

1960

Wear-ever Aluminum, Inc. v. Board of Review of the Industrial Commission of Utah, Department of Employment Security : Brief for Plaintiff

Utah Supreme Court

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IN THE
Supreme Court of Utah

NO. 9321

FILED

WEAR-EVER ALUMINUM, INC.,
Plaintiff,

v.

Clerk, Supreme Court, Utah

BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH, DEPARTMENT
OF EMPLOYMENT SECURITY,
Defendant

Original Proceeding to Review a Decision of the
Board of Review of the Industrial Commission

BRIEF FOR PLAINTIFF

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STATEMENT OF FACTS

This case is on original proceeding to review a decision of the Board of Review of the Industrial Commission affirming a decision of the Appeals Referee that the plaintiff, Wear-Ever Aluminum, Inc., is liable for contributions to the Unemployment Compensation Fund on monies paid to certain distributors. The question for determination is whether the distributors are in the employment of Wear-Ever within the meaning of the Employment Security Act, Section 35-422, Utah Code Annotated, 1953.

The findings of fact by the Appeals Referee which were adopted by the Board of Review of the Industrial Commission present a wholly inadequate foundation for the determination of this legal issue.* There is no dispute as to the facts, however, since the evidence presented by the plaintiff at the hearing of this matter was uncontradicted. For these reasons, reference is made throughout this Statement of Facts to the record of testimony at the hearing.

Wear-Ever enters into written agreements (R. 95) with individuals known as distributors. By the agreement, the Company appoints them as distributors to solicit orders for the sale of its cutlery products from the date of the contract

* Part of Finding No. 4 of the Findings of Fact is in error in that it is unsupported by evidence in the record. This is detailed below at p. 18.

Statement of Facts.

to December 31 of the same year. The contract is automatically renewed for successive terms of one year each, unless prior to December 31 of any year either party notifies the other to the contrary.

The Company furnishes the distributor with a suggested price list, but he may and does sell at higher or lower prices (R. 24, 54, 55, 59, 60, 78, 79). If the suggested retail price of an item is \$10, the Company will ship the merchandise for \$7 (R. 95). If the distributor sells at the suggested price, he has a profit of \$3; on the other hand, if he sells the item for \$20, he has a \$13 profit; if he sells it for \$2, he has a \$5 loss (R. 52-53). In order to promote sales, the distributor gives away premiums; he alone fixes the nature and amount of the premiums; he buys them at his own expense (R. 29-30, 55, 80, 92). Accordingly, the distributor, and not the Company, determines the price at which he sells merchandise (R. 24).

The Company does not reserve any direction or control over the activities of the distributors (R. 95), and they work entirely for themselves (R. 39). The distributor is not required to work any particular time or for a certain amount of time (R. 30, 33). He solicits as he sees fit (R. 78, 93) and takes a vacation when he feels like it (R. 37, 60). In Utah the distributor spends an average of about 20 to 25% of his time distribut-

Statement of Facts.

ing Wear-Ever products, from which his average earnings are about \$25 to \$27 a month (R. 31, 57, 58, 66). He makes no written or oral reports (R. 36-37, 55). He receives no instructions or directions of any kind (R. 30-31, 56, 78, 91-92). He does not submit his customer lists to the Company (R. 33, 60). He does nothing to protect the rights and interest of the Company (R. 31). The distributors may and do sell other merchandise, including merchandise competing with Wear-Ever (R. 30, 56-57, 64, 82). The distributor is not required to do any work whatever (R. 30, 56, 78, 91-93). He need never be present personally at any particular time or place, and he gets no additional bonus or financial advantage of any kind by appearance (R. 36-37, 55, 60, 79-80, 92).

No distributor has any exclusive territory (R. 34) and a distributor may sell wherever he chooses (R. 34, 81, 92). No Company policy prevents assignment (R. 37); distributors may and do have assistants, without Company knowledge or approval (R. 25, 55-56, 80-81). The Company provides sales kits for distributors which sometimes the distributors buy; if the kits have been loaned, the distributors return them when they get through with them (R. 53). The distributors need not use order forms but may send in an order on any scrap of paper (R. 36). The distributor need not submit orders within any certain period of time (R. 68). The distributors are

Statement of Facts.

not required to meet any quotas of any kind (R. 33, 60). The distributor does not collect on accounts (R. 35). The Company cannot terminate the contract of a distributor (R. 35, 58).

If the distributor takes money from a customer, he is not required to remit it to the Company (R. 35-36). In most cases the customer makes a down payment to the distributor; the arrangement is whatever is agreed to between the distributor and the customer (R. 44). Nothing prevents the distributor from carrying his own paper on conditional sales agreements (R. 77). The distributors may and do carry stocks of merchandise owned by them and shipped to them by the Company on their orders, and on which they bear the risk of price fluctuation (R. 25, 32, 60, 79, 92). While in the majority of sales the distributors direct the Company to ship merchandise to their customers (R. 85), they make delivery from their own stock of merchandise direct to the customer whenever they desire (R. 25, 60, 78, 92).

The Company does not furnish the distributor with any office space, desk space, or telephone (R. 26, 59). He receives no salary or drawing account (R. 26, 59). Distributors may and do rent their own offices (R. 59). They provide their own business cards, stationery, advertising, and transportation facilities, and carry their own insurance (R. 26-27, 29, 59). They are not required

Point on Which the Plaintiff Relies.

to keep any records, repossess merchandise, adjust complaints, or investigate credit ratings (R. 35-36, 60). Substantially all distributors engage in other gainful activities as they see fit (R. 31, 56, 64, 80, 82, 91). Distributors are not subject to reprimand by the Company for anything at all (R. 32, 59).

Distributors are not included in the Company pension plan for employees (R. 28). The Company does not withhold income tax on amounts paid distributors, nor has it ever paid or been held liable to pay unemployment or Social Security taxes to the federal government or any of the fifty states in which it operates (R. 28, 30). The Company has never been held liable for torts of or workmen's compensation on distributors (R. 38). The federal government and twenty-one states (including nine states with statutes here identical with Utah) have ruled that the Company is not liable for unemployment compensation contributions; there have been no adverse rulings (R. 29).

POINT ON WHICH THE PLAINTIFF RELIES

1. The Wear-Ever distributors do not perform services for the Company for wages.

*Argument.***ARGUMENT****The Wear-Ever Distributors Do Not Perform Services for the Company for Wages**

This case raises the question as to whether the distributors under contract to Wear-Ever Aluminum, Inc., are in the employment of Wear-Ever within the meaning of the Employment Security Act, Section 35-4-22, Utah Code Annotated, 1953. That depends, as this Court held in *Powell v. Industrial Commission*, 116 Utah 385, 210 P. 2d 1006, on "whether there was a 'service relationship' between (the alleged employer) and the several persons who entered in the oral and written agreements . . . If there existed a 'service relationship' the plaintiff was an employer . . . When a service is performed for a person by another for remuneration . . . a service relationship arises. Thus true vendor-vendee and lessor-lessee relationships are not service relationships."

The distributors here involved sold Wear-Ever products. There have been six cases, we believe, in which this Court held that the relationship between a particular salesman and a particular manufacturer either was or was not a service relationship.* In *Fuller Brush Co. v. Indus-*

* *Globe Grain & Milling Co. v. Industrial Commission*, 98 Utah 36, 91 P. 2d 512, involved a salesman, but there was no question but that he performed services; the only question was

Argument.

trial Commission, 99 Utah 97, 104 P. 2d 201, this Court found a vendor-vendee relationship. On the other hand, this Court found a service relationship in *Creameries of America, Inc., v. Industrial Commission*, 98 Utah 571, 102 P. 2d 300; *Salt Lake Tribune Publishing Co. v. Industrial Commission*, 99 Utah 259, 102 P. 2d 307; *Singer Sewing Machine Co. v. Industrial Commission*, 104 Utah 175, 134 P. 2d 479; *Northern Oil Co. v. Industrial Commission*, 104 Utah 353, 140 P. 2d 329; and *Leach v. Board of Review*, 123 Utah 423, 260 P. 2d 744. The question at bar is whether the Wear-Ever distributors are like those of *Fuller Brush* or like those of *Creameries*, *Salt Lake Tribune*, *Singer*, *Northern*, and *Leach*.

At the outset it is clear that this case is not to be decided by any thought of the "weight of authority," that is, five cases against one. All six cases are entirely consistent with each other and the problem is on which side of the line the facts in each case fall. As this Court held in *Singer* (104 Utah at 183), "in every case under the Act that has been before this Court, we have steadfastly laid down the same rules and tests." Accordingly, let us look at the facts of each of the

whether he was to be excluded under Section 19 (j) (5) of the Act. *Abrahamsen v. Board of Review*, 3 Utah 2d 289, 283 P. 2d 213, involved salesmen; however, there was no issue as to the service relationship, but only as to constitutional law.

Argument.

six cases and compare them with those of the case at bar. This may be done most conveniently, we believe, by the use of parallel columns.

In *Creameries of America, Inc., v. Industrial Commission*, 98 Utah 571, the facts as compared with the present facts were these:

Creameries

"... the retail sale price was fixed by plaintiff [the manufacturer] (p. 584). This remuneration was the difference between what Foss had to pay the company for the products and what he was permitted to charge for such products."

"The dealer agreed not to handle products other than those of the company," (p. 574).

The company granted to the dealer "the exclusive right to sell its products at retail in a defined franchise area" (p. 574).

The agreement provided "for the 'purchase' from the dealer, upon the termination of the contract, of any

Wear-Ever

The distributor determines the price at which he sells merchandise (R. 24). He is furnished a suggested price list, but may and does sell at higher or lower prices (R. 24, 54-55, 59-60, 78-79).

Distributors may and do sell other merchandise, including merchandise competing with Wear-Ever (R. 30, 56-57).

No distributor has any exclusive territory (R. 34).

There is no such provision in the written agreement (R. 95) and there are no side agreements (R. 24). Dis-

Argument.

Creameries

customers or business acquired by the latter ...” (p. 574).

“The agreement was terminable by either party upon giving the other two weeks’ written notice.” (p. 574).

“The agreement was not assignable without the written consent of the company.” (p. 574).

Wear-Ever

tributors are not required to submit their customer lists to the company (R. 33, 60).

The company cannot terminate the contract of a distributor (R. 35, 58).

No company policy prevents assignment (R. 37). Distributors may and do have assistants, without company knowledge or approval (R. 25, 55-56, 80-81).

On the *Creameries* facts, of course, there was a service relationship. There the distributor could handle no other products, and had an exclusive territory in which he could “resell” only at prices fixed by the manufacturer. At the termination of the contract he had to turn over his customers to the company and go out of business. His remuneration was in an amount fixed by the company, and for services he had to perform personally.

Salt Lake Tribune Publishing Co. v. Industrial Commission, 99 Utah 259, is quite similar to *Creameries* and quite different from *Wear-Ever*:

*Argument.**Salt Lake Tribune*

The carrier “was, however, required to sell the newspapers at a certain fixed price.” (p. 260).

The carrier agreed “to deliver said newspapers and publications regularly and promptly” (p. 261).

The contract could be terminated by the company “with or without cause, upon 15 days’ notice in writing.” (p. 261)

“Upon termination of the contract the circulator was required to turn over to the company . . . the names and addresses of all subscribers” (p. 261).

Again, the service relationship was evident. The carrier had to perform the service of delivering newspapers regularly and promptly, and he had to charge the subscriber exactly the price fixed by the company. When an alleged purchaser is

Wear-Ever

The distributor determines the price at which he sells merchandise (R. 24). He is furnished a suggested price list, but may and does sell at higher and lower prices (R. 24, 54-55, 59-60, 78-79).

The distributor is not required to do any work whatever, or to follow any directions or instructions of any kind (R. 30, 56, 78, 91-93).

The company cannot terminate the contract of a distributor (R. 35, 58).

Distributors are not required to submit their customer lists to the company (R. 33, 60).

Argument.

so restricted in his manner of reselling and the price at which he resells, of course he has not genuinely made a purchase and resale.

Next we consider *Fuller Brush Co. v. Industrial Commission*, 99 Utah 97, which case, we submit, is indistinguishable from the case at bar in all material facts:

Fuller Brush

"The company suggested retail prices for the various articles but the dealer was not required to adhere thereto." (p. 104)

"The dealer set his own hours of work, the order of work, and methods of work." (pp. 104-105)

"He made no work reports to the company and received no orders or directions from it." (p. 105)

"He made no reports of sales, furnished the company no list of his

Wear-Ever

The distributor determines the price at which he sells merchandise (R. 24). He is furnished a suggested price list but may and does sell at higher and lower prices (R. 24, 54-55, 59-60, 78-79)

The distributor is not required to work any particular time or any certain amount of time (R. 30, 33). He solicits as he sees fit (R. 78, 93) and takes a vacation when he feels like it (R. 37, 60).

The distributor makes no written or oral reports (R. 36-37, 55). He receives no instructions or directions (R. 30-31, 56, 78, 91-92).

The distributor makes no reports (R. 36-37, 55), and does not sub-

*Argument.**Fuller Brush*

customers or record of his accounts with them. Any good will he built up was his own and not the company's." (p. 105)

The dealers "were supplied with a sample case of brushes, which was charged or leased to them, and which they could pay for and keep or return for credit upon termination of the contract . . ." (p. 104)

The dealer "could sell for cash or credit without knowledge of the company," (p. 105).

The dealers "have a territory assigned to them and in which they effectuate their sales" (p. 104).

Wear-Ever

mit customer lists to the company (R. 33, 60). The distributor does nothing to protect the rights and interests of the company (R. 31).

The company provides sales kits for distributors which sometimes the distributors buy. If the kits have been loaned, the distributors return them when they get through. (R. 43)

If the suggested retail price of an item is \$10, the company will ship the merchandise for \$7. If the distributor sells at the suggested price, he has a profit of \$3. On the other hand, if the distributor sells the item for \$20, he has a \$13 profit; if he sells it for \$2, he has a \$5 loss (R. 52-53).

The distributors sell wherever they choose (R. 34, 81, 92), so they are subject to even less restrictions than the Fuller Brush dealers (R. 89).

Argument.

In every respect, therefore, the case at bar is as good or better on the facts than the case for *Fuller Brush*. The holding of this Court, in *Fuller Brush*, in which the basic element of the vendor-vendee relationship is emphasized, is squarely in point (p. 106) :

“Since there was no obligation on plaintiff to pay claimant any remuneration for services, but claimant must get his remuneration, if any, from his ability to sell the brushes at an advanced price over the cost to him and that he and not plaintiff assumed the risk of profit or loss on the venture or undertaking, it follows claimant’s services were not rendered for wages or under a contract of hire.”

The essential element, the risk of profit or loss on the venture, is present in the case at bar from the undisputed testimony that the company charges the distributor \$7 for a particular item and he may sell it for \$2, \$10, or \$20 (R. 52, 53). In addition, the distributor, in order to promote sales, usually gives away premiums; he alone fixes the nature and amount of the premiums; he buys them at his own expense; and of course the amount of the premiums affects his profit or loss (R. 29-30, 55, 80, 92).

Singer Sewing Machine Co. v. Industrial Commission, 104 Utah 175, restated the principle of all these cases and expanded the language of the

Argument.

Fuller Brush opinion.* Then this Court showed that, unlike *Fuller*, the Singer salesman performed personal services for the Company, “inconsistent with the concept of a vendor-vendee relationship” (104 Utah at p. 194). These services, quite different from the facts of *Wear-Ever*, were these:

Singer

“ . . . the salesman is authorized to solicit, negotiate and effect at prices and on terms approved and authorized from time to time by the Company” (p. 193).

“ . . . it authorized him to collect on such Company accounts as it left or placed in his hands” (p. 193).

“ . . . salesman make weekly reports of all business done, and re-

Wear-Ever

The distributor determines the price at which he sells merchandise (R. 24). He is furnished a suggested price list, but may and does sell at higher and lower prices (R. 24, 54-55, 59-60, 78-79).

The distributor does not collect on accounts (R. 35).

The distributor makes no written or oral reports (R. 36-37, 55).

* This Court noted that some other states have construed their statutes differently. Even so, it is worth noting that the Company has not been held liable in any of the fifty states (R. 28-29). This includes Oregon (R. 29), whose decision in a *Singer Sewing Machine* case this Court expressly approved (104 Utah at p. 193).

*Argument.**Singer*

mit daily all moneys collected" (p. 193).

"The salesman must '*do any act or thing the Company considers necessary or advisable for the protection of its interest or protection of its rights*'" (Italics by the Court) (p. 194).

"The commissions . . . were not deductible by the salesman, but all moneys were sent in to the Company" (p. 194).

". . . in any dispute the books of the Company shall be binding on the salesman" (p. 194).

". . . his contract was terminable at the will of either party." (p. 178).

Wear-Ever

If the distributor takes money from a customer, he is not required to remit it to the Company (R. 35-36).

The distributor has no such obligation (R. 31). Indeed, he is not required to do any work whatever or follow any directions or instructions of any kind (R. 30, 56, 78, 91-93).

The down payment is whatever is agreed to between the distributor and the customer (R. 44); the distributor is not required to remit money collected to the Company (R. 35-36).

There is no such provision in the written agreement (R. 95) and there are no side agreements (R. 24).

The Company cannot terminate the contract of a distributor (R. 35, 58).

Certainly, when the Singer salesman had to do anything the Company directed, there was a serv-

Argument.

ice relationship. But your Honors made it clear that the twofold test was whether the salesman did “render personal services *for another*” and whether he was “entitled to remuneration (wages) therefor.” To render personal service for himself, and to be compensated by “his ability to sell at an advanced price,” does not make a salesman an employee.

Northern Oil Co. v. Industrial Commission, 104 Utah 353, so clearly involved a service relationship that it is hard to see why the Company litigated. The facts are entirely different from those of *Wear-Ever*:

Northern

“We are not dealing here with a definite formal contract between the company and the solicitors, as none existed . . .” (p. 360).

“. . . the company was selling its stock at ten cents per share” (p. 361).

“. . . the services of the solicitors could be *terminated without incurring liability*” (Italics by the Court) (p. 360).

Wear-Ever

The written agreement between the Company and its distributors is in evidence (R. 95). There is no agreement except in accordance with the printed form (R. 24).

The distributor determines the price at which he sells merchandise (R. 24, 54-55, 59-60, 78-79).

The Company cannot terminate the contract of distributor (R. 35, 58).

*Argument.**Northern*

The solicitor was allowed "a greater commission when the solicitor was personally present at the consummation of a sale than was allowed otherwise" (p. 359).

Wear-Ever

The distributor need never be present personally at any particular time or place, and he gets no additional bonus or financial advantage of any kind by appearance (R. 36-37, 55, 60, 79-80, 92).

As your Honors pointed out, the requirement of personal presence in the *Northern* case is consistent only with a service relationship.

Last in our review of the cases involving salesmen is *Leach v. Board of Review*, 123 Utah 423. The differences between *Leach* on one hand, and *Fuller Brush* and the case at bar on the other, are readily apparent:

Leach

The Company gives the dealer "the exclusive right . . . to solicit orders . . . in a certain territory . . ." (p. 425).

" . . . at prices fixed by the plaintiffs [the Company]" (p. 425).

"The plaintiffs [the Company] furnish all order forms and dealers are required to submit all orders . . .

Wear-Ever

No distributor has any exclusive territory (R. 34). The distributors sell wherever they choose (R. 34, 81, 92).

The distributor determines the price at which he sells merchandise (R. 24, 54-55, 59-60, 78-79).

The distributor need not use order forms but may send in an order on any scrap of paper (R. 36). The

*Argument.**Leach*

within five days" (p. 425).

"The dealers did not have legal title to the products for which they obtained orders. Title reposed in the plaintiffs" (p. 428).

Wear-Ever

distributor need not submit orders within any certain period of time (R. 33).

The distributors may and do carry stocks of merchandise owned by them and shipped to them by the Company on their orders, and on which they bear the risk of price fluctuation (R. 25, 32, 60, 79, 92).

At this point it is worth noting that as to the amount of stock maintained by a distributor, the Industrial Commission fell into an error of fact. The Appeals Referee stated (R. 8) :

"The distributors did not ordinarily carry a sizable stock of such paid-for products and then deliver directly to the customers."

For this statement there is absolutely no support in the record. The only witnesses who said anything about a stock of merchandise were Smith, Howells, and Jackson. Smith testified that "a large proportion of our active distributors carry stocks of merchandise" (R. 32). Howells, asked if he maintained a stock of merchandise, replied "Yes" (R. 55). Jackson, asked if he had a stock of merchandise, answered "I do" (R. 34), and agreed simply that "the majority" of his merchandise sold is delivered by the Company (R.

Argument.

85). None of these statements justifies a conclusion that the stock of merchandise was not “sizable”. The record establishes that the distributors delivered merchandise from their own stock whenever they wanted to do so, in which case, of course, they had the legal title.

Now in the other cases, solely at their own option, the distributors had the company make direct shipments. With respect to these, the Industrial Commission assumed, contrary to the law, that the distributor could not have had title, and hence be in a vendor-vendee relationship, simply because he did not personally physically handle the merchandise. This assumption is shown by the statement of the Appeals Referee (R. 8) :

“The only time when a distributor had title to the product was when he paid the company established price, minus his discount and commission,* and took delivery himself.”

But is it the law that a distributor cannot have title because he does not physically handle the merchandise?

In *Middleton v. Evans*, 86 Utah 396, 45 P. 2d 570, the plaintiff Middleton had obtained a judgment against the defendant Evans. Evans had written a book entitled “Joseph Smith, an American Prophet”, which was published by the inter-

* There is no commission; the distributor simply buys merchandise at a discount (R. 95).

Argument.

pleaded defendant, MacMillan Company. The agreement between MacMillan and Evans provided that Evans would purchase 1,000 copies of his work at the retail price less a 40% discount. After the book had been published Evans solicited the Deseret Book Company to buy copies of the book, and received an order for 300 copies which he forwarded to MacMillan. Then MacMillan "shipped said books as ordered directly to the Deseret Book Company, according to Evans' directions" (pp. 398-399). Before Deseret paid anybody for the 300 books MacMillan served a writ of garnishment on it. The question then was whether Deseret owed Evans, in which case the garnishment was good, or owed MacMillan, in which case it was not.

The argument of MacMillan was that Evans had never received the books because there had been no personal delivery to him. This Court rejected that argument, holding (p. 403) :

"If there is any question about the delivery in this case to the carrier being sufficient to constitute an unconditional appropriation to this contract, it will be settled by the fact that it is a well-established rule that delivery to a person appointed by the buyer to receive the goods or to any third person at the buyer's request or with his consent is sufficient delivery to the buyer. See 55 C. J. p. 364, § 357, note 75; also, *Francis v. Merkley*, 59 Cal. App. 196, 210 P. 437; *Fergus County Hardware Co. v. Crowley*, 57 Mont. 340, 188 P. 374; *Williamsburgh Stopper Co. v. Bickart*, 104 Conn.

Argument.

674, 134 A. 233. In the last case it is held that delivery to the buyer's customers in accordance with his instructions is delivery to him."

Then this Court considered the question of title and held squarely that title had passed from MacMillan to Evans and from Evans to Deseret (pp. 405-406) :

"But counsel argues that the Deseret Book Company is liable or indebted for these books to whoever was the owner of them immediately prior to the delivery to the Deseret Book Company. That is true, but if the above analysis is correct, then when MacMillan Company delivered the books to the carrier the title passed to Evans and he became the owner of them, and when he delivered the books to the Deseret Book Company the title passed from him to the Deseret Book Company; so that immediately prior to the delivery to the Deseret Book Company the title was in Evans. It might be that the delivery of the books to the carrier by MacMillan Company would be sufficient to pass the property in the books from MacMillan Company to Evans and at the same time from Evans to the Deseret Book Company, even before they were actually delivered physically to it; but, in any event, if we are correct in holding that there was a sale to Evans and a resale by him to the Deseret Book Company, then even though one act transferred title it would pass first from MacMillan Company to Evans and through him to the Book Company. And the Deseret Book Company was indebted to Evans for the purchase price of the books at the time of the service of this garnishment

Argument.

upon it, and the plaintiff was entitled to a judgment to that effect."

Accordingly, this case establishes, contrary to the Appeals Referee, that title to merchandise passes through the distributor who orders it from the manufacturer and sells it, at such prices as he sees fit, to his customer. In effect, the distributor has what the stock market would term a "call" on the company. So, he is assigning to his own customers for \$2, \$10, or \$20 the merchandise he is buying from the company for \$7. Certainly the distributor performs no greater "service" for the company when he orders the company to mail direct than when he takes the article out of his suitcase. In either event the distributor is buying and selling and, as this Court said in *Fuller Brush*, he must get his remuneration, if any, from his ability to sell at an advanced price over the cost to him.

Continuing with the differences between the *Leach* dealers and the *Wear-Ever* distributors:

Leach

The dealers "use the plaintiffs' office telephone as a reference in their selling activities and the plaintiffs provide a table at its office for the use of the dealers" (p. 425).

"Because the plaintiffs have sales and instal-

Wear-Ever

The Company does not furnish the distributor with any office space, desk space, or telephone (R. 25, 59).

The distributors are not required to meet

*Argument.**Leach*

lation quotas to meet, the services of dealers who do not produce sufficiently are terminated by the plaintiffs. Only five days' notice of termination need be given to the dealers by the plaintiffs." (pp. 425-426).

Wear-Ever

any quotas of any kind (R. 33, 60). The Company cannot terminate the contract of a distributor (R. 35, 58).

And your Honors held that it was "manifest" that the dealers were agents because they received a "commission to be fixed by and in accordance with a discount or commission schedule maintained by the [Company] at its office" (p. 429). But in the case at bar, as in *Fuller*, the earnings of the distributor equal the price *he* charges the customer, less the cost of the merchandise, the premiums *he* elects to give, the profits *he* can realize from the trade-ins *he* elects to take, and the expense for transportation, telephone, and the like that *he* thinks it good business to incur.

So much for the cases involving salesmen. However, there should also be noted one additional case which, while it involved an alleged lessor-lessee relationship, is the most recent case before your Honors where the service relationship was in dispute. Accordingly, we note the facts of *Salt Lake Transportation Co. v. Board of Review*, 5 Utah 2d 87, 296 P. 2d 983:

*Argument.**Salt Lake Transportation*

The "plaintiff is the owner of *non-transferable* franchises from the Utah Public Service Commission and from Salt Lake City to *operate* taxicabs . . ." (Italics ours) (p. 89).

"Further, the drivers were required to keep daily trip sheets, attend safety meetings . . . The drivers were not allowed to choose any shift they might want . . ." (p. 89)

"Plaintiff furnished taxicab stands, garage service, supplied all the necessary oil, grease and antifreeze liquids and defrayed all costs of repairs to the cabs. It also furnished dispatchers, switchboard and two-way radio service and carried liability insurance . . ." (p. 89).

". . . plaintiff actually had the right to control the manner and method of the drivers'

Wear-Ever

Nothing requires Wear-Ever to sell direct to the distributor's customers. Wear-Ever is not legally bound to perform all selling activities itself.

The distributor makes no reports (R. 36-37, 55). He never need be present personally at any particular time or place (R. 36-37, 55, 60, 79-80, 92), and he is not required to work any particular time (R. 30, 33).

The company does not furnish the distributors with any office space, desk space, or telephone (R. 26, 59). Distributors provide their own business cards, stationery, advertising, and transportation facilities, and carry their own insurance (R. 26-27, 29, 59).

The company does not reserve any direction or control over the activities of the distrib-

*Argument.**Salt Lake Transportation*

activities in performing the services." (p. 91).

"If a driver were acting in a manner inimical to the interests of plaintiff, such as being drunk while on a shift, plaintiff could order him to report to the garage and they would take the car away from him, or if the driver were in no condition to safely drive, would send someone to bring the cab in . . ." (p. 91).

". . . if a driver refused a shift assigned to him, plaintiff could refuse to lease to him any more." (p. 91).

Wear-Ever

utors (R. 95).

The distributor is not required to follow any directions or instructions of any kind (R. 30, 56, 78, 91-93). He is not subject to reprimand by the company for anything at all; if he is a "bad actor", the company can do nothing about it (R. 32, 59).

The company cannot terminate the contract of a distributor (R. 35, 58).

Certainly, therefore, *Salt Lake Transportation* is not adverse. Indeed, the function of operating taxicabs could not legally be assigned to the drivers, and so they did for the company the work it was required to do. Further, a service relationship could not be denied when the company had the right to control the manner and method of the drivers' activities. The very facts on which the *Salt Lake Transportation* decision depended establish how different the present case is.

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Faced, then, with the similarity of this case to the *Fuller Brush* case and the entire dissimilarity of this case to the others where a service relationship was found, what is the answer of the Department of Employment Security? That is found in the "Comment" of the Appeals Referee (R. 10) :

" . . . it must first be determined whether the so-called distributors were actually performing a personal service *for this employer* or whether they were *independent operators* who merely purchased a product from this company and then resold it independent of the company.

To assist in making such a determination, the objectives of the company must be examined. It then becomes obvious, naturally, that the objective of the company was to sell its products. And to further such objective, the company sales manager for Utah solicited the services of various individuals and had them sign the 'distributor agreements.' It is noted that in addition to other sales provisions, these agreements recite that such individuals were 'independent contractors' and not employees. However, such language has no bearing on the actual and factual relationship and the facts fall far short of showing that the so-called distributors were really independent in the sense of having their own business establishments.

The *degree of control* over the distributors appears to have been rather limited, but it still must be considered that they were performing a personal service for the employer. Furthermore, in this respect, it must be noted

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that the company sales manager did not contact these individuals (prospective distributors) for the purpose of selling the company product to them. They were solicited for the purpose of utilizing their services in selling the company product to the public.” (Italics ours).

In analyzing this “Comment” of the Appeals Referee, it will be observed that he says that it must first be determined whether the distributor was performing a personal service for the Company—which is true. Then he says that to assist in making the determination, the objective of the Company must be examined and that the objective of the Company was to sell its products — all of which is equally true of *Fuller Brush* and proves nothing as to the service relationship. Then he says that the Company “solicited the services of various individuals”—which of course begs the entire question as to whether they performed services!

Following this statement, the Appeals Referee mentions the language of the agreement (R. 95), which recites that the distributors are independent contractors in their own business, and he says that this is not conclusive—which is true. And then he concludes by saying that “it still must be considered they were performing a personal service.” So, except for the unsupported question-begging statement that the Company “solicited services,” the whole argument of the Appeals Referee is simply that the distributors were performing services for the Company be-

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cause the objective of the Company was to sell its products!

The mere fact that the Company receives benefit from the services performed by distributors is not determinative of the question whether such distributors perform service within the meaning of the Utah law. The test consistently applied by the Utah court is whether such services are performed for another *or for the salesman himself*. If the facts show that the service is rendered for himself and not for an employer, there is no service relationship, notwithstanding incidental benefit to the alleged employer. Thus this court stated in the *Fuller Brush* case (99 Utah at pp. 105, 103) :

“That claimant performed personal service is not in dispute, but there is a dispute as to whether such services were performed for plaintiff or for self and as to whether he received wages therefor or profits on sales.

* * * * *

But it is not all personal service performed for another that comes within the act, but only such as is performed ‘for wages or under any contract of hire.’ ‘Wages’ is *defined as all compensation payable for personal services, rendered for another under a contract of hire, express or implied*. This compensation is *based upon and computed upon service rendered*, and is not derived from the accomplishment of a purpose or achievement of an objective, by the person receiving the remuneration, through a difference in two prices. *The essential elements*

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of wages are that they form a direct obligation against the employer, in favor of the employee; that when the service is performed the compensation, if any, accrues and becomes payable regardless of the success or failure of the undertaking; that any profits or earning over and above costs of the service accrues to the employer, and any loss as a result of the undertaking or service must be borne by the employer.” (Italics ours.)

This concept of service has been reiterated by this Court on several occasions, most recently in the case of *Leach v. Board of Review*, where this Court commented upon the *Fuller Brush* case and noted that:

“ . . . in selling those brushes they (the Fuller Brush salesmen) were rendering service for themselves and not for the plaintiff company.” 123 Utah at p. 429).

In the case at bar, as a matter of fact one of the Wear-Ever distributors had previously worked as a Fuller Brush salesman and testified that he was under less obligation to Wear-Ever in the performance of service than he had been to Fuller (R. 82, 83). If the Fuller situation constituted activity nonservice in character, a fortiori as to the Wear-Ever situation.

In summary, then, what are the important benchmarks to determine whether a salesman is engaged in performing “services” for the manufacturer of the products he sells, or whether the relationship is nonservice in character:

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(1) Most important, we think, is whether the salesman himself fixes the price at which he sells the merchandise. The manufacturer fixed the price in every case where a service relationship was found: *Creameries*, *Salt Lake Tribune*, *Singer*, *Northern*, and *Leach*. And the significance of this fact is emphasized by your Honor's statement in *Powell v. Industrial Commission*, 116 Utah 385, 210 P. 2d 1006, where a lessor-lessee relationship was alleged, that

“ . . . the miners did not *sell* the coal they produced 'because regardless of the fluctuation in the price of coal, the miners received the same price for the coal they produced—one dollar and fifty cents per ton.' ”

But in *Fuller Brush* and *Wear-Ever* the earnings of the salesman depend on his ability to sell “at an advanced price over the cost to him”; the price is fixed by the salesman. When the salesman fixes prices, he is selling his own goods, either in his possession or on which he has a call from the manufacturer; when the salesman sells at the manufacturer's price, he is selling the manufacturer's goods.

(2) If the contract is terminable by the Company, particularly on short notice, this is strong evidence of a service relationship. This was likewise the situation in every case where a service relationship was found: *Creameries*, *Salt Lake Tribune*, *Singer*, *Northern*, and *Leach*. But not in *Fuller Brush* or *Wear-Ever*.

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(3) Restrictions on the activities of the salesman show that the relationship is of service rather than that of vendor-vendee. Such restrictions may be that the salesman shall handle no other products (*Creameries, Leach*) ; that he shall make reports (*Singer*) ; that he shall meet a sales quota (*Leach*) ; that he shall work personally, regularly, promptly, or as directed (*Creameries, Salt Lake Tribune, Singer, Northern*) ; that he shall surrender his customers' lists (*Creameries, Salt Lake Tribune*). Another restriction, that he shall work only in a particular area, was noted in *Creameries* and *Leach*, but this was not fatal to the vendor-vendee relationship in *Fuller Brush*. The important thing is that at least one of these restrictions was present in every case where a service relationship was found, but Wear-Ever salesmen are subject to none of them.

Accordingly, we sincerely urge that this Court hold that on the undisputed facts Wear-Ever distributors did not perform services for the Company for wages.

Respectfully submitted,

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