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Labor

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XI. LABOR

A. *Producers and Associates Are Not Employees Under NLRA*

The Producers Guild of America (PGA)[1] has fought a long and hard battle for unionization against the management of various television and motion picture production companies.[2] One of the many obstacles faced by the PGA was the California Court of Appeals. In January 1974, the court invalidated PGA's last industry-wide contract,[3] thus temporarily stopping its attempts at entering into a collective bargaining agreement with management.

In its most recent attempt at unionization the PGA, in January of 1983, took its case to the Regional Director of the National Labor Relations Board (NLRB). Twenty PGA members testified that producers and associate producers are in fact employees within the meaning of the National Labor Relations Act (NLRA) and thus are entitled to collectively bargain. Such testimony was in opposition to management's claim that these producers were managers and supervisors and thus barred from unionizing.[4] At an administrative hearing, NLRB Re-

1. The PGA is made up of approximately 800 producers and associate producers from throughout the country, many of whom have previous experience as writers and directors. Although the PGA requires that its members be either a producer or associate producer, it does not bar them from membership in other guilds or unions. Therefore, producers and associate producers, who among themselves are prohibited from unionizing, can enjoy the benefits of collective bargaining if they are employed with another labor organization, as long as such employment is not in a producer or associate producer capacity. Alliance of Motion Picture and Television Producers and Its Member Cos. v. Producers Guild of America, Inc., NLRB Case No. 31-RC-5435 (Apr. 15, 1983).

2. The Alliance of Motion Picture and Television Producers (AMPTP) opposed the PGA's attempts at unionization. The AMPTP is made up of the following member companies: Aaron Spelling Productions, Inc.; Columbia Pictures Industries, Inc.; Consolidated Film Industries; Deluxe Laboratories, Inc.; Embassy Television/Tandem Productions, Inc.; Lorimar Productions, Inc.; MTM Enterprises, Inc.; Metro-Goldwyn Mayer Film Company; Metro-Goldwyn Mayer Film Laboratory; Movie Lab, Hollywood, Inc.; Paramount Pictures Corporation; Talent and Production Payments, Inc.; Techicolor, Inc.; the Burbank Studios; the Ladd Company; the Leonard Goldberg Company; Twentieth Century Fox Film Corporation; United Artists Corporation; Universal Studios, Inc.; Walt Disney Productions, Inc.; Warner Brothers, Inc.; and Metromedia Producers Corporation. Producers Guild of America, supra note 1, at 12.

3. In Knopf v. Producers Guild of America Inc., 40 Cal. App. 3d 323, 144 Cal. Rptr. 782 (1974), the California Court of Appeals held that the collective bargaining agreement between the PGA and the AMPTP was invalid because the PGA was dominated by "employers" who are barred from entering into collective bargaining agreements by Section 7 of the National Labor Relation's Act.

4. *See generally* The Daily Reporter, April 19, 1983, at 1, col. 4 and The Hollywood Reporter, April 19, 1983, at 1, col. 2.

gional Director Roger Goubeaux turned down the PGA's petition for unionization, finding, among other things, that the producers and associate producers often share in the profits of productions, manage financial, physical and technical aspects of the production, represent management and engage in the supervision of various employees.[5] Such findings led Goubeaux to hold that producers and associate producers were both managers and supervisors under rules provided by the Act[6] and thus were prohibited from unionizing.

The PGA appealed the Regional Director's decision to the Head Office of the NLRB in Washington, D.C. A three-member panel voted unanimously to reject the appeal on the ground that it did not raise any substantial issues sanctioning a review of the decision, thus ending the PGA's bid for union status, as the right to appeal had been exhausted.[7]

The NLRA gives all "employees" the federal right to self-organize. The Act provides in pertinent part:

> [E]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .[8]

Section 2(3) of the Act defines "employees" as including all employees except those hired as supervisors.[9]

The evidence showed that producers are responsible for the supervision of the creative, financial and technical areas of film production and post production. Associate producers act on the direct authority bestowed upon them by the producers. They are free to perform duties on their own or to supervise those duties delegated to them by the producer.[10]

Both producers and associate producers are hired by an employer prior to the commencement of general employment for the production. Producers often supervise writers in the development of the screenplay,

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5. *See generally Alliance*, *supra* note 1.

6. Section 2(11) of the NLRA, 29 U.S.C. § 152(11) 1980, states: "[t]he term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

7. The Daily Variety, July 1, 1983, at 1, col. 1.

8. NLRA § 7, 29 U.S.C. § 157 (1980).

9. *Id.* at § 2(3), 29 U.S.C. § 152(3) (1980).

10. *See generally Alliance*, *supra*.

prepare itemized budgets for approval by executives of the employer and are responsible for all costs regarding the physical production of the film. The producers negotiate and are responsible for much of the costs of leased facilities, set construction, wardrobe, labor and materials, script, makeup and hair styling, trucking and post production costs.[11]

Producers report to management on a daily basis and in turn relay information back to the film set. The primary responsibility of the producers and the associate producers is to insure that all phases of the production keep within their budget limits by restricting expenditures, diverting amounts budgeted from one department to another and approving day to day production expenditures.[12]

The producers and associate producers are actively involved in the actual filming of a picture. They routinely review daily filming and can order refilming; the directors, writers and editors are under the supervision of the producer. The post production work of dubbing and final cuts are also the responsibility of the producers. The record shows that producers and associate producers are often responsible for the hiring of directors, associate directors, production managers, art directors, writers, crew, composers, stage managers, actors, cast, set directors, wardrobe personnel, stage managers, script supervisors, makeup and hair artists, and production office personnel.[13]

In addition, producers have had authority to impose discipline, including the firing of personnel, handling work schedule and payroll problems and disputes between directors and stars.[14]

For the above reasons and under the holding of *Writers Guild of America West Inc.*,[15] the regional director held that producers are supervisors within the meaning of the Act.

The PGA asserted that producers and associate producers are not managerial employees. Managerial employees are those who are: (1) so closely related to or aligned with management as to place themselves in a position of potential conflict of interest between the employer and his fellow workers, or (2) are engaged in formulating, determining and effectuating the employer's policies or (3) have discre-

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. In Writers Guild of America West Inc., 217 NLRB 957, the NLRB held that executive producers, producers and associate producers are supervisors within the meaning of the NLRA.

tion, independent of an employer's established policy, in the performance of duties. *Iowa Southern Utilities Co.*[16]

The record clearly indicates that producers and associate producers effectuate management policies, by controlling both the aspects of the production and the methods in achieving the desired results of studio management. Producers exercise independent judgment regarding schedules, locale, film direction and quality, length and what facilities will be used in the post production. They engage in negotiating financial arrangements, leases, the budgeting of funds, the salaries of those they hire, and are sometimes given a share in a percentage of the profits of production.[17]

Producers and associate producers are considered "arms of management." They often formulate and implement management policy. The threat of their being exploited by management is minimal.[18]

The federal right to self-organization was designed to combat exploitation of workers by management. Since producers and associate producers are essentially "managerial" employees, their attempt to self-organize is of little or no merit. The Act explicitly excludes "supervisory" employees from the right to self-organization. Specific statutory lanaguage is necessary to implement such an inclusion.

The decision by the NLRB has effectively stopped PGA's attempt at unionization. Other groups contemplating unionization should take notice of the regional director's finding to determine whether they too will fall into the managerial and supervisory category. As this decision indicates, the Act did not intend "arms of management" to unionize, but instead intended to protect those groups of workers who were not afforded autonomy and were in a position to be exploited. Producers and associate producers are not members of the class of employees that the Act intended to protect. To allow producers and associate producers to collectively bargain would defeat the purpose of the NLRA.

Bob Nunez

B. *Standup Comedians Are Independent Contractors*

The Administrative Law Judge (ALJ), Maurice Miller, found that stand-up comedians regularly performing in the Comedy Store are in-

16. 207 NLRB 341, 345.
17. *See generally Alliance, supra.*
18. *Id.*

dependent contractors, and therefore, not protected by the National Labor Relations Act.[1]

The Comedy Store is a night-club, where comedians perform stand-up routines for club patrons. In addition to entertaining the customers of the Comedy Store, comedians also develop their comedy routines and, with the help of the owner, have their talent observed by major producers which may result in significant advancements to their careers. Comedians regard the Comedy Store as "the only game in town," where their acts can be developed and given exposure to television and other media producers.[2]

Prior to May, 1979, the majority of the Comedy Store performers were not paid for their services. Only big name comedians were compensated.[3] In March, 1979, comedians of the Comedy Store organized into the Comedians for Compensation (CFC), and on March 27, the CFC called a strike against the Comedy Store. On May 3, 1979, an agreement was reached with the Comedy Store and the CFC where the comedians would return to work for a minimum compensation rate.[4] On July 3, CFC changed its name to the American Federation of Comedians (AFC) and passed articles of association, by-laws for the union, and specified the amount of annual dues to be paid.[5]

On July 17, 1979, the Comedy Store threatened to withdraw recognition of the AFC and rescind the agreement.[6] Confronted with this threat, the AFC voted unanimously to assign its bargaining rights to the American Guild of Variety Artists (AGVA).[7] The AGVA was held to be the proper bargaining representative for the comedians of the Comedy Store.[8]

The Comedy Store claimed that it was not obligated to bargain with the AGVA because the comedians represented by the AGVA were independent contractors, not employees of the Comedy Store. The AGVA filed an unfair labor practice action against the Comedy Store for failure to bargain with the proper representative of the comedians.[9] This hearing before the ALJ was in response to this complaint.

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1. The Comedy Store, Case No. 31-CA-9219, -10067 (Dec. 16, 1982); summarily affirmed 265 NLRB 183 (1982).
2. *The Comedy Store*, Case No. 31-CA-9219, -10067, pages 27-28 (Dec. 16, 1982).
3. *Id.* at 22.
4. *Id.* at 8.
5. *Id.* at 8-9.
6. *Id.* at 10.
7. *Id.*
8. *Id.* at 11.
9. 28 U.S.C.A. § 158(a)(1,3,5) (West 1976). NLRA § 8(a)(5).

Independent contractors are not protected by the National Labor Relations Act.[10] Therefore, in order for the Comedy Store to have an obligation to bargain with the AGVA, the comedians must be determined to be employees of the Comedy Store. To determine whether these comedians were employees or independent contractors of the Comedy Store, the ALJ used the common law agency test of the right to control the "means" as well as the "result" of the work performed.[11] In applying this test, the ALJ reviewed all aspects of employment at the Comedy Store.

To become a regular performer at the Comedy Store, a comedian must audition with the owner of the Comedy Store. Successful auditions are given regular "spots" (performance times). The sole judge of the auditions is the owner.[12] Comedians advance by being given more popular times, and this advancement is at the sole discretion of the owner.[13]

Comedians are expected to be on time for their performances, and if late, could be subject to discipline.[14] Generally, discipline takes the form of fewer performance slots or slots poorly valued by comedians for their lack of attendance or exposure.[15]

The comedians were directly responsible for developing and refining their routines, providing their own costumes and props, and writing the content and order of their jokes.[16] However, the owner of the Comedy Store could suggest the content and style of a comedians performance.[17] If the comedian disregarded the advice of the owner, termination could result.[18] The owner also required the comedians to attend group sessions, and if these sessions were not attended, the comedian could be subject to discipline.[19] The comedians, however, did their own advertising;[20] some worked for night clubs other than the Comedy Store;[21] and others had full-time day jobs.[22] Furthermore, when the comedians were paid, no taxes or deductions were withdrawn

10. 28 U.S.C.A. § 152(3) (West 1976).
11. *The Comedy Store* at 37.
12. *Id.* at 14.
13. *Id.* at 48-49.
14. *Id.* at 17.
15. *Id.* at 28.
16. *Id.* at 18.
17. *Id.*
18. *Id.* at 31.
19. *Id.* at 20.
20. *Id.* at 32.
21. *Id.* at 23.
22. *Id.* at 35.

from their checks.[23]

The ALJ found that the owner of the Comedy Store had the right to control the means of the performance as well as the result sought.[24]

> In language consistent with the *Restatement of Agency* definition, previously noted, the ongoing relationship between Respondent's [the Comedy Store] proprietor and Respondent's recognized "regular" performers, described and defined within the present record, reflects—so I find—their shared understanding and consequent tacit "agreement" that Ms. Shore [owner of the Comedy Store], realistically, possesses a right of control which she "may exercise" with regard to "details" which, within her view, have affected, or might affect, their comedy performances.[25]

Although the ALJ found that the common law principles of agency determined that the relationship of the comedians to the Comedy Store was that of an employer/employee,[26] the ALJ did not rest his holding on that issue. He included all aspects of employment at the Comedy Store,[27] including an analysis of "the societal consensus" (a novel factor which he does not support by case or statute).[28] Notably however, the ALJ did not consider policy factors or economic realities in his analysis of this case.[29] The ALJ concluded that comedians form a distinct occupation and display distinct "entreprenurial" characteristics, and held that comedians working for the Comedy Store are independent contractors, not employees of the Comedy Store. Therefore, the NLRB had no jurisdiction over this dispute.[30]

The immediate result of this decision is that the comedians and regular night club performers are not protected by the National Labor Relations Act (NLRA). The Comedy Store, therefore, can repudiate its agreement with the performers without liability to the NLRB. The ALJ is not unaware of this result nor with the injustice involved. The

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23. *Id.* at 27.
24. *Id.* at 50-51.
25. *Id.* at 54.
26. *Id.* at 50-51.
27. *Id.* at 35.
28. *Id.* at 40. This is truely a novel factor apparently based upon Marcus Aurelius, *Meditations*. *Id.* at 58. Although it is not the intention of this author to dispute the wisdom of the Second Century Roman Empiror/Philosopher, his work is not binding authority. It is also notable that Aurelius' son, the recipient of *Meditations*, began the political decline that ended in the collapse of the Western Roman Empire. It is sincerely hoped that this continued use by decision makers today, will not have a similar result.
29. *The Comedy Store* at 43.
30. *Id.* at 59-60.

ALJ sees that a wrong may be done, and that a remedy may be needed, "but which this board, functioning within its proper jurisdictional sphere, cannot provide—that remedy must, obviously be pursued by some other forum."[31]

However, The *Comedy Store*, read in conjunction with *Hilton Int'l Co. v. NLRB*,[32] makes it appear that no performer would be protected by the NLRA Until the NLRB or the Supreme Court act, performers will continue to be separated into two classes. Those performers who are successful will be able to earn an adequate income at their chosen profession. But, beginning, local, or undiscovered performers will be forced to accept whatever measure of compensation night clubs or hotels wish to provide. By the nature of their jobs, performers do not neatly fall into easily definable classes of employees. However, performers are as dependent upon their paychecks as are the easily definable classes of employees. This is an unfortunate "economic reality" which appears to address the purpose of the National Labor Relations Act.[33]

The determination of "employee" or "independent contractor" status is to be achieved according to the common-law principles of agency.[34] However, economic and policy matters are still to be considered when determining the status of workers as employees or independent contractors for purposes of the application of the NLRA[35] The inclusion of "societal consensus" is a unique factor used to determine agency, a method however, which lacks authority and a concrete method of determination. "Societal consensus" seems to mean no more than what the ALJ considers to be an appropriate bargaining unit.

In common law agency questions, agency is determined by the amount of control which can be exercised, not the amount of control actually exercised.[36] Among the rights most indicative of control is the

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31. *Id.* at 60.

32. Hilton International Co. v. N.L.R.B., 690 F.2d 318 (2d Cir. 1982).

33. N.L.R.A. section 1; 29 U.S.C.A. § 151 (West 1976). "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, . . . by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." *Id.*

34. NLRB v. United Insurance Co. of America, 390 U.S. 254, 256 (1968).

35. Allied Chemical & Alkali Workers of America v. Pittsburg Plate Glass Co., 404 U.S. 157, 168 (1971).

36. Lorenz Schneider Co. Inc. v. N.L.R.B., 517 F.2d 445, 449 (2d Cir. 1975).

right of an employer to terminate his employee.[37] The Comedy Store retained this right to terminate.[38] This factor was not addressed by the ALJ

The employment status of the comedians at the Comedy Store is not entirely clear. The ALJ could have justified his decision on the basis of the common law agency test. However, by finding the comedians to be employees under the common law agency test, and independent contractors under "other" factors (including "societal consensus"), the ALJ departed from accepted methods of employment consideration which resulted in a wrong doing without a remedy.[39] Notably, the common law agency test is meant to include all factors of employment,[40] but the A.L.J. justified his departure from the common law agency test in order to consider "all factors" of employment.[41]

This wrong should be able to be remedied by the wide discretion of agency law and the latitude given by consideration of economic reality and policy consideration used to determine employee status under the NLRA[42] Until the NLRB or the circuit courts affirm performers' rights to organize for collective bargaining, performers only compensation will exist in the form of audience applause and laughter, unfortunately, not acceptable to landlords or grocery stores.

Christopher McIntire

C. *Hotel Musicians Are Not Employees Under the NLRA*

The Second Circuit, in *Hilton International v. NLRB*,[1] held that musicians employed for steady engagements by Hotels of the Puerto Rico Hotel Association are not employees of the hotels. This denies the musicians protection under the National Labor Relations Act.[2]

In 1979, the Federacion de Musicos de Puerto Rico, Local 468, filed an unfair labor practice charge against the Puerto Rico Hotel Association and Hilton International Company for their refusal to bargain with the representatives of musicians employed for steady

37. Kuchta v. Allied Builders Corp., 21 Cal. App. 3d 541, 550, 98 Cal. Rptr. 588, 593 (1971).
38. *The Comedy Store* at 31.
39. *Id.* at 60.
40. Malloy v. Fong, 37 Cal. 2d 356, 370-372, 232 P.2d 241, 249-250 (1951).
41. *The Comedy Store* at 59.
42. 404 U.S. at 168.

1. Hilton International Co. v. NLRB, 690 F.2d 318 (2d Cir. 1982).
2. NLRA § 8(a)(5); 28 U.S.C.A. § 158(a)(5) (West 1976).

engagements.[3] This refusal to bargain with the representatives would have violated section 8(a)(5) of the National Labor Relations Act (NLRA).[4]

Musicians hired for steady engagements typically play for more than one week,[5] some for periods in excess of one year.[6] The hotels determine the working hours and locations where the bands play. At times, the hotels would determine what types of music played and determine the size of the bands.[7] The Hilton Hotel Co. also controlled the conduct of the musicians in order to protect their customers.[8] Hotels paid the band members individually through an employee check which would withhold payroll taxes.[9]

The Administrative Law Judge found that band leaders of long term engagement bands were hotel supervisors, not independent contractors, and that the musicians themselves were hotel employees.[10] The Administrative Law Judge also found the Federacion de Musicos de Puerto Rico to be the proper bargaining representative of the musicians; therefore, the hotel's refusal to bargain with the union violated section 8(a)(5) of the NLRA[11] The National Labor Relations Board (NLRB) summarily adopted the findings of the Administrative Law Judge and required the Hotel Association to comply with the Administrative Law Judge's order.[12] The Second Circuit, Justice Cardamone, reversed.[13]

Independent contractors are not protected by the NLRA.[14] Therefore, in order for the Hotel Association to be obligated to bargain with the representative of the musicians, the musicians must first be found to be employees of the hotel.

To determine whether a worker is an employee or an independent contractor, principles of agency law are applied.[15] Generally, if the employer can control the manner and means of accomplishing the de-

3. 690 F.2d at 319.
4. 28 U.S.C.A. § 158(a)(5) (West 1976).
5. 690 F.2d at 319.
6. *Id.* at 322.
7. *Id.* at 321.
8. *Id.*
9. *Id.* at 322.
10. *Id.* at 320.
11. *Id.*
12. *Id.*
13. *Id.* at 323.
14. 28 U.S.C.A. § 152(3) (West 1976).
15. NLRB v. United Insurance Co. of America, 390 U.S. 254, 256 (1968).

sired result, an employer/employee relationship exists.[16] Although there is no definitive test to determine a worker's status, the more detailed the supervision, the more likely that an employer/employee relationship is being maintained.[17] Yet, if the only control exercised is over the result sought, an independent contractor status is likely.[18]

Factors used to determine whether an employee/employer relationship exists are:

> (W)hether the proported employee is engaged in a distinct occupation or business; whether the work involved is usually done under an employer's direction or by an unsupervised specialist; the skill involved; who supplied the instrumentalities and place of employment; the method of payment (by the time or by the job); whether the work is part of the employer's regular business and/or necessary to it; and the intent of the parties creating the relationship.[19]

The Second Circuit found that the control the hotels had included: requiring certain types of music, working hours of the musicians, performance location, size of the bands (to produce a certain type of sound), and conduct of the musicians. However, the court held that the means of accomplishing the desired result was in the hands of the band leaders.[20]

The band leaders hired, terminated, instructed, and disciplined the band members.[21] Although musicians were paid from the same payroll service as admitted employees of the hotel and taxes were deducted from the paychecks, the bands usually contracted in advance for a specific amount of payment.[22] Furthermore, musicians were not entitled to the same personnel practices and disciplinary rules that pertained to regular hotel employees.[23]

Other factors considered by the court included: bands were usually contracted through booking agents;[24] some bands had outside per-

16. 690 F.2d at 320.

17. *Id.*

18. Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 449 (2d Cir. 1975). In *Lorenz*, the Lorenz Schneider Co. offered to sell franchises to its employees rather than maintain the employer/employee relationship. The employees accepted this offer. The NLRB determined that the franchisees were still employees for purposes of the NLRA. The Second Circuit reversed.

19. 690 F.2d at 320-321; *see e.g.* Restatement (Second) of Agency § 220(2).

20. 690 F.2d at 321.

21. *Id.*

22. *Id.* at 322.

23. *Id.* at 321.

24. *Id.*

formances with other night clubs or television performances;[25] the bands usually provided their own instruments;[26] and hotels can not terminate an individual band member, only the entire band.[27]

> Upon careful consideration, we find that although there is some evidence to support the Board's determination, it does not constitute substantial evidence when viewing the record as a whole. The evidence instead establishes with sufficient certainty that the band leaders are independent contractors who employ the musicians who perform in the bands.[28]

The result for the entertainment field is that only big name bands will be able to make an adequate living as musicians. Musicians in local bands, deprived of their power to bargain for their wages and conditions of employment, will have to accept whatever compensation the hotels wish to make. Individual musicians in the Second Circuit will fall into two classes; those in big name bands with adequate earnings, and those in little known or local bands unable to influence the amount of their compensation.

In common law agency questions, the issue presented is not the amount of control exercised, but the amount of control which can be exercised.[29] Among the rights most indicative of control, is the right to terminate for cause.[30] The hotels retained the right to prescribe the conduct of the musicians and apparently retained the right to control bands by the threat of termination.[31] These factors do not appear to have been given proper consideration by the Second Circuit.

The court justified overturning the decision of the NLRB by the decision of *Associated Musicians of Greater Newark, Local 16*.[32] Yet, *Associated Musicians* involved an entirely different question of law. *Associated Musicians* dealt with the issue of whether the Associated Musicians, Local 16, called an illegal strike against an employer. The independent contractor status of musicians employed by the band agents involved, Aimes and Herman, was not disputed.[33] Aimes was a

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 323.
29. 517 F.2d at 449.
30. Kuchta v. Allied Builders Corp., 21 Cal. App. 3d 541, 550, 98 Cal. Rptr. 588, 593 (1971).
31. 690 F.2d at 321.
32. *Id.* at 323; Associated Musicians of Greater Newark, Local 16, 206 NLRB 581 (1973).
33. 206 NLRB at 588.

corporation whose activities engaged in providing bands to clients for dances, bar mitzvahs, shows, etc.[34] Sometimes, Aimes would provide up to five bands per day for various performances.[35] Herman was also a corporation involved in the same activities as Aimes. Herman employed up to 12 orchestras as a time, and over 200 musicians. Herman paid these musicians himself, deducted taxes from their checks, and had individual contracts with his musicians.[36] The Second Circuit failed to note that the musicians under Aimes and Herman were considered employees of Aimes and Herman, not employees of the band leaders.[37] *Associated Musicians* supports the holding of the NLRB, not the Second Circuit.

A further issue not addressed by the court in *Hilton International* is the question of whether the hotel would be liable for an injury caused by a musician. If the hotel would be liable for such an injury, the musicians are employees of the hotel.[38] Additionally, the court did not examine the special policy considerations and economic realities to be taken into account when addressing the issue of agency in the context of the NLRA Although common law agency standards are to be used to determine a workers status, "(i)n doubtful cases, resort must still be had to economic and policy considerations to infuse section 2(3) with meaning."[39]

The prior decision of the Second Circuit in *Herald Co. v. NLRB*[40] conflicts with the decision of *Hilton International*. The Herald Co., a newspaper publisher and distributor, refused to recognize and bargain with the representatives of the distribution employees. The company claimed the employees were independent contractors, not employees. The distributors were free to hire substitutes and select delivery boys,

34. *Id.* at 584.

35. *Id.*

36. *Id.* at 584-585.

37. *Id.* at 588.

38. 517 F.2d at 452.

39. Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 168 (1971). In 1944, the Supreme Court in NLRB v. Hearst Publications, 322 U.S. 11 (1944), decided that the term "employee" was to be determined with reference to the purpose of the N.L.R.A. and given wide application. *Id.* at 129. Congress reacted to the Court's decision by specific exclusions of independent contractors in the Taft-Hartley Amendment in 1947. See N.L.R.A. § 2(3). The Supreme Court responded in United Insurance by holding that common-law agency principles were to be used to determine an employee's status. See 390 U.S. at 256. However, "(a)lthough Hearst Publications was thus repudiated, we do not think its approach has been totally discredited. In doubtful cases (sic) resort must still be had to economic and policy considerations to infuse § 2(3) with meaning." 404 U.S. at 168.

40. Herald Co. v. NLRB, 444 F.2d 430 (2d Cir. 1971), *cert. denied*, 404 U.S. 945 (1971).

plan their own work schedules, decide whether or not to extend credit to their customers, and provide their own vehicles and transportation. Distributors were not given any vacation, holiday, or fringe benefits by the company and some distributors held other jobs. Yet, the Herald could fine distributors for customer complaints, had exclusive control over advertising, and exercised substantial control over the distributor's immediate income.[41] The NLRB found the distributors were employees of the Herald Co., and the Second Circuit affirmed.[42]

The standard of review exercised by the court does not comport to the standard of review established by the U.S. Supreme Court in *NLRB v. United Insurance Co. of America*.[43] A ruling by the NLRB should not be set aside just because a court would decide the case differently.[44] Even though the issue of agency requires no special administrative expertise, if presented with two conflicting views, the court should affirm the finding of the NLRB.[45] The Second Circuit reversed because there was a lack of substantial evidence of the decision of the NLRB. However, the Second Circuit recognized the basis for the NLRB's decision.[46] Although there is not a specific definition for "substantial evidence", substantial evidence is not to be interpreted in a manner which would give the appellate court justification to reverse a holding of the NLRB which the appellate court would have decided differently.[47]

Hilton International, read in conjunction with *Herald Co.*, makes it difficult to determine what the Second Circuit would consider an appropriate bargaining unit. The result is that employees organizing for collective bargaining, especially in the entertainment industry, will be unable to determine whether theirs is in appropriate bargaining unit until their case is reviewed by the Second Circuit. The time delay and extra cost of the appellate process will have the unfortunate effect of discouraging employees from engaging in the risks of collective bargaining. The Second Circuit reversed the NLRB on the basis of the court's interpretation of "substantial evidence." Unfortunately, musi-

41. *Id.* at 434.
42. *Id.* at 435.
43. 390 U.S. at 254.
44. *Id.* at 260.
45. *Id.*
46. 690 F.2d at 323.
47. 390 U.S. at 260.

cians throughout the Second Circuit bear the cost of this court's terminological application.

Christopher McIntire