

NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of the Claim of:

Gregory A. Mitchell

Claimant

The Nation Co., LLC

Employer - Appellant

Commissioner of Labor of the State of New York

Respondent

APPENDIX TO EMPLOYER –APPELLANT’S BRIEF

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

STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD

In the matter of:

Gregory A. Mitchell, claimant

And

The Nation Company, Ltd Partners

Case Nos: 014-33646 and 33642

Please be advised that The Nation Company is appealing the decision of the UI Appeals Board to the Supreme Court, Appellate Division of the Supreme Court.

By Daniel Silverman

Daniel Silverman, Esq.
Attorney for The Nation Co. Ltd Partners
(The Nation Co. LLC)

Dated: November 6, 2015



GERALDINE A. REILLY
CHAIRMAN
MICHAEL T. GREASON
GEORGE FRIEDMAN
JAMES S. ALES
RANDALL T. DOUGLAS
MEMBERS

STATE OF NEW YORK
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MATTHEW J. TIERNEY
PRINCIPAL ADMINISTRATIVE LAW COUNSEL

NOTICE OF RECEIPT OF APPEAL TO COURT
AVISO DE RECIBO DE LA APELACIÓN A LA CORTE

Date Of This Notice: November 10, 2015

Appeal Board Case No. 586278

IN THE MATTER OF: THE NATION CO LTD PARTNERS S.S.A. or E. R. No. 32-11836

THE NATION CO LTD PARTNERS
33 IRVING PL FL 8
NEW YORK NY 10003-2332

LAW OFFICE OF DANIEL SILVERMAN LLP
52 THIRD ST
BROOKLYN NY 11231

GREGORY MITCHELL
7 TOWNSEND AVE
NYACK NY 10960

NEW YORK STATE DEPARTMENT OF LABOR
ADJUDICATION SERVICES OFFICE
APPEAL UNIT, MAIL STOP 3B
PO BOX 701
NEW YORK, NEW YORK 10014-0701

NEW YORK STATE DEPARTMENT OF LABOR
LIABILITY & DETERMINATION SECTION
APPEALS UNIT, RM 360
BLDG. 12, STATE OFFICE BLDG CAMPUS
ALBANY, NY 12240

This is to acknowledge receipt of a NOTICE OF APPEAL to the Appellate Division of the Supreme Court, Third Department, from a decision of the Unemployment Insurance Appeal Board. The decision of the Board (Appeal Board Case No. 586278) was mailed on **October 08, 2015**. The Employer has filed the NOTICE OF APPEAL which is **November 06, 2015**. All parties should consult the back of this notice for information about the rules and instructions with respect to this appeal.

Por la presente acuso recibo de un aviso de apelación a la Appellate Division of the Supreme Court, Third Department (División de Apelaciones de la Corte Suprema, Tercer Departamento) de una decisión del Unemployment Insurance Appeal Board (Junta de Apelaciones de Seguro de Desempleo). La decisión de la Junta (Appeal Board Caso No. 586278) fue enviada por correo el **October 08, 2015**. El Empleador presentó el AVISO DE APELACIÓN con fecha **November 06, 2015**. Todas las partes deben consultar el reverso de este aviso para obtener información sobre las reglas e instrucciones relacionadas a esta apelación.

UNEMPLOYMENT INSURANCE APPEAL BOARD

Susan Borenstein

SUSAN BORENSTEIN
EXECUTIVE DIRECTOR

READ IMPORTANT INSTRUCTION AND INFORMATION ON REVERSE SIDE
LEA INSTRUCCIONES e INFORMACIONES IMPORTANTES
TRADUCIDAS EN ESPAÑOL AL REVERSO DE ESTA HOJA



GERALDINE A. REILLY
CHAIRMAN
MICHAEL T. GREASON
GEORGE FRIEDMAN
JAMES S. ALES
RANDALL T. DOUGLAS
MEMBERS

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SUSAN BORENSTEIN
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JAYSON S. MYERS
CHIEF ADMINISTRATIVE LAW JUDGE
TERESA A. DEMEO
CHRISTOPHER M. TATE
MATTHEW J. TIERNEY
PRINCIPAL ADMINISTRATIVE LAW JUDGE

**DECISION OF THE BOARD
DECISIÓN DE LA JUNTA**

IN THE MATTER OF:

**THE NATION CO LTD PARTNERS
33 IRVING PL FL 8
NEW YORK NY 10003-2332**

**GREGORY MITCHELL
7 TOWNSEND AVE
NYACK NY 10960-9999**

**A.S.O. - Appeals Section
Department of Labor Office: LND**

Mailed and Filed: **OCT 08 2015**
Appeal Board No. 586278

**LAW OFFICE OF
DANIEL SILVERMAN LLP
52 THIRD ST
BROOKLYN NY 11231-**

**A.L.J. Case No. 014-33642
ER#: 32-11836**

PLEASE TAKE NOTICE that the commissioner, or any other party affected by this decision who appeared before the Appeal Board, may appeal questions of law involved in such decision to the Appellate Division of the Supreme Court, Third Department, by written notice mailed to the Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 within **THIRTY DAYS** from the date this decision was mailed.

POR FAVOR TOME NOTA que el comisionado o cualquier otra parte afectada por esta decision que haya comparecido ante la Junta de Apelaciones puede apelar aspectos legales de dicha decision a Appellate Division of the Supreme Court, Third Department, enviando un aviso escrito a Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 dentro de los **TREINTA DIAS** a partir de la fecha en que esta decision fue enviada por correo.

**DOCUMENTO IMPORTANTE. PUEDE OBTENER UNA TRADUCCIÓN DEL MISMO LLAMANDO
AL 1-888-209-8124 (FUERA DEL ESTADO DE NUEVA YORK 1-877-358-5306)**

COMBINED CASE CONSISTING OF APPEAL BOARD NOS. 586278, 586279

PRESENT: GEORGE FRIEDMAN, MEMBER

The Department of Labor issued the determination holding The Nation Co Ltd Partners liable for additional contributions, effective January 1, 2011, based on remuneration paid to the claimant and to all other individuals similarly situated as employees. The employer requested a hearing and objected contending that the claimant and all other persons similarly situated were independent contractors.

The Administrative Law Judge held combined hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer and the Commissioner of Labor. By decision filed June 05, 2015 (A.L.J. Case No. 014-33642), the Administrative Law Judge overruled the employer's objection and sustained the determination.

The employer appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the employer.

We have reviewed the entire record and have considered the testimony and other evidence. It appears that no errors of fact or law have been made. The findings of fact and the opinion of the Administrative Law Judge are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of

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the Board. We further find that the claimant was entitled to reimbursement of some expenses and that he was restricted from publishing the same content with competitors. We further conclude that Appeal Board No. 585504 is distinguishable. Unlike that case, in the case at hand, the company required the claimant to use its computer program and provided training on it; required him to identify himself as a writer for the company when interviewed; assigned him an intern for assistance; directed the claimant to continue to cover a topic after he requested to stop; and restricted him from publishing the same content with competitors.

DECISION: The decision of the Administrative Law Judge is affirmed.

The employer's objection, that the claimant and all other persons similarly situated were independent contractors, is overruled.

The determination, holding The Nation Co Ltd Partners liable for additional contributions, effective January 1, 2011, based on remuneration paid to the claimant and to all other individuals similarly situated as employees, is sustained.

The claimant is allowed benefits with respect to the issues decided herein.

GEORGE FRIEDMAN, MEMBER

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JAYSON S. MYERS
CHIEF ADMINISTRATIVE LAW JUDGE
TERESA A. DEMEO
CHRISTOPHER M. TATE
MATTHEW J. TIERNEY
PRINCIPAL ADMINISTRATIVE LAW JUDGE

STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
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NICOLE BEASON
RACHEL FREEMAN
SENIOR ADMINISTRATIVE LAW JUDGE

**DECISION AND NOTICE OF DECISION
DECISIÓN Y AVISO DE LA DECISIÓN TOMADA**

A.L.J. Case No. 014-33646

Mailed and Filed: June 5, 2015

IN THE MATTER OF:

GREGORY A MITCHELL
7 TOWNSEND AVE
NYACK NY 10960-4829

THE NATION CO LTD PARTNERS
33 IRVING PL FL 8
NEW YORK NY 10003-2332

LAW OFFICE OF DANIEL
SILVERMAN LLP
52 THIRD ST
BROOKLYN NY 11231-

Department of Labor Office: 801

Hearing Requested: December 18, 2014

A.S.O.-NYC-ATT: S. MEJIA

PLEASE TAKE NOTICE that this decision has been duly mailed on the date listed above. If you appeared at the hearing and are not satisfied with this decision, you may appeal within **TWENTY DAYS** from the date this decision was mailed. **READ IMPORTANT INFORMATION ON REVERSE SIDE REGARDING YOUR RIGHT TO APPEAL.** Any party who failed to appear at the hearing has the right to apply to reopen the case. For the application to be granted, the party must apply within a reasonable time and must establish good cause for its failure to appear.

POR FAVOR TOME NOTA: esta decisión ha sido debidamente enviada por correo en la fecha que aparece arriba. Si usted asistió a la audiencia y no está satisfecho con la decisión, puede apelar dentro de **VEINTE DIAS** contados a partir de la fecha en que esta decisión fue enviada por correo. **LEA LA INFORMACIÓN IMPORTANTE AL REVERSO SOBRE SUS DERECHOS DE APELACIÓN.** Cualquiera de las partes que falle en comparecer a la audiencia, tiene el derecho de solicitar que se reabra su caso. Para que dicha solicitud sea otorgada, la parte interesada debe solicitarlo dentro de un periodo de tiempo razonable y debe establecer buena causa por no haber comparecido a la audiencia.

DOCUMENTO IMPORTANTE. PUEDE OBTENER UNA TRADUCCIÓN DEL MISMO LLAMANDO
AL 1-888-209-8124 (FUERA DEL ESTADO DE NUEVA YORK 1-877-358-5306)

NOTICE OF DECISIONCLAIMANTS**IF YOU DISAGREE WITH THIS DECISION, YOU HAVE A RIGHT TO APPEAL TO THE UNEMPLOYMENT INSURANCE APPEAL BOARD.**

Parties may be represented by lawyers or other persons of their choice on appeal to the Appeal Board. For representing a claimant, a lawyer or an agent registered by the Appeal Board may charge a fee. The fee must be approved by the Appeal Board before payment may be accepted by such lawyer or agent. No other person may charge a fee for representing a claimant. If you do not have enough money to hire a lawyer or registered agent, you may be able to get one free through your local Legal Aid Society or Legal Services Program.

TO APPEAL A DECISION

1. Continue to follow all instructions from the Unemployment Insurance office where you originally filed your claim and to certify for benefits as long as you are unemployed and claiming benefits. This will protect your rights to any benefits you claim.
2. Within twenty (20) days of the date printed on the face of this decision, mail a letter to the office where you originally filed your claim or to the Appeal Board at P.O. Box 15126, Albany, New York 12212-5126, or fax your appeal to the Appeal Board at (518) 402-6208. Please state that you wish to appeal and the reasons for your appeal. Include your ALJ Case Number (found just above your name on the face of the Notice of Decision) and a copy of the Notice of Decision.
3. Claimants who appeal are not required to pay a deposit on filing an appeal.

EMPLOYERS

If you wish to appeal this decision, you may file a notice of appeal within twenty (20) days from the date printed on the face of this decision to the office where the claim was originally filed and which issued the initial determination, or to the Unemployment Insurance Appeal Board at P.O. Box 15126, Albany, New York 12212-5126, or you may fax your notice of appeal to the Appeal Board at (518) 402-6208. Such notice of appeal should include the A.L.J. Case Number (found on the face of this Notice of Decision), the reason(s) for the appeal and a copy of the Notice of Decision.

ALL PARTIES WILL RECEIVE A NOTICE OF RECEIPT OF APPEAL DIRECTLY FROM THE APPEAL BOARD AFTER ANY APPEAL IS MADE.

INSTRUCCIONES A LOS RECLAMANTESRECLAMANTES

SI NO ESTÁ DE ACUERDO CON ESTA DECISIÓN, USTED TIENE DERECHO DE APELARLA A LA JUNTA DE APELACIONES DEL SEGURO POR DESEMPLEO.

Las partes si lo desean, pueden estar representadas por abogados u otras personas que ellos seleccionen en la apelación a la Junta de Apelaciones (Appeal Board). Un abogado o un agente que esté registrado por la Junta de Apelaciones, puede cobrarse honorarios por representarle. Estos honorarios deben ser aprobados por la Junta de Apelaciones antes que el pago pueda ser aceptado por dicho abogado o agente registrado. Ninguna otra persona podrá cobrar honorarios por representar al reclamante. Si usted no tiene suficiente dinero para contratar a un abogado o un agente registrado, puede conseguir uno gratis a través de la Sociedad de Asistencia Legal (Legal Aid Society) o el Programa de Servicios Legales (Legal Services Program).

PARA APELAR LA DECISIÓN

1. Continúe siguiendo todas las instrucciones de la oficina del Seguro por Desempleo (Unemployment Insurance) donde usted presentó su reclamo originalmente y para certificar por los beneficios mientras permanezca desempleado y esté reclamando beneficios. Esto protegerá su derecho a recibir cualquier beneficio que reclame.
2. Antes de cumplirse veinte (20) días de la fecha que aparece al frente de esta decisión, envíe una carta a la oficina donde presentó originalmente su petición o al Appeal Board a P.O. Box 15126, Albany, New York 12212-5126, o envíe por fax su apelación al Appeal Board al (518) 402-6208. Por favor, explique que desea apelar y las razones que tiene para hacerlo. Incluya su número de caso ALJ (lo encontrará justo encima de su nombre al frente de este Aviso de Decisión) y envíe una copia de este Aviso de Decisión.
3. Los reclamantes no necesitan depositar dinero para poder apelar su caso.

TODAS LAS PARTES RECIBIRÁN UN AVISO DE RECIBO DE APELACIÓN DIRECTAMENTE DE LA JUNTA DE APELACIONES DESPUÉS DE QUE SU PETICIÓN SEA RECIBIDA.

ISSUES: Employer's Application to Reopen Case No. 014-30546.
Status of persons as employees as defined by the Law.
Employer's objection to claimant's entitlement.
Coverage of employment in base period.

COMBINED CASE CONSISTING OF A.L.J. NO. 014-33646 AND 014-33642

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits, effective July 14, 2014 and holding company herein liable for contributions, effective January 1, 2011, based on remuneration paid to the claimant and to all others similarly situated as employees. The employer requested a hearing and objected that the claimant and all other persons similarly situated were independent contractors and not employees.

The employer has applied to reopen A.L.J. Case Nos. 014-31238 and 014-30546. In that case, the Administrative Law Judge sustained the initial determination based upon the employer's failure to appear at a hearing on December 8, 2014.

Hearings were held at which testimony was taken. There were appearances by the claimant and on behalf of the Commissioner of Labor and the employer.

FINDINGS OF FACT: The claimant filed for unemployment insurance benefits in 2014, after his position with the publication company herein ended. The company operates a web-site and a print magazine. The claimant is a writer and had been an editor of another national magazine for years.

The claimant and the editor/publisher of this company had known each other for years and after his last job ended, they communicated about the claimant working with this company. They had telephone calls and e-mails back and forth about how the claimant could work with this company, and signed their first agreement dated February 11, 2010, which was renewed annually until the last one expired March 31, 2014.

The agreement was that the claimant would write a blog on the web-site to focus on the media. The claimant was to write a daily blog, submitted in the morning. He could update it during the day as he chose, but the initial posting had to be morning. The information was reviewed by the company's copy editors. The claimant wrote from home, but had to use the company's program, on which he was trained when he began. Every few months, he would be assigned a company intern to assist him in research or editing as he chose. He could not choose to have someone else write his blog if he felt ill or was away. The claimant notified the company when he wanted to take vacations, although he could have worked from anywhere. He had at least daily e-mail contacts with the editor, executive director or other editors about what topics to cover or ideas to consider or changes to make. The claimant was required to introduce himself as a writer for this company, in any interviews he gave. He was told to be active on social network sites and promote his blog and the company. He was paid in an amount agreed upon with the editor, in pay periods set by the employer. During his years there, he would periodically grow tired of a topic and would ask to stop covering it; he was told to continue. The editor periodically made suggestions or edits to his work, and monitored that he stayed on the track the company wanted. Near the end of their arrangement, the editor changed his work to be a weekly blog, rather than daily. The editors maintained the right to request changes, or have a particular article removed.

The claimant is an accomplished author in his own right, and published a book shortly after he stopped working with this company. His arrangement with the company was unique despite the company having other bloggers.

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RECLAMANTESINSTRUCCIONES A LOS RECLAMANTES**SI NO ESTÁ DE ACUERDO CON ESTA DECISIÓN, USTED TIENE DERECHO DE APELARLA A LA JUNTA DE APELACIONES DEL SEGURO POR DESEMPLEO.**

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PARA APELAR LA DECISIÓN

1. Continúe siguiendo todas las instrucciones de la oficina del Seguro por Desempleo (Unemployment Insurance) donde usted presentó su reclamo originalmente y para certificar por los beneficios mientras permanezca desempleado y esté reclamando beneficios. Esto protegerá su derecho a recibir cualquier beneficio que reclame.
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3. Los reclamantes **no** necesitan depositar dinero para poder apelar su caso.

TODAS LAS PARTES RECIBIRÁN UN AVISO DE RECIBO DE APELACIÓN DIRECTAMENTE DE LA JUNTA DE APELACIONES DESPUÉS DE QUE SU PETICIÓN SEA RECIBIDA.

The employer failed to appear at a hearing on December 8, 2014 because the company's attorney requested an adjournment of that hearing, and applied to reopen after the request was denied.

OPINION: On application duly made, an Administrative Law Judge may reopen a case where a decision made upon or following the default of a party if such party shows good cause for the default. (See, Appeal Board Rule 12 NYCRR 461.8.) The credible evidence establishes that the employer failed to appear at the hearing in A.L.J. Case Nos. 014-33646 and 014-33642 because their attorney had to go to Florida to assist in arranging care for a family member being released from the hospital. I find that such circumstances constitute good cause for the default and that the application to reopen is therefore granted.

Pursuant to Labor Law § 560 (1), any employer shall become liable for contributions under Labor Article 18, if the employer has paid remuneration of \$300 or more in any calendar quarter. Such liability shall commence on the first day of such calendar quarter. Pursuant to Labor Law § 517 (1), remuneration means every form of compensation for employment paid by an employer to an employee; whether paid directly or indirectly by the employer, including salaries, commissions and bonuses. Pursuant to Labor Law § 511 (1) employment means any service under any contract of employment for hire, express or implied, written, or oral. The determination that an employer-employee relationship exists must rest upon evidence that there was control exercised by the purported employer over the results produced or the means used to achieve the results. (Matter of 12 Cornelia St., 56 NY2d 895, revg 83 AD2d 681, affg Appeal Board No. 296021.) With regard to professional services not lending themselves to control over results produced and means employed, a finding of an employment relationship may be based upon substantial evidence of control over important aspects of the services performed other than results or means. Who locates the clients? Are the hours regularly scheduled rather than occasional or sporadic? Who fixes the fees for the services? Where are the services rendered? Whose equipment and facilities are used? Who takes care of the billing and collection? Who keeps essential records? These are all important aspects to be analyzed. (Matter of Concourse Ophthalmology Assoc., 60 NY2d 734, affg 89 AD2d 1047, affg Appeal Board No. 318862.)

The credible evidence in this case establishes that the claimant was in an employment relationship with this company and was not an independent contractor. The claimant is an accomplished writer, and was provided this employment, so was reasonably given some freedom from the company with respect to his actual writing. This freedom is insufficient to establish that he was an independent contractor. There is little dispute on the material facts in this case: the company directed that the claimant submit a daily blog in the morning, the company reviewed his writing both to be sure it conformed to its standards and for copy editing, the company set the pay increments, the company required the claimant use its computer program and trained the claimant on it, the company required he identify himself as a writer for this company when interviewed, the company required that he be active on social media to promote the blog and the company, the company gave the claimant topics about which to write and directed that he continue covering a topic after he requested to stop, the company communicated at least daily with editors about topics or changes to make, and the company assigned an intern to him for assistance. This is substantial supervision, direction, and control over the claimant's work procedures and constitutes an employment relationship.

I note the various arguments otherwise by the employer. They argue that the company had no control over the means to get the work done. I reject this argument. Daily "suggestions" or changes from editors and copy editors constitutes far more than no control, as does the use of company computer programs and company interns. They argue that by both the Internal Revenue Service and the National Labor Relations Board standards, the claimant would be an independent contractor. The standards of other government agencies are irrelevant to the analysis at issue here. Furthermore, the employer cites Appeal Board Case 223141, from January 1977, which held a reporter to be independent. However, that case differs in that the claimant in that case could submit work whenever and however often he chose, and had no minimum guidelines of articles to submit, unlike the claimant here who was required to submit daily. The claimant in that case was not given deadlines, topics more than "on one or two occasions", or any help from the office. The claimant in this case was given the computer program to use, training on the program, assistance from interns regularly, and daily changes and/or topics from editors. This case is substantially different and the result is

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INSTRUCCIONES A LOS RECLAMANTESRECLAMANTES**SI NO ESTÁ DE ACUERDO CON ESTA DECISIÓN, USTED TIENE DERECHO DE APELARLA A LA JUNTA DE APELACIONES DEL SEGURO POR DESEMPLEO.**

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PARA APELAR LA DECISIÓN

1. Continúe siguiendo todas las instrucciones de la oficina del Seguro por Desempleo (Unemployment Insurance) donde usted presentó su reclamo originalmente y para certificar por los beneficios mientras permanezca desempleado y esté reclamando beneficios. Esto protegerá su derecho a recibir cualquier beneficio que reclame.
2. Antes de cumplirse veinte (20) días de la fecha que aparece al frente de esta decisión, envíe una carta a la oficina donde presentó originalmente su petición o al Appeal Board a P.O. Box 15126, Albany, New York 12212-5126, o envíe por fax su apelación al Appeal Board al (518) 402-6208. Por favor, explique que desea apelar y las razones que tiene para hacerlo. Incluya su número de caso ALJ (lo encontrará justo encima de su nombre al frente de este Aviso de Decisión) y envíe una copia de este Aviso de Decisión.
3. Los reclamantes **no** necesitan depositar dinero para poder apelar su caso.

TODAS LAS PARTES RECIBIRÁN UN AVISO DE RECIBO DE APELACIÓN DIRECTAMENTE DE LA JUNTA DE APELACIONES DESPUÉS DE QUE SU PETICIÓN SEA RECIBIDA.

different.

The employer also seems to argue that since the claimant has published on his own, he cannot be an employee. The issue is not what else he has done in his life, or in his non-blogging hours, but the relationship between the claimant and the company with respect to the work done for the company. Given the totality of the circumstances, I must conclude that there was sufficient supervision, direction and control exerted over the claimant and his work processes to create an employment relationship. I find that the claimant was in covered employment with this company. The company is liable for contributions based upon remuneration paid to the claimant and to any others similarly situated, and the claimant is eligible for benefits with respect to this issue.

DECISION: The employer's application to reopen A.L.J. Case Nos. 014-31238 and 014-30546 is granted.

The employer's objection, that the claimant and all other persons similarly situated were independent contractors and not employees, is overruled.

The initial determination, holding the claimant eligible to receive benefits, effective July 14, 2014 and holding company herein liable for contributions, effective January 1, 2011, based on remuneration paid to the claimant and to all others similarly situated as employees, is sustained.

The company is liable for contributions, effective January 1, 2011, based on remuneration paid to the claimant and to others similarly situated as employees.

The claimant is allowed benefits with respect to the issues decided herein.

Andrea S. Addison
/s/ Andrea S. Addison

Administrative Law Judge

1 KIM - WITNESS

2 Q. And can you give us some examples. You mentioned
3 something about Occupy Wall Street. Where there, uh,
4 other areas that he had particular --

5 A. Wiki --

6 Q. -- blogging --

7 A. -- leaks. Occupy Wall Street, um, it -- he first
8 came onto our radar because he really is a national
9 expert on media and so is to cover media and
10 especially media in politics.

11 Q. Um, can you tell us something about political, uh,
12 bends of The Nation or The Nation itself to

13 A. We're --

14 Q. -- give --

15 A. -- we're --

16 Q. -- give the judge some understanding of what you're
17 doing?

18 A. Sure. So we're a progressive, um, magazine, um,
19 founded in 1865 by abolitionists and, um, we, uh, you
20 know, really think of our mission as, um, you know, a
21 pro-democratic, uh, small D, um, um, pro-standing up
22 to power, you know, magazine and we have a mission to
23 really influence the public debate around, um, key
24 issues.

25 Q. And are you familiar with what The Nation Institute

1 MITCHELL - WITNESS

2 Q. How would you categorize The Nation as a business?

3 A. How would I categorize The Nation as a business?

4 Well, it's one of the oldest publications in America,
5 uh, progressive, um, some could say left liberal or
6 however they -- the names they throw around. Um,
7 it's a publication I've had -- I've written for going
8 back to the 1970's, you know, off and on.

9 Q. Is it a media company?

10 A. It's a media -- I'm sorry, I'm talking too much.
11 Yes, a media company.

12 Q. What was your position with them?

13 A. Uh, I was a -- a -- I guess you would say daily
14 writer, daily blogger.

15 Q. Uh, what was your day like?

16 A. Well, it varied. Um, um, you know, I went up and
17 down. It was, um, I think the first year I think it
18 was about -- I mean I -- I -- I really want to check
19 this contract because I think -- I think this
20 contract was revised and this wasn't the correct
21 figure and I'll have to show that. But it
22 varied -- the -- The Nation's share of what I
23 received in that period was -- varied from
24 maybe -- it started at maybe \$32,000 and ended up at
25 like \$15,000. Changed every year.

A-6(a)

Vol 3

1 MITCHELL - WITNESS

2 mean they're --

3 Q. All right. So --

4 A. -- colloquial they want to be. They're a left-
5 liberal publication going back progressive
6 from -- from their founding more or less.

7 Q. Okay. So and I can't think of an example. Could you
8 have written a right-wing provocative article
9 under -- in this blog?

10 A. Um, I mean, I guess I could have written it and
11 posted it then I certainly would expect that I would
12 have heard -- heard -- heard about it and, um, I
13 mean, there's -- you can write at The Nation. You
14 can write things that aren't completely in sync with
15 their editorial policy but I think a right-wing
16 provocative column, you know, generally gets flagged.
17 I -- I certainly, mean. Mr. Kim said, you know,
18 besides saying that I was closely monitored and
19 everything. He said, that anybody could monitor what
20 I was doing just by reading the site every day.
21 Because we talked about, you know, whether -- what
22 was the scrutiny like and he just sort of said, well,
23 everyone at the magazine could see what I was writing
24 every day on the blog. It was out there for -- for
25 all to see. So certainly I didn't feel I was

A-6(b)

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KIM - WITNESS

MR. SILVERMAN: 95.

MR. MEJIA: I have no questions.

ALJ DOMINIQUE: All right.

Mr. Kim - having been duly sworn, testified as follows

BY ALJ DOMINIQUE

Q. All right. Mr. Kim, please say your name for the record.

A. Richard Kim.

Q. What type of business is The Nation Ltd Corporation?

A. Um, it's a publication. We have a print magazine, um, that has about 140,000 subscribers. Um, and we have a Web site that has about 2 million readers a month.

Q. And, uh, what was the nature -- what was Mr. Mitchell's position?

A. Um, he was a freelance writer, um, um, um, on contract with us and he blogged and wrote articles for the print magazine, as well.

Q. And what was, um, his salary?

A. Um, you know, I don't actually know what it was. Um, it varied from beginning towards the end, but I think it was --

Q. Do you have anything that would help you remember?

A7(a)

VOL 2

1 MITCHELL - WITNESS

2 ALJ DOMINIQUE: May I take a look? Okay. I'll
3 just describe this for the record. This just appears
4 to be article 1 of what looks like the union contract
5 with the employer and it's just saying that it covers
6 employees. And, um, which employees it does not
7 cover. Um I do not believe, um, I need this
8 document.

9 MR. MITCHELL: Did you say it includes a list of
10 employees not covered?

11 ALJ DOMINIQUE: Correct.

12 MR. MITCHELL: So there are employees --

13 ALJ DOMINIQUE: -- coverage?

14 MR. MITCHELL: -- that are not covered.

15 MR. SILVERMAN: Well, for the purpose of the
16 record I think we should say that the provisions of
17 this agreement shall cover all employees who are now
18 who may hereafter be employed by the company with the
19 exception --

20 ALJ DOMINIQUE: Mr. Silverman, you should not
21 testify, um --

22 MR. SILVERMAN: No. But I'm just reading to --

23 ALJ DOMINIQUE: The --

24 MR. SILVERMAN: -- Your Honor, the --

25 ALJ DOMINIQUE: -- document --

Vol 1

1 KIM - WITNESS

2 MR. SILVERMAN: 95.

3 MR. MEJIA: I have no questions.

4 ALJ DOMINIQUE: All right.

5 *Mr. Kim - having been duly sworn, testified as*
6 *follows*

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9 record.

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17 Mitchell's position?

18 A. Um, he was a freelance writer, um, um, um, on
19 contract with us and he blogged and wrote articles
20 for the print magazine, as well.

21 Q. And what was, um, his salary?

22 A. Um, you know, I don't actually know what it was. Um,
23 it varied from beginning towards the end, but I think
24 it was --

25 Q. Do you have anything that would help you remember?

A 8

you 2

1 MITCHELL - WITNESS

2 A. Not in 2013. There -- there were times in the past,
3 um, where I was but not -- I don't think. I'd be
4 very surprised if in 2013. I might have had a flurry
5 of posts in a certain period but not for -- for an
6 entire year.

7 Q. Okay. Um, now, um, do you know whether there was a
8 labor organization at The Nation magazine
9 representing employees?

10 A. Yes. There was some sort of agency union,
11 (Unintelligible, one second, 0:19:10), I'm not sure
12 what it's called and that's --

13 Q. That's good enough. Do you know the cover -- what
14 covers -- covers all employees? Do you know? Do you
15 know?

16 A. I -- I don't know. I know sometimes it gets very
17 technical and -- who discovered, um, exactly what
18 your post is how -- what post you're covered for.
19 Um, you know, whether you're full time or part time
20 and, um, I don't know -- I don't really know. I
21 haven't really been involved in --

22 Q. You're not covered by the contract?

23 A. Absolutely not.

24 Q. And you've never been covered?

25 A. Never.

Vol 2

1 MITCHELL - WITNESS

2 Q. And if I told you that it covered all employees who
3 now (unintelligible, one second, 0:19:50) that
4 wouldn't surprise you?

5 A. It would surprise me if it was that blanket
6 (unintelligible, one second, 0:19:56) discussions
7 between people who were there.

8 Q. For exhibits -- this is the cover to the union
9 contract.

10 ALJ DOMINIQUE: Okay. Show it to, um, Mr.
11 Mitchell.

12 BY ALJ DOMINIQUE

13 Q. Do you recognize that --

14 ALJ DOMINIQUE: Why are you offering the union
15 contract into evidence?

16 MR. SILVERMAN: Because this covers all
17 employees of The Nation. Mr. Mitchell was not an
18 employee. Both the union --

19 ALJ DOMINIQUE: If -- I'm sorry.

20 MR. SILVERMAN: Both the union, the company and
21 everybody recognized that Mr. Mitchell was not an
22 employee by the way the contract is -- that's --

23 ALJ DOMINIQUE: Um, does it have -- does it list
24 the employees that are covered there?

25 MR. SILVERMAN: It covers, yes. All employees.

1 MITCHELL - WITNESS

2 and, uh -- and then other -- some other subjects that
3 were -- what I would consider media related such as
4 WikiLeaks, and, um, would come up and then I
5 would -- would write about them for months.

6 Q. And how is it that you came to work with them?

7 A. Um, I had worked for 10 years at the editor of, um, a
8 magazine called Editor & Publisher. And I was
9 editor -- I wasn't the editor and publisher but the
10 magazine was called Editor & Publisher, and, um, uh,
11 but I had known Katrina vanden Heuvel for, you know,
12 decades literally, um, and I had written for The
13 Nation off and on in different capacities.

14 And so when, uh, Editor & Publisher, uh, folded, it
15 was later revived but when it folded in, um, December
16 of -- of 2009, um, one of the first people I called
17 was Katrina and said, you know, well, I'm gonna be
18 free next, you know, starting next month and, um, you
19 know, maybe you want me to work for you and stuff
20 like that?

21 Q. Did she interview? Was there any interview process?

22 A. Yeah. She interviewed me. I mean if you
23 interviewed, I think it ended up face-to-face but we
24 had a lot of e-mails, uh, back and forth. Uh, I
25 think we had phone conversations and e-mails talking

Vol 1

1 KIM - WITNESS

2 A. Um, Mary van Valkenburg, our director of finance

3 would have that information.

4 Q. Are you aware, um, of Mr. Mitchell's responsibilities

5 where -- how he came to work there, the specifics,

6 um, of that -- those types of things?

7 A. Um, my boss, Katrina vanden Heuvel, um, brought Mr.

8 Mitchell onboard as a writer for us. Um, he is a

9 very established, um, media critic. Um, was a former

10 and publisher of, um, Editor and Publisher. Um, and

11 I believe that's how he came to write for us. Um, I

12 think that was in 2010, if I'm not --

13 Q. What was your --

14 A. -- mistaken.

15 Q. -- interaction with Mr. Mitchell?

16 A. From -- so from 2011 'til this year I was the

17 executive editor of TheNation.com so I was, um, in

18 charge of all the digital end of the business, um, so

19 all the, um, writers online, um, I would look at

20 their work. I would mostly supervise the staff, um,

21 under me, the editors and deputy editors and

22 multimedia producer, um, in getting that work up

23 online.

24 Q. I'm thinking that it might better to start with Ms.

25 Uh, va -- val -- van Valkenburg.

A-10(b)

2/21

1 MITCHELL - WITNESS

2 Q. How would you categorize The Nation as a business?

3 A. How would I categorize The Nation as a business?

4 Well, it's one of the oldest publications in America,

5 uh, progressive, um, some could say left liberal or

6 however they -- the names they throw around. Um,

7 it's a publication I've had -- I've written for going

8 back to the 1970's, you know, off and on.

9 Q. Is it a media company?

10 A. It's a media -- I'm sorry, I'm talking too much.

11 Yes, a media company.

12 Q. What was your position with them?

13 A. Uh, I was a -- a -- I guess you would say daily

14 writer, daily blogger.

15 Q. Uh, what was your day like?

16 A. Well, it varied. Um, um, you know, I went up and

17 down. It was, um, I think the first year I think it

18 was about -- I mean I -- I -- I really want to check

19 this contract because I think -- I think this

20 contract was revised and this wasn't the correct

21 figure and I'll have to show that. But it

22 varied -- the -- The Nation's share of what I

23 received in that period was -- varied from

24 maybe -- it started at maybe \$32,000 and ended up at

25 like \$15,000. Changed every year.

A-11(a)

1 MITCHELL - WITNESS

2 Q. And the, um, Nation's share or --

3 A. No. The Nation -- I -- I don't know how much, you
4 know, overlapping with this morning. But, um, I -- I
5 received two contracts and two checks from The Nation
6 Magazine and The Nation Institute and, um, I believe
7 the first year about two thirds was The Nation
8 Magazine and the second year it flipped. It was
9 about two-thirds Nation Institute. And, um, by the
10 final year it was exactly the same. It was less
11 money and exactly the same. So it varied, you know,
12 the -- my contract varied every year.

13 Q. Did you --

14 A. But I think the high was probably about 32,000 and
15 the low was probably 15,000.

16 Q. When did you start working there?

17 A. Uh, about March of, uh, 2010.

18 Q. And when did you last work there?

19 A. Uh, well the -- the contract, uh, ran out in March of
20 2014 but it was I -- I -- I continued to get paid
21 without a contract, uh, until June 30th.

22 Q. And I know you said that you were a writer there for
23 a specific -- was it that you did --

24 A. Um, well, mainly I wrote, uh, this daily or nearly
25 daily blog. On, um, we basically, media and politics

1 MITCHELL - WITNESS

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20 2014 but it was I -- I -- I continued to get paid
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23 a specific -- was it that you did --

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25 daily blog. On, um, we basically, media and politics

A-12(a)

1 VANDEN HEUVEL - WITNESS

2 within those areas he had every, um, how do I put it.

3 It was his decision what to select, when to write,

4 how much to write each day. What to look at more

5 closely. There was no real guidance within except

6 for s -- you know, selecting this big thing. So --

7 Q. So what did you --

8 A. I didn't -- I read, I would eyeball it. But there

9 was an element, okay. He's doing his thing. There

10 was no real supervision on my part. Because he, um,

11 one of the reasons he started blogging for The Nation

12 was he was known as a former editor of Editor &

13 Publisher. He was known in the industry so that

14 there was an element of let him do his thing. And

15 that's kind of what the relationship was like.

16 There was one instance, I remember. I believe there

17 was only one, I may be wrong. One instance in which

18 Greg wrote an article for The Nation magazine. And

19 that was -- I suggested he write about the omnibus

20 person public editor for the New York Times because

21 he'd been blogging about her. There was -- there

22 were a couple discussions about how he might write,

23 do a -- might edit a special issue. Um, but those

24 never came to pass. I mean a special issue or

25 special piece. So within the framework of the blogs,

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KIM - WITNESS

proceeded. Again, there was a lot of variation in the -- in the -- in the relationship. So there were times when, um, he didn't write at all and then there were times when he wrote rather infrequently but I would say the majority of the time it was a short daily post that would grow a little bit throughout the day.

Q. Did he know to write daily or was it his, um, discretion whether he wrote on a daily basis?

A. Um, you know, I believe that's what he pitched to us, a sort of daily aggregated blog.

Q. And then when, for example, he would create the post, um, did he choose what he was, um --

A. The content -- the contents of the post and the topic were really -- entirely his choice. The -- again, there would be, as editors we would often make suggestions. Um, and we would -- at the end of the day, since it's my publication and I have to vouch for everything that goes up, if something didn't meet the standards of the publication we would -- we could ask for corrections or we could ask to -- to take it down and sometimes we would. But he was really -- it was his choice as to which subjects he would particularly cover that day. Um, the treatment he

A . 13(a)

1 MITCHELL - WITNESS

2 about, you know, what she -- she might have me do and
3 what the price might be and, um -- and so on.

4 Q. By interview I mean, did she ever meet with you to
5 inquire into, um, your employment history? Sorry
6 about that?

7 A. Um, well, she was quite familiar with my employment
8 history. Um, I don't -- I cannot recall whether we
9 had a sit down, um, you know, interview going --

10 Q. Did she ever sit with you to assess your skills to
11 see if it matched their needs?

12 A. Certainly on the phone and maybe in e-mails. That
13 means she, you know -- she -- she knew me very well
14 and so it was more okay, this is -- you know, what do
15 you want to do for us and what do we maybe want you
16 to do. You know, and is this something we really
17 want and -- you can do.

18 Q. Was there ever a formal interview or was it more she
19 was familiar with you and then she --

20 A. Well, it's a combination. I mean, you know, she was
21 familiar with me but she, you know, had, um, in fact,
22 uh, I'll present an exhibit where she said to me,
23 even though we had just talked for a couple of weeks.
24 It says, she seems like we've been talking for months
25 for even years about this position. So, um, I think

1 MITCHELL - WITNESS

2 the day even into the -- into the wee hours of the
3 morning, sometimes. Um, I would be, you know, I
4 could say, what's interest me in this -- the broad
5 subject area that I was supposed to cover which was
6 media and politics.

7 Okay. So generally had to do -- had something to do
8 with media, intersection with politics generally.

9 And, um, so I would often have freedom to say, okay,
10 what interest me. Um, what would I like to write
11 about today. What seems most important.

12 What -- what's the best for my blog or for -- for The
13 Nation. Um, but there were many other times where I
14 would get a note, generally from Katrina, sometimes
15 from, um, um, someone else, generally, um, Ms. vanden
16 Heuvel, um, saying, why don't you cover this. Or you
17 really should cover this. Or -- or there's different
18 language. And again, I have 15 examples here which I
19 can submit.

20 Q. Yeah, but did -- think about the examples. But could
21 you said, no? I don't like -- I don't want to
22 discuss that.

23 A. Yeah. I -- I could. But remember, she was the
24 editor, the publisher, the co-owner and a board
25 member of The Nation, um, The Nation entity. Um, so

1 MITCHELL - WITNESS

2 Q. What do you mean by that?

3 A. Uh, I actually brought an exhibit, if I'm allowed to
4 submit that at -- some time today.

5 Q. I'd prefer you just talk.

6 A. Okay.

7 Q. And then we'll get there.

8 A. Okay. Uh, I was, um, for most of the -- the four
9 years, I wrote daily. I was expected to write
10 something daily. Um, sometimes it was in a live blog
11 that would go on all day, you know, and it updates
12 constantly. Other times it's just like one column
13 type thing in the morning.

14 Q. And how was it decided which day it would be? An
15 ongoing thing or a one time?

16 A. Uh, I was supposed to write daily -- virtually daily.
17 Um, um, from the -- for more than four years, um, for
18 most of that time. Um, you know, every -- every
19 single day. I wrote I think I submitted an exhibit,
20 1,200 separate articles in those four years.

21 Q. But you're saying -- I'm sorry. You're
22 saying -- some days you had constant updates?

23 A. Right.

24 Q. Some days it would be once --

25 A. Once in the morning. Right.

P-13(2)