

BRITISH COLUMBIA LABOUR RELATIONS BOARD

THE KELOWNA DAILY COURIER, A DIVISION OF
THOMSON NEWSPAPERS CORPORATION

(the "Courier")

-and-

COMMUNICATIONS WORKERS OF AMERICA LOCAL 226

(the "Union")

PANEL: Kate Young, Vice-Chair

COUNSEL: Donald A. Farquhar Q.C., for the Courier
E. Casey McCabe, for the Union

CASE NO.: 14768

DATES OF HEARING: May 7, June 7, 8 and 9, 1993

DATE OF DECISION: July 23, 1993

DECISION OF THE BOARD

I. APPLICATION

The Union applies for certification under Section 28 of the *Labour Relations Code* to represent dependent contractors who deliver the Kelowna Daily Courier. The Courier objects to the application, stating the proposed unit is composed of independent contractors, and that the unit is inappropriate for collective bargaining.

II. FACTS

The Courier is a daily newspaper published in Kelowna. The paper is distributed door to door by carriers, sold in local businesses and through vending boxes, mailed to areas outside Kelowna, and distributed in bundles to local schools. Delivery drivers pick up the newspapers where they are printed and deliver the papers to carriers, local businesses, vending boxes, the post office, and schools. The Courier currently has contracts with approximately twenty individuals who agree to ensure the pick up of the newspapers at the office of the Courier, and the distribution of the newspapers in a specified area. There are no employees of the Courier who perform these deliveries.

The contract between the contractor and the Courier is a standard form and includes the following term:

In the event of sickness, vacation or any other reason, said contractor cannot fulfil this agreement, it is the responsibility of the contractor to supply a reliable substitute on a temporary basis. If the newspaper is forced to replace the substitute, a new contractor will be hired and this agreement considered void.

Sixteen to eighteen persons who have signed contracts with the Courier perform all or most of the driving required to be performed under their contract. Four persons who have signed delivery contracts with the Courier do not perform the majority of the driving under the contract.

Diane Fulton and her husband, Austin Fulton have jointly signed a contract agreeing to provide a delivery service to the Courier. The contract is performed by Austin Fulton.

Inez Tarbot has signed a contract, although her husband, Hugh Tarbot, performs almost all the driving under that contract. If he is ill or unable to perform the work, Inez Tarbot will, on a casual, irregular basis, perform the deliveries. The Courier acknowledges that Hugh Tarbot performs the work under this contract, as an amendment to the contract dated January 27, 1992, was signed by Hugh Tarbot.

Brian Thomas is signatory to a contract with the Courier. He regularly employs two individuals, Dave Meade and Pam Meade, to drive his route. The evidence does not indicate whether Thomas ever drives.

Joe Forrest has signed a delivery contract but is physically unable to drive. He employs Alan Reece and Sharon Johnson to drive on his behalf.

Almost all of the contractors employ others to perform their deliveries from time to time. Some contractors regularly drive five days a week and get another person to drive the two weekend days. Other contractors regularly do all the driving and hire others to perform the service only if they are ill or on vacation. There is no evidence that the Courier has ever objected to the selection of a replacement driver by a contractor.

Contractors have the opportunity to hire replacement drivers at a lower rate of pay than they receive under the contract. None of the contractors who testified did so. Chuck Cristofanetti drove regularly for John McCarthy who was at one time a contractor. McCarthy paid Cristofanetti less than he received under the contract.

Ten drivers who hold contracts with the Courier testified at the hearing. Two contractors receive pension income. Randy Appleyard, has newspaper carrier routes in addition to a delivery contract. Gail Kania works as an employee of the Courier in the mail room just under fifteen hours per week on a regular basis. Austin Fulton sells candy through vending machines. His income tax return, filed as an exhibit, indicate that repairs to the vending machines consumed all profits from this enterprise last year. Five contractors testified that they receive no other income

from any source.

The drivers use their own automobiles to perform the deliveries. The vehicles are not identified with the Courier. The drivers pay all expenses associated with performing the delivery service, such as the cost of vehicle maintenance, fuel and insurance. The Courier requires that the contractors obtain delivery insurance, which costs approximately \$100 a year in addition to regular insurance.

The contractors receive no employee benefits, no statutory holidays, paid annual vacation or any paid leave. They invoice the Courier every two weeks for the services performed under the contract. They file income tax as contractors, deducting all the expenses of operating their vehicles. All drivers testified that they earn very little or no money from their delivery work for the Courier.

The contracts state a daily fee to be paid for deliveries within a designated area. There appears to be no history of negotiation between the contractors and the Courier about rates. The rates are amended upward from time to time to reflect changes in the deliveries required or increases in operating costs. Some drivers have complained to the Courier about the rate which is paid. In the past, these complaints have been met with a statement that if the contractor is not satisfied with the rate which is being paid, he or she will be replaced. More recently, such requests have been met with the response that the Courier will re-assess the route to determine whether the rate paid is less than reasonable. To date, the latter approach has not resulted in any increases to the contract price.

Several of the contractors do not file any income tax returns because they believe that their income after paying their expenses is so small there is no need to do so. Others write off expenses for maintaining an office and telephone (expenses which are not realistically incurred in order to earn monies under their contracts with the Courier) and bring their net income for their delivery work for the Courier to zero or below zero.

When the contracts are entered into, the contractor is told which area they are responsible for. The area is enlarged or changed unilaterally by the Courier from time to time. The contract provides that in the event the contractor is required to cover additional miles on the route an

adjustment will be made to the daily rate. Some drivers testified that they sought to obtain additions to their daily rate when they were required to cover additional miles but were unsuccessful in their efforts. Others indicated that when changes are made to their route which require them to go out of their established area they are normally given some additional amount.

When the drivers report to the Courier, they go to "a peg" where they find any special instructions regarding their route. Special instructions include any additional deliveries. The drivers receive notice if they are to put up a yellow mail box for new subscribers, or are to put notices on existing mail boxes indicating new subscribers. The drivers are paid 75 cents per box for this service. The drivers also receive a computer printout, entitled "Driver Manifest Report" which states the drop-off addresses and the number of papers and/or bundles which should be dropped at each location. The mail room at the Courier sets out the newspapers in bundles in the order in which they are to be delivered in accordance with the manifest. The drivers have the opportunity to change the order in which they deliver their newspapers.

The delivery drivers have only minimal face to face contact with their supervisor. Directions are conveyed in writing and placed on the peg.

One job related to the delivery of the Courier is the delivery of advertising supplements twice a week. Two individuals who perform this job in addition to their regular contracts have received a disciplinary warning from the Courier. The drivers were told that if they did not comply with the requirements of the contract for the delivery of advertising supplements, their contracts would be terminated.

Contract drivers are not normally terminated although one contract was terminated when the contractor failed to show.

The contracts state that a driver must report to the office of the Courier at a set time. These times are slightly staggered so as to minimize the waiting period. All drivers except two report as instructed. Appleyard was told to report at noon for loading, but having arrived at noon several times and not being loaded until 1:00, he started coming at 1:00 p.m. He was told to report at 1:00 a.m. for the weekend deliveries, but found that he had to wait until at least 2:30 a.m. before loading. He has chosen to come and pick up his load at 4:30 a.m. on the weekends.

Christopher Finetti reports at 11:30 a.m., not at 10:30 a.m. as required on his written contract.

The time that the drivers leave the loading ramp is recorded by the Courier. The vehicles are expected to depart the Courier in a specific order. The newspapers must be delivered by a specified time, and all of the contractors are aware of this requirement.

The hours the driver works varies depending on the waiting time which is required at the newspaper office, as well as on any changes to the route. If it rains the delivery drivers must cover the newspapers with plastic which takes some additional time. The contracts take anywhere between three and five hours to complete, most are done within the shorter period. During the week the work is performed between approximately 10:30 a.m. and 3:30 p.m. and, on the weekends between 1:00 a.m. and 6:00 a.m.

Under the terms of the contract, the contractor agrees not to distribute any newspaper or publication in direct competition with the Courier without the consent of the circulation manager. None of the drivers who testified distributed any newspaper or publication in competition with the Courier, and there is no evidence that any contractor has sought the consent of the circulation manager to do so.

Persons obtain the delivery contracts by different methods. Some respond to newspaper ads, others hear of an available contract and apply. The interview to obtain the contract appears to be fairly brief. The individual must have a vehicle. The routes have no resale value and no individual who has taken over a contract from another has paid money to do so. There is no competitive bidding between individuals to obtain the routes. The rate is set for the route by the Courier.

There is no seniority between the contractors and no driver has a claim to a route should it become available. The Courier dissuaded one driver from changing routes because this would have required it to train two drivers. The Courier does not appear to encourage contractors to take on more than one route as this may result in the driver being unable to deliver at the required time.

The contractors do not purchase the papers they deliver, and bear no financial

responsibility for the delivery and acceptance of the newspapers. The drivers are unable to make a profit from the sale of the newspapers which they deliver. The contractors are entitled under the contract to earn a commission for obtaining new subscribers. The contractors who testified did not avail themselves of this opportunity and were for the most part unaware of this provision in the contract.

III. SCOPE OF THE PROPOSED UNIT

A threshold issue is whether the Union possesses sufficient membership support among the persons within the proposed unit. The parties were unable to agree on the scope of the unit.

The Union takes the position that the individuals who regularly drive for Brian Thomas and Joe Forrest (Dave Meade, Pam Meade, Alan Reece and Sharon Johnson) are within the proposed unit. The Courier says they are not.

The parties disagree as to whether individuals who hold contracts but do not drive are within the proposed unit. The Union argues that persons such as Joe Forrest and Diane Fulton, who hold contracts but do not drive, are nonetheless in the proposed unit.

The Courier points out that the Union failed to call any evidence concerning nine persons who have signed contracts: Bob MacMillan, Dave Parker, Elizabeth Howitt, Burgess Longson, Bernie Curtis, Gordon Fossom, Brian Thomas, Dennis Edwards and Peter Love. The Union called no evidence to establish whether these individuals perform any driving under their contracts. The Courier says that I can make no determination as to whether they are within the proposed unit or not.

I have carefully reviewed the membership evidence. Whether any or all of the persons in the three groups described above, are either excluded or included in the proposed unit, the Union has the support of well over 55 percent. Consequently it is unnecessary for me to determine which of the above-noted persons are within the proposed unit. It is the Board's policy not to make determinations as to who is within a proposed unit, where it is not necessary to do so in order to determine whether the Union has sufficient membership support. The Union has demonstrated overwhelming membership support among all of the drivers, both the contract

drivers and the regular replacements, and I should add among those who testified as well as those who did not. Even if those individuals who hold contracts but do not drive fell within the proposed unit, the Union still has ample membership support for an automatic certification.

Consequently, the resolution of the scope of the unit is left to the parties to negotiate. In the event no agreement can be reached, the parties are at liberty to bring an application under Section 139 of the Code for a determination as to the status of named individuals.

IV. IS THE PROPOSED UNIT COMPOSED OF DEPENDENT CONTRACTORS OR INDEPENDENT CONTRACTORS?

1. Positions of the Parties

The Union argues that the contract drivers are dependent contractors because their capital investment is minimal, they are required to make no independent business judgments, or exercise entrepreneurial talent, they are under the direction and control of the Courier, and are in a position where they have little or no bargaining power.

The Courier argues that the Union has failed to establish that the contract drivers are economically dependent upon the Courier and argues that looking at the contractual relationship as a whole the persons in the proposed unit are independent contractors.

The Courier argues that as almost all of the witnesses called by the Union testified that they made virtually no money from their contracts, they cannot be considered economically dependent on the Courier. The Courier says because some persons in the proposed unit receive other income they are not dependent upon the Courier. The Courier argues that pension and other employment income must be taken into account in assessing whether the "lion's share" of the income of the contractors comes from the Courier.

The Courier also argues that some of the contract drivers work so few days per week they cannot be considered economically dependent. An example is Hugh Tarbot, who currently drives five days a week. His wife drives two days a week. He testified that he was looking for someone to work three of his five days. The Courier argues that a person who works two days

per week can not be considered dependent upon the Courier.

The Courier also argues that an onus rests upon the Union to establish that each contractor relies upon the contract with the Courier and depends upon it for his or her livelihood.

The Courier says the Union failed to establish that all persons in the proposed unit are economically dependent as it failed to call any evidence with respect to the income received by at least nine persons in the proposed unit. The Courier says that the ten individuals who testified are not a generic sample of the whole unit.

The Courier argues that a finding of economic dependence is critical because contractors who are not economically dependent upon the Courier will have nothing to lose in the event of a strike for higher rates and better contract terms. It submits that persons receiving the majority of their income from other sources will take more forceful positions during bargaining, and should not be extended the opportunity to bargain collectively.

The Courier points out that the contract holders regularly sub-contract their work to others and act in this respect as independent contractors. The Courier argues that it does not exercise direction and control over the contractors as the individuals have discretion to determine the order in which they will deliver their bundles of newspapers, and have some discretion as to when they come to pick up the papers at the newspaper office. The Courier argues that the contractors do have an opportunity to make a profit under the contract by hiring replacement drivers at a lower rate than they receive and by selling subscriptions. It argues that the opportunity to exercise entrepreneurial skill is what is relevant, not whether it is actually exercised.

By way of reply, the Union states that the witnesses it called are representative of the entire complement of the bargaining unit, and cover the spectrum of persons in the proposed unit.

The Union asked me to rely on hearsay evidence which purports to state the other income sources of the nine persons in the proposed unit who did not testify. The Union argued that it would be unreasonable for the Board to require it to call as its own witnesses all of the members of the proposed bargaining unit because not all of them support the Union.

The Union argues that individuals who receive pension income are nonetheless dependent

upon the Courier, even if the pension income is greater than their income from the Courier deliveries. The Union also argues that income from employment should not be considered in determining whether an individual is a dependent contractor or independent contractor, as employment income is not earned from the exercise of business initiative or entrepreneurial skills.

2. The Statute

The definition of dependent contractor is unchanged and reads:

1. (1) "dependent contractor" means a person, whether or not employed by a contract of employment or furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

The definition of "employee" has been amended to include a dependent contractor. "Employer" is defined as "a person who uses the services of one or more dependent contractors".

3. Analysis and Decision

I heard no direct evidence with respect to nine contractors. I heard no evidence as to whether they performed any driving under the contract and if they did, how much. I received no direct evidence on what, if any, income they may receive from other sources. The Union asserts that the ten contractors who testified are like the nine who were not called as witnesses. I have no evidence before me to support this assertion. The Courier says it is unaware of what if any other income the nine contractors who did not testify may earn.

I make no finding as to whether the nine contractors who did not testify are dependent contractors. Nor is it necessary for me to do so. Whether these nine are included or excluded from the proposed unit is irrelevant to the question of whether the Union has sufficient

membership support among the persons in the proposed unit.

Turning now to the question of whether the ten contractors who testified are dependent contractors. The Courier makes essentially three arguments in support of the position that these individuals are not in a position of economic dependence: (1) the drivers only work part time for the Courier, and at least one, seeks to work only two days per week, (2) some of the contractors testified they earned little or no money net from the contract and (3) several contractors receive other incomes from pensions or employment.

In *Fownes Construction Ltd.*, BCLRB No. 82/74, [1974] 1 Can LRBR 453, Chairman Paul Weiler considered the term "economic dependence". The Board on this point said:

...The difficulty is the intermittent relationship between any one owner-operator and Fownes. Rarely does an owner-operator work on a continuing basis for one contractor in the construction industry. ...Accordingly, Employer's counsel argued here that these owner-operators were not "in a position of economic dependence" upon Fownes because the latter accounted for only a small proportion of their work and earnings over any appreciable period of time.

The answer to that argument can be seen in the complete language of the definition read in the light of the history and policies which I sketched earlier. ...If it were the normal pattern in an industry for employment to be on a regular, continuing basis with one employer, then the fact that contractors were engaged for short periods by large numbers of persons would be a significant reason for finding they were independent rather than dependent contractors. ... (p. 462)

The jurisprudence of the Board and Council confirms that in assessing the term "economic dependence" it is necessary to consider the nature of the industry where the work is performed. A contractor who works only part time for an employer may nonetheless be in a position of economic dependence upon that employer.

In *Flyer Force, a division of Southam Inc.*, IRC No. C113/89, the Council considered the issue of economic dependence in the context of contractors who performed a delivery service on

a part time basis. The evidence was that the majority of the persons in the proposed unit held other part time or full time jobs and some earned more money from these jobs than they did distributing flyers for Flyer Force (p. 10). Flyer Force argued that the persons in the proposed unit were not economically dependent on Flyer Force. On this point, the Council concluded:

...The fact a majority of the area supervisors have full-time jobs elsewhere or earn the bulk of their income in other jobs, does not negate an economic dependence upon Flyer Force. Neither the freedom to work elsewhere nor the limited income received by the area supervisors is inconsistent with the notion of economic dependence as defined in Section 1(1) of the Act. The test of economic dependence is designed to distinguish between those persons who need the protection of collective bargaining and those who do not. In this sense, economic dependence is a key factor in distinguishing the person who works for another from the person who carries on business for himself. ...(p. 18)

The comments of the Board in Pacific Press Ltd., supra, do not indicate that any type of outside remunerative work, and in particular work outside the dependent contractor's field, signals a lack of economic dependence upon the employer. An individual may be economically dependent on several sources of income without being in business for himself as an independent contractor. ...(p. 19)

...Indeed, the panel would go further; in some circumstances, an individual may be economically dependent on all sources of income, even those sources which provide minimal income. This is particularly true where the individual is employed at the lower end of the income scale. (p. 21)

In *Kamloops News Inc.*, IRC No. C215/90, (1991) 11 CLRBR (2d) 70, the Council had before it an application for certification for a unit of delivery drivers working under contract. These delivery drivers were in almost the identical situation as the delivery drivers for the Courier. Having reviewed the jurisprudence on economic dependence, the Council said:

...Although there is evidence of other work engaged in by some of the drivers, this did not demonstrate entrepreneurial activity. The drivers have little room in which to exercise entrepreneurial

judgment or initiative. ...(p. 82)

In *Alberni Valley Times Ltd.*, IRC No. C130/92, the Union applied to vary delivery drivers into its certified bargaining unit under the former legislation. These persons drove on a part time basis. The Council found that the delivery drivers were dependent contractors and not employees.

The delivery drivers contracted by the Courier to deliver newspapers work less than full time to fulfil their contracts. Consequently, it is likely that some or all of these delivery drivers will have some other source of income. The fact that these individuals receive other income from other work, other income from pensions, or even income from other delivery contracts, does not lead necessarily to a conclusion that these persons are independent contractors.

Receipt of income from a source unrelated to the work performed under the contract with the employer is not a factor which detracts from a finding of dependency. It is income from work performed which is similar to the work done under the contract which is relevant. It is relevant because if a person performs, for instance, delivery work for several employers and earns the majority of his or her income from carrying on a business as a delivery driver, this may indicate that the driver is an independent contractor. The drivers who testified before me do not engage in any delivery business and perform no work delivering for any other companies.

The final argument of the Courier is that several of the contractors who testified earned very little if any money from their work and thus are not economically dependent upon their contracts. I cannot accept this argument in light of the evidence which I heard that the contractors rely on the money received, albeit small, for their livelihood. Five contractors testified they received no other income. None testified that they worked for any other reason than the money paid, although it was suggested to several witnesses in cross-examination that the reason they chose to work was to socialize with others. This suggestion was rejected by the witnesses.

The relationship between the Courier and the contractors is in most respects like that of an employer and an employee. The work of the contract drivers is controlled by the Courier. The Courier tells the individuals when and where to pick up the papers, where they must be

dropped, the size of the bundles, when they must be delivered. From day to day, the Courier modifies its directions given to the drivers and may require them to do other drops or additional work. The drivers have no right to question the changes in the requirements of their contracts. The Courier retains the power to determine who it will enter into contracts with, what the term of those contracts will be, and what payment will be made.

The major area where the Courier does not exercise direct control is with respect to the control over the person who provides the service. As noted, these contractors have the right to employ replacement drivers in the event they wish a holiday or are unable or unwilling to work. In fact, the contractors have an obligation to provide replacement drivers as the Courier will not undertake this.

The fact that an individual is free to employ a substitute to perform his or her work while sick or on vacation is not fatal to the determination that the individual is an employee: *Powell River Regional District*, IRC No. C250/89. Employees in some industries are at liberty to obtain replacements. The issue really is whether the opportunity to obtain a replacement or a substitute indicates the exercise of some entrepreneurial initiative. Only one of the ten persons who testified indicated that the contract holder may take a small percentage of the income from the contract for themselves when they hire replacements. None of the contractors who testified did, and in fact, it may be difficult for the contractors to obtain replacements who will work for less than what they work for.

The only other area of some independence is the ability of individuals to choose the vehicle they will purchase to perform their work. This is not a factor establishing an independent decision making capacity.

The contract drivers are not in any sense in business for themselves. There is no indication that they are in fact contributing to the development of a business by driving under contract for the Courier. Their work does not contribute to the growth of any investment which they may have, their work is contributing simply to the requirements of the Courier.

The only opportunity to make a profit as a contractor is to have someone else perform the work for a lower rate of pay than received under the contract. The risk of loss is simply that the

cost of performing the work will be greater than the rate paid. These individuals are not in business for themselves.

It is clear that these individuals have little or no bargaining power with the Courier. The skills required to carry out their work are not such that it would be difficult for the Courier to obtain replacements, a fact which has been brought to the attention of these contractors on several occasions. The Courier has told several drivers that if they don't like what they are paid, the Courier will replace them.

I have no difficulty concluding that these individuals are dependent contractors, not independent contractors. They are not in business for themselves and exercise no independent entrepreneurial talent or judgment. They work under the direction and control of the Courier in all material respects.

The fact that these individuals have signed contracts which state that they are independent contractors carries no weight. Several of the contracts were signed some time after the individuals commenced work; all of them testified that they signed them because they were told that if they did not, they would not get the work. The contracts are really in the nature of self-serving documents prepared by the Courier. Such contracts will not deter the Board from looking at the real relationship from a labour relations perspective.

V. IS THE PROPOSED UNIT APPROPRIATE FOR COLLECTIVE BARGAINING?

The next matter to consider is whether the unit applied for is appropriate for collective bargaining. The Courier argues that the proposed unit includes persons with quite different arrangements with the Courier and different levels of dependence and independence. The Courier says there are contractors who range from dependent to independent, and there exists no rational and distinct unit of dependent contractors. The Courier relies on the Board decision in *Pacific Press Limited*, BCLRB No. 142/74, [1977] 1 Can LRBR 342, where an application to carve out a limited number of delivery drivers for certification was rejected. In *Pacific Press Ltd.*, *supra*, the Board stated:

"...The group ranges from those who are clearly independent and only

gradually shades into varying degrees of economic dependence. We seriously doubt that it is proper to carve out one segment of these contractors, whose boundaries would necessarily be artificial, and hold that the terms and conditions of its contractors should be established by collective bargaining along with employees..."(p. 17)

The facts before me are distinct from those before the Board in the *Pacific Press* case. There the Union applied to represent only a limited number of delivery drivers, not all drivers in an appropriate unit. Here the Union has applied for the largest group possible, all delivery drivers providing a service to the Courier. There is no carving out of a small group of contractors from a larger number.

The Courier argues that the unit is inappropriate because the boundaries of the unit are unclear. It says that if contractors who don't drive or drive only a few hours per week are outside the unit then contractors can move in and out of the unit depending upon how much driving they chose to perform. The Courier argues that such a fluid unit is inappropriate for collective bargaining. The unit proposed by the Union is for delivery drivers under contract with the Courier. The determination of which contractors and drivers fall within the bargaining unit is left to the parties to negotiate. The fact that persons from time to time may not fall within the scope of the certificate because they choose not to drive does not cause me to conclude that the proposed unit is inappropriate.

I find that the unit applied for by the Union is appropriate for collective bargaining.

The Union is certified to represent certain employees of the Courier. The Courier does not assert that it would be more appropriate for collective bargaining to include the contractors in one of the existing units, and I agree.

VI. CONCLUSION

In conclusion, I find that the unit applied for is composed of dependent contractors and that the proposed unit is appropriate for collective bargaining. I am satisfied that the Union is entitled to certification under the provisions of the Code, and certification for the proposed unit is

granted.

LABOUR RELATIONS BOARD

KATE YOUNG
VICE-CHAIR