NEW YORK CITY CRIMINAL COURT

NEW YORK COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK :

-against-

:

ALAN FREED,

Defendant. :

- -x

THE PEOPLE'S TRIAL MEMORANDUM.

Statement.

On May 6, 1960, the Fourth Grand Jury of the County of New York for the February 1960 Term, directed the District Attorney to file an information charging the defendant, a well-known "disc-jockey," with violations of Section 439 of the Penal Law. On May 10, 1960, the District Attorney filed an information charging the defendant with twenty-five violations of Section 439 of the Penal Law.

The information alleges that the defendant as an agent and employee of American Broadcasting Company, a division of American Broadcasting-Paramount Theatres, Inc. which owns and operates radio station WABC, and without the knowledge and consent of his employer, requested and accepted gifts and

gratuities from various phonograph manufacturers and distributors, pursuant to agreements and understandings that the defendant would act in a particular manner in relation to his employer's business. The defendant is alleged to have received a total of $20,650. within the two-year statutory period. The defendant was arraigned on May 19, 1960, and pleaded not guilty on September 19, 1960.

The People will demonstrate that Section 439 applies to the defendant because, as a matter of law, he was an employee of the American Broadcasting Company, the owner and operator of Radio Station WABC.

The People also expect to prove on the trial all the elements of the crime of commercial bribery, namely:

(1) The defendant accepted and received gifts and gratuities;

(2) The gifts were paid under agreements and understandings that the defendant would act in a particular manner with respect to his employer's business;

(3) The Defendant's conduct related to the business of his employer;

(4) The defendant acted without the knowledge and consent of his employer.

The People's Proof and the Applicable Law.

The major proof to be offered by the People will be summarized herein to clarify the issues raised at the trial. The evidence will include the following:

(A) Receipt of Gifts by the Defendant.

The People expect to prove that within the two year statute of limitation, the defendant received $20,650. from a number of phonograph record manufacturers and distributors as follows:

Record Firm	From-To	Total Amount
Action Records, Inc.	9-2-59 to 11/6/59	$ 2,000.
Alpha Distributing Co.	7-14-59 to 10/2/59	1 ,500.
Superior Records Sales Co., Inc.	8/11/58 to 11/4/59	8,900.
United Artists Records, Inc.	6-30-58 to 7/30/58	2,250.
Cosnat Distributing Corp.	9-29-58 to 11/7/59	4,000.
Cosnat Distributing Corp. of Cleveland	7/2/59	2,000.
	TOTAL	$20,650.

(B) Agreements and Understandings.

The witnesses from the record firms will testify to the agreements and understandings that the defendant was to play phonograph records on the air for which he received payments. The agreements varied. In some cases, the defendant received a monthly fee for playing a specified number of records each night on the program which he conducted; in other instances, he received a flat sum in order to expose as many records as possible for the record firms, and in one case he received a lump-sum payment for playing a so-called "Pick of the Week" record each night of the program for at least one week.

(C) Defendant's Status as an Employee.

Executives of Station WABC will describe the program on which the defendant appeared, known as "The Alan Freed Show." The defendant played records popularly known as "Rock and Roll" music for four hours each night from 7 P.M. until 11 P.M., Monday through Saturday. Inasmuch as the defendant was an expert in this field he was supposed to choose the best "Rock and Roll" records, within the limits of good taste, which were being produced by all the record firms. Under the terms of the various contracts which the defendant had with the Station, he was also obligated to read commercials,

news, weather and sports, and spot and time announcements and leads into and leads out of the foregoing.

The defendant's status during the period covered by the information was governed by a series of contracts with the American Broadcasting Company, dated May 20, 1958, superseded by contract of February 13, 1959, superseded by contract of March 26, 1959. The People will offer the contracts and testimony by radio executives as to the actual conduct of the parties pursuant to the contracts, as evidence that the defendant was an employee of the American Broadcasting Company and not an independent contractor.

The most important indicia of an employer-employee relationship are the extent and character of supervision and control exercised over the individual by the alleged employer. If this supervision extends beyond the results to be accomplished, and includes control and direction of the manner of performance and of elements of the work itself, an employer-employee relationship is found to exist. The test as to whether an employer-employee or independent contractor relationship has been created was stated by Judge Pound in Matter of Reach v. Velzi, 238 N.Y. 100, 143 N.E. 805 (1924).

> "The independent contractor is one who agrees to do a specific piece of work for another for a lump sum or its equivalent who has control of himself and his helpers, as to when, within a reasonable time, he shall begin and finish the work; as to the method, means or procedure

> of accomplishing it; and who is not subject to discharge because he does the work as to method and detail in one way rather than another. In the relation of employer and employee the employer has control and direction not only of the work as to its result but as to the details and method of doing the work and may discharge the employee for disobeying such control and direction."

This rule was applied in Matter of Camaros v. Firm Amusement Corporation, 264 App.Div. 973, 37 N.Y.S.(2d) 204 (Third Dept., 1942), aff'd in part 209 N.Y. 838 (1943), which held that a group of musicians were employees of the hotel and theater where their orchestra played, rather than of the leader. In arriving at its decision, the Court looked to the orchestra's contracts with the hotel and theater and noted the following significant portions. The agreement with the hotel provided for fixed hours of employment. The orchestra was subject to the direction and control of the manager of the hotel, who reserved the right to determine the character of the music played. Under the other agreement, the theater had the sole right to determine the number of performances which should be given. Finally, the management "reserved to itself the right to cancel the agreement if the leader or any member of the band was guilty of conduct which in the opinion of the corporation was likely to bring discredit upon the theatre or the vaudeville profession." As will be shown at the trial, the agreement between the defendant and WABC in the instant case contained substantially similar

provisions as appeared in these contracts.

The rule that supervision and control over the various aspects of an individual's work give rise to an employer-employee relationship was also applied in Matter of Bellaventa, 261 App.Div. 863, 24 N.Y.S.(2d) 748 (Third Dept., 1941), which held that a musician was an employee of the hotel in which he performed and therefore entitled to unemployment benefits. The Court noted that the manager controlled the hours of employment, and could disband the orchestra on two weeks' notice, which in effect gave him the right to discharge a member thereof whose services were unsatisfactory.

The settled principles announced in these cases apply equally here. The general scheme of the contract under which both parties operated was to retain for Station WABC extensive control and direction of the various aspects of defendant's employment. Supervision extended to the actual means by which the program was broadcast over the air, to the defendant's employment in other areas and to the administrative details of his job.

All of the broadcasting activities of the defendant were to be under the supervision and direction of the station. (Para. 1 of all three contracts). The broadcast schedule was controlled by the station. (Para. 2 of all three contracts).

The station designated the place from which the broadcast was to originate and had the right to change it at will. (Para. 4 of all three contracts). In addition, the station was to supply a director, engineers, studio and all technical facilities which the station deemed necessary for broadcasting the programs. (Para. 3 of all three contracts). Station WABC hadthe right to direct the defendant to make certain announcements without additional compensation, including the reading of commercials, news, weather and spot reports, time announcements and leads into and out of the foregoing. (Para. 9 of all three contracts). The title of the program was under the control of WABC, who could change it at any time, and the sole rights therein remained with the station. (Para. 1 of all three contracts). The defendant's services in radio were limited exclusively to his broadcasting on WABC and guest appearances on other radio programs could not be undertaken without the written consent of the station. (Para. 6 of all three contracts). The company denied to the defendant the right to engage in activities or authorize the use of his name or likeness in order to endorse or promote products of competing sponsors. (Para. 17 of contract of May 20, 1958, Para. 16 of contract of February 13, 1959, and Para. 17 of contract of March 26, 1959). WABC could also assign the defendant's contract to subsequent purchasers of the station. (Para. 22 of contract of May 20, 1958, Para. 21 of contract of

February 13, 1959, and Para. 23 of contract of March 26, 1959).

In addition to the regulation of defendant's performances in connection with the defendant's program itself, the station also exercised control over him in other areas, a situation inconsistent with the claim that he was an independent contractor. Station WABC had the right to use and license others to use the name, the voice, and likeness of the defendant in any and all media and by any and all means for informative purposes and for the advertising of defendant's program and the fact that the program was sponsored by certain firms. (Para. 12 of contract of May 20, 1958, Para. 11 of contract of Feb. 13, 1959, and Para. 12 of contract of March 26, 1959). WABC hadthe right to discharge the defendant forthwith if he failed to act at all times with due regard to public morals and conventions, (Para. 18 of contract of May 20, 1958, Para. 17 of contract of February 13, 1959, and Para. 18 of contract of March 26, 1959); or if he violated any of the material terms of the contracts (Para. 20 of contract of May 20, 1958, Para. 19 of contract of February 13, 1959, and Para. 21 of contract of March 26, 1959).

Under the terms of the last contract dated March 26, 1959, the station had the right to terminate the contract at any time by giving the defendant at least four weeks notice. (Para. 5 of contract of March 26, 1959). Pursuant to this

provision, notice of termination was given to the defendant on November 21, 1959.

The defendant was paid on a weekly basis; the manner of payment was different from that used by the station to pay independent contractors. His wages amounted to $23,622.40 in 1958 and $34,925.87 in 1959. The evidence will show that the defendant filed withholding exemption employee certificates with WABC, and that the station withheld amounts from his salary pursuant to the Federal Insurance Contribution Act. The station also deducted federal and New York State withholding taxes, and New York State Disability payments from defendant's weekly salary. (Para. 7 of all three contracts). The defendant's wages were also subject to further deductions on a pro rata basis for absenteeism, and the Station had the right to select a replacement of its own choosing. (Para. 7 of contracts of February 13, 1959 and March 26, 1959).

The defendant's contract was subordinate to a collective bargaining agreement by the station and the American Federation of Radio and Television Artists. (Para. 16 of contract of May 20,1958; Para. 16 of contract of February 13, 1959, and Para. 15 of contract of March 26, 1959). Pursuant to this agreement Radio Station WABC was required to contribute 5% of the gross income of all employees covered by this contract into a pension and

welfare fund maintained by AFTRA. According to the federal tax law such a fund can be maintained only for employees. The pension and welfare fund set up by AFTRA was approved by the Internal Revenue Service. The defendant's gross salary from the station was included in the calculations for the 5% contribution to this fund. In addition, pursuant to the collective bargaining agreement between the station and AFTRA the defendant had the right to strike.

The Station also contributed to the New York Unemployment Insurance Fund and the Workmen's Compensation Fund; the

premiums in each case were a percentage of the payroll which included the salary of the defendant.

Thus, there will be clear evidence of the control which the Station WABC, the employer, exercised over the broadcast of the program, the defendant's other employment activities, and administrative details of his job. These arrangements impel classification of the defendant as an "employee" of the station.

The significance of these arrangements, however, is not merely that they fall within the established legal doctrine relating to the employer-employee relationship. Their importance liesalso in the fact that they show the closeness of the relationship between the defendant and the station, the reliance it placed upon him, and the identification of the defendant with the station in its own view and in the public eye. This is the very type of relationship which Section 439 of the Penal Law was designed to protect. The policy of the statute is to prevent individuals, who are blended into the organization of an enterprise and in whom the enterprise must continuously place confidence and trust, from exploiting their closeness to the company for their own advantage and to the detriment of the employer's interest. If the defendant claims that he does not come within the purview of Section 439 of the Penal Law, such a defense would

be inconsistent with the purpose of the statute, and would remove the protection it affords to countless businesses which must rely on the loyalty of employees.

(D) Relationship to the Interest of the Employer.

The word "business" in Section 439 of the Penal Law has been construed to include the concept of the employer's "interest." Thus, in People v. Jacobs, 309 N.Y. 315 (1955), the Court of Appeals stated that under Section 439 the employee must be shown to have accepted the consideration "to influence his actions concerning a matter affecting his employer's interest." The gifts that the employee receives must be given and accepted

> "with the intention to affect some decision by the employee involving discretion on his part with respect to his employer's interest.... We think that it requires proof of payment of money to influence an agent in a way inconsistent with his duties towards his employer."
> People v. Graff, 261 App.Div. 188 (First Dep't, 1941).

The People will offer proof to show that the defendant's agreements involved discretion on his part with respect to his employer's interest, and were "inconsistent with his duties to his employer."

For example, the defendant's contract with the station gave to WABC "the right to sell the program in commercial sponsorship of any type whatsoever." (Para. 8 of all three

contracts). The defendant breached this contract and usurped a business opportunity which rightfully belonged to his employer.

Another interest of WABC which was affected by the defendant's conduct was the interest of the station in preserving the confidence and patronage of its listeners. This interest is expressed by the defendant's covenant to conform to public morals and to preserve the reputation of the program and of the station. (Para. 18 of the contract of May 20, 1958; Para. 17 of the contract of February 13, 1959, and Para. 18 of the contract of March 26, 1959). Breach of this agreement was grounds for prompt termination of the entire contract, indicating the importance of the provision to the station.

The defendant's conduct also affected WABC's interest in maintaining a good broadcasting reputation in order to assure renewal of its license. The Federal Communications Commission may renew stations licenses every three years, but only if it finds that "the public interest, confidence, and necessity, will be served thereby." 47 U.S.C.A. 307. If the F.C.C. found that the station's duty to uphold the public interest was breached by allowing the defendant to choose the music played on WABC on the basis of payments amounting to $20,650. the F.C.C. could revoke or refuse to renew the station's license. The defendant's conduct endangered the standing of

the station with the F.C.C. and prejudiced any claim by the station upon application for renewal of its license that it had conscientiously broadcast in the public interest.

(E). Absence of Knowledge and Consent by the Employer.

The People will show by testimony of the personnel of Radio Station WABC that the defendant's employers had no knowledge of the defendant's conduct, and would not have consented if they had known of his activities.

On November 13, 1959, Radio Station WABC requested all of its employees, including the defendant, to answer a questionnaire which required disclosure of (1) acceptance of gratuities by employees and/or performers in connection with the promotion of music and music recordings ("payola"), and (2) financial interests of such persons, which interests may be directly affected by the broadcast of music. The defendant refused to answer the questionnaire and instead wrote a letter, dated November 21, 1959, in which he denied having accepted undisclosed considerations for broadcasting. On the same day, the American Broadcasting Company terminated its contract with the defendant, pursuant to Paragraphs 5 and 11 of the agreement between the defendant and the station dated March 26, 1959, which gave WABC the right to terminate their contract with the defendant at anytime provided the station gave him four weeks written notice.

On December 17, 1959, due to an inquiry by the Federal Communications Commission directed to WABC and other radio stations concerning the receipt of payola by all employees of the station as of November 1, 1958, WABC again submitted a questionnaire to the defendant. He ignored this questionnaire.

The evidence will also show that the station required the defendant to conform to the requirements of the F.C.C., and that the contract was subordinated to these requirements. (Para. 23 of contract of May 30, 1958, Para. 22 of contract of February 13, 1958, and Para. 24 of the contract of March 26, 1959). One of the requirements enforced by the F.C.C. is contained in Section 317 of the Federal Communications Act:

> "All matter broadcast by any radio station for which service, money or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person." 47 U.S.C.A. 317.

The defendant violated this requirement, thereby breaching his agreement with WABC to conform to F.C.C. requirements, and exposing the station to possible charges that it had violated Section 317 of the F.C.A. WABC could hardly be expected to consent to activities which jeopardized its license, an asset worth in the millions of dollars. This fact supports the credibility of the testimony that the station had no knowledge of the defendant's conduct, did not consent to it, and considered it a breach of station policy.

(F.) Proof of Injury to the Employer Not Required Under Section 439.

The People have presented evidence to show that according to the agreements entered into by the defendant with record firms, he was to act in a particular manner in relation to Station WABC's interest, and in a manner inconsistent with his duties towards his employer. This meets the requirements set forth in People v. Jacobs, 309 N.Y. 315 (1955) and People v. Graff, 261 App.Div. 188 (First Dept., 1941).

Inherent in this evidence is proof that the station suffered as a result of the defendant's conduct. However, in a prosecution for commercial bribery, the prosecution is not required to show that the employer actually suffered injury. State v. Landecker, 136 Atl. 408 (N.J.S.C., 1924), aff'd 137 Atl. 919 (N.J. Er. plus App. 1927); C.J.S. Master and Servant, Section 639. Once the illegal agreement is proved, "it is quite immaterial whether its successful carrying out will be injurious to the position of the employer or not." State v. Landecker, Id. at 409.

In Nathanson v. Brown & Williamson Tobacco Corp., 68 N.Y.S. 2d 914, 920 (S.C.N.Y.Co.1947), a purchasing agent sued vendors for commissions due under an agreement. The defendants asserted that the agreement vidated Section 439 of the Penal Law, hence was unenforceable. Plaintiff moved to dismiss the defense for insufficiency, on the theory that Section 439

applies to such agreements only when they are shown to increase the purchase price of the goods purchased. Justice Shientag stated that the statute "is not so limited in its terms," and allowed the defense of illegality to stand.

The rule that injury to the employer need not be proved under Section 439 follows from the legislative purpose; statutes prohibiting commercial bribery are designed to deter corrupt influences. State v. Landecker, supra. The same policy applies in suits by employers to recover illegal fees paid to their employees, or to avoid transactions induced by corrupt influences.

> "This doctrine is based on the idea of closing the door to temptation to fraud and keeping the agent's eye single to the rights and welfare of his principal, rather than on the idea that the transaction is necessarily an injury to or a fraud upon the principal." 2 Am.Jur., Agency, Section 253.

Thus, in Robertson v. Chapman, 152 U.S. 673 (1894), the Supreme Court of the United States ruled that an agent, who acquires an interest in the subject of his agency, must account to the principal for full value and profits, and held:

> "The law will not, in such case, impose upon the plaintiff the burden of proving that he was in fact injured and will only inquire whether the agent has been unfaithful in the discharge of his duties. While the agency continues, he must act, in the manner of such agency, solely with reference to the interest of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal." Id. at 681-82.

See also Carter v. United States, 217 U.S. 286, 305-306 (1910).

To the same effect is Donemar Inc. v. Molloy, 252 N.Y. 360 (1930), where a vendee sued his employee and a vendor to recover a bribe paid to the employee by the vendor to obtain favorable settlement of prior dispute with the vendee. The Court of Appeals affirmed judgment for the plaintiff, rejecting the argument that he had not shown that he had been injured by the agreement:

> "Penal Law, Section 439, makes it a misdemeanor to give or receive money for the corrupt influencing of agents, employees, or servants. It would be a strange miscarriage of justice if the corrupting vendor and the corrupt agent of the vendee could retain the fruits of their crime and say that because the settlement was a fair one, the vendee sustained only nominal damages or no damages." Id. at 365.

This construction of Section 439 of the Penal Law is impelled by the language of the statute. The section applies to an employee who "requests or accepts" the gratuity, and to a person who "gives, offers or promises" the gratuity. Clearly the legislature, by proscribing the mere request or offer of the gratuity, has obviated proof of actual damage to the employer.

Dated, New York, N.Y. November , 1962.

Respectfully submitted,

Joseph Stone
Assistant District Attorney