

# Legal Distinction Between Employee and Independent Contractor as Applied to Collective Bargaining Activities in Timber Harvesting

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## Abstract

Collective bargaining attempts by timber harvesting labor groups is often complicated by lack of a clear legal distinction between "employees" and "independent contractors." The primary criterion to make the distinction — the "right-to-control" test of common law — has now been amplified by a number of secondary tests, including: 1) the right to discharge; 2) the degree of skill required by the worker; 3) permanency or length of service; 4) ownership or extent of personal investment in equipment and facilities; 5) opportunities for profit or loss; and 6) method of payment (by time or by job). Several other guidelines also exist, including the question of ownership of stumpage, a factor peculiar to timber harvesting cases.

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WHAT IS the legal distinction between an employee and an independent contractor? Forest industry firms often confront this question with regard to individuals engaged in timber harvesting activities. More specifically, it has been at issue in several recent collective bargaining attempts by various woods labor groups. This article discusses factors which distinguish between employee and independent contractor under the labor relations laws, and the application of these factors in forest industry cases.

## Background

The right to organize and bargain collectively with employers over wages, hours, and working conditions is granted to employees by the National Labor Relations Act, as amended.<sup>1</sup> This Act imposes duties and obligations upon both parties in collective bargaining. However, provisions of the Act apply only if an employer-employee relationship legally exists. This employment relationship is also necessary if workers are to be exempt from the

antitrust laws while involved in collective bargaining.<sup>2</sup> Persons who are classified as independent contractors rather than employees may not form labor organizations for collective bargaining purposes. Nor may they picket and engage in boycotts in restraint of trade. Employers have no responsibility under the National Labor Relations Act toward such persons.

Although this difference in status is important, the legal distinction between employee and independent contractor is often not clear. The problem usually arises in situations involving individuals who perform services away from a plant or office and are not subject to direct supervision, as in timber harvesting. Depending upon the conduct of the parties involved, persons thought to be engaged as independent contractors may sometimes be legally found to be employees when disputes occur.

The many arrangements by which timber is cut and delivered to wood-using establishments can pose a number of confusing situations with respect to labor negotiations. Can those who cut wood for a producer organize and bargain collectively with the company that buys the wood? Or must they do so with the producer? If a dealer is involved, can they negotiate with him? Is a producer an agent of the company, an employee, or both? If he sells to a dealer, is he the dealer's agent or his employee? Or is he an independent contractor? Must producers bargain collectively with the workers who cut

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<sup>2</sup>For example, the Clayton Anti-Trust Act provides that an employer in a labor dispute may not be granted an injunction against employee actions unless threatened with irreparable property damage for which legally recoverable damages would be inadequate. And the Norris-LaGuardia Act prevents the federal courts from issuing injunctions in labor disputes at the behest of employers when the employer-employee relationship is the matrix of the controversy.

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<sup>1</sup>29 USCA 151 et seq.

for them? Wherever an employer-employee relationship is found, collective bargaining under the National Labor Relations Act is possible, provided employees choose to elect a bargaining representative. To determine whether or not an employment relationship exists in a specific situation, however, requires an examination of the pertinent statutes, as well as administrative and court decisions.

The National Labor Relations Act (NLRA)<sup>1</sup> states that the term "employee" as used in the Act does not include independent contractors or supervisors. The Act includes as an "employer" any person acting as an agent of an employer, either directly or indirectly. But other than these qualifications, there are virtually no other guides in labor relations legislation for making distinctions in status. The Norris-LaGuardia Act,<sup>3</sup> which prevents federal courts from issuing injunctions in labor disputes (except where violence is involved), defines neither employee nor independent contractor. Because of the lack of statutory guidance, one must refer to court decisions and rulings of the National Labor Relations Board (NLRB)<sup>4</sup> for criteria to distinguish between employee and independent contractor.

The NLRA assigns the task of determining whether an individual is an employee for purposes of collective bargaining primarily to the NLRB. A decision by the Board that a specified person is an employee is to be accepted if it has a reasonable basis in law.<sup>5</sup> If it does not, the courts will act. But, what is a reasonable basis in law?

The primary criterion for determining whether the employer-employee relationship exists has traditionally been the so-called "right-to-control" test of common law. Under this test, the relationship usually exists when one person has the right to control and direct the services of another, in both method and result. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but also how, when, and where work is done. On the other hand, an individual is usually deemed to be an independent contractor if he is subject to the direction of another regarding only the result and not the means and methods for accomplishing the result.

However, since passage of the NLRA and related labor legislation, the U.S. Supreme Court has widened the scope of the control test.<sup>6</sup> In the beginning, certain statutory and economic factors not consistent with the traditional common law standards were allowed as the ultimate criterion upon occasion. This trend, though, was curtailed after a few years by passage of the Taft-Hartley amendments to the NLRA in 1947. Thus the ultimate test today is still the "right-to-control."<sup>7</sup> Nevertheless, the trend to secondary factors within the common law framework—as illustrated by the *Hearst* and *Blount*

decisions<sup>6</sup>—has continued. In recent years, therefore, the federal courts and the NLRB have been looking increasingly to secondary tests in order to ascertain the existence of the "right to control." Thus the terms "employer," "employee," and "independent contractor," as used in federal labor legislation, now draw substance from a number of secondary tests.

### Secondary Criteria

At least a dozen substantial secondary tests have been recognized in court and administrative decisions. Factors which are commonly considered include:

- 1) the right to discharge,
- 2) the degree of skill required in the particular occupation,
- 3) the permanency and length of time the services have been performed,
- 4) ownership or extent of personal investment in equipment and facilities,
- 5) opportunities for profit or loss,
- 6) method of payment for services performed,
- 7) whether the parties intended to create an employer-employee or principal-independent contractor relationship,
- 8) the establishment of a work routine or hours of work,
- 9) whether assistants are employed to perform the services,
- 10) who controls those assistants, and
- 11) whether the service performed is an integral part of the principal's regular business.

Selected court cases involving timber harvesting activities illustrate how relevant factors may be interpreted to determine what relationship exists between parties to a dispute.

*Right to discharge.*—An employer-employee status is indicated if the "employer" may terminate the relationship at will. Thus, if a worker is discharged because he failed to adhere to certain rules, it will be suggested that he was an employee and that he was fired because he refused to take instructions. On the other hand, independent contractor status is indicated if the person's termination is for failure to produce a satisfactory result.

For example, in the case of *Nordling v. Johnston*,<sup>8</sup> three experienced loggers were engaged to fell timber at a stipulated price per thousand board feet. Discharged after 1 week, they were held to be employees. The court stated that no single fact is more indicative of the right to interfere in the details of the work than the unrestricted right to end particular service without regard to the final result of the work itself.

*Degree of skill required; permanency of the relationship.*—The need for a high degree of skill may indicate that there is no employer-employee relationship due to the probable lack of control by the "employer." On the other hand, if the worker has performed services for a long time, the permanence of the arrangement may suggest the typical employer-employee relationship.

<sup>3</sup>29 USCA 101-115.

<sup>4</sup>The National Labor Relations Board, an independent body of the federal government, is responsible for administering the National Labor Relations Act.

<sup>5</sup>*National Labor Relations Board v. E. C. Atkins and Co.*, 331 U.S. 398 (1947).

<sup>6</sup>*National Labor Relations Board v. Blount*, 131 F2d 585, 63 SC 995 (1942); *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111 (1944).

<sup>7</sup>*National Labor Relations Board v. United Insurance Co. of America*, 390 U.S. 254 (1968).

<sup>8</sup>*Nordling v. Johnston*, 283 P2d 994, 287 P2d 420 (1955).

Both these tests were involved in *Brown v. E. L. Bruce and Company*.<sup>9</sup> Here a contract timber hauler was held to be an employee despite the fact that he owned his own trucks and equipment because he had been in the exclusive service of the same firm for 12 years. His helpers, engaged by him on a casual basis, were also held to be company employees since no great degree of skill was required of them. The Court said "The fact that a person has no particular calling or occupation, but works at anything he can get to do for anybody who will employ him, is particularly persuasive that he is not an independent contractor."

*Investment in equipment and facilities.*—As indicated in the *Brown* decision, the amount of personal investment by a person in the purchase and maintenance of his tools, equipment, and work facilities is also an important guideline. Substantial investments of this type are not usually found in the customary employer-employee relationship. However, a worker with a large personal outlay for such items may still be classified as an employee if he is subject to extensive detailed instructions as to how he will use the tools and equipment. Yet, even if a person such as a pulpwood producer leases equipment from a dealer or mill, independent contractor status is not precluded. An independent relationship is suggested if the producer has full responsibility for the equipment, its use and maintenance, purchase of fuel, and in deciding the locations where it will be used. Employee status is suggested if use of the equipment is restricted to that which is beneficial only to the dealer or mill.

*Opportunities for profit or loss.*—The opportunity afforded the person for profit or loss is another secondary test. If the circumstances indicate that he does, in fact, have an opportunity for significant profit or loss from his endeavors, independent contractor status is suggested. An example would be a pulpwood producer who usually purchases stumpage himself, makes payments directly to the landowners, and is free to sell his wood to the markets that bring him the best prices.

*Method of payment.*—A worker paid on an hourly or piecework basis will usually be considered an employee, whereas a person paid on a job basis is more likely to be an independent contractor.<sup>10</sup> In the latter situation, the person for whom the work is being done would be most interested in final results. He would not likely give detailed instructions to the worker. The courts have generally tended not to consider such arrangements as drawing accounts or advances, for those who are paid on a job basis, as constituting a salary.

*Actual intent.*—Whether the parties believe they are creating an employer-employee relationship or a principal-independent contractor relationship is important. Even if a written agreement expresses that an individual is an independent contractor, such a relationship may not be valid if the conduct of the parties indicates that this was not their real intention.<sup>11</sup>

*Other tests.*—Other secondary tests sometimes used are whether a person determines his own hours of work,<sup>12</sup> whether he employs his own assistants,<sup>13</sup> whether the person who pays him exercises control over these assistants,<sup>14</sup> and whether the service is an integral part of the principal's regular business.<sup>15</sup>

Although not a common law secondary test, the ownership of stumpage can also be a distinguishing factor that is specific to the timber-harvesting industry. If a timber producer buys a large share of his own stumpage and doesn't cut exclusively on land owned or leased by his purchaser, independent status is indicated. But what about the producer who is assisted in acquiring stumpage and cutting rights? The critical point here is the manner in which the assistance is given. The employer-employee relationship is de-emphasized if the producer himself makes payment to the landowner—and also if the producer doesn't borrow the money directly from a dealer or mill but instead is only aided by them in obtaining it from a third party such as a bank.

### Application

Although some of the factors discussed appear in cases more frequently than others, this does not indicate the importance of a particular test. Any of the tests mentioned may or may not appear in a specific case. Generally, the courts will consider only as many tests as are necessary to determine relationship or status in any given situation. The comparative importance of the various tests that may be used was expressed in one court decision as follows:

No one of such factors is controlling, nor are the various factors mutually exclusive. The relationship is to be ascertained by an overall view of the entire situation, not by any rule of thumb or by the presence or absence of a single factor.<sup>16</sup>

Two recent federal court cases involving collective bargaining attempts by pulpwood producers illustrate how tests are collectively applied in particular situations. In one instance producers were found to be independent contractors. In the other they were found to be employees of pulpwood dealers.

In the 1968 case of *Boise Cascade International, Inc. v. Northern Minnesota Pulpwood Producers Association*,<sup>17</sup> a group of pulpwood producers attempted to stop wood deliveries to a mill to secure a price increase. The court found that the pulpwood producers involved met the classic definition of independent contractors. They provide their own saws, loaders, trucks and trailers and other equipment. Plaintiff does not furnish nor finance such. They cut and deliver

<sup>9</sup>*Brown v. E. L. Bruce Co.*, 175 So2d 151 (1965).

<sup>10</sup>*Fox Park Timber Co. v. Baker*, 84 P2d 736 (1938).

<sup>11</sup>*Ozan Lumber Co. v. McNeely*, 217 S.W. 2d 341.

<sup>12</sup>*Industrial Indemnity Exchange v. Southland Paper Corp.*, 160 S.W. 2d 905 (1942).

<sup>13</sup>*Brunswick Pulp and Paper Co.*, 152 NLRB 973 (May 27, 1965).

<sup>14</sup>*National Labor Relations Board v. Long Lake Lumber Co.*, 138 F2d 363 (1944).

<sup>15</sup>*Scott Paper Co. et al. v. Gulf Coast Pulpwood Association, Inc.*, S.D. Ala. 9/21/73.

<sup>16</sup>*Cape Shore Fish Co. v. U.S.*, 330 F2d 961 (1964).

<sup>17</sup>294 F. Supp. 1015 (1968).

pulpwood when and as they can and please so long as they have completed their deliveries by the deadline date . . . They may, and many do, hire others to assist them. They receive no wages, but merely a price for their product and apparently at the desire of both the plaintiff Company and operators are not considered employees.

As such, the court noted, the producers' association was not a labor organization within the meaning of the NLRA and, therefore, was not eligible for collective bargaining rights under the Act. Consequently, the boycott by the producers was enjoined as an illegal restraint of trade under the Sherman Antitrust Act.<sup>18</sup>

The situation was not so clearly defined in the 1973 case of *Scott Paper Company et al. v. Gulf Coast Pulpwood Association, Inc.*<sup>15</sup> Here again a group of pulpwood producers picketed mills in support of a price increase and other demands made to dealers and companies owning the mills to which the dealers sold wood. The companies sought an injunction against the picketing, contending that the producers involved were independent contractors. As such, they could be enjoined from violating the price-fixing prohibitions of the Sherman Act.<sup>18</sup> The producers contended they were actually employees of the dealers (who in turn supplied the mills), that the picketing was part of a labor dispute concerning the employer-employee relationship between themselves and dealers, and that therefore the Norris-LaGuardia Act<sup>3</sup> prevented the federal court from issuing an injunction against them.

For the record, the court first stated that there was no employer-employee relationship between the companies and the dealers. It found it sufficient to cite only the fact that the companies paid each dealer on a per cord basis pursuant to a purchase order issued monthly. The primary issue, the legal relationship between the dealers and producers, was more difficult to resolve. Important findings of facts were that 1) the producers generally employed other workers and paid them, 2) most of the producers' equipment was either leased from a dealer or the dealer had cosigned a financing agreement, 3) stumpage to be cut was provided almost exclusively for the producers by the dealers, 4) the producers were paid weekly by the dealers for the amount of wood cut and delivered, less deductions for goods and services provided by the dealers, and 5) because of the arrangements under which the producers operated, they had little freedom to work for anyone except the particular dealer to whom they were indebted and of whose business they were an integral part. Although the first factor would suggest independent contractor status, the others indicated substantial control over the producers by the dealers. The court recognized the conflicting evidence by stating that the producers were not within the classic definitions of either independent contractors or employees. Nevertheless, viewing the "totality of the circumstances," the court concluded that "the control exerted by the dealer is of such a nature and amount as to render the producers the employees of the dealers for purposes of

this suit." Accordingly, the requested injunction was not issued because of the restrictions of the Norris-LaGuardia Act.<sup>3</sup>

### Supervisors

In addition to criteria that distinguish independent contractor and employee, a further test may be necessary in some situations to determine the bargaining rights of certain individuals. As mentioned earlier, the NLRA also excludes individuals employed as supervisors from its definition of employee for purposes of collective bargaining. Supervisors are management representatives and, as such, Congress felt that they should not be encouraged to divide their loyalties. In the *Scott Paper* case, for example, the pulpwood producers, as distinct from workers in their crews, may still have been ineligible for bargaining rights under the NLRA—although the court did not address this particular issue.

A 1965 NLRB hearing did face such a situation.<sup>13</sup> An organization composed of pulpwood producers and their crews sought certification as a bargaining representative, contending an employer-employee relationship with a pulp and paper firm for whom they cut and delivered wood. It was established that the producers had the authority to hire and otherwise control the members of their crews; therefore, they were either independent contractors or supervisors. The Board concluded it was not necessary to determine which of the two categories the producers fit since both were excluded from the definition of employee under the NLRA. And, because the organization was controlled by the producers, it could not act as a labor organization on behalf of the employees on their crews.

The test to be applied for supervisor status is specified in Section 2 of the NLRA. It states that a supervisor is any person having authority, in the interest of an employer, to hire, transfer, suspend, promote, discharge, or take related actions, or to recommend such actions, if the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. Section 14 of the Act does permit supervisors to be members of labor organizations, but employers are not compelled to bargain collectively with them.

The *Long Lake Lumber Company* case further illustrates the management status of supervisors.<sup>14</sup> Here, a logging contractor had contracted with the company for the logging of standing timber owned by the firm. The agreement was terminable on 30 days' notice. His payrolls and other operating expenses were financed by the company. After the start of union activity by the contractor's workers, the company instructed the contractor to shut the logging camp down. There was additional evidence of the firm's active intervention in the labor dispute. The Court held that these collective facts indicated that the contractor and the company were joint employers of the workers. The contractor was deemed to be an employer under the NLRA because he was acting for the company in his supervisory capacity.

### Summary and Conclusion

The right-to-control test of common law is still the ultimate test for distinguishing between employee and

<sup>18</sup>26 Stat 209 as amended, 15 USCA 1 et seq. (1890).

independent contractor for collective bargaining purposes in woods labor situations. But a number of secondary tests have surfaced in court and administrative decisions as the field of labor law has developed. Beginning with the control test, pertinent factors that should be considered if disputes arise include: 1) control over how, when, and where services are performed; 2) the right of discharge; 3) the degree of skill required in the particular occupation; 4) the permanency and length of time the services have been performed; 5) ownership or extent of personal investment in equipment and facilities; 6) opportunities for profit or loss; 7) the method of payment (by time or job); 8) whether the parties intended to create an employer-employee or principal-independent contractor relationship; 9) establishment of a work routine or hours of work; 10) whether assistants are employed to perform the services; 11) who controls those assistants; 12) whether the service is an integral part of the principal's regular business; and 13) the ownership of stumpage. The last test is, of course, specific to timber harvesting situations. In addition, if an employment relationship is indicated, the

employer should determine if any individuals fall under the supervisor exemption, for they are not considered employees for collective bargaining purposes.

Distinguishing between employee and independent contractor is important for other purposes as well as for collective bargaining and labor negotiations. An employer also incurs legal responsibilities with respect to social security, income tax withholding, unemployment compensation, workers' compensation, and wage and hour legislation. In most instances, the same legal criteria that apply to labor negotiations are applicable to these other statutes. But in some situations, additional criteria may be employed. Each statute should first be examined for exemptions or provisions which may treat certain classes of employees differently, as illustrated by the status of supervisors with respect to collective bargaining. The facts of each case must be examined in light of the law governing that particular situation; only then can proper legal distinctions be made. However, the tests that have been discussed may be used for general guidance.

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