

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

TIMES PUBLISHING CO.,
d/b/a ST. PETERSBURG TIMES¹

Employer

and

Case 12-RC-8900

GRAPHIC COMMUNICATIONS
INTERNATIONAL UNION, AFL-CIO, CLC

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER DISMISSING PETITION

The Employer, Times Publishing Co., d/b/a St. Petersburg Times, publishes a daily newspaper that it distributes throughout the greater Tampa – St. Petersburg metropolitan area. The Employer distributes subscription newspapers using mainly home delivery carrier staffers and carriers in training. These individuals deliver copies to homes in Hillsborough, Pinellas, Pasco, Citrus and Hernando counties. On September 19, 2002, the Employer notified about 50 to 60 of its home delivery carrier staffers and carriers in training in Hillsborough County that their employment would end on December 1, 2002. The Employer offered these employees the opportunity to become “independent contractors,” a term used by the Employer. By a date later this year, the Employer plans to similarly end the employment of all remaining home delivery carrier staffers and carriers in training, and offer each the chance to become an independent contractor.²

On January 22, 2003, the Petitioner, Graphic Communications International Union, AFL-CIO, CLC, filed a petition with the National Labor Relations Board (the Board), under Section 9(c) of the National Labor Relations Act (the Act). The Petitioner seeks to represent a unit of all

¹ The Employer's name appears as corrected at the hearing.

² For convenience, I shall not use the Employer's term in quotes. However, when referring to independent contractors as set forth in Section 2(3) of the Act, I shall use the term “statutory” independent contractors.”

of the Employer's regular part-time³ home delivery carrier staffers and carriers in training.⁴ On February 4, 2003, a hearing officer of the Board held a hearing. The Employer has since filed a timely brief with me.⁵

There are two issues before me. First, the Employer claims that the individuals it terms independent contractors are statutory independent contractors, and not employees within the meaning of Section 2(3) of the Act. If that is the case, these individuals cannot vote in a Board election. Second, the Employer argues that an election among its remaining carriers would be a waste of Board resources because all of the carriers will be replaced by independent contractors by a date later this year.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the independent contractors are statutory independent contractors, not employees. I have also concluded that it would not serve the purposes of the Act to hold an election among the remaining carriers. I have therefore decided to dismiss the petition.

I will first provide an overview of the Employer's home delivery operation. Then, I will present in detail the facts relevant to each of the two above issues, and the reasons supporting my conclusions.

Home Delivery Operation of the *St. Petersburg Times*

Paul Tash is the Employer's President and Executive Editor. Tommie McLeod is circulation director. Reporting to Ms. McLeod is the home delivery manager, who supervises four regional managers who divide the Employer's home delivery territory.⁶ Regional managers supervise zone managers, each of whom manages seven to nine zones. Zones are made up of

³ The parties agree that some carrier staffers and carriers in training work 40 hours per week on occasion, but are classified by the Employer as part-time.

⁴ At the hearing, the parties debated terminology for these employee positions. Toward the end of the hearing, they agreed upon "carrier staffers," a term used by the circulation director in her testimony, but not by the carrier staffer who testified and who referred to himself as a carrier. For clarity, I will refer to carrier staffers and carriers in training as "carriers" in this Decision.

⁵ The Petitioner did not file a brief.

⁶ The four regions are North Suncoast, Hillsborough and two Pinellas County regions. The North Suncoast region comprises Pasco, Hernando and Citrus counties.

districts. A district consists of several zip codes. The district is the smallest organizational layer from a geographical and circulation volume perspective.

District managers supervise carriers, including carriers in training.⁷ At the time of the hearing, there were approximately 860 carriers and about 50 to 60 independent contractors. All independent contractors worked in Hillsborough County.

Carriers

Carriers are required to report to work at designated times ranging from 12:30 a.m. to 3:30 a.m. They report to district offices or substations, where the Employer arranges for delivery of bundles of newspapers. Carriers are assigned benches, which serve as work stations for assembling and bagging newspapers. A carrier testified that it normally takes him about an hour to assemble and bag his newspapers. The Employer supplies a plastic bag for each newspaper. Carriers have to pay 40 per cent of the cost of these bags. The Employer supplies a second bag at no cost to carriers told to double bag to protect newspapers from moisture. Carriers have individual mailboxes at the district office.⁸ The Employer supplies each carrier with a “throw book.” This contains the addresses on each carrier’s route, using different colored dots to symbolize the different services at each address, such as daily, weekdays only or weekends.⁹ The Employer determines the order in which carriers deliver their assigned routes.

Carriers are supervised by district managers. District managers bring carriers their newspapers and distribute their mail each morning. When a customer complains or threatens to stop his subscription, the district manager conveys this to the carrier and instructs the carrier to deliver on time. District managers assist carriers in locating addresses along newly created roads, occasionally traveling with a carrier to find an address. A carrier testified that his district

⁷ A carrier in training is a new employee receiving guidance from a carrier until he or she can fully assume responsibility for a route.

⁸ Carriers have access to copy machines and certain office supplies at district offices.

⁹ A carrier testified he does not use the throw book, and delivers from memory.

manager tells carriers when to use double bags to protect newspapers from rain. This carrier testified that he witnessed his former district manager discharge a carrier for arguing with him.

Carriers must supply their own vehicle and automobile insurance, possess a valid Florida driver's license and be physically capable of performing the essential functions of the position. Carriers must deliver their assigned routes at least four days each week. They may designate substitutes on the other days, but the Employer must approve the substitutes.¹⁰ Carriers are covered by the Employer's personnel handbook. They are not required to wear uniforms, or display the Employer's name on their vehicles.

Carriers are permitted one customer complaint per one thousand deliveries on Monday through Saturday, and two complaints per thousand deliveries on Sunday. Carriers who exceed these rates are subject to progressive discipline, culminating in discharge. Carriers who meet these standards receive bonuses, which do not vary among carriers.

Carriers are paid the difference between the wholesale and retail rate per newspaper. The Employer also pays carriers an automobile allowance. Certain carriers with seasonal routes receive subsidies during slow periods. Carriers receive additional income for selling certain of the Employer's other products,¹¹ as well as a Thanksgiving Day fee. The Employer bases raises for carriers solely on the rates paid to deliver competing newspapers and similar products. There are no merit raises.

Carriers are not permitted to deliver competing newspapers or any other products. The circulation director testified that carriers have been discharged for violating this policy.

The Employer provides carriers with health and dental benefits, short-term and long-term disability, pension benefits and a 401(k) plan. When the Employer earns a profit, carriers receive profit sharing. A carrier testified that the Employer provides him with an IRS Form 1099 each year, and that he is responsible for paying his own taxes. The record fails to reflect

¹⁰ The Employer performs criminal background checks on carriers and substitutes who enter gated communities and other limited access areas.

¹¹ The record does not reflect examples.

whether other carriers receive a Form 1099 or W-2, or whether the Employer withholds federal income and social security taxes from carriers' pay. The personnel handbook states that carriers are covered under the Employer's workers compensation and unemployment insurance policies.

Independent Contractors

In Hillsborough County, carriers received their notice of termination 67 to 74 days before their last scheduled dates of employment. This notice is required by the federal Worker Adjustment and Retraining Notification Act (WARN Act). Before receiving the WARN Act notice, each carrier was offered training programs in managing his own business as an independent contractor.¹² Once carriers received the notice, those who expressed an interest in becoming an independent contractor met with the district manager to begin negotiations. At the first session, each carrier was presented with a document created by the Employer, the Independent Contractor Agreement For Home Delivery Distribution (the Agreement). The circulation director testified that the Agreement is "a point from which to start negotiations or conversations about a business agreement." Independent contractors were allowed to bring representatives into the negotiations to assist them. The circulation director testified that the same process of sending WARN Act notices and negotiating through district managers will be repeated in each district.

Carriers who wanted to become independent contractors negotiated their Agreements solely with the district manager, who approved the Agreement on behalf of the Employer. The circulation director testified that so far, negotiations have averaged four to five hours per independent contractor Agreement, often spanning two or more meetings.

The Agreement consists largely of technical, boilerplate language. It is terminable at will by either party upon 30 days written notice, or immediately upon a "material breach" as defined in the Agreement. The record contains no evidence as to whether this boilerplate language has

¹² The record does not reflect whether carriers have accepted these offers.

been modified during negotiations. A carrier who was negotiating his Agreement at the time of the hearing testified that he had “no clue” about its language.

The Agreement has several variable terms to be negotiated by the parties. These variables are mainly the duration of the Agreement,¹³ the delivery area (the geographic area in which the independent contractor will deliver), the location and time at which the independent contractor must pick up newspapers each morning, two levels of incentive fees to be paid when the independent contractor receives less than a negotiated rate of customer complaints,¹⁴ and the maximum rate of complaints permitted per thousand subscribers. A carrier testified that, during negotiations, his district manager agreed to raise his complaint rate from the 1.6 per thousand deliveries set forth in the Agreement to 1.9 per thousand. Breach of the maximum complaint provision is deemed a “material breach,” for which the Employer may terminate the Agreement. The circulation director testified that district managers have discretion to decide whether to enforce this provision.

The Agreement has an attachment, Schedule B, entitled “AGREED-UPON FEES AND CHARGES UNDER THE INDEPENDENT CONTRACTOR AGREEMENT FOR HOME DELIVERY DISTRIBUTION.” The circulation director testified that these fees are to be negotiated by the parties. They include the delivery fee,¹⁵ incentive fees, the late truck fee (for occasions when the Employer delivers newspapers to district offices past the contracted time range), fees for assembling and bagging special inserts, fees for securing new subscriptions, a dry newspaper incentive fee (for days on which the independent contractor receives no complaints), and a subscriber delivery list fee (for updated, accurate copies of the independent contractor’s subscriber delivery list). Charges include a redelivery charge assessed on the independent contractor when the independent contractor misses a subscriber or delivers the

¹³ The circulation director testified that Agreements vary in duration between two months and two years.

¹⁴ The Agreement defines a complaint as an unsatisfactory or missed delivery.

¹⁵ The circulation director testified this fee depends on the complexity of the route, wear and tear on the vehicle used to deliver, and other factors.

wrong product, and a negotiated commercial bond to be provided by the independent contractor.

To receive the assembly, delivery and bagging fees, the independent contractor must “[d]eliver each newspaper in a clean, dry, undamaged and readable condition at a time and place that meet the reasonable delivery requests and expectations of each Subscriber, but in no event later than 6:00 a.m. Monday through Saturday and 7:00 a.m. on Sunday.” Independent contractors do not bear the risk of non-payment by subscribers.

The Agreement allows the Employer to offer new delivery areas, which the independent contractor is free to refuse. If the independent contractor accepts a new delivery area, the Agreement allows the parties to renegotiate certain fees. The circulation director testified that several independent contractors have negotiated an addendum giving them a right of first refusal. This requires the Employer to offer such independent contractors first option on specified delivery areas.

Section 9 of the Agreement states:

The mode, manner, method and means used by Contractor to perform Contractor’s obligations under this Agreement shall be of Contractor’s sole selection, direction, and control. Contractor is responsible for ... obtaining and maintaining all equipment and supplies it deems necessary or appropriate to perform its obligations; paying all expenses incurred; selecting and controlling the means and facilities used to provide results; retaining its own contractors, if any; hiring, training and compensating, controlling and discharging employees and/or subcontractors used by Contractor, if any; and complying with all applicable laws and regulations.

Independent contractors can deliver their routes in any order they choose. They are not subject to supervision by district managers, who do not train them or accompany them along new routes. Independent contractors are not covered by the personnel handbook or progressive discipline. The Agreement prohibits independent contractors from holding themselves out as agents or representatives of the Employer. Independent contractors are permitted to deliver rival newspapers and other products.

Independent contractors can augment their compensation in several ways. They can increase their compensation by “sampling,” or delivering the Employer’s newspaper to non-subscribers who have been targeted by the Employer or advertisers in an attempt to procure new subscriptions. Independent contractors can also obtain new subscriptions on their own initiative by going door-to-door.¹⁶ The Employer negotiates with independent contractors to determine how much the independent contractor receives for bringing in additional business. The circulation director testified that one independent contractor picks his newspapers up at the Employer’s plant and receives an additional fee for this. Carriers are not permitted to pick up their newspapers at the plant.

Independent contractors are not required to supply a vehicle. Those who do so pay their own operating expenses, gas and insurance, unless they negotiate for the Employer to subsidize these expenses. The circulation director testified that independent contractors have negotiated amendments allowing them to renegotiate their fees should the price of gas rise above a certain level and remain there for a specified period. Independent contractors are liable for any damage incurred in connection with performing their responsibilities, and must provide a commercial bond.

Independent contractors are not required to deliver newspapers themselves, and can employ any number of subcontractors or employees to do so. The subcontractor does not need to be approved by the Employer.

The Employer provides independent contractors with a new “branding bag” showing the Employer’s name, and makes additional bags available to them at cost. Independent contractors do not have work stations, but can license space from the Employer, for a negotiated fee, to assemble and bag newspapers.

Each independent contractor can sign the Agreement in the name of an individual, fictitious business name, corporation or any other lawful form of business entity.

¹⁶ A carrier testified that although he used to have success doing this, he cannot compete with telemarketers whom the Employer permits to sell new subscriptions at reduced rates.

The Employer does not withhold state and federal taxes or social security for independent contractors, or contribute to workers compensation or unemployment insurance on their behalf. Independent contractors do not receive any leave or fringe benefits.

**Analysis: The Employer's Independent Contractors
Are Statutory Independent Contractors**

Section 2(3) of the Act excludes from the definition of "employee" anyone "having the status of an independent contractor." In determining whether an individual is an employee or independent contractor, the Board applies the common law of agency. NLRB v. United Insurance Co., 390 U.S. 254 (1968). The Board gives weight to factors such as: (1) whether the individuals perform functions that are an essential part of the employer's normal operation; (2) whether they have a permanent working arrangement with the employer which will continue as long as performance is satisfactory; (3) whether they do business in the employer's name with assistance and guidance from employer personnel and ordinarily sell only the employer's products; (4) whether the agreement containing the terms and conditions under which they operate is promulgated and changed unilaterally by the employer; (5) whether they account to the employer for funds collected under a regular reporting procedure prescribed by the employer; (6) whether particular skills are required for the operations subject to contract; (7) whether the individuals have a proprietary interest in their work; and (8) whether the individuals have the opportunity to make decisions which involve risks taken by independent businessmen and which may result in profit and loss. Standard Oil Co., 230 NLRB 967, 968 (1977)

Under the Board's approach, no single factor or set of factors carries the most weight, and each case must be treated on its own facts. Roadway Package System, 326 NLRB 842, 850 (1998). Generally, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the manner and method of achieving such ends. Drukker Communications, 277 NLRB 418, 422 (1985); Fort Wayne Newspapers, 263 NLRB 854 (1982).

The Board has decided a number of cases involving individuals responsible for home delivery of daily newspapers. The duties of those making deliveries have varied somewhat in each case, as have details of their contractual relationships with the newspaper companies. These cases demonstrate that the independent contractors whom the Union seeks to represent are statutory independent contractors, not employees.

In The Daily Mining Gazette, A Division of Thomson Newspapers (Michigan), Inc., 273 NLRB 350 (1984), the individuals at issue were motor route drivers who dropped off bundled newspapers for dealers and carriers, placed newspapers in coin-operated news racks and inserted newspapers in plastic tubes on stakes placed in front of the homes of subscribers. The drivers received a flat rate set by the employer for each run completed. The employer computed this rate based upon mileage of the run, length of time of the run, number of tube deliveries and number of bundle drops. New drivers occasionally negotiated higher flat rates than those offered initially by the employer. Drivers were assigned pickup times between 1:00 p.m. and 2:45 p.m., and target completion times between 5 and 5:30 p.m. District managers accompanied newly hired drivers for a day or two, but did not supervise them afterward. Drivers were not required to maintain any records. They determined the order in which they made deliveries. Drivers were free to hire substitutes and helpers without the employer's approval, and to deliver other products along their routes. They were not subject to dress codes or work rules, and did not have to display the employer's logo. Drivers were required to supply their own vehicles, gas, insurance and vehicle maintenance. When the employer received a customer complaint, it informed the driver and asked him to address the complaint, but the employer could not take disciplinary action short of replacing the driver. Drivers solicited new subscribers to augment their compensation. The employer did not withhold money for taxes or social security, or make workers compensation and unemployment insurance payments for drivers. Drivers did not receive leave or fringe benefits.

In Thomson Newspapers, the Board concluded the drivers were statutory independent contractors. The Board emphasized that the employer exercised no control over the manner and means by which the desired result, daily newspaper delivery, was accomplished. Id. at 352. The Board supported its decision by citing several factors, which are present here as well.

Thus, the Board observed that drivers could deliver in any order they chose and were not supervised, subject to work rules or a dress code, or required to drive a particular type vehicle or display the employer's logo. The Board also noted that drivers could hire substitutes without consulting the employer and deliver other products along their routes. The Board pointed out that drivers had to provide their own vehicles, gas, insurance and upkeep, received no leave or fringe benefits, and had no deductions made on their behalf for workers compensation and unemployment insurance. Id. The relationship between the Employer and independent contractors shares all these attributes.¹⁷

In American Publishing Company of Michigan, d/b/a The Evening News, 308 NLRB 563 (1992), the Board denied review of a regional director's decision and direction of election, upholding the employer's contention that motor route carriers were statutory independent contractors. The Board agreed with the regional director's decision that the employer retained control only over the results required to be achieved under their contracts. Id. at 564.

In Evening News, the carriers negotiated contracts allowing them to deliver other products while on their routes and to use substitutes to deliver their routes. As here, carriers were not required to deliver their routes themselves. Carriers were responsible for their vehicles, gas, maintenance and insurance. Carriers could solicit new subscribers, and participate in promotions sponsored by the employer toward that end. Carriers could decide the order, method and timing of deliveries, as long as deliveries were completed within target times set by the employer. The contract was terminable by either party upon 30 days notice, or immediately upon failure to perform. The contract exempted the employer from withholding

¹⁷ In addition, the independent contractors can increase their compensation by soliciting new subscriptions, as in Thomson Newspapers.

taxes and social security, and from paying for workers compensation and unemployment insurance for carriers.

As with the Employer's independent contractors, the carriers in Evening News were not required to comply with any work rules or dress code. They were not supervised. Subscriber complaints were relayed from the employer to the carrier, who remedied them. Carrier contracts were terminated for consistent late deliveries.

In both Thomson Newspapers and Evening News, there were several factors pointing to an employer-employee relationship. However, the Board held that these were outweighed by factors supporting a finding of independent contractor status. The same conclusion applies here.

In Asheville Citizen-Times Publishing Co., 298 NLRB 949 (1990), individuals similar to those the Union seeks to represent were found to be statutory independent contractors. Asheville Citizen-Times Publishing Co. involved home delivery carriers, who signed contracts terminable at will by either side upon 30 days notice, as with the Agreement here. The home delivery carriers in Asheville Citizen-Times Publishing Co. received primary delivery areas, which the company could alter at will. They were trained by district managers, but then no longer supervised by them.¹⁸ As with the Employer, home delivery carriers decided how many newspapers to purchase from the company, at a wholesale price established by the company. They received nothing for unsold newspapers. As with the Employer, the employer in Asheville Citizen-Times Publishing Co. did not withhold income taxes, social security or workers compensation, or provide any benefits. Also as with the Employer, home delivery carriers were permitted to hire substitutes and helpers without consulting the company, and to engage in other employment while under contract with the company. Home delivery carriers had to purchase, insure and maintain their own vehicles, and were prohibited from displaying the

¹⁸ Here, the district managers must negotiate before changing delivery areas, and do not train independent contractors. These are further factors supporting a finding that the independent contractors are statutory independent contractors.

company's logo on their vehicles. They had no dress code. The Board concluded that the home delivery carriers were independent contractors. Id. See accord Drukker Communications, 277 NLRB 418 (1985).

While the Employer's time targets require independent contractors to ensure deliveries by 6:00 a.m. Monday through Saturday and by 7:00 a.m. on Sunday, these requirements indicate the Employer's control over the results to be achieved rather than the manner and method of their achievement. Thomson Newspapers, 273 NLRB at 352.

I find that the independent contractors control the manner and means by which to deliver newspapers in accordance with their Agreements. They retain significant entrepreneurial control. For example, they can hire their own employees and deliver competing products along their routes. Independent contractors also incur entrepreneurial risk. For example, they must be bonded, and incur the risk of damage from deliveries. Based upon the foregoing, and the record as a whole, I conclude that the independent contractors at the *St. Petersburg Times* are statutory independent contractors, not employees within the meaning of the Act.

Thus, the only statutory employees the Union has indicated willingness to represent are the remaining carriers. I will now consider whether it would effectuate the policies of the Act to direct an election among the carriers, in view of the Employer's plans to end the carriers' employment and use independent contractors.

Timeline For Conversion To Independent Contractors

The Employer first informed all carriers of its intent to replace them with independent contractors by letter dated June 3, 2002. This letter stated that the change would begin in the fall of 2002 and take "approximately 18 months." The Employer continued to hire carriers after sending the June 3, 2002 letter. Each new carrier hired received written notice that the Employer would change to a system of independent contractors by "the end of 2003."

As mentioned above, the Employer began notifying individual carriers of their pending discharges through WARN Act notices sent 67 to 74 days before their last dates of employment.

The Employer mailed WARN Act letters to about 50 carriers in Hillsborough County on September 19, 2002, notifying them that their last date of employment would be December 1, 2002. The circulation director testified that the remaining 860 carriers will receive WARN Act notices on a district by district basis.¹⁹

The Employer asks each carrier to begin negotiating with his district manager roughly 67 days before his projected final day of employment. The Employer wants to conclude negotiations for all independent contractors within each district between 26 and 38 days before the projected changeover date for that district.

The Employer presented somewhat ambiguous evidence as to when the last carriers are scheduled to be converted to independent contractors. The Employer's "revised draft" schedule, dated January 24, 2003,²⁰ calls for the last conversions to take place by June 23, 2003. According to the revised draft, the Employer was scheduled to mail WARN Act letters to 96 additional carriers on January 9, 2003, 61 carriers on February 6, 102 carriers on February 20, 99 carriers on March 6, 128 carriers on March 20, 124 carriers on April 3, and 150 carriers on April 17.

Thus, according to the revised draft, the last WARN Act notices will be sent to carriers on April 17, 2003. The circulation director testified, without contradiction, that the original 18-month conversion schedule has been accelerated, and that the employment of carriers will be ended by "June 20 something," 2003.²¹ She testified that the Employer initially decided it needed 18 months because of the technological and administrative changes required to terminate such a large group of employees, but has since revised this estimate.

The circulation director also testified that "I believe we will finish [conversions] earlier than 18 months." She testified that "[t]here were variables that would affect the timetable" for conversions. She testified that the timetable changes "almost weekly." It appears from the

¹⁹ It appears from the record that, as of the time of the hearing, the only carriers who had received WARN Act notices were those in Hillsborough and West Pasco counties.

²⁰ Union Exhibit 9.

²¹ Union Exhibit 9 appears to confirm the circulation director's testimony in this regard. The Petitioner did not examine her about this exhibit.

record that these changes refer mainly to the order in which districts are to be converted to the independent contractor system, rather than any change in the final date for conversions. The circulation director testified that changes in the schedule are caused in part by staffing concerns, such as the absence of a district manager and the termination of the retail sales manager, who supervises all single copy sales.²² She testified that the Employer's decision to replace carriers with independent contractors was not subject to rescission.

**Analysis: It Would Not Serve the Purposes of the Act
to Direct an Election among the Remaining Carriers**

The Board has held that where an employer's operations are scheduled to terminate within three to four months, no useful purpose is served by directing an election. Davey McKee Corp., 308 NLRB 839, 840 (1992). This principle has been applied mostly in the construction industry, where projects are temporary. See e.g. M. B. Kahn Construction Co., 210 NLRB 1050 (1974) (given imminent completion of projects within six months of hearing, no useful purpose would be served by conducting elections in the units found appropriate). However, it has also been applied in other industries.

In Martin Marietta Aluminum, 214 NLRB 646 (1974), the union filed a petition on April 19, 1974, one week after the employer stopped taking orders and wrote to all unit employees announcing that the plant would close on August 31, 1974. Soon thereafter, the employer notified its suppliers that it was terminating its contracts with them on June 21, 1974. The regional director rejected the employer's position that the petition should be dismissed because the plant was being closed. The Board reversed the regional director and dismissed the petition. The Board noted that about 50 percent of the unit's employees would have been terminated by the date of the election, with further substantial layoffs scheduled shortly thereafter, and that the closure of the plant was "definite and imminent." Id. at 647.

²² The Employer is also converting single copy sales employees to independent contractors, although these individuals are not at issue.

In Larson Plywood Co., 223 NLRB 1161 (1976), the employer's shareholders approved a resolution on January 13, 1976 to liquidate all assets within 90 days. On January 26, 1976, the regional director issued a decision and direction of election, rejecting the employer's position that no useful purpose could be served by ordering an election. The regional director concluded that the liquidation resolution could not be "relied upon with absolute certainty." Id. The Board reversed the regional director, holding that the imminent closure of the plant was sufficiently certain that it would not effectuate the policies of the Act to conduct an election. The Board noted that the plant was scheduled to be closed within 90 days. The Board stressed that there was "no evidence of any inconsistent action on the part of the [e]mployer, nor is there any evidence that any employment relationship will survive the liquidation." Id.

In Hughes Aircraft Company, 308 NLRB 82 (1992), the union petitioned to represent plant guards and receptionists in separate units. On June 5, 1992, the employer notified all unit employees of its decision to subcontract their positions by August 16, 1992. The pre-election hearing was held in June. On June 19, 1992, the employer signed agreements with the subcontractors. The Board agreed with the regional director that no election should be held because permanent layoff of the unit was "imminent and certain." Id. at 83.

Martin Marietta Aluminum, Larson Plywood Co. and Hughes Aircraft establish that an election serves no useful purpose where it is clear there will be no more unit employees within a short period of time following the hearing. The Petitioner filed the petition in this case on January 22, 2003. As explained above, I have determined that the Employer's independent contractors are statutory independent contractors. Therefore, the Employer's elimination of all carriers is "definite and imminent." Martin Marietta Aluminum, 214 NLRB at 647. The record reflects that well over half of the carriers will have received WARN Act letters by the time an election can take place.²³ Although they will remain statutory employees until the effective dates of these letters, they will be terminated 67 to 74 days after the dates of their respective

²³ According to the revised draft schedule, 486 carriers will receive WARN Act letters by the end of March, in addition to those in Hillsborough County who had received them before the hearing.

WARN Act letters. Thus, more than half the carriers will be terminated within less than three to four months of an election. There is no evidence of any of any inconsistent action by the Employer,²⁴ and no evidence that the employment relationship will survive beyond approximately late June, 2003.

Based upon the foregoing, and the record as a whole, I conclude that it would not serve the purposes of the Act for me to direct an election among the remaining carriers. I have therefore decided to dismiss the petition.

ORDER

Accordingly, IT IS HEREBY ORDERED that the petition in this case 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. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on March 21, 2003. The request may not be filed by facsimile.

DATED at Tampa, Florida, this 7th day of March 2003.

Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
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177-2414-2200
177-2414-3300
177-2414-5500
177-2414-6600
177-2414-9900
347-8020-6000

²⁴ Just as the employer in Martin Marietta Aluminum had stopped taking orders, the Employer had already converted 50 to 60 Hillsborough County carriers to statutory independent contractors as of the date of the hearing.