requests that the carrier produce his identification badge. After a crew of carriers has been selected, the crew loads the driver's van with the circulars that are to be distributed. They are then driven, either by the driver or a reloader, to the area they will cover. The carriers who are compensated by the Employer are generally paid the minimum wage. When a carrier works for a contract driver, it is the driver who establishes his rate of pay. Knight testified that he makes this determination based upon the carrier's punctuality and length of service. Carriers are not paid for the time they spend at the warehouse, even though they spend some of that time loading the drivers' vehicles. Nor are they paid for the time they are in transit. They can be charged for any damage they do to a resident's property. Taxes are not deducted from their pay, and they are issued 1099s.

It is clear from the above that the Employer has fallen well short of meeting its burden of establishing that the carriers are independent contractors. They have little if any control over the manner in which they perform their work. They receive precise delivery instructions from The Marketeer which are issued to them by the drivers. They must distribute circulars in pairs according to the protocol described earlier (one wheeling a shopping cart and the other carrying a bag.) Their work is closely overseen by both the drivers and the checkers, and failure to follow the driver's instructions can result in their removal from the crew. Unlike carriers in past Board cases who have been found to be independent

contractors, the Employer's carriers do not buy and sell newspapers. Thus, in undertaking the delivery of the Employer's product, they assume no financial risk and experience no opportunity for profit. As noted earlier, their freedom to decide which days to report to the warehouse, does not elevate them to the level of independent contractor. NLRB v. Prudential Insurance; supra, Elite Limousine; supra. Nor does the fact that a carrier, over a period of time, may work for more than one driver. This is not a situation in which the carriers are freely offering their services to the Employer and its competitors. Even those who are paid by the drivers are performing services for the Employer, pursuant to guidelines set by the Employer and The Marketeer. I thus find that the carriers are not independent contractors as that term is defined by the Board.<sup>16</sup>

However, that there are many carriers who perform work for individuals who are clearly independent contractors raises questions concerning their inclusion in the unit. It appears that there are some carriers who work almost exclusively with contract drivers, some that primarily work with drivers employed by the Employer, and some that work with both.<sup>17</sup> In the past, the Board has declined to include employees of a joint employer in the same unit as employees of a single employer absent the consent of the employers. Greenhoot, Inc. 205

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<sup>16</sup> The Employer contends that the Petitioner's showing of interest among the carriers was tainted by the participation of drivers in the organizing campaign. It asserts that various drivers: wore buttons supporting the Petitioner; placed bumper stickers advocating representation by the Petitioner on their vehicles; distributed union buttons and fliers to carriers; encouraged the carriers to join the strike, a strike the Petitioner supported; and participated in the vote that ended the strike. The Petitioner did not offer any evidence, even of a hearsay nature, that any drivers solicited authorization cards on behalf of the Petitioner or were present when they were executed. Thus I find that it has failed to meet its burden of establishing that the Petitioner's showing of interest among the carriers was improperly obtained and will continue processing the petition with regard to these employees.

<sup>17</sup> Knight, the contract driver who testified, asserted that he had a fairly regular crew. Levine appeared to assert that, to the best of his knowledge, each carrier worked either exclusively with a contract driver or

NLRB 250 (1973); Hughes Aircraft Company, 308 NLRB 82 (1992); Hexacombe Corporation, 313 NLRB 983 (1994); The Brookdale Hospital, 313 NLRB 592 (1993).

In the instant matter it appears that each contract driver, along with the Employer, is a joint employer of the carriers he or she works with. Employers are joint employers if they share or codetermine matters relating to terms and conditions of employment. NLRB v. Browning Ferris Industries, 691 F.2d 1117 (C.A. 3, 1982). It is clear that the Employer plays an important role in determining the terms and conditions of employment of carriers working with the contract drivers. The Employer also plays some role in the “hire” of these carriers as it screens them and issues them identification badges.<sup>18</sup> A carrier cannot shape at the Employer’s warehouse or work for a contract driver unless he has been issued such a badge. The specific delivery instructions are provided by the Employer, and their routes are initially designed by the Employer. In addition, the Employer deploys 4 or 5 checkers who closely monitor the work the carriers are performing.

With regard to the contract drivers, as earlier noted, they are exclusively responsible for setting the carriers’ wages and compensating them. They independently decide whether a carrier will work for them, and assign and oversee their work. They have also reprimanded and subsequently “fired” certain carriers. Accordingly, I find each contract driver to be a joint employer, along

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exclusively with hourly drivers. Sukhram, on the other hand, testified that he knew of some carriers who worked with both contract drivers and hourly drivers.

<sup>18</sup> There is no evidence that any contract drivers have hired carriers “off the street.”

with the Employer, of his or her carriers. Quantum Resources Corp., 305 NLRB 759 (1991); The Brookdale Hospital, supra; Flatbush Manor Care Center, 313 NLRB 591 (1993).

Inasmuch as the Board will not include employees of a joint employer in the same unit as employees employed solely by a single employer, I will direct an election in a unit of carriers employed by the Employer (i.e. carriers working with hourly drivers). With regard to the carriers who occasionally work for hourly drivers and occasionally work for contract drivers, I will utilize the Board's traditional formula, set forth in Davis-Paxon Company, 185 NLRB 21 (1970) to determine their eligibility. Thus, if they work with the hourly drivers (i.e. are paid by the Employer) an average of four or more hours per week during the calendar quarter preceding the Direction of Election, they will be included in the unit. The Board has held that employees working with this regularity share a community of interest with other unit employees. That some of these carriers may also work for contract drivers does not negate their community of interest with carriers employed exclusively by the Employer.

With regard to the remaining carriers (i.e. the carriers who almost exclusively work with and are paid by contract drivers), although the Petitioner indicated a general willingness to proceed to an election in any unit found appropriate by the Board it did not address the unit placement of these employees. In the event the Petitioner is seeking an election among these carriers as well, it may file separate petitions, each naming the joint employers

(i.e. each naming a contract driver and the Employer) that employ the carriers in question.

### The Reloaders

The Employer contends that the reloaders, like the drivers and carriers, are independent contractors. It further maintains that even assuming the reloaders are not independent contractors, the petition should be dismissed with respect to these individuals as it intends to eliminate the position by the end of 1999.

Currently, the Employer utilizes the services of approximately 20 reloaders, all of whom work on a shape basis. The number of reloaders working on any given day can vary from one to several based upon the Employer's distribution schedule. As earlier noted, the reloaders are responsible for replenishing the supply of circulars delivered by the drivers and their carriers. It appears that when the supply runs short, the reloaders are dispatched from the warehouse to the area in which the crews are working. It appears that in some cases, the drivers coordinate this activity directly with the reloaders. Reloaders may also transport carriers from the warehouse to the delivery area. Reloaders own the vehicles they use. It appears that they, unlike carriers, are paid for the time they spend at the warehouse. However, taxes are not deducted from their pay, and they are issued 1099s. Levine asserted that one reloader has executed

an independent contractor agreement. Apart from the above, the record revealed no information concerning their working conditions.<sup>19</sup>

Based upon the above, I find that the Employer has failed to sustain its burden of establishing that the reloaders are independent contractors. It appears that they are supervised by the Employer's dispatchers and checkers. Although no taxes are deducted from their pay, they are apparently paid by the hour, rather than by the job, and are compensated for the time they remain at the warehouse. This method of pay is more typical of the employer-employee relationship than of that between two businesses. As is the case with the drivers and carriers, their work carries no entrepreneurial risk. I thus find that the reloaders are employees as defined in Section 2(3) of the Act.

With regard to the Employer's asserted plans to terminate its reloaders, as earlier noted, Levine stated that the Employer anticipates that all its drivers will become independent contractors by the end of 1999. He asserted that the employer will hold drivers responsible for their own reloading when this occurs. He further stated that some of the contract drivers have already hired their own reloaders, and the number of reloaders currently employed by the Employer is "probably half" of what it was in February, 1999. It appears that Knight employs his own reloader.

Although Levine asserted that the independent contractor agreements provide that the drivers will be required to arrange for their own reloading, the provisions of these agreements, all of which are identical, are not so explicit. Rather, Sections 2 and 3 of these contracts provide:

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<sup>19</sup> Levine testified that he was not familiar with their day to day responsibilities.

2. The company agrees to make papers available to Distributor for pick-up each day of publication at a place agreed upon by Distributor and Company as of the execution of this Agreement...

3. Distributor warrants that he/she owns and operates an independent business enterprise which offers delivery services to newspapers publishing companies, other commercial enterprises, or the general public. Consequently, Distributor is and shall remain an independent contractor, solely responsible for (1) obtaining and maintaining vehicles used to perform deliver services; (2) paying all expenses incurred in providing delivery services; (3) selecting and controlling the means and facilities used to perform delivery services; (4) hiring, compensating, controlling and discharging persons utilized by him/her to provide delivery services...

As discussed earlier, on May 13, 1999, Levine drafted and executed a letter assuring the hourly drivers that they would not be required to execute independent contractor agreements. The Employer contends that the May 13 letter, which caused the hourly drivers to end their strike, should be disregarded. It maintains that it was executed under duress. It further contends that the Employer's true intentions can be better gleamed from the testimony of Sukhram concerning the circumstances surrounding the execution. Surkhram, whose English was less than fluent, testified as follows:

We talked to him. He said that we should go back to work and let's talk. I said that we need some things. I'm writing that we're not going to be in contract. He said okay, this not going to take any, never make any difference, but I'm going to give you this. All right.

He scribbled on piece of paper here. Which is this paper said, "To Whom It May concern, ...

Board decisions on whether to conduct an election in the face of planned changes in an employer's operations have generally involved asserted plans to

expand operations,<sup>20</sup> close the business,<sup>21</sup> or relocate.<sup>22</sup> In determining whether an election is warranted in such circumstances, the Board examines: 1) whether the planned changes are definite; 2) their imminence; and 3) the impact these changes will have upon the continued viability of the unit.<sup>23</sup>

In my view, the evidence does not establish that the elimination of the hourly driver position is either sufficiently definite, or sufficiently imminent to warrant the conclusion that the Employer will no longer employ reloaders in the near future.<sup>24</sup> The Employer has assured the hourly drivers, in writing, that they will not be required to execute independent contractor agreements. These written assurances ended a strike, and would appear to be entitled to at least as much weight as any verbal disavowals made during the course of this proceeding. There is no evidence that any of the hourly drivers who ended their strike based upon the contents of this letter have since been advised, in writing or otherwise, that notwithstanding this letter of assurance, they will be required to become independent contractors.<sup>25</sup> Even if these drivers are required to execute contracts, I am not satisfied, given these circumstances, that the Employer will

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<sup>20</sup> Frolic Footwear, 180 NLRB 188 (1970); Redman Industries, 174 NLRB 1065 (1969); Some Industries, 204 NLRB 1142 (1973).

<sup>21</sup> Fraser-Brace Engineering Co., 38 NLRB 1263 (1942); M.B. Kahn Construction Co., 210 NLRB 1050 (1974).

<sup>22</sup> Cooper International, 205 NLRB 1057 (1973).

<sup>23</sup> E.I. du Pont de Nemours and Company, 117 NLRB 1048 (1957); Martin Marietta Aluminum, Inc., 214 NLRB 646, 647 (1974); Cooper International, Inc., 205 NLRB 1057 (1973);

<sup>24</sup> I have been advised that on August 10, 1999, the Employer filed a “supplement” to its brief in which it essentially restated this argument with regard to the hourly drivers, asserting that since they will be made independent contractors by the end of 1999, further proceedings relating to these employees are not warranted. Briefs in this matter were due on July 30, 1999. Inasmuch as Section 102.67 of the Board’s Rules does not provide for the filing of supplemental briefs, the Employer’s August 10 supplement is rejected as untimely. Notwithstanding my rejection of its August 10 supplement, I note that my findings with regard to the reloaders is largely based upon my conclusion that the Employer’s plans to convert its hourly drivers to independent contractors is neither sufficiently imminent nor definite to warrant the forfeiture of the reloaders’ right to select a collective bargaining representative.

have completed the restructuring of its operations by the end of 1999. This timetable was announced prior to the strike, which at the very least has delayed its implementation. It appears that the contract drivers and the Employer would have to negotiate prices for the various areas the drivers will be covering. The independent contractor agreements submitted into evidence did not contain prices, and little information was provided during the hearing as to how these negotiations have progressed.

As earlier noted, the independent contractor agreements do not clearly provide that drivers will be responsible for their own reloading. Although Levine asserted that the number of reloaders employed by the Employer had decreased (an assertion that the Employer did not support with payroll records), it was not clear that all the contract drivers employ their own reloaders. Thus, in my view, even if the hourly drivers do execute independent contractor agreements, the record does not unambiguously establish that the Employer will terminate all its reloaders by the end of 1999.<sup>26</sup>

Further, I find that the reloaders and carriers share a sufficient community of interest to warrant their inclusion in the same unit. It is well established that a unit, to be certifiable under Section 9(b) of the Act, need only be *an* appropriate unit. Morand Bros. Beverage Co., 91 NLRB 409 (1950). Although the record revealed little about the reloaders' wages and benefits, the work they perform is functionally integrated with that of the carriers. Both work fairly closely with the drivers. Although the reloaders drive a van while the carriers walk, both are

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<sup>25</sup> Canteberry of Puerto Rico, Inc., 225 NLRB 309 (1976); Gibson Electric, 225 NLRB 1063 (1976).

<sup>26</sup> The eligibility of the reloaders will be determined in the same manner as that of the carriers.

engaged in the distribution of circulars. It appears that the responsibilities of the reloaders, like those of the carriers, include loading vans. I thus find that a unit that includes carriers and reloaders is *an* appropriate unit.

Accordingly, I find the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time carriers and reloaders employed by the Employer excluding all drivers, checkers, dispatchers, office clerical employees, guards and supervisors as defined in the Act.<sup>27</sup>

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been

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<sup>27</sup> Part time employees will be eligible to vote if they have worked, and been paid by the Employer, an average of four or more hours per week during the calendar quarter preceding the Direction of Election.

discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by District Lodge 15, International Association of Machinists and Aerospace Workers, AFL-CIO.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before August 23, 1999. No extension of time to file the list may be

granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National

Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by August 30, 1999.

Dated at Brooklyn, New York, this 16th day of August, 1999.

/S/ ALVIN BLYER

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