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Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)

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PRINCIPLES OF AGENCY PERMIT THE NLRB TO CONSIDER ADDITIONAL FACTORS OF ENTREPRENEURIAL INDEPENDENCE AND THE RELATIVE DEPENDENCE OF EMPLOYEES WHEN DETERMINING INDEPENDENT CONTRACTOR STATUS UNDER SECTION 2(3)

Ruth Burdick*

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I. INTRODUCTION

Employers have strong economic incentives to classify workers as independent contractors because the classification relieves them of statutory obligations and liabilities under a wide range of federal labor laws which apply only to employees.¹ As a consequence, classification has become a growing concern because workers classified as independent contractors are constructively removed from the legal protections Congress designed to safeguard employees and regulate the employer-employee relationship.

Preeminent among the federal labor laws that employers may avoid by classifying employees as independent contractors is the National Labor Relations Act (NLRA).² Under section 2(3) of the

² Id.
Act, independent contractors are excluded from the definition of "employee," and thus are not guaranteed the rights to organize, join unions, or bargain collectively. Employers, therefore, have been able to dodge unionization by creating new classes of independent contractors beyond the reach of NLRA protections.

In response, several commentators have called for a reformulation of the common law test for defining contractor status under the NLRA. These proposed tests include consideration of the economic realities or inquiries into the entrepreneurial nature of the employment relationship. In December 1996, the National Labor Relations Board heard oral arguments in a set of cases in which it raised the issue of reformulating the test for independent contractor status.

Originally, the Wagner Act, enacted by Congress in 1935, did not contain an exclusion for independent contractors under the definition of "employee." At the time, section 2(3) of the Act provided that "[t]he term 'employee' shall include any employee," with explicit exceptions only for agricultural laborers, domestic servants, and persons hired by a parent or spouse. However, because independent contractors traditionally had been excluded from the class of employees at common law, the Board exempted independent contractors from NLRA coverage even without an express statutory exclusion. From 1935 to 1944, the Board determined the line between employees and contractors by applying the traditional principles of the common law test, and in close cases considered other factors relevant to the purposes of the NLRA.

In 1944, this approach was reviewed and upheld by the United States Supreme Court in NLRB v. Hearst Publications, Inc. Three

5. See infra Part II.C.
6. See infra Part II.C.
7. See infra Part II.D.
10. See id.
11. See infra Part III.A.
14. 322 U.S. 111 (1944); see infra Part IV.B.4.
years later, the Taft-Hartley Act of 1947\(^\text{15}\) amended the section 2(3) definition and added an express exclusion for independent contractors.\(^\text{16}\) In the committee report that proposed the amendment, House members extensively attacked the Board and the *Hearst* opinion.\(^\text{17}\) The final conference agreement, however, rejected most of the House report's language and concluded merely that the *Hearst* Court improperly allowed the Board to ignore "the ordinary tests of the law of agency" in deciding whether certain occupational groups were employees under the Act.\(^\text{18}\)

In order to understand today's controversy over modifying the Board's test for employee under section 2(3), this Article analyzes whether it is feasible for the Board to add new inquiries into entrepreneurial independence or the relative dependence of employees to its existing common law test. Toward this end, Part II outlines the rising use and misuse of the independent contractor classification, the calls by commentators to alter the common law test, and the current case involving this issue now pending before the Board. Part III summarizes the principles of the common law of agency as they existed when the NLRA was enacted, as well as the intent of the drafters of the Wagner Act of 1935 with respect to the interpretation of section 2(3). Part IV evaluates the early Board decisions from 1935 to 1944 on the issue of independent contractor status, details the Board's pre-*Hearst* test, and analyzes the *Hearst* case and its enunciation of the factors of economic dependency. Then, in an effort to determine the intent of Congress's Taft-Hartley amendment which added the express exclusion for independent contractors, Part V analyzes the congressional record of the 1947 amendment to section 2(3) and concludes that the sole directive of Congress was that the Board and courts must adhere to the principles of agency. Part VI argues that the principles of agency which the 1947 Congress instructed the Board to follow


\(^{17}\) See H.R. REP. No. 80-245, at 18 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 309 (1948); see also infra Part V.A. (discussing the House Committee Report).

actually permit the Board to consider a range of additional factors, including additional facts indicating the independence associated with entrepreneurs and the dependence coincident with employee status. Finally, Part VI argues that the Board's adoption of this more flexible approach is supported fully under the current cases of the United States Supreme Court.

II. BACKGROUND

A. Expansion of the Use and Misuse of Independent Contractors

In recent years, employers have increasingly expanded the use of independent contractors for the stated purposes of gaining flexibility in the employment relationship and lowering costs so that their businesses are more competitive in today's national and international markets. Employers have strong economic incentives to classify workers as independent contractors because the definition relieves them of statutory obligations to contribute to Social Security, unemployment insurance, workers' compensation, income tax withholding, and employee benefits. Employers who are able to


20. See House Hearing on Independent Contractor Status, supra note 19, at 35-36; see also Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1189 (9th Cir. 1996) ("Large corporations have increasingly adopted the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits."); House Hearing on Independent Contractor Status, supra note 19, at 4 (testimony of Craig Willett, Willett and Assoc.) (stating that from the perspective of an employer who hires independent contractors, one goal is "to make the most amount of profit possible with the least amount of cost in so doing"); House Hearing on Independent Contractor Status, supra note 19, at 11 (testimony of Marc S. Wagner, H.D. Vest Fin. Serv.)
label workers as independent contractors also avoid liability under a number of federal labor statutes, including laws that protect collective bargaining and prohibit employment discrimination.\(^{21}\)

Workers who have the same economic needs as employees, but who instead are classified as independent contractors, are more economically burdened than employees because they must pay both the employer and employee portions of Social Security, and fend for their own health, unemployment, disability, and retirement needs.\(^{22}\) These workers also suffer the loss of a broad range of employment protections that apply only to employees.\(^{23}\) As one congressional leader described the converted worker's predicament, "When an employer switches a worker from employee to contractor status, he is in effect cutting him or her adrift, depriving the worker of essential, congressionally-mandated support."\(^{24}\) In most cases, workers have no choice but to accept the employer's decision to define a job as an independent contractor position, and many workers are uninformed about the loss of employee protec-

\(^21\) See Dunlop Report, supra note 19, at 36; see also infra note 23.


\(^24\) See House Hearings on Misclassification, supra note 20, at 2 (opening statement of Chairman Tom Lantos).
tions they will suffer by accepting a job that carries the contractor label. Moreover, classification schemes are prevalent in sectors of the low-wage work force where unskilled workers who have little bargaining power must assume contractor status in order to be employed.

Beyond the economic strategy of classifying workers as independent contractors whenever it is possible legally to manipulate the technicalities of the law, an increasing number of employers also are engaging in the deliberate and illegal misclassification of employees, a practice that is widespread and growing. One government study, for example, found that thirty-eight percent of employers who filed documentation stating they had paid wages to independent contractors had, in fact, misclassified employees. A second study estimated the number of misclassified American workers will exceed five million by the year 2005.

B. Problems Resulting From the Classification of Independent Contractors in the NLRA Context

Foremost among the federal labor laws that employers may avoid by classifying employees as independent contractors is the National Labor Relations Act (NLRA). Under section 2(3) of the Act, independent contractors are excluded from the definition of employee, and thus are not guaranteed the rights to organize, join unions, or bargain collectively. Employers, therefore, may sidestep unionization by creating new classes of independent contractors beyond the reach of NLRA protections. It is claimed that

25. See House Hearings on Misclassification, supra note 20, at 2 (opening statement of Chairman Tom Lantos).
27. See House Hearing on Misclassification, supra note 20, at 176 (opening statement of Chairman Tom Lantos).
29. See Coopers & Lybrand, supra note 22, at 63.
31. 29 U.S.C. § 152(3) (1994), amended by ch. 120, tit. I, § 101, 61 Stat. 137 (1947) ("The term 'employee' ... shall not include ... any individual having the status of an independent contractor.").
32. Section 7 of the NLRA provides: "Employees 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 ... ." 29 U.S.C. § 157 (1994).
under the current test for the definition of employee, employers readily can avert shop unionization by simply varying certain terms or conditions of employment: 33

For example, by taking money from taxicab drivers rather than giving money to them, taxicab companies have succeeded in virtually eliminating employees from the taxicab industry and transforming almost all cab drivers into independent contractors. The trucking industry has followed a similar course. This trend has gone so far that one Seattle cleaning contractor, after submitting the lowest bid to clean downtown office buildings, proceeded to sell “franchises” for the right to clean floors . . . for $4,000 to $7,000 a floor — transforming low-wage janitors, mostly immigrants from Central America and Asia, into “independent contractors.” 34

Moreover, several commentators have viewed the trend toward increased use of independent contractors as precipitating not only the erosion of unionization at individual shops, but also as a challenge to the union movement as a whole. 35

C. Calls for a New or Modified Test for Determining Independent Contractor Status Under the NLRA

In response to this trend by employers to evade unionization and collective bargaining by manipulating the common law test for “employee,” several commentators called for the reformulation of the test for defining contractor status to include consideration of the economic realities of the work relationship. 36 The Dunlop Commission, for example, recommended that the test for determining the line between employee and independent contractor “should be based on the economic realities underlying the relationship” between worker and employer, rather than “the control test borrowed from the old common law of master and servant.” 37 Similarly, Charles B. Craver argued for a return to the same economic

33. See Hiatt & Jackson, supra note 19, at 177.
34. Hiatt & Jackson, supra note 19, at 177. For additional information on the problem of “franchising,” see House Hearing on Misclassification, supra note 20, at 177-85 (testimony of Tom Balanoff, Bldg. Serv. Div. Dir., SEIU).
35. See, e.g., CHARLES B. CRAVER, CAN UNIONS SURVIVE?: THE REVIVIFICATION OF THE AMERICAN LABOR MOVEMENT 139-40 (1993); Hiatt & Jackson, supra note 19, at 177.
36. See CRAVER, supra note 35, at 140.
37. DUNLOP REPORT, supra note 19, at 36; see also Hiatt & Jackson, supra note 19, at 177 (“The Dunlop Commission’s recommendation . . . merits far more attention than it has

http://scholarlycommons.law.hofstra.edu/hlelj/vol15/iss1/4
realities test outlined in *NLRB v. Hearst Publications, Inc.* which was a target of Congress in the 1947 Taft-Hartley Amendment to the NLRA. Another commentator has suggested that the version of the economic dependency test used to define employee under the Fair Labor Standards Act might be imported for use under the NLRA. Beyond these possible economic considerations, the Service Employees Independent Union (SEIU) has suggested that the NLRA test for independent contractor status should be based on inquiries into the entrepreneurial nature of the employment relationship which should exist if a worker is truly an independent contractor.

**D. The Issue Is Now Before the Board: The Roadway Cases**

After several years of commentary, the issue of reformulating the definitional test for employee under the NLRA has recently reached the Board for review and its decision is still pending. In December 1996, the Board heard oral arguments in a set of consolidated cases in which the parties and amici curiae raised the issue of what is included in the proper common law inquiry for determining contractor status under the NLRA. Both of these cases, *Roadway Package System, Inc.* and *Dial-A-Mattress Operating Corp.*

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38. 322 U.S. 111 (1944).

39. *See Craver, supra* note 35, at 140 (“Modifying Section 2(3) to incorporate the *Hearst Publications* ‘economic realities’ test would enable individuals who do not fall within the traditional definition of ‘employee’ but nevertheless retain little or no control over the terms and conditions of their employment to benefit from the protections of the NLRA.”); *see also infra* Part IV.B.4.c.

40. *See Hiatt, supra* note 19, at 750 (“Courts have considered a variety of factors to determine ‘economic dependence,’ including the degree of control exercised over the individual, the skill required to perform the job, the location of the work, and the control over compensation.”).

41. *See Hiatt, supra* note 19, at 750 (citing considerations such as who bears the risk of loss, who schedules or otherwise controls work time, who controls manner of payment, whether the work is integral to the client’s enterprise, and whether the worker holds himself out to the public as available to render services beyond that connected with the employer).


involve efforts by the International Brotherhood of Teamsters to organize truck drivers at two California package delivery terminals and a New York trucking facility. At each trucking site, the Teamsters filed representation petitions which the companies opposed by asserting that their drivers could not be organized because they were independent contractors expressly excluded from NLRA coverage.

Generally, Roadway's package and delivery business operates through a network of interstate terminals and hub facilities. Customers tender packages for pickup and delivery drivers bring them to the local terminal where they then are routed to a hub facility, sorted, and loaded to go out to destination terminals for delivery. Then, at each terminal, the pickup and delivery drivers, who are the subject of the dispute, deliver the packages to local addresses. Overall, Roadway operates a delivery system comparable to its competitor, the United Parcel Service.

In Roadway I, the first of two earlier cases involving this issue, the Board rejected Roadway's independent contractor defense and found that the truck drivers at its Louisville trucking terminal were employees under section 2(3). There, the Board found that the drivers were employees rather than independent contractors because Roadway exercised substantial control over the manner and means of performing the pickup and delivery of packages. Illustrating the complex balancing of considerations used to decide employee status under the Act, the Board noted that:

We recognize, as is normal in this type of case, that there are factors that support independent contractor status, namely, the drivers' responsibility for vehicle expenses, workers' compensation and unemployment compensation; the lack of wage withholdings or benefits accorded other employees; and the drivers'
limited ability to flex and turn in sales leads. In our opinion, however, these do not outweigh the Employer's significant control over the manner and means of performing the pickup and delivery of packages and the drivers' relative lack of entrepreneurial freedom.\(^{54}\)

In a subsequent NLRB case brought against it for six separate complaints of discrimination, Roadway argued that the Board should reopen an earlier representation case in which a regional director determined that Roadway's drivers at its Redford, Michigan terminal were employees.\(^{55}\) In that case, *Roadway II*, the Board held that there was no reason to reexamine the regional director's findings that entrepreneurial decisions affecting the drivers' profit and loss picture are not made by the drivers, and that [Roadway] tells the drivers how to perform their work tasks well beyond the point of simply dictating the result, or his conclusion that the drivers are employees and not independent contractors.\(^{56}\)

Thus, the present case before the Board is Roadway's *third* attempt to have its delivery drivers declared independent contractors so they would be precluded from achieving collective bargaining or union protection which they have sought.

Now, in *Roadway III*, Roadway argues that the *Roadway I* holding does not control the current case “because of the numerous and dramatic changes that have occurred in the contractors' relationship with RPS through the implementation of the 1994 Agreement.”\(^{57}\) In fact, Roadway admits that it had *Roadway I* specifically “in mind” when it drafted the 1994 contract which all of its drivers must agree to in order to work for Roadway.\(^{58}\)

When RPS redefined the 1994 Agreement, it did so with [*Roadway I*] and other Board cases in mind. RPS specifically eliminated many of the factors relied on by the Board in [*Roadway I*] so that they reflect independent contractor status. Thus, under the 1994 Agreement, the contractors have significantly more control over their job performance . . . . In contrast to the

\(^{54}\) *Id.* at 199.


\(^{56}\) *Id.* at 378 (citing *Roadway Package Systems, Inc.*, 288 N.L.R.B. 196 (1988)).


\(^{58}\) See *id.* at 36.
entrepreneurial interests missing in [Roadway I], current contractors operating under the 1994 Agreement have a proprietary interest in their service areas and have discretion to sell their routes and their trucks at the best price they can negotiate.\(^\text{59}\)

In other words, Roadway III stands as an example of an employer classification scheme designed to convert a segment of employees to independent contractors and thereby avoid the unionization and collective bargaining desired by its employees.

Showing its apparent willingness to consider a reformulation of the test, the Board in Roadway III asked the parties to address the following questions in their pre-argument briefs:

Under prevailing precedent, the Board determines an individual’s status as an employee within the meaning of § 2(3) of the Act or an independent contractor excluded from the protection of the NLRA by applying the common law right of control test to the particular facts of the case at hand. Does the Board have the authority to change or modify that standard? If so, should any changes or modifications be made?\(^\text{60}\)

Potentially hanging in the balance of this inquiry are the organizing rights of the drivers at all of Roadway’s 370 delivery facilities, as well as the organizing rights of their counterparts at similar businesses. Also, NLRA coverage of other occupational groups in which the line between employee and independent contractor has been closely drawn will be implicated by any change in the current Board test. These occupational groups include traditionally disputed categories such as taxicab drivers, newspaper carriers, and performers,\(^\text{61}\) as well as newer classes created in recent years by employer classification schemes.\(^\text{62}\)

III. The Law Relevant to Independent Contractor Status at the Time Congress Enacted the NLRA

In order to understand the history of independent contractor status through the developments of the Board’s early decisions from 1935 to 1944, the United States Supreme Court’s Hearst opinion, and Congress’s Taft-Hartley amendment to section 2(3) in 1947, it is

\(^{59}\) Id. at 36-37.


\(^{61}\) See supra notes 33-35 and accompanying text.

\(^{62}\) See supra notes 33-35 and accompanying text.
necessary to examine the common law principles of agency used to determine independent contractor status as they existed at the time the National Labor Relations Act passed, and to consider the original intent of the Wagner Act’s drafters with regard to the meaning of *employee* under section 2(3) of the Act.

A. *The Principles of Agency*

In 1933, two years before the passage of the NLRA, the American Law Institute completed its Restatement of the Law of Agency, the purpose of which was to gather, analyze, and explain the common law of agency.63 Section 220 of the Restatement contained the principles for determining servant status, and listed the common law factors that courts most often considered in determining the line between employees and independent contractors.64 Specifically, section 220(2) provided:65

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;66 (b) whether or not the one employed is engaged in a dis-

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63. See Restatement (First) of the Law of Agency Introduction (1933).
64. See id. § 220.
65. See id. § 220(2) (emphasis and footnotes added). The Second Restatement retained all of these factors without any change in their wording, but added one factor: “(j) whether the principal is or is not in business.” Restatement (Second) of the Law of Agency § 220(2) (1958).
66. See Restatement (First) of the Law of Agency § 220(2)(a) (1933); see id. at § 220 cmt. c (“Those rendering service but retaining control over the manner of doing it are not servants.”) (using same language retained in comment e of the Restatement (Second)); id. § 220 cmt. e (“The custom of the community as to the control ordinarily exercised in a particular occupation is of importance. This, together with the [level of] skill which is required in the occupation, is often of almost conclusive weight.”) (same language retained in comment i of the Restatement (Second)).

In the American Law Institute [hereinafter ALI] tentative draft of 1926, the fact that a worker was “left in control of the operation of the forces and instrumentalities by which the stipulated result is to be accomplished” was an “essential characteristic.” Restatement of Agency (Tentative Draft No. 11, 1926) § 6. Without this essential retention of absolute control, the status of independent contractor reverted to a servant classification: “The characteristics stated as usual may be varied, but the one designated as essential may not be destroyed without destroying the relation.” Id. at 12. The ALI final draft also contained absolute language, defining an independent contractor as a person “who is not controlled by the other nor subject to the other’s right to control in respect to his physical conduct in the performance of the undertaking.” Restatement of Agency (Proposed Final Draft No. 24, 1926) § 2. Under this absolute view, any control exercised or any retention of the right to control by an employer would destroy independent contractor status.
tinct occupation or business;\(^67\) (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;\(^68\) (d) the skill required in the particular occupation;\(^69\) (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;\(^70\) (f) the length of time for which the person is employed;\(^71\) (g) the method of payment, whether by the time or by the job;\(^72\) (h) whether or not the work is a part of the regular

References to the absolute nature of the right to control are found widely in the earlier twentieth century treatises on agency. See, e.g., Gleason L. Archer, The Law of Agency 10 (1915) (stating that for independent contractor status to exist, the employer "retains no control over the workmen employed by the contractor and takes no part whatever in directing the work"); Ernest W. Huffcut, The Law of Agency 9 (1901) ("The test usually applied is whether the employer retains any control, or right to control, over the means or methods by which the work is to be accomplished. If he does, the employe is a servant."). But see Merton Person, Principles of Agency § 41 (1954) ("The right to control is an incident. It is much used as a test, but it is not a fact that fixes the worker's status.").

The absolute character of the control factor, however, is less apparent from the definition adopted in the Restatement. Section 220's definition of servant stated that a servant is a person "who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." See Restatement (First) of the Law of Agency Introduction § 220(1) (1933). By shifting the wording from the negative not controlled by, to the positive, is subject to the other's control, the language loses much of its absolute tone. However, there is no indication from the draft materials that the ALI drafters intended any historical shift away from the generally accepted, absolute nature of the control factor.

\(^{67}\) See Restatement (First) of the Law of Agency Introduction § 220(2)(b) (1933).

\(^{68}\) Id. § 220(2)(c).

\(^{69}\) Id. § 220(2)(d); see id. § 220 cmt. e ("Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost conclusively a servant in spite of the fact that he may nominally contract to do a specified job for a specified price.") (using same language retained in comment i of the Restatement (Second)).

\(^{70}\) Id. § 220(2)(e); see id. § 220 cmt. g

The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the direction of the owner in their use and hence this indicates that the owner is a master.

Id. (using same language retained in comment k of the Restatement (Second)).

\(^{71}\) See id. § 220(2)(f); see id. § 220 cmt. f ("If the time of employment is short, the worker is less apt to subject himself to control as to the details and the job is more likely to be considered his job than the job of the one employing him.") (same language retained in comment j. of the Restatement (Second)); id. § 220 cmt. a. (stating that a servant is a worker who "performs continuous service for another") (same language retained in comment a of the Restatement (Second)).

\(^{72}\) See id. § 220(2)(g); id. § 220 cmt. f
business of the employer; and (i) whether or not the parties believe they are creating the relationship of master and servant.

The comments to section 220 further explained that an employee is a person “who performs continuous service,” and that the status of being a servant indicates a “closeness of the relationship between the one giving and the one receiving the service.” The comments also specified that an important distinction of independent contractor status was whether “the actor's physical activities and his time are surrendered to the control of the master,” or whether instead the employment was arranged “to accomplish results.”

The Restatement also provided triers of fact guidance in the application of the common law test, explaining that “[the relationship of master and servant is one not capable of exact definition,” that this relationship cannot be defined in general terms with any accuracy, that the stated factors “are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship.” This weighing process could be made more elaborate by the inclusion of additional factors, allowed under the phrase “the following matters of fact, among others, are considered.” Thus, the Restatement presented the common law test as a flexible, ad hoc balancing of factors which each judge or jury was relatively free to apply or adjust to the facts of each case in its inquiry into the true nature of the employment relationship.

The time of employment and the method of payment are important. If the time of employment is short, the worker is less apt to subject himself to control as to the details and the job is more likely to be considered his job than the job of the one employing him. This is especially true if payment is made by the job and not by the hour. If, however, the work is not skilled, or if the employer supplies the instrumentalities, the workman may be found to be a servant.

Id. (same language retained in comment j of the Restatement (Second)). Therefore, a worker who is paid by the job, rather than by the hour, may still be an employee. See id.

73. Id. § 220(2)(h).
74. Id. § 220(2)(i).
75. Id. § 220 cmt. a (same language retained in comment a of the Restatement (Second)).
76. Id. § 220 cmt. c (same language retained in comment c of the Restatement (Second)).
77. See RESTATEMENT (FIRST) OF THE LAW OF AGENCY Introduction § 220 cmt. b (1933) (same language retained in comment c of the Restatement (Second)).
78. Id. § 220(2) (emphasis added).
For advice on how to interpret the word "employee" in a statutory rather than common law context, comment d to section 220 of the Restatement presented this cautionary note:

Statutes have been passed in which the words "servant" and "agent" have been used. The meaning of these words in statutes varies. The context and purpose of the particular statute controls the meaning which is frequently not that which the same word bears in the Restatement of this Subject.79

Therefore, when interpreting the common law test for employee under a statute, the purpose of the statute was to be given weight and, in close cases, to control the definition.80

Overall, these general principles collected by the Restatement constituted the predominant common law test for determining independent contractor status at the time the NLRA was enacted.81 Therefore, the Board as a trier of fact applying the common law test was free to employ this flexible balancing of factors and to consider whatever additional facts it found would assist its inquiry into the true nature of the employment relationship in question.

B. The Original Meaning of Employee Under the Wagner Act

The drafters of the Wagner Act expressly intended section 2(3)'s definition of employee to be read broadly and not necessarily limited to the categories of workers that had been recognized as employees in other contexts.82 Specifically, the 1935 House report of the Committee of Labor stated that, with regard to section 2(3), "[t]he committee wishes to emphasize the need for the recognition as expressed in subsections 3 [the definition of employee] and 9 [the definition of labor dispute], that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee."83

Thus, under this expansive design, the drafters

79. Id. § 220 cmt. d (emphasis added). This language, however, was omitted from the Restatement (Second), which instead advises that "[u]nder the usual Employers' Liability Acts and the Workmen's Compensation Acts the tests given in this Section for the existence of the relation of master and servant are valid," but that beyond those laws "there is little uniformity of decision." RESTATEMENT (SECOND) § 220 cmt. g.

80. See id. § 220 cmt. d.

81. See id. § 220.


conceived of the possibility that workers who had not been considered "employees" in the traditional, common law sense were not necessarily barred from coverage under section 2(3) if they were involved in a labor dispute and in need of the Act's protections.\textsuperscript{84} Moreover, the drafters intended that the meaning of employee under section 2(3) was to be applied in a manner that would effectuate the Act's purposes of remedying unequal bargaining power and encouraging collective bargaining.\textsuperscript{85} In support of its decision that "employee" was to be interpreted broadly, the 1935 House report quoted from a 1921 United States Supreme Court discussion remarkably similar to the discussion of economic dependency in \textit{Hearst}:\textsuperscript{86}

\begin{quote}
[Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.\textsuperscript{87}
\end{quote}

The drafters' reliance upon this passage highlights their intent that the determination of the meaning of employee under the Act was to include consideration of the Act's overall purposes of remedying unequal bargaining power and encouraging collective bargaining so that workers in need of the Act's protections would be assured protection.

The intent of the Wagner Act drafters that the meaning of employee would require some consideration of the NLRA's purposes was not a new idea and in fact followed the contemporary common law model for interpreting labor statutes.\textsuperscript{88} By the time of the NLRA, it was a well established principle of the courts to inter-

\textsuperscript{84} See id. at 3057.
\textsuperscript{85} See id.
\textsuperscript{88} See, e.g., Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552-53 (2d Cir. 1914).
pret the language of a labor statute in the context of the statute’s purpose. For example, in 1914, Judge Learned Hand of the Second Circuit described this very principle in the context of interpreting Pennsylvania’s workers’ compensation law:

It is true that the statute uses the word “employed,” but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a [worker] as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company’s only business; he is their “hand,” if any one is .... Such statutes ... should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.

This quotation not only illustrates the importance that the statutory purpose of a labor law had in interpreting the word “employee” at common law, it also demonstrates that factors of dependency were being applied by courts deciding independent contractor status prior to the NLRA.

In sum, the drafters of the Wagner Act, relying upon well established principles of common law, expressly intended that the term “employee” be read broadly and applied in a manner that would effectuate the Act’s purposes of remedying unequal bargaining power and encouraging collective bargaining. Thus, the early Board and the courts were permitted to interpret section 2(3) cov-

89. See id.
90. See id.
91. Id. (emphasis added). The axiom contained in this passage, that “where all the conditions of the relation require protection, protection ought to be given,” id., was the same principle stated by the Board in Seattle Post-Intelligencer Dept. of Hearst Publications, Inc., 9 N.L.R.B. 1262 (1938), when it held that “[t]he declared policy and procedure of the Act encompasses the needs of such employees” who were in the same relative position as other workers who were classified as employees. Seattle-Post-Intelligencer, 9 N.L.R.B. at 1281 (emphasis added). Or, as the Hearst Court later stated,

when the particular situation of employment combines these characteristics [of unequal bargaining power] so that the economic facts of the relation make it more one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.

verage broadly and look to the purposes of the Act for guidance when deciding independent contractor status.

IV. THE BOARD'S EARLY INDEPENDENT CONTRACTOR DECISIONS

Originally, the Wagner Act\(^92\) enacted by Congress in 1935 did not contain an exclusion for independent contractors under the definition of employee.\(^93\) At the time, section 2(3) of the Act provided that "[t]he term 'employee' shall include any employee," with explicit exceptions only for agricultural laborers, domestic servants, and persons hired by a parent or spouse.\(^94\) However, because independent contractors traditionally had been excluded from the class of employees at common law,\(^95\) the Board excluded independent contractors from NLRA coverage even without an express statutory exclusion.\(^96\)

As this section illustrates, the Board, in its decisions during the period of time from the Wagner Act of 1935\(^97\) to the Taft-Hartley Act of 1947,\(^98\) consistently determined the line between employees and independent contractors by applying the traditional principles of the common law test as they were rendered by the Restatement.\(^99\) However, in those close cases where the Restatement factors expressly listed in section 220(2) did not clearly decide the status of workers, the Board added to the balance facts relevant to either the dependence or independence of the worker in relation to the employer.\(^100\)

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94. Section 2(3) of the Act, in full, provided:
   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 parent or spouse . . . .
   Id.
95. See supra Part III.A.
96. See infra Parts IV.A. & B.1. & B.2.
100. See infra text accompanying notes 123-25, 133-41.
Additional inquiries that the Board considered which shed light on the independence of workers included whether the workers had any real interest in the employment separate from the employer's interest, and whether the workers could be employed by other companies without the employer's consent. With regard to indicia of dependence, the Board considered such factual questions as whether the monies received by the worker were analogous to the wages of an employee, whether the workers were in the same economic position as employees, and whether the workers would benefit from collective bargaining, a condition contrary to the interests of true independent contractors.

A. The First Application: Seattle Post

In its first case interpreting the definition of employee in the independent contractor context, the Board in *Seattle Post-Intelligencer Department of Hearst Publications, Inc.*, found that two disputed classes of workers employed by the Seattle Post were employees within the meaning of section 2(3) of the Act, despite the existence of employment contracts that stated otherwise. The Board framed its inquiry in the following manner:

As used in the Act the term [employee] embraces "any employee," that is, all employees in the conventional as well as legal sense except those by express provision excluded. The primary consideration is whether effectuation of the declared policy and purposes of the Act comprehends securing to the individual the rights guaranteed and protection afforded by the Act. The matter is not conclusively determined by a contract which adverts to and purports to establish the status of such person other than as an employee. Public interest in the administration of the Act

101. See infra text accompanying notes 123-25, 133-41.
102. See infra text accompanying notes 123-25, 133-41.
103. 9 N.L.R.B. 1262 (1938).
104. Id. at 1275, 1281; see also Constitution Publ'g Co., 29 N.L.R.B. 105 (1941) (holding newspaper carriers were employees under § 2(3) of the Act). But see Jalmer Berg, 35 N.L.R.B. 357, 360 (1941) (holding truck drivers were not employees under § 2(3) because the employer did not own the trucks and did not exercise control over the details of the work; the drivers themselves determined hours worked, number and size of loads they would haul, and sometimes hauled logs for other timber companies without permission of employer).
permits an inquiry into the material facts and substance of the relationship.\textsuperscript{103}

The first occupational group the Board reviewed was a class of motor route drivers who delivered newspapers by automobile to subscribers, collected monthly subscription fees, and attempted to secure new subscribers for the newspaper.\textsuperscript{106} In holding that the motor route drivers were employees, the Board noted that they were employees in the conventional sense because their work was a functional part of the business, was continuous rather than aimed at accomplishing specific results, and was subject in large measure to the control and right of control of the newspaper.\textsuperscript{107} Additionally, the Board regarded the drivers as having no real interest in the business, which was in fact the property of the newspaper and was available to the company at any time it wished to terminate a driver's contract.\textsuperscript{108}

The second class of disputed workers consisted of outside telephone crew workers who engaged in the solicitation of subscriptions for the newspaper by telephone.\textsuperscript{109} Finding that these solicitors were also employees,\textsuperscript{110} the Board noted that each worker was required to report daily to the plant, was furnished a list of prospective subscribers to contact that day, and was subject to the

\textsuperscript{105}See Seattle Post, 9 N.L.R.B. at 1274-75 (emphasis added) (footnotes omitted). As evidence of the declared policy of the NLRA, the Board cited § 1 of the Act which described the policy as the elimination and mitigation of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of the full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

\textit{Id.} at 1274 n.22.

The policy paragraph of § 1, which the Board quoted as evidence of the Act's directives of encouraging collective bargaining and protecting collective bargaining, remains in force today without substantive change. See 29 U.S.C. § 1951 (1996). Amendments to § 1, however, have added only a few paragraphs of congressional findings, which constitute statements of factual conditions which motivated Congress to amend the Act at various times. See \textit{id}. In other words, the basic prescriptive policies of the Act have remained constant throughout the history of the Act despite the Taft-Hartley and Landrum-Griffin amendments. See \textit{id}.

\textsuperscript{106}See Seattle Post, 9 N.L.R.B. at 1273.

\textsuperscript{107}See \textit{id}. at 1275. The Board found the drivers also to be legally defined as employees under the applicable state law. See \textit{id} (with no citation to Washington law).

\textsuperscript{108}See \textit{id}.

\textsuperscript{109}See \textit{id}. at 1281.

\textsuperscript{110}See \textit{id}.
same control and discharge as the "inside" telephone solicitors who worked on the plant's premises and were considered by the newspaper to be employees.\textsuperscript{111} The Board specifically held that "[t]he declared policy and procedure of the Act encompass the needs of such employees."\textsuperscript{112} In other words, because these workers were in the same relative position as conventional employees, the Board therefore required the same guarantees and protections afforded employees under the NLRA.\textsuperscript{113}

Although the Board stated that its holdings were made partially upon policy, in substance, it heavily relied upon traditional common law factors in determining whether these workers were in fact employees.\textsuperscript{114} For example, with respect to the drivers, it reviewed whether their work was part of the newspaper's regular business,\textsuperscript{115} the amount of control the paper exercised over the drivers,\textsuperscript{116} and the fact that the performance of the drivers was "not so much the accomplishment of any specified result as continuing operation in close association with the entire enterprise..."\textsuperscript{117} Similarly, with regard to the outside telephone workers, the Board considered the amount of control exercised by the newspaper,\textsuperscript{118} the continuous nature of the relationship,\textsuperscript{119} as well as the fact that the workers were performing the same tasks as other workers recognized by the newspaper as employees.\textsuperscript{120}

After evaluating the common law factor regarding the method of payment,\textsuperscript{121} the Board concluded that "[w]e do not consider the manner by which the drivers are compensated as inconsistent with

\begin{itemize}
\item \textsuperscript{111} See Seattle Post, 9 N.L.R.B. at 1281.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} See id.
\item \textsuperscript{114} See id.; \textsc{Restatement (First) of the Law of Agency} § 220 (1933).
\item \textsuperscript{115} See Seattle Post, 9 N.L.R.B. at 1275; \textsc{Restatement (First) of the Law of Agency} § 220 (2)(b) (1933).
\item \textsuperscript{116} See Seattle Post, 9 N.L.R.B. at 1275; \textsc{Restatement (First) of the Law of Agency} § 220(2)(a) (1933).
\item \textsuperscript{117} See Seattle Post, 9 N.L.R.B. at 1275; \textsc{Restatement (First) of the Law of Agency} § 220 cmt. a (1933).
\item \textsuperscript{118} See Seattle Post, 9 N.L.R.B. at 1281; \textsc{Restatement (First) of the Law of Agency} § 220(2)(f) (1933).
\item \textsuperscript{119} See Seattle Post, 9 N.L.R.B. at 1281; \textsc{Restatement (First) of the Law of Agency} § 220(2)(c) (1933).
\item \textsuperscript{120} See \textsc{Restatement (First) of the Law of Agency} § 220(2)(g) (1933). A worker who is paid by the job, rather than by the hour, still may have been an employee if the work
\end{itemize}
Determining Independent Contractor Status Under Section 2(3)

The Board explained its conclusion by stating:

In addition to the weekly allowance for car expense and carriage of bundles, the drivers receive the difference between the so-called purchase price and the regular subscription price. Inasmuch as the drivers deal only with newspapers delivered to subscribers their return is analogous to earnings measured by the number of subscription deliveries rather than profit from an independent business.

In other words, the Board determined that where the publishers provided subscription lists to the drivers, and had set both the wholesale and resale prices of the papers, the per-paper method of payment was more analogous to the setting of a wage than to the selling of papers to an independent business which could resell the papers freely and without the restraint of an established subscription list. Thus, the Board held that because of the economic reality of the manner used by the publisher to pay the motor route drivers, this per-paper method of payment was not inconsistent with dependent employee status.

The Board also considered a few inquiries into the independence of the drivers in the employment relationship in order to determine whether the entrepreneurial dimension of independent contractor status was present. These additional factors included whether the drivers had any real interest in the delivery business separate from the newspaper’s enterprise, and whether the drivers could act as representatives of competing publishers without the company’s consent.

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122. See Seattle Post, 9 N.L.R.B. at 1275.
123. Id. (emphasis added).
124. See id.
125. See id.
126. See id.
127. See Seattle Post, 9 N.L.R.B. at 1275 (finding drivers had no real interest in business and could not work for other companies without employer consent).
B. The Hearst Publications Case

1. Board Decision on the Status of the District Managers

In *Hearst Publications, Inc.*,128 the Board held that the district managers of four Los Angeles newspapers were employees within the meaning of section 2(3).129 Each district manager worked an assigned geographical area within which he was authorized to distribute his company's newspaper.130 He picked up the newspapers for distribution from the publisher's plant, and delivered them to newsboys who then sold them to the public.131 The publishers charged the district managers for each newspaper they took from the plant. At the end of the selling period, the district managers received the difference between the wholesale and resale prices of the paper, both of which were set by the publisher.132

In deciding the case, the Board used a mix of common law and additional economic factors of dependence in making its determination that these distribution agents "occupy positions comparable, in all substantial respects, to persons indisputably identified as employees."133 For instance, referring to common law inquiries, the Board noted the continuous nature of the employment relationship in which the managers worked regular hours each day for an indefinite term,134 and that the managers provided the publishers with a function essential to the newspaper business.135 Moreover, the Board found indicia of control in the methods used by the publishers to check the work of the district managers and to direct the managers in the correction of faults found in their territories.136

The only fact regarding the managers' lack of independence that the Board added to the balance was that the publishers prohibited the managers from selling other newspapers.137 The only economic
facts of dependency reviewed by the Board were those concerning the method of payment. There, the Board found the wages of the district managers were controlled by the publishers because the publishers regulated both the quantity of papers the managers could purchase for distribution, as well as the purchase and resale prices of the papers. The Board found these economic facts to be evidence of a form of payment similar to the regular wages received by an employee, rather than the profit gained by a business. Thus, the Board found these managers to have the characteristics of employees, rather than independent contractors.

2. Board Decision on the Status of the Newsboys

In the consolidated case of *Stockholders Publishing Co.*, involving the same four newspaper businesses in Los Angeles, the Board held that a certain class of newsboys were employees within the meaning of section 2(3). "Newsboy" was an occupational term of art for positions held by adult men who sold newspapers to customers on the streets. The appropriate unit at issue in *Stockholders* were specific groups of newsboys who sold "full-time at established spots," and worked "on a regular basis, often for a number of years, [forming] a stable group with relatively little turnover." This group was in contrast to regular schoolboys and others who sold newspapers as temporary and causal distributors, and thus, clearly were not employees. The Los Angeles publishers refused to bargain with these newsboys claiming they were independent contractors over whom the papers exercised only that amount of incidental control usually associated with conditions placed upon any buyer of a commodity.

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138. See Hearst, 25 N.L.R.B. at 629; Restatement (First) of the Law of Agency § 220(2)(g) (1933).
140. See id.
141. See id. at 629-30.
142. 28 N.L.R.B. 1006 (1941).
143. See id. at 1022-24.
144. See Hearst Publications, Inc. v. NLRB, 136 F.2d 608, 610 (9th Cir. 1943), rev’d, 322 U.S. 111 (1944).
146. See id.
147. See id. at 1023.
Once again, the Board applied common law factors as its central analysis. For instance, the Board considered the extent to which the companies exercised control over the details of the newsboys' work, and found there was sufficient control to grant employee status based on the facts that the newspapers "supervise the newsboys' selling activities as to such details of performance as the manner of calling, holding, and displaying the newspaper, and place of its sale within the allotted territory." The Board also found indicia of control where the publishers were able to "at will discharge the newsboys, transfer them to other locations, and lay them off as disciplinary measures," and because the papers required "the newsboys' attendance at their posts . . . during relatively definite hours." The publishers also were found to have provided the newsboys with a place to work and supplied the instrumentalities of work, because "the Companies hire the newsboys by the allotment of corners and spots, thus providing them with a place to work, [and] furnish[ing] company-owned equipment and paraphernalia to facilitate newspaper sales."

The Board also found the newsboys were employees because they were hired for an indefinite period, and were "an integral part of the Companies' distribution system and circulation organization." When assessing the common law factor of method of payment, the Board found that even though the news vendors were "charged" for the number of papers they received and then later reconciled accounts with the district manager, this method of payment was merely "a convenient accounting device employed by the Companies to measure the earnings of the newsboys."

Thus, the Board's analysis of the status of this certain class of newsboys under section 2(3) as conventional employees considered factors from the common law test outlined by the Restatement.

148. See id. at 1023; RESTATEMENT (FIRST) OF THE LAW OF AGENCY § 220(2)(a) (1933).
149. Stockholders, 28 N.L.R.B. at 1023.
150. Id.
151. See id.; RESTATEMENT (FIRST) OF THE LAW OF AGENCY § 220(2)(e) (1933).
152. Stockholders, 28 N.L.R.B. at 1023.
153. Id.; RESTATEMENT (FIRST) OF THE LAW OF AGENCY § 220 cmt. a (1933).
154. Stockholders, 28 N.L.R.B. at 1023; RESTATEMENT (FIRST) OF THE LAW OF AGENCY § 220(h) (1933).
155. See RESTATEMENT (FIRST) OF THE LAW OF AGENCY § 220(2)(g) (1933).
156. Stockholders, 28 N.L.R.B. at 1023.
157. See id. at 1023-24; RESTATEMENT (FIRST) OF THE LAW OF AGENCY § 220 (1933).
To these factors, the Board added, in terms similar to Seattle Post, that the newsboys had "no vested interest in the newspaper business" that one might expect from entrepreneurs.\textsuperscript{158} With regard to whether the newsboys were employees as a matter of law, the companies argued that California case law defined newsboys as independent contractors for the purposes of tort liability and workers' compensation, and that this definition decided the issue under the NLRA.\textsuperscript{159} The Board, however, rejected this argument, stating "[w]e do not herein pass upon the nature of the relationship for other purposes, but hold upon this record that the newsboys here involved are within the definition of employees as the term is used in this Act."\textsuperscript{160}

In essence, the Board asserted that it had the authority to interpret de novo the question of which workers were employees under the Act, rather than simply import the legal definitions and specific holdings from the case law of the local state in which the labor dispute arose.\textsuperscript{161} The Board instead applied the general principles of the common law, which, from the structure of its analysis, appear to be substantially similar to the Restatement.\textsuperscript{162}

As the Board established in Seattle Post, the words "any employee" in section 2(3) were to be interpreted broadly and embraced "all employees in the conventional as well as legal sense except those by express provision excluded."\textsuperscript{163} In interpreting section 2(3)'s definition of employee, the Board's primary consideration was "whether effectuation of the declared policy and purposes of the Act comprehends securing to the individual the rights guaranteed and protection afforded by the Act."\textsuperscript{164}

In sum, the Board's early rendering of a test for the definition of employee in the independent contractor context involved a consideration of the general principles of common law as referenced by the Restatement. The intent was to achieve the declared purposes of section 1 of the Act, which the Board interpreted as meaning that workers who had substantially similar needs for the guarantees

\begin{footnotesize}
\begin{enumerate}
\item See Stockholders, 28 N.L.R.B. at 1023-24.
\item See id. at 1024.
\item Id.
\item See id.
\item See id at 1023-24; \textit{Restatement (First) of the Law of Agency} § 220 (1933).
\item Seattle Post, 9 N.L.R.B. 1262, 1274 (1938).
\item Id. at 1274-75.
\end{enumerate}
\end{footnotesize}
and protections of the NLRA would be assured coverage. Given
the intent of the drafters of the Wagner Act, that “employee” was
to be read broadly and with some consideration of the purposes of
the Act, the early Board in the years 1935 to 1944 properly
applied the principles of agency in the statutory context of the
NLRA.

3. The Ninth Circuit Opinion.

The newspaper businesses who had been ordered by the Board to
bargain with their street vendors in Stockholders Publishing Co.167
petitioned the Ninth Circuit Court of Appeals for review, again
claiming that the newspaper vendors were not their employees.168
Specifically, the companies argued that because the Act did not
contain a precise definition of employee, “Congress intended to use
the words in their ordinary and conventional sense as understood at
the time the statute was enacted.”169 Counsel for the NLRB, in
contrast, argued that Congress contemplated a class of potential
employees larger than found under the common law, stating “where
the persons involved function in a realistic economic sense as
employees of an industrial enterprise Congress intended them to be
within the Act.”170

As authority, NLRB Counsel relied upon Seattle Post’s discussion
of employee as including “all employees in the conventional as well
as legal sense except those by express provision excluded,” with the
primary inquiry being “whether effectuation of the declared policy
and purposes of the Act comprehends securing to the individual the
rights guaranteed and protection afforded the Act.”171 The court,
however, rejected the Board’s interpretation stating that under the
NLRA:

[T]here is no delegation to an administrative body of power to
determine whether the facts are within a specified exception to a
statute, the exercise of which power involves an interpretation of
terms. Rather does the instant case fall within the general rule

165. See supra Part IV.A. & B.1
166. See supra Part III.B.
167. 28 N.L.R.B. 1006 (1941).
168. See Hearst Publications, Inc. v. NLRB, 136 F.2d 608, 611 (9th Cir. 1943), rev’d, 322
U.S. 111 (1944).
169. Id. at 611-12.
170. Id. at 612 (quoting the Board’s Brief for Enforcement).
171. Seattle Post, 9 N.L.R.B. at 1274-75.
that "the interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function." 172

With this analysis, the court dissolved the usual deference accorded to an administrative agency absent a finding that its interpretation was arbitrary, and proceeded to interpret for itself the meaning of employee under the Act. 173

The Ninth Circuit agreed with the newspapers and held that the definition of employee under section 2(3) was to be given its conventional, common law meaning. 174 Relying upon a California case that held newsboys to be independent contractors under California's statutory definition of employee, 175 the court found the case law persuasive on the common law meaning of employee, and decided that the NLRA was intended to import specific state common law standards by occupation, as it held that the newsboys were employees. 176

4. The United States Supreme Court Opinion

On appeal from the Ninth Circuit, the United States Supreme Court granted certiorari in NLRB v. Hearst Publications, Inc. 177 to resolve the question of whether the newsboys were employees within the meaning of section 2(3). 178 Reversing the Ninth Circuit, the Court found that Congress did not intend to import specific variations of state common law into the NLRA definition of employee, 179 that the Board was allowed to consider facts involving


173. See id. The dissent addressed this point stating "we are not free to draw our own inferences, and the sole question before us is whether the Board reasonably could infer from the varied incidents of the relationship between the men and the publishers that it is one of employer and employee." Id. at 614 (Denman, J., dissenting).


175. See id. at 613 (citing New York Indem. Co. v. Indus. Accident Comm'n, 1 P.2d 12 (Cal. 1931) (tort liability of employer); State Compensation Fund v. Indus. Accident Comm'n, 14 P.2d 306 (Cal. 1932) (workers' compensation)). The California statutory definition interpreted by the cited cases provided: "A servant is one who is employed to render personal service to his employer, other than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the employer, who is called his master." Id. at 613 n.3 (citing CAL. LAB. CODE § 3000, St. 1937, 261).

176. See Hearst, 136 F.2d at 613.

177. 322 U.S. 111 (1944).

178. See id. at 113 & n.1.

179. See id. at 120-24.
the economic reality of the relationship between worker and employer based upon the special purposes of the NLRA,\textsuperscript{180} and that the Board's determinations were to be accepted by the courts as long as its findings were warranted on the factual record and based reasonably in law.\textsuperscript{181}

\textbf{a. The State Law Issue}

The Ninth Circuit had decided that the NLRA was intended to import specific state common law standards by occupation.\textsuperscript{182} The Supreme Court rejected this notion and held that those state standards "unrelated to the Wagner Act's purposes and provisions"\textsuperscript{183} should not be automatically imported as a matter of law into the Act's definition of employee:\textsuperscript{184}

The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as "the test" for deciding whether one who hires another is responsible in tort for his wrongdoing. [citing the Restatement of the Law of Agency § 220.] But this formula has been by no means exclusively controlling in the solution of other problems. . . . Few problems in law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.\textsuperscript{185}

Illustrating this variation, the Court discussed the different results reached within the same jurisdiction where a single person was "held to be an 'independent contractor' for purposes of imposing vicarious liability in tort,"\textsuperscript{186} but found to be an employee for pur-

\begin{flushleft}
\textsuperscript{180}. See id. at 128-29. \\
\textsuperscript{181}. See id. at 130-32. \\
\textsuperscript{182}. See Hearst Publications, Inc. v. NLRB, 136 F.2d 608, 613 (9th Cir. 1943), \textit{rev'd}, 322 U.S. 111 (1944). \\
\textsuperscript{184}. See id. at 120-23. \\
\textsuperscript{185}. \textit{Id.} at 120-21 (footnotes omitted). \\
\textsuperscript{186}. \textit{Id.} at 122.
\end{flushleft}
poses of unemployment compensation. The Court viewed this variation as a function of the different purposes of the two laws.

Rather than give effect to varying local statutory or judicial conceptions, the Wagner Act, the Court stated, "is federal legislation, administered by a national agency, intended to solve a national problem on a national scale." Thus, the Court held, because Congress intended the NLRA to apply uniformly throughout the nation, the federal interpretation of the relationship under the NLRA was to prevail no matter what status the worker was given under state law.

b. The Issue of Deference to the Board

The Ninth Circuit had held that the usual deference accorded to the findings of an administrative agency did not apply to determinations of the Board because it found that Congress had not expressly delegated to the Board the judicial power of interpreting the statutory terms of the NLRA. The Supreme Court, however, reversed that holding, finding instead that the task of defining employee "has been assigned primarily to the agency created by Congress to administer the Act." In addition to the congressional delegation, the Court noted that the Board also had the mandate of special insight to make such interpretations:

Everyday experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers.

187. See id. at 122 (citing Globe Grain & Milling Co. v. Industrial Comm'n, 91 P.2d 512 (Utah 1939) (holding that the statutory purpose of making an employer prove all three elements of the exclusion under state unemployment statute for independent contractors was to ensure that workers who were employees in reality would not lose protection because they were labelled independent contractors in form)).
188. See Hearst, 322 U.S. at 122.
189. Id. at 123.
190. See id. at 123-24.
193. Id. at 130.
As a result, the Court found it was improper for the Ninth Circuit to have substituted its own inferences of fact where the Board's findings were warranted on the factual record and based reasonably in law.194

c. Factors of Economic Dependency

When determining the question of whether workers were employees under the NLRA, the Court concluded that the purposes of the Act allowed inquiry into the economic facts of the employment relationship.195 Citing section 1 of the Act, the Court stated that the interrelated purposes of the NLRA were “to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power.”196 The Court explained that:

Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of [independent contractors] as of [employees]. The former, when acting alone, may be as “helpless in dealing with an employer,” as “dependent . . . on his daily wage” and as “unable to leave the employ and to resist arbitrary and unfair treatment” as the latter. For each, “union . . . [may be] essential to give . . . opportunity to deal on equality with their employer.”197

In other words, “[w]here all the conditions of the relation require protection, protection ought to be given.”198 The Court summarized the relevant economic facts as follows:

In short, when the particular situation of employment combines these characteristics [of unequal bargaining power], so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation,

194. See id. at 130-32.
195. See id. at 126-28.
196. Id. at 126.
197. Hearst, 322 U.S. at 127 (quoting American Steel Foundaries Co. v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921)) (cited in H.R. Rep. No. 74-1147, at 10 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3056-57 (1935)) (“[t]he committee wishes to emphasize the need for the recognition as expressed in subsections 3 [the definition of employee] and 9 [the term labor dispute], that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee . . . .”).
198. Hearst, 322 U.S. at 129 (quoting Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552 (2d Cir. 1914)).
those characteristics may outweigh technical legal classification
for purposes unrelated to the statute's objectives and bring the
relation within its protections.199

The Court grounded this view upon the legislative history, demon-
strating that Congress intended the definitions of the Act to be read
broadly and anticipated that the Act at times would cover workers
who might not be considered employees for the purposes of other
statutes.200 Thus, in the borderland between what is clearly an
employer-employee relationship and what is clearly one of
independent entrepreneurial dealing, the Court found the determi-
nation was to be made broadly by assessing the “underlying eco-
nomic facts rather than technically and exclusively by previously
established legal classifications.”201

Applying the test to the California newsboys, the Court found
them to be exposed, “as a matter of economic fact, to the evils that
statute was designed to eradicate,” and therefore found it was
appropriate to provide them protection as employees under the
Act.202 For the particular facts of this dependence, the Court cited
the findings developed by the Board.203 Specifically, the Court
noted that:

[T]he designated newsboys . . . rely upon their earnings for the
support of themselves and their families, and have their total
wages influenced in large measure by the publishers, who dictate

199. Id. at 127-28.
200. See id. at 128 (citing S. Rep. No. 74-573, 7 (1935)).
201. Id. at 129. But see NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968) (characterizing
the sole standard used in Hearst as “one of economic and policy considerations within the
labor field.”) In fact, as the text in Hearst notes, these policy concerns came into play only in
the very close cases in which the common law principles of agency failed to direct a clear
answer:

Myriad forms of service relationship, with infinite and subtle variations in the terms
of employment, blanket the nation's economy. Some are within this Act, others
beyond its coverage. Large numbers will fall clearly on one side or on the
other . . . But intermediate there will be many, the incidents of whose employment
partake in part of one group, in part of the other, in varying proportions of weight.
And consequently the legal pendulum . . . may swing one way or the other
depending upon the weight of this balance and its relation to the special purpose at
hand.

Hearst, 322 U.S. at 126-27.
202. Id. at 127.
203. See id. at 131.
their buying and selling prices, fix their markets and control their supply of papers.\textsuperscript{204} The Court also noted evidence of the traditional common law factors of control, such as the continuous nature of the employment, and the provision of instrumentalities and tools, which pointed toward an inference of employee status.\textsuperscript{205}

In sum, the doctrine of economic dependency was to be applied only in that borderland of cases where the line between employee and independent contractor was unclear.\textsuperscript{206} Where the line was distinct, the general principles of the common law of agency, as rendered in the Restatement, were sufficient for the analysis.\textsuperscript{207} In other words, the economic test did not displace the common law test, but was instead a set of additional inquiries to be used in very close cases.\textsuperscript{208} In those close cases, the Act's purposes of encouraging collective bargaining, and in particular, remedying the individual worker's inequality of bargaining power, were to be given weight.\textsuperscript{209} What was to be avoided was the mechanical application of technical standards developed under statutes unrelated in purpose to the NLRA, the result of which would render holdings inconsistent with the Act.\textsuperscript{210}

\begin{itemize}
\item 204. Id.
\item 205. See id. (stating the vendors "hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents," that they "work continuously and regularly," and that the publishers furnished "sales equipment and advertising materials" from which the newspapers would benefit).
\item 206. The Supreme Court's enunciation and explanation of the "test" was far more expansive than the Board's explanation, which presented the economic inquiries as little more than additional factors for consideration. The Board did not consider these additional factors to be part of a test separate from the principles of common law agency. See supra text accompanying notes 132-40.
\item 207. See supra text accompanying notes 132-40.
\item 208. See Hearst, 322 U.S. at 129.
\item 209. See id. at 126.
\item 210. But see United States v. Silk, 331 U.S. 704, 713-14 (1947) (holding that the application of the Social Security Act "should follow the same rule that we applied to the National Labor Relations Act in the Hearst case"). The Silk Court explained the Hearst opinion in the following abbreviated manner:
\end{itemize}

The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an
The aim of these economic inquiries was to determine whether the workers were economically dependent in a manner similar to the financial dependence most employees have upon an employer. Specifically, the general categories of economic facts discussed by the Hearst Court that indicated the existence of unequal bargaining power in disputes over wages, hours and working conditions, were facts tending to establish (1) helplessness in dealing with an employer, (2) dependence upon wages from the employer, (3) an inability to leave the employment relationship without severe economic consequences, (4) an incapacity to resist the employer's legal responsibility to third persons for acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, § 220. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act."

Sill, 331 U.S. at 713.

The accuracy of this rendering of Hearst, however, is misleading because in summarizing Hearst, the Sill Court disregarded the Hearst Court's acceptance of the Board's findings of fact that utilized the common law factors listed in § 220 of the Restatement, such as the continuous nature of the employment, the provision of instrumentalities and tools, and the indicia of control the newspapers exercised over the newsboys. See Hearst, 322 U.S. at 131. The Sill Court overlooked the complexity of the Hearst Court's analysis and improperly presented it as merely a choice between the common law test or the inquiry into the declared policy and purposes of the statute. In fact, the Hearst Court intended that the usual principles of agency be used to assess the work relationship, but where these principles failed to be useful in close cases, and possibly could lead to a determination of status on mere technicalities, then facts indicating the economic reality of the relationship were to be assessed so that the outcome would be consistent with the purposes of the Act. See supra notes 201-209 and accompanying text.

In fact, in subsequent Social Security Act cases, the Court adopted a "hybrid approach" which utilized both the statutory purposes inquiry and common law rules. See Matthew J. Rita, Note, Fishing for Dollars: The IRS Changes Course in Classifying Fishermen for Employment Tax Purposes, 77 CORNELL L. REV. 393, 402-03 (1992).

One year after Sill upheld the use of the statutory purpose inquiry in determining independent contractor status under the Social Security Act, Congress passed a joint resolution amending the law to include an express exemption for independent contractors by excluding: "(1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules." See Status Quo Resolution of 1948, H.R.J. Res. 296, 80th Cong. § 2, 62 Stat. 438 (1948)(emphasis added). The joint resolution also amended the Internal Revenue Code with an identical exclusion. See id.

211. See supra note 197 and accompanying text.
arbitrary and unfair treatment, and (5) the potential to benefit from collective bargaining.  

V. The Intent of the Taft-Hartley Amendment of Section 2(3)

Three years after the *Hearst* Court upheld the use of economic dependency factors, Congress generated a proposed amendment to section 2(3) which was enacted under the Taft-Hartley Act of 1947. In congressional comment, House members attacked the *Hearst* opinion claiming that the Court improperly allowed the Board to ignore "the ordinary tests of the law of agency." Today, for those current commentators and practitioners who wish to revive the factors of economic reality set out in *Hearst*, the primary hurdle to be cleared is the 1947 legislative record that explicitly condemned *Hearst*.

Therefore, in order to analyze the viability of such a doctrinal revival or other modification, this section reviews the record of the Taft-Hartley amendment with an eye to the questions of what exactly the House critics opposed in *Hearst*, which holdings of *Hearst* were overruled by the Taft-Hartley amendment, and whether the early Board law on the meaning of section 2(3) prior to *Hearst* could be viewed as having survived the 1947 amendment. The total congressional record on the intended purpose of amending section 2(3) to exempt all workers of independent contractor status is contained in two documents, the original House report from the Committee on Education and Labor, and a second House report summarizing the agreements of the Conference Committee that were enacted into law.

212. See *Hearst*, 322 U.S. at 127.
215. See supra Part II.C.
A. The House Committee Report

On April 11, 1947, Chairman Hartley of the House Committee on Education and Labor submitted the committee’s report on the proposed amendments to the National Labor Relations Act of 1935. With regard to the proposal to exempt independent contractors from the definition of employee under section 2(3), the report introduced the discussion with the following statement:

An “employee,” according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of National Labor Relations Board v. Hearst Publications, Inc. (322 U.S. 111 (1944)), the Board expanded the definition of the term “employee” beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic “expertness” of the Board, upheld the Board.

On its face, this introduction appears to be moving toward an outright overruling of the Hearst Court’s affirmation of the Board’s determination that the newsboys were employees covered by the Act.

However, as the comment continues, it becomes evident that the House criticism was directed not at the status of the newsboys, but instead at the relationship between the newspaper publishing companies and those persons that Hearst had referred to as district managers:

219. H.R. REP. No. 80-245, at 292. The stated purposes of the bill, H.R. 3020, were to prescribe fair and equitable rules of conduct to be observed by labor and management in their relations with one another which affect commerce, to protect the rights of individual workers in their relations with labor organizations whose activities affect commerce, to recognize the paramount public interest in labor disputes affecting commerce that endanger the public health, safety, or welfare, and for other purposes.

Id.

For a good summary of the pressures leading to the 1947 amendments, as well as the Taft-Hartley Act’s principle changes to the NLRA, see generally 1 PATRICK HARDIN, THE DEVELOPING LABOR LAW 35-48 (3d ed. 1992). For a more thorough account, see HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS (1950).

220. H.R. REP. No. 80-245, at 309.

221. See id.

In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees." The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching.\textsuperscript{223} These "independent merchants" referred to by the House comment were in fact the "district managers" referenced in the Board decision, the Ninth Circuit opinion, and the United States Supreme Court opinion. This is evident from the role of the district managers as described in \textit{Stockholders Publishing Co.},\textsuperscript{224} the Board decision below:

Each district manager works in an assigned geographical area, varying in mileage, within which he is authorized to distribute the newspaper published by his company. . . . Each district manager obtains newspapers for purposes of distribution at the publisher's plant, travels throughout his district and delivers the newspapers . . . . to newsboys, who sell them to the public. . . . The publisher makes a charge against the district manager for each newspaper that he takes from the plant. Likewise the district manager enters a charge, which is set by the publisher, against the newsboy . . . .\textsuperscript{225}

The district managers also hired the newsboys.\textsuperscript{226} The details of this holding on the status of the district managers were readily available to the House members since the \textit{Hearst} Court referenced them in its opinion.\textsuperscript{227}

From these facts, it is apparent that the criticism set out in the House comment with regard to "independent merchants" was directed at the district managers rather than the newsboys: the dis-

\textsuperscript{223} H.R. REP. No. 80-245, at 309. This portion of the House report is typically omitted by commentators quoting the committee's criticism of \textit{Hearst}. \textit{See}, e.g., \textit{HARDIN}, supra note 219, at 1623-24. This is probably due to its inconsistency with the generally accepted notion that the committee was addressing the status of the newsboys.

\textsuperscript{224} 28 N.L.R.B. 1006 (1941).

\textsuperscript{225} \textit{Id.} at 1013; \textit{see also} \textit{Hearst} Publications, Inc. v. NLRB, 136 F.2d 608, 610 (9th Cir. 1943), \textit{rev'd}, 322 U.S. 111 (1944) (citing same facts).

\textsuperscript{226} \textit{See} \textit{Stockholders}, 28 N.L.R.B. at 1023; \textit{cf.} \textit{Hearst}, 136 F.2d at 611 ("The newsboy customarily obtains his corner by applying at the plant of the publisher where he consults the district manager, who allocates the street corners in his district."). \textit{But see} NLRB v. \textit{Hearst} Publications, Inc., 322 U.S. 111, 119 n.17 (1944) (referring to the companies' argument that newsboys were independent contractors in part because they sometimes hired assistants).

\textsuperscript{227} \textit{See} \textit{Hearst}, 322 U.S. at 118 n.15.
district managers were the persons purchasing papers from the publishers and directly hiring the newsboys to sell papers on particular street corners, and the newsboys were the persons selling the papers to the public.\textsuperscript{228} Thus, the House comment did not dispute that the newsboys were employees under section 2(3), but believed them to be employees of the district managers, rather than the newspapers.\textsuperscript{229}

The House comment then continued its assessment of the \textit{Hearst} opinion, stating:

In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.\textsuperscript{230}

In this section of commentary, the House merely recites a few of the general principles of the common law of agency, albeit in such an oversimplified manner as to be misleading.\textsuperscript{231} Logically, this short rendering of the common law test mentioning only the factors regarding method of pay and the hiring of others, was most likely meant as a summary of just those facts the House members considered offensive in the Board's finding that the district managers were employees: that they hired newsboys, and that their income was from profits.

Further, only persons entirely unfamiliar with the history and scope of the problems associated with defining the line between independent contractors and employees under various state and federal statutes could possibly describe the difference between these two statuses as "big."\textsuperscript{232} Ironically, such a rhetorical rendering illustrates the common error discussed by the \textit{Hearst} Court: the incorrect assumption that there is some simple, uniform, and easily

\textsuperscript{228} See H.R. Rep. No. 80-245, at 309.
\textsuperscript{229} See \textit{id.}
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Supra} Part III.A.
\textsuperscript{232} See H.R. Rep. No. 80-245, at 309.
applicable test. As one commentator of the period described the complexity of applying the common law factors:

There are literally thousands of decisions issued by American and English courts revealing an infinite number of varying and inconsistent applications of the tests designed to determine whether or not an individual is an employee. There have been few legislative concepts which have been applied more varyingly or inconsistently.

Thus, the House members who attacked the Hearst decision as being adverse to the principles of agency and simultaneously instructed the Board to return to the simple business of applying the large distinctions between independent contractors and employees, appear to have had very little understanding of the subject they were attempting to legislate.

The House comment on amending the definition of employee under section 2(3) concluded with the following passage:

It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board’s expertness, has approved, the bill excludes “independent contractors” from the definition of “employee.”

It is remarkable that the committee assumed the intent of the 1935 drafters, rather than directly citing the language of the 1935 congressional record. Instead of finding it “inconceivable,” the House committee would have found a specific reference supporting the intent to give the definition of employee under section 2(3) a broader meaning than found in other contexts, and that the drafters founded this intent upon well established precepts of the pre-NLRA common law. Therefore, these were not in fact new, “far-fetched” principles that the Board had thought up on its own.

The final passage from the 1947 House report stated that the purpose of expressly exempting independent contractors from NLRA

236. See supra Part III.B.
coverage was "[t]o correct what the Board has done." The narrowest interpretation of the meaning of the House comment’s discussion of *Hearst* resides in the realm between these two ideas expressed in the House comment: its rejection of the holding that district managers were employees as "most far reaching," and its simple statement that the paper sellers (or newsboys) were employees. In other words, a close scrutiny of the Board’s analysis with regard to the district managers should illuminate exactly which definitional factors the House found offensive to the principles of agency.

In *Hearst Publications, Inc.*, the Board held that the district managers of four Los Angeles newspapers were employees within the meaning of section 2(3). The Restatement factors used by the Board included the continuous nature of the employment relationship, the indispensable function of the position to the business of the publishers, and various indicia of control. Given that these were "ordinary" factors at common law, there is little likelihood that the 1947 House committee members intended to overrule this portion of the Board’s analysis. The only economic facts reviewed by the Board concerned the method of payment factor. Analogizing to traditional wages, the Board had found that the publishers controlled the income of district managers by regulating the quantity of papers a manager could purchase, as well as

237. H.R. Rep. No. 80-245, at 309. In fact, in the years before the Taft-Hartley amendment, the Board had not "done something wrong." In centering its § 2(3) inquiry upon the principles of agency and supplementing those principles with facts relevant to the purposes and policies of the NLRA, the Board correctly applied the proper formula of the time. See supra Parts III. & IV. This point of vindication, however, is only of historical significance.

239. See id.
240. See id.
241. 25 N.L.R.B. 621 (1940).
242. See supra Part IV.B.1. This holding was summarized by the Supreme Court. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 118 n.15 (1944).
243. See *Hearst*, 25 N.L.R.B. at 629; Restatement (First) of the Law of Agency § 220(2)(f) & cmt. a (1933).
244. See *Hearst*, 25 N.L.R.B. at 629; Restatement (First) of the Law of Agency § 220(2)(b) (1933).
245. See *Hearst*, 25 N.L.R.B. at 629; Restatement (First) of the Law of Agency § 220(2)(a) (1933).
247. See Restatement (First) of the Law of Agency § 220(2)(g) & cmt. f (1933).
the purchase and resale prices of the papers. This was the analysis most likely offensive to the House Committee, particularly since the House comment insisted that independent contractors "depend for their income not on wages, but upon the difference between what they pay for goods . . . and what they receive for the end result, that is, upon profits." The narrowest interpretation of the House committee's criticism of Hearst, therefore, is that it disagreed with the Board's use of the inquiry into whether income was not in reality a structure of wages rather than profits.

A second interpretation of the House comment is that it meant to address the Board's analysis with regard to both the district managers and newsboys. An inquiry into which economic facts the Board considered in the balance of factors determining the newsboys' status in Stockholders Publishing Co. reveals only such a discussion with regard to the assessment of the common law factor of method of payment. There, the Board found that even though the news vendors were "charged" for the number of papers they received and later reconciled accounts with the district manager each week, this method of payment was merely "a convenient accounting device employed by the Companies to measure the earnings of the newsboys," which in economic reality the Board considered to be wages. This is the same analysis that the House comment was likely to have found offensive in the Board's analysis of the income of the district managers. Thus, the meaning of the House com-

249. H.R. REP. No. 80-245, at 309.
250. The Board accepted this criticism and in the years immediately following the Taft-Hartley amendment, applied the "profit test" under which it found workers whose income was from profit to be independent contractors. See 1 PATRICK HARDIN, THE DEVELOPING LABOR LAW 35-48 (3rd ed. 1992) at 1624. This reliance upon the House report for specific interpretative guidance, however, was misplaced given the fact that the Conference Committee omitted this language from its final compromise. See infra Part V.B.

This narrow interpretation of the House report would leave intact the Hearst categories of economic facts implicating unequal bargaining power, that is, (1) helplessness in dealing with an employer, (2) dependence upon wages from the employer, (3) an inability to leave the employment relationship without severe economic consequences, (4) an incapacity to resist arbitrary and unfair treatment, and (5) the potential to benefit from collective bargaining. See supra Part IV.B.4.c.

251. 28 N.L.R.B. 1006 (1941).
252. See Restatement (First) of the Law of Agency § 220(2)(g) (1933); supra note 72 and accompanying text.
253. See Stockholders, 28 N.L.R.B. at 1023.
254. See id.; see also supra note 240 and accompanying text.
ment would be no broader under this second method of interpretation.255

A third interpretation of the House comment is that the committee members intended to implicate all of the prior cases in which the Board used factors beyond those commonly associated with the principles of agency.256 This is the predominant explanation,257 although this author believes that interpretation to be overly broad because the House comment discussed no cases other than Hearst, nor did it reflect any knowledge of the Board’s other early applications of the test for employee.258 This lack of apparent knowledge of the Board’s prior cases on the issue of independent contractor status is consistent with the House comment’s lack of understanding of the general principles of the common law of agency and its misstatements of both the pre-NLRA common law of labor disputes and the express intent of the 1935 drafters with regard to the meaning of employee.259

A fourth interpretation of the House comment might be that the House members were attempting to legislate that, under all circumstances, employees work for wages or salaries and are directly supervised, and that independent contractors always do a job for a price, control the details of the work, and depend upon profits for income.260 However, this simple formula not only defies the complexity and variety of actual work arrangements (and is therefore a useless test), it also is inconsistent with the very principles of agency that the House instructs the Board to follow.261 For instance, under section 220 of the Restatement, the common law test requires a weighing of whatever relevant factors may exist under the circum-

256. See id.
257. See, e.g., Hardin, supra note 250, at 1622 ("[C]ongress indicated that the Board had exceeded the standards and intent of the original Act by including independent contractors as employees in several cases.").
259. These misstatements contained in the House report are in line with the conclusion of two commentators who found that in general the House proceedings on the Taft-Hartley amendment “did not match the difficulty of the subject,” nor did it contain “adequate and relevant analysis of the important issues presented.” Harry A. Millis & Emily Clark Brown, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 374, 381 (1950).
261. See id. at 302.
stances of each case, with no one factor being decisive. Instead, the House members seem to indicate that if a worker receives wages, that worker is an employee, and if a worker is paid by the job, that worker is a contractor. This simple construction, however, is inconsistent with the common law test. Specifically, under the Restatement, the status of workers paid by the job depended as much upon other factors not included in the committee’s brief summary, such as the level of skill and the length of time the employment was to last. Moreover, the principles of agency would be violated if the common law test were reduced to a short recitation of oversimplified and general terms. Instead, the employer-employee relationship, the Restatement reported, "cannot . . . be defined in general terms with any substantial accuracy," and the factors for determining independent contractor status "are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship." Thus, to the extent that it may be considered inconsistent with the principles of agency, this overly simple formulation cannot stand above the House comment's express direction that the Board must apply agency principles when deciding the status of workers under section 2(3).

In sum, as drawn from the text of the House comment, the best explanation of the intent of the House drafters is that they wished the Board not to find profits to be, in economic reality, wages, and that when the Board was to assess the status of a class of workers, it should not disregard from the balance the fact that those workers hire other workers. However, as discussed in the next subsec-

262. See Restatement (First) of the Law of Agency § 220(2) (1933).
264. See Restatement (First) of the Law of Agency § 220 cmts. e & f (1933) (same language retained in comments i. and j. of the Restatement (Second)); see also supra Part III.A.
265. See Restatement (First) of the Law of Agency § 220 cmt. b (1933) (same language retained in comment c. of the Restatement (second)).
267. Additionally, these House committee members may have been so motivated by antilabor sentiment that they were, under the guise of the precedent of agency principles, attempting indirectly to restrain the reach of the Board's discretion. See Hardin, supra note 219, at 37 (“[t]he emphasis in the House hearings was an investigation of abuse by labor of its power”). For earlier evidence of such sentiments, see Report of the Special House Committee to Investigate the National Labor Relations Board, H.R. Rep. No. 76-3109 (1941).
tion, any intent gleaned from the language of the House report ultimately carries no weight in the determination of the intent of the Taft-Hartley Congress in amending section 2(3). This is because the House language was never accepted by the Senate, did not survive the conference compromises, and was omitted from the final Conference Committee report which was voted into law.

B. The Conference Committee Report

On June 3, 1947, the Conference Committee which hammered out the differences between the House and Senate versions of the 1947 Taft-Hartley amendment issued its report containing the compromised provisions. Unlike the bill generated by the House Committee, the Senate bill had contained no independent contractor exclusion. During the Conference Committee proceedings, the Senate representatives compromised on this point and agreed to support an express exclusion. The Conference Committee report, however, rejected or watered down the language of the House report, summarizing the reasons for the amendment as merely the following:

The House bill excluded from the definition of "employee" individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be

268. See discussion infra Part V.B.
269. See discussion infra Part V.B.
271. See id at 1139.
272. See id. at 1135. It would have been a fairly simple matter for the Senate members of the Conference Committee to concede to adding an express exclusion since the Board had always excluded independent contractors from the Act's coverage, see supra Part IV, and because independent contractors were excluded under the principles of agency, see supra Part III.A. Thus, the exclusion was a ready bargaining chip for the Senate members.

Moreover, there is no question that the House members of the Conference Committee made many concessions in order to ensure passage of the bill. In explaining the results of the Conference Committee compromises, Representative Hartley made the following comments on the House floor:

Entirely too much emphasis has been placed on the so-called concessions that the House conference made during the conference. I will be very frank and say that I agreed to some of these concessions very reluctantly. I would much rather have seen the House bill as it originally passed enacted into law, but I want to see a bill that can be enacted into law passed by this Congress. . . . I also want to make it perfectly clear that there was no concession made except upon the assurance that it would provide us votes in another body to be certain that the legislation would be enacted into law.

93 Cong. Rec. 6383-84 (1947).
employees, the Supreme Court in *N.L.R.B. v. Hearst Publications, Inc.* (1944), 322 U.S. 111, held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were "employees" within the meaning of the Labor Act. Consequently it refused to consider the question of whether certain categories of persons whom the Board had deemed to be "employees" were not in fact and in law really independent contractors.273

This reduced version of the House comment is the decisive passage of the legislative record on the meaning of the section 2(3) exclusion because it was the portion produced by the Conference Committee and ultimately agreed upon by both the House and Senate.274

Specifically, the Conference Committee rejected all of the original House language criticizing the Board, and most of the House criticism of the *Hearst* opinion, leaving only its concern for adherence to agency principles.275 This final version dropped the House comment's discussion that contained misstatements of the intent of the Wagner Act drafters, the pre-NLRA common law of labor disputes, and the overly simplified rendering of the principles of agency.276 Instead, it contained its disagreement with the *Hearst* Court to the statement that the Court had improperly held that "the ordinary tests of the law of agency could be ignored by the Board."277 Therefore, the language of the House report that was rejected by the Conference Committee is not an accurate statement

273. See H.R. Rep No. 80-510, at 1138 (emphasis added).
274. See generally 93 Cong. Rec. 6370 (1947) (demonstrating House agreement as the House passed the proposed changes in H.R. Rep No. 80-510 (1947)); id. at 6536 (demonstrating Senate agreement as the Senate passed the proposed changes in H.R. No. 80-510 (1947)). For an example of Supreme Court analysis employing this principle of determining congressional intent according to Conference Committee documents when House and Senate bills differ, see *NLRB v. Hendricks County Rural Elec.*, 454 U.S. 170, 181-84 (1981) (holding that the language of the House proposal rejected by the Conference Committee was not the proper source of legislative intent).
275. See H.R. Rep No. 80-510, at 1138.
276. See id.
277. See id. In agreement with this view, Senator Taft entered his understanding of the section 2(3) amendment upon the Senate record as follows:

The legal effect of the amendment therefore is *merely* to make clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency.

of the legislative intent of the Taft-Hartley Congress on the meaning of the section 2(3) amendment.278

Thus, the sole directive of the Taft-Hartley Congress to the Board and the courts under the section 2(3) amendment was that the factors used to determine independent contractor status under the NLRA must be drawn from the general principles of agency.279 Currently, this is also the interpretation of the legislative intent supported by the United States Supreme Court.280 For instance, in NLRB v. United Insurance, Co.,281 the Court reviewed the congressional record of the Taft-Hartley amendment to section 2(3) and found that "[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."282 More recently, the Court has unanimously upheld this statement of the Taft-Hartley legislative intent in Nationwide Mutual Insurance Co. v. Darden,283 finding that Congress amended section 2(3) "to demonstrate that the usual common-law principles were the keys to meaning."284

C. The Effect of This Intent Upon the Issue of Judicial Deference to the Board

The mandate of the Taft-Hartley Congress that the Board apply general principles of agency to an inquiry into independent contractor status under section 2(3) confused the question of what degree of deference the Court should apply when reviewing the Board’s application of agency principles. The reason for this confusion was

278. As a result, the holdings of cases which have extensively relied upon the House report language in determining the legislative intent of the Taft-Hartley amendment should be considered questionable. See, e.g., Local 777, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB, 603 F.2d. 862 (D.C. Cir. 1978) (citing the House Report at 879 n.47, 903, 905, 909) (holding narrowly that the most important factor of the right-to-control test was the extent of supervision exercised, and that no great amount of deference was due a Board decision on independent contractor status) and its progeny, C.C. Eastern, Inc. v. NLRB, 60 F.3d 855 (D.C. Cir. 1995); Aurora Packing Co. v. NLRB, 904 F.2d 73 (D.C. Cir. 1990); North Am. Van Lines, Inc. v. NLRB, 869 F.2d 596 (D.C. Cir. 1989); Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); City Cab Co. v. NLRB, 628 F.2d 261 (D.C. Cir. 1980).
282. Id. at 256.
284. Id. at 324-25 (construing United Ins. Co., 390 U.S. at 256).
that while the common law inquiry was generally a question of law, the usual degree of judicial deference afforded to the Board was based in part on the rationale that the Board was more expert than the courts in applying the Act to matters of fact.\footnote{285}

In *United Insurance*, the Court discussed the appropriate degree of deference to be given the Board in the independent contractor context in the following manner:

[S]uch a determination of pure agency law involved no special administrative expertise that a court does not possess. On the other hand, the Board's determination was a judgment made after a hearing with witnesses and oral argument had been held and on the basis of written briefs. Such a determination should not be set aside just because a court would, as an original matter, decide the case the other way. . . . Here, the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's order.\footnote{286}

In other words, the Court explained that when a Board decision on independent contractor status under section 2(3) was reviewed, the result is to be upheld as long as the Board made a choice between two fairly conflicting views. However, because of the Court's use of the qualifying phrase "the least that can be said," coupled with its limited holding that the Board in this case had chosen between two fairly conflicting views, *United Insurance* presents the floor on the issue of deference to the Board, but not necessarily the ceiling.\footnote{287}

Although the application of agency principles is generally a question of law, section 220 of the Restatement recognizes an exception for cases in which employee status is less than clear:

If the inference is clear that there is, or is not, a master and servant relation, it is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered.\footnote{288}

The Court had upheld the application of this Restatement principle in a line of cases prior to *United Insurance* which held or reaffirmed the rule that agency principles were to be used for determining


\footnote{286. United Ins. Co., 390 U.S. at 260 (citations omitted).}

\footnote{287. See id.}

\footnote{288. Restatement (Second) of the Law of Agency § 220 cmt. c (1958).}
independent contractor status under the Federal Employer's Liability Act (FELA). 289

First, in Baker v. Texas and Pacific Railroad Co., 290 citing section 220 of the Restatement as the source of agency principles, the Court held that the status determination was a question for the jury to decide, and that "[o]nly if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury." 291 Second, in Ward v. Atlantic Coast Line Railroad Co., 292 again citing section 220 of the Restatement and citing Baker, the Court reaffirmed that the question of independent contractor status under FELA was a question "for determination by the jury on the basis of all relevant factors." 293 Finally, in Kelley v. Southern Pacific Co., 294 the Court reaffirmed these Baker and Ward holdings. 295

Because United Insurance did not overrule this well established agency principle derived from the Baker line of cases—that if reasonable minds could differ, then the question of independent contractor status was an issue of fact for the jury to decide, it is likely that the Court in United Insurance meant no reasoned divergence from the rule. Moreover, United Insurance can be read to be consistent with the Baker principle because it did yield to the Board on a question of fact involving "two fairly conflicting views" upon which reasonable minds could differ. 296

Under this Restatement principle applied by the Court in the Baker line of cases and not overruled by or inconsistent with the degree of deference afforded by the Court in United Insurance, the Board should receive deference where it decides questions of fact as a jury would decide them, rather than questions of law as rendered by a judge. In practice, most if not all cases heard by the Board on the issue of independent contractor status involve close
cases of fact which rise on appeal from disputed ALJ decisions. Therefore, there is a strong argument that deference to the Board should be presumed in all of its decisions on independent contractor status because these decisions involve close questions of fact with which reasonable minds could differ.

Despite this question of the exact amount of deference to afford the Board’s findings on independent contractor status, there is no question that the Court has retained for the Board, the usual degree of deference due to the findings of an administrative agency when reviewing questions concerning the interpretation of section 2(3) outside the independent contractor context. In Sure-Tan, Inc. v. NLRB, for example, the Court held that undocumented workers were employees within the meaning of section 2(3) of the Act. Quoting Hearst for the proposition that “the task of defining the term ‘employee’ is one that ‘has been assigned primarily to the agency created by Congress to administer the Act,” the Court held that “the Board’s construction of that term [employee] is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible.” Later, in NLRB v. Town &

297. See Baker, 359 U.S. at 228 (stating “[e]ach case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative”) (quoting Cimorelli v. New York Cent. R. Co., 148 F.2d 575, 577 (1945)).
299. See id. at 891-94.
300. Id. at 891 (quoting NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944)). This principle enunciated in Hearst, that the Board had been assigned the primary task of interpreting the Act, was upheld consistently by the Court in the years following the Taft-Hartley amendment. See, e.g., Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979) (stating that “Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language,” and that “the primary function and responsibility of the Board” was to apply the “general provisions of the Act to the complexities of industrial life” with its “special understanding”); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963) (stating “as in other cases, we must recognize the Board’s special function of applying the general provisions of the Act to the complexities of industrial life,” involving “an issue which Congress had placed in its hands”); NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1957) (stating “[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board”).
301. Sure-Tan, 467 U.S. at 891; see also Ford Motor Co., 441 U.S. at 497 (holding that as long as the Board’s “construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view”); NLRB v. Local Union No. 103, Iron Workers, 434 U.S. 335, 350 (1978) (holding that the Board’s construction of § 8 of the Act represented “a defensible construction of the statute and is entitled to considerable deference”).
Determining Independent Contractor Status Under Section 2(3)

Country Electric, the Court again relied on this same passage from Hearst, holding that paid union organizers working for the company that was targeted for unionization were within the definition of employee under section 2(3). In Holly Farms Corp. v. NLRB, the Court continued the use of this principle, stating that "[f]or the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one." Therefore, although the degree of deference afforded Board decisions on independent contractor status was left somewhat unclear by United Insurance, there is no question that the Board will be given the usual degree of agency deference for inquiries into the meaning of employee outside of the independent contractor context.

VI. PRINCIPLES OF AGENCY PERMIT THE BOARD TO CONSIDER ADDITIONAL FACTORS OF ENTREPRENEURIAL INDEPENDENCE AND THE RELATIVE DEPENDENCE OF EMPLOYEES

In the consolidated cases of Roadway III and Dial-A-Mattress, the Board asked the parties to brief these questions: Does the Board have the authority to change or modify the standard for determining independent contractor status under the NLRA? If so, should any changes or modifications be made? This section argues that the traditional principles of agency allow the Board to consider certain additional and relevant factors in its inquiry into independent contractor status. While the fundamental criteria should remain the currently recognized factors summarized in section 220 of the Restatement, the Board may expand its inquiry to include facts that tend to prove the independence associated with entrepreneurs and the dependence coincident with employee status. Further, the Board's ability to draw upon these additional inquiries is bolstered by recent Supreme Court cases.

303. See id. at 94 (quoting Sure-Tan, 467 U.S. at 891 (quoting Hearst, 322 U.S. at 130)).
305. Id. at 1406 (citing Sure-Tan, 467 U.S. at 891).
306. See supra note 60 and accompanying text.
A. Principles of Agency Support the Use of Factors of Entrepreneurial Independence

In general, the common law principles, as reduced by the Restatement and reported in section 220, are not a closed set of inquiries. The introductory language of section 220(2) states “[i]n determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered.” This open ended collection of factors used by various courts at common law allows a trier of fact to consider other facts relevant to the inquiry. This design recognizes that “[t]he relation of master and servant is one not capable of exact definition,” and that this relationship cannot be defined “in general terms with substantial accuracy.” “[I]t is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation.”

The flexible balancing of the common law test has been described by the Supreme Court in United Insurance in the following manner:

In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.

Thus, the common law test for defining the line between employee and independent contractor provides a flexible balancing of factors which each judge is relatively free to apply given the facts of each case. By expressly stating that the determination is not limited to the listed inquiries, the Restatement acknowledges the complexity of assessing the difficult and varying factual situations with which a trier of fact often is faced when determining independent contractor status. The common law test, in other words, is necessarily flexible to meet and measure the corresponding complexity of work.

307. Restatement (Second) of the Law of Agency § 220(2) (1958) (same language used in Restatement (First)).
308. Restatement (Second) of the Law of Agency § 220 cmt. c (1958) (same language used in comment b. of the Restatement (First)).
309. See id.
310. NLRB v. United Ins. Co., 390 U.S. 254, 258 (1968) (upholding the Board’s finding that insurance agents were employees under § 2(3) of the Act).
relations. Moreover, the open ended aspect of the inquiry springs from its common law nature which allows the test to evolve as judges are confronted with evaluating varying fact patterns as well as greater changes in the conditions of society and developments in the American workplace.

These principles of the common law of agency which give broad discretion to the trier of fact and allow the inclusion of other relevant facts, provide the Board, as a trier of fact, with the option of considering additional factors in the balance of its common law determination of independent contractor status. Under these principles, the Board is not restricted from considering additional facts concerning either entrepreneurial independence or the relative dependence of employees.

The use of facts tending to indicate independence or dependence are supported under the principles of agency by their logical connection to the inquiry of who is or is not an independent contractor. In this sense, relevant facts pointing toward the independence of a worker are closely related to the nature of control, which is, of course, a central consideration of the common law test. In other words, signs of independence—or indications of lack of control—are simply the flip side of the traditional control factor. Just as a trier of fact might frame the control inquiry as whether the employer controls the worker, this same inquiry can be informed by facts indicating the worker is not controlled and is therefore independent of the employer to a degree that would in the balance, cause the worker to be designated an independent contractor.

Also, these entrepreneurial inquiries are consistent with the traditional definition of an independent contractor as stated at common law. For instance, a 1923 treatise summarized an independent contractor in the following manner:

[The independent contractor is] one who exercises some independent calling, occupation, or employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to his employer for the end to be achieved, and not for the means by which he accomplishes it.

312. See id.
313. FLOYD R. MECHEN, OUTLINES OF THE LAW OF AGENCY 13 (1923).
This "independent calling, occupation, or employment" factor is therefore an ancient resident of the common law of agency, and as such is a viable tool for today's triers of fact.

In fact, the Board and the Court have at times applied factors of entrepreneurial independence. For instance, the early Board in Seattle Post, its first determination of independent contractor status under the Act, considered relevant the fact that motor route drivers had "no real interest in the business" of the newspaper, and that whatever interest they did have in the delivery subscription lists could be terminated at will by the publisher who held title to the lists. Likewise, in Stockholders Publishing Co., the Board found relevant the fact that the newsboys had "no vested interest in the newspaper business" that one might expect from entrepreneurs. Also, in Seattle Post, the Board noted in its balance of facts that the motor route drivers were not allowed by their employers to act as representatives of competing newspapers without the company's consent.

In United Insurance, the Court noted that the insurance agents in question "do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor." Then, in its list of "decisive factors" weighing in favor of a finding of independent contractor status under section 2(3) of the Act, the Court recognized two entrepreneurial considerations: (1) that "the agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations," and (2) that "they do business in the company's name."

Following United Insurance, the Board began to increase its use of entrepreneurial considerations. Most recently, in Roadway I,

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314. See Seattle Post Intelligencer Dep't of Hearst Publications, Inc., 9 N.L.R.B. 1262, 1275 (1938); see also supra Part IV.A.
315. See Seattle Post, 9 N.L.R.B. at 1275; see also supra Part IV.A.
316. See Stockholders Publishing Co., Inc., 28 N.L.R.B. 1006, 1023 (1941); see also supra Part IV.B.2.
317. See Seattle Post, 9 N.L.R.B. at 1275.
319. Id. at 258-59.
320. See, e.g., Richard C. Tmney, Annotation, Trucker as Independent Contractor or Employee Under § 2(3) of the National Labor Relations Act (29 USCS § 152(3)), 55 A.L.R. Fed. 20 § 7 (1981) (discussing work done by truckers as a distinct trade or business); id. at § 15 (discussing opportunities for profit or loss).
the Board included "the drivers' relative lack of entrepreneurial freedom" as a fact relevant to its finding that a class of delivery drivers were employees.\textsuperscript{321} Relevant facts indicating entrepreneurial independence, however, will vary from case to case depending on the exact circumstances of each work arrangement, and therefore should not be restricted to only those facts recognized in prior cases.\textsuperscript{322}

The use of such facts indicating the entrepreneurial independence of true independent contractors, when coupled with the application of the factors listed in section 220 of the Restatement, refine the inquiry into independent contractor status under section 2(3) and will produce a more exact evaluation of the reality of the work relationship. Moreover, this mix of factors presents a more accurate tool for determining independent contractor status in light of its many new and developing forms in today's complex economy.

B. Principles of Agency Also Support the Use of Factors Indicating the Relative Dependence of Employees

The flexible nature of an inquiry into independent contractor status under the common law principles collected in section 220 of the Restatement also allows consideration of additional factors indicating the relative dependence of employees.\textsuperscript{323} Consideration of facts indicating the relative dependence of employees is merely the natural and logical reverse of the inquiry into the independence of contractors. Because in close cases the status inquiry requires scrutiny of facts tending to show which side of the line between employees and independent contractors the workers in question properly fall, a logical resident of that analysis is the underlying question, "independent or dependent?"\textsuperscript{324}

Generally, workers who are true independent contractors are not as relatively dependent upon their employers as are workers in traditional employee arrangements. Further, because the employer-employee relationship is by necessity largely framed on an economic basis, this dependence often is defined in economic terms. For example, the general categories of facts indicating the economic

\textsuperscript{321} See Roadway Package Systems, Inc., 288 N.L.R.B. 196, 198-99 (1988); see also supra notes 51-54 and accompanying text.


\textsuperscript{323} See Restatement (Second) of the Law of Agency § 220 (1958).

\textsuperscript{324} Id.
dependence of employees acknowledged in Hearst were those facts tending to establish (1) helplessness in dealing with an employer, (2) dependence upon wages from the employer, (3) an inability to leave the employment relationship without severe economic consequences, (4) an incapacity to resist arbitrary and unfair treatment, and (5) the potential to benefit from collective bargaining. In fact, a worker of true entrepreneurial status would not suffer under similar conditions. For example, contractors who are truly independent readily can sever the business relationship and take their services and equipment elsewhere when faced with unfair or arbitrary treatment, or unfavorable working conditions. They usually have contracts with more than one company, or contract with one company on a full-time basis for short durations, and consequently are not dependent on a single employer in the same all-or-nothing fashion as traditional employees who tend to work on a full-time basis for an indefinite term. Because of these characteristics of independence, a true contractor does not suffer the effects of unequal bargaining power to any degree comparable to that suffered by employees, and thus would find little benefit in bargaining collectively. In fact, the principle of collective bargaining is antithetical to the business of a contractor whose livelihood depends upon the ability to underbid competing entrepreneurs, rather than join with them in concert.

Thus, inquiries into the relative dependence of employees could properly include facts of an economic character since work arrangements by their nature are economic and because employees are relatively more dependent upon an employer than are independent contractors. Independent contractors tend to have contracts of short duration, work for more than one company, and hold a vested interest in their livelihood that is retained once the work arrangement ends. The relative dependence of employees is merely the flip side of the independent contractor coin and is therefore rooted in our common law understanding of the distinctions between employees and independent contractors. As such, facts indicating the relative dependency of employees can assist a trier of fact in differentiating employees from independent contractors in the same way that facts demonstrating independence assist the common law.

325. See supra note 212 and accompanying text.
Determining Independent Contractor Status Under Section 2(3) inquiry. Appropriately then, these facts are available to the Board, as a trier of fact, in a section 2(3) inquiry into independent contractor status under the agency principles as outlined in the Restatement.

C. The Supreme Court View

Currently, the Supreme Court has unanimously recognized the flexible nature of agency principles as guided by the Restatement’s rendering of the common law test. Additionally it has left open the possible inclusion of additional facts under the inquiry, by noting that section 220 contains a non-exhaustive list of factors, and has enunciated a unifying principle which indicates that the Board may freely move to accept the more flexible approach of the application of agency principles as summarized in the Restatement.327

As discussed previously, the sole directive of the Taft-Hartley Congress to the Board and the courts under the section 2(3) amendment was that the factors used to determine independent contractor status under the NLRA must be drawn from the general principles of agency.328 In recent years, the Supreme Court has upheld this interpretation of legislative intent, finding in United Insurance that “[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act,”329 and holding in Darden that Congress amended section 2(3) “to demonstrate that the usual common-law principles were the keys to meaning.”330

Three years before Darden, in Community for Creative Non-Violence v. Reid,331 Justice Marshall wrote for the unanimous Court stating that the meaning of the term “scope of employment” under the Copyright Act of 1976 was to be construed by general principles of the common law of agency when determining independent contractor status.332 The rationale for its holding, the Court stated, was the general rule that “when Congress has used the term ‘employee’

328. See supra Part V.B.
332. See id. at 739-40.
without defining it, we have concluded that Congress intended to
describe the conventional master-servant relationship as under-
stood by common-law agency doctrine.\footnote{333}{Id.} 

Then, in \textit{Darden}, also writing for the unanimous Court, Justice
Souter clarified the importance of the rule set out in \textit{Reid}.\footnote{334}{See \textit{Darden}, 503 U.S. at 325.} In his
discussion of the intent of Congress in expressly excluding
independent contractors under the NLRA after \textit{Hearst}, as well as
the amendment of the Social Security Act after \textit{Silk},\footnote{335}{United States v. \textit{Silk}, 331 U.S. 704 (1947); see also supra note 210.} Justice Sou-
ter explained:

\begin{quote}
To be sure, Congress did not, strictly speaking, “overrule” our
interpretation of those statutes, since the Constitution invests the
Judiciary, not the Legislature, with the final power to construe
the law. But a principle of statutory construction can endure just
so many legislative revisitations, and \textit{Reid}’s presumption that
Congress means an agency law definition for “employee” unless
it clearly indicates otherwise signaled our abandonment of \textit{Silk}’s
emphasis on construing that term “‘in the light of the mischief to
be corrected and the end to be attained.’”\footnote{336}{\textit{Darden}, 503 U.S. at 325 (quoting \textit{Silk}, 331 U.S. at 713 (quoting \textit{Hearst}, 322 U.S. at 124)).} 

With this passage, \textit{Darden} made clear that an inquiry into the pur-
poses and policies of the federal labor laws in the analysis of
independent contractor status was untenable,\footnote{337}{See id. at 323. The Court, however, has retained an inquiry into the purposes of the
NLRA when reviewing questions concerning § 2(3)’s interpretation \textit{outside} of the
independent contractor context. Similar in principle to the old common law axiom set out in
1914 by Judge Learned Hand that “where all the conditions of the relation require
protection, protection ought to be given,” Lehigh Valley Coal Co. v. Yensavage, 218 F. 547,
552-53 (2d Cir. 1914), was the recent cautionary note of Justice Ginsburg in \textit{Holly Farms v. NLRB}, 116 S.Ct. 1396, 1401 (1996), that “administrators and reviewing courts must take care
to assure that exemptions from NLRA coverage are not so expansively interpreted as to
deny protection to workers the Act was designed to reach” (discussing the § 2(3) exemption
for agricultural workers). Analogous also was Justice O’Connor’s statement in \textit{Sure-Tan Inc. v. NLRB}, 467 U.S. 883, 892 (1984), that extending the coverage of § 2(3) to undocumented
aliens was “consistent with the Act’s avowed purpose of encouraging and protecting the
collective bargaining process” (citing \textit{Hearst}, 322 U.S. at 126).} at long last ex-
pressly rejecting the proposition of \textit{Hearst} and \textit{Silk} that the content
of the term ‘employee’ in the context of a particular federal statute is “to be construed ‘in the light of the mischief to be corrected and
the end to be attained.” More importantly, the Darden Court also announced its acceptance of the Reid presumption as a new unifying rule that if Congress enacts a federal labor law using the term “employee” without defining it, then the general principles of agency are to be applied in determining independent contractor status.339

Traditionally, the Court has looked to the Restatement as the source of guidance for the content and application of the general principles of common law agency.340 Recently, the Court has reaffirmed this method of utilizing section 220 of the Restatement in determining independent contractor status in its Reid and Darden opinions, and has stressed the open-ended nature of the inquiry.341 In Reid, for example, the unanimous Court cited the “non-exhaustive list of factors” of section 220(2) as the reference for the common law principles of agency that were to be used to determine employee or independent contractor status under the Copyright Act of 1976.342 Three years later, in Darden, the unanimous Court adopted the Reid approach for interpreting the common law test for independent contractor status in the statutory context of the

338. Silk, 331 U.S. at 713 (quoting Hearst, 322 U.S. at 124); cf. United Ins. Co., 390 U.S. at 256 (stating that Hearst had stood for the proposition that a determination of independent contractor status required an inquiry into “the history, terms and purposes of the legislation”) (quoting Hearst, 322 U.S. at 124).

339. See Darden, 503 U.S. at 323.

340. See Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752 n.31 (1989) (citing Kelley v. Southern Pac. Co., 419 U.S. 318, 323-24, 323 n.5 (1974)) (citing Baker for the rule that common law principles were to be used to determine the employer-employee relationship under the Federal Employer’s Liability Act); Ward v. Atlantic Coast Line R.R. Co., 362 U.S. 396, 400 (1960) (citing the Restatement (Second) of the Law of Agency § 220 (1958) as the source of agency principles for determining independent contractor status under the Federal Employer’s Liability Act, and stating that the determination is for a jury to make after considering all of the relevant factors among others); Baker v. Texas & Pacific Ry. Co., 359 U.S. 227, 228 (1959) (citing the Restatement (Second) of the Law of Agency § 220 (1958) as the source of agency principles for determining independent contractor status under the Federal Employer’s Liability Act, and stating that the determination is for a jury to make and the question may be taken from the jury only if reasonable persons could not reach differing conclusions)).

341. See Darden, 503 U.S. at 323-24; Reid, 490 U.S. at 751-53.

342. See Reid, 490 U.S. at 751-53 (holding that a sculptor hired to create a work of art according to the general specifications of an organization’s members was an independent contractor under the Copyright Act because, according to section 220 factors, the sculptor was highly skilled, provided his own tools, worked in his own studio, for whatever hours he chose to work, with no daily supervision, and was retained only for a short two-month time period by an organization that did not have the right to assign the sculptor additional projects, nor was sculpture its regular business).
Employee Retirement Income Security Act of 1974 (ERISA), again citing the Restatement's list of "non-exhaustive criteria for identifying [the] master-servant relationship."\textsuperscript{343}

In sum, the \textit{Darden} Court announced its adoption of the \textit{Reid} rule as a unifying principle that the general common law of agency is to be applied in defining employee where Congress has used the term in federal labor legislation without supplying a definition.\textsuperscript{344} The Court has further made clear that the Restatement is a proper source of these general principles, but that the common law test is a flexible inquiry and that section 220 presents a non-exhaustive list of factors to guide but not restrain a trier of fact in determining the often close line between employee and independent contractor status under the federal labor laws in which Congress left the term undefined.\textsuperscript{345}

Because the Wagner Act Congress did not supply an express definition of employee under the NLRA, and because the Taft-Hartley Congress corrected this deficiency by explaining that it intended that the general common law principles of agency were to define the term's meaning, and in light of the recent Court's announcement of this unifying rule that the common law principles are to be applied under the federal labor laws in which Congress did not provide an express definition, the Board is now in the position to accept this Supreme Court doctrine and announce its adoption of the flexible and open ended version of the common law test set out in the Restatement and interpreted by the Court.\textsuperscript{346} Such a move is

\textsuperscript{343} \textit{Darden}, 503 U.S. at 323-24.
\textsuperscript{344} See id. at 322-23.
\textsuperscript{345} See id. at 323-24.
\textsuperscript{346} The Board's acceptance of the Court's announcement of the unifying rule of \textit{Reid} and \textit{Darden} and its express adoption of the flexible version of the common law test, as explained by those cases, will also require the Board to explicitly reject the restrictive right-to-control test that is still being applied by the District of Columbia Circuit. See \textit{Local 777}, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB, 603 F.2d. 862 (D.C. Cir. 1978) (holding narrowly that the most important factor in determining independent contractor status is the right to control), \textit{and its progeny}, C.C. Eastern, Inc. v. NLRB, 60 F.3d 855 (D.C. Cir. 1995); Aurora Packing v. NLRB, 904 F.2d 73 (D.C. Cir. 1990); North American Van Lines, Inc., v. NLRB, 869 F.2d 596 (D.C. Cir. 1989); Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); City Cab Co. v. NLRB, 628 F.2d 261 (D.C. Cir. 1980).

Under the right-to-control test, an employer's right to control and direct the physical movements of a worker is the most important factor in the independent contractor inquiry. See \textit{Local 777}, 603 F.2d at 874-75 (quoting \textit{Warren A. Seavey, HANDBOOK OF THE LAW OF AGENCY} 142 (1964)). By placing so much emphasis on the right-to-control, the doctrine improperly rejected the common law principle explained in the Restatement that the listed
supported by the trend of Supreme Court precedent, and should be upheld by the Court upon review. This advance toward a unifying test for independent contractor status also brings the obvious advantage of creating a more consistent, lateral definition of employee among the highly splintered interpretations of the term presently used under the various federal labor laws that do not include an express definition. Moreover, the unifying test will provide the flexibility needed to adapt to and interpret the diversity of today’s evolving forms of employment arrangements.

VII. CONCLUSION

The common law principles of agency provide a flexible method of addressing today’s expanded use of independent contractors and the increasing variety of alternative employment relationships which in many instances have the effect of exempting workers from the employee protections that Congress intended for them. This flexible system of factors has particular importance in resolving the employer classification schemes arising in the NLRA context where the insufficiency of an overly rigid set of factors may at times result in outcomes inconsistent with the true nature of the employment relationship.

Under current Supreme Court precedent, the Board may broaden its inquiry under the non-exhaustive criteria of section 220 of the Restatement to include additional factors which more precisely focus on the independence of a true contractor and the dependence of a genuine employee. Such an inquiry should be firmly centered upon the existing factors listed in section 220 of the Restatement and incorporate other relevant facts that may assist the Board in assessing the nature of the work arrangement. This response by the Board to the changed circumstances of today’s factors “are all considered in determining the question,” RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 220 cmt. c. (1958), and is inconsistent with the principle recognized by the Court that “all the incidents of the relationship must be assessed and weighed with no one factor being decisive.” NLRB v. United Ins. Co., 390 U.S. 254, 258 (1968); see also Reid, 490 U.S. at 752. Further, in deciding its Local 777 holding, the D.C. Circuit quoted the following passage from Seavey’s treatise: “The right to control the physical movements of the employee is the most important single element in most of the situations.” Local 777, 603 F.2d at 875 (quoting WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY 142 (1964)). However, the court failed to consider the following statement presented on the same page of that treatise: “Even the right to control the physical activity of the employee, which in many cases is determinative, has been disregarded . . . .” Seavey, at 142.
employment relations and the increased variety of employment forms is an appropriate adjustment in light of its role as the primary interpreter of the Act and is consistent with the intent of the Taft-Hartley amendment directing the Board to apply principles of agency. In fact, in the unanimous cases of *Reid* and *Darden*, the Court upheld the use of the open ended system of Restatement factors, and announced the unifying rule that the principles of agency, as referenced by the Restatement, are to be applied to the term "employee" in all federal labor statutes in which Congress did not provide an express definition. Thus, under the present view of the Court, the intent of the 1947 Congress, and the unambiguous wording of the Restatement, the Board may under the principles of agency expand its section 2(3) inquiry into independent contractor status to include additional factors demonstrating entrepreneurial independence and the relative dependence of employees.