SUPREME COURT
FIRST DIVISION

USHIO MARKETING,
***Petitioner*,**

-versus-

G.R. No. 124551
August 28, 1998

NATIONAL LABOR RELATIONS COMMISSION and SEVERINO ANTONIO,
***Respondents*.**
x----------x

D E C I S I O N

DAVIDE, JR., *J.*:

Petitioner urges us to annul the Decision of 31 May 1995 of the National Labor Relations Commission (NLRC) in NLRC NCR CA No. 008495-95[1] which reversed the Labor Arbiter's 13 January 1995 decision in NLRC NCR Case No. 08-06147-94 and the NLRC's Order[2] of 29 February 1996 which denied petitioner's motion for reconsideration.

The factual and procedural antecedents are summarized by the public respondent NLRC in its Comment as follows:

Private respondent Severino Antonio was an electrician who worked within the premises of petitioner Ushio's car accessory shop in Banawe, Quezon City. On August 77, 1994, private respondent filed a complaint for illegal dismissal, non-payment of overtime pay, holiday pay, and other benefits against petitioner Ushio Marketing which was docketed as NLRC NCR Case No. 08-06147-94 and assigned to Labor Arbiter Facundo L. Leda.

On October 13, 1994, Labor Arbiter Leda directed the parties to file their respective papers within a non-extendible period of twenty-five (25) days. On November 4, 1994, petitioner filed a motion to dismiss, while private respondent failed to file his position paper.

In Petitioner's Motion to Dismiss, she alleged that it was a single proprietorship engaged in the business of selling automobile spare parts and accessories. Petitioner claimed that private respondent was not among her employees but a free lance operator who wait[ed] on the shop's customers should the latter require his services. Petitioner further alleges in her Motion to Dismiss the following:

> "5.0 In pursuit of its trading business, the company employs a handful of regular employees such as sales persons, clerks, account officers and the like. These employees are on the Company payroll and are provided with all the privileges and benefits accorded by law to regular employees. These employees were selected and engaged by the management of the company and are paid their respective salaries regularly. They also have fixed working days and hours and are subject to disciplinary measures (such as reprimand, suspension or dismissal) should they violate company policies on tardiness, absences and general employment conduct. Simply put, the Company has full control over the manner by which the said employees perform their jobs

6.0 In stark contrast to the Company's regular employees, there are independent, free lance operators who are permitted by the Company to position themselves proximate to the Company premises. These independent operators are allowed by the Company to wait on Company customers who would be requiring their services. In exchange for the privileges of favorable recommendation by the Company and immediate access to customers in need of their services, these independent operators allow the Company to collect their service fee from the customer and this fee is given back to the independent operator at the end of the week. In effect, they do not earn fixed wages from the Company as their variable fees are earned by them from the customers of the Company. The Company has no control over and does not restrict the methodology or the means and manner by which these operators perform their work. These operators are not supervised by any employee of the Company since the results of their work is controlled by the customers who hire them. Likewise, the Company has no control as an employer over these operators. They are not subject to regular hours and days of work and may come and go as they wish. They are not subject to any disciplinary measures from the Company, save merely for the inherent rules of general behavior and good conduct.

7.0 Complainant was one such independent,' free lance operator. He was allowed by the Company to provide his services to the customers of the Company who were in need of such services. He received his fees indirectly from the Company out of the fees paid by the customers during a given week. In doing his job, he was under the direct supervision and control of the customer. He was under no compulsion whatsoever to report to the Company on a regular basis, He was not subject to any disciplinary measures for his work conduct.

> Furthermore, he was free to position himself near other car accessory shops to offer his services to customers of said shops, as he is [sic] in fact had done on various occasions prior to the filing of this complaint."

Attached to the motion of the petitioner is an affidavit executed by Ms. Caroline Tan To, Assistant Manager of Share Motor Sales, also engaged in the business of selling car spare parts and accessories along Banawe Street, attesting to the following: that in the pursuit of the said business, it allows independent and free lance operators, such as electricians, to wait on customers who would want them to perform their services; and that she knows one independent operator by the name of Severino Antonio, as the latter had performed jobs [for] its customers.

On January 13, 1995, Labor Arbiter Facundo L. Leda premising on the allegations contained in the Motion to Dismiss submitted by the petitioner Company, issued an order dismissing the complaint of private respondent Severino Antonio against petitioner Ushio Marketing Corp.

On February 28, 1995, private respondent assisted by the Public Attorney's Office, appealed the order of the Honorable Labor Arbiter to the Commission. In his memorandum, private respondent alleged that Ushio Marketing hired his services on 15 November 1981 until July 3, 1994 as an electrician with a daily salary of one hundred thirty two pesos (P132.00) per day. He further alleged that:

> "During the employ of herein complainant with the respondents, he performed his job religiously and faithfully, in fact he was the most trusted employee in the company. For instance, Mrs. Tan, the employer, would ask him to go to the bank and withdraw money and deliver the purchased spare parts/accessories to the customer. If there was no driver, or they needed [a] handyman in the office and even in their household, Mrs. Tan would call for the complainant. He could be called, the employer's 'personal assistant.' However, despite his

> devotion and loyalty to his work as well as to his employer, his services were terminated by the respondents without legal grounds. When he reported for work on 3 July 1994, his employer would not let him inside the office because he was already dismissed from his job. He came [sic] back to the office for a number of times but his efforts proved futile. Hence, he instituted a complaint with this Honorable Office."

Attached to the private respondent's Memorandum of Appeal were affidavits of his co-electricians who worked with Ushio Marketing namely: Roberto Lopez and Narcing Pascua, corroborating the allegation that Mr. Severino Antonio worked with the petitioner Company as an electrician for the past four years when they have been working with the same Company; they were receiving One Hundred Thirty Two (P132.00) per day from Mrs. Tan, that they cannot be absent from work without the permission of Mrs. Tan; and that it was Mrs. Tan who gave them work when a client comes in. To quote:

> "4. Na ang suweldo ko at ni Severino na P132.00 isang araw ay kay Gng. Tan nanggagaling at hindi direktang ibinibigay ng kliyente;
>
> 5. Na hindi kami maaring lumiban sa aming trabaho nang hind nagpapa[a]lam kay Gng. Tan;
>
> 6. Na si Gng. Tan ang nagbibigay sa amin ng trabaho kung mayroong dumarating na kliyente."

On May 31, 1995, the National Labor Relations Commission issued its decision holding that complainant is respondent's employee and that he was illegally dismissed. The dispositive portion of the decision reads as follows:

> "WHEREFORE, the appealed Order dated January 13, 1995 is hereby set aside. The respondent is directed to reinstate complainant with full backwages computed from August 3, 1994 until he is actually reinstated. Complainant's monetary claims presented as third issue

> on appeal is however remanded for further arbitration there being no substantial basis to grant or deny the same." (p. 6 NLRC's Decision)[3]

The NLRC reversed the Labor Arbiter. It adopted private respondent's allegations in his complaint that he had "worked for respondent since '1981' as [an] 'electrician' [and] paid 'weekly every Sunday' at the rate of '132' pesos per day;" and concluded that petitioner's arrangement as regards the mode of payment of private respondent's wages was "nothing but an evasive attempt to hide the real employment status of [private respondent]," considering that it could not understand why private respondent could not directly collect his earnings from a customer, immediately after private respondent accomplished a job for which he was hired; and why private respondent's proceeds from jobs rendered on a daily basis could only be paid to him on a weekly basis.

Petitioner's motion for reconsideration having been denied by the NLRC in its resolution of 29 February 1996 for "lack of palpable and patent errors," petitioner filed the instant petition, ascribing to the NLRC the commission of grave abuse of discretion in: (1) declaring private respondent as a regular employee; and (2) ignoring the accepted industry practices of car spare parts shop owners which are not contrary to law, public order and public policy.

Petitioner maintains that as it was private respondent who alleged the existence of an employer-employee relationship, the burden to prove the same by credible and relevant evidence thus lay with private respondent, especially since petitioner staunchly and consistently denied the same. Petitioner insists that the nature of its operations, as collaborated by the sworn statement of the assistant manager of a rival establishment, sufficiently established the real status of private respondent as a free lance operator performing assorted services like electrical jobs, installation of accessories and spare parts, and some minor repairs for petitioner's customers. Petitioner then concludes that the basic issue of whether private respondent was an employee should be resolved in the negative, considering that: (1) petitioner had no part in the selection and engagement of private respondent, its role merely limited to recommending private respondent's services to the former's customers; (2) private respondent was not paid a fixed

regular wage, but only a service fee collected by petitioner from its customers and paid to private respondent at the end of the week; (3) private respondent was not included in petitioner's payroll and neither was the former reported as petitioner's employee to the Social Security System or the Bureau of Internal Revenue, citing Continental Marble Corporation vs. NLRC (161 SCRA 151, 157 [1988]); (4) petitioner had no occasion to exercise its power to dismiss since petitioner never hired private respondent; and (5) petitioner did not exercise control and supervision over the means and methods by which private respondent performed his job, as private respondent practiced independent judgment as to the time and place of work and was not required to report on a regular basis and even allowed to service the customers of other auto supply shops. Additionally, petitioner had no liability, on account of private respondent's poor workmanship, to customers who chose to avail of private respondent's services and regulated his performance.

Petitioner further argues that it was a recognized and accepted trade practice peculiar to the auto spare parts shop industry operating along the stretch of Banawe Street, Quezon City, that shop owners would collect the service fees from its customers and disburse the same to the independent contractor at the end of a week. In fine, the shop owner and the independent contractor were partners in trade, "both benefiting from the proceeds of their joint efforts." This mutual cooperation between petitioner and private respondent could then be likened to that of a shoe shiner and a shoe shop owner in Besa vs. Trajano,[4] or that of a caddy and the golf club in Manila Golf Club, Inc. vs. Intermediate Appellate Court.[5]

In his comment, private respondent reiterates his arguments that he was an employee of petitioner, having worked for petitioner as an electrician from 15 November 1991 until 3 July 1994 with the following salary, to wit: 1981 — P20.00/day; 1983 — P21.00/day; 1989 — P75.00/day; 1990 — P100.00/day; 1991-1994 — P132/day. Likewise, during private respondent's employ, he carried out various tasks as a driver, handyman, and "personal assistant" of petitioner. Private respondent could not be regarded an independent contractor since there was no written proof to support such a conclusion; his services as a handyman and an electrician for 13 years, more or less, were necessary in the operation of petitioner's business; he received a

fixed salary instead of a commission; and he was dismissed and subjected to control by petitioner. Moreover, private respondent claims that the factual settings of Besa and Manila Golf and Country Club preclude their application to the instant case.

In its Manifestation in Lieu of Comment, the Office of the Solicitor General (OSG) supports the stand of petitioner and recommends the reversal of the challenged decision. The OSG asserts that there was no employer-employee relationship between the parties because the control test, being the most important element of an employer-employee relationship, was absent. The OSG then points out that there was no showing that petitioner supplied private respondent with equipment and tools; apart from private respondent's bare allegation that he could not leave the premises without petitioner's permission, it was not established that private respondent was under the control and supervision of petitioner or of its personnel; private respondent's admission that Mrs. Caroline Tan To referred jobs directly to him supports the notion that private respondent was not an employee, otherwise, Mrs. Tan To would have coursed the job orders for private respondent through petitioner; and the arrangement that petitioner would receive the service fees of private respondent from customers was not adequate to establish an employer-employee relationship.

In view of the stand of the OSG, we required the NLRC to file it. Comment, if it so desired.

In its Comment filed on 1 August 1997, the NLRC argues, through its Legal and Enforcement Division, that it did not err in finding that there existed an employee-employer relationship between petitioner and private respondent for "[u]ndisputed are the facts that private respondent worked as an electrician within the premises of the petitioner's shop and would serve its customers when the latter so requires [and] [h]e was the one who closed and opened the shop of the petitioner and sometimes even asked to withdraw money and deliver purchased spare parts to petitioner's clients; [and] [h]e could be practically described as the personal assistant' of the manager, Mrs. Lilybeth Tan." Moreover, the NLRC derides petitioner's reliance on Besa vs. Trajano, as the shoe shiners there collected their fees directly from the customers, which could not be said of private

respondent here. Finally, the NLRC takes petitioner to task for attempting to capitalize on its failure to submit its payroll or Social Security remittances to refute private respondent's claims.

There is merit in the petition.

It is not disputed that on 13 October 1994, Labor Arbiter Leda directed the parties to file their respective position papers within a non-extendible period of 25 days. Private respondent, however, failed to comply with this order. As to him then, there was no evidence extant on record to substantiate his allegations. On the other hand, on 4 November 1994, private respondent filed its motion to dismiss, duly verified by its sole proprietor, Lilybeth Tan. Said motion contained a statement of the case, a statement of facts, a statement of the issues involved, coupled with petitioner's position thereon and the arguments in support thereof. Moreover, attached to the motion and forming an integral part thereof was the affidavit of petitioner's business competitor, Mrs. Carolina Tan To, who corroborated private respondent's allegations as regards the nature of the automobile spare parts business and that private respondent was indeed an "independent operator." For all legal intents and purposes, the motion to dismiss sufficiently served as petitioner's position paper.

Under Section 3, Rule V of the New Rules of Procedure of the NLRC, should the parties fail to reach an amicable settlement, either in whole or in part, during the conference mandated by Section 2 thereof, the Labor Arbiter shall, inter alia, direct the parties to simultaneously file their respective verified position papers covering only those claims and causes of action raised in the complaint, but excluding those which may have been amicably settled, and shall be accompanied by all supporting documents including the affidavits of their respective witnesses to take the place of the affiants' direct testimony. Thereafter, the parties shall not be allowed to allege facts, or present evidence to prove facts not referred to and any cause or causes of action not raised in the complaint or position papers, affidavits and other documents.

For failure then of private respondent to file his position paper, the Labor Arbiter acted correctly in taking into account only petitioner's

motion to dismiss and thereafter dismissing private respondent's complaint.

It follows that in the exercise of its appellate jurisdiction, the NLRC cannot go beyond the pleadings and evidence submitted by the parties before the Labor Arbiter. However, we have sustained the action of the NLRC in allowing the parties to submit additional evidence even during the pendency of an appeal,[6] in light of Article 221 of the Labor Code which provides that rules of evidence prevailing in courts of law or equity do not control the proceedings before Labor Arbiters and NLRC and that the Labor Arbiters and the NLRC should use every and all reasonable means to ascertain the facts in each case speedily and objectively and without regard for the technicalities of law or procedure.

Here, on appeal to the NLRC, private respondent alleged that his failure to submit his position paper before the Labor Arbiter was due to private respondent's having fallen victim to petitioner's misrepresentations as to the possibility of arriving at an amicable settlement. To this end private respondent submitted the affidavits[7] of Roberto Lopez and Narcing Pascua which, pursuant to Article 221 of the Labor Code discussed above, were properly admitted by the NLRC. A perusal of these affidavits, however, plainly shows that the avowals therein had no connection whatsoever with private respondent's claim of denial of procedural due process before the Labor Arbiter. Moreover, said affidavits, having been admitted by the NLRC on appeal, any defect in procedural due process must be deemed cured. Finally as to these affidavits, in the same vein as the rest of private respondent's cause, the declarations of the affiants were but mere sweeping statements, unsubstantiated and unsupportive of private respondent's allegations.

If only to underscore the paucity, if not absence, of evidence of private respondent, certainly falling short of the standard of substantial evidence governing proceedings before quasi-judicial bodies, we note that private respondent himself did not execute any affidavit, despite submitting the affidavits of Lopez and Pascua on appeal to the NLRC. Notably, neither did private respondent verify his Memorandum on Appeal filed with the NLRC, as only his counsel signed the Memorandum. All told, private respondent's dereliction of his duty to

furnish some measure of probative value to his allegations mandates the grant of this petition.

Turning to the challenged decision and resolution of the NLRC, we note that in stark contrast to private respondent's perfunctory advocacy, petitioner submitted a verified opposition[8] to private respondent's Memorandum, which reiterated petitioner's arguments in its Motion to Dismiss. To this, private respondent filed a reply[9] to the opposition to which private respondent filed a rejoinder.[10]

The foregoing pleadings notwithstanding, the NLRC, in passing upon the merits of the case, failed to refer to any of the arguments raised therein, opting, instead, to confine its discussion solely to the assertions in the complaint and the motion to dismiss. Initially, as adverted to earlier, it would seem that the NLRC, in ruling for private respondent, merely took at face value and indiscriminately adopted private respondent's allegations that he had "worked for respondent since '1981' as [an] 'electrician [and] paid 'weekly every Sunday' at the rate of '132' pesos per day," despite private respondent not having substantiated his allegations in the least.

What is most telling, however, is the NLRC's observation that "there [were] so many unexplained kinks in [petitioner's] theory of denial on [the existence of an] employer-employee relationship that we have no recourse but to rule that [private respondent] is [petitioner's employee]." Clearly, this observation cannot but be characterized as having been attended by grave abuse of discretion. Under the fact pattern of the instant petition, more so, the dearth of evidence in private respondent's favor, the NLRC should not have so readily afforded private respondent a presumption of the existence of an employer-employee relationship. The bare allegations in the complaint, the absence of an affidavit from private respondent, and the barren affidavits of Lopez and Pascua, could not, by any stretch, have furnished the particulars to justify the NLRC's conclusion. That private respondent's espousal failed to meet the standard of substantial evidence becomes all the more too painfully evident when considered in light of petitioner's arguments in its verified motion to dismiss and the supporting affidavit of petitioner's business competitor, akin to an admission against interest.

We hasten to add, however, that even if the NLRC had taken into account the various pleadings filed before it, as the same malady characterized those filed by private respondent, the conclusion would still be inevitable that the existence of an employer-employee relationship between the parties here was not proven by substantial evidence.

The factors to be considered in determining the existence of an employer-employee relationship are: (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employee's conduct. The so-called "control test" is commonly regarded as the most crucial and determinative indicator of the presence or absence of an employer-employee relationship. Under the control test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end achieved, but also the manner and means to be used in reaching that end.[11]

We agree with the Office of the Solicitor General that here, the power to control the employee's conduct, i.e., the conduct of private respondent, is absent, thus:

> ***First***, private respondent contends that he worked as an electrician and personal assistant at petitioner's store. As [an] electrician, private respondent may be presumed to have used equipment or tools in rendering electrical services. If it is true that private respondent was an employee of petitioner, he would have used equipment or tools supplied and owned by his employer. However, private respondent failed to allege and present proof that petitioner supplied him equipment and tools.
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> ***Second***, the conduct of private respondent was not subject to the control and supervision of petitioner or any of its personnel. There was no allegation of this, nor was evidence presented to prove it other than the bare allegation of private respondent that he could not leave the work premises without permission from petitioner. Private respondent himself decided how he would render electrical services to customers. If it is true that private respondent was hired as [an] electrician, petitioner

would have exercised supervision and control over the means and manner he performed his electrical services for, otherwise, if private respondent's work was unsatisfactory, it would reflect on the business of petitioner.

Third, private respondent was free to offer his services to other stores along Banaue, Quezon City, as evidenced by the affidavit of Caroline Tan To, Assistant Manager of Share Motor Sales (Annex B, Reply to Private Respondent's Comment dated August 5, 1996) and private respondent's own admission. But although private respondent admits that he rendered electrical services to the customers of other stores, he claims that petitioner allowed him to do so. If private respondent was an employee of petitioner, it was unthinkable for petitioner to allow private respondent to render electrical services to three other stores selling automobile spare parts and accessories who were its competitors.

Fourth, private respondent admits that "[i]t was Mrs. Tan who refers electrical and other jobs to private respondent" (p. 6, Private Respondent's Comment dated August 5, 1996). If private respondent was an employee of petitioner, Tan could not have referred electrical work directly to him. She would have to course job orders to petitioner. The fact that she dealt directly with private respondent means that she did not consider private respondent a employee of petitioner.

It is clear that petitioner did not have the power to control private respondent "[w]ith respect to the means and methods by which his work to be accomplished" (Continental Marble Corporation, et al. vs. National Labor Relations Commission, 161 SCRA 151, 158 [1988]).

Lastly, private respondent allowed petitioner to collect service fees from his customers. He received said fees on a weekly basis. This arrangement, albeit peculiar, does not prove the existence of an employer-employee relationship. In Besa vs. Trajano, 146 SCRA 501, 506 [1986], the shoe shiner rendering services in the premises of Besa, received from Besa the payments for his services on a weekly basis. Yet the shoe shiner

was not considered an employee of Besa. This is the same arrangement between petitioner and private respondent.[12]

WHEREFORE, judgment is hereby rendered **GRANTING** the petition, **REVERSING** the challenged decision and resolution of the National Labor Relations Commission in NLRC-NCR CA No. 008495-95 and **REINSTATING** the Order of 13 January 1995 of the Labor Arbiter in NLRC-NCR Case No. 08-06147-94.

No pronouncement as to costs.

SO ORDERED.

Bellosillo, Vitug, Panganiban and Quisumbing, *JJ.*, concur.

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[1] Annex "A" of Petition; Rollo, 20-26. Per Commissioner Vicente S.E. Veloso, with the concurrence of Presiding Commissioner Bartolome S. Carale and Commissioner Alberto R. Quimpo.
[2] Annex "B," Id., 28-31.
[3] Rollo, 110-114.
[4] 146 SCRA 501 [1986].
[5] 237 SCRA 207 [1994].
[6] Havelton Shipping Ltd. vs. NLRC, 135 SCRA 685, 691 [1985]; Bristol Laboratories Employees' Association vs. NLRC, 187 SCRA 118, 121 [1990]; Lopez vs. NLRC, 245 SCRA 644, 648-649 [1995]; Nagkakaisang Manggagawa sa SONY vs. NLRC, 272 SCRA 209, 218-219 [1997].
[7] Rollo, 63-64.
[8] Original Record, 76-83.
[9] Id., 99-102.
[10] Id., 90-95.
[11] Encyclopedia Britannica (Phils.), Inc. vs. NLRC, 264, SCRA 1, 6-7 [1996]; Progress Homes vs. NLRC, 269 SCRA 274, 279 [1997].
[12] Rollo, 96-99.