

Fall 1967

The Independent Contractor Status of Newspaper Carriers: Some Antitrust Questions

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

The Independent Contractor Status of Newspaper Carriers: Some Antitrust Questions, 2 Val. U. L. Rev. 157 (1967).

Available at: <https://scholar.valpo.edu/vulr/vol2/iss1/20>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



THE INDEPENDENT CONTRACTOR STATUS OF NEWSPAPER CARRIERS: SOME ANTITRUST QUESTIONS*

INTRODUCTION

Typically, home delivery of newspapers is carried on through a system of exclusive routes.¹ Under this system newspapers are sold by the publishers to the carriers² who then resell the papers to the public. Each carrier services a designated area or route.³ The carrier's compensation is measured by the difference between the price paid by the customer and the price charged by the publisher plus whatever tips the carrier may receive.

The legal relationship between the publisher and the carrier is curious, to say the least. The crucial question is whether the carrier is a "servant" or an "independent contractor."⁴ This may seem merely an academic question. However, the determination of the carrier's status is of utmost importance to newspaper publishers. The publishers are the first to insist that their carriers are independent contractors and not servants.⁵

A determination of this question is important for two reasons. First, if the carriers are not servants, the publisher is not liable for their torts under the laws of agency and the doctrine of respondeat superior. Second, if the carriers are independent contractors, the publishers escape many of the burdens and requirements of modern social legislation.⁶

* This paper was originally prepared in fulfillment of seminar requirements at the Valparaiso University School of Law. The author, David Hessler, is presently a third-year law student.

1. In a recent case, when a witness was asked how long this method of delivery had been used, he answered "forever." *Albrecht v. St. Louis Globe-Democrat*, 367 F.2d 517 (8th Cir. 1965).

2. This paper will use the term "carrier." Designations such as "newspaperboy," "newsboy," or "paperboy" are synonymous.

3. Most newspapers are distributed by both minor and adult carriers. Minors usually distribute the city routes while adults usually service the outer areas. These outer areas typically demand the use of some mode of transportation and are commonly referred to as "motor routes."

4. Perhaps the term "employee" would be more descriptive in light of modern usage, but the Restatement of Agency uses the term "servant" to connote those who work for others. Therefore, when referring to common law the term "servant" will be employed in this paper, while the term "employee" will be used when speaking of modern social legislation. In this way the terms used will be consistent with the references in each of the areas. The terms are practically synonymous.

5. See, e.g., Appendix III.

6. E.g., the National Labor Relations Act, Workmen's Compensation Acts, the Fair Labor Standards Act and the Social Security Acts.

This paper discusses certain situations in which the carrier's status as an independent contractor has been urged. The discussion illustrates the general acceptance accorded the publisher's contention that the carriers are independent contractors. The final sections of the paper discuss the antitrust implications of the carrier-publisher relationship. It would be ironic if this carefully nurtured relationship would result in adverse antitrust implications for the publishers. This unexpected twist, it is suggested, may be the result of recent Supreme Court antitrust activity.

COMMON LAW

Under the common law doctrine of respondeat superior, the determination of whether a carrier is a servant or an independent contractor is no simple task. However, the courts are in general agreement as to the indicia of the status of an independent contractor. The ultimate test in determining whether a carrier is an independent contractor or a servant is the amount of *control* reserved by the employer.⁷ Courts are also in agreement that the presence, in any given case, of one or more of the recognized indicia of the status of independent contractor is not necessarily conclusive. There is no absolute rule for determining whether a carrier is a servant or an independent contractor, but each case must be determined on its own facts. Attention is often focused on the intention of the parties as evidenced by written contracts or agreements. However, the mere fact that the agreement refers to the

7. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) 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;

(d) the skill required in the particular occupations;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

carrier as an independent contractor or as an agent is not controlling. Consequently, cases within this area produce conflicting results.

A number of cases have held that the circumstances established that the status was not that of servant as a matter of law.⁸ In *Batt v. San Diego Sun Publishing Co.*,⁹ the carrier struck a minor with his automobile while collecting from subscribers on his route. The court looked to the contract between the carrier and the publisher and decided that since the carrier was collecting from regular subscribers, a duty imposed upon him by the contract, the latter determined his status as of that time. Other cases considered factual contexts in which the determination of the carrier's status was a jury question.¹⁰ In *Joslin v. Idaho Times Publishing Co.*,¹¹ a newspaper company was sued by a pedestrian for injuries sustained when struck by a motorcycle being operated by a carrier. There was no written contract between the carrier and the publisher, but there was an oral agreement that the carrier was to furnish his own means, methods, and manner of conveyance without restrictions or supervision as to the kind, character, or use thereof. The agreement also provided that, subject to the requirement of delivery at the specified places within the required time, the carrier was free to cover the route in any order, within such time and at such speed as he desired. The court held that the evidence was insufficient to show that the relationship between the company and the carrier was that of master and servant.

By taking note of the circumstances relied on by the courts in imposing liability, publishers were able to draft contracts and control their carriers (or not control their carriers, as the case may be) in such a manner so as to escape much of the common law civil liability under the doctrine of respondeat superior.¹² As a result, civil liability of publishers for torts of carriers is not very common today.¹³

8. *Batt v. San Diego Sun Publishing Co.*, 21 Cal. App. 2d 429, 69 P.2d 216 (1937); *Rathburn v. Payne*, 21 Cal. App. 2d 49, 68 P.2d 291 (1937); *Bohanon v. James McClatchy Publishing Co.*, 16 Cal. App. 2d 188, 60 P.2d 510 (1936); *Florida Publishing Co. v. Lourcey*, 141 Fla. 767, 193 So. 847 (1940); *Morris v. Constitution Publishing Co.*, 84 Ga. App. 816, 67 S.E.2d 407 (1951); *Skidmore v. Haggard*, 341 Mo. 837, 110 S.W.2d 726 (1937).

9. *Batt v. San Diego Sun Publishing Co.*, 21 Cal. App. 2d 429, 69 P.2d 216 (1937).

10. *Hampton v. Macon News Printing Co.*, 64 Ga. App. 150, 12 S.E.2d 425 (1940) and *Joslin v. Idaho Times Publishing Co.*, 56 Idaho 242, 53 P.2d 323 (1935).

11. *Joslin v. Idaho Times Publishing Co.*, 56 Idaho 242, 53 P.2d 323 (1935).

12. See the carrier contracts reprinted in Appendix I and II.

13. Leidy, *Salesmen as Independent Contractors*, 28 MICH. L. REV. 365 (1930); Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1934); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939).

SOCIAL LEGISLATION

Frequently, a determination of the carrier's status has been required under modern social legislation. However, even in this context, the determination has been imprecise. Conflicting results rather than uniform handling are much in evidence. An examination of several social legislation acts illustrates the situation.

A. National Labor Relations Act.

The carrier-publisher relationship under the National Labor Relations Act¹⁴ provides an excellent example of how newspaper publishers have successfully asserted the independent contractor status of carriers. One of the landmark cases in this area under the Act is *NLRB v. Hearst Publications, Inc.*, decided by the Supreme Court of the United States in 1944.¹⁵ The principal question was whether newsboys were "employees" under the Act. Since Congress did not explicitly define the term "employee,"¹⁶ the publisher contended that its meaning must be determined by reference to common law standards. The Court, in an opinion written by Mr. Justice Rutledge, rejected this argument, stating that the argument assumes that there is some simple, uniform and easily applicable test to determine whether persons doing work for others fall into one class or the other. The Court felt that this apparent simplicity is illusory because it involves a simplicity of formulation rather than of application. The Court stated that "the assumed simplicity and uniformity . . . of common law standards, does not exist."¹⁷

On the other hand, the NLRB argued that the carrier is an employee. In support of this contention, the Board alleged that the carrier is one of a group which the NLRA is designed to protect.¹⁸ The determination of the status depends on the intent of Congress in drafting the Act. This argument has force, especially if uniform applica-

14. 49 Stat. 449, 61 Stat. 136, 29 U.S.C. §§ 151-68 (1964). Also known as the Wagner Act.

15. *Hearst Publications, Inc.*, 322 U.S. 111 (1944).

16. The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parents or spouse.

49 Stat. 449 (2), 29 U.S.C. § 152 (3) (1964).

17. 322 U.S. at 122.

18. The carriers were organized as a unit under the "Truck Drivers and Helpers Local Union No. 696," affiliated with the "International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America."

tion of the Act is the desired result. If the determination of the status were left to the common law rules, variations in the statute's operation would be as numerous as the differences between the fifty states. "Employees" in one state would be "independent contractors" in another. The scope of the statute's protection would depend upon the accidental location of the work and the attitude of the particular local jurisdiction rather than on whether the worker's situation falls factually within the ambit Congress had visualized. Of the desirability of this situation the Court said :

Both the terms and the purpose of the statute, as well as their legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employee's organization and of collective bargaining.¹⁹

In ascertaining the intent of Congress the Court looked to the purpose of the Act, which is to avert the "substantial obstructions to the free flow of commerce" which result from "strikes and other forms of industrial strife or unrest" by eliminating the causes of that unrest.²⁰ Since the evil at which the Act is directed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors," such distinctions become irrelevant for purposes of the application of the Act. Some forms of services will be within the Act while others will be beyond its coverage. The Court concluded that newsboys were within the Act because they are subject, as a matter of economic fact, "to the evils the statute was designed to eradicate."²¹ Thus, under the National Labor Relations Act, the Court adopted a test of economic reality rather than control or the right to control as at common law.

One year after the *Hearst* decision, in the case of *Pulitzer Publishing Company v. Paper Carriers Local 450*,²² the National Labor Relations Board again determined that carriers were employees within the coverage of the Act. Therefore, publishers were required to conduct collective bargaining with the carriers. However, when the last of the Pulitzer Publishing Company agreements with the carriers expired, the publisher announced that it would no longer enter into collective bargaining agreements with carriers, maintaining that the carriers were independent contractors. On review of their prior decision, the Board determined that in the period since the 1945 decision, sub-

19. 322 U.S. at 123.

20. *Id.* at 126.

21. *Id.* at 127.

22. *Pulitzer Publishing Co. v. Paper Carriers Local 450*, 62 NLRB 229 (1945).

stantial changes in the relationship between the carriers and the publisher had occurred. These changes tended to establish the status of the carriers as independent contractors within the meaning of the Act.²³ In reaching this determination the Board resorted to the old "right to control" test.²⁴ The test was set forth as follows:

[W]here the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought the relationship is that of an independent contractor.²⁵

This 1964 decision seems to be the prevailing view under the Act. Thus, where the publisher's only retention of control is in the initial establishment of the relationship with the carrier, in the determination of the contents of the delivered newspaper, and in the frequency of its delivery, leaving the method of delivery to the carrier, the carrier will be an independent contractor within the contemplation of the NLRA. The practical result of this is that publishers are able to free themselves from the collective bargaining and other requirements of the Act in the same manner as they were able to escape civil liability for the torts of their carriers.²⁶

B. Workmen's Compensation Acts

Most workmen's compensation acts do not apply the economic reality test. Rather, they recognize that compensation acts do not have the broad social basis that other social legislation, such as the National Labor Relations Act, has.²⁷ Thus, the control test and the common law distinctions between servants and independent contractors are usually employed. The result is that carriers under workmen's compensation

23. *Pulitzer Publishing Co. v. Paper Carriers Local 450*, 146 NLRB 302 (1964).

24. This was not the first case which adopted the right to control test. It was previously restated in *Lindsay Newspapers, Inc.*, 130 NLRB 680 (1960). The test has been used many times. See, e.g., *A.S. Abell Co.*, 137 NLRB 238 (1962) and *The Kansas City Star Co.*, 76 NLRB 284 (1948).

25. 146 NLRB at 305.

26. Note that the carrier contracts (Appendix I and II) leave unmentioned any provisions concerning method of delivery.

27. *Elder v. Aetna Casualty Surety Co.*, 230 S.W.2d 1018 (Tex. Civ. App. 1950), *rev'd*, 149 Tex. 620, 236 S.W.2d 611 (1951). The court reviewed the *Hearst* decision and said that "This decision makes it clear that the meaning of the term 'employee' as used in the National Labor Relations Act is not the same as its meaning in the Texas Workmen's Compensation Act." *Id.* at 1021.

acts are employees in some cases,²⁸ independent contractors in others,²⁹ included in some jurisdictions³⁰ and excluded in others.³¹ However, the rule of the majority appears to be in accord with the view that a newspaper delivery boy is an independent contractor and not an employee of the publishing company within the workmen's compensation act.³² The factors generally treated as controlling are that the agreement for the sale of the newspapers purports to be one of principals and that delivery methods on each route are largely left to the carrier's discretion. Once again, the result is that newspaper publishers are able to escape the burdens of administering the workmen's compensation laws, in a majority of the cases, by asserting that carriers are independent contractors and by drafting appropriate contracts and exercising only proper control.³³

C. Other Social Legislation

Results are similar under other social legislation. For example, both child and adult carriers are exempt from the requirements of the Social Security Act.³⁴ The same is true under the Fair Labor Standards

28. *Globe Indemnity Co. v. Industrial Accident Comm'n*, 208 Cal. 715, 284 P. 661 (1930); *Macon News Printing Co. v. Hampton*, 192 Ga. 623, 15 S.E.2d 793 (1941); *DeMonaco v. Renton*, 32 N.J. Super. 450, 108 A.2d 506 (1954); *Samuel Gorden v. Newark Star-Ledger*, 131 N.J.L. 373, 36 A.2d 616 (1944); *Bergerson v. Press Co.*, 252 App. Div. 716, 298 N.Y.S. 685 (1937); *Hann v. Times Printing Co.*, 166 Va. 102, 184 S.E. 183 (1930); *Wilson v. Times Printing Co.*, 158 Wash. 95, 290 P. 891 (1930).

29. *Great American Indemnity Co. v. Fleniken*, 134 F.2d 208 (5th Cir. 1943); *New York Indemnity Co. v. Industrial Accident Comm'n of Cal.*, 213 Cal. 43, 1 P.2d 12 (1931); *Bohanon v. McClatchy Publishing Co.*, 16 Cal. App. 2d 188, 60 P.2d 510 (1936); *Call Publishing Co. v. Industrial Accident Comm'n*, 89 Cal. App. 194, 264 P. 300 (1928); *Ross v. Post Publishing Co.*, 129 Conn. 564, 29 A.2d 768 (1943); *Carter Publications v. Davis*, 24 Kan. 363, 68 S.W.2d 640 (1934); *Gall v. Detroit Journal Co.*, 191 Mich. 405, 158 N.W. 36 (1916); *Oklahoma Publishing Co. v. Greenlee*, 150 Okla. 69, 300 P. 684 (1931); *Balinski v. Press Publishing Co.*, 118 Pa. 89, 179 A. 897 (1935).

30. WIS. STAT. ANN. § 102.07 (1955) states that the benefits of the Workmen's Compensation Statute extend to "every person selling or distributing newspapers or magazines on the street or house to house."

31. CAL. CODE ANN. § 3352 (1953). The workmen's compensation statute excludes "any person engaged in vending, selling, offering for sale, or delivering directly to the public any newspaper, magazine, or periodical where the title has passed to the person so engaged."

32. See, e.g., *Hann v. Times-Dispatch Publishing Co.*, 166 Va. 102, 184 S.E. 183 (1938) and *Wilson v. Times Printing Co.*, 158 Wash. 95, 290 P. 691 (1930).

33. A list of indicia used in determining the degree of control was published by the ANPA in one of its Bulletins. This list is reproduced in Appendix III.

34. 49 Stat. 620, 42 U.S.C. § 410 provides:

(a) The term "employment" means any service performed. . . ; except that . . . such term shall not include—

(14)(A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shipping news, not including delivery or distribution to any point for subsequent delivery or distribution.

(B) Service performed by an individual in, and at the time of, the sale of

Act.³⁵ This Act would not apply to those carriers deemed "independent contractors." However, even if the carriers are "employees," they are exempted. Section 13(D) of the Fair Labor Standards Act provides an exemption from the child labor and the wage and hours provisions for employees engaged in the delivery of newspapers to the consumer. This provision applies to carriers engaged in making deliveries to the homes of subscribers or other consumers of newspapers. It also includes employees engaged in the street sale or delivery of newspapers to the consumer. However, as in the Social Security Act, employees engaged in hauling newspapers to drop stations, distributing centers, newsstands, etc., do not come within the exemption because they do not deliver to the consumer.

From this summary, it is evident that newspaper publishers have been successful in limiting their liability for the torts of carriers and exempting themselves from the administration of modern social legislation. The vehicle has been the independent contractor status of carriers. Let us now examine the impact of this carefully nurtured status when viewed in relation to the antitrust laws.³⁶

POSSIBLE ANTITRUST VIOLATIONS

It is important to note the purpose of the antitrust laws. In 1955, the "Report of the Attorney General's National Committee To Study The Antitrust Laws" stated:

The general objective of the antitrust laws is promotion of competition in open markets. This policy is a primary feature of private enterprise. Most Americans have long recognized that opportunity for market access and fostering of market rivalry are basic tenets of our faith in competition as a form of economic organization.³⁷

It should be noted that, to date, no decision has ever found an antitrust violation in the dealings of a newspaper publisher with his

newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back.

35. 29 U.S.C. § 213 (1964).

36. The basic antitrust statutes include: (1) The Sherman Act: 26 Stat. 209, 15 U.S.C. §§ 1-8 (1964); (2) The Clayton Act: 38 Stat. 730, 15 U.S.C. §§ 12-27 (1964); (3) The Federal Trade Commission Act: 38 Stat. 717, 15 U.S.C. §§ 41-51 (1964); (4) The Robinson-Patman Act: 49 Stat. 1526, 15 U.S.C. §§ 13, 13a, 13b, 21a (1964); (5) The Miller-Tydings Act: 50 Stat. 693, 15 U.S.C. § 1 (1964); (6) The McGuire Act: 66 Stat. 632, 15 U.S.C. § 45 (1964).

37. AGNC Report 1 (1955).

carriers. However, neither have newspaper publishers and carriers been excluded from the requirements of the antitrust acts.³⁸ We must therefore operate under the premise that the antitrust laws are applicable to publishers and carriers whose newspapers are deemed to be part of interstate commerce.³⁹

A. Resale Price Maintenance

The validity of an attempted maintenance by the manufacturer of resale prices of his product was tested in *Dr. Miles Medical Co. v. Park & Sons*.⁴⁰ The medical company marketed its product through various independent retailers and distributors. Although the medicine was sold to the distributors, the medical company attempted, by contract, to specify the resale price.⁴¹ The Supreme Court, speaking through Mr. Justice Hughes, held that this attempted price maintenance was illegal. Apparently concentrating on the fact that the goods were sold to the distributors, the Court said:

And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstances whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.⁴²

Thus, the contracts were illegal and invalid both at common law and under the Sherman Act. The doctrine expounded in this case has become known as the doctrine of "per se" illegality of resale price maintenance contracts. The reasonableness of the price maintenance scheme is of no consequence.

38. For a discussion of antitrust exemptions see F. ELKOURI, *TRADE REGULATION* (1957).

39. See *Lorain Journal v. United States*, 342 U.S. 143 (1951). The Las Vegas Sun had a daily circulation of about 8,000 papers which were distributed in 31 states; it received United Press news service and other nationally distributed columns and features; ink and other supplies were received from out of state. The Court held the paper to be engaged in interstate commerce.

40. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911).

41. These contracts were drafted as agency contracts. They were designated "consignment contracts" and "retail agency contracts." However, the court looked beyond the terminology of the contracts and declared that the so-called "retail agents" were not agents at all, but are contemplated purchasers who buy to sell again; that is, retail dealers. The contracts were essentially attempts by the manufacturer to fix the amount which the consumer shall pay.

42. 220 U.S. at 409.

The relationship between the newspaper publisher and the carrier is quite similar to that in the *Miles* case. The carrier *buys* his papers from the publisher and then resells them to the subscribers on his route. Thus, as in the *Miles* case, the distributor or retailer is the owner of the article. Also, the contract between the publisher and the carriers provides that the carrier will sell the newspapers "at the established rate therefor."⁴³ This seems to be an example of the per se violation spoken of in the *Miles* case. It should be noted that the carrier contracts are designated as those of an agent.⁴⁴ Also, the route or list of subscriptions is called a "lease."⁴⁵ However, as we have seen,⁴⁶ the courts will look beyond the printed word of contracts and determine what the relationship is in fact. Thus, the mere heading of a contract purporting to be of "agency" and "leasing" is of little consequence.

B. Refusals to Deal

Refusals to deal are closely aligned with resale price maintenance. Inasmuch as resale price maintenance is declared to be a per se violation of the antitrust laws, the question arises as to what a manufacturer may do, if anything, to protect himself and his product from those who cut prices. Actually, the manufacturer does have some power, although the exact extent of this power is unclear. It is clear, however, that the producer or manufacturer has the right to refuse to deal with a retailer who will not maintain the prices suggested or recommended by the producer. In the case of *United States v. Colgate & Co.*,⁴⁷ Mr. Justice McReynolds, for the Court, declared that in the absence of any intent to create a monopoly,⁴⁸ the Sherman Act does not prevent a manufacturer from announcing in advance the prices at which his goods may be resold and that such a manufacturer may refuse to deal with wholesalers or retailers who do not conform to the advertised prices.⁴⁹

Thus, a manufacturer may not make a contract to maintain or fix the resale prices of goods he sells, but the manufacturer may refuse to sell to a retailer who does not maintain suggested retail prices. Interestingly enough, there does not seem to be any middle ground. A

43. Both of the carrier contracts (Appendix I and II) contain the following clause: "(1) That I will sell and regularly deliver the [newspaper] to all of said subscribers, at the established rate therefor."

44. See Appendix I and II.

45. *Id.*

46. See notes 7-13 *supra* and accompanying text.

47. 250 U.S. 300 (1919).

48. If done with the intent of creating a monopoly, refusals to sell are unlawful. *United States v. Klearflax Linen Looms*, 63 F. Supp. 32 (D. Minn. 1945).

49. This was established as law before the *Colgate* case. See *Brown, The Right to Refuse to Sell*, 25 YALE L.J. 194 (1916).

manufacturer may give warning of a refusal to sell unless retail prices are maintained,⁵⁰ but almost every other form of affirmative action taken by a producer to keep up the resale price of his product is invalid.

The administration of a refusal to deal policy was considered in *FTC v. Beech-Nut Packing Co.*⁵¹ The Beech-Nut company had an elaborate system of checking on its retailers and weeding out those who cut prices. Retailers with a record of cutting prices on Beech-Nut products were denied the right to purchase such products. In 1922 the company was advised that its efforts constituted unfair competition. The Court pointed out that the company's practices went beyond a mere refusal to sell.

[The] system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade.⁵²

The Court found that it could "infer, indeed cannot escape the conclusion, that competition among retail distributors is practically suppressed."⁵³

In subsequent cases it was determined that producers could not require the assurance of the retailers that resale prices would be maintained,⁵⁴ nor could producers solicit information from customers as to their compliance, or the compliance of other customers with the resale price restrictions.⁵⁵

However, there remains one form of resale price maintenance approved by the Court. In *United States v. General Electric Co.*,⁵⁶ it was held that if a true agency relationship existed, the principal could fix the prices at which the agent might sell at retail.

The impact of all of this on the newspaper publishers is that publishers and carriers may not contract to resell the paper at an established rate, but the publisher may refuse to sell to those carriers who do not sell at the published price. Thus, by redrafting the contract, newspaper publishers are able to circumvent the restrictions against resale price maintenance.⁵⁷ Indeed, this is what the publishers are

50. *United States v. Hudnut*, 8 F.2d 1010 (S.D.N.Y. 1926).

51. 257 U.S. 441 (1922).

52. *Id.* at 454.

53. *Id.* at 455.

54. *Toledo Pipe-Threading Mach. Co. v. FTC*, 11 F.2d 337 (6th Cir. 1926).

55. *Cream of Wheat Co. v. FTC*, 14 F.2d 40 (1926).

56. 272 U.S. 476 (1926).

57. Rather than having a clause in the contract whereby the carrier is required to sell at an established rate, publishers could fail to mention the resale price in the contract; most carriers would automatically sell at the published resale price. A clause permitting the publisher to refuse to deal with carriers who refuse to sell at the suggested price would most likely be inserted.

encouraged to do.⁵⁸

However, as shown above, the practice and administration of a refusal to deal operation may in itself constitute an antitrust violation. Anything beyond a warning of refusal to sell unless resale prices are maintained could constitute sufficient affirmative action to be a violation.

An interesting analysis of resale price maintenance, refusals to deal, and newspapers is offered in the case of *Albrecht v. The Herald Company*.⁵⁹ This was a treble damage action by a newspaper carrier against the newspaper. The "Globe-Democrat" was a morning newspaper delivered to home customers of the St. Louis area through a system of 172 routes. The carriers were entrepreneurs, purchasing their papers at wholesale and selling them at retail. The plaintiff operated route number 99 which consisted of approximately 1200 customers.

The Globe-Democrat advertised a suggested retail price in its newspaper. Carriers were subject to termination for charging more than the suggested retail price. This was accomplished by an insertion in the contract which read :

The right of each carrier whose appointment is effective to sell the St. Louis Globe-Democrat by home delivery in his territory, will be maintained exclusively to him under the terms of his appointment so long as the price at which such sales are made in his territory shall not be higher than the price therefor suggested by the publisher for such sales in the City or County in which such territory is located.⁶⁰

The plaintiff adhered to the suggested retail price for several years, but started overcharging in 1961. Customers on his route then began calling the Globe-Democrat to complain about the overcharging. Plaintiff was informed about these calls during the years 1961 and 1962. Finally, in May of 1964, the Globe-Democrat informed the plaintiff that it would start to compete in the area through another carrier at the lower, established prices. Letters were then sent to the customers on route 99 explaining the position of the newspaper and telling the customers that if they were being overcharged they could purchase their papers from the new carrier at the established rate. Following the letters, house to house solicitations were made in behalf of the Globe-Democrat. This campaign resulted in a customer list of 314 by July 7, 1964. This new route was taken over by one George Kroner with the understanding that he might be required to return it to the plaintiff.

58. See point four under Appendix III.

59. 367 F.2d 517 (8th Cir. 1966).

60. *Id.* at 519.

During this period the Globe-Democrat continued to sell papers to the plaintiff who continued to sell them to his customers. The newspaper again warned the plaintiff that by the terms of the contract the paper was not required to continue to do business with him. On August 21, 1964, the Globe-Democrat notified the plaintiff of his termination as a Globe-Democrat carrier. This termination came after the plaintiff filed the present suit. The plaintiff thereafter sold his route for \$12,000.00. This was more than he had paid for it, but less than he would have received if the Globe-Democrat had returned the 300 customers comprising the alternate route.

The theory of plaintiff's action was that Section 1 of the Sherman Act was violated by reason of a combination between the Globe-Democrat and Kroner. Plaintiff argued that the case was controlled by the *per se* cases and was therefore a question of law and not of fact. The court rejected this argument and distinguished the *per se* cases:

[T]he record evidence reveals many obvious distinctions from any of the reported cases relied upon by plaintiff ["*per se*" cases].

As examples, none of the cited cases involves a business whose product must be delivered daily at a certain time by a monopolistic delivery man; and in none does the sales price of the product to the consumer represent only a fraction of the cost of the product. In none is the only alternative a monopoly leaving unprotected the public interest.⁶¹

Furthermore, the court claimed that the activity in this case was unilateral and thus no combination could have been formed. The practical result of the competition, as declared by the court, was that "Globe-Democrat's activity here did not hinder, but fostered and actually created competition to the benefit of the public."⁶²

This case is, no doubt, a great victory for the newspaper publishing industry. It stands for the proposition that publishers may refuse to deal with those carriers who do not sell at the suggested price. However, the case does not hold that publishers may contract with carriers to maintain a retail price. Thus, even in light of this case, those publishers who draft contracts similar to those in Appendix I and II would still appear to be in violation of the antitrust laws. It is also interesting to note that Kroner, the carrier who took over the alternate route, was deemed an employee of the Globe-Democrat. In this way the Globe-

61. *Id.* at 524.

62. *Id.* at 522.

Democrat's action was unilateral and not a "combination." But, what if the situation would arise where the agreement between the publisher and the carrier were not unilateral? If Kroner were not an employee of the publisher but an independent contractor like other carriers, would it then be said that there was no violation? This question was not posed and consequently not answered.

However, let us make a close examination of the court's reasoning. As previously stated, the basis for the decision was that the product had to be delivered at a certain time by a "monopolistic" delivery man and the only alternative was a monopoly leaving unprotected the public interest. Stated in other words, the court's reasoning would run something like this: if a carrier, who had the exclusive right to deliver in a certain area, could exact any price for the paper he wanted, both the public and the publisher could be injured. The public would be injured in that they would have to pay a higher price than other areas if they wanted the same paper. The publisher would be injured because people would stop buying the paper if the price were too high. Therefore, the reasoning continues, the publisher should be able to protect both himself and the public by being permitted to refuse to deal with carriers who do not sell at the retail price suggested by the publisher. This reasoning is bolstered by the only available alternative, that being the establishment of a monopoly leaving unprotected the public interest. This monopoly would be according to the court, comprised of publishers who *employ* their carriers and could thereby:

[W]reck such havoc as Mr. Justice Douglas decried in his opinion in *Standard Oil Co. of California and Standard Stations v. United States*, 337 U.S. 293, 318-319, 69 S. Ct. 1051, 1066, 93 L. Ed. 1371 (1949): 'But beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one.'⁶³

Further analysis reveals discrepancies in the court's reasoning. It is difficult to determine just what action is condoned and what action is condemned. However, one may surmise that the court believes that publishers are justified in refusing to deal with carriers who do not

63. *Id.*

maintain the established retail price. Further, when a carrier does overcharge, the newspaper publisher may send an employee into the area to compete with the carrier. It is this result that is difficult to rationalize with the philosophy of the court in upholding refusals to deal.

First, refusals to deal are valid because when a carrier has an exclusive area to serve, he could conceivably charge whatever price he wants and both the public and the publisher will be harmed.

Second, the only alternative open to the publisher, argues the court, would be a monopoly leaving the public interest unprotected. As stated above, this monopoly would consist of publishers employing carriers. Since the carriers would then be employees, the publisher could charge whatever price he wanted and "wreck havoc." However, this argument assumes too much. It assumes that when all of the carriers are employees and action on the part of the publisher is unilateral, the public will be put into the helpless condition of being forced to bow to whatever price is demanded by the publisher for the paper. This is simply not true. Each newspaper is in competition with other newspapers and news media. If the price of the paper is too high the public can refuse to buy. The publisher has no real monopoly over the product or the price. At any rate, how can the situation be any different than it is now merely because the carriers are employees rather than independent contractors. If the publisher does not have a monopoly now, it is surely not because his carriers are independent contractors rather than employees. The status of the carriers, under present price fixing practices, has nothing to do with the established price of the newspaper. It appears that the publishers are establishing the prices irrespective of the status of the carriers. If there is no monopoly now, and the court recognizes this, how could there be a monopoly merely because carriers are employees? Or, if there would be a monopoly when carriers are employees, why is it that there is not a monopoly now? In the final analysis, the status of the carrier is simply irrelevant to the question of monopoly.

Third, as noted above, the court condones the sending of an employee into the area in dispute. The court relies on this factor for the determination that there is no combination or agreement in restraint of trade. There simply can be no "combination" when the action is unilateral. It is this aspect that is most confusing. It is confusing because the court is relying on the same thing to justify its decision of non-combination that it condemns as an alternative to the refusals to deal. In both instances the publisher is using carriers in the capacity of an employee. In speaking to the question of "combination," the court said

that there can be no combination between the publisher and the carrier because the carrier is an employee. In the words of the court: "Globe-Democrat acted only through its employees and agents. Thus it became a carrier itself in competition with plaintiff."⁶⁴

However, when speaking to the validity of refusals to deal, the court stated that they are valid because the alternative would be a monopoly, *i.e.*, making all carriers employees. Wherein lies the rationale? Sending carriers in to compete is condoned because the carriers are employees. Refusing to deal with carriers is condoned because the alternative is making them employees and this is bad. Perhaps this criticism of the court's reasoning would seem more substantial if fifty carriers or one hundred carriers were involved in overcharging. According to the decision in this case the publisher could send in carriers as employees. What if all of the carriers overcharged? Then the publisher could send employees into all of the areas. Would this then be any different than the result or alternative condemned by the court in justifying refusals to deal? This writer sees no difference.

The court continues by saying that "To have condoned plaintiff's overcharging would have been a signal to all carriers, each monopolistic in his own right, to mulct the public for all the traffic would bear."⁶⁵ Perhaps the evil lies in the exclusive route system. This is the subject of the following section.

C. Exclusive Territorial Distributorships

An exclusive territorial distributorship is an attempt to divide a given marketing area into a number of smaller territories. Typically, one distributor is given exclusive control of distribution within each territory. Apparently, the route system of newspaper distribution is merely a variation of the exclusive distributorship.

Horizontal Territorial Restrictions

Functionally, the antitrust implications of an exclusive territory agreement revolve around the particular agreement's status as a horizontal or a vertical restraint. Horizontal restraints are *per se* violations of the Sherman Act.⁶⁶

A horizontal restraint is an exclusive territory agreement initiated by the distributors of a product, with or without the cooperation of the

64. *Id.* at 523.

65. *Id.* at 522.

66. *See* United States v. General Motors Corp., 384 U.S. 127 (1966).

manufacturer.⁶⁷ The case of *United States v. Sealy, Inc.*,⁶⁸ illustrates the nature of a horizontal restraint. The Sealy corporation licensed manufacturers of mattress and bedding products to make and distribute these items under the Sealy trademark. Each licensee was required to limit its sales to a defined area. All of the licensees were stockholders of Sealy.

In defense of the government's attack on this territorial arrangement, Sealy contended that the arrangement was vertical in nature and should be judged on the basis of a rule of reason.⁶⁹ Sealy relied upon the formal corporate entity, claiming that the licensor initiated the restraint and not the licensees.⁷⁰ The Supreme Court rejected this argument and held that the licensing arrangement was, in fact, an invalid horizontal restraint.⁷¹ The Court looked beyond the formal corporate entity; it found a mere paper corporation whose actual control rested in the joint venturor licensees.

Sealy was a joint venture, of, by and for its stockholder-licensees; and the stockholder-licensees are themselves directly, without even the semblance of insulation, in charge of Sealy's operations.⁷²

Vertical Territorial Restraints

A vertical restraint is an exclusive territorial arrangement initiated by the manufacturer. Generally, a vertical restraint is valid unless it is unreasonable.⁷³ This reasonableness is determined

by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.⁷⁴

This "rule of reason" treatment of vertical restraints was modified in *United States v. Arnold, Schwinn & Co.*⁷⁵ Distribution of Schwinn products was accomplished primarily through three methods. These

67. See *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

68. *United States v. Sealy, Inc.*, 87 S. Ct. 1847 (1967).

69. *Id.* at 1850.

70. *Id.*

71. *Id.* at 1851.

72. *Id.* at 1850.

73. See *White Motor Co. v. United States*, 372 U.S. 253 (1963). The applicability of this rule of reason has been questioned. E. KINTNER, AN ANTITRUST PRIMER 45 (1964).

74. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 709 (1944).

75. 87 S. Ct. 1856 (1967).

were: 1) direct sale to Schwinn distributors; 2) sale to franchised retailers through agency or consignment arrangements with the distributors; and 3) direct sale to franchised retailers. In connection with each of these methods, Schwinn imposed restrictions upon the resale of its product. The distributors were required to sell only to franchised retailers and only within a specified territory. The retailers were subject to territorial restrictions and were prohibited from selling to non-franchised retailers.

According to the majority of the Supreme Court, the district court held that, "where a manufacturer *sells* products to its distributor subject to territorial restrictions on resale, a *per se* violation of the Sherman Act results."⁷⁶ This determination was not tested on appeal. Instead, the government contended that the lower court's decree of invalidity should be extended to all territorial restrictions, regardless of the nature of the agreement by which the distributor acquired possession of the product. The government also urged that the agreements limiting the distributor's resale to franchised retailers should be enjoined. Finally, the government asked the Court to prohibit the restrictions on the retailer's right to resell to a non-franchised retailer.

In ruling upon the government's contentions, the Court adopted a dichotomous treatment of vertical restraints. Apparently, the *per se* validity of the restraint is conditioned upon whether the distributor has *purchased* the product. The Court extended the lower court's *per se* invalidity rule to all resale restrictions in the situations in which the Schwinn product was sold to the retailer or distributor.

Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred . . . is a *per se* violation of § 1 of the Sherman Act.⁷⁷

The Court, however, rejected the opportunity to extend the *per se* rule to situations in which the distributor did not purchase the product. The government contended that limiting the invalidity decree to sale transactions provided only a partial remedy. Allocation of territory and restriction to franchised retailers can only be eliminated, the government urged, by enlarging the decree to forbid these practices however effected. The Court disagreed.

We conclude that the proper application of § 1 of the Sherman

76. *Id.* at 1859.

77. *Id.* at 1867.

Act to this problem requires differentiation between the situation where the manufacturer parts with title, dominion, or risk with respect to the article, and where he completely retains ownership and risk of loss.⁷⁸

While an extended critique of the *Schwinn* decision is beyond the scope of this paper, certain aspects of the Court's decision must be noted. The Court prefaces its remarks on the validity of the restraints by noting that the government did not contend for a per se rule. This, the Court states, requires an analysis of the market impact of the restraints. The Court's analysis, however, consists of no more than a cursory comment on a limited aspect of the market situation. This comment is followed by an abrupt reversal of emphasis and the adoption of the per se rule without a clear statement of the necessity for this new rule.

The reasons advanced by the Court for the adoption of the per se rule should also be noted. The Court assigns two factors in support of the rule. These are: 1) the restrictions violate the rule against restraints on alienation, and 2) the rule is an extension of the district court's decree, necessary to avoid inconsistency. Clearly, the ancient rule against alienation restraints is a doubtful basis for a modern antitrust decision. The impact of the district court decree is also questionable. As noted by the dissent, the district court decision may have been based on a finding of a horizontal restraint.⁷⁹ As such, it would not compel a similar per se rule in the context of a pure vertical restraint. The weakness of the Court's reasons is especially noteworthy in the context of recent Court decisions refusing to apply a per se rule to restraints of a much harsher nature than the *Schwinn* restrictions.⁸⁰

Finally, if the Court, in fact, intends to prohibit all franchise agreements involving sold goods, it is eliminating a traditional and effective mode of business. Franchising arrangements provide an avenue for small businesses to compete with larger enterprises. Indeed, the Court recognizes the value of this traditional function when it affirms the use of a rule of reason in connection with consignment or agency agreements.

Perhaps, in the final analysis, the Court is merely imposing an additional cost on doing business by franchise. Generally, little difficulty would be encountered in making the transition to an agency or consignment other than increased cost. One wonders, however, why this additional cost must be assessed. One also wonders whether the Court will

78. *Id.* at 1865.

79. *Id.* at 1871.

80. *See White Motor Co. v. United States*, 372 U.S. 253 (1963).

retreat from this per se rule when confronted by a manufacturer who is unable to make the transition.

Restraints in the Context of the Newspaper Carrier

The route system of newspaper delivery clearly involves vertical rather than horizontal restraints. The restrictions are initiated by the publisher and there is no evidence that the carriers are able to alter the restrictions. Accordingly, the system appears to be within the prescriptions of the *Schwinn* case.

Before the standards of the *Schwinn* case are applied in the newspaper delivery context, a factual distinction should be noted. The invalid *Schwinn* restrictions clearly affected distributors and retailers with respect to their resale to other retailers. However, the invalid restrictions did not as clearly affect the sale of the product to the public. On the other hand, the newspaper restrictions directly control the "retailer's" sale to the public. This distinction may be of value in view of the Court's prior tendency to allow justification for territorial restrictions on the retailer while disallowing attempted justification of restrictions on wholesale distributors.⁸¹ It should be remembered, however, that the Court in *Schwinn* did not mention this distinction.

As indicated in Appendix I and II, the typical route delivery system involves a sale of the newspapers to the carrier. Applying the *Schwinn* per se standard, the route restrictions attendant to this sale appear to be invalid. This apparent invalidity may, however, be of little consequence to the publishers. The consignment device would appear to be a readily available alternative to the sale contract.

CONCLUSION

The premise of the entire antitrust discussion was the fact that newspaper publishers have successfully contended that carriers are independent contractors. When a manufacturer chooses to deal with independent contractors certain results follow. All of these results have been favorable to the newspaper publishers. The publishers have been able to escape the responsibilities of civil tort liability and also the requirements of modern social legislation. If publishers want their carriers to be independent contractors, let them be independent contractors. However, if they are independent contractors, the carriers should also have all the rights and privileges of independent contractors. At the expense of an old cliché, it seems that newspaper publishers have been having their cake and eating it too. They have enjoyed all the advantages of agency with none of the responsibilities.

81. See, e.g., *White Motor Co. v. United States*, 372 U.S. 253 (1963).

If, as the publishers assert, the carriers are independent contractors, it would appear that the present distribution system may be violative of the antitrust laws. Clearly, any contractual limitation of resale price is a violation. Also, in view of the *Schwinn* decision, the validity of the territorial restrictions embodied in the route system is doubtful.

APPENDIX I

THE VIDETTE-MESSENGER

Lease

Route No.

AGENTS OR CARRIER'S LEASE

Date, 19

The undersigned acknowledges receipt from THE VIDETTE-MESSENGER, of Valparaiso, Indiana, of a list of subscribers who purchase THE VIDETTE-MESSENGER and who live on a certain paper route in which list of subscribers and paper route is hereby leased to me by THE VIDETTE-MESSENGER and in consideration thereof I hereby agree to and with THE VIDETTE-MESSENGER as follows:

(1) That I will sell and regularly and promptly deliver THE VIDETTE-MESSENGER to all of said subscribers, at the established rate therefor.

(2) That I will not sell or deliver any other newspaper to any person without the written consent of THE VIDETTE-MESSENGER.

(3) That I will do all in my power to promote and extend the circulation of THE VIDETTE-MESSENGER.

(4) That prior to giving up said paper route I will give THE VIDETTE-MESSENGER two weeks notice of my intention so to do.

(5) That I will not turn over said list of subscribers to any person nor disclose the name of any subscriber for THE VIDETTE-MESSENGER without first obtaining the consent of THE VIDETTE-MESSENGER.

(6) That I have not paid any money to any person for this list of subscribers and that I will not sell it to any person or persons for any money. That I will not collect in advance from any of my subscribers. That should I do so I shall become responsible for any such amount under my bond and deposit.

(7) That I will regularly and promptly pay, each for all copies of THE VIDETTE-MESSENGER sent to me in accordance with my orders, at the established wholesale rate.

(8) THE VIDETTE-MESSENGER may cancel this lease at any time for good and sufficient reason and when so cancelled I agree to forthwith turn over to THE VIDETTE-MESSENGER, or its authorized representative, the names of all subscribers to whom I had been delivering THE VIDETTE-MESSENGER and I agree to keep a written list of all such persons with their street addresses and that such written list shall be the property of THE VIDETTE-MESSENGER.

(9) The Carrier Salesman shall deposit with THE VIDETTE-MESSENGER \$..... THE VIDETTE MESSENGER shall add thereto interest at the rate of three per cent (3%) per annum. The deposit with said interest shall be held by THE VIDETTE-MESSENGER for the purpose of securing to it the performance by the Carrier Salesman of all his agreements, and for the purpose of securing to it the payment of all claims hereafter accruing to THE VIDETTE-MESSENGER against the Carrier Salesman. Two weeks after the termination of this contract (whether by THE VIDETTE-MESSENGER or by the Carrier Salesman) THE VIDETTE-MESSENGER shall refund such part of the deposit as shall remain after satisfying all claims accruing to THE VIDETTE-MESSENGER against the Carrier Salesman since the date of this contract.

Carrier's Signature

AGENTS OR CARRIER'S REPORT

This must be filled in

Carrier's Full Name

Street Address

Town Age

Occupation or Business or School Attended

Phone

Date New Carrier is to Begin Delivery

Date New Carrier Starts to Collect and from Which His First Payment is Due

It is mutually understood and agreed by and between the parties hereto that the carrier, being a minor, his parent hereby agrees to and with THE VIDETTE-MESSENGER to be responsible for the performance of each and all of the obligations and agreements herein contained.

PARENT

THE VIDETTE-MESSENGER

APPENDIX II

Circulation Department
The Post-Tribune
1065 Broadway
Gary, Indiana 46402
Phone 885-7531

THE POST-TRIBUNE
AGENT'S OR CARRIER'S LEASE

Route No. _____
District _____
Date _____

The undersigned acknowledges receipt from THE POST-TRIBUNE, hereinafter sometimes referred to as the "Company," of a list of subscribers (collection book) who purchase THE POST-TRIBUNE and who live on a certain paper route in _____, which list of subscribers and paper route is hereby leased to me by the Company and in consideration thereof I hereby agree to and with the Company as follows:

- (1) That I will sell and regularly and promptly deliver THE POST-TRIBUNE to all of said subscribers, at the established rate therefor.
- (2) That I will not sell or deliver any other newspaper to any person without the written consent of the Company.
- (3) That I will not attach to THE POST-TRIBUNE any outside material of any kind without first securing the written consent of the Company.
- (4) That I will do all in my power to promote and extend the circulation of THE POST-TRIBUNE.
- (5) That prior to giving up said paper route I will give the Company two weeks' notice of my intention to do so.
- (6) That I will not turn over said list of subscribers to any person nor disclose the name of any subscriber for THE POST-TRIBUNE without first obtaining the consent of the Company.
- (7) That I have not paid any money to any person for this list of subscribers and that I will not sell it to any person or persons for any money.
- (8) That I shall be liable for advance collections beyond the cancellation date of this contract.
- (9) That I will regularly and promptly pay, each designated Saturday before _____ M., for all copies of THE POST-TRIBUNE sent to me in accordance with my orders, at the established wholesale rate.
- (10) The Company may cancel this lease at any time for good and sufficient reason and when so cancelled, I agree to forthwith turn over to the Company, or the authorized representative of the Company, the names of all subscribers to whom I have been delivering THE POST-TRIBUNE and agree to keep a list of all such persons with their street address and that such list shall be the property of the Company and subject to its inspection at any time.

CARRIER: _____

Carrier's Full Name _____ Phone _____

Age _____ Birthday _____

Street Address _____ City _____ Zip _____

School attending _____

Date new carrier is to begin delivery _____ First Payment Due _____

Remarks: _____

DEPOSIT

I agree to make a deposit of \$ _____ to cover the cost of any papers which I have received and for which I have not paid, or any amount for which I should become indebted to the Company.

I agree to pay this deposit at the rate of \$ _____ down and \$ _____ per period for _____ payments, or until the total deposit has been paid. Any balance remaining of said deposit, after all my bills are paid, shall be returned to me within thirty days of such time as I shall have surrendered the route to the Company.

The above is in no way a receipt for down payment on deposit.

CARRIER: _____

It is mutually understood by and between the parties hereto that, the carrier being a minor, his parent, _____

hereby agrees to and with the Company to be responsible for the performance of each and all of the obligations and agreements herein contained.

Place of employment of Parent _____ CARRIER: _____

Daily drop _____ PARENT: _____

Daily rain drop _____ COMPANY: THE POST-TRIBUNE

Sunday drop _____ By _____

W. C. Todd, Circulation Director

APPENDIX III

Excerpt from American Newspaper Publishers Association General
Bulletin

Factors used in determining the independent contractor status:

1. Publisher's fixing route limits.
2. Ownership of subscription list.

3. Requiring prompt pick-up or delivery, and otherwise determining hours.
4. Fixing wholesale and retail prices ("We suggest you control the wholesale price only since in most cases the newspaperboy will charge the publicly advertised retail price.")
5. Retaining power in newspaper only to terminate on little notice or without notice.
6. Furnishing supplies or vehicles.
7. Restricting competition or non-competitive activities.
8. Giving instructions in detail of route operation.
9. Subscriber complaints.
10. Imposition of fine or penalty for missed deliveries.
11. Bearing of losses from operation of route; reimbursement of expenses; extensions of credit to customers; unluccrative routes; special allowances; returns.
12. Right of paper to approve transfer of route by newspaperboy.
13. Right of newspaperboy to obtain helpers and substitutes.
14. Contractual provision prohibiting insertion of advertisement or other foreign matter.
15. Prepaid subscribers.
16. Requirement of sale and collection for reader insurance and magazine subscriptions.
17. Requirement of bonds, deposit or guaranty.
18. Designating place of delivery and matter of travelling route.
19. Required attendance at meetings and other promotional activities.
20. Assistance in servicing route, making collections and getting substitutes.
21. Bonuses and prizes.
22. Requiring collections at stated intervals.
23. Specific language in contract indicating independent contractor status.