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H. L. & Irene Leach dba Rusco Window Company v. Board of Review of the Industrial Commission of Utah et al : Defendant's Brief

Utah Supreme Court

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In the Supreme Court of the State of Utah

H. L. & IRENE LEACH, dba RUSCO
WINDOW COMPANY,

Plaintiff,

vs.

BOARD OF REVIEW, of the INDUS-
TRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOY-
MENT SECURITY,

Defendant.

Case No. 7751

DEFENDANT'S BRIEF

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STATEMENT OF THE CASE

On February 26, 1951, a representative of the Utah Department of Employment Security, acting under the provisions of Chapter 42-2a, Utah Code Annotated, 1943, and regulations pursuant thereto issued a determination that certain commission salesmen (franchise dealers) and certain installation contractors and carpenters were deemed to be in employment for the Rusco Window Company, a partnership.

On May 7, 1951, a representative of the Department issued a review decision affirming the decision of February 26. The matter was appealed to the Appeals Referee on May 14, 1951. A hearing on the matter was held by the Referee on June 25, 1951, and a written decision was rendered under the date of July 9, 1951. The Referee upheld the decision of the Department representative, and on July 18 the company appealed to the Board of Review of the Industrial Commission. The Board of Review, on August 27, 1951, upheld the decision of the Referee, and the matter is now before this court on a Petition for Review.

STATEMENT OF FACTS

H. L. & Irene Leach, doing business as Rusco Window Company, became subject to the Utah Employment Security Act as of July 1, 1948, when it commenced business operations in Salt Lake City. Its business operations consist primarily in fabricating, distributing, and installing steel windows specifically designated as Rusco Windows.

In its reports to the Department of Employment Security the company did not include or pay contributions on the earnings of franchise dealers and installation contractors. It is the services and wages of these two groups of workers which forms the subject matter for this appeal.

1. Franchise Dealers

Written contracts (Tr. 45) generally outline the conditions under which the franchise dealers or salesmen operate.

The dealer is given the exclusive right to sell in a certain area subject to the limitation that other dealers may enter the area to make sales to customers of such dealers.

Under the written agreement the Rusco Window Company supplies the goods which are sold to customers. The distributor, or the Rusco Window Company, sets these prices and fixes the installation schedules and costs (Tr. 45 and 28). The dealer is required to verify his selling prices with the company. The company supplies all contract forms, and sales contracts made by the dealer become binding on the company only when accepted by the company (Tr. 24 and 45.) At no time does any title to the merchandise pass to the dealer. The agreement provides that the dealer must submit all contracts to the company for acceptance or rejection within five days after the date of sale. The contracts may not be assigned by the dealer to anyone other than the company, and the contract may be cancelled on 5-days' notice.

The dealer is bound by the contract not to handle, sell, or distribute any products other than those provided by the company while the contract is in effect. The dealer receives his remuneration by way of commission on the contracts which he has sold, said commissions becoming payable after the materials have been installed.

The dealers are trained by factory or company representatives (Tr. 13, 14 and 22), and during the training period the company has classed them as employees and has paid contributions on their earnings (Tr. 13 and 14). For at least a period of time when a new dealer commences operations the sales manager of the company, who is a salaried representative,

accompanies the men on selling activities (Tr. 27). The sales manager receives, in addition to his guaranteed salary, a commission based on any sales which might be made jointly by him and the dealer during this training period.

The dealers develop some of their own prospects, and in addition they are aided by leads which are furnished by the company (Tr. 29). The company does not telephone the leads to the dealer, but places them in the dealer's individual mail box at the company office where the dealer "religiously" picks them up.

The dealers' activities appear to be those normally associated with those of a commission salesman except that in addition to making the sale, the dealer must complete certain company forms which provide information which is necessary for F.H.A. or other forms of financing of the purchase (Tr. 32). Upon making a sale, the dealer delivers the completed contract forms to the company. The company then either accepts or rejects the contract and takes those steps necessary either to get cash settlement for the materials furnished or to help the customer arrange financing.

While there is no evidence to show the dealer has anything further to do with the installation of the materials sold, it appears from the testimony (Tr. 30) that the dealers sometimes appear at the customer's place during the installation to determine whether or not the customer is satisfied with the job. In cases where the customer is not happy, the dealer tells the installer "to make the people happy."

The dealers, insofar as the facts appear, are not listed in the classified section of the telephone directory (Tr. 27).

The testimony indicates that the dealers customarily use the company's office phone as a reference in their selling activities, and the company provides a table at its offices which is reserved for the use of the dealers (Tr. 19). However, they do pay their own expenses (Tr. 14), and their earnings are received solely by means of commissions on sales.

All sales tax licenses are in the name of the Rusco Window Company (Tr. 19). The orders which are taken by the salesman become binding contracts between the customer and the company when they are accepted by the company (Tr. 18). All credit investigation is done by the company (Tr. 19).

The company has certain sales and installation quotas to meet. These quotas make it necessary that the company terminate the services of dealers who are not producing in an amount which will permit these quotas to be met.

The company occasionally makes advances on commissions prior to the time commissions are earned (Tr. 33); however, this is optional with the company.

If a dealership is cancelled the dealer must perforce go find another job (Tr. 29).

2. Installers

The installation contracts (Tr. 46) provide that the installer shall furnish the tools, equipment, and transportation necessary to install materials sold by the dealer and to perform the service necessary to install such material. The contract with the installers is, of course, between the installer and the com-

pany. The contract provides that all installations must be made in workmanlike manner.

Under the terms of the agreement the installer must complete and obtain a completion certificate on the installation, and he receives his payment for his services when the installation has been completed. The company formulates and keeps available a schedule of installation prices. The contract provides for cancellation on 5 days' notice.

In practice the installers are obtained by means which include advertising and orders at the employment service offices, and they consist primarily of individuals who either had or have at the time of their performance other part-time or full-time employment either on a salary or pay day basis (Tr. 36). For example, two of the installers were employees of the Kennecott Copper Company,, one a boiler maker and the other a carpenter.

When the installers appear at the company offices in the first instance they are given training in making installations and they are familiarized with the products which they are to install. The work which they are required to do includes the installation of porch enclosures and the taking out of old windows and the putting in of new steel windows.

In practice, then, the installer, after he has entered into an agreement with the company, appears at the company premises and picks up for delivery to the customer's property the materials which have been fabricated by the company or which have been received in a fabricated state (Tr. 34). He signs a receipt for these materials and obtains a list of specifications

on installation (these specifications on standard jobs involve 20 different points). He then transports this material to the customer's premises in his, the installer's truck (except that when no contract installer is available, the company has the materials installed by its own salaried employees and has them delivered by its own service truck) (Tr. 34).

After the materials have been installed pursuant to the detailed specifications (Tr. 35), the installer returns a completion form to the company and verifies that the materials have been installed. The work of the installer is not always inspected by the company, but as a matter of practice sometimes the company does inspect it and sometimes the franchise dealer inspects the work and contacts the customer to make sure the customer is "happy."

The company attempts to maintain a practice of paying for installations on Saturdays, but as a matter of fact, the installers usually collect the amount due for their services at the time they turn in the completion form (Tr. 35).

Whenever it appears that the installer is going to need materials which are not included with those which he picks up at the company premises, the company advances the money to be used in the purchase of these additional materials (Tr. 35). In cases of out-of-town installations where the installer furnishes materials in addition to his labor, his labor costs and material costs are itemized separately and paid for on that basis (Tr. 36).

STATEMENT OF POINTS

I. THE FRANCHISE DEALERS PERFORMED PERSONAL SERVICES FOR THE RUSCO WINDOW COMPANY FOR WAGES WITHIN THE MEANING OF THE UTAH EMPLOYMENT SECURITY ACT.

II. THE SERVICES WERE NOT EXCLUDED BY THE EXCLUSION PROVISIONS OF SECTION 19(j)(5)(A)(B) & (C).

III. THE CONTRACT INSTALLERS WERE PERFORMING PERSONAL SERVICES FOR THE RUSCO WINDOW COMPANY FOR WAGES WITHIN THE MEANING OF THE UTAH EMPLOYMENT SECURITY ACT.

IV. THE SERVICES OF THE CONTRACT INSTALLERS WERE NOT EXCLUDED BY REASON OF THE EXCLUSION PROVISIONS OF SECTION 19(j)(5)(A)(B) & (C).

ARGUMENT

Before discussing specific points of argument we would like to briefly refer to the findings in earlier decisions of this court on unemployment compensation. The provisions of the Utah Employment Security Act, Chapter 42-2a for determining whether individuals are performing services in "employment" have been so clearly interpreted by this court in previous unemployment compensation cases that it is not necessary to look to other fields or decisions for precedents. (See *Globe Grain & Milling Company vs. Industrial Commission* and

Albert Thomas, 98 U. 36, 91 P. 2d 512; Creameries of America vs. Industrial Commission and Robert L. Foss, 98 U. 577, 102 P. 2d 300; Salt Lake Tribune Publishing Company vs. Industrial Commission and Lynn Clark Cushing, 99 U. 259, 102 P. 2d 307; The Fuller Brush Company vs. Industrial Commission and Lamont Holst, 99 U. 97, 104 P. 2d 201; Singer Sewing Machine Company vs. Industrial Commission and Gorman C. Winget, 104 U. 175, 134 P. 2d 479; B. Grant Powell, also known as B. G. Powell, dba, Royal Blaze Coal Company vs. Industrial Commission, 210 P. 2d 1006).

Therefore, we must first determine whether or not there is a performance of personal service for the employing unit for wages within the meaning of Section 42-2a-19(j)(1), which provides as follows:

“ ‘Employment’ means any service performed prior to January 1, 1941, which was employment as defined in the Utah Unemployment Compensation Law prior to the effective date of this act, and subject to the other provisions of this subsection, service performed after December 31, 1940, including service in interstate commerce, and service as an officer of a corporation performed for wages or under any contract of hire written or oral, express or implied.”

Section 42-2a-19(p) defines wages:

“ ‘Wages’ means all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. Gratutities customarily received by an individual in the course of his employment from persons other than his employing unit shall be treated as wages received from his employing unit. The reasonable cash

value of remuneration in any medium other than cash and the reasonable amount of gratuities shall be estimated and determined in accordance with rules prescribed by the Commission; provided, that the term 'wages' shall not include: . . . "

Accordingly, if it is found that the services of the individuals in question are performed for the employing unit for wages, then the services are within the purview of the Employment Security Act unless they are excluded by the statutory tests of Section 42-2a-19(j)(5)(A)(B) & (C), which are as follows:

"(5) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the Commission that—

"(A) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of hire and in fact; and

"(B) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

"(C) such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service."

In the Creameries of America and the Salt Lake Tribune cases, *supra*, the following elements were pointed out as

evidence in the relationship of employment: (a) The purchasers were customers of the company, not the distributor; (b) the company never relinquished its right to these customers; (c) the distributor had to furnish the company a list of the new customers; (d) the dealer could acquire no customers for himself; (e) the company paid him \$1 for each new customer he obtained; (f) the retail sales price was fixed by the company; (g) the goodwill of the public was reserved to the company; (h) the dealer could handle no products other than those of the company; (i) upon termination of contract he could not deal with customers relative to products for such lines for two years after.

In the Singer Sewing Machine case, *supra*, the following elements reveal that the service relationship existed: (a) The contract between the company and the salesman provided that the salesman was authorized to solicit, negotiate, and effect the prices and on terms approved and authorized from time to time by the company, sales and leases of Singer Sewing Machines; (b) the title to the machines remained in the Company; (c) he was authorized to collect on such company accounts as were leased or placed in his hands; (d) the leases and sales on time were to be made in the name of the company and the papers turned over to it; (e) the salesman made weekly reports of all business done and daily remitted monies collected; (f) the company reserved the right to reject any sale or lease made by the salesman.

The court stated:

"Each of the above terms are inconsistent with the concept of vendor-vendee relationship. The business

shows it was the company's goods, the company's accounts; the company's risks of profit or loss; the company's money; the company's customers; the company's goodwill; the company's salesman. Many of the services rendered by the salesman were rendered at the specific direction of and for the company. It was a service relationship."

In the Singer Sewing Machine Company case the court quoted parts of its decision in the Fuller Brush Company case, *supra*, supplying in brackets explanation of the court's intention in the Fuller case. We quote from the Singer case:

" " The question as to whether one performing personal services is performing them for another or for himself usually offers no difficulty. In a few borderline cases, where services for another and for self may overlap, or where an artificial relationship may be set up between the parties, some difficulty may be encountered. It may be stated that [beyond any question] services are performed for another when performed under his supervision, direction and control; in the performance of the details of the work and in the use of the means employed; (Texas Co. v. Wheelless, 185 Miss. 799, 187, So. 880) [or] when he has the right to hire (select the worker) and the right to fire (terminate the employment) and when the compensation, if any, accruing to the worker becomes a direct liability on the other party. But all these are not always present, [is not this an equivalent of a statement that he may be in "employment" without, "control" or without "the right to hire and fire" or without compensation "being a direct liability" on the other party] and if present they may not be evident on a casual examination. Under some of the recent labor legislation, the right to hire and fire has been much limited. The right to determine and fix the com-

compensation of the worker is indicative, although under many wage laws the compensation is fixed by law or by an administrative body, or may be determined by a contract between the employer and a third party.' "

(See also the B. Grant Powell case, *supra*.)

I. THE FRANCHISE DEALERS PERFORMED PERSONAL SERVICES FOR THE RUSCO WINDOW COMPANY FOR WAGES WITHIN THE MEANING OF THE UTAH EMPLOYMENT SECURITY ACT.

In the instant case the record reveals that the company was engaged in fabricating, distributing and installing steel windows. To carry out the selling part of its business, the company entered into contracts with franchise dealers or salesmen to sell its products to customers. The company fixed the prices and the installation schedules and costs. The dealer was required to verify his selling prices with the company. The company supplied all contract forms, and the sales contracts negotiated by the dealer became binding on the company only when accepted by the company. The company retained title to all merchandise, and the dealers were required to submit all contracts to the company for acceptance or rejection within five days after the date of sale. The contracts were not assignable by the dealer, and the dealer's contract could be cancelled on five days' notice. The dealer was bound by contract not to sell or distribute any products other than those provided by the company while the contract was in effect.

The dealer received his remuneration by means of commissions on merchandise which he sold, said commissions being

payable after the materials had been installed. The dealers were trained by factory or company representatives and during the training period were classified as employees. In many cases a new dealer when commencing operations, was accompanied by the sales manager of the company who was a salaried representative. This sales manager received, in addition to his guaranteed salary, a commission based on any sales which might be made jointly by him and the dealer during this training period.

The dealers were furnished leads by the company, said leads being picked up at the office of the company from each dealer's individual mail box. The dealer was required to complete certain company forms which were necessary in securing F.H.A. or other forms of financing. The dealers customarily used the company's office phone as a reference in their selling activities, and a table in the office of the company was reserved for the use of the dealers.

All sales tax licenses were in the name of the Rusco Window Company. All credit investigation was done by the company.

The company had certain sales and installation quotas to meet, and these quotas make it necessary that the company terminate the services of dealers who were not producing an amount which would permit these quotas to be met. The company had the right to hire and the right to fire the worker, and the compensation of the dealer became a direct liability on the company at the time installations were made.

The agreement between the company and the franchise dealer provides specifically for the sale of products of the

distributor, which in this case is the company. That the franchise dealer was receiving his remuneration by means of a commission rather than by means of any sale of contracts is obvious from the following language of the agreement between the company and the franchise dealer:

"14. This franchise dealer shall be entitled to a commission on any contract secured by him from customer after said contract has been approved by the distributor (the company) and after the products ordered by the customer have been installed and invoiced and the commission to be fixed by and in accordance with a discount or commission schedule maintained by the distributor at its office in Salt Lake City, Utah. The distributor agrees on written request to provide in writing to the franchise dealer the amount of commission called for on any particular contract or order secured by this franchise dealer."

The provisions of the franchise dealer agreement are inconsistent with the concept of a vendor-vendee relationship. As in the Singer case, *supra*, the record shows that it was the company's goods, the company's accounts, the company's risks of profit and loss, the company's money, the company's customers, the company's goodwill, and the company's salesmen. The services were performed for wages as defined in Section 42-2a-19(p), being entirely in the form of commissions on sales. Clearly, there existed between the company and the franchise dealer a service relationship which brought the services of the franchise dealers within the term "employment" as defined by the Act. The determination by the Commission that a service relationship existed is fully supported by the facts.

II. THE SERVICES WERE NOT EXCLUDED BY THE EXCLUSION PROVISIONS OF SECTION 19(j)(5)(A)(B) & (C).

Having found that a service relationship existed between the franchise dealers and the company thus bringing the services within the purview of the Employment Security Act, we now examine the record to determine whether or not these services are excluded by the provisions of 19(j)(5)(A)(B) & (C) supra. It will be noted that the exclusion provisions of that section are in the conjunctive, and in order to support an exclusion the company must satisfy each provision.

Considering these three tests in the order in which they appear in the statute, we find:

(A) (Control Test). The Commission correctly found that although there was a great deal of freedom exercised by the dealers in carrying out their selling activities, they were certainly not entirely free of company control. It will be remembered that these individuals were, in the first instance, given some training. They were required to complete company forms and submit in detail the information required by the company. The times at which these forms and information was to be submitted were specified either by the company indirectly or by means of the contractual terms.

The testimony was that the company had quotas to meet and unless the franchise dealers did their part in the selling scheme, the company would have to fire the dealer and get someone who could more effectively carry out the business of selling.

In its application the statute contemplates that the Commission must look not only to the controls which were exercised in actual practice by the company, but to the right to control which is inherent in the particular relationships between the company and the dealers as evidenced by the facts. It will be noted in paragraph II of the dealer's contract that the dealer must "operate in accordance with policies established by the distributor." (company). Paragraph X of the contract provides that the agreement may be cancelled on five days' written notice.

The right to hire and the right to fire is always indicative of the right to control particularly when the activities of the worker are "dovetailed" into the general company operations. The dealer was, of course, in every instance controlled as to specifications and price. The Commission properly found, therefore, that the (A) test was not satisfied inasmuch as there was no showing that the individual was completely free of control within the meaning of the statute.

(B) (Usual Course and Place of Business Test). From the records and the facts, it appears without question that the usual course of the company's business is that of assembling, fabricating, selling, and installing steel windows, designated as Rusco Windows. It will be noted that from time to time during the period in question the company engaged a salaried individual to act as sales manager. When there was no particular designation of anyone specifically as a sales manager, some other member of the organization acted in that capacity.

While the main portion of the services of the individuals in question were performed outside all places of business of

the company, certainly not all of the services were performed outside the company's business establishment. The company maintained at its offices a table for the use of the salesmen or dealers. It maintained mail boxes in which leads and business calls were placed. The salesmen, as a general practice, religiously appeared at the offices of the company to pick up their mail and to take care of phone calls. It was the practice of the individual franchise dealers generally to use the telephone number of the company as reference. This would naturally result in the requirement that a certain portion of time be spent in taking care of these calls which arrived at the company's offices pursuant to this reference.

The Commission properly found that although the work was mainly performed outside the places of business of the company a certain proportion of the work was actually performed on the company's premises.

(C) (Independently Established). An examination of the records and the testimony shows that while the individuals in question were termed franchise dealers, there is little, if anything, to distinguish them from commission salesmen who are hired on a contract basis to sell at specified rates of commission.

The dealers paid nothing for the dealerships. In the course of their activities they acquired no property right. They were required to put forth no capital outlay. (The only amounts they invested were for expenses). They acquired nothing which they could subsequently sell or convey to another. The risk of profit and loss was all in the company, and when their services were terminated by the company, they

became unemployed in the same sense that any other workman who had been engaged either on a salary or commission becomes unemployed. If his dealership agreement was terminated, the franchise dealer could, of course, go to some similar industry and convince another employing unit that his services were valuable and should be engaged. At no time did he acquire for himself anything other than training and experience together with his commissions. His activities were thoroughly integrated with the other activities of the company. They consisted entirely of carrying out an agency relationship for a certain commission based on the volume of sales made by the dealer and accepted and installed by the company. He was prevented by his contract from selling other products while the franchise agreement was in effect. He had, therefore, no independence from the company in carrying out his assigned activities.

The Commission correctly found that the franchise dealers were not customarily engaged in an independently established business of the same nature as that involved in their contract of service.

III. THE CONTRACT INSTALLERS WERE PERFORMING PERSONAL SERVICES FOR THE RUSCO WINDOW COMPANY FOR WAGES WITHIN THE MEANING OF THE UTAH EMPLOYMENT SECURITY ACT.

When a sale has been made by the franchise dealer and the financing has been arranged by the company, an installation specification sheet is turned over to an individual designated as an installation contractor. In the first instance, the company

obtains the services of this contract installer by advertising in the papers and by placing orders with the employment service offices in the state.

Primarily, these installers either had, at the time they were engaged by the company, part-time or full-time work on a salaried or day paid basis or they had such other employment during the time they were doing the installing. For example, the record reveals that two of the installers, one a boiler maker and the other a carpenter, were currently employed by the Kennecott Copper Company.

The installers are required to furnish the necessary tools and equipment, and in most cases to transport the needed material to the place of installation, that is, the customer's premises. In practice the installer is called by telephone and notified that there is an installation to be made. He then appears at the company premises and picks up the materials which are fabricated and assembled. He then transports them to the place of installation and installs them according to the specification sheet which is given him at the time he takes the work. Whenever it appears that the installer will need materials in addition to those which he picks up at the company premises, the company advances the money to be used in the purchase of these materials. After the work is completed the installer returns a completion form to the company and verifies that the materials have been installed.

At no time in the process does the installer have any title in the materials which are being installed. His only compensation for the work is that which he received from the company. This compensation is arrived at by the company from a

schedule of installation prices, which is formulated and maintained by the company.

The installer's work is not always inspected by the company, but as a matter of practice the company does sometimes inspect it to make sure the customer is satisfied. Under the working arrangement it is agreed that the company may terminate the installer's services at any time on 5 days' notice.

It would appear that there is little to distinguish these installers from the ordinary carpenter who owns his own tools and customarily uses them as a part of his occupation. The company does not maintain a foreman on each job, but there is definitely a great amount of control exercised by the company in that the individual is required to do his work according to the detailed specifications of the company. If installations are not made in accordance with the instructions given by the company at the time of the original training of the installer, then, of course, he is subject to being fired.

The Commission correctly found that the contract installers were performing services for wages for the company. The measure of wages earned by the installer is, of course, the difference between the installation schedule price (in other words, the piece rate price) and the expenses which might have been incurred by the installer in transporting the materials to the job. It must be noted that in some instances the company uses its own transportation and its own salaried people to make installations if there are no so-called contract installers immediately available. It also must be noted that in cases of out-of-town installations where the installer furnishes materials in addition to his labor he is required to itemize

separately his labor costs and his material costs as a basis for payment by the company. The relationship is clearly a service relationship.

IV. THE SERVICES OF THE CONTRACT INSTALLERS WERE NOT EXCLUDED BY REASON OF THE EXCLUSION PROVISIONS OF SECTION 19(j)(5)(A)(B) & (C).

These contract installers are not excluded from coverage under the Employment Security Act by reason of the exclusion tests of Section 19(j)(5).

The company, by reason of the original training of these individuals and the detailed specification sheets and job completion requirements, does maintain a definite control over the installers. The company could and would terminate the services of any installer if such services were detrimental to the customer's satisfaction. If the work is not done at the time and in a manner which meets with the approval of the company, the company would, of course, terminate the services.

While the work is done in the usual course of the company's business, there is only a minimum of service performed at the premises of the company. This service consists generally in picking up the materials which are to be installed. This is true, of course, unless it is considered that during the installation the situs of the installation is a place of business of the company.

There is no indication that these contract installers are customarily engaged in an independently established trade, oc-

cupation, profession, or business of the same nature as that involved in their contract of service. As was previously pointed out, these contract installers are usually engaged by the company by means of advertising and through orders placed with the employment service. They are individuals who customarily have the type of an occupation under which they perform service for others for wages. They have no established business as that term is generally known. They are performing only one step in the general business operations of the company and are doing so subject to the company desires. At any time their services might be terminated, and they would be unemployed just as any other unemployed individual who usually works for day wages or salary.

At no time do they have title to the materials which are being used. The customers are the company's customers; it is the company's goodwill; the company's property; the company's business.

There is no evidence that these installers hold themselves out to the public generally as being engaged in that type of business. Some of them did this, of course, only during periods of time when their employer's operations (as in the case of the Kennecott Copper Company employees) were closed and work in their regular job was not available. Whether or not the installers had installation work to do depended entirely on whether or not the company salesmen (franchise dealers) made sufficient sales in order to make jobs available. It also depended on whether or not the company notified them by telephone or otherwise that there was work to be done.

While there may have been some negotiation from time

to time regarding the amount they were to receive for their work, the general rule was that they receive for such work the wages which were fixed by the company schedules. There was no open bidding for these jobs as would be customary if they were being done by individuals or companies customarily engaged in doing that type of work. Just as the franchise dealers did not have business addresses and did not advertise for business, neither did the contract installers have business locations nor did they advertise as would normally be expected of individuals who offered their services to the public at large.

The Commission correctly found that the services of the contract installers were not excluded by the provisions of Section 19(j)(5), *supra*.

CONCLUSION

We submit that the franchise dealers and the contract installers are squarely within the purview of the Utah Employment Security Act as interpreted by previous decisions of this court and, therefore, were performing services in employment within the meaning of the Act. The defendants, therefore, pray that the findings of the said defendants that the franchise dealers and the contract installers were performing services in employment as defined by the Act be affirmed.

Respectfully submitted,

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