

1942

# Southern Oil Company v. Department of Placement and Unemployment Insurance, and Industrial Commission of Utah : Brief of Appellant

Utah Supreme Court

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Homer Holmgren; Attorney for Appellant;

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No. 6373

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In  
The Supreme Court  
of the  
State of Utah

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NORTHERN OIL COMPANY,

Appellant,

vs.

DEPARTMENT OF PLACE-  
MENT AND UNEMPLOYMENT  
INSURANCE, AND INDUS-  
TRIAL COMMISSION OF  
UTAH,

Defendants.

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BRIEF OF APPELLANT

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Attorney for Appellant.

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FILED

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case arose out of the following facts: The Department of Placement and Unemployment Insurance of the Industrial Commission of Utah, hereinafter referred to as Department, caused an audit to be made of the books of the appellant Northern Oil Company, hereinafter referred to as Company, to ascertain the Company's liability for unemployment insurance contributions for the years 1938, 1939 and 1940. The report of the De-

partment's auditor made the following determinations as shown by the Department's Exhibit 1, Parts 1, 2 and 3:

The Company had reported certain wages and made contributions for these three years and the auditor determined there were additional wages paid and so additional contributions due, all as follows:

Year	Company's Report of Wages Paid	Auditor's Report of Wages Paid	Additional Wages Not Reported	Additional Contribu- tions Claimed Due
1938	\$ 4,878.09	\$ 9,128.24	\$ 4,250.15	\$114.75
1939	18,747.65	29,558.48	10,810.83	291.90
1940	2,477.87	15,304.97	12,827.10	346.35

In the decision of the Appeal Tribunal, affirmed by the Industrial Commission, without hearing, and from which this appeal is taken, the Appeal Tribunal decided that the auditor should not have included as wages for the year 1938 certain items of stock issued to Stella Dysart totalling in par value \$3222.60. With this we agree, but we further claim that for that year there was an amount of \$3153.07 which was received by persons not employees of the Company, called in common parlance "bird dog salesmen." This is shown by the Company's Exhibit A1-5, first column of figures. So that there is nothing due for that year. These two figures added together total \$6375.67. The Department claims a total of \$9128.24 paid in wages for that year. Deducting the \$6375.67 therefrom leaves \$2752.57, which should have been the amount of wages the Company should have paid on. However, it reported and paid on a total wage of \$4818.09, which was actually \$2152.52 in excess of its real wages. There was, therefore, an over pay-

ment for the year 1938, in an amount equal to 2.7 percent of \$2152.52, or \$51.12.

The decision appealed from left unaltered the amount fixed by the auditor as additional wages paid by the Company in 1939 and not reported, to-wit: \$10,810.83. The Company claims that this amount should be reduced by the sum of \$5567.43, as being the total amount received during that year by persons not in the Company's employ, being so-called "bird dog salesmen." This amount is shown on the Company's Exhibit A, pp. 1-5, the second column of figures. The net wages not reported that year would therefore be \$10,810.83 minus \$5567.43, or \$5243.40. Since the Company in 1938, by mistake, had reported its total wages as \$4878.09, whereas it should have been \$2752.57, as already shown, and had paid contributions on the larger sum, we contend it should receive credit for the overage on its 1939 contribution liability. This would reduce the \$5243.40 for 1939 by \$2125.52, leaving a net of \$3116.88 unreported wages paid with an additional contribution due for that year of \$84.16, based on 2.7 percent of such unreported wages.

The decision reduced the total unreported wages paid in 1940, as fixed by the auditor, from \$12,827.10 to \$11,710.10, eliminating from wages paid certain stock issued to Mr. Thompson and Mr. Hunsaker as consideration for obtaining oil leases from them. With this elimination we agree. But we contend that there should also be eliminated the further sum of \$1670.87 paid to "bird dog salesmen" that year, as shown by Company's Exhibit B, pp. 1-2; that there should also be eliminated the sum of \$11,118.90 which represents the par value (but not the reasonable cash value) of stock issued to officers and others for services that year. With

these further eliminations there would be nothing owing for the year 1940, as the Company reported and paid contributions on wages slightly in excess of what it actually had to report and pay, as compared with the auditor's report and the decision appealed from.

It thus appears that the Department has classified as wages, on which it claims the Company is liable for contributions to the unemployment compensation fund, moneys received by persons, called bird dog salesmen, hereinafter referred to as solicitors, whom the Company claims were not its employees. It further appears that the Department is claiming that the Company is liable to pay contributions upon the basis of the par value of stock issued to its officers and others for services, without any evidence or showing whatsoever as to its reasonable cash or market value. We will discuss these two phases of the appeal in their order.

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## I.

WERE THE "BIRD DOG SALESMEN" IN THE EMPLOYMENT OF THE COMPANY SO AS TO MAKE THE COMPANY LIABLE FOR CONTRIBUTIONS BASED UPON THE AMOUNT THEY RECEIVED?

On this question there is no dispute in the facts. Two persons who performed this kind of work, one, Mr. Butler, called by the Company, and the other, Miss Albertson, called by the Department, both testified as to the method of operation. Mr. Butler testified that he was persuaded by an acquaintance to attend what she said was a free lecture on the resources of Utah. At the meeting he met a Mr.



Rigby, an old acquaintance from Cache Valley. Rigby asked Butler to solicit prospects for him. (p. 21). Rigby stated "he could give me a job as solicitor for him." (p. 29). Rigby was what was called a divisional manager. (p. 12). That meant that he had a group of solicitors which was called his division. (pp. 27-28). Butler went out and got prospects for Rigby. (p. 12). Prospects would be secured by Butler as he happened to see his friends anywhere he met them.

There was a general sales manager, Campbell, who had under him six or seven division heads who did the selling of stock. These division heads had to perfect their own sales force. The Company had nothing to say as to whom the division head employed as solicitor. Butler was at liberty to go anywhere; wasn't controlled by anybody, neither Rigby nor anyone else. Rigby had to consult no one in the Company in securing Butler to act as solicitor. The division head fixed the amount of compensation he would pay a solicitor and it varied from time to time according to the division head's willingness to split with the solicitor. He simply divided his commission which he got from the Company for selling its stock with the solicitor who brought in the prospect with whom a sale was made. All the solicitor did was to bring the division head (Rigby) in contact with the prospect. (pp. 13-15).

The Company would be advised of the split between the division head and solicitor and it would see that each got his share according to the split arranged by them, as all money on a stock sale was turned in to the Company and it then divided the commission owing to the division head between him and the particular solicitor entitled to a part thereof according to the terms the division head had agreed



to. (pp. 16, 17). The solicitor got whatever the division head felt like giving. The solicitors came and went as they pleased; they were not under anybody in any way. (p. 18). The sales manager had no control whatever over solicitors. At no time were they told to do any certain work. They went out on their own. (p. 21). They carried no prospectus and no literature. Butler had a contract book form furnished by the Company but he did not attempt to take subscriptions until after he obtained a license from the Securities Commission as agent. The solicitors had no right to sell and could not get signatures to contracts to purchase stock. The Company did hold sales meetings in the mornings which the solicitors could attend as they saw fit at which information concerning the Company's prospects would be given and information would be given on how best to approach people to interest them in investing in the Company. (p 27).

Miss Albertson was a friend of Miss Dysart, the general manager, president and treasurer of the Company, and came here from Los Angeles at the latter's invitation. She testified she performed services as solicitor under the same circumstances as testified by Butler. The solicitor did not have to buy stock of the Company before beginning the work of sending in prospects. Of course, a person who owned stock in the Company could be more persuasive in interesting people. She was, however, paid a salary of \$8.00 per week through Miss Dysart. She informed the manager she couldn't make enough and would have to quit. As a result she was given this \$8.00 per week through Miss Dysart. (pp. 42, 45) although she claims she was quite successful in getting prospects in. (p. 36). It is clear that she was Miss Dysart's protegee in

coming here from California (p. 47) and that the other solicitors cannot be grouped with her in determining whether they were in the Company's employ. But even she could devote as much or as little time to the work of soliciting, and could go anywhere, as she wished. The solicitor was furnished cards on which he wrote his name and which he gave to prospects to be left at the desk when the prospects attended the lecture. Company's Exhibit 4 is a sample of this card.

It was stipulated that the division heads were employees of the Company, but that they did not have any power to employ anyone on behalf of the Company.

Mr. Ellis, the Department's auditor, testified that the books of the Company showed that some of the solicitors had a drawing account with the Company which was offset with commissions, but not on a regular weekly basis. There did not appear from the books to be any balancing of these accounts.

We contend that under this evidence the solicitors were not in the Company's employment. They were such persons as the division head, salesman, for the Company could persuade to talk to their friends and get the salesman in contact with such prospects. If the salesman was successful in making a sale he divided his commission with the solicitor who got the prospect in, and the percentage of the commission which went to the solicitor was fixed wholly by the salesman. If the salesman was not successful in making a sale the solicitor got nothing. Whether he received anything depended entirely on the ability of the salesman to make a sale and if a sale was made the amount the solicitor got de-

pended entirely upon what the salesman was willing to allow.

The Company, in paying direct to the solicitor, merely took the responsibility of seeing that the division of the commission was made as agreed in order, it is to be inferred, to preserve good feelings and avoid trouble that might arise should a salesman fail to make the division himself after receiving his commission from the Company. The whole thing simply amounted to this: If Butler, for instance, chanced to meet an acquaintance on the street he could, if he desired, tell his acquaintance what he knew about the Company and its prospects of striking oil and could, if he desired, invite his acquaintance to attend the lectures which were being given at the Company's office. The invitation could be in any form or it might be in the form of the card. Exhibit 4. The card had the additional attraction of advising that prizes would be given away. He could employ any means he desired to get his friend in contact with Rigby. If Rigby succeeded in making a sale then Butler would be entitled to a split on Rigby's commission, but Rigby determined how much the split would be. In bringing about the contact between the prospect and the salesman the solicitor was free of all direction and control by the Company and by the salesman, both under his agreement with the salesman and in fact. This being true, the solicitor did not perform services for the Company under a contract of hire or for wages and "therefore the relationship was one that never came within the scope of the act because he (solicitor) was not in employment that would bring him within the act, to wit, rendering personal services (for the Company) under a contract of hire or for wages."

Fuller Brush Co. v. Industrial Commission  
of Utah, 104 P. (2d) 201: . . . Utah . . .

See also

In re Binder, 21 N. Y. S. (2d) 369,  
where it was held that one who solicited magazine subscriptions on commission basis but who could work anywhere she pleased, there being no check upon her time, no hours required, she could use her own sales methods, gave no written reports, such a one was not an employee as she was under no supervision or control.

Certainly, the statute requires a condition of employment to exist before contributions can be exacted thereunder. Whether there is employment must be determined initially from standards which the law affords. Supervision or control by the party sought to be charged as an employer over the party sought to be held an employee must exist before there can be a relationship of employment. There must be a contract of hire, express or implied.

It is evident by examining Company's Exhibit A 1-5, that numerous persons referred prospects that purchased stock. In the year 1938 only five solicitors out of a total of 120 solicitors received more than \$100.00 during that year for this kind of activity, and only 13 more received in excess of \$50.00. In 1939, out of a total of 230 solicitors, only 14 received more than \$100.00 that entire year, and only 10 more received above \$50.00. It is clear from this that the vast majority of these solicitors devoted little time to this activity and simply interested a few of their acquaintances in investing in the Company's stock to drill a test well for oil, as Mr. Butler put it. It was almost a community undertaking of many people who were convinced there

were good prospects of finding oil and they were willing to recommend the investment to their friends. The evidence shows, and the fact is, that the Company has about 1900 stockholders. It certainly seems far fetched to conclude that these several hundred persons, who got their friends to see a salesman, can be classed as being in the employment of the Company and so form the basis for making the Company's treasury respond in paying contributions with money obtained in the sale of this stock to their friends and, for that matter, with money they themselves invested in the Company in purchasing stock for themselves.

The setup is a good deal similar to the one used by aluminum salesmen a few years ago. The salesman would give a free dinner at a home for the home owner and a number of the latter's guests, with the understanding that during the evening the salesman could make a sales 'talk and sell his wares if he could. The home owner was given a piece of aluminum as a present in addition to the meal for his guests for his part in bringing the guests, as prospects, in contact with the salesman. Certainly, it could not be maintained that the home owner was in the employ of the aluminum company so that it must pay unemployment contributions based upon the value of the piece of aluminum and the meal given the home owner.

The Appeal Tribunal quotes from Sec. 19 (h) of the Act, Chapter 52, 1939 Laws, as follows:

“Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this

Act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided, the employing unit had actual or constructive knowledge of the work,"

and concludes that because the division head or salesman secured the services of these solicitors they must be classed as employees of the Company.

In the first place this section requires that there be an employment. There cannot be an employment without control or supervision. That initial determination must still be made. Further the employment must be one "to perform or to assist in performing the work" of the agent or employee. These solicitors were not employed to perform or assist in the performance of the work of the salesman. They didn't do any of his work or any part of it. They merely helped him to increase his contacts. They had no license to do his work or any part of it and had they attempted to do it or to assist him in doing it they would have violated the Securities Act.

In the second place the salesman could not hire anyone to do any of his work or to assist him. He had no such power from the Company and the Company could not avoid running afoul the Securities Act if it obtained agents in this fashion and did not have them licensed.

In the third place the section must contemplate that there is a relationship of employer and employee by virtue of *a hiring for the company* by the agent or employee. The Company must either have authorized the agent or employee to hire the individual in question or must have ratified the hiring in the Company's name by having knowledge of the

hiring and failing to repudiate it, permitting the individual to do the work of the agent or employee. In no other way could the individual in question be considered an employee of the Company. Certainly if an agent sees fit to hire some one on his own behalf, *never intending to hire on behalf of the company*, and accepts full responsibility for the payment of the one he hires, he is not precluded from doing so by the section above quoted. The interpretation of that section by the Appeal Tribunal would make Huckleberry Finn the employee of Tom Sawyer's aunt, when Huck got permission of Tom to paint the fence for Tom, and the aunt saw Huck painting. The section must receive a reasonable construction.

This point was decided in the case of

Wisconsin Bridge & Iron Co. v. Ramsay,  
233 Wis. 467; 290 N. W. 199,

where the Court held that to hold those hired (claimants)

*“employees of the company, Draws must have been an employee of the company in the sense that he was hiring the claimants for and in behalf of the company as its agent.”*

Certainly that is the only reasonable construction to be given to section in question. If the agent hires with the right to hire, then the person hired is an employee of the Company. If he hires without right to hire, but hires on behalf of the Company, and not on his own behalf, and the Company knows actually or constructively of the hiring and the doing of work thereunder then the person hired becomes an employee of the Company by estoppel or ratification, under the terms of said section.



## II.

THE DEPARTMENT WAS NOT AUTHORIZED TO BASE A CONTRIBUTION LIABILITY OF THE COMPANY UPON THE STOCK ISSUED TO OFFICERS AND OTHERS FOR SERVICES.

Section 19 (p), Chapter 52, 1939 Laws,  
provides as follows:

“ ‘Wages’ means . . . the cash value of all remuneration payable in any medium other than cash . . . The reasonable cash value of remuneration payable in any medium other than cash . . . shall be estimated and determined in accordance with rules prescribed by the commission.”

Here the undisputed facts show that the Company is engaged in a “wild cat” oil drilling venture. Its stock has no market or cash value. If there is oil it will be valuable; if there is no oil it will be worthless. There is an entire absence of any basis by which the Department determined or could determine its “reasonable cash value.” Some reasonable standards must be followed. The record as it stands shows the stock has no cash value. That is the only evidence there is in the record bearing upon its value. Furthermore, there is no finding by the Appeal Tribunal or the Industrial Commission as to the value of the stock, or that it has any value at all. There is simply a legal conclusion that the Company paid wages in the year 1940 in a certain amount, which amount includes an amount equaling the par value of all stock issued by the Company that year for services and without which amount there would be no further contributions payable for that year. Surely, before the Department can be entitled to contributions based upon a remuneration made in stock it must, by reason-

able standards, determine the cash value of such stock and there must be in evidence something or some facts from which the cash value can reasonably be determined. There is an entire absence of any finding as to cash value, and had there been a finding on that matter it would have been totally without support in the evidence as the record stands. As a matter of fact a finding of cash value would have been contrary to the evidence in the record for the evidence therein discloses that the stock has no cash value.

We respectfully submit that the decision of the Appeal Tribunal and Industrial Commission should be vacated. The Company is engaged in determining whether there is oil in the White's Valley structure in Boxelder County. It has no revenue or income. Whatever money it receives is from the sale of stock. We respectfully submit that the law did not intend that it should take from its treasury such money to pay unemployment benefits for people whom it never employed and who only procured some of their friends to investigate the Company's prospects and put them in the way of seeing a representative of the Company.

And we further submit that the statute did not intend that where stock has no cash value, but the Company's officers are willing to take a gamble with the Company by accepting stock for services rendered, money paid in for the purchase of stock should be withdrawn and paid into the unemployment fund for the benefit of such officers. Furthermore to use the par value of stock in a wild-cat oil venture as its cash value, without anything more appearing, is wholly arbitrary and unreasonable.

**Respectfully submitted,**

**HOMER HOLMGREN,**  
Attorney for Appellant.