

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATION BOARD  
REGION 9

In the Matter of

COURIER-JOURNAL, A DIVISION OF GANNETT  
KENTUCKY LIMITED PARTNERSHIP <sup>1/</sup>

Employer

and

Case 9-RC-17809

GRAPHIC COMMUNICATIONS INTERNATIONAL  
UNION, LOCAL 619-M, AFL-CIO, CLC <sup>2/</sup>

Petitioner

**ACTING REGIONAL DIRECTOR'S DECISION AND  
DIRECTION OF ELECTION**

The Employer, with a facility in Louisville, Kentucky, is engaged in the publication and distribution of a newspaper (The Louisville Courier-Journal), in Louisville, Kentucky and the surrounding vicinity. The only Employer operation involved in this proceeding is its Oldham County, Kentucky newspaper distribution and delivery service. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit comprised of all the newspaper carriers employed by the Employer from its Oldham County Distribution Center located at 1803 Button Court, LaGrange, Kentucky, excluding all other employees, managerial employees, and all guards and supervisors as defined in the Act. There is no history of collective bargaining affecting the employees involved in this proceeding.

A hearing officer of the Board held a hearing on the issues raised by the petition. <sup>3/</sup> The Employer maintains that the newspaper carriers cannot comprise an appropriate unit because

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<sup>1/</sup> The name of the Employer appears as amended at the hearing.

<sup>2/</sup> The name of the Petitioner appears as amended at the hearing.

<sup>3/</sup> The parties stipulated that the facts in this matter are substantively the same as the facts presented at the hearing in Case 9-RC-17754. The only apparent differences are the number of carriers involved, the location of the distribution center, and the manager in charge. This information was placed in the record and is referred to in the decision. They have also stipulated that I may base my decision in this matter on the evidence presented in Case 9-RC-17754, including the transcript, exhibits, the oral arguments of the Petitioner contained in the transcript, and the post hearing briefs submitted by the Employer. The parties have waived the submission of additional briefs. However, I have fully considered the additional oral argument and cases cited by the Employer and the oral argument made by the Petitioner at the hearing in the subject matter. It is clear, and the parties apparently agree, that the individuals in this case have the same status as those at issue in Case 9-RC-17754 pending on review. Thus, if the individuals at issue in Case 9-RC-17754 are employees, they are employees here. Conversely, if the individuals in Case 9-RC-17754 are found to be independent contractors by the Board, the individuals at issue here are independent contractors.

they are independent contractors and, as such, they are not employees within the meaning of Section 2(3) of the Act. The Petitioner contends that the newspaper carriers are employees under the Act and that the Employer's Oldham County Distribution Center carriers constitute an appropriate unit for purposes of collective bargaining. <sup>4/</sup>

I have carefully considered the evidence and the arguments presented by the parties on the issues. I have concluded, as discussed below, that the factors militating in favor of a finding that the newspaper carriers are employees, on balance, outweigh the evidence that they are independent contractors. Accordingly, I find that the newspaper carriers are employees entitled to representation and I will direct an election among the newspaper carriers in the unit found appropriate.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and analysis supporting each of my conclusions on the issues.

## **I. OVERVIEW OF OPERATIONS**

The Employer publishes a daily newspaper, Monday through Saturday, that retails for 75 cents a copy. The more extensive Sunday edition retails for \$1.75 a copy. The Employer delivers the newspaper from its downtown Louisville, Kentucky printing plant to the Oldham County Distribution Center 7 days a week. The newspapers are delivered to the distribution center between 2 a.m. and 2:30 a.m., Monday through Saturday, and somewhat later on Sunday because of the larger size of the Sunday edition. The newspaper carriers receive their papers and commence their routes from the distribution center.

Louis Sabatini is the Employer's State Division Manager and he works out of Louisville, Kentucky. In this capacity he oversees sales and distribution operations throughout the State of Kentucky, except for Jefferson County in which the city of Louisville is located. Twelve district managers and a state supervisor work under Sabatini, including the district manager for Oldham County, John Harcourt. Harcourt is responsible for "contracting" with the newspaper carriers in Oldham County, a county that borders Jefferson County on the northeast and which is just south of the Indiana border. Harcourt reports directly to State Supervisor Steve Brown. There are about 25 newspaper carriers who deliver the Employer's products in Oldham County.

## **II. NEWSPAPER CARRIERS**

The 25 carriers at issue are engaged in the home delivery of the Employer's newspaper to customers on routes that are established and determined by the Employer through District Manager Harcourt. About 90 percent of the carriers also deliver an Employer product known as a TMC (Total Market Coverage) to nonsubscribers, which permits advertisers to reach nonsubscribers with their messages. Additionally, an unspecified number of carriers handle what are referred to in the record as single copy sales. Single copy sales occur when newspaper carriers deliver the newspaper to a store like a Seven Eleven or a Speedway, or to a vending machine, also known as a rack.

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<sup>4/</sup> The Employer only asserts that the carriers are independent contractors. It does not contest the scope of the unit which is limited to its Oldham County operation.

Each carrier services one or more home delivery routes. The carriers do not have any proprietary interest in their routes and cannot assign or alter them. Thus, the carriers cannot buy or sell routes. In contrast, the Employer has the right to add to or subtract from a route. The routes vary in size. For example, in Case 9-RC-17754, the smallest number of papers handled by a carrier per day was about 150 to 175 papers and the largest number of papers handled on a daily basis by a single carrier was about 400 papers.

There are other disparities among carriers. The carriers are in a broad age range and have been delivering papers for the Employer or its predecessor for varying periods of time. Some of the carriers have other full-time employment while others do not have regular employment outside their newspaper delivery jobs. There is no evidence that any carriers have incorporated.

All carriers sign "Home Delivery Service Agreements" with the Employer. All the agreements are effective for 1 year, with automatic renewal for successive 1-year periods unless terminated by mutual agreement, material breach, or 30-days advance written notice to the other party. These agreements are required by the Employer and are non-negotiable. Carriers who deliver the TMC must also sign a "Home TMC Delivery Service Agreement." Additionally, those carriers engaged in store or rack sales are required to sign a "Single Copy Wholesale Distribution Agreement." All three agreements state that the agreements are between the Employer and an "independent contractor" and are the same for each carrier, except that each agreement contains a different numerical designation that reflects a particular delivery area. The record in Case 9-RC-17754 reflects that some of the carriers, whom the parties agree are identical to the carriers here, were told by representatives of the Employer that they were independent contractors. The instant record does not disclose whether any similar statements were made to any of the carriers working out of the Oldham County district.

The Employer recently discontinued a prior home delivery agreement and implemented a new agreement for all carriers in the Oldham County district, altering the remuneration rates that had been set forth in the old contract. Effective February 24, 2003, and continuing thereafter, carriers receive 7 cents for each daily paper delivered and 10 cents for two copies delivered to the same address. They receive 37 cents for each Sunday paper delivered and 57 cents for two copies delivered to the same address. Carriers also receive an extra cent for each copy of the paper they deliver that includes an insert. Carriers are compensated at a rate of 5 cents for each TMC product they deliver. All home delivery customers are billed directly by the Employer and the Employer is responsible for collections. The rate changes recently implemented by the Employer were not negotiated with the carriers and represent a lower profit margin for them. Under the new agreements, however, carriers do not bear the risk of loss when customers are delinquent or fail to pay because, as noted, they are paid a per piece rate for delivery and the Employer is responsible for collections.

The single copy wholesale agreement utilized by the Employer was not discontinued in February 2003. The wholesale agreement does not specify the rate of compensation. However, the record testimony finding in this case reflects that the carriers buy the papers used in this operation from the Employer at the wholesale rate and that they simply keep any profit from the sale of newspapers at racks and stores they service. (The record does not reflect the wholesale rate for the paper.) In this regard, the carriers are responsible for collecting money from their racks and from the store merchants with whom they have single copy arrangements. The Employer owns the racks and the carriers are charged a rental fee of between 30 and 90 cents a week as determined by the Employer, with the higher volume racks being set at a higher rental

rate. Carriers are responsible for maintaining the racks. However, if a rack is defective and needs to be replaced, the Employer provides a replacement. The district manager determines whether a particular store or rack site is a good location for paper sales; however, carriers may suggest location possibilities. Carriers are permitted to return a "reasonable amount" of papers at no cost to them when the papers are not purchased from stores or racks. The Employer considers a reasonable amount to be about 15 to 20 percent and it credits the carriers for these returns.

In theory, carriers have the ability to negotiate with store merchants the amount that the store will receive as its share of the profit. This is an amount between the wholesale price to the carrier and the retail price that is set by the Employer. Testimony discloses that in practice stores receive 5 or 6 cents a copy for daily papers and about 10 cents a copy for Sunday papers, with the carrier receiving the remainder of the difference between the wholesale and retail price of the paper. Carriers assume the risk of loss for uncollected debts from store merchants and from the theft of newspapers from racks.

The Employer provides many of the carriers with a weekly route allowance, the amount of which is based principally on the district manager's evaluation of the profitability and desirability of a particular route. State Division Manager Sabatini also is involved in evaluating routes for the purpose of assigning an allowance. Thus, carriers who have routes with fewer subscribers or more rural, or who have routes that have bad roads, receive a higher route allowance in comparison to carriers with routes with more desirable locations. Route allowances vary widely and may range from a low of about \$2 a week to a high of about \$70 to \$80 a week as reflected by the testimony in Case 9-RC-17754 which the parties agree is true here. Carriers may request an adjustment to their weekly route allowance but the Employer determines how much, if any, additional allowance will be granted. Indeed, the district manager is not independently authorized to make adjustments on his own.

The district manager determines when and whether deliveries should be added to or subtracted from a route. He sometimes initiates a route change on his own and sometimes the impetus for a change will come from a carrier. A frequent reason for subtracting from a route occurs when the number of subscribers on a route has grown and the carrier is having difficulty making all of his or her deliveries by the Employer's targeted delivery times of 6 a.m. for the daily paper and 7 a.m. for the Sunday paper. A frequent reason for adding to a route is because of the subtraction from another route to alleviate timely delivery problems.

Carriers are responsible for providing their own transportation to make their deliveries. They must prove to the Employer that they have valid drivers' licenses and that their vehicles carry at least the minimum insurance required by Kentucky. The carriers are required to pay for their own insurance and gas. They are not directly reimbursed for their mileage, but, as noted, route allowances are higher for less dense and more rural routes.

Carriers generally arrive at the distribution center between 2 a.m. and 4:30 a.m. to pick up their papers for delivery. The Employer does not require the carriers to pick up their papers by any certain time, but it does require them to have the papers delivered by 6 a.m. on weekdays and Saturdays and by 7 a.m. on Sundays. Carriers are not required to wear any items with the Employer's logo and are not permitted to have anything on their vehicles identifying them as carriers for the Employer. Indeed, the agreements that they sign with the Employer specifically prohibit them from placing on their vehicles any logos or other marks identifying them with the Employer. The record discloses that they have been given hats in the recent past with the

Employer's name on them. However, they are not required to wear them and apparently, at least some carriers do not regularly wear the hats. Similarly, carriers received a t-shirt from the Employer in the recent past. There is no evidence that carriers regularly wear these t-shirts while making deliveries and there is no requirement that they do so.

Carriers may make their route deliveries in any manner that they choose and are constrained only by the Employer's delivery times. Carriers generally make deliveries in the most timely and cost effective manner possible. However, they are free to deviate from their regular delivery pattern and may take breaks as they wish. Carriers are permitted to deliver other products at the same time that they deliver the newspaper and TMC as long as the delivery of other products does not interfere with the timely delivery of the Employer's products. The other products delivered include local shopping circulars or advertisement papers and the Wall Street Journal.

As noted, some carriers also deliver the Wall Street Journal on their routes. They receive 10 cents for each copy of the Wall Street Journal that they deliver. An unspecified number of copies of the Wall Street Journal are delivered in Oldham County on a daily basis. The carriers apparently do not have any type of agreement with the Wall Street Journal. Rather, the Wall Street Journal has an agreement with the Employer and the Employer remits to the carriers the payments for Wall Street Journal delivery.

Carriers are responsible for ensuring that customers on their routes are properly serviced through timely delivery of papers in good and dry condition. In this regard, they deliver papers in several different ways. If a customer has a tube provided by the Employer, the carrier may use the tube. If the weather is inclement and there is no tube, the carrier will use a plastic bag provided by the Employer. Papers are also delivered banded or unbanded and may be delivered in any other manner that the customer wishes. The Employer also provides the carriers with a supply of rubber bands used to band the papers. Papers for customers in apartment complexes may be delivered to the doorstep.

Carriers are expected to obtain their own substitutes when they are unavailable to make deliveries. They do not need approval from the Employer regarding the identity of their substitute or substitutes and, in many instances, the Employer is unaware of the identity of a substitute who is handling a route. However, the agreement requires that the carriers provide the Employer with driver and motor vehicle records for any substitute driver as well as records for any motor vehicle to be used in the delivery of the paper. Apparently, many of the carriers obtain substitutes to cover their routes when they go on vacation or for other reasons. The Employer is not involved in any remunerative arrangement between the carrier and his or her substitute. However, the Employer holds the carrier responsible for any failure on the part of the carrier's substitute and the carrier bears any cost undertaken by the Employer to deliver the carrier's route as a result of the failure of either a substitute or carrier to make timely delivery of the paper.

Carriers are recruited for open routes through newspaper advertisements seeking "independent contractors" to deliver the paper or through referrals from carriers who are giving up their routes. The district manager interviews prospective carriers and determines whether to offer a route contract to an applicant. The district manager rides the route with a new carrier for a few days to ensure that the carrier is familiar with the route and his customers. Thereafter, the district manager rarely rides a route with a carrier, perhaps only once in a 10-year period.

Carriers may interact briefly with the district manager when they pick up their papers each morning. On these occasions, the district manager conveys customer service issues, including complaints, to the carriers, or the conversation may simply involve non-work related topics.

Customer complaints may be made to either the Employer or to the carrier. It is the carrier's responsibility to address and rectify any service complaints, such as a missed delivery. If a carrier misses a delivery and the Employer has to make the delivery, the carrier may be charged the full cost of the paper. If a customer registers a complaint with the Employer, the complaint is entered into the Employer's computer system. A note is then placed on the carrier's "top sheet" with the following morning's product to be delivered. Top sheets are the records that the Employer uses to determine the number of papers that go to each individual route. They are computer generated sheets that contain a route number and the number of papers for each route, which is called the draw. The draw is indicated on the top sheet so that the distribution employee in the distribution center can lay out the papers for each individual carrier. It appears that one distribution employee works in the Oldham County distribution center to stage the papers for delivery.

If a carrier continues to experience service issues on his or her route the district manager will discuss these issues with the carrier. The district manager has the option of terminating a carrier's contract for breach when the carrier fails to rectify delivery issues relating to timing or quality. The Employer does not take any other disciplinary actions against carriers short of terminating their contracts. For example, the progressive disciplinary procedure that is applicable to the Employer's other employees does not apply to the carriers.

The Employer provides carriers with IRS 1099 forms each year showing their earnings and also covers them under the applicable workmen's compensation statute in Kentucky. However, the Employer does not provide carriers with unemployment insurance, a W-2 form, and does not make any tax or social security deductions from their earnings. Carriers do not receive the fringe benefits that the Employer accords to other employees, including pension or 401(k), paid vacations, and paid sick leave. However, the Employer offered the carriers the opportunity to purchase accident and death insurance at their own cost through the same company that it uses for bonding the carriers. The Employer's employees are also offered the opportunity to purchase accident and death insurance, through a separate carrier.

All carriers are required to be bonded. The bonding rate is set by the district manager and is at least four times the potential liability of the carrier. The Employer utilizes a bonding company for this purpose that charges the carriers about 15 cents for each \$100. Carriers are not required to obtain a bond from the company suggested by the Employer, but must be bonded in the amount that the Employer requires.

### **III. THE LAW AND ITS APPLICATION**

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The burden of establishing that an individual is an independent contractor rather than an employee rests with the party asserting independent contractor status. *BKN, Inc.*, 333 NLRB 143 (2001). Under Section 2(3) of the Act, the Board applies a multifactor test developed under the common law of agency to decide whether an individual is an employee or an independent contractor. *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968); *Roadway Package System, Inc.*, 326 NLRB 842 (1998);

*Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998). In determining whether individuals are employees or independent contractors, the Board in *Roadway* expressly adopted the multifactor analysis of the Restatement (Second) of Agency, Section 220 (1958). Under this analysis, there are 10 specific factors that are considered in determining whether an individual is an employee or independent contractor:

1. The extent of control the employer exercises over the individual's work details.
2. Whether the person employed is engaged in a distinct occupation or business.
3. Whether the work of that occupation is usually performed under an employer's supervision.
4. The skill required by the occupation.
5. Whether the employer or the worker supplies instrumentalities, tools, and the place of work.
6. The length of employment.
7. Whether payment is made according to the time spent or by the job.
8. Whether the work is part of the employer's regular business.
9. Whether the parties believe they are creating an employer-employee relationship.
10. Whether "the principal is or is not in the business."

However, as pointed out by the Employer in its brief in support of its request for review in Case 9-RC-17754, which is part of the record in this case, all of the above factors are not given equal weight. The right of control an employer exercises over an individual's work is paramount. Nevertheless, the other factors are considered important in determining whether the right of control is present in any given situation.

For example, *Roadway* involved pick up and delivery drivers at two of the employer's terminals whom the Board found to be employees rather than independent contractors. In reaching this conclusion, the Board applied the common law of agency test as set forth in the Restatement (Second) of Agency. Specifically, the Board relied on the following to support its finding:

[T]he drivers here do not operate independent businesses, but perform functions that are an essential part of one [employer's] normal operations; they need not have any prior training or experience, but receive training from the [employer]; they do business in the [employer's] name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the [employer's] business under its substantial control; they have no substantial proprietary interest beyond their investment in

their trucks; and they have no significant entrepreneurial opportunity for gain or loss. *Roadway*, supra, at 851.

The Board also noted that:

Other support for employee status can be found in [the employer's] compensation package for the drivers. Here, [the employer] establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers. Generally speaking, there is little room for the drivers to influence their income through their own efforts or ingenuity. *Id.* at 852.

The Board expressly held in *Roadway* that the common law of agency test, “encompasses a careful examination of all the factors and not just those that involve a right of control.” *Id.* at 850.

The Board reached the opposite conclusion with respect to delivery drivers in *Dial-A-Mattress*, the companion case to *Roadway*. The Board concluded in *Dial-A-Mattress* that the common law of agency test factors weighed more strongly in favor of independent contractor status for the drivers in that case. In finding the drivers to be independent contractors, the Board relied, in part, on the fact that the drivers had, “significant entrepreneurial opportunity for gain or loss.” *Id.* In that regard, the Board noted that some drivers had more than one van to perform deliveries, that they could and did negotiate economic terms in their agreements with the employer, and that they had no guaranteed minimum compensation. *Id.* at 892. Additionally, they could decline to work or make their trucks available on certain dates without advance notice to the employer and without penalty. *Id.* at 887. The Board distinguished *Dial-A-Mattress* from *Roadway* in part on the basis that the “elements of *Roadway*’s compensation plan, in effect, result in both minimum guarantees and effective ceilings for its drivers” and the fact that, “*Roadway* drivers are required to provide delivery services each scheduled workday.” Moreover, there was, “no evidence that the *Roadway* drivers [could] negotiate . . . special deals.” *Id.* at 893.

Following the issuance of *Roadway* and *Dial-A-Mattress*, the Board has issued several decisions involving independent contractor issues. However, none of those cases have involved individuals who deliver newspapers. Rather, recent cases have considered the employee/independent contractor status in occupations such as those of car haulers, pick up and delivery drivers, taxi drivers, and free lance writers, artists, and designers. Thus, in *Time Auto Transportation, Inc.*, 338 NLRB No. 75 (2002), the Board affirmed the ALJ’s finding that car haulers were employees rather than independent contractors. In making this finding the ALJ relied in part on the fact that the employer had a “direct financial stake” in the amount of cargo hauled by drivers as it received a percentage of the gross for each load. *Id.* slip op. at 20. Indeed, the ALJ found that the employer controlled the “manner and means in which an employee generates income.” *Id.* slip op. at 22. The ALJ also noted that the drivers, like the carriers here, had to accept the independent contractor agreements presented to them and that they could not be negotiated. *Id.* slip op. at 9.

In *Slay Transportation Co.*, 331 NLRB 1292 (2000), the Board reversed a regional director’s finding that owner-operator truck drivers were independent contractors. In finding the drivers to be employees the Board relied, in part, on the fact that the drivers performed functions

that were at the core of the employer's business, they could not negotiate special pay deals with the employer, and they had little entrepreneurial opportunity for financial gain or loss. *Id.* at 1294. In addition, the Board noted that drivers could hire substitutes but that they could only negotiate a substitute's wages within the compensation rate set by the Employer. *Id.*

In *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), the Board affirmed a finding by the ALJ that owner-operators were employees rather than independent contractors. In upholding the ALJ, the Board found that the employer's package pickup and delivery drivers, like the carriers here, had "no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss." *Id.* In this regard, the Board noted that "The routes, the base pay, and the amount of freight to be delivered daily on each route are determined by [the employer], and owner-operators have no right to add or reject customers." Moreover, the employer in *Corporate Express*, like the Employer here, "incur[ed] no liability for unilaterally terminating an owner-operator's contract." *Id.*

In *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000), the Board, in agreement with the ALJ, held that a unit of taxi drivers were employees rather than independent contractors. In reaching this conclusion, the Board re-emphasized that the common law agency test, under which all aspects of an individual's relationship to an employing entity are examined, is the appropriate analysis to use in assessing a disputed individual's independent contractor status. The Board noted that factors impacting on the "right to control" were significant, but so were those that did not include the concept of control. *Id.* at 1373. The Board specifically noted in *Stamford Taxi* that restrictions placed on the taxi drivers by the employer resulted in their having no significant entrepreneurial opportunity for gain or loss and no meaningful proprietary interest in their cabs. *Id.* Additionally, the Board found that the employer, in *Stamford Taxi*, like the Employer here, unilaterally drafted, promulgated, and changed the lease agreements that the taxi drivers signed. *Id.* The Board concluded that the drivers in *Stamford Taxi* were employees even though the lease agreements, like those here, defined the drivers as independent contractors, the drivers paid their own taxes, and the employer made no payroll withholdings on their behalf.

In *BKN*, the Board found in agreement with the regional director that freelance writers, artists, and designers were employees, rather than independent contractors. With regard to the writers specifically, the Board based its finding on the fact that the employer exercised extensive control over them through the imposition of time deadlines and editorial review of the content of their work. *Id.* at 144. The Board also noted that, "the writers, like the carriers here, clearly perform functions that are an essential part of the [employer's] normal operations, and they constitute an integral part of the [employer's] business under its substantial control." *Id.* The Board found the writers to be employees although a number of factors militated in favor of independent contractor status. Those factors supporting an independent contractor finding, many of which are present here, included: "the writers work out of their homes, set their own hours, provide their own equipment and materials, are not subject to discipline, sign agreements to work on each episode, are paid per episode, may work for other employers, receive no benefits, and have no taxes or other payroll deductions withheld." *Id.*

Following the issuance of the *Roadway* and *Dial-A-Mattress* decisions, the employee versus independent contractor status issue in the newspaper delivery industry was addressed by the ALJ in *St. Joseph's News Press*, JD(SF)-68-01 (September 6, 2001), (currently pending before the Board on exceptions). Although an ALJ decision which has not been reviewed by the Board is not binding precedent, it provides a helpful analysis of the issues here and the Employer

has addressed the applicability of *St. Joseph's* in its brief in 9-RC-17754. The parties agree that the facts here are identical and the Employer's brief in 9-RC-17754 has been made a part of the record. Like in Case 9-RC-17754, there are numerous factual similarities between *St. Joseph's* and the subject case. Such similarities include the following facts noted by the ALJ:

1. The carriers' contracts emphasize they will be working as independent contractors.
2. The carriers sign their contracts as individuals.
3. The carriers' contracts prohibit them from displaying the Respondent's name on their vehicles.
4. The carriers do not wear uniforms.
5. The contracts mandate that the carriers are responsible for providing their delivery services 7 days a week.
6. The contracts direct that the carriers deliver their newspapers before 6 a.m. on weekdays and Saturdays, and before 6:30 a.m. on Sundays. (The delivery times are not specified here in the agreements, but carriers are required to make their deliveries in compliance with those times set by the Employer.)
7. The carriers are responsible for providing a substitute if they are unable to personally perform their contractual obligations.
8. The contracts allow carriers to hire helpers and substitutes without prior approval from [the employer], but carriers have no right to assign or subcontract their routes nor can they trade routes.
9. The carriers have no interest or property right in the route, the bundle drop site, or the subscribers.
10. The carriers' one large investment is the vehicle they need to perform their deliveries.
11. The carriers are required to indemnify [the employer] and are responsible for damages caused by them or their substitute carriers while delivering newspapers.
12. Should a carrier default in making his deliveries [the employer] will make arrangements to deliver the route and charge him for the cost it incurs.
13. Either party must give the other party 30-days' written notice before terminating the contract "without cause."
14. [The employer] decides where racks are located and what news dealers will receive papers.
15. [The employer] may eliminate or add newspaper locations based on its assessment of profitability.

16. The newspaper bundles contain messages that notify the carrier of such things as new customers names and addresses, where the customer wants the paper delivered (e.g. in the driveway or on the porch), and temporary stops of delivery for vacationing customers, etc.
17. [The employer] determines the geographical area covered by a particular route. [The employer], in its discretion, may cut or enlarge a route.
18. [The employer] issues the carriers IRS 1099 forms each year showing their earnings. No income taxes are withheld from the carriers' earnings.
19. [The employer] provides the contract and unilaterally changes its terms with ease.

Moreover, although there are some facts in *St. Joseph's* that differ from those here, the distinctions between the two cases appear minor. In *St. Joseph's* the carrier agreement specifically required that the carriers provide the employer with the name of a person who can be called if the carrier is unavailable. No such requirement exists here. However, the carriers here are required to provide the Employer with information on substitutes within 48 hours of a request and, as noted, are required to provide the Employer with Department of Motor Vehicles' records for any driver or motor vehicle to be used in performance of the agreement.

In *St. Joseph's*, the ALJ found that certain carriers negotiated with the Employer to deliver newspapers at a negotiated per piece rate which would militate in favor of an independent contractor finding. Here, there is no evidence of negotiation. Additionally, in *St. Joseph's* the employer paid a gas subsidy to carriers. Here, although there is no direct gas subsidy, many of the carriers receive route allowances that take into account the rural nature of a route. Thus, here gas and other transportation costs are indirectly subsidized. In *St. Joseph's* the carriers were required to purchase their own supplies, such as rubber bands and bags. Here, by contrast, the Employer provides these supplies to the carriers.

In *St. Joseph's* the employer also posted a list of the sequence in which carriers received their papers for loading at the employer's facility. There is no evidence here of any established sequence in which the carriers receive their newspapers, but all carriers must pick up their papers in time to meet the Employer's imposed delivery schedule. The employer in *St. Joseph's* also instructed carriers when they were to make "drops" in relation to other duties performed on their route, including when to deliver mailbags of newspapers to post offices. No such delivery instructions have been shown to exist here.

The ALJ in *St. Joseph's* noted that the carriers and haulers did not operate independent businesses and that they devoted virtually all their time and efforts toward providing the essential functions of the employer's newspaper business. Likewise, there is no evidence here that the carriers operate independent businesses. However, some carriers have other gainful employment.

The ALJ in *St. Joseph's* reviewed the factors relating to the independent contractor inquiry and concluded that the record supported the conclusion that the carriers and haulers were employees within the meaning of Section 2(3) of the Act. In reaching this conclusion, the ALJ noted that the carriers, like those here, had "little realistic entrepreneurial opportunity for gain or loss." Indeed here, there are a number of factors that provide a stronger case for finding an employer-employee relationship than in *St. Joseph's*. For example, the carriers here, unlike

those in *St. Joseph's*, do not, except for those sold through local merchants or racks, purchase the newspapers. Moreover, the carriers here, unlike those in *St. Joseph's*, for the most part, are not responsible for collecting for the sale of papers and do not suffer the loss for nonpayment. Such factors are supportive of an employer-employee relationship finding.

The ALJ in *St. Joseph's* also acknowledged the existence of a series of pre-*Roadway* newspaper cases, several of which, as noted below, are relied on by the Employer, in which carriers and others in the newspaper industry were found to be independent contractors. The ALJ noted that these cases were analyzed solely on the basis of the "right to control" test rather than the common law agency test set forth by *Roadway* and *Dial-A-Mattress*. Thus, the ALJ concluded that the precedential authority of those pre-*Roadway* cases in the newspaper industry was marginal as they appeared to be based on an incomplete analysis of the common law agency test.

In analyzing the status of the carriers here, I acknowledge that some factors militate in favor of finding them to be independent contractors. However, applying the *Roadway* and *Dial-A-Mattress* criteria to the subject case, like the ALJ in *St. Joseph's*, I conclude that the newspaper carriers here are employees within the meaning of Section 2(3) of the Act. I recognize that the Board in *Roadway* and *Dial-A-Mattress* did not specifically overrule the pre-*Roadway* and *Dial-A-Mattress* decisions. However, the Board did make clear that all incidents of the parties' relationship, under the common law test of agency, must be considered in determining employee or independent contractor status rather than simply the right of control test relied on by the Board in pre-*Roadway* and *Dial-A-Mattress* cases. Certainly, the right of control an employer has over the manner and means of the work being performed remains, as argued by the Employer in its brief in support of its request for review in 9-RC-17754, paramount in determining employee or independent contractor status. However, having carefully considered all the common law test of agency factors present in this case, including the importance of the right of control, I am of the opinion that the evidence suggesting the carriers are independent contractors is outweighed by those factors indicating that they are employees.

In any event, even if the rationale of the pre-*Roadway* and *Dial-A-Mattress* cases in the newspaper industry is applied here, I am of the opinion, based on the existing factors, that the Employer's newspaper carriers are employees and not independent contractors. See, *Beacon Journal Publishing Co.*, 188 NLRB 218 (1971) (similar facts, although no written agreement). Certainly, under *Roadway* and *Dial-A-Mattress*, the carriers here are employees. In reaching my conclusion, I note in particular that the carriers do not have the ability to negotiate the terms of the contract with the Employer. They have, at best, a minuscule opportunity for entrepreneurial gain or loss because of the prevalent per piece sold method of compensation rather than the buy/sell arrangement in *St. Joseph's*. A detailed discussion of the application of the *Roadway* and *Dial-A-Mattress* criteria (common law agency test) to the facts here is set forth below.

### **1. Extent of Control Over Work Details**

Carriers are required to deliver the Employer's product by specified delivery times each day. Although there is no required starting time, carriers must pick up their papers, or have a designee do so, in a sufficient amount of time to complete timely delivery. Carriers have discretion to accomplish their deliveries in the manner that they choose, subject only to compliance with the Employer's specified delivery times and the requirement that the paper be delivered in a dry and readable condition. This essentially means that they can determine

whether to deliver the paper to a customer's driveway, doorstep, or other location requested by a customer. Additionally, carriers can determine whether to rubber band a paper, deliver it flat, or whether to use a delivery tube. If the carrier or his/her substitute fails to perform deliveries the Employer will make the deliveries or retain a substitute to do so. If the Employer has to make a delivery for a carrier, the carrier is charged the Employer's costs for making the delivery up to the retail price of the newspaper and the failure of the carrier or his or her substitute to perform is considered a material breach of the contractual agreement. The choice of a substitute belongs to the carrier and apparently, the carrier need not disclose the identity of the substitute to the Employer. However, I note that the applicable agreements between the Employer and the carriers require that the carriers provide the Employer with a copy of Department of Motor Vehicle records for any driver used in performance of the delivery agreements with the Employer. Although the Employer may not always demand these documents or be apprised of the identity of substitutes, the contracts clearly give it the right to obtain this information.

Carriers may deliver competing products while they make their deliveries for the Employer. However, the record indicates that such opportunities are limited and there is no evidence that any of the carriers deliver another daily paper that focuses on news specific to Louisville, Kentucky and the surrounding vicinity. In fact, there is no evidence that there is a competing daily paper in the Louisville market that focuses on local news and events.

The record discloses that the contracts that the carriers sign are identical and that the Employer unilaterally imposes these agreements on the carriers on a take it or leave it basis. There are no negotiations that occur over the terms of these agreements. Although the Employer in making adjustments in route allowances may take into consideration input from the carriers, the Employer may make such adjustments without carrier input and it is the Employer who ultimately determines what, if any, adjustment will be made. Route allowances are used by the Employer to enhance the attractiveness of those routes that are considered less desirable because of their rural nature, sparse subscription density or poor roads. The Employer controls the size and number of routes that a carrier has and makes adjustments to delivery routes to ensure that they are balanced and can be completed by the specified delivery times. Some of these route adjustments are made at the request of and with the input of carriers, while other changes emanate solely from the Employer.

I conclude that an analysis of the evidence related to this factor, on balance, favors a finding of employee status. In reaching this conclusion, I note that the work details that are left to the discretion of the carriers are largely menial and somewhat illusory in nature. Although the Employer does not specify starting times, the fact that it requires a deadline for delivery and the fact that the papers are available with only an hour or two to spare, indicates significant control over the timing of the performance of the carriers' duties. As for actual delivery, the carriers are limited to the geographic routes granted by the Employer. Although carriers may decide the order in which deliveries are accomplished, as a practical matter, even their discretion in this area is greatly limited as the carriers will undoubtedly make their deliveries in the most efficient manner as dictated by the amount of fuel and time needed to complete their routes. Thus, the manner in which the papers are delivered does not show true independence on the part of carriers in accomplishing their task. Rather, the delivery method is circumscribed by the Employer's requirement that the papers be delivered by a certain time, in a dry and readable condition and by the carrier's need to satisfy the Employer's customers. The record is clear that carriers who fail to consistently satisfy the Employer's customers will lose their routes.

## **2. Distinct Occupation or Business**

The carriers are not engaged in a distinct occupation or business. Rather, the service that they perform, the delivery of the Employer's daily and Sunday newspapers, is arguably part of the Employer's business. Indeed, the ALJ in *St. Joseph's* found that the delivery of the paper was an integral part of the Employer's business. I recognize that it could be argued that the Employer is engaged in merely publishing a newspaper and that the distribution of the paper is a distinct operation which the Employer has elected to subcontract. However, whether the publication and distribution of the paper is viewed as separate operations here is not controlling based on the oversight the Employer maintains over the delivery of its papers which restricts any realistic opportunity by the carriers to engage in true entrepreneurial activities. Thus, the carriers here, unlike the drivers in *Dial-A-Mattress*, have not made significant investment in their own business with substantial opportunity for gain or loss. Accordingly, I find that the evidence pertaining to this factor favors a finding of employee status.

## **3. Whether Newspaper Carrier Work is Performed Under Supervision**

The carriers, as noted, receive only minimal supervision after an initial orientation period that lasts a few days. During the initial orientation period, the district manager typically rides the route with a new carrier to ensure that the carrier is familiar with his/her route and customers. Following this initial orientation, the district manager interacts with carriers briefly, if at all, on a daily basis. This brief interaction may involve relaying customer concerns or complaints or it may simply be an opportunity for the district manager to touch base with the carrier. Additionally, after orientation the district manager rides with carriers only rarely, perhaps once over a period of several years. The type of work involved, the delivery of newspapers, typically is not the subject of close supervision as the bulk of the performance of the work occurs away from any facilities maintained by the Employer. Moreover, the work is routine in nature, requires minimal skill and, therefore, the need for oversight is limited. Finally, customer feedback directly to the Employer ensures that the carrier performs competently and that a level of customer satisfaction is maintained.

I find that the evidence regarding this factor does not strongly favor either employee or independent contractor status. On the one hand, there is little day-to-day supervision by the Employer. On the other, the nature of the task and the fact that it occurs away from the Employer's facilities lends itself to minimal supervision.

## **4. Required Skills**

The work performed by carriers requires dependability and timeliness, but does not involve any particularized skills. Other than the brief orientation referenced above, there is no specialized training given or needed. Carriers must have a satisfactory driving record and a valid commercial driver's license. The record does not disclose under what circumstances a carrier would be denied a contract if there were deficiencies in his/her driving record. However, the Employer has a right to such information under the contract and presumably would use it to guard against the potential liability that an individual with a poor driving record might represent. Here, the Employer may easily substitute one carrier for another or replace a carrier on his or her route with a new hire who requires only a minimal amount of training. Based upon the lack of specialized skills for a carrier position, I find that the evidence related to this criterion favors a finding of employee status.

## **5. Who Supplies Instrumentalities, Tools, Place of Work**

Carriers are responsible for providing their own properly licensed and insured vehicles to perform deliveries. The Employer provides the carriers with a supply of rubber bands and plastic bags that are used to protect newspapers against inclement weather. The Employer also provides the carriers with a bench area within its distribution center where one of the Employer's employees will stage the papers for the carriers and where the carriers receive their draw numbers, notification of any customer issues, and where they arrange and load their papers for delivery.

The evidence related to this factor is again somewhat equivocal in determining the employee versus independent contractor status of the carriers. Thus, the carriers provide the principal tool for their task, their own vehicles and the Employer does not specify the type of vehicle to be used. However, the Employer does require proper licensing and insurance. Additionally, the Employer provides the carriers with some materials and with a location to assemble the newspapers for daily deliveries.

## **6. Length of Employment**

Many of the carriers have delivered the Employer's paper for many years. Others have worked as carriers for only a brief period of time. Some carriers hold other employment while some have no other employment. All the carrier contracts are for a 1-year duration and continue for successive years unless there is a material breach or termination by one of the parties.

I find that the evidence pertaining to this factor, on balance, favors employee status. Although the record does not disclose how many of the carriers are long term employees of the Employer, at least some of them are long term. Longevity with one employer is indicative of an employer/employee relationship as it suggests the type of permanence that such a relationship frequently fosters, rather than the generally more ephemeral relationship experienced in the employer/independent contractor context.

## **7. Compensation - Hourly or By the Job**

The carriers do not have any proprietary interest in their routes and there is little entrepreneurial opportunity for gain or loss. In theory, they may sign up new subscribers on their established routes and may receive a bonus in the range of \$2 to \$10 for each new subscriber. In practice, carriers are not authorized to offer special deals to prospective customers and cannot compete with the Employer's telemarketing efforts in which subscription specials or deals are routinely offered to new customers. Indeed, the Employer not only makes most of the initial sales but collects for the costs of the papers. Thus, the carriers do not suffer any risk of loss. Carriers may also suggest store or rack locations to the district manager as a means of selling more papers, thereby enhancing their earning capacity. However, in practice the use of racks is not widespread and the Employer's rack rental fees and the theft of papers from racks limits profitability. Additionally, it is the district manager who ultimately determines whether a particular rack location is feasible and the district manager may unilaterally increase or decrease a carrier's draw for rack or store sales if sales are believed to warrant the change. Also, the risk of loss to carriers is minimal as the Employer buys back the unsold papers as long as returns are kept at a "reasonable amount," characterized in testimony as 15 to 20 percent.

Carriers are primarily compensated on a piece rate basis, with the Employer paying a set rate for each daily and Sunday paper delivered to customers' homes. Although papers that carriers sell through store merchants and racks are purchased by the carriers at a wholesale rate, the carriers exercise little entrepreneurial discretion. In the case of stores, carriers divide the difference between the wholesale and the retail price (set by the Employer) with the merchants. In practice, there appears to be a difference of only a cent or two over which a carrier may negotiate with the store over the split for the carrier and the store. Moreover, there is no evidence that all of the carriers are aware that they are even permitted to negotiate the split.

On balance, I find the evidence regarding this factor suggests employee status. Although payment is piece rate or by the job, and not hourly, there is almost no latitude for entrepreneurial gain or loss. Such lack of ability significantly affect earnings suggests an employer/employee relationship.

#### **8. Part of Employer's Regular Business**

The work involved here, the delivery or circulation of the Employer's newspaper, is arguably a part of the Employer's regular business. Without delivery the Employer's product would not likely reach many of its customers. Thus, the carriers' delivery of the papers to the homes of the Employer's customers, newspaper racks and retail stores, would tend to support that the carriers perform a part of the Employer's business. Even if the distribution of the papers is considered a distinct operation from the publication of the paper, the evidence discloses that the Employer's control over the sale of the majority of the newspapers delivered by the carriers and the Employer's unilateral establishment of the terms of the lease and of the routes and delivery times negates a finding that the carriers are independent contractors. Rather, the control exercised by the Employer tends to establish that the carriers operate as part of the Employer's regular business. Accordingly, I find the evidence pertaining to this criterion favors employee status.

#### **9. Parties' Belief as to Employer/Employee Relationship**

The contracts between the Employer and the carriers recite clearly that the carriers are to be considered independent contractors. In this regard, the Employer does not withhold income taxes from amounts owed the carriers, 1099 forms are annually issued to them, and they are not provided the fringe benefits that the Employer accords to employees. Additionally, unlike other employees to whom progressive discipline applies, the Employer's only form of "discipline" over carriers is termination of their contracts without notice if the carrier has committed a material breach.

With regard to the type of relationship that the parties believed they were creating in this matter, the evidence is somewhat equivocal. Clearly, the terms of the contracts that the Employer requires carriers to sign reflect the Employer's intention to characterize the relationship between it and the carriers as one between two separate entities, a contractor and a subcontractor. However, the contracts appear to be non-negotiable and at least one carrier indicated in his testimony during the hearing in Case 9-RC-17754 that he considered the arrangement to be more in the nature of employer/employee. This factor, on balance, appears to favor independent contractor status for the carriers.

## **10. Whether the Employer is “In the Business”**

As discussed above, the work in question here, the delivery of newspapers, is arguably part of the regular business of the Employer. Even if the delivery of the papers is a distinct operation, the control exercised by the Employer over the carriers in the manner discussed above under “Factor 8” militates in favor of finding that the carriers are not engaged in an independent business. Accordingly, the record evidence regarding this factor favors a finding of employee status for the carriers.

Based on the above analysis of the criteria utilized by the Board in determining whether individuals are independent contractors or employees, I find that the relationship between the Employer and the carriers, on balance, is that of employer-employees. In reaching my decision, I have carefully examined the Employer’s arguments to the contrary and find them unpersuasive.

### **The Employer’s Contentions**

The Employer places much reliance on a series of newspaper cases that predate *Roadway* and *Dial-A-Mattress*. However, in each of those cases, as noted above, the Board appears to have applied only exclusively the “right to control” test rather than the common law agency test as advocated by the Board in *Roadway* and *Dial-A-Mattress*. Indeed, the Board specifically acknowledged in one such case that “The Board relies primarily on the common law ‘right to control’ test in determining the status of individuals alleged to be independent contractors.” *Thomson Newspapers*, 273 NLRB 350, 351 (1984), citing *Fort Wayne Newspapers*, 263 NLRB 854 (1982). The Employer relies on both *Thomson* and *Fort Wayne* in support of its proposition that the carriers are independent contractors. Similarly, in *Evening News*, 308 NLRB 563 (1992), the Board noted that:

In determining whether individuals are employees or independent contractors, the Board applies the ‘right to control test.’ If the employer retains the right to control the manner and means by which the results are accomplished, the individual is an employee. If the employer controls the results alone, the individual is found to be an independent contractor. *Id.* at 564, citing *Glen Falls Newspapers, Inc.*, 303 NLRB 614 (1991); *Drukker Communications*, 277 NLRB 418 (1985).

Both *Glen Falls* and *Evening News* are relied on by the Employer.

Another case relied on by the Employer is the Board’s decision in *Asheville Citizen-Times Publishing Company*, 298 NLRB 949 (1990). In *Asheville*, the Board summarily affirmed the Acting Regional Director’s Decision and Order finding carriers to be independent contractors. *Id.* In reaching this conclusion, the Acting Regional Director predicated his findings on the “right to control test,” relying on *Thomson* and *Fort Wayne*.<sup>5/</sup> A common thread in both the Employer’s contentions and these pre-*Roadway* and *Dial-A-Mattress* cases is that they rely unduly on certain criteria, specifically those involving a right of control, and appear to discount those factors which do not include the concept of “control.” The Board emphatically rejected this approach in *Roadway*, stating that:

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<sup>5/</sup> Notably, the carriers in *Asheville* could and did charge higher prices for the newspapers they delivered than the employer recommended, a fact not present here.

While we recognize that the common-law agency test described by the Restatement ultimately assesses the amount or degree of control exercised by an employing entity over an individual, we find insufficient basis for the proposition that those factors which do not include the concept of ‘control’ are insignificant when compared to those that do. *Id.* at 850.

Contrary to the Employer’s assertions in its brief in support of its request for review in Case 9-RC-17754, I have carefully considered the pre-*Roadway/Dial-A-Mattress* newspaper cases in reaching my finding in this case as did the Regional Director in reaching his decision in Case 9-RC-17754. In all the cases cited by the Employer, the carriers had more control over their profits and losses as they purchased their papers and/or were responsible for collections. Here, for the most part, the Employer sells the papers directly to the customers and is responsible for collections. I recognize, and have not ignored, the fact that a small percentage of the carriers here have single copy distribution agreements that allow them to sell to stores and through “racks.” However, such arrangements and sales appear to constitute a small portion of the carriers’ total sales. In addition, as the Regional Director recognized in Case 9-RC-17754 and as the ALJ noted in *St. Joseph’s*, the rationale of the pre-*Roadway/Dial-A-Mattress* cases must be considered in light of the common law of agency test that was adopted by the Board in *Roadway* and *Dial-A-Mattress*. Having considered all the common law of agency factors, recognizing that the right of control factor relied on in the pre-*Roadway/Dial-A-Mattress* cases is paramount, I find, as discussed above, that such factors, on balance, support a finding that the carriers in this case are employees.

The Employer’s contentions, in its post-hearing brief and brief in support of its request for review in Case 9-RC-17754, which are part of the record in this case, that the Decision and Order that issued on March 11, 1999, in *Philadelphia Newspapers, Inc. d/b/a The Philadelphia Inquirer*, Case 4-RC-19607, is controlling here lacks merit.<sup>6/</sup> Initially, although a decision of another Regional Director provides instructive analysis to me, it is not controlling precedent in reaching my decision in this matter. Moreover, I find that there are significant factual differences between this case and *The Philadelphia Inquirer*. Most significantly, the Regional Director in *The Philadelphia Inquirer* concluded that many of the contractual provisions in the agreements between the employer and its carriers were negotiable. Such negotiable terms included duration of the agreements and differing monetary incentives for performing delivery duties. In contrast, the agreements here, like those in *St. Joseph’s*, are presented to the carriers on a “take it or leave it” basis. Additionally, in *The Philadelphia Inquirer* the carriers could decide whether to bill and collect from particular subscribers directly or to have the Employer perform these functions for a 5 percent charge. Further, the Regional Director, in *The Philadelphia Inquirer*, placed significant emphasis on the fact that the carriers enjoyed free samples and solicitation and collection incentives. The collection incentives, in particular, were negotiable and could be a flat fee or a percentage of monies collected. In contrast, as previously noted, the carrier incentives involved here are largely illusory as the carriers cannot compete with the offers that the Employer makes directly to subscribers through telemarketing solicitation. Concededly, there are certain factors in *The Philadelphia Inquirer* similar to those here and which militate in favor of independent contractor status for the carriers. However, my analysis of the salient factors and of the applicable legal precedent compels a finding, as was true in Case 9-RC-17754, that the Employer’s carriers are employees within the meaning of the Act.

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<sup>6/</sup> No Request for Review was filed in this matter.

The carriers here, unlike those in *The Philadelphia Inquirer*, have little, if any, control over the means and method of their work and almost no entrepreneurial opportunity for gain or loss.

Like the Regional Director in Case 9-RC-17754, I find that the recent decision issued by the Regional Director for Region 13 in *Allstate Insurance Co.*, 13-RC-20827 (December 2, 2002)<sup>7/</sup> finding that approximately 10,000 exclusive insurance agents for Allstate nationwide were independent contractors, is distinguishable from the subject case. In *Allstate*, the agents, unlike the carriers here, enjoyed substantial entrepreneurial opportunity for gain or loss, had a proprietary interest in their work, determined their own advertising strategies and more importantly, were compensated solely by commission.

The Employer contended during the hearing in this matter that the substantive facts here and in Case 9-RC-17754 are similar to those found in a recent decision issued by the Regional Director for Region 12 in *Times Publishing Co., d/b/a St. Petersburg Times*, 12-RC-8900. In *Times Publishing*, the Regional Director found that the employer's newspaper carriers were independent contractors rather than employees. In reaching this conclusion the Regional Director relied substantially on the fact that the Employer negotiated numerous terms of its independent contractor agreements with carriers. Negotiations between the employer and its carriers were detailed and significant, averaging four to five hours for each agreement and often spanning two or more meetings. The record disclosed that many economic and non-economic terms were negotiated, including duration, the delivery area, location and time that the carrier must pick up papers, two levels of incentive fees paid to the carrier when he receives less than a negotiated rate of customer complaints, and the maximum rate of complaints permitted per 1,000 subscribers. Other fees negotiated in that case included a delivery fee based on the complexity of the route and other factors, a late truck fee (when the employer fails to deliver the papers to the carriers in a timely manner), fees for assembling and bagging special inserts, fees for securing new subscriptions, a dry newspaper incentive fee, and a subscriber delivery list fee for maintaining an updated subscriber list. Certain charges to the carriers were also negotiated. Some of the carriers also negotiated a right of first refusal for new delivery areas. Once again I note that in stark contrast, the agreements here, like those in *St. Joseph's*, are presented to the carriers on a "take it or leave it" basis. Accordingly, the *Times Publishing* decision shares more in common with *The Philadelphia Inquirer* decision than it does with this matter. Again, although there are factors in *Times Publishing* that militate in favor of a finding of independent contractor status for the carriers, the carriers here, unlike those in *Times Publishing* and *The Philadelphia Inquirer*, have little, if any, control over the means and method of their work and almost no entrepreneurial opportunity for gain or loss.

During the hearing in this matter, the Employer cited the recent decision of the United States Supreme Court in *Clackamas Gastroenterology Associates v. Wells*, 123 S. Ct. 1673 (2003), as support for its position that the carriers are independent contractors. *Clackamas* involves the issue of whether director-shareholder physicians are counted as employees in determining whether a professional corporation employs the threshold number of employees for coverage and potential liability under the Americans with Disabilities Act. The matter arose when a terminated employee sued the employer, a medical clinic, alleging disability discrimination in violation of the ADA.

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<sup>7/</sup> On March 26, 2003, the Board declined to review the Regional Director's decision.

The majority in *Clackamas* held that, “the common law element of control is the principal guidepost that should be followed . . .” in determining whether director-shareholders are employees for purposes of the ADA, or whether they are more akin to employers. *Id.*, at 1679. I note, however, that the majority acknowledged that many of the common-law factors used to determine whether a hired party is an employee were not directly applicable to the *Clackamas* case. The Court reasoned that these factors, as set forth in valid precedent and in Restatement (Second) of Agency §220(2) (1958), were not applicable because it was not, “faced with drawing a line between independent contractors and employees.” *Id.*, at 1677, fn. 5. This is precisely the type of line that I must draw here. Accordingly, I conclude that *Clackamas* is inapposite and that it does not overrule or diminish Supreme Court precedent involving a determination of employee versus independent contractor status. See, *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-324 (1992).

Finally, the Employer, in its brief in support of its request for review in 9-RC-17754, argues that the drivers in *Dial-A-Mattress* are more similar to the carriers here than were the drivers in *Roadway*. Although the Employer’s carriers have some similarities to the drivers in *Dial-A-Mattress*, I am of the opinion, based on the factors discussed above, that the Employer’s carriers are more akin to the *Roadway* drivers, whom the Board found to be employees, than the *Dial-A-Mattress* drivers, whom the Board found to be independent contractors.

Based on the foregoing, the record as a whole, and having carefully considered the arguments of the parties at the hearing and in the Employer’s briefs, I find that the Employer has failed to meet the burden of establishing that the carriers are independent contractors. Accordingly, I find that the carriers are employees within the meaning of Section 2(3) of the Act and I will direct an election among the employees in such a unit.

#### **IV. EXCLUSIONS FROM THE UNIT**

The record shows, and I find that the following persons are supervisors within the meaning of Section 2(11) of the Act: Louis Sabatini, State Division Manager; Steve Brown; State Supervisor; John Harcourt; District Manager. Accordingly, I will exclude them from the unit.

#### **V. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussions above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are 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 in this case.
3. The Petitioner 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 following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**All the newspaper carriers employed by the Employer from its' Oldham County Distribution Center located at 1803 Button Court, LaGrange, Kentucky, excluding all other employees, managerial employees, and guards and supervisors as defined in the Act.**

## **VI. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Graphic Communications International Union, Local 619-M, AFL-CIO, CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. VOTING ELIGIBILITY**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS**

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

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both

preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 9, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. NOTICE OF POSTING OBLIGATIONS**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## **VII. 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 p.m., EDST on **July 16, 2003**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 2<sup>nd</sup> day of July 2003.

/s/ Earl L. Ledford, Acting Regional Director

Earl L. Ledford, Acting Regional Director  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

### **Classification Index**

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