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Labor Law-Independent Contractor Status-Extension of the Right of Control Test

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LABOR LAW—INDEPENDENT CONTRACTOR STATUS—EXTENSION OF THE RIGHT OF CONTROL TEST—Petitioner, a large independent oil company, owned a gasoline service station which it leased to an individual operator, reserving the right to determine certain aspects of the lessee's operations.[1] During the lease period, a majority of the station attendants signed union authorization cards, and the union requested a meeting with the lessee for the purpose of negotiating a contract. The lessee refused to negotiate, discharged the attendants, and hired replacements. The trial examiner found that petitioner, as an employer of his lessee, had violated section 8(a)(5) of the National Labor Relations Act by refusing to bargain.[2] On appeal, *held*, affirmed. Under the "right of control" test, the petitioner is an employer of the lessee; as the employer, petitioner is responsible for the unfair labor practice of his employee and therefore must rehire the station attendants[3] and pay their back wages. *Site Oil Co.*, 137 N.L.R.B. 1274 (1962).

Section 2(3) of the National Labor Relations Act contained no comprehensive definition of "employee."[4] The Taft-Hartley Act, however, included an amendment to section 2(3) which excluded independent contractors from the category of employees.[5] This attempt to narrow the employee concept[6] reversed the judicial trend evidenced by *NLRB v. Hearst Publications, Inc.*[7] In that case, the Supreme Court, in holding newspaper vendors to be employees, refused to apply the old common-law distinction between independent contractors and employees because it felt the policy behind the statute required a broader test. The House report on the Taft-Hartley Act, on the other hand, specified that the terms independent contractor and employee were to be given their ordinary legal meanings, and not the broad definitions of the *Hearst* case.[8] Further, the House report indicated that the essential difference between an employee and an independent contractor was that the former worked for wages, whereas the latter was compensated by profits.[9] The NLRB, instead of adopting this quite narrow approach, has applied, in every subsequent case, the

1 The lease was terminable on thirty days notice by either party; it required the lessee to make a substantial payment to obtain the lease, gave the lessee the right to hire and discharge the attendants and set their wages, required the lessee to obtain approval to sell any items other than the oil company's products, and provided that all gas and oil would be delivered on a consignment basis and would be sold at a price set by the oil company.

2 NLRA § 8(a)(5), as amended, 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1958).

3 The station had burned to the ground after the discharge of the original attendants and the petitioner was required to rehire them only if it decided to rebuild the station.

4 NLRA § 2(3), 49 Stat. 450 (1935).

5 LMRA § 101, 61 Stat. 137-38 (1947), 29 U.S.C. § 152(3) (1958).

6 See H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947).

7 322 U.S. 111 (1944).

8 H.R. REP. No. 245, *supra* note 6, at 18.

9 *Ibid.*

somewhat broader "right of control" test.[10] This test focuses on whether the person for whom the services are being performed has control over the manner and means by which the result is to be accomplished.[11] If the former has such control, the person performing the services is an employee. On the other hand, if the person for whom the services are being performed specifies only the result to be accomplished and has no substantial control over the method used to achieve it, the person hired is an independent contractor within the meaning of the statute. The decisions have recognized that the basic question as to whether the amount of control retained is sufficient to make the relationship one of employment is to be determined from the facts of each case, with no one factor being determinative.[12] Nevertheless, the courts have announced several factors which are significant indications of the type of relationship involved in a given case.[13] Among the more important factors are whether the alleged employee (1) has the right to hire and discharge the people actually doing the work; (2) has control of the premises where the work is being done; (3) furnishes the tools and materials; and (4) stands to make a profit from those working under him.[14]

While the principal case purports to apply this same "right of control" test to determine the relationship between the petitioner and its lessee,[15] it seems the Board may have extended the scope of the test beyond its traditional bounds. Although the test, as verbalized by the courts, is indefinite and therefore cannot provide an absolute basis for decision in a given case, reliance upon the factors referred to has made possible some consistency. This approach requires the courts to balance one factor against another,[16] and the cases have shown a tendency of the courts to favor the party able to support his position with a preponderance of the critical factors. The principal case appears to reach a result contrary to that dictated by the application of these criteria. The lessee had the right to hire and discharge the station attendants and set their wages without consulting the petitioner.[17] Even more important, the lessee

10 *E.g.*, American Broadcasting Co., 117 N.L.R.B. 13 (1957); Albert Lea Co-op. Creamery Ass'n, 119 N.L.R.B. 817 (1957).

11 American Broadcasting Co., *supra* note 10, at 18.

12 *Ibid.*; Koontz Creamery, Inc., 102 N.L.R.B. 1619, 1623 (1953).

13 See United Ins. Co. of America v. NLRB, 304 F.2d 86, 89 (7th Cir. 1962); National Van Lines, Inc. v. NLRB, 273 F.2d 402, 405 (7th Cir. 1960).

14 National Van Lines, Inc. v. NLRB, *supra* note 13, at 405. Another factor which may be taken into consideration is the intent of the parties as expressed in their contract. However, the court will ignore this when the other factors point strongly to a different relationship.

15 Principal case at 1275.

16 See United States v. Silk, 331 U.S. 704, 716 (1947).

17 The lessee also furnished the tools which were used at the station and was responsible for the management of the station, although the oil company made suggestions as to the arrangement of displays and like matters. Only two factors appear to support the result: (1) the oil company computed the station rent with regard to sales of gasoline, much like a commission basis; and (2) the gasoline was furnished

was not paid a wage by the petitioner, but was compensated by the profits he made on the sale of gasoline and other commodities.[18] In a similar factual setting, the NLRB recently held, in *Clark Oil & Refining Corp.*,[19] that such a lessee is an independent contractor. The majority in the principal case relegated *Clark* to a footnote, distinguishing it on its facts and seemingly ignoring any similarities between the cases. Instead of balancing the various factors for and against the result reached, the majority stressed only those particular facts which tended to support its conclusion.[20] Thus the principal case seems to have broadened the definition of employee by a subtle but substantial extension of the "right of control" test.

In order to determine the advisability of expanding the employment relationship, it is necessary to consider the consequences of such expansion. First, the employer may be held responsible for the unfair labor practices of his employee.[21] Second, once it has been decided that the lessee is an employee of the petitioner, the service station attendants are also the petitioner's employees.[22] A logical extension of this analysis leads to the conclusion that the petitioner should be ultimately responsible for the attendants' wages, pensions, unemployment benefits, and workmen's compensation. The principal case apparently lends weight to this conclusion. The remedy given by the NLRB made the petitioner liable for the back wages of the discharged attendants. This at least suggests that the oil company may be liable for their wages whenever the lessee defaults. The attendants' wages, however, are determined by the contract of employment between them and the lessee. This contract may also contain job security provisions and many other terms with corresponding responsibilities imposed on the employer. If the oil company is to be liable for the attendants' wages, it may also be liable for the other benefits secured by the same contract.

on consignment. In fact, the strength of even these factors was diluted by the requirement that the lessee pay a substantial sum of money to obtain the lease.

18 Even though the petitioner set the price at which the lessee could sell, the lessee controlled his profit by such factors as the volume he sold, the minimization of his overhead, and the wage scale he used to pay his attendants. Furthermore, the lessee obtained additional revenue from his sales of items other than the oil company's products.

19 129 N.L.R.B. 750 (1960).

20 The dissenting member in the principal case pointed out several factors, such as the amount of capital necessary to enter the business, which tended to support the petitioner's argument that the lessee was an independent contractor. He also stressed the fact that the lease in *Clark* was substantially identical in every important detail to the lease in the principal case, the terms of which are set out in note 1 *supra*.

21 NLRA § 2(2), as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1958), includes in the definition of employer "any person acting as an agent of an employer" and NLRA § 2(13), as amended, 61 Stat. 139 (1947), 29 U.S.C. § 152(13) (1958) provides that a person may be an agent even though the specific acts performed were not actually authorized. A supervisory employee is considered the employer's agent within the meaning of the act. J. D. Jewell, Inc., 99 N.L.R.B. 61 (1952).

22 Shell Oil Co., 90 N.L.R.B. 371 (1950).

Confronted by the certainty that it will be liable for the unfair labor practices of the lessee, together with the possibility that it will be bound by all the terms of the attendants' employment contracts, the petitioner may well alter its leasing arrangement so as to control this liability. The company has two alternatives. It may either increase its influence over the lessee to the point where petitioner negotiates with the union for the attendants' contracts, or it may relinquish some of its control in the hope of avoiding a relationship of employment between it and the lessee. If the former approach is adopted, the lessee will certainly be no more than a supervisory employee. This will effectively destroy what has hitherto been one of the largest groups of small businessmen in our economy,[23] and it flies in the face of a concerted effort by Congress, through special legislation, to protect the vitality of small business in this country.[24] On the other hand, if the oil company seeks to redraw the lease so as to reduce control over the lessee and thereby render him an independent contractor, the company may still destroy service station operation as a major small business. This result would follow if the company, in trying to make the lessee an independent contractor, decides to charge a flat rental for the station instead of one related to sales, or ceases to sell its products to the lessee on a consignment basis. Either of these steps would greatly increase the financial burdens on the lessee and would consequently reduce the number of those able to raise the necessary capital. Furthermore, under the principal case the oil company cannot be sure exactly how much of, or what aspects of control they must give up to satisfy the "right of control" test.

Although certainty is desirable in this area, the endless variety of terms possible in such contracts makes it impossible for the courts or Congress to establish an absolute standard to determine whether a person is an independent contractor. An approach like that of the principal case, however, serves only to promote further uncertainty by departing from the existing, albeit indefinite, standards of the prior cases, while phrasing the rationale of the decision in terms of those standards. If an extension of the "employee" concept is desired, it would be far better to enunciate new criteria on which to base the determination than to erase the boundaries of the established "right of control" test. The most practical solution may be for the NLRB to indicate certain provisions it will consider compatible with the retention of the independent contractor status. At a minimum, this would provide the oil companies with a guaranteed method of relieving themselves of liability if they should so desire.

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23 AMERICAN PETROLEUM INSTITUTE, PETROLEUM FACTS AND FIGURES 149 (1961). This table indicates that in 1960, sales by gasoline service stations (including all items sold at such stations) were equal to 8.01% of the total retail sales in the United States on the basis of dollar volume.

24 Barnes, *What Government Efforts Are Being Made To Assist Small Business*, 24 LAW & CONTEMP. PROB. 3 (1959).