RECENT CASES

ESTABLISHMENT OF EMPLOYMENT RELATIONSHIPS BY COLLECTIVE AGREEMENT

The manipulation of conceptual language in legal instruments for the purpose of camouflaging the true nature of business transactions and jural relationships is often a tribute to the legal profession's ingenuity and, occasionally, to its sense of humor. Employers, particularly, stimulated by the expensive legal consequences of the employment relationship, have sought to insulate themselves from these consequences by turning their employees into independent contractors. Some recent cases, however, portend the demise of the capitalists' monopoly in this limited but fascinating field. Organized labor, it appears, has discovered the scrivener.

Following the passage of workmen's compensation and unemployment insurance statutes and the Social Security Act, numerous cases arose concerning the coverage of dance-band musicians. Since all of these statutes placed tax liability on the "employer," it became necessary to determine who "employed" the sidemen[1]—the band leader, or the operator of the establishment (i.e., the dance-hall, restaurant, theater, etc.) at which the band performed. Applying the control test, courts frequently held that band leaders were independent contractors.[2] Thus, the band leader, as an employer, was not only beyond the beneficial coverage of the acts, but he was burdened with the task of meeting the required assessments. This unsatisfactory state of affairs propelled the American Federation of Musicians into action. As the unfavorable decisions had turned on the fact that the establishments had no right to exercise control over the band members, the union devised a contract, known as Form B, which purported to grant this right to the establishments.[3] Band leaders were required by the union to use Form B exclusively when contracting with establishments.

Miss O'Meara, a member of the Federation, was an organist in a four-piece dance band. Her leader, through a booking agency, obtained a thirteen-week

[1] The term "sidemen" designates all members of an orchestra exclusive of the leader.

[2] In general, see 158 A.L.R. 915 (1945) and notes 7 and 8, infra.

[3] The pertinent provisions of Form B are as follows: ". . . [The] employer employs the personal services of the employees severally, and the employees severally, through their representative, agree to render collectively to the employer services . . . according to the following terms and conditions: . . . The employer shall at all times have complete control of the services which employees will render. . . . On behalf of the employer, the Leader will distribute the amount received from the employer to the employees, including himself. . . . The amount paid to the Leader includes the cost of transportation. . . . The employer hereby authorizes the Leader . . . to replace any employee who . . . does not perform any or all of the services provided for under this contract." Bartels v. Birmingham, 67 S. Ct. 1547, 1549 (1947).

engagement with the Earle Restaurant, Inc. The Form B contract was signed by the band leader, the booking agent, and a representative of the restaurant. While performing at the restaurant, Miss O'Meara was injured through the negligence of a waiter. In a subsequent tort action, the defendant restaurant contended that its liability was limited to workmen's compensation, and offered the contract of hire in evidence to prove that the plaintiff was, in fact, its employee. The district court excluded this document on the finding that the plaintiff was ignorant of its contents. The District of Columbia Court of Appeals held the exclusion erroneous on the ground that the contract was binding on the plaintiff if made by her validly authorized representative. *Earle Restaurant, Inc. v. O'Meara.*[4]

The courts have almost unanimously sought to determine the employment status of musicians through application of the common law control test. In applying this test, a distinction has been drawn by the Bureau of Internal Revenue[5] and, somewhat less articulately, by the courts,[6] between so-called "name" bands and "non-name" bands. Examples of the former type frequently possess all of the attributes of independent entrepreneurial units. Their personnel remains intact over long periods of time, during which they ordinarily perform at numerous establishments for relatively short engagements. Sidemen are often under long-term contracts with their leaders providing for fixed weekly salaries regardless of the number of performances given. The profitability of a name band depends largely on the ability of the leader to select competent musicians, drill them into a state of high discipline, devise unique orchestrations, and sell the band to the public. Thus, when a night club or restaurant hires such an organization, it purchases the services of a going concern. Since any interference on the part of the establishment with the mode of performance, and particularly with the selection of personnel, will damage the artistry of the ensemble, effective "control" is out of the question. Name bands are therefore generally regarded as independent units.[7]

[4] 160 F. 2d 275 (App. D.C., 1947).

[5] See 1 Prentice-Hall Social Security Tax Serv. ¶¶33,786.75 and 33,786.76.

[6] See cases cited notes 7 and 8, infra.

[7] Bartels v. Birmingham, 67 S. Ct. 1547 (1947); Palmer v. Michigan Unemployment Compensation Comm'n, 310 Mich 702, 18 N.W. 2d 83 (1945); In re Roseland Amusement Co., 269 App. Div. 713, 54 N.Y.S. 2d 173 (1945); Spillson v. Smith, 147 F. 2d 727 (C.C.A. 7th, 1945); In re Muni, 266 App. Div. 1052, 44 N.Y.S. 2d 924 (1943); Biltgen v. Reynolds, 58 F. Supp. 909 (Minn., 1943); Williams v. United States, 126 F. 2d 129 (C.C.A. 7th, 1942); People v. Grier, 53 Cal. App. 2d 841, 128 P. 2d 207 (1942). Contra: In re Rogavin's Claim, 259 App. Div. 774, 18 N.Y.S. 2d 302 (1940).

Under some state unemployment insurance acts, a presumption of employment arising from services for wages may be rebutted only by showing that a) the individual is free from control, b) his service is outside the usual course of business of the person hiring him, and c) he is customarily engaged in an independent calling. In these jurisdictions, members of name bands have been held employees of the hiring establishment. Utah Hotel Co. v. Industrial Comm'n, 107 Utah 24, 151 P. 2d 467 (1944); Maloney v. Industrial Comm'n, 242 Wis. 165,

At the other extreme are bands which form an integral part of the establishment which employs them. Such an establishment may directly employ the musicians, or engage a "contractor," often a band leader, to organize a band for the specific job. In these cases there is likely to be substantial control exercised by the management over hiring and firing, types of music to be performed, and the manner of performance. As opposed to name-bands, the profit and loss earmark more clearly lies with the establishment, the band leader assuming the function of a foreman. Consequently, members of non-name bands are generally regarded as employees of the establishments, rather than of the leader.[8]

Between the two extremes are bands, such as the one in the *Earle Restaurant* case, which are difficult to categorize. On the one hand, this band was a going concern to the extent that it had been organized some time prior to its engagement with the restaurant, and continued as a unit thereafter. It provided its own instruments and musical paraphernalia. Furthermore, there was no substantial control exercised by the management over the individual members. These factors would tend to show that the leader was an independent contractor. On the other hand, the engagement was for a relatively long period; the profit and loss earmarks were substantially on the management (each member was paid a salary which was stipulated in the contract of hire, and, so far as appears, the band leader probably incurred very few, if any, business expenses); and there is no indication that the band possessed such a distinctive style as would normally preclude interference in manner of performance and selection of personnel by the management.[9] However, the district court found the band leader to be an independent contractor, and the question of his status, apart from Form B, was not argued on appeal.

In holding the contract admissible to prove that the band members were in fact employees of the restaurant, the court of appeals expressly relied on the decision of the Circuit Court of Appeals for the Eighth Circuit in *Birmingham v. Bartels*,[10] a suit by a dance-hall operator to recover social security taxes assessed against him as an employer of numerous name bands. There, the court did not question that, apart from the provisions of Form B, the band leader would have been held an independent contractor. That status, however, was held to have been changed by Form B's contractual grant to the establishment

9 N.W. 2d 623 (1943). Contra: Unemployment Compensation Comm'n of Wyoming v. Mathews, 56 Wyo. 479, 111 P. 2d 111 (1941); Hill Hotel Co. v. Kenney, 138 Neb. 760, 295 N.W. 397 (1940).

[8] General Wayne Inn, Inc. v. Rothensies, 47 F. Supp. 391 (Pa., 1942); In re Dellapenta, 261 App. Div. 863, 24 N.Y.S. 2d 748 (1941); Ajello v. Savarins Mgt. Inc., 259 App. Div. 949, 19 N.Y.S. 2d 886 (1940); Boyle v. Mahoney, 92 Conn. 404, 103 Atl. 127 (1918); see Palumbo v. Unemployment Compensation Board of Review, 148 Pa. Super. 289, 25 A. 2d 80 (1942); Steel Pier Amusement Co. v. Unemployment Compensation Comm'n, 127 N.J.L. 154, 21 A. 2d 767 (1941).

[9] See Transcript of Record, Earle Restaurant, Inc. v. O'Meara, 160 F. 2d 275 (App. D.C., 1947), and dissent, ibid., at 279.

[10] 157 F. 2d 295 (C.C.A. 8th, 1946), rev'd 67 S. Ct. 1547 (1947).

of the complete right to control. The court drew a distinction between contracts which merely *recite* the existence of an employment relationship, and those which, as here, *create* such a relationship.[11] In the latter case, the facts that the exercise of control was unlikely, and that the conduct of the parties actually remained unchanged despite Form B, were considered irrelevant, except to prove that the parties had abrogated the contract. This, it was held, they had not done. The mere failure to exercise control was not inconsistent with an intention to retain the right to exercise it. Accordingly, the sidemen were found to be the employees of the dance hall, not of the band leader.

The weight to be given to control provisions in contracts for the purpose of determining the existence of an employment relationship is far from clear.[12] Decisions denying the effectiveness of provisions requiring that the work shall be performed under the employer's direction are frequently based on the finding that the supervision was intended to be exercised only with respect to the results to be accomplished rather than the details of performance.[13] On the other hand, where the contract has been held to create the employment relationship, either control was in fact exercised,[14] or the nature of the contract was such that the existence of actual control, or a practical power to control, may be inferred.[15] In a third line of cases, the courts often disregard a contract which purports to divest the hiring party of control, where it is found that he retains, as a practical matter, potential or actual control.[16] No case has been found, however,

[11] But cf. In re Roseland Amusement Co. 269 App. Div. 713, 54 N.Y.S. 2d 173 (1945), where a contract providing that sidemen should be deemed employees of a dance-hall was the decisive factor in the finding of an employment relationship. See also Claim of Camgros, 264 App. Div. 973, 37 N.Y.S. 2d 204 (1942).

[12] The Restatement of Agency lists, as one of nine factors to be considered in determining whether the subject is an employee or independent contractor, the degree of control reserved under the contract. Rest., Agency § 220 (2)(a). However, since a servant is defined as one who is "subject to the other's control," ibid., § 220(1), it could be argued that a contract providing for complete control is conclusive.

[13] United Gas Improvement Co. v. Larsen, 182 Fed. 620 (C.C.A. 3d, 1910); McGrath v. City of St. Louis, 215 Mo. 191, 114 S.W. 611 (1908); Miller v. Merritt & Co., 211 Pa. 127, 60 Atl. 508 (1905); United States v. Driscoll, 96 U.S. 421 (1877).

[14] Williams v. National Cash Register Co. 157 Ky. 836, 164 S.W. 112 (1914); Chicago, R.I. & P. R. Co. v. Bennett, 36 Okla. 358, 128 Pac. 705 (1912).

[15] Such an assumption is reasonable where the control provisions are elaborate. See Kelley v. Delaware, L. & W. R. Co., 270 Pa. 426, 113 Atl. 419 (1921); Aarnes v. Great Northern Ry. Co., 129 Minn. 467, 152 N.W. 866 (1915); B. Schade Brewing Co. v. Chicago, M. & P.S. Ry. Co., 79 Wash. 651, 140 Pac. 897 (1914); Charles T. Derr Const. Co. v. Gelruth, 29 Okla. 538, 120 Pac. 253 (1911); Smith v. City of Seattle, 20 Wash. 613, 56 Pac. 389 (1899).

[16] Salt Lake Tribune Pub. Co. v. Industrial Comm'n, 99 Utah 259, 102 P. 2d 307 (1940). See Wolfe, Determination of Employer-Employee Relationships in Social Legislation, 41 Col. L. Rev. 1015, 1025 et seq. (1941).

Courts likewise frown on attempts to camouflage employment relations by drafting instruments purporting to create other relations. "*Lessee*": S. A. Gerrard Co. v. Industrial Accident Comm'n, 17 Cal. 2d 411, 110 P. 2d 377 (1941); Comm. v. Weinfeld's, Inc., 305 Mass. 108, 25 N.E. 2d 198 (1940); National Tunnel & Mines Co. v. Industrial Comm'n, 99 Utah 39, 102 P. 2d 508 (1940); see In the Matter of Edward F. Reichelt, 21 N.L.R.B. 262 (1940). But

which holds that a bare contractual right to control, without more, is sufficient to establish the master-servant relationship.[17]

The logic of the *Bartels* and *Earle Restaurant* decisions is impregnable only if some magical significance be imparted to the oft-repeated phrase that "the right to control, and not its exercise"[18] determines the employment relationship. If one looks behind the literal words of this formula to its function, these holdings, even granting the validity of the much-maligned control test, become dubious. The "right to control" concept may be viewed as a device to protect the integrity of the control test.[19] Without it, the test would break down wherever positive evidence of control is lacking. The formula may be said to have been developed in recognition of the facts that 1) in an age of specialization, many types of employees may function with a minimum amount of employer supervision, and 2) latent, unexercised power to control may have as strong a coercive value as direct supervision. This rationale is particularly applicable to cases involving vicarious tort liability, where the courts have rightly felt that recovery should not be made to depend on what is, from the plaintiff's standpoint, a mere accident of affirmative supervision. Therefore, in the absence of specific reservations by the employer,[20] or in the face of specific negations of the power to control,[21] courts have examined the total picture to see if, apart from its exercise, the right exists. This use of the test may be contrasted with its application in the instant cases. In the *Bartels* case the total picture emphatically negates the possibility of control by the establishment. Hence, the contract can provide no more information on this point than is already known. *Earle Restaurant, Inc.*

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cf. Laffery v. United States Gypsum Co., 83 Kan. 349, 111. Pac. 498 (1910). "*Vendee*": Creameries of America, Inc. v. Industrial Comm'n, 98 Utah 571, 102 P. 2d 300 (1940); Beatrice Creamery Co. v. State Industrial Comm'n, 174 Okla. 101, 49 P. 2d 1094 (1935). Compare In the Matter of Seattle Post-Intelligencer, 9 N.L.R.B. 1262 (1938). But cf. Mountain Meadow Creameries v. Industrial Accident Comm'n, 25 Cal. App. 2d 123, 76 P. 2d 724 (1938). "*Partner*": Montello Granite Co. v. Industrial Comm'n, 227 Wis. 170, 278 N.W. 391 (1938). "*Licensee*": California Employment Stabilization Comm'n v. Matcovich, 74 Cal. App. 2d 398, 168 P. 2d 702 (1946).

[17] This seeming paucity of cases in an otherwise plethorically litigated field should not shock the reader in view of the fact that control provisions are usually inserted at the behest of the one using the services, and not, as here, the one providing them.

[18] Murrelle v. Industrial Comm'n, 382 Ill. 128, 134, 46 N.E. 2d 1007, 1010 (1943); Bernat v. Star-Chronicle Publishing Co., 84 S.W. 2d 429, 432 (Mo. App., 1935); McDermott's Case, 283 Mass. 74, 77, 186 N.E. 231, 233 (1933); United States Fidelity & Guaranty Co. v. Industrial Comm'n, 42 Ariz. 422, 433, 26 P. 2d 1012, 1016 (1933).

[19] Some would consider this a too charitable view. ". . . [While] the sop thrown to the employer, that he at least has the 'right to control' the work, may serve to keep the principle verbally intact, it fails to conceal the fact that it is obvious rationalism." Steffen, Independent Contractor and the Good Life, 2 Univ. Chi. L. Rev. 501, 507 (1935). "The control test seems to fit itself too readily into an *ex post facto* determination. . . . In view of the fact that, relationship once determined, control would follow . . . the possibility of reasoning in a vicious circle is apparent." Leidy, Salesmen as Independent Contractors, 28 Mich. L. Rev. 365, 377–78 (1930).

[20] See cases cited in note 18, supra.

[21] See cases cited in note 16, supra.

v. O'Meara presents a more difficult problem, since the relationship of the parties was not free from ambiguity. If the facts were thoroughly equivocal, the contract might have provided a convenient weight with which to tip the scales in favor of an employment relationship. The appellate courts in both cases, however, chose to treat the agreement not in terms of its evidentiary potency, but rather as presenting a problem in the law of contracts. To do this, however, allows private parties to frustrate statutory schemes, and places upon outsiders who wish to attack the validity of the arrangement the burden of proving either a contemporaneous parol understanding that the hiring party shall not exercise control, or that the parties, by their subsequent behavior, have abrogated the control provisions—almost impossible tasks.

That this problem is not an imaginary one is demonstrated in the *Earle Restaurant* case. Setting aside, for the moment, the collective nature of Form B, and viewing the contract as merely an arrangement between the actual signatories, the result of the decision is to substitute the establishment for the bandleader as plaintiff's employer, without the plaintiff's consent or knowledge. If the essence of the employment relation is consensual, such a result is clearly unsound, and so the cases seem to hold.[22] A complicating feature, however, is the fact that the Form B provisions were devised by the plaintiff's union, and incorporated into its by-laws. It could therefore be argued that, as a collective bargaining contract, it bound the plaintiff regardless of notice.[23] This raises the problem of the scope of the union's power to bind individual members. The recent tendency to impart a normative[24] effect to collective agreements has severely limited the application of many common-law principles. Collective

[22] "But employment, like any other contract, presupposes understanding. The new relation cannot be thrust upon the servant without knowledge or consent." Cardozo, J., in Murray v. Union Ry. Co. of N.Y.C., 229 N.Y. 110, 113, 127 N.E. 907 (1920); Wilson & Co., Inc. v. Locke, 50 F. 2d 81 (C.C.A. 2d, 1931); Standard Oil Co. v. Andrews, 212 U.S. 215 (1909). But cf. Tokash v. General Baking Co., 349 Mo. 767, 163 S.W. 2d 554 (1942); Rest., Agency § 220, Comment (2)(i) (1933). Perhaps this "rule" assumes a certainty in the law of independent contractor which is unwarranted. "A contractor may go forth in the morning proud in his independence and return at nightfall a servant, some court having found in the employer such a measure of control . . . as no truly independent contractor could countenance." Steffen, op. cit. supra note 19, at 502.

[23] This was, in fact, the holding in the instant case. However, the court took the position that the plaintiff was bound, not by the action of the Federation, but by that of the booking agency which negotiated the contract, and which the court thought was plaintiff's "collective bargaining representative." Earle Restaurant, Inc. v. O'Meara, 160 F. 2d 275, 276–77 (App. D.C., 1947). On the other hand, the defendant thought the plaintiff to be bound by her "agent," the band leader. Ibid., dissent, at 278. Both views obscure the essential issue of the power of a union to act as a gigantic risk-shifter.

[24] See Lewellyn v. Fleming, 154 F. 2d 211 (C.C.A. 10th, 1946); J. I. Case Co. v. NLRB, 321 U.S. 332 (1944); 1 Teller, Labor Disputes and Collective Bargaining § 172 (1940); Hoeniger, The Individual Employment Contract under the Wagner Act: I, 10 Fordham L. Rev. 14, 35 (1941); Fisher, Trade Unions under the Wagner Act, 21 Ore. L. Rev. 37, 51 (1941); Duguit, Collective Acts as Distinguished from Contracts, 27 Yale L.J. 753 (1918).

agreements which destroy seniority ratings,[25] abolish jobs,[26] impose a check-off of union dues on the wages of both union and non-union workmen,[27] and even impose affirmative obligations on the employees as individuals, have been held valid.[28] The only limiting factor has been the requirement that the union act in good faith and without discrimination against minority groups.[29] But in cases like the instant one, courts might plausibly be reluctant to allow the operation of collective bargaining to foreclose common law remedies to individual union members.[30] Furthermore, the possibility that union arrangements which tamper with fundamentally consensual relationships are actually beyond its power as a bargaining agent should not be overlooked. At any rate, the court's failure to discuss, or even realize, its extension of collective agreements into a new field is unfortunate.

Subsequent to the *Earle Restaurant* decision, the Supreme Court reversed the circuit court's holding in the *Bartels* case.[31] In a reassertion of its "mischief-remedy" doctrine,[32] the court denied that the "right to control" was determina-

[25] Llewellyn v. Fleming, 154 F. 2d 211 (C.C.A. 10th, 1946); Day v. Louisville & N. R. Co., 295 Ky. 679, 175 S.W. 2d 347 (1943); Florestano v. Northern Pac. Ry. Co., 198 Minn. 203, 269 N.W. 407 (1936).

[26] O'Keefe v. Local 463 of United Ass'n of Plumbers and Gas Fitters, 277 N.Y. 300, 14 N.E. 2d 77 (1938); Hartley v. Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, 283 Mich. 201, 277 N.W. 885 (1938).

[27] Greenwald v. Chiarella, 18 L.R.R.M. 2218 (1946) (semble); but cf. Braddon v. Three Point Coal Corp., 288 Ky. 734, 157 S.W. 2d 349 (1941).

[28] The following cases have held employees bound by collective agreements not to compete: Western Maryland Dairy v. Chenowith, 180 Md. 236, 23 A. 2d 660 (1942); Western-United Dairy Co. v. Nash, 293 Ill. App. 162, 12 N.E. 2d 47 (1937); Whiting Milk Cos. v. Grondin, 282 Mass. 41, 184 N.E. 379 (1933); Whiting Milk Cos. v. O'Connell, 277 Mass. 570, 179 N.E 169 (1931).

[29] Betts v. Easley, 161 Kan. 459, 169 P. 2d 831 (1946); Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944); O'Keefe v. Local 463 of United Ass'n of Plumbers and Gas Fitters, 277 N.Y. 300, 14 N.E. 2d 77 (1938); Hartley v. Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, 283 Mich. 201, 277 N.W. 885 (1938); Cameron v. International Alliance of Theatrical Stage Employees and Moving Picture Operators, 118 N.J. Eq. 11, 176 Atl. 692 (1935); Burke v. Monumental Division No. 52, Brotherhood of Locomotive Engineers, 273 Fed. 707 (D.C. Md., 1919).

[30] Exculpatory clauses in employment contracts purporting to exempt the employer from liability for negligence are invalid. Johnston v. Fargo, 184 N.Y. 379, 77 N.E. 388 (1906); Brant v. Chicago & A.R. Co., 294 Ill. 606, 128 N.E. 732 (1920); Rest., Contracts § 575(1)(a) (1933). Where the state of employment had no workmen's compensation, a contract providing for determination of compensation under the act of another state was held to be against public policy. Standard Pipe Line Co. v. Burnett, 188 Ark. 491, 66 S.W. 2d 637 (1933). Compare The Henry S. Grove, 22 F. 2d 444 (Md., 1927). But cf. Western Union Telegraph Co. v. Tompa, 51 F. 2d 1032 (C.C.A. 2d, 1931); Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920); cf. also Michels v. City of St. Paul, 193 Minn. 215, 258 N.W. 162 (1935).

[31] Bartels v. Birmingham, 67 S. Ct. 1547 (1947).

[32] See United States v. Silk, 331 U.S. 704 (1947); Grace v. Magruder, 148 F. 2d 679 (App. D.C., 1945), cert. den. 326 U.S. 720 (1945); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

tive of the employment relation for the purposes of social legislation. Employees, said the court, "are those who as a matter of economic reality are dependent upon the business to which they render service."[33] In view of this decision, the *Earle Restaurant* case may no longer be considered as authoritative in federal courts. But state courts clinging to the control test may still be embarrassed by the conundrums which it poses.

That the broader field of inquiry announced by the Supreme Court is more fruitful than the control test is certainly made manifest by the musician cases. The difficulty of determining what indicia of control are significant is particularly pointed in this field, and accounts for most of the conflicting decisions. While the right to hire and discharge personnel is a strong indication of control, a finding that such right does or does not exist is likely to be speculative because it is so rarely exercised. But many other kinds of control normally exercised are nearly, if not totally, irrelevant to the issues of liability for insurance payments and workmen's compensation coverage. Among the factors stressed by courts have been control of the kind of music played,[34] the duration of intermissions,[35] routes of ingress and egress to and from the band-stand,[36] requirements of dress,[37] and rules governing the deportment of musicians in the establishment.[38] The illogic of the test is highlighted by a decision holding a theater employing an animal act exempt from the unemployment insurance tax on the grounds that the theater "could not order a dog to jump through a hoop instead of ride on top of a pony. . . ."[39] This, it is submitted, is a non sequitur. It, along with the *Bartels* and *Earle Restaurant* cases, indicates the fundamental fallacy of blind reliance on the control test without further inquiry as to whether, in a particular situation, the application of the test will define the true entrepreneurial unit. Perhaps, in the vast majority of cases, economic reality follows control. But in the more difficult situations, ambiguities would seem best resolved by focusing on the economic realities directly, rather than through the oblique mirror of the control formula.

[33] Bartels v. Birmingham, 67 S. Ct. 1547, 1550 (1947). Factors to be considered along with control were stated to be "permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit and loss. . . ." Ibid.

[34] Steel Pier Amusement Co. v. Unemployment Compensation Comm'n, 127 N.J.L 154, 21 A. 2d 767 (1941). Contra: People v. Grier, 53 Cal. App. 2d 841, 128 P. 2d 207 (1942).

[35] Palumbo v. Unemployment Compensation Board of Review, 148 Pa. Super, 289, 25 A. 2d 80 (1942). Contra: In re Earle, 262 App. Div. 789, 27 N.Y.S. 2d 310 (1941), aff'd 286 N.Y. 610, 36 N.E. 2d 453 (1941).

[36] Claim of Camgros, 264 App. Div. 973, 37 N.Y.S. 2d 204 (1942).

[37] Palumbo v. Unemployment Compensation Board of Review, 148 Pa. Super. 289, 25 A. 2d 80 (1942).

[38] Appeal of Firm Amusement Corp., 264 App. Div. 973, 37 N.Y.S. 2d 204 (1942). Contra: Hill Hotel Co. v. Kinney, 138 Neb. 760, 295 N.W. 397 (1940).

[39] In re Radio City Music Hall Corp., 262 App. Div. 593, 597, 31 N.Y.S. 2d 284, 288 (1941).