NEW YORK SUPREME COURT

APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of the Claim of:

Gregory A. Mitchell Case No. 522892

Claimant

The Nation Co., LLC

Employer - Appellant

Commissioner of Labor of the State of New York

Respondent

EMPLOYER –APPELLANT'S BRIEF

Daniel Silverman
Law Office of Daniel Silverman, LLP
52 Third St.
Brooklyn, NY 11231

April 14, 2016

TABLE OF CONTENTS

APPENDIX

A. THE FOLLOWING FACTS ARE NOT IN DISPUTE

The Nation Co., LLC (herein The Nation Co.) publishes a magazine, published under the name of *The Nation,* that was first issued 150 years ago by abolitionists. Appendix (A)5 To this day, The Nation Co. continues to publish a print magazine on a weekly basis with a progressive editorial mission. A6 The magazine has approximately 140,000 subscribers. It maintains a staff of employees at its 33 Irving Place, New York City location. Almost all of the employees are covered by a collective bargaining agreement between The Nation Co. and the Newspaper Guild. A7 The Nation Co. also maintains a website under the name of *TheNation.com* and has various freelance writers who contribute material to the website and to the magazine. The website has about two million readers a month. A8 The freelance writers for digital or print content are not included in the unit represented by the Guild and the Guild has never sought to represent the freelance writers. A9

Claimant Gregory Mitchell was a well-established writer when he agreed to blog for *The Nation.com,* having written numerous books and articles. A10 (A "blog" is a term for a type of short written post.) He actually had written for The Nation Co. off and on since the 1970's in various capacities. A11 Just prior to the period of association at issue here, he was editor for a magazine called *Editor and Publisher* and so was widely regarded as an expert in the field of media criticism. A12 After several conversations with Katrina vanden Heuvel, the Publisher of *The Nation*, about how he might contribute, an agreement was reached and he and The Nation Co. signed a contract for him to write a daily or near daily blog on media and politics. A13 He wrote the blog for four years, three months under an individual contact with The Nation Co. A14 He negotiated a lump sum yearly remuneration, payable as a monthly retainer, not related to how much he actually published.

His contract expired in March, 2014 and he continued to blog under an oral agreement to extend the terms until June 30, 2014, when he ceased blogging for The Nation Co. A16 Claimant testified that he also blogged for the *Huffington Post* and continued to do so after he stopped blogging for The Nation Co. A17

Claimant's agreement with The Nation Co. was that he would post a daily or near daily blog covering matters of public interest related to media and politics. A18 The content of the blog was up to him, so long as it was within the media and politics area, as was the amount of time he spent writing the blog. A19. While the editors and Publisher of *The Nation* made suggestions on general topics for his blog, Claimant had complete independence on whether to accept the suggestions and could reject them without adverse consequence. A20 Thus, the substance of his blog posts was totally within his discretion. A21 Indeed, Mitchell testified that he could even post a blog that was contrary to *The Nation's* political outlook. A22

The only censorship on the substance of his posts was his own sense of what would be appropriate. A23 There was no prior review of the matters he decided to put on the web. His blogs were only reviewed by interns for grammar and factual accuracy and valid links after they were posted. A24 As he explained, "I would be sitting at home, sign on to the Nation site, press a button and my story would get posted." A25

Claimant worked from a location of his choice, mostly at his own home, using his own equipment. A26 (Q: Whose decision was it for you to work from home? A: It was mine. A27) He came into The Nation Co. offices perhaps once a year. A28 He received no training for the job except to learn the technicalities of how to post on The Nation Co.'s website. Claimant testified that if he was asked to perform work for The Nation Co. other than blogging, he was paid extra for that work. A29 "It was not expected of me; it was not part of my contract." A30 (Q: … [D]id you ever receive any work assignments? A: [Y]ou mean beyond the daily thing?. Actually, I did…some articles for print which was different. I was paid separately. It was like, okay, you're a freelance, would you do this for us and we'll pay you extra money A31)

He was not required to submit any reports. A32 There is no evidence of his ever receiving a written appraisal of his work.

Claimant set his own hours, posting as he wished any time of day. A33 As he stated, in response to a question as to who set his hours, "I did, except within the demands of having to get the work done by a certain time," A34, ideally sometime in the morning. A35 Even assuming, as the ALJ found, that he was encouraged by *The Nation* managers to post in the morning, he could, and did, post any time of day and there was no adverse consequence if he did not post in the morning. A36 When and how often he posted depended on the subject for the day, the timing of traffic on the blog, the needs of the readership. A37 (Q: What were your work hours? A: Well, it varied…First months we talked about I had to get up early and post this Daybook…and I might be done by 10:00 or 11:00 in the morning and then I'd have to update a little bit during the day…[W]ith the Wikileaks and Occupy Wall Street it was almost 24/7. I could be up to 2 in the morning covering something that was being covered online or on a newspaper site…There were days when I wrote what you might consider a column, you know, get up and say, I'm just going to write on one subject today and I know they'd like me to get it up by noon so I'm going to take morning and write on one subject a little longer… A38)

On the occasions that he failed to post daily, there was no adverse consequence and he was free to take time off whenever he desired. A39 Indeed, at times, Claimant decided to take a vacation and spent many days away from blogging. For instance, he testified that when he went to Europe to visit his daughter, he decided not to post during that time, A40, and instead worked on researching a book that he was writing independent of his work at The Nation. A41 He was not required to obtain advance approval for this time off, although as a courtesy, he notified the magazine as to when he would be leaving. A42

Claimant performed blogging and writing for other companies during the time he was blogging for *The Nation* and there was no restriction on the amount of such work he could perform. A43 Indeed, he was encouraged by the Publisher of *The Nation* to do so. A44 He also wrote/co-wrote/updated and published eight

books during this period, performed research and made a proposal for a book to be published after his departure from The Nation Co., A45, and made a few short proposals to two or three publishers. A46

He even used his blog, or the Twitter account he started to promote his blog, for unrelated matters in furtherance of his personal interests, without being disciplined by The Nation Co. A47 For example, he wrote about Beethoven and Upton Sinclair. A48 Further, Claimant was free to take the content of his blog and to repost it with another publisher. A49

Claimant had the authority to hire a research assistant who would be paid by him. A50 While he testified that he "ethically" couldn't have had someone write his blog for him and post it under his name; he could have hired someone to do research for him. A51

Claimant was paid a yearly fee, paid in monthly installmants, for his contributions, as is standard practice in the magazine/media industry. The amount of his remuneration was set forth in his contract with The Nation Co. He received no fringe benefits. A52 He was not covered by The Nation Co.'s insurance plans. A53 He received $32,000 during the first year of his blog and approximately $15,000 during the last year, plus a stipend for expenses between $2,000 and $2,500. A54 He was never paid a bonus. A55 The Nation Co. considered him to be an independent contractor and told him so. A56 He filed taxes as an independent contractor, A57, and listed his occupation on his tax returns as "independent writer/performer." A58.

B. THE FINDINGS OF THE ALJ AND THE BOARD

The Board adopted the findings of fact and the opinion of the ALJ.[1] Several of these initial findings, however, are not supported by the record:

[1] While the Appellant does not believe credibility is an issue in this case, to the extent that the Court concludes otherwise, it should be noted that the ALJ presiding on March 10, 2015 and April 16, 1016 was not the finder of fact in this case.

The ALJ found that Claimant's initial posting every day had to be in the morning. Mitchell testified that he was hired initially to write something called Daybook, the essence of which was to do an initial post first thing in the morning and then update it throughout the day. (A: … [I]n the roughly six months or eight months, or whatever it was, I was supposed to and did produce a blog every morning. In fact it was called Daybook, it was sort of the subtitle for the blog during that period. And so every morning by like 9:00 in the morning, 9:30 in the morning, I was expected to put…links from around the Internet of interesting stories, so that people would get up. They'd sign on. Nation readers would go to the site and they'd say, oh, there's Greg Mitchell's Daybook…and then during the day I would keep adding links to it….then I started Wikileaks which was seven days of week. A59) During this period, the control exercised by The Nation was not, therefore, control over his schedule, but the basis of his agreement to write the Daybook. A60

The record established that when he stopped doing the Daybook, it was the preference of The Nation Co. for him to post in the morning, but there were no consequences if he did not do so. A61 As Mitchell explained, "Theoretically, I could write the pieces at any time of the day, but in reality, the majority of news and Web traffic was in the morning and it's also the time the Web editors decide what to highlight on the site, so it was obvious that I should do my work in the morning and post well before noon. Of course, in live-blogging, it had to start early and usually went on all day—little choice in that." Mitchell testified that he was "expected" to file virtually every day. As noted above, the time to post and the number of days to post was determined by his analysis of the urgency of the subject matter and the traffic on the blog. When he failed to post, there were no adverse consequences. A62

The ALJ found that Claimant's posts were reviewed by copy editors. Mitchell testified that Nation interns made suggestions for links and tips for his blog and that copy editors at times suggested changes that he was free to accept or not. A63 It is clear that the only review that occurred had nothing to do with the substance of his post; it was solely quality control -- checking spelling and grammar, verifying links, sizing images, etc. A64 Mitchell described it as "clean

up." A65 Editor Richard Kim testified that often Mitchell would file his blog during the day and there would be a quality control review, but sometimes he would file at night and that would go up on the website without such review. A66

The ALJ found that Mitchell always notified The Nation Co. if he wanted to take a vacation. Mitchell testified that it was his opinion that The Nation Co. should be notified. There is no evidence that anyone at The Nation Co. asked him to do that. A67 As Richard Kim explained, Mitchell didn't have to get permission for vacation, just send a heads up email. A68 It is also noted that it is not in dispute that Mitchell could post from anyplace he could access the internet. He was thus on "vacation" only when he unilaterally decided not to blog for awhile. A69

The ALJ found that the pay periods were set by the employer. Directly contrary to this finding, Mitchell testified that he had been getting paid every two weeks and then he requested to get paid monthly and the change was made. A70

In its decision, in addition to the Appeal Board generally adopting the factual findings of the ALJ, specifically relied on the following facts. As demonstrated below, either the record does not support the facts found or the facts do not reasonably establish employee status.

1. The Board cites without support its conclusions that the Claimant was restricted from publishing with competitors the same content written for The Nation and that that fact supports a finding of employee status. The record is inconclusive about the underlying factual question.

The contract between Claimant and The Nation Co. stated that he could publish his content in other media, if he waited 48 hours and said it appeared first in *The Nation*. A71 According to Mitchell, vanden Heuval encouraged him to "cross post" his blog at the *Huffington Post*. A72 Vanden Heuvel testified that Mitchell was retained to write a blog for The Nation, "but it was picked up by other places too as I recall." A73

Claimant testified that he really didn't know what the copyright law was on that question, but he presumed he would have been restricted from selling the

exact same content. (Q: Could you take your content and sell it to the New York Times? A: I presume not. I really don't know about the [copyright] law that well. A74) But he believed that his contract permitted him to post something he had written for The Nation somewhere else, after 48 hours and if he gave The Nation Co. some credit of where it came from. A75

Thus, it does not appear that Mitchell was precluded from submitting his work product to other media outlets. However, even if this Court were to conclude that he were, the Employer argues that that fact would not lead to a conclusion of employee status. It cannot be disputed that in the publishing industry, if an article, for instance, appears in a particular publication and that publication has paid for the production of that article, that publication has certain ownership rights over that article, whether it is written by a company employee or a freelancer. Editor Richard Kim explained that Mitchell couldn't publish the exact same content he wrote for The Nation with the Huffington Post, but he could write for them on subjects he also covered for The Nation. (A: [T]he content that he actually wrote, the actual sentences had to be exclusive to us. And this is standard in publishing. We, as the magazine cannot have their articles be republished by other places… [i]n the journalism profession that would be considered self-plagiarism on the part of the writer and on the part of other outlets it would be considered copyright infringement. A76) In the context here, these limitations are evidence of some control over the end result, but not the means of producing that result. (See also the Department of Labor Guidelines on which the Employer relied that specifically provide "A policy that precludes the individual from offering the information, story or pictures to another publication in order to protect the value of the product is not considered a restriction on the individual's right to work for others." *Infra* page 16 A-101 c)

2. In a related finding, the Appeal Board gave weight to the finding that Claimant was required to identify himself as a writer for the Nation when interviewed. Mitchell testified that he "generally" identified himself as a Nation writer. A77 He then clarified that he introduced himself as a writer or a blogger for The Nation when he was interviewing people for The Nation blog. A78 Katrina vanden Heuvel explained that there are a number of independent contractors

who write for The Nation and for other places. “We ask that if it relates to their writing for The Nation, they identify themselves as such.” A79 There is no evidence that Mitchell was required to identify himself as a writer for The Nation in contexts other than when he was talking to someone about The Nation blog he was writing. As Richard Kim testified, Claimant could identify himself differently in other outlets. A80 The Appeal Board does not explain why this would lead to a conclusion of employee status. Surely it makes sense that if Mitchell was interviewing someone for The Nation blog, he should inform them that he was writing a blog for The Nation.

3. Both the ALJ and the Appeal Board emphasized their conclusions that The Nation Co. exercised the right to tell Claimant what to write about and that he sometimes asked to stop writing about something, but they insisted he continue. It is necessary to review the record carefully on this question.

It is undisputed that Mitchell had the discretion to write about what he wanted to write about, within the terms of the contract, i.e. so long as it had to do with media and politics. As he put it, “I didn’t really have to ask permission.” A-81. He specifically noted that the ideas for the very large subjects he covered over a long period of time—Wikileaks, Rupert Murdoch and Occupy Wall Street—all came from him. A82 (Q: Who decided it would only be Occupy Wall Street during those periods? A: I think it was kind of collaborative in a way… [I]n both those cases [Wikileaks and Occupy Wall Street] I had started writing about them because they were enormously important for The Nation audience. I keep writing about them which would have been expected for a week or two and then they became in both cases the most popular thing on the entire site, every single day…I liked that. It was good to write something that was so popular but The Nation also liked it because it was a real audience driver. A83)

It is clear that Publisher vanden Heuvel and others sometimes made suggestions to Mitchell about possible blog topics. Mitchell himself characterized them as suggestions or urgings or guidance or encouragement, not direction. A84 As vanden Heuvel described it in response to a question from Mitchell, “Within

the mandate and framework of your criticism…I would fire off an email in a very loose way, like what do you think? Take a look." A85

Mitchell had the freedom to say no or not to respond to these suggestions, without consequence. A-86 The only motivation he had to accept the suggestion from The Nation Co. was that he did not want to alienate the Publisher because he wanted his contract to be renewed. A87 Mitchell testified as follows:

> A: There were other times where I would get a note, generally from Katrina, sometimes from someone else, saying, why don't you cover this or you really should cover this. Q: Could you have said no I don't want to discuss that? A: Yeah, I could. But remember, she was the editor, the publisher, the co-owner and a board member of the Nation. Q: So the times you didn't outright say no, but you just let it go and you didn't write about that. A: There were times, yeah. Q: Did you hear about it afterwards? A. I don't think so. I mean, I don't think she said whatever happened to that? A88

There is no evidence of any control exercised by The Nation over the substance of Mitchell's posts, with only one exception. Mitchell alleges that he requested to change his focus and to write about the 2012 election beyond as it related to the media and was told he could not. In emails contained in Claimant's Exhibit 9, he repeatedly asked to stop doing Wikileaks in order to focus on the 2012 election. Vanden Heuvel responded that she wanted to retain his (contractually negotiated and agreed to) media focus. Vanden Heuvel's explanation was clear when he asked her about it at the hearing: "My understanding is that…it was your right to cover [the 2012 election] within the framework of the media, but to go—to do a whole thing…was a decision that didn't make sense." A89 Steven Mejia, Commissioner of Labor representative, in his closing statement said that the fact that Mitchell was restricted to writing about the media showed that he was an employee. A90 This is wrong. Mitchell was retained and signed a contract to do a blog about the media. That was the deal. If one were to retain a house painter to paint a house, the painter could not on her own decide to stop painting the house and start painting the fence. She was hired to paint the house. That restriction does not make her an employee.

The record is clear, therefore, that while there was interplay between Mitchell and vanden Heuvel, as professional colleagues, he did not have to ask permission before deciding what to write about and he did not have to accept suggestions, so long as he wrote about that which he was contracted to write about.

The related question is whether he was told to continue writing about something after he wanted to stop. A91 In the hearing, Mitchell referred only to vanden Heuvel and other management directing him to continue to write about Wikileaks when he wanted to stop. Even though he introduced many emails between him and vanden Heuvel that he said characterized his relationship with her, the only email submitted that allegedly indicated her telling him to continue writing about something after he wanted to stop was the one described above, where Mitchell requested to stop covering Wikileaks and change his contractual focus from media to the 2012 elections. Even then, though she declined his request to change his focus away from media as he had been contracted to cover, vanden Heuvel invited him to talk with her about it and commented, "Still think Wiki has oxygen and traction, for a period more…and we should test that for a bit, no?" Claimant's Exhibit 9 Thus, as above, vanden Heuvel's communications to Claimant were suggestions, not assignments of work. To the extent that Claimant interpreted them to the contrary, it was only out of a desire to keep on friendly terms with the Publisher of the magazine.

4. The Board relies on the fact that Claimant has to use The Nation's computer program and was given training so that he could do that. There is no dispute that Claimant used his own computer A92 and could submit material from anywhere in the world. Somehow the Board finds it determinative that he had to submit his product through The Nation Co.'s content management system. The content management system, as Richard Kim explained it, is technical guidelines for entering things into the computer system, the way the words get into a website and posted online. A93 As Mitchell himself explained, "It's a common thing, now evolved for years for all websites of this sort…You have a password…[Y]ou have an address where you go. You sign in and then a form comes up where you might check off some boxes but then you can literally write

your article or paste in the article if you've written it elsewhere. And then you go through some other steps and press publish." A94 He testified that it would technically have been possible for him to submit his work as attachments to an email, but that would have required having someone else load it onto the content management system so that it could be published. "I mean, I've worked in magazines before with websites like this and I sort of knew what the deal is." A95 It is not an indication of employee status that The Nation Co. asked him to expedite the submission by posting it directly through the content management system.

5. The Board cites as supportive of its conclusion of Mitchell's employee status the fact that he was assigned an intern. There is no evidence that he was required to work with the interns or to use them in a particular way. According to Richard Kim, Mitchell was asked to call the intern that was available to him to talk about what they could do for him. A96 Interns would often send him links or tips for the blog. A97 As vanden Heuvel explained to Claimant at the hearing, "You used the interns at your discretion." A98 In fact, Mitchell himself testified that he co-authored a book with one of the interns! A99 It is submitted that the limited role of the interns over non-substantive matters cannot be considered control over the work of Claimant. It was as if Claimant was given access to a dictionary and grammar book. The control over the substance of his material was admittedly his own.

6. Finally, the Board relies on the fact that Claimant was given reimbursement for some expenses. The record establishes that Claimant negotiated a flat amount he could spend on travel and conferences. A100 Such reimbursement does not constitute control over the means of producing the product.

C. LEGAL ANALYSIS

The Board's determination must be supported by substantial evidence, a standard that requires "proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted

reasonably – probatively and logically.*" Matter of Classic Riverdale, Inc*. 520759 (January 13, 2016) citing *Matter of Rodriquez [2020 Video Voice Data, Ltd – Commissioner Labor]*, 58 AD3d 929, 930 (2009).

It is well-established that the determination of whether someone is an independent contractor or an employee is a fact-specific analysis that rests on the extent of control exercised over the employee. While the ALJ in the instant case correctly noted that the UI Board and the courts look to the control over the results produced as well as the means used to achieve those results, she omitted from her analysis the fact that control over the means used is the more important test. *Matter of Rodriquez v. Commissioner of Labor*, *supra*; *Matter of Confero Consulting Associates*, 518472 (May 7, 2015) As this Court has recently held, an employment relationship does not exist where "the evidence established that the alleged employer exercises only incidental control over the results produced – without further evidence of control over means employed to achieve the results. *Matter of Classic Riverdale, supra*. *See also Ted is Back Corp*. 64 NY2d 725 (1984)

The Board has stated that the desire to know whether work is being done properly, i.e., the results, is a condition just as readily required of an independent contractor as an employee and is not conclusive as to either situation. *Matter of Appeal Board No. 543454 Haven After School Program* (2009) citing *Matter of Werner*, 210 AD2d 526 (1994)

Clearly, one contracting for the services of an independent contractor is entitled to insure that the product being produced is consistent with the purpose of the agreement. Indeed, to conclude that any expression of control over the outcome establishes an employer/employee relationship would mean that telling a house painter you want your house to be painted blue and that she should not to get paint on the windows would somehow be evidence that the painter is not an independent contractor. This flies in the face of economic reality. In the instant case, if Mitchell was hired to do a daybook on media and politics, even as an independent contractor he was properly encouraged to post in the morning and to write on media and politics.

Factors more critical to the determination are whether the contracting party controls the means used to achieve the desired results and whether the person doing the work has the potential for economic gain to make a profit by hiring a subordinate and paying the subordinate out of his/her own payment from the contracting party. An analysis of precedent supports this conclusion.

The ALJ in the instant case cited *Matter of 12 Cornelia St*., 56 NY2d 895 (1982) for the proposition that a determination that an employer-employee relationship exists it must rest upon evidence that there was control exercised by the purported employer over the results produced or the means used to achieve results. It is noted that the holding in that case clearly supports the Appellant's position herein. The Court of Appeals found in that case that salespersons were independent contractors wherein it stated:

> The following characteristics are illustrative of the nature of the relationship between petitioner and its associated salespersons: salespersons are paid commissions upon gross sales, if any, without deduction for taxes, and are not entitled to draw against commissions; they are permitted to work whatever hours they choose (although a voluntary time schedule has been set up by the salespersons themselves, to which not all adhere), out of their own homes or petitioner's office, and are free to engage in outside employment; petitioner provides limited facilities and supplies for the use of salespersons, but the salespersons otherwise bear their own expenses; attendance at periodic sales meetings is not required; whatever initial training is provided by petitioner may be availed of or not at the salesperson's option; a group insurance plan covers the salespersons, but the salespersons themselves pay the premiums; and, while petitioner assigns leads to salespersons on a rotating basis, the majority of leads come from the salespersons themselves. In the face of uncontradicted evidence of these characteristics of petitioner's relationship with its salespersons, it cannot be said that substantial evidence exists to support the finding of the appeal board that the relationship is one of employment. At pp. 897-898

While Claimant in the instant case was not paid by commission, the remaining factors noted by the Court in *Matter of 12 Cornelia Street* finding independent contractor status are similar to those herein.

The recent *case Matter of Conferno Consulting, Appeal Board No. 5184724,* decided May 7, 2015, supports this conclusion. In that case this Court reversed a decision of the Appeals Board and found that the claimant was an independent contractor and not an employee. There, as here, the critical facts were that the claimant could have someone else perform some of his duties and had complete control over the manner in which they were performed. While in that case the claimant was paid per assignment that distinction should not control the outcome since it does not affect the degree of control that is actually exercised over the claimant.

See also *Matter of Riverdale, supra*, where this Court reversed an Appeal Board ruling and found that a fitness instructor who provided exercise classes to the facility's residents was an independent contractor. While in that case, the instructor was paid a flat fee for each class, the control exercised by the facility over the work of the instructor was virtually the same as the control exercised by The Nation Co. in the instant case over the work of the Claimant.

While Mitchell makes much of the fact that he was in frequent communication with Publisher vanden Heuvel, the case of Appeal Board No. 582304 makes clear that communication itself, such as progress reports, is not necessarily supervision or control. In that case, freelance writers were held to be independent contractors.

Finally, the Employer relied in its decision to treat Claimant as an independent contractor on "Guidelines for Determining Worker Status in the Magazine Publishing Industry" promulgated by the Department of Labor as the guidelines to be used by the Unemployment Insurance Division to establish whether the relationship between a worker in a magazine publishing occupation and the periodical's publisher is an employment relationship or that of an independent contractor. A101 An application of the factors to the facts in the

instant case clearly supports the conclusion that Claimant was an independent contractor while blogging for *The Nation* and not an employee of The Nation Co.

These Guidelines state the following are the factors of employment:

1. Individual must accept assignments issued by the magazine.
2. Services are performed exclusively for the magazine and similar services cannot be performed for others
3. Payment is on an hourly basis, or based on time spent.
4. Payment other that a "kill fee" is made when information, story, or picture is not accepted. Under these conditions, payment is for time and expense and not the product.
5. Services are required to be performed at the magazine's premises.
6. Periodic progress reports are required in order to ensure deadlines are met. A requirement to submit draft of articles by specified time is not an indication of control.
7. The magazine specifies that a specific amount of time or specific time periods, be devoted to providing the services.
8. Services must be performed by the individual; the individual cannot retain a replacement or substitute. The presence of personal service contract whereby the individual is compensated to retain his/her exclusive service due to the individual's unique talent, skill, ability, or notoriety shall not be an indication of control. A personal service contract might b executed by, but not limited to, a contract, requisition, or purchase order.
9. Individual is paid an additional fee if work must be redone.
10. Worker is routinely reimbursed for expenses.

The undisputed evidence demonstrates that none of these factors are present in the instant case.

- Claimant was free to accept or reject an assignment. His stated disinclination to reject a suggestion from the Publisher of The Nation is irrelevant

since the same can be said of every independent contractor who would like to continue or increase a business relationship.

- Claimant had an established business and regularly sought and performed similar work elsewhere.
- He was paid a fee, not based on time spent or the number or length of blogs produced,
- He did not perform his work at the offices of the magazine; indeed, he rarely came into the facility.
- He was not required to submit periodic progress reports or meet deadlines imposed by the magazine except to fulfill the objective of his work at the magazine to post on a daily or almost daily basis. Thus, the control over the timing of his submissions within the agreed upon objective was within his personal control.
- There was no supervision or control exercised over the amount of time he was required to devote to produce the blog.
- The Nation Co. contracted with him because of his expertise and reputation in the field of media criticism, i.e. he had a unique talent, skill, ability and notoriety, but he was free to hire an assistant, at his own expense, to perform research or other work.
- He was not paid an additional amount if the blog had to be redone and he was not routinely reimbursed for expenses, except for a small fee paid annually negotiated in his contract.

On the other hand, the factors listed by the DOL as leading to independence do apply to the instant case:

- Mitchell was paid based on negotiations between him and The Nation Co.
- The amount was not based on time spent.
- Mitchell was free to accept or reject magazine assignments without penalty.
- Mitchell was available to and did perform similar work for others while he was working with The Nation Co.

- The Nation Co. did not provide Claimant routine equipment or supplies for use in performing his services.
- The Nation Co. reimbursed him for expenses as part of a payment negotiated by Mitchell.
- He was not required to work within the Nation Co. facilities.
- His services were not exclusive to the Nation Co. and he was free to work for others. Significantly, the DOL guidelines read, "A policy that precludes the individual from offering the information, story or pictures to another publication in order to protect the value of the product is not considered a restriction on the individual's right to work for others."
- The magazine could require that the work meet its standards.

The DOL lists as neutral factors that neither point to an employment or independent contractor relationship a magazine's authority to edit the writer's product, establish deadlines, provide a style manual and require that a writer use it, and prohibit the sale or an article developed at the expense of the magazine to a competitor. To the extent that the Board relies on any of these factors to support a finding of employee status, it is incorrect.

Thus, a fair application of the promulgated DOL standards for determining employee status in the magazine industry standards on which the Employer reasonably relied clearly requires the conclusion that Claimant was not an employee of the magazine.

D. CONCLUSION AND RECOMMENDATION

Based on the foregoing, it is respectfully submitted that the Appeals Board decision is arbitrary and capricious and not based on the record as a whole. It should not be enforced.

Respectfully submitted,

Daniel Silverman
Attorney for The Nation Co., LLC

Law Office of Daniel Silverman, LLP
52 3rd Street
Brooklyn, NY 11231