

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

CREW 4 YOU, INC.

and

Case No. 8-RC-16238

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL UNION 1377

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as 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 case,¹ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. 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. International Brotherhood of Electrical Workers, AFL-CIO, Local Union 1377, herein referred to as Petitioner, is a labor organization that claims to represent certain employees of the Employer.

The Petitioner seeks to represent a unit of broadcast technicians (hereafter “technicians”) that they assert are employees of the Employer. The Employer takes the position that the technicians are independent contractors and not employees under the Act. Alternatively, the Employer argues that if the individuals at issue are statutory employees, they are the employees of another employer. There are approximately 40 individuals sought by the petition.

Crew 4 You, Inc. (hereafter “Crew 4 You” or “the Employer”) is an Ohio corporation that is in the business of providing crews of technicians to work at televised sporting events. Crew 4 You contracts with vendors such as National Mobile Television and New Century Production who are known in the industry as “trucking companies.” The trucking companies have contracts with the companies that possess the right to broadcast sporting events, such as Fox Network and Madison Square Garden, to provide a mobile production vehicle and all the equipment necessary to broadcast such sporting events. Crew 4 You currently does business in about 12 states. In the Cleveland market, which includes Cuyahoga, Lake, Geauga, Summit, Medina, Lorain and Portage Counties, Crew 4 You has contracts with approximately seven to ten different trucking companies to provide technicians to work in the broadcasting of major league baseball, college basketball, college football and pre-season professional football.

When the broadcasting entities come to Cleveland to broadcast a game back to their home city, they generally bring only a producer, director and on-air announcer. They do not bring any equipment. Instead, they hire a trucking company to provide all the equipment needed to televise a game. Crew 4 You’s president Charlyn Miller explained that the trucking company provides a production truck that is “a mini studio, all housed in a tractor-trailer.” The trucking company generally staffs its production truck with an “engineer in charge” (hereafter “EIC”) and a truck driver, and sometimes there is also a maintenance person, but it does not employ any

¹ The parties have filed briefs that have been duly considered.

broadcast technicians. The trucking company obtains its technician staff through companies such as Crew 4 You, known in the industry as “crewers.”

Each trucking company has different requirements for crew staff. The following are the technician positions which a trucking company may request and which the Employer provides. A “technical director” runs a machine called a switcher that routes video to air. An “audio” is responsible for mixing the overall sound of the game. An “A-2” is responsible for setting up the audio equipment in the field. A “camera operator” operates a video camera. A “videotape operator” operates the slow motion replays. An “EVS operator” operates a computerized tape machine called an EVS. A “video operator” has control of the look of the cameras. An “infinite operator” operates the graphics box. A “font” provides the infinite operator the information that can be read when viewing a game. A “stage manager” works with a broadcast company’s on-air personality and is a liaison between the trucking company and the on-air personality. A “statistician” passes information to the truck and to the on-air personality regarding matters such as how many times a player has been at bat. A “utility” does whatever needs to be done regarding set-up such as “pull cable.” A “runner” assists the producer and director. A “jugs gun” operates the speed gun that measures the speed of a baseball. A “fox box” operates a machine called a fox box, which can put a game’s score in the corner of the television screen or indicate a network’s name across the top of the screen.

Miller, who started Crew 4 You in March of 1996, explained the manner in which it operates. Miller is contacted by her clients, the trucking companies, prior to the opening of a season for her rates. After the trucking companies receive contracts from the various broadcast entities, they inform Miller of their schedule of games and crew needs. Miller or her general manager, Debra Coch, sends that information to their list of technicians, and request that the

technicians indicate, in writing, which games they are available to work. After receiving the technicians' availability, Miller assigns individual technicians to games, and sends a copy of those assignments to the technicians and to the trucking companies. Three to four days prior to a game, Crew 4 You sends a reminder of a game and call time to each technician scheduled to work a game either by e-mail or telephone. After a game is broadcast, Miller sends an invoice to the trucking company for the crew supplied. After the trucking company pays Crew 4 You, Miller pays the technicians for their work.

Regarding scheduling assignments, Miller stated that she does not necessarily offer work initially to all the technicians who are on her list, nor does she necessarily offer them all of the work that they request. She explained that some technicians whom she did not initially schedule for games because they had less experience or were not one of the technicians she normally uses were later scheduled when other technicians cancelled their jobs with her. Miller testified that "for the most, everyone gets some dates. There are possibly some I will not have – initially offer dates, but as things open up during the season and names get added, they get added on." Miller also attempts to assign technicians who reside in the Cleveland area to work Cleveland games because it is more cost effective for her clients. If Miller cannot find a local technician to work, then she will book a technician who may have to travel in to Cleveland from another city.

Miller testified that she charges her clients a flat rate for each technician and in turn pays each technician a flat rate. The flat rate for each technician is the hourly rate for a technician's position, which Miller testified is the going rate in the market, multiplied by 10 hours, which is the industry's standard workday. "Call time," which is when technicians must arrive to set up the broadcast equipment, is known throughout the industry to be six hours before game time. Miller testified that a call time might be changed by producer or director, but never by Crew 4

You. Skrada confirmed that producers or directors might change a call time if, for instance, a game is scheduled for 1 p.m. on a Sunday and the crew worked a game the night before. The producer or director or EIC tell the technicians when their work is complete for the day. If technicians work longer than 10 hours, which a producer or director may require, then Miller charges her client time and one half for each hour each technician works beyond 10 hours, and in turn passes the overtime pay on to the technicians.

Miller testified that she determines whether technicians receive a raise and the amount of any raise. For each of the past 5 years, Miller testified that she has given the technicians “at least a \$10.00 raise.”² All technicians in a particular position receive the same pay rate. No technician receives a higher pay rate because of seniority or their level of skill or experience. On occasion, Miller finds that she cannot obtain a technician to work a game for a particular client for the going pay rate because of a client’s need for a particularly specialized technician. In that case, she will inform her client of the rate required by a technician who is able to fulfill the client’s needs and the client must approve that rate before Miller will book that technician for the job.

Technicians are not required to work any certain number days in a given year or season for the Employer, nor are they obligated to continue to perform work for the Employer. Technicians are free to decline work offered by the Employer for any reason and have done so. Technicians are free to work for any other company at any time, including competitor companies of the Employer, and do so. Technicians are also free to cancel jobs they have already booked with the Employer, and have done so because of personal reasons or because they have received offers for a more lucrative job on that same day. Miller explained that in the past, when a technician needed to cancel a booking with her, she requested only that the technician give her as

much advance notice as possible of the cancellation so that she could attempt to find a replacement technician. Starting with the 2001 season, however, Miller has instructed the technicians in writing that they must find a suitable replacement when they cancel a job and to notify Crew 4 You of the replacement. Miller testified that this new system has been working successfully. If a technician fails to find a suitable replacement or in any other way has been unsuitable for Crew 4 You, Miller explained her only recourse is to not use the technician again in the future. Technician Timothy Kuss testified “most freelancers know that their livelihood hinges on the crewer. So out of professional courtesy, you would try to find a replacement so they were not left short-handed for a production.”

Crew 4 You is similarly not required to schedule technicians for any minimum number of games. Miller explained that she has chosen not to assign games to certain technicians because of their relative inexperience or because a technician is not one that she usually uses. Crew 4 You may also cancel a technician’s assignment to a game at any time. Technician Skrada testified that Crew 4 You has cancelled his assignment to work games in the past because a trucking company dropped one or more technicians from their booking for a broadcast.

Miller testified that she does not deduct state or Federal withholding taxes from the technicians’ paycheck, nor does she provide any fringe benefits or contribute to a workers’ compensation fund. She asserted that the only employees of the company are herself and general manager Deborah Coch. Neither Miller nor Ms. Coch are present when a crew works at a game. Technician Skrada testified the only times he has seen either Miller or Coch present when he is performing a job is, on occasion, especially at the beginning of a season, they may be present for about a half an hour at the call time to socialize with clients and technicians. The Employer does not provide any broadcasting equipment for jobs, and, in fact, does not own any such equipment.

² Miller did not explain whether the increase was on a per hour basis or per workday.

The Employer carries liability insurance but Miller was not aware whether that insurance covered the technicians or not.

Technician Skrada explained a typical workday as follows. After receiving a work assignment from Crew 4 You, he reports to the job at the call time. If he is a camera operator for that game, he and the other camera operators unload and set up the cameras from the production truck, operate the cameras during the game, and then reload the cameras and equipment back on the truck when the broadcast is over. When asked who decides which camera he operates for a particular event, Skrada explained that “It’s usually predetermined . . . but if not, then we [camera operators] talk it through and basically the ones that have more seniority usually pick first which ones they would like to do for the series.”

Kuss testified that usually the producer and director determine which video operator operates a particular machine, but if not, then the operators decide among themselves. Skrada explained that the director “is the one in charge of making the show go. He tells the technical director what camera he wants up at a specific time, what graphics he wants in a specific time.” Regarding direction at the work site, Skrada testified that “shows are different depending on the director. So he will guide you a little bit of what he wants for the series. People do things a little bit different . . .” Skrada explained that the producer “basically is making sure all – basically making sure all the spots run for the advertising. If there is any in-game stuff that needs to be put in, they work together.” Skrada testified that the producer or director decides such matters as how many cameras are used to broadcast the event and how many tape machines are used.

Skrada testified that in the industry, technicians cannot solicit work from trucking companies on their own. Skrada explained that the crewers such as Crew 4 You “actually do the hiring for the people looking for personnel to do the events. It’s not like I could just go to, you

know, any event that's coming up to or go to, you know, a baseball team and say, 'I'm available to work.' I have never done that.”

Miller testified that she has asked her clients to fill out a performance review after using a crew, but explained that they are not required to and generally do not fill out a review. Miller stated that if she is given any negative information about an individual more than once, she “may go to – call the individual and say, “Hey, look, this is what I've been hearing. You know, what's up, what's going? Talk to me about this. You know, that kind of thing.” Regarding whether she has ever disciplined a technician, Miller explained once she has chosen not to use one technician “for a period of time” as a result of a client complaint about that individual. Besides that, Miller testified that she has not disciplined or reprimanded technicians in any way.

Technician Kuss testified that around February of this year, the Employer docked him ½ hour pay. He explained that Miller called him and told him that she had spoken to a client who reported that he had returned late from lunch and as a result he was being docked ½ hour of pay. Miller testified that a client told her that Kuss was late coming back from lunch and was upset about it. The client said that they were not going to pay her for a half-hour of his rate and, in fact, did not pay her for that time.

Miller did not provide any testimony regarding whether she requires the technicians she books for jobs possess any minimal degrees or training. Skrada, who is a video camera operator, testified that he has a 4-year degree in television. Kuss, who is a videotape and EVS operator, testified that he has a four-year degree in radio and television, and “the rest [he] learned working in the industry.” Miller did not testify regarding whether her company provides any training to technicians. Kuss testified that Miller has asked him “to kind of watch over [junior

crewpersons], make sure they don't get themselves in trouble or compromise the integrity of the production.”

Nicholas Greco, a representative for the IBEW who services local unions that represent employees in the broadcast industry, testified that Crew 4 You has a current labor agreement with IBEW, Local 385 covering the employees that work in the Union's jurisdiction in Pittsburgh, Pennsylvania. Under the contract, Crew 4 You is required to contact the Union when they need technicians to fill a job and allow the Union to refer freelance broadcast technicians to them before they may hire any technicians from outside the Union's jurisdiction. Miller testified that this contract came about after some clients asked her to do work for them in the Pittsburgh market, and to work in the Pittsburgh market she needed to be signatory to the contract with the Union. Miller simply contacted the Union and asked them if she could be signatory on the contract, which the Union sent her and she signed. Miller testified she operates in the Pittsburgh market the same way that she does in Cleveland.

Section 2(3) of the Act excludes “any individual having the status of an independent contractor” from the definition of employee. The Supreme Court in **NLRB v. United Insurance Co.**, 390 U.S. 254, 258 (1968), relied on the legislative history of the 1947 amendment to Section 2(3), and concluded that independent contractor status is to be determined by assessing “the total factual context . . . in light of the pertinent common law agency principles.”

The appropriate test to apply in determining whether certain individuals are independent contractors or “employees” is the common law of agency right-to-control test. **NLRB v. United Insurance Co.**, *supra*; **Ace Doran Hauling Co. v. NLRB**, 462 F.2d 190 (6th Cir. 1982). The Board described the right-to-control test in **News Syndicate Co.**, 164 NLRB 422, 423-424 (1967), as follows.

Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of independent contractor. The resolution of this question depends on the facts of each case and no one factor is determinative.

The Board listed the factors considered significant at common law in connection with the “right to control” test in determining whether an employment relationship exists in **Standard Oil Co., 230 NLRB 967, 968 (1977)** to include:

(1) whether individuals perform functions that are an essential part of the Company’s normal operation or operate an independent business; (2) whether they have permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the Company’s name with assistance and guidance from the Company’s personnel and ordinarily sell only the Company’s products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company; (5) whether they account to the Company for the funds they collect under a regular reporting procedure prescribed by the Company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have proprietary interest in the work in which they are engaged; and, (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss.

The Board does not regard as determinative the fact that the written agreement defines the relationship as one of "independent contractor" (**National Freight, 153 NLRB 1536 (1965), and Big East Conference, 282 NLRB 335, 345 (1986)**), or that the employer does not make payroll deductions and the drivers pay their own social security and other taxes (**Miller Road Dairy, 135 NLRB 217, 220 (1962)**). The party asserting that an independent contractor status exists has the burden of establishing that status. **BKN, Inc., 333 NLRB No. 14, p. 3 (slip. Op. January 31, 2001)**.

For the reasons described herein, I find that the technicians at issue in this case are independent contractors and not employees under the Act. I conclude that the right-to-control

test, applied to the facts of this case, does not support a finding of employee status. Most importantly, the Employer does not retain any right to control the manner and means of the technicians' work. See **Cardinal McCloskey Children's and Family Services, 298 NLRB 434 (1990)**. To the extent that technicians need work assignments or direction in this highly skilled profession, that direction is provided by the personnel of either the trucking company or broadcasting company personnel. The technicians receive no assistance or guidance from the Employer's personnel. The Employer's personnel are generally not present at a work site, and when they are present, they are not providing any assistance or guidance to technicians. The producers, directors and EICs, not the Employer, set the technicians' hours of work. The Employer does not evaluate or discipline technicians.

The only evidence in the record of a technician having been monitored and having received any subsequent repercussion is when technician Kuss was docked ½ hour of pay for returning late from a lunch break. The record was clear that such action was taken by the Employer's client after it noticed Kuss' tardiness, and was not initiated by the Employer. In addition, there is no evidence the Employer discharges technicians. Miller explained that her only recourse with technicians is to not book them for jobs in the future.

There is no description in the record regarding how Crew 4 You came to have the list of technicians' names that it uses for bookings. The only information relevant to this matter contained in the record was technician Skrada's testimony that he was offered assignments by the Employer when his friend gave his name to Miller; thereafter he was offered work. This testimony demonstrates a lack of any formal hiring process by the Employer.

The Employer pays a set day rate for all technicians in each position without regard to skill, ability, or seniority. In some instances, technician may even negotiate for a higher pay rate

by refusing to work for the Employer's regular rate. While Miller testified that she had given annual "raises" to technicians, this was no different than a company offering a subcontractor a higher contract rate than offered in a previous year based upon a market's going rate. Miller testified that rates are set for the most part by the industry market, and it is apparent from the record that if she did not follow them she would have neither clients contracting with her nor technicians to book with her clients. The Employer does not deduct state or federal taxes from technicians' pay and does not provide any fringe benefits to technicians. The Board found the foregoing factors to be of great significance in determining that photographers were independent contractors in **Young & Rubicam, Int'l, Inc., 226 NLRB 1271 (1976)**.

Another important factor is that technicians have no permanent working arrangement with the Employer. There is no understanding that technicians will receive any minimum amount of work with the Employer on an ongoing basis, nor is there any understanding that technicians will continue to receive any work from the Employer in the future. The Employer and the technicians are free to cancel bookings at any time for any reason. Technicians can and do work for other employers at any time, including competitors of the Employer. The fact that the Employer determines which technicians they will book for which jobs does not undermine the independent contractor relationship. This situation is not unlike any other business context where there is competitive bidding for work, such as in the construction industry. The Board found the ability of individuals to refrain from performing work for an employer for any given day or days without prejudicing their chances of performing additional work for the employer in the future to be a crucial factor in determining that newspaper contributors were independent contractors. **Boston After Dark, Inc., 210 NLRB 38, 43 (1974)**.

The Board's decision in **Century Broadcasting Corporation d/b/a WFME, 198 NLRB 923 (1972)** is particularly instructive to the instant case. In **Century Broadcasting**, the Board found that announcers were independent contractors and not employees of a radio station. In making its decision, the Board gave particular weight to the lack of supervision or review of the announcers' work by the employer, the announcers' complete freedom to accept or reject assignments offered them or to select find substitutes once they were booked for a job, and the absence of any restriction as to their outside work.

The fact that the Employer has a current labor agreement with IBEW, Local 385 covering the technicians that work in the local union's jurisdiction in Pittsburgh, Pennsylvania, does not undercut my conclusion that the technicians are independent contractors. The fact that a labor agreement exists between the Employer and another local union covering individuals similarly situated to those at issue in this case is not dispositive of the issue. The Board has held that a pattern of bargaining in other facilities of the same employer will not be considered controlling regarding a petitioned-for unit. **Big Y Foods**, 238 NLRB 855 (1978). This is particularly so in the instant case since I conclude, based on the instant record, that the individuals sought by the petition are independent contractors.

Having found that the individuals the Petitioner is seeking to represent are not employees under the Act, I find it unnecessary to reach the issue of whether the individuals at issue are temporary employees of someone besides the Employer.

ORDER

It is hereby ordered that the petition in this case be, and it hereby is, dismissed.

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 the Board in Washington by August 8, 2001.

Dated at Cleveland, Ohio this 25th day of July 2001.

/s/ Frederick J. Calatrello

Frederick J. Calatrello, Regional Director
National Labor Relations Board
Region 8

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