

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**THE ARIZONA REPUBLIC, A DIVISION
OF PHOENIX NEWSPAPERS, INC.¹**

Employer

and

Case 28-RC-6304

**GRAPHIC COMMUNICATIONS INTERNATIONAL
UNION, LOCAL 58-M, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of newspaper carriers employed by the Employer in the Phoenix metropolitan area. The Employer contends that the petition should be dismissed because its newspaper carriers are independent contractors and not statutory employees within the meaning of Section 2(3) of the Act. Although at hearing the Employer contended that if the carriers were not found to be independent contractors, they should be found to be either supervisors or managerial employees, in its post-hearing brief it would appear the Employer has withdrawn from this alternative position. The Petitioner contends that the carriers are statutory employees. Based more fully on the reasons set forth below, I find that the newspaper carriers who are the subject of the petition are employees and not independent contractors, where, among other things, the Employer exercises significant control over the newspaper carriers, and the carriers have little meaningful opportunity for entrepreneurial gain or loss. I also find that the newspaper carriers are not either supervisors or managerial employees, and I will direct an election in the petitioned-for unit of carriers.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

¹ The name of the Employer appears as amended at the hearing.

² The Petitioner's name is corrected, sua sponte, to reflect its full and proper name.

2. **Jurisdiction:** The record evidence establishes that the Employer, an Arizona corporation, maintains an office and place of business at 200 East Van Buren Street, Phoenix, Arizona (the Employer's main facility), where it is engaged in business as a newspaper publisher. During the 12-month period ending July 28, 2004, the Employer in conducting its business derived gross revenue in excess of \$200,000. During the same period, it received at its main facility goods valued in excess of \$50,000 directly from points located outside the State of Arizona. The Employer is engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Claim of Representation:** The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

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

5. **Unit Finding:** The issue presented in this case is whether the individuals in the unit sought by the Petitioner are statutory employees or independent contractors. I have concluded that these individuals are statutory employees and not independent contractors and that the petitioned-for unit is appropriate. In addition, I have concluded that the record evidence fails to establish that carriers are either supervisors or managerial employees. In support of these conclusions, I will first summarize the record evidence and then review the relevant case law.

A. The Employer's Delivery Organizational Structure

The *Arizona Republic* is a daily newspaper of general circulation with its main office in Phoenix, Arizona. The Employer has a total circulation of 467,000 daily non-Sunday newspapers and 587,000 Sunday newspapers. The Employer classifies newspaper delivery and assigns newspaper carriers according to the destination of the newspaper. Newspapers delivered to houses, apartments, businesses, and schools in the Phoenix metropolitan area are called "metro home delivery"; newspapers delivered to racks and retail stores in the Phoenix metropolitan area are called "metro single copy"; newspapers delivered to homes throughout Arizona outside the Phoenix metropolitan area are called "state home delivery"; and newspapers delivered to racks and retail stores throughout Arizona outside the Phoenix metropolitan area are called "state single copy." Some carriers outside the Phoenix metropolitan area have both state single-copy and state home-delivery routes, while metro carriers are either home-delivery or single-copy carriers. Only the employee or independent-contractor status of the approximately 1,262 metro home-delivery carriers, who are the subject of the petition, is at issue. The metro home-delivery carriers yearly deliver approximately 290,000 daily non-Sunday and 334,000 Sunday newspapers, with an increase to 355,000 daily non-Sunday and 395,000 Sunday newspapers during the winter season. In addition to delivery of the *Arizona Republic*, the Employer requires carriers to deliver the *Wall Street Journal*, *New York Times*, *USA Today*, *Financial Times*, *Investor's Business Daily*, and *La Voz*, as well as any Employer advertising materials. The Employer makes the *Arizona Republic* and the other publications available to the metro home-delivery carriers for

pick up at nine different distribution centers throughout metropolitan Phoenix. The Employer provides the newspapers at no cost to the carriers.

The Employer, using zip codes, has divided the Phoenix metropolitan area into approximately 1,805 routes assigned to carriers. Approximately 302 carriers have two routes; 43 carriers have three routes; 13 carriers have four routes; two carriers have five routes; and one carrier has six routes. The remaining metro home-delivery carriers have one route each. The Employer requires each carrier to pick up newspapers for delivery at a designated distribution center. Each distribution center has four or five District Service Managers, also known as District Managers (DMs), each of whom oversees 40 to 50 routes and the carriers assigned to them. The DMs report to the Area Operations Managers (AOMs), each of whom is in charge of one distribution center. The AOMs report to two Regional Operations Managers (ROMs), who report to the Home Delivery Operations Manager, who in turn reports to the Vice President of Circulation. The Employer employs District Service Assistants (DSAs) and Field Support Representatives (FSRs), all of whom assist and report to DMs. The FSRs deliver missed newspapers, occasionally collect bills at a subscriber's residence, and dispatch subscriber complaints to other FSRs in the field. The DSAs help assemble newspapers at the distribution center prior to delivery, oversee carriers when the DM is not available, by, for example, driving to a subscriber's residence to verify the subscriber's complaint of missed deliveries, and deliver newspapers to "open" routes—routes that do not have any carriers assigned to them. The Employer also fills open routes by contracting "vendors," who are often carriers, to deliver those routes temporarily until the Employer can fill them with regular carriers. In addition to the above employees, the Employer employs one Distribution Center Manager and one Warehouse Coordinator at each distribution center. Three or four FSRs under the Distribution Center Manager and Warehouse Coordinator unload newspapers from trucks, keep the warehouse clean, and place certain newspaper sections on route tables before the carriers arrive at the distribution center.

B. The Recruitment and Hiring Process

The Employer recruits carriers through word of mouth and advertisements in the *Arizona Republic*. The advertisements state that the *Republic* adult newspaper carriers will work as independent contractors. Anyone, including carriers, can recommend prospective carriers to the Employer, but the application process is the same regardless of whether the applicant is recommended or not. Applicants fill out an application, and DMs interview the applicants. The application form contains several questions about the applicants, including the applicant's motor vehicle insurance information, social security number, and driver's license number; the type of vehicle used on the route; and whether the applicant is currently employed or contracted, and if so, where the applicant is employed or contracted. The Employer requires the contracted carrier to have a valid driver's license, a mode of transportation to deliver newspapers, and minimum motor vehicle insurance pursuant to Arizona law. The Employer reviews an applicant's Arizona Department of Motor Vehicles report for moving violations and has rejected applicants when this report evinces too many moving violations. The Employer does not require any other qualifications for the carrier job. The DM informs the qualified applicant about the available route and takes the applicant on a

tour of the route. If the applicant is interested in the job after the tour, the DM reviews a carrier contract with the applicant and has the applicant sign it.

C. Carrier Contracts with the Employer

The carrier contract is titled “Independent Contractor Agreement, The Arizona Republic Metro, Home Delivery” and contains 23 sections. A summary of each section follows:

1) Independent Contractor Relationship. The contract is between Phoenix Newspapers, Inc. (“PNI”) and an independent contractor, and PNI will treat the carrier as an independent contractor for tax purposes and all other purposes. The carrier is not entitled to unemployment or workers’ compensation benefits.

2) No Right of PNI to Control. The carrier “shall have the exclusive control and supervision over the methods and means used to perform the services” described in the contract and is free to engage in other activities.

3) Place and Time of Delivery to Independent Contractor. PNI will designate a location at which the carriers will pick up the newspapers and other products for delivery and will inform the carrier about changes in subscribers’ delivery status. The carrier agrees to follow all of the PNI’s safety standards while on PNI property.

4) Distribution Area. The carrier agrees to deliver newspapers and other products to a distribution area whose boundaries are described in Schedule A of the contract.

5) Delivery Service. The carrier agrees to: “(a) assemble and deliver newspapers including Newspapers in Education (“NIE newspapers”) and to deliver other publications and other products to subscribers at the subscriber’s current address within the Distribution Area; (b) at a location on the subscriber’s property as may be requested by the subscriber; (c) in plastic bags furnished by PNI on days when PNI requests bagging (such bags being considered part of the newspaper for purposes of the payment of fees under this Agreement); and (d) in the same dry, readable and satisfactory condition as the newspapers are received from PNI. Independent Contractor agrees it is the Independent Contractor’s responsibility to provide consistent placement of the newspaper, other publications and other products that meets the subscriber’s requests. Independent Contractor agrees, at the request of and at times specified by PNI, to deliver NIE newspapers, other publications and other products and items furnished by PNI, including without limitation, advertising bags for the newspaper, rubber bands imprinted with advertising for banding the newspaper, advertising tags, post-it notes, sample consumer products and welcome packages, and to deliver billing statements, communications, and notices from PNI (collectively referred to as “Notices”) to subscribers and pick up any subscriber payment (“Payment”).” This section also gives the delivery deadlines for newspapers and prohibits carriers from adding any non-PNI furnished advertising material or charging subscribers delivery fees.

6) Delivery Fees. PNI will pay the carrier a “per piece fee” for delivery of newspapers and other products. This fee is listed in this section.

7) Solicitation. PNI agrees to pay the carrier a minimum of \$8.00 for each subscription the carrier successfully solicits.

8) Subscriber Questions and Complaints. PNI charges carriers for missed deliveries and wet, damaged, or incomplete newspapers if subscribers complain to PNI. The charge is \$1.00 for each complaint Monday through Saturday and \$2.00 on Sunday.

9) Subscriber List and Recordkeeping. PNI and the carrier will share subscribers’ addresses and delivery days, and the carrier will maintain the confidentiality of this list. The carrier agrees to pay \$1.50 per week for an “electronic route list” display and power unit. The charge for failing to return the display and power unit at the end of the contract is \$300, and the charge for returning a damaged unit is between \$50 and \$300.

10) Security Deposit. The carrier agrees to pay a \$300 security deposit. The carrier can make this payment at the execution of the contract or in weekly installments. PNI will return the security deposit with interest within 30 days of the contract’s termination if the carrier has not breached the contract.

11) Not PNI Representative. The carrier is neither an agent nor representative of PNI, and PNI prohibits the carrier from using any “trademarks, trade names, slogans, or logos” owned by PNI to perform services under the contract.

12) Independent Contractor Investment/Expenses of Business. The carrier is responsible for all costs and expenses relating to performance of the contract.

13) No Employee Benefits. The carrier agrees not to receive any benefits that PNI provides to its employees, “including, without limitation, health, sickness, accident or dental coverage, life insurance, disability benefits, accidental death and dismemberment coverage, unemployment insurance coverage, workers’ compensation coverage, vacations, and qualified retirement plan benefits provided by PNI to its employees.”

14) Indemnification. The carrier will indemnify PNI against losses or damages caused by the carrier or the carrier’s subcontractors or employees.

15) Valid Driver’s License and Insurance. The carrier agrees to maintain a valid Arizona driver’s license and the minimum vehicle insurance under Arizona law for the duration of the contract. The carrier also agrees to cause any subcontractors or employees of the carrier who use vehicles to deliver the carrier’s route to have a valid Arizona driver’s license and the required insurance.

16) Assignability. “Independent contractor may assign Independent Contractor’s rights and obligations under this Agreement to any person capable of completing

performance of Independent Contractor's obligations under this Agreement, subject to prior approval by PNI, which approval will not be unreasonably withheld."

17) Duration and Renewal. The dates of the duration of the contract are listed in this section. Either party will notify the other no later than 30 days before the end of the contract if either party does not intend to enter into another contract with the other party at the end of the contract.

18) Termination. "Either party may terminate this Agreement without cause upon 30 days' advance written notice provided to the other party." The parties agree that either party can terminate the contract with written notice if either party materially breaches the contract. The parties agree that a carrier materially breaches the contract if the carrier, without limitation, fails to provide consistent placement of the newspaper and other products; fails to deliver a route; or commits fraud or dishonest acts with respect to PNI or a subscriber.

19) Liquidated Damages. The carrier agrees to pay PNI the carrier's security deposit as liquidated damages if the carrier terminates the contract without 30 days' written notice.

20) Changes. "Except as otherwise expressly provided herein, this Agreement shall not be changed, modified, supplemented or amended except by express written agreement signed by Independent Contractor and PNI."

21) No Waiver. "The failure of either party to exercise a right or to require performance by the other party of any part of this Agreement shall not affect the full right to exercise such right or to require such performance at any time thereafter, nor shall the waiver by either party of a breach of any provision of this Agreement constitute a waiver of any later breach of the same or any other provision."

22) Applicable Laws. "This Agreement shall be governed by, interpreted, and construed in accordance with the laws of the state of Arizona."

23) Complete Agreement. "This Agreement supersedes any and all previous written or oral agreements between the parties."

In May 2004, the Employer's Vice President of Circulation announced by letter that, effective July 1, 2004, the Employer would no longer charge carriers for customer complaints. Although the Employer has implemented the change and intends to remove Section 8 from the contract, the Employer's current contracts still include Section 8. The same May 2004 letter announced that the Employer would provide plastic bags to carriers on Sundays free of charge so carriers could more easily handle the voluminous Sunday newspapers.

When DMs present contracts to carriers for their signatures, DMs generally explain the contracts to the carriers. DMs usually have filled in all of the contract terms already, including the piece rates. Although there are approximately 20 to 80 carriers who speak

Spanish and do not read English in one distribution area, the contracts are all in English, and there is no evidence of Spanish-language contracts. However, in February 2004, the Employer sent a letter, in English and in Spanish, to carriers advising them not to join the Union. When the DMs contract with new carriers who do not read English but speak Spanish, Spanish-speaking DMs orally translate the contract from English to Spanish and explain its terms.

In addition to signing the main body of the contract above and the application form, the applicant signs Schedule A: Description of Route Boundaries, which describes the approximate route boundaries; Schedule B: Driver's License and Insurance Information, which lists the applicant's driver's license number, its expiration date, and vehicle insurance information; a document titled "Contract Signing Checklist," which acknowledges that an Employer representative explained the terms of the contract to the applicant; a document titled "Independent Contractor Accident Insurance," which offers the applicant the opportunity to elect to purchase accident insurance through a firm unaffiliated with the Employer; a document usually titled PNI Safety Standards, which lists rules to obey, such as not overloading carrier carts at the distribution center; and a document titled "Electronic Route List Inventory Receipt," which itemizes the electronic-route-list display and peripheral equipment that the carrier receives from the Employer.

D. The Delivery Process

Once the DM and new carrier sign the contract for a route, the DM, the carrier who previously had the same route, or another carrier shows the new carrier the route by riding along with the new carrier. The DM then directs the new carrier to pick up the route's newspapers at a designated distribution center.

In the early morning hours, the Employer delivers the main sections of the newspaper, called "heads," via large trucks to the distribution centers. During the summer months, only one truck delivers the heads to each distribution center, and this truck usually arrives between 1:00 a.m. and 2:30 a.m. During the winter months, when the circulation substantially increases in the Phoenix metropolitan area, two trucks deliver the heads. The first truck, also known as the express truck, arrives approximately between 1:00 a.m. and 2:30 a.m., and the second truck, also known as the main truck, arrives between 3:00 a.m. and 4:30 a.m. Approximately one-half hour after the express truck's arrival, DMs restrict release of the "heads" to carriers assigned to the express truck. After this time, the "heads" are released to any carriers in the distribution center. Carriers whose routes are on the express truck risk late delivery if they do not pick up their newspapers immediately or soon after the express truck's arrival at the distribution center. One DM posted notices in the distribution center and told the carriers assigned to the express truck that they were required to arrive by 2:00 a.m. at the distribution center; otherwise, the carriers would be reassigned to the main truck. Many carriers assigned to the main truck, especially those with multiple or lengthy routes, wait in line until the "heads" are released to all carriers. The express truck's estimated arrival time is posted on an Employer bulletin board in each distribution center and is also available to all carriers on the Internet. One carrier uses a pager that sends him the express truck's estimated arrival time at the distribution center. The Employer provides the carrier with the pager, but

the carrier pays a \$3-per-month bill directly to Verizon, the paging company. If the pager breaks or malfunctions, the carrier gives the pager to his DM for repair at no cost to the carrier.

The carrier arrives at the distribution center in a personally-owned vehicle and enters the distribution center to retrieve a sheet of paper, called a draw sheet, route information page, or carrier information report, from a box that tells the carrier how many newspapers to deliver on the route that day. There is one table per route at the distribution center. Field-support representatives or other Employer employees, in a process called “staging,” have placed non-headline sections on each table before the distribution center opens to carriers. If they have time, FSRs stage alternate products such as non-*Arizona Republic* newspapers; toppers (large advertising pages wrapped around or on top of newspapers); powerstrips (narrow pages with advertising); polybags (plastic bags with advertising into which carriers must stuff the newspapers); or post-it notes (adhesive advertising notes placed on the front of a news section.) Otherwise, carriers retrieve the alternate products from a counter in the distribution center. Some carriers choose to pre-assemble the non-headline sections and alternate products on their tables, while others skip the pre-assembly and receive the headlines, in Employer-provided carts, from the Employer employees who unload the trucks. If the carriers are using Employer-provided rubber bands or plastic bags for delivery that day, they obtain them from a storage area in the distribution center. Once carriers have the headlines, they use the carts to transport the newspapers to their vehicles and begin newspaper delivery on their routes. Carriers may assemble the newspapers inside the distribution centers, in the distribution center parking lots, in their homes, or in their cars as they deliver. The Employer does not require the carriers to use a particular method or place to assemble newspapers.

In order to inform carriers about changes to their routes, the Employer requires carriers to rent from the Employer what it terms “electronic route list” equipment. This equipment mainly consists of an electronic display called a “soft book” and peripheral devices such as a battery charger and phone splitter. When the Employer learns about route changes, such as subscriber address changes, and orders to start or stop newspaper delivery, Employer employees input this information into a computer system. The software in this system updates the information and creates a recommended delivery sequence, including street addresses and directions, on a daily basis. Carriers are required to use their soft books to download this information, and they can do so from any telephone line or at the distribution centers, where the Employer provides downloading jacks. Without downloading this information, which changes every day, into the soft books, carriers would not know where to start or stop delivery and could not deliver newspapers accurately. Two witnesses—each of whom had two routes they wanted to deliver simultaneously—testified that their former DMs had told them that they were required to deliver their routes according to the recommended soft-book sequence, but they did not suffer any adverse consequences when they ignored the DMs’ orders. DMs have resequenced carrier delivery routes at carriers’ requests. In addition to resequencing delivery routes, DMs input special customer requests, such as bagged delivery, early delivery, or delivery to a certain door, into the soft book. The Employer requires carriers to carry out customers’ special requests. The soft book can only receive information. Although the carrier can make limited notes in the soft book, the carrier cannot

use the soft book to transmit information. Using the soft book requires no more knowledge than using an automated teller machine.

Carriers may use rubber bands and plastic bags to bind newspapers. The Employer requires the use of plastic bags, provided by the Employer at no cost to carriers, whenever the Employer determines that rain is likely. Since July 2004, the Employer also has provided free plastic bags to the carriers on Sundays so the carriers can more easily maintain the integrity of the large Sunday newspaper, but carriers are not required to bag the Sunday newspapers. Carriers can also choose to purchase rubber bands or plastic bags from the Employer. The record reflects that a DM prohibited a carrier from using clear plastic bags that she had purchased from another source because these bags did not have the *Arizona Republic* logo on them. Many of the various non-*Republic* newspapers come with color-coded bags. Another DM told the same carrier that she was prohibited from using rubber bands on the non-*Republic* newspapers, but was required to stuff the non-*Republic* newspapers into the color-coded bags provided free of charge to the carriers. Also, if subscribers request delivery of their newspapers in plastic bags or with rubber bands, the Employer requires the carrier to meet these requests.

E. Carrier Substitutes and Helpers

Virtually all carriers occasionally use substitutes. Substitutes are individuals whom carriers hire to assemble and deliver newspapers on their routes while the carriers are away, typically on vacation. Some carriers work as a team with their spouses and have one spouse regularly deliver newspapers on the other spouse's route. Substitutes commonly include carriers' family members, other carriers, and carriers' neighbors, among others. The carriers themselves arrange their substitutes' schedules, train their substitutes if necessary, and pay the substitutes directly. The carriers give the DMs their substitutes' phone numbers and tell the DMs who their substitutes will be and when they will be substituting. Some carriers do this as a courtesy while others are required by the DMs to provide this information. Each DM has a list of carriers in his or her district, and many of these lists include the names of a few substitutes and their telephone numbers. At least two DMs have told carriers that they cannot use the substitutes of their choice. If a carrier or substitute has not arrived in the distribution center within a time frame that, in the DM's judgment, would allow timely delivery of the newspapers on the route, the DM calls the carrier or the substitute, if known, to address the problem. Some carriers use helpers, who assist carriers with assembling newspaper sections and advertising material, as well as substitutes. Carriers make arrangements directly with their helpers.

F. Route Boundaries

The Employer controls the boundaries of a route and changes these boundaries without carriers' consent based on such factors as subscription growth, season, and the creation of new advertising zones. A few carriers have prevailed upon their DMs to change their route boundaries. Notwithstanding the approximately 30% of carriers who have more than one route, DMs monitor carriers' performance to ascertain the carriers' ability to deliver the newspapers on their assigned route or routes successfully. One DM testified that she does

not award more routes to carriers who, in her judgment, do not have enough time to deliver more than their current number of assigned routes. Because carriers—especially those with more than one route—assigned to the main truck often wait in line for the release of extra or unclaimed newspapers from the express truck, the Employer has a rule in at least one distribution center that prohibits anyone other than a route’s carriers or vendors, or their substitutes or helpers, from taking that particular route’s “heads” from the express truck. The intent of this rule is to prevent “heads” from sitting at a route table awaiting a carrier’s arrival when a carrier waiting in line could be delivering those “heads” before the arrival of the main truck.

G. Carrier Compensation: Piece Rates and Other Benefits

Carriers are paid a piece rate for delivery of the *Arizona Republic* and have limited ability to modify their compensation. Each distribution center has an annual piece-rate budget that the AOMs divide among the DMs they supervise. DMs determine the piece rate for each route based on factors such as the percentage of houses that subscribe, the route’s terrain, the route’s distance from the distribution center, and the number of subscribers in apartment complexes, where delivery is more difficult as a result of climbing stairs and stepping out of the vehicle. For example, a route with dirt roads, few subscribers, and at a far distance from a distribution center is assigned a higher per-piece rate than a rapidly growing subscriber base located near a distribution center with few apartment subscribers. A DM’s ability to increase piece rates usually depends on the state of the budget. For instance, when two carriers asked a particular DM for a piece-rate increase, the DM, after consulting with the AOM, determined that the distribution center was “under budget” at that particular time of the year and increased both carriers’ piece rates by one to one-and-one-half cents. If the distribution center’s budget is inflexible, a DM’s increase in one route’s piece rate likely would result in the decrease of another route’s piece rate inasmuch as the DM could combine, split, or adjust routes or fill any open routes. For example, DMs have filled an open route with a piece rate lower than the previous carrier’s piece rate on that route and used the savings to increase the piece rate on another route. One DM testified that approximately 25% of carriers who renew contracts negotiate the piece rates, and approximately 15% of these carriers negotiate a piece-rate increase. One carrier successfully negotiated a one or one-and-a-half-cent piece-rate increase on two out of the five times that he negotiated piece rates with the DM. Other carriers, however, testified that DMs steadfastly had refused to increase their piece rates. Also, new carriers typically do not negotiate piece rates.

Aside from piece rates, very few other contract terms, if any, are negotiable. New carriers receive contracts from three to six months in duration while carriers who renew contracts receive contracts from three to twelve months in duration. Although one DM testified that contract duration is negotiable, she also testified that no one had attempted to negotiate this term with her. The Employer sets non-negotiable piece rates for delivery of non-*Arizona Republic* newspapers; advertising materials such as toppers, powerstrips, polybags, and post-it notes; and delivery of the *Republic* to schools (known as the “Newspapers in Education” program or “NIE” program.) In addition to piece rates for delivery of newspapers and advertising materials, the Employer offers a minimum amount of weekly compensation to carriers whose routes are in low subscriber-penetration areas, rural

areas, and areas affected by subscriber seasonality. About 14% of the approximately 1,262 carriers in the unit receive this minimum weekly compensation.

In addition to paying carriers' piece rates for delivery of newspapers and advertising materials, the Employer pays carriers \$15 for each new subscription they successfully solicit. It is the carriers' choice whether to solicit new subscriptions. The Employer occasionally distributes solicitation flyers to carriers by leaving them on the route tables in the distribution center, but some carriers create their own solicitation flyers. The Employer periodically has special offers during which all *Republic* employees are paid \$15 for each new subscription, and carriers compete for new subscribers with the Employer's sales and telemarketing teams. The Employer neither prohibits carriers from delivering other products while on their routes nor requires carriers to inform the Employer if they do so. Some carriers deliver newspapers for competing publications such as the *Scottsdale Tribune*, the *West Valley View*, the *Ahwatukee Foothills News*, the *Chandler Connection*, and the *Wrangler News*. Four carriers have advertising on their vehicles for various businesses unaffiliated with the Employer. Carriers can increase their compensation through subscriber tips, which they can collect in a variety of ways. Some carriers leave self-addressed envelopes at subscribers' residences, and the subscribers mail tips directly to the carriers. Alternatively, subscribers can pay tips directly to the Employer, in which case the Employer includes the tip amounts in carriers' regular invoices. During the holiday season, carriers can choose to purchase "Season's Greetings" cards from the Employer for subscribers, but the Employer, so as not to offend the religious sensibilities of any subscribers, requires carriers who prefer to use their own holiday cards to submit these cards to the Employer for approval. To reward carriers who have superior customer service or have markedly improved their customer service, the Employer gives them prepaid gas cards in amounts of approximately \$25 per card. The Employer also occasionally sponsors a "Carrier-Appreciation Day" at the distribution center during which the Employer may hold raffles for items such as gas cards, lawn chairs, and on one occasion, a television. Sometimes DMs take hamburgers and hot dogs to the distribution center for a barbecue on Carrier-Appreciation Day.

The Employer prohibits the carriers from delivering newspapers with unsanctioned advertising materials, charging subscribers a higher subscription rate than the Employer has authorized, and charging subscribers for delivery or services such as bagging or rubber banding.

The Employer does not provide carriers with benefits the Employer provides to non-carrier employees such as health, life, disability, unemployment insurance, vacations, and retirement plans. The Employer does offer to carriers, usually at the time the carriers sign the contracts, the opportunity to purchase one of two insurance policies through an independent carrier that cover medical expenses as well as disability and death benefits as a result of accidents. To file a claim on either policy, carriers must ask their DMs for the claim forms. The Employer deducts the weekly premiums, \$1.25 or \$1.75, directly from the pay of the carriers who select the insurance. None of the carriers who selected this insurance received a copy of the policy or an explanation about the policy.

DMs have their own customer-service goals to meet. The Employer has terminated the contracts of carriers who have materially breached the contract by, for example, failing to appear at work and deliver newspapers. For underperforming carriers, the Employer has given them 30-day notices of contract termination or failed to renew their contracts. When DMs receive subscriber complaints, DMs actively communicate with their carriers to solve the problem. Especially when DMs receive more than one complaint about a carrier—multiple missed deliveries, for instance—DMs alert the carriers about the complaints and sometimes drive to the subscribers’ residences to verify complaints or follow the carriers on their routes. One experienced carrier testified about a progressive discipline system: the first complaint resulted in a verbal warning from the DM; the second complaint resulted in written documentation about the warning; and any further complaints resulted in an official reprimand.

All of the carriers who testified have worked as carriers for the Employer from two to eleven years. The Employer’s two carrier witnesses testified that they believe themselves to be independent contractors, while the Union’s four carrier witnesses testified that they believe themselves to be employees. One of the Union’s carrier witnesses, who was averse to wearing shoes at the distribution center, protested a district manager’s order to wear shoes by telling him that she was an independent contractor. Nevertheless, she was ordered to wear shoes. The Employer has contracted one route with a limited liability company, another route with a corporation, and a third route with two individuals who use a trade name.

H. Legal Analysis and Determinations

1. The Employee Status of the Carriers

Section 2(3) of the Act provides that the term “employee” shall not include “any individual having the status of independent contractor.” The United States Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), observed that Congress did not define “independent contractor” in the Act, but intended that the issue should be determined by the application of general agency principles in each case. *Id.* at 256. According to the Court, “[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor.” *Id.* at 258. The Court further stated that under the common-law agency test, “there is no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law principles.” *Id.*

In *Roadway Package System, Inc.*, 326 NLRB 842 (1998), the Board reaffirmed that the common law test of agency determines an individual’s status as an employee or independent contractor. While acknowledging that the common-law agency test “ultimately assesses the amount or degree of control exercised by an employing entity over an individual,” the Board in *Roadway* rejected the proposition that those factors that do not include the concept of “control” are insignificant when compared to those that do. *Id.* at 850. Instead, the Board in *Roadway* found that “the common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control.” *Id.* The

Board uses the multifactor analysis of Section 220(2) of the Restatement (Second) of Agency to apply the common-law agency test. *First Legal Support Services., LLC*, 342 NLRB No. 29 (2004); *BKN Inc.*, 333 NLRB 143, 144 (2001); *Roadway*, 326 NLRB at 849-51. Section 220(2) of the Restatement lists ten factors to consider in determining independent-contractor status: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating the relation of master and servant; and (10) whether the principal is or is not in business.

After *Roadway*, the Board has not considered the issue of an individual's status as employee or independent contractor in any newspaper-industry cases. Before *Roadway*, the Board relied on the "control" factor of the common-law agency test as the predominant factor to determine whether a newspaper carrier was an employee or independent contractor. See, e.g., *The Evening News*, 308 NLRB 563, 564 (1992); *Thomson Newspapers, Inc.*, 273 NLRB 350, 351-52 (1984). Therefore, although the pre-*Roadway* cases are instructive, the facts of each case must be considered in light of the Board's reaffirmation in *Roadway* of the United States Supreme Court's pronouncement that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Roadway*, 326 NLRB at 850 (citing *United Insurance*, 390 U.S. at 258).

In previous decisions, the Board examined a myriad of factors to determine a newspaper carrier's status as employee or independent contractor. For example, the Board has considered whether the employer sets the purchase and selling prices; controls the composition of routes; withholds taxes; subsidizes the distributors' pay; and assumes the risk of loss. See, e.g., *Oakland Press Co.*, 249 NLRB 1081, 1083 (1980); *Philadelphia Newspapers, Inc.*, 238 NLRB 835, 837 (1978). The Board also has considered whether the distributors own their own vehicles; receive fringe benefits; have a proprietary interest in their routes; hire people to substitute for them; set their own working hours; and determine the manner and means of delivery. See, e.g., *Thomson Newspapers*, 273 NLRB at 352. The employer's methods of applying corrective and disciplinary measures are another factor the Board considers. See, e.g., *The Evening News*, 308 NLRB at 564. In addition to the above factors, the Board considers newspaper carriers' entrepreneurial risk and their ability to control earnings. For instance, the Board considers whether carriers can realize additional profit by reselling the newspapers at a profit, securing new subscribers, or making deliveries for clients other than the employer while on their routes, as well as whether the carriers assume the financial risk of trying to resell newspapers purchased by the employer. See, e.g., *Thomson Newspapers*, 273 NLRB at 352; *The Evening News*, 308 NLRB at 564-65; *Glens Falls Newspapers, Inc.*, 303 NLRB 614, 616 (1991); *Asheville Citizen-Times Publishing Co.*, 298 NLRB 949, 950 (1990); *The Beacon Journal Publishing Co.*, 188 NLRB 218, 220 (1971).

Based on my assessment of the case law and an analysis of the Restatement factors associated with independent contractors, which follows, I conclude that carriers are not independent contractors.

(1) The Extent of Control Which, by the Agreement, the Master May Exercise over the Details of the Work

The Employer exercises substantial control over carriers' work details. It establishes deadlines for newspaper deliveries, requires carriers to pick up the newspapers at assigned distribution centers, and during the winter months with higher circulation assigns carriers to one of two trucks that deliver the newspapers to distribution centers. Carriers must deliver newspapers and advertising materials every day to every address specified by the Employer. Carriers generally are free to decide whether to rubber band newspapers or stuff newspapers in plastic bags; however, the Employer requires carriers to use plastic bags when it determines that it will rain, and some carriers are required to use color-coded bags to deliver the non-*Arizona Republic* newspapers. Furthermore, if a subscriber has a special request—such as receiving the newspaper in a plastic bag every day—the Employer obliges the carriers to comply with these requests. In theory, carriers freely choose the method and means of newspaper delivery, and the Employer is satisfied as long as the newspapers reach subscribers on time and in a dry and readable condition. In practice, however, the Employer requires carriers to rent the soft book for a weekly fee and to use it to download information that details the specific order in which newspaper deliveries should be made on a route. Some carriers have been directed to deliver newspapers according to the soft book's instructions. Even if the carriers do not use the soft book's instructions, carriers' discretion to determine the order of delivery of newspapers on their routes is limited by the very few ways to arrange the order of delivery of newspapers in a time and fuel efficient manner on a particular route while in a vehicle.

District managers, who supervise the carriers, have their own customer goals that they must meet. Therefore, it is not surprising that the Employer exerts substantial control over carriers' work details since carriers' performance directly affects district managers' ability, and presumably their superiors' ability, to meet customer-service goals. Carriers can choose to employ substitutes for their routes, but the Employer typically keeps a list of at least some substitutes and their telephone numbers. Moreover, the Employer occasionally has forbidden carriers from using the substitutes of their choice, and the contract permits the Employer to require carriers to provide the Employer with the driver's license number and proof of vehicle insurance of carriers' substitutes. Based on the Employer's business necessities, the Employer creates and eliminates routes, determines the size and location of routes, makes any adjustments to routes, and controls the number of routes assigned to any one carrier. In deciding whether to award another route to a carrier, for example, the Employer judges the ability of the individual carrier to deliver multiple routes in a timely fashion. The Employer infrequently agrees to change or adjust a route at a carrier's initiative.

My analysis of this factor leads me to the conclusion that the Employer exercises a substantial amount of control over the work details of carriers. The carriers' discretionary activities are minimal. For instance, in view of the delivery deadlines imposed by the

Employer, the Employer's requirement that route sequencing changes be inputted by the Employer into the soft book, and the very limited number of ways that a carrier could efficiently arrange the order of newspaper delivery to subscribers on a particular route, carriers lack true independence even to determine the order in which their customers will receive newspapers.

(2) Whether or Not the One Employed Is Engaged in a Distinct Occupation or Business

The carriers are engaged in a vital function that is an integral part of the Employer's regular business: delivery of newspapers to subscribers at homes, businesses, and schools. That carriers are not engaged in a distinct occupation or business is borne out by the Employer's restrictions on the carriers' ability to engage in entrepreneurial activities. Carriers cannot set their own prices for selling subscriptions, charge subscribers delivery or special-request fees, or insert their own advertising material into newspapers. The carriers have no proprietary interest in the routes, and the Employer can adjust or eliminate routes unilaterally without compensating the carriers in any way. Carriers receive \$15 for every new subscription they solicit and compete with the Employer's telemarketing and dedicated sales forces for new subscribers. The carriers neither purchase any of the newspapers they deliver nor meaningfully negotiate their per-piece rates for newspaper delivery.

I find that all of these factors demonstrate that the Employer restricts carriers from engaging in significant entrepreneurial activities and thus prevents carriers from suffering any risk of gain or loss.

(3) The Kind of Occupation, with Reference to Whether, in the Locality, the Work Is Usually Done under the Direction of the Employer or by a Specialist Without Supervision

Carriers perform some of their work activities under the supervision of district managers. DMs typically show carriers their delivery routes by driving with them on their routes and explaining the soft book information to them. Although DMs usually do not interact with carriers as they deliver the newspapers, DMs become involved as soon as there is any hint of a problem in the delivery process. For example, if a carrier or his or her substitute does not arrive at the distribution center within a time frame that, according to the DM's judgment, would allow the carrier to deliver the newspapers in a timely fashion, the DM will telephone the carrier or substitute to ascertain their whereabouts. The DM may deliver the newspapers on the route personally, if necessary. Similarly, if the Employer receives subscriber complaints, the DM may drive to the residence where the complaint originated or follow the carriers while they are delivering newspapers on their routes. Instead of terminating or failing to renew contracts of underperforming carriers, DMs give at least one verbal warning to carriers and sometimes present them with written documentation of customer complaints before terminating or failing to renew their contracts. I find that the record evidence relating to this factor weighs in favor of finding that carriers are employees within the meaning of the Act.

(4) The Skill Required in the Particular Occupation

The newspaper-carrier job does not require any specialized training or skills. The Employer requires its newspaper carriers to have a valid regular driver's license, a means of transportation for newspaper delivery, and a motor vehicle report with fewer than a certain number of moving violations. These requirements are similar if not identical to the job requirements for field-support representatives, who are Employer employees, not independent contractors. The Employer also requires its carriers to use the soft book, which requires knowledge no greater than the knowledge required to use an automated teller machine. DMs train carriers mainly by riding along with them on a route. The Employer can easily replace carriers and do so with a minimum amount of training for new carriers. In sum, the skill factor suggests employee status for carriers.

(5) Whether the Employer or the Workman Supplies the Instrumentalities, Tools, and the Place of Work for the Person Doing the Work

Carriers provide the main tools for the task of delivering newspapers: their driver's licenses and properly insured vehicles. However, the Employer provides the carriers with everything else necessary to complete their delivery tasks. In addition to providing the newspapers for delivery, the Employer provides soft books, the distribution centers, assigned route tables at the distribution centers, and downloading facilities for soft books at the distribution centers. The Employer sells plastic bags and rubber bands to carriers and provides them, free of charge, with plastic bags for expected rainy days and colored bags for non-Arizona Republic newspapers. The Employer also supplies pagers to inform carriers of the express-truck arrival times and makes this information available on the Internet. In sum, this factor weighs in favor of employee status.

(6) The Length of Time for Which the Person Is Employed

All of the carriers who testified have worked between two and eleven years for the Employer, although other carriers have worked for shorter periods of time. This longevity factor suggests to me more of an enduring employee-employer relationship.

(7) The Method of Payment, Whether by the Time or by the Job

Carriers have no proprietary interest in their routes, and they do not purchase newspapers from the Employer. The Employer prohibits them from setting their own prices to sell subscriptions, charging subscribers delivery or special-request fees, or inserting their own advertising material into newspapers. Carriers usually receive \$15 from the Employer for every new subscription they solicit; however, they compete with the Employer's telemarketing and dedicated sales forces for new subscribers. A few carriers occasionally attempt to negotiate increases in their per-piece rates, but few are successful. Furthermore, the Employer's compensation scheme effectively results in floors and ceilings for carriers' per-piece rates. To assure carriers who are affected by subscriber seasonality and who deliver in rural and low subscriber-penetration areas a minimum amount of compensation, the

Employer provides approximately 14% of the unit's carriers with minimum weekly amounts of compensation. The lack of minimum compensation for the remaining carriers suggests that to the extent that their compensation is dynamic, it is not so dynamic that minimum compensation is necessary. The effective compensation ceilings occur because the Employer adjusts piece rates in such a way that most piece-rate increases on one route are usually matched by piece-rate decreases on another route. Carriers' piece rates may fluctuate slightly with variations in subscription patterns, but carriers' total piece-rate compensation always remains subject to the Employer-imposed budget rather than the carriers' individual efforts. In sum, the record evidence with respect to this factor demonstrates that carriers have little opportunity for entrepreneurial gain or loss and, therefore, are employees.

(8) Whether or Not the Work Is Part of the Regular Business of the Employer

The Employer's business is primarily to print, publish, and deliver the *Arizona Republic*. Even if the delivery of newspapers were considered a separate operation vis-à-vis the printing and publication of newspapers, the Employer's control over the process of newspaper delivery demonstrates that the carriers form an integral part of the Employer's regular business. The Employer devotes a significant number of personnel to the delivery operation, from field-support representatives to district managers to regional operations managers, to ensure that newspapers are delivered to subscribers. District managers oversee the delivery of the newspapers on a daily basis and will take any necessary action, including delivering the newspapers themselves, requiring field-support representatives to assemble newspapers, fining carriers for missed deliveries, and following carriers on their routes, to maintain Employer-mandated subscriber-satisfaction standards. I find the evidence related to this factor supports the conclusion that carriers are employees.

(9) Whether or Not the Parties Believe They Are Creating the Relation of Master and Servant

Whereas all of the Union's witnesses testified that they believed they were employees, all of the Employer's witnesses testified that they believed themselves to be independent contractors. While the carrier application form and the carrier contract recite that newspaper carriers are independent contractors rather than employees, I find this labeling less probative than the other factors.

(10) Whether the Principal Is or Is Not in the Business

The Employer is in the business of publishing, printing, and delivering newspapers. Prospective subscribers generally contact the Employer to initiate delivery and to register complaints about delivery. The Employer, through field-support representatives, district service assistants, and district managers, actively supervises the delivery process. The Employer also has contracted with several other publications to have the Employer's carriers deliver these publications to subscribers in the Phoenix metropolitan area. I conclude that the Employer's business militates towards a finding of employee status.

Based on my analysis of the agency criteria used by the Board to determine whether individuals are employees or independent contractors, and noting the Employer's significant control over the newspaper-delivery process as well as carriers' limited ability to engage in entrepreneurial risk, I find that the newspaper carriers are employees rather than independent contractors. In reaching my decision, I have carefully examined the Employer's arguments to the contrary and find them unpersuasive.

The Employer relies on *Dial-A-Mattress Operating Corp.*, 326 NLRB 84 (1998), in support of its argument that the carriers in the instant case are independent contractors rather than employees. In *Dial-A-Mattress*, the Board found a unit of truck drivers who delivered mattresses to be independent contractors. In *Roadway Package System, Inc.*, 326 NLRB 842 (1998), the companion case to *Dial-A-Mattress*, the Board had found a unit of package-delivery drivers to be employees. The Board noted that the *Dial-A-Mattress* drivers had significant entrepreneurial opportunity for gain or loss because they had no minimum compensation, some drivers had more than one vehicle to perform deliveries, and some drivers negotiated the contracts' economic terms with the employer. *Dial-A-Mattress*, 326 NLRB at 892. The *Dial-A-Mattress* drivers also could choose to make their trucks unavailable on any given day, without penalty or advance notice, even if the drivers had been scheduled to work that day. *Id.* at 887. In contrast, the *Roadway* drivers were required to provide delivery services each scheduled workday, did not negotiate any special economic deals with the employer, and benefited from a compensation plan that resulted in minimum guarantees and effective ceilings for the unit's drivers. *Id.* at 993. The newspaper carriers in the instant case resemble the *Roadway* drivers more closely than the *Dial-A-Mattress* drivers. Carriers are required to deliver newspapers to each subscriber address every day of the year without fail, and they do not engage in meaningful negotiation over the contract's economic terms. Some carriers have minimum monetary guarantees in their contracts, and the zero-sum nature of any piece-rate increases that carriers may receive indicates an effective ceiling for carrier piece-rate compensation.

The Employer also relies on several pre-*Roadway* and *Dial-A-Mattress* cases in which the Board found newspaper carriers to be independent contractors. These are *Asheville Citizen-Times Publishing Co.*, 298 NLRB 949 (1990); *Fort Wayne Newspapers*, 263 NLRB 854 (1982); *Thomson Newspapers, Inc.*, 273 NLRB 350 (1984); *Glens Falls Newspapers, Inc.*, 303 NLRB 614 (1991); and *The Evening News*, 308 NLRB 563 (1992). However, in each of these cases, the Board relied, either explicitly or implicitly, on the narrow right-to-control test rather than the broad common-law agency test advocated by *Roadway*. "The Board relies primarily on the common law 'right-to-control' test in determining the status of individuals alleged to be independent contractors." *Thomson*, 273 NLRB at 351 (citing *Fort Wayne*, 263 NLRB at 854). The Board affirmed the Acting Regional Director's decision that was based on the right-to-control test in *Asheville*, 298 NLRB at 950. Similarly, the Board noted in *The Evening News*, 308 NLRB at 564:

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 (citing *Glens Falls*, 303 NLRB at 615-16).

Because the cited cases appear to discount those factors which do not include the concept of control, I am reluctant to rely on them, but instead rely on the factors set out in the Restatement and *Roadway* to reach my conclusion.

2. The Carriers are not Supervisors or Managerial Employees:

As noted above, during the representation hearing, the Employer contended that if the newspaper carriers were found to be employees rather than independent contractors, they should nevertheless be excluded from any unit because they are supervisors or managers insofar as they hire and fire substitutes and helpers and determine their compensation. In its post-hearing brief, the Employer, after reviewing the applicable case law, asserted that it was withdrawing its arguments on the supervisor and managerial exemptions “without prejudice to making one or both arguments in an appropriate action in the future should carriers be deemed to be employees and should the particulars of its relationship with carriers be modified accordingly.” As it is not absolutely clear to me that the issue of supervisor status or managerial status is no longer before me, I will address those issues as well. I find insufficient evidence that the carriers are either supervisors or managerial employees under the Act.

Carriers are not statutory supervisors because the supervisory authority they may have over substitutes and helpers is neither exercised over employees of the Employer nor exercised in the interest of the Employer. “The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees” Section 2(11) of the Act. To qualify as a supervisor under this statute, an individual must exercise supervisory authority over employees of the employer at issue and not employees of another employer. *Franklin Hospital Medical Center*, 337 NLRB 826, 826-27 (2002) (registered nurses who supervised home health care aides employed by outside vendors were not statutory supervisors); *Fleet Transport Co.*, 196 NLRB 436, no.6 (1972) (employee driver who recommended hiring of independent contractors or employees of independent contractors to the employer was not a statutory supervisor); *Fordham University*, 193 NLRB 134, 136 (1971) (faculty members who directly hired outside researchers to write grants were not statutory supervisors); *El Mundo, Inc.*, 167 NLRB 760, 761 (1967) (newspaper dealers who made own arrangements for the hire of their own substitutes and carrier boys were not statutory supervisors). In the instant case, the carriers make all the arrangements for the hiring, training, and payment of their substitutes or helpers. The carriers’ substitutes or helpers are either employees or independent contractors of the carriers, but they are not employees of the Employer. The carriers, therefore, are not statutory supervisors because insofar as they exercise any supervisory authority, they exercise it over employees who are not employees of the Employer.

Carriers do not exercise supervisory authority in the interest of the Employer. The Board has held that employees’ optional use of assistants at their own financial risk indicates

that the employees act in their own interest rather than in the interest of the employer. In *Allstate Insurance Co.*, 332 NLRB 759 (2000), an insurance agent had complete discretion to hire assistants, but any such wages would be deducted from the agent's office expense allowance supplied by the insurance company. The agent thus risked having to pay assistants' wages out of her own pocket if the wages exceeded the expense allowance, which the insurance company adjusted depending on the agent's performance. The Board found that the supervisory authority that the agent possessed to hire assistants would be exercised in her own interest because it was the agent's decision, depending on the agent's financial circumstances, whether to hire assistants and incur financial risk. *Id.* at 761. Accord *Tiberti Fence Co.*, 326 NLRB 1043, 1043 (1998) (foremen who recommended the hire of helpers acted in their own interest and were not statutory supervisors because the wages paid to a helper as a result of a foreman's recommendation were subtracted from the pay of the foreman with whom the helper worked). Whether the carriers in the instant case employ substitutes or helpers is the carriers' decision. Carriers may want to take some days off for various reasons, but they are responsible for making alternative arrangements. These arrangements usually include paying substitutes or helpers to deliver their newspapers while they are away. The Employer is not involved in any way in compensating substitute carriers or helpers. Therefore, carriers act in their own interest, instead of the Employer's interest, with respect to supervisory authority the carriers may possess to use substitutes or helpers.

In addition, the unbalanced ratio of supervisors to employees that would ensue if the carriers were statutory supervisors also militates against finding the carriers to be statutory supervisors. See, e.g., *Ohio River Co.*, 303 NLRB 696, 719 (1991) (three supervisors for every four workers supported a conclusion of non-supervisory status). There are more carriers than substitutes or helpers, but even if every carrier used a different substitute or helper, a supervisor-to-employee ratio of one-to-one would be inordinately low.

The Employer also asserted that the carriers are managers subject to exclusion from the protection of the Act. "Managerial employees are defined as those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' These employees are 'much higher in the managerial structure' than those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.' Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management." *NLRB v. Yeshiva University*, 444 U.S. 672, 682-83 (1980) (citations omitted). There is no evidence in the record that newspaper carriers formulate or effectuate management policies. The carriers are not at or near the top of a hierarchical or other management structure, and they are not aligned with management. I find, therefore, that the carriers are not managerial employees.

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 brief, I find that the Employer has failed to meet the burden of establishing that the carriers are independent contractors. Accordingly, I conclude that the carriers are employees within the meaning of Section 2(3) of

the Act and that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All contracted home delivery newspaper carriers employed by the Employer operating out of its Phoenix, Arizona metropolitan area distribution centers, including those designated as Areas 80 through 88, inclusive and currently located at: Sun City (13333 West Bell Roads, Surprise, Arizona); West Phoenix (4931 West Brill, Phoenix, Arizona); North Phoenix (21615 North 7th Avenue, Phoenix, Arizona); Union Hills, (18808 North 32nd Street, Phoenix, Arizona); South Phoenix (2601 East Magnolia, Phoenix, Arizona); Scottsdale (7881 East Gray, Scottsdale, Arizona); Tempe (8420 South Hardy, Tempe, Arizona); Gilbert (455 East Baseline Road, Mesa, Arizona); and Mesa (7444 East Hampton, Mesa, Arizona).

EXCLUDED: All other employees employed by the Employer, managers, clerical employees, substitute carriers, street salespersons, guards, and supervisors as defined in the Act.

There are approximately 1,262 employees in the unit found appropriate.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election, that will issue soon, subject to the Board's Rules and Regulations. The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. 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. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

**GRAPHIC COMMUNICATIONS INTERNATIONAL
UNION, LOCAL 58-M, AFL-CIO**

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with me, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters. I will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, I must receive the list at the NLRB Region 28, 2600 North Central Ave. Suite 1800 Phoenix, Arizona 85004-3099, on or before September 30, 2004. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

REQUEST FOR 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. The Board in Washington must receive this request by October 7, 2004. A copy of the request for review should also be served on me.

Dated at Phoenix, Arizona, this 23rd day of September 2004.

/s/Cornele A. Overstreet
Cornele A. Overstreet, Regional Director
National Labor Relations Board