

Argix Direct, Inc. and Local 11, International Brotherhood of Teamsters. Case 22–RC–12480

December 16, 2004

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On June 16, 2004, the Regional Director for Region 22 issued a Decision and Direction of Election in the above-entitled proceeding in which he found that the Employer's truckdrivers (owner-operators) at its Ridgefield, New Jersey facility are employees within the meaning of Section 2(3) of the Act.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review, maintaining that the owner-operators are independent contractors and not statutory employees.

By Order dated July 21, 2004, the Board granted the Employer's request for review.¹ The election was conducted as scheduled on July 16, 2004, and the ballots were impounded.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, we conclude, contrary to the Regional Director, that the Employer's owner-operators are independent contractors and, therefore, not employees within the meaning of Section 2(3) of the Act.² Consequently, we dismiss the petition.

Facts

The Employer provides distribution and transportation services to major retailers under what is known as "source to store" delivery.³ It picks up shipments at various sources as directed by its customers and transports them to one of its two retail sort centers, in Jamesburg, New Jersey, and Southgate, California. At the retail sort center cartons are weighed, scanned, identified, and relabeled for sorting. The Employer then reconfigures these multiple shipments for store deliveries. From the retail sort centers, the shipments are sent to 40-store delivery terminals located throughout the country. When the shipments arrive at the individual store delivery terminals, the cartons are again scanned, weighed, and sorted by individual retail store. Those reconfigured shipments are then loaded and delivered to the various

stores by owner-operators. It is the owner-operators who work out of the Employer's Ridgefield, New Jersey store delivery terminal who are the petitioned-for unit of drivers in this matter.⁴

When the need for Ridgefield drivers arises, the Employer advertises in local newspapers for owner-operators. Applicants are required to have their own truck, 1-year's driving experience, and a clean driving record. Once an applicant meets the Employer's minimum requirements and passes all Department of Transportation (DOT) requirements, which include a background check, a check of driving record, and a physical and drug test, the applicant signs a written operating agreement with the Employer entitled "Retail Delivery Contractor Operating Agreement."⁵ That agreement purports to establish an independent contractor relationship between the Employer and the owner-operator and sets forth all of the terms governing the relationship. Each owner-operator is presented with the agreement on a take-it-or-leave-it basis and has no power to negotiate a more favorable contract.

An owner-operator must own or lease his own truck, or have authority to drive a truck owned by another owner-operator. The Employer does not lease any of the trucks to the owner-operators and does not provide any financial assistance to the owner-operators to help them acquire trucks. The Employer's only requirements are that the owner-operators' trucks be no less than 24 feet long and that they pass a DOT-required inspection.⁶ The Employer does not require that the trucks be of any particular make, model, or color, and owner-operators are not restricted from placing their names on the trucks. In fact, a majority of the owner-operators have their own names, addresses, and/or logos emblazoned on their trucks. The only identification that the Employer requires the owner-operators to place on their trucks is a small, DOT-required sign with the Employer's name and DOT number. The Employer also requires that a special "Vaslock" lock be installed on the cargo box of the truck to help secure the truck's cargo. The owner-operators are responsible for paying for all repairs and maintenance to their trucks, as well as for registration fees, truck insurance, and fuel. Owner-operators are provided with

⁴ Thirty-seven of the store delivery terminals are owned by 20 independent companies, each of which has a contract with the Employer. Three of the store delivery terminals are owned and operated by the Employer, including the one located in Ridgefield, New Jersey. All of the factors discussed in this case relate to the Employer's Ridgefield operation.

⁵ Many of the provisions in the operating agreement are mandated by the DOT.

⁶ The Employer sometimes accepts 22-foot trucks.

¹ Chairman Battista was not on the panel that granted review.

² In view of this finding, we find it unnecessary to pass on the Employer's request to strike the Petitioner's brief on review or, alternatively, to strike an exhibit attached to the brief.

³ The Employer is a motor carrier subject to the regulations of the United States Department of Transportation (DOT).

the opportunity to park their trucks at the Ridgefield facility at no cost.⁷

Five of the Ridgefield owner-operators own 20 of the approximately 63 trucks that operate out of the Ridgefield facility.⁸ Some of these owner-operators drive one of their own trucks, while others elect not to do so. Each owner-operator is ultimately responsible for supervising, paying, withholding taxes, and obtaining workers' compensation coverage for the drivers they employ. All drivers are required to sign an operating agreement including drivers who work for an owner-operator who owns multiple trucks. Even though nonowner-operator drivers must sign this agreement, an owner-operator must still notify the Employer that such a driver has permission to drive his truck. Additionally, the owner-operator will confirm that he or his company remains responsible for truck insurance, maintenance, repairs, and road service for the truck.

DOT regulations require that the Employer inspect each vehicle. The Employer's insurance company requires that the inspection be done quarterly. Inspections are usually done at the Ridgefield facility by a company named Ray's Way. The Employer contracts with Ray's Way and pays for its services.⁹ If a truck fails inspection, it cannot be driven. If repairs are required to bring the vehicle up to DOT standards, the owner-operator pays for the repairs. If the owner-operator chooses to have Ray's Way perform the maintenance, the Employer will pay Ray's Way and deduct the cost from the owner-operator's weekly settlement check. The Employer allows such costs to be amortized over several pay periods and charges the owner-operator interest.¹⁰

Owner-operators are required by DOT regulations to submit proof of truck insurance to the Employer. Since the owner-operator is carrying the Employer's cargo, the Employer provides general liability and cargo insurance for the owner-operators. However, the owner-operators must purchase nontrucking liability insurance which covers damage to the trucks even when not used in the Employer's operation. Owner-operators must also have "occupational accident" insurance, a substitute for Workers' Compensation coverage required for sole proprietors by New Jersey law. If an owner-operator is in need of an insurance provider, the Employer refers him to an inde-

pendent third-party insurance carrier named Empire Insurance who will provide insurance to owner-operators at a discounted rate. If the owner-operator elects to purchase insurance from Empire, the Employer will deduct the cost of the insurance from the owner-operator's weekly settlement check once a month and remit payment directly to Empire. Owner-operators are not required to purchase insurance from Empire, and only 20 do so. The Employer also requires that all drivers attend DOT-required safety meetings. These meetings are usually held at the Ridgefield facility on Saturdays.

Each of the Employer's clients has strict delivery time requirements, known as "windows," when each store will accept the delivery of merchandise. Window delivery times vary from a few hours to most of the day. To optimize the retail store deliveries made by the owner-operators, the Employer uses a computer program called "Roadshow," which develops what the Employer calls a "unique delivery solution." Roadshow calculates the number of packages and stops that can reasonably be made within a particular service area and prints out a manifest setting out the deliveries to be made. The roadshow manifest suggests the order that the deliveries be made, including proposed arrival and departure times for each stop. Each owner-operator is provided with his own road show manifest for the day. However, owner-operators are not required to follow the order of delivery suggested by roadshow, as long as they make deliveries within the client's windows. The roadshow manifest does not map out the roads to be followed from stop-to-stop; that decision is up to the owner-operator. The volume of packages on a route may vary from day-to-day depending on the volume of merchandise at the Ridgefield facility.

The Ridgefield facility does not have enough doors to load out all of the owner-operators at the same time. Accordingly, owner-operators typically pick up merchandise in two different waves, 5 and 6:15 a.m., depending on how far their deliveries are from Ridgefield and the window delivery times established by the clients. Owner-operators arrive at the facility, check in with dispatch, pick up a roadshow manifest, and load their trucks. They must wear the Employer's uniform and bear the Employer's identification badge while on their route.¹¹ Owner-operators may hire their own helpers and are responsible for hiring, supervising, paying withholding taxes, and obtaining the appropriate insurance to cover such employees. However, the Employer contracts with an employment agency to provide helpers for

⁷ Owner-operators are required to leave a spare set of keys for their trucks with the Employer.

⁸ The following owner-operators own multiple trucks: Jose Araujo owns two trucks; Eric Puncel owns six trucks; Diego Varela owns six trucks; Amauri Gutierrez owns four trucks; and Neal Lindsey owns two trucks.

⁹ Each inspection costs the Employer approximately \$50.

¹⁰ At the time of the hearing, the Employer was charging 5-percent interest.

¹¹ The Employer's customers require these forms of identification for security purposes.

owner-operators who deliver to stores in Manhattan. These helpers serve primarily a security function and the Employer pays their salaries.¹²

Owner-operators are not assigned specific routes. Rather, they are generally assigned to deliver in general geographic areas, such as Manhattan or Queens. Roadshow develops daily routing assignments based on each day's scheduled deliveries; owner-operators do not deliver to the same stores each day. At the client's store, the shipment is unloaded. The owner-operators must supply their own loading and unloading equipment, such as power pallet jacks and handtrucks. Labels are scanned by the owner-operator using a scanner gun provided by the Employer. If an owner-operator is running late or has an accident, and will miss a window as a result, he uses his two-way radio, provided by the Employer, to call the dispatcher at the Ridgefield facility so that the Employer can notify the client of the delay. The owner-operator will also use the two-way radio to contact the dispatcher if he has lost a carton or has a problem with a customer, and after his last stop so that the dispatcher can arrange an unscheduled pickup, if need be. Owner-operators are not required to make unscheduled pickups, but most do so when asked. Owner-operators decide for themselves when to take lunch or other breaks.

After an owner-operator has finished his deliveries, he returns to Ridgefield and turns in his radio and scanner. This is done so that the Employer can download the delivery information from the scanner into its computer system and then make the information available to its customers. They also turn in their roadshow manifests and proof of delivery documents. If an owner-operator accidentally loses or destroys any of the Employer's cargo, the owner-operator is responsible for paying for it.

Owner-operators are free to elect not to work for the Employer on any particular day without penalty, provided that the owner-operator has not previously advised the Employer that he would be available at such time. For instance, some owner-operators elect not to accept routes on specific days of the week, some may take a week or more off, and some only accept routes during the busy season. During most of the year, there are not enough deliveries out of the Ridgefield facility to provide routes for all owner-operators each day. The number of routes available also varies from day-to-day within the week, with Monday and Tuesday being the busiest days and Thursday the slowest. Thus, for most of the year owner-operators drive for the Employer fewer than 5 days a week. Under the operating agreement, owner-

operators specifically reserve the right to provide services for other carriers, and nothing in the agreement prohibits owner-operators from using their trucks for personal or other business use. The record reflects that at least two owner-operators have curtailed their services for the Employer in order to work elsewhere 1 day a week.

Owner-operators are paid on a sliding scale depending on the amount of miles driven per day. However, the mileage calculation is dictated by the roadshow manifest, regardless of the actual mileage driven. Owner-operators who make pick-ups not listed on their roadshow manifests are paid \$40 per pickup. The owner-operators' gross payments from the Employer vary greatly. In 2003, owner-operators who contracted with the Employer for the entire year earned from a low of \$42,911.68 to a high of \$92,129.77. The Employer charges each owner-operator a weekly \$10 fee to cover administrative expenditures such as random drug testing, road taxes, and uniforms. The Employer pays tolls, fuel taxes, and parking tickets for the owner-operators. The Employer also pays the owner-operators a fuel surcharge when the price of fuel surpasses a preset average. Such payments are common in the trucking industry. The Employer awards three different types of bonuses: a quarterly bonus of \$300, a "years of service bonus" based on how long the owner-operator has contracted with the Employer, and a yearly bonus of \$1200. The quarterly bonus and "years of service" bonus are given to all owner-operators. The yearly bonus is given in full to those owner-operators who have contracted with the Employer for a full year and is prorated for those that have not.

Owner-operators fill out IRS Form W-9, and the Employer does not withhold income taxes or FICA from their weekly settlement checks. In addition to various individuals, the Employer remits settlement checks to eight companies, some of which are incorporated. The parties stipulated that each of these companies is paid through an employee identification number (EIN), rather than a social security number.

In addition to its owner-operators, the Employer employs warehouse employees at its Ridgefield facility. These employees are paid on a salaried basis, are required to punch a timeclock, receive holiday pay, a 401(K) with profit sharing, paid vacation, personal/sick time, major medical, and vision and life insurance. Owner-operators do not receive any of these benefits. Warehouse employees are also subject to the terms and conditions of employment set forth in the Argix Ridgefield employee handbook. Owner-operators do not receive the employee handbook, but instead are provided

¹² No party contends that these employees should be included in the unit.

with a business support guide. This guide contains DOT-mandated policies and procedures as well as the Employer's drug and alcohol policy and various other regulations and responsibilities for the owner-operators. The owner-operators are required to sign a "Certificate of Receipt" noting that the owner-operator received the handbook and "materials describing the company's drug and alcohol policy as described in the Federal Motor Carrier Safety Regulations."

The Employer's clients place strict on-time delivery requirements on the company. Hence, the Employer reviews the performance of the owner-operators. Its management at Ridgefield will discuss such issues as missed delivery windows with owner-operators and urge them to be more cautious. The Employer keeps a record of such issues for each owner-operator, and may terminate an owner-operator's contract for not meeting contractual obligations. If the issue involves a driver who works for one of the owner-operators, the Employer will discuss the issue with both the driver and the owner-operator.

Analysis

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." In determining whether an individual is an employee or an independent contractor, the Board applies the common law agency test and considers all the incidents of the individual's relationship with the employing entity.¹³ See *Roadway Package System*, 326 NLRB 842, 850 (1998); *Dial-a-Mattress Operating Corp.*, 326 NLRB 884, 892 (1998); and *Slay Transportation Co.*, 331 NLRB 1292, 1293 (2000). The determination of whether an individual is an independent contractor is quite fact-intensive. *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968). The burden is on the party asserting independent contractor status to show that the classifications in question are independent contractors. *BKN, Inc.*, 333 NLRB 143, 144 (2001).

¹³ The multifactor analysis set forth in Restatement (Second) of Agency, Sec. 220 includes the following factors to be examined: (1) the control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is in the business.

In this case, the Petitioner maintains that the Regional Director did not err in finding that the owner-operators are employees within the meaning of Section 2(3) of the Act.¹⁴ The Employer, on the other hand, contends that the petitioned-for owner-operators are independent contractors and therefore excluded from the coverage of the Act. We agree with the Employer and find that it has met its burden of establishing that its Ridgefield owner-operators are independent contractors.

Here, the owner-operators have a significant proprietary interest in the instrumentalities of their work. Although the Employer supplies the owner-operators with a few items such as a two-way radio and scanner, the most costly piece of equipment used in making deliveries for the Employer—the truck—is the owner-operators' sole responsibility.¹⁵ The Employer does not own or lease any of the owner-operators' trucks and does not provide any financial assistance to the owner-operators to help them acquire trucks; each owner-operator must own or lease his own truck. Trucks can be of any make, model, or color, and the owner-operators frequently place their corporate or individual names and logos on the trucks.¹⁶ The Employer's only requirements are that the truck be at least 24 feet long and that it pass a DOT-required inspection. The owner-operators are responsible for their trucks' maintenance, repairs, and insurance. Since the owner-operators personally own or lease their trucks, the Employer places no restriction on the use of the trucks for purposes other than delivering for the Employer and, in fact, its agreement with each owner-operator specifies that the owner-operator reserves the right to provide services for other carriers. The record reflects that at least two owner-operators have curtailed their services for the Employer in order to work elsewhere 1 day a week.

Additionally, some of the owner-operators are entrepreneurs who have their own independent companies, several of which are incorporated. Five of the owner-operators own 20 of the approximately 63 owner-operator trucks. Some of these owners drive one of their own trucks while others elect not to do so. Those owner-operators with multiple trucks hire their own drivers.

¹⁴ To the extent that the Regional Director's decision equates the common law agency test with the "right to control" test, the Regional Director's analysis is incorrect. In *Roadway Package Systems*, supra, the Board affirmatively abandoned the "right to control" test and opined that it would apply the common-law agency test and consider all the incidents of the individual's relationship with the employing entity when determining whether an individual (or group of individuals) is an employee or independent contractor under Sec. 2(3) of the Act.

¹⁵ Owner-operators must also supply their own equipment, such as power pallet jacks and handtrucks.

¹⁶ The only sign that the Employer requires the owner-operators to place on their trucks is a small, DOT-required, Argix sign with Argix's DOT number.

The owner-operator is ultimately responsible for supervising, paying, withholding taxes, and obtaining workers' compensation coverage for the drivers of their trucks. Contrary to the Petitioner's contention, by having the owner-operator's drivers sign operating agreements, the Employer is not mandating the terms of the relationship between the owner-operator and his driver(s). The owner-operator still negotiates individual terms and conditions of employment and wages with his driver(s). Specifically, all money is remitted directly to the owner-operator's company or corporation and the owner-operator in turn pays his driver(s) the agreed-upon salary.

Owner-operators have discretion over their work schedules, and the Employer does not guarantee that each owner-operator will receive a minimum amount of work. For instance, some owner-operators elect not to accept routes on specific days of the week, some may take a week or more off, some only accept routes during the busy season, and some have work elsewhere. Owner-operators are not penalized in any manner for electing not to work, so long as they have not previously agreed to work on a given day. Additionally, during most of the year, there are not enough deliveries out of Ridgefield to provide routes for all owner-operators each day. The number of routes available also varies from day-to-day within the week, with Monday and Tuesday being the busiest days and Thursday the slowest.

Several aspects of the owner-operators' daily work routine support an independent contractor finding as well. While the roadshow manifest suggests the order in which the deliveries are to be made, the owner-operators are not required to follow the order of delivery suggested by roadshow, as long as they meet the client's delivery windows. Since delivery window times vary from a few hours to most of the day, the owner-operators have latitude in arranging the routes for their day. Indeed, the record reveals that owner-operators regularly deviate from roadshow's proposed delivery sequence.¹⁷ The Employer does not instruct them on which traffic pattern or route to take to make their assigned deliveries. The owner-operators also establish their own lunch and breaktimes, and they do not have a minimum daily time requirement. Lengths of routes vary and once the owner-operator finishes his route for the day and returns his paperwork and scanner, he is free to do whatever he wants. Additionally, owner-operators are free to hire

helpers to assist them with their routes. The owner-operator is ultimately responsible for supervising, paying, withholding taxes, and obtaining workers' compensation coverage for his helpers.

Also important is the Employer's method of compensating the owner-operators. An owner-operator is not paid an hourly rate or a salary and receives no guaranteed income. Rather, the Employer compensates the owner-operators based on a sliding scale that depends on the length of the route for the day. The mileage calculation is from the roadshow manifest, regardless of the actual mileage driven. Although they are not required to do so, owner-operators can make pickups for the Employer not listed on their roadshow manifest. When they do so, they are paid \$40 per pickup. Because they are free to elect not to work for the Employer at particular times based on their own schedule and because the Employer's volume of work varies, owner-operators can choose to maximize or minimize their income. Indeed, the owner-operators' gross payments vary greatly. In 2003, owner-operators who contracted with the Employer for the entire year earned from a low of \$42,911.68 to a high of \$92,129.77. In addition, the owner-operators bear the risk of loss when they (or their drivers) damage customers' merchandise.

The owner-operators are responsible for paying their own expenses, as well as their own taxes. The Employer takes no deductions from the owner-operators for taxes, social security contributions, state disability, fringe benefits, health insurance benefits, or vacations. The Employer does not provide workers compensation insurance/benefits for the owner-operators.

In contrast to the relationship between the Employer and the owner-operators, the Employer employs warehouse employees at its Ridgefield facility who are paid on an hourly or salary basis, are required to punch a timeclock, and receive benefits. These employees are also subject to the terms and conditions of employment set forth in the Argix Ridgefield employee handbook. Owner-operators are not subject to the policies contained in the employee handbook and their business support guide is not akin to an employee handbook.

Furthermore, the Employer does not maintain a system of progressive discipline and discharge rules for the owner-operators.¹⁸ The Employer, however, demands that all of its owner-operators perform up to its and its

¹⁷ See *Dial-a-Mattress*, supra at 892 (Board found that by proffering the "suggested efficient sequence" of deliveries Dial did not exercise significant control over its owner-operators because the owner-operators deviated from the suggested sequence, and Dial did not penalize them unless the owner-operator missed the customer's scheduled delivery time).

¹⁸ The Petitioner maintains that the Employer will discipline an owner-operator by not scheduling him to work the following day for various infractions, such as failing to wear a uniform, failing to attend a safety meeting, or missing a window. However, after reviewing the record, we conclude that the weight of the evidence does not support this contention.

clients' demands. To this end, the Employer discusses missed window times with owner-operators, keeps records of such discussions, and will terminate an owner-operator's contract for repeatedly not meeting contractual obligations.

Finally, although not a dispositive fact, the contract between the owner-operators and the Employer expresses an intention on the part of the contracting parties to create an independent contractor relationship. The contract states that owner-operators are independent contractors and that the owner-operators have the sole control over the means and manner of the performance of their work.

Indeed, the facts of this case bear similarity to the facts of *Dial-a-Mattress Operating Corp.*, supra, where the Board found Dial-a-Mattress' owner-operators to be independent contractors. In *Dial-a-Mattress*, the owner operators, among other facts: acquired and financed their own trucks; had few restrictions on the types of trucks they could use, or the appearance of the trucks; had business identities independent of the company; owned multiple vehicles and hired supplemental drivers and helpers; controlled their own work schedules; were given a "suggested efficient sequence" of deliveries by the Employer but were free to choose their own delivery order; had no minimum guaranteed compensation; were free to use their trucks for outside pursuits; were not subject to progressive discipline and discharge rules; and did not receive any fringe benefits from the Employer.

Despite the aforementioned, we are not unmindful that there are some facts favoring finding the owner-operators

to be statutory employees. The owner-operators have a permanent working relationship with the Employer that ordinarily continues as long as performance is satisfactory; they wear the Employer's uniform and bear Employer identification badges; the Employer pays their tolls and parking tickets; and the agreement containing the terms and conditions under which they operate is promulgated unilaterally by the Employer. Nevertheless, we find that, evaluating all of the relevant factors, the facts weigh more strongly in favor of independent contractor status.¹⁹

For the foregoing reasons, we conclude that the Employer's owner-operators are independent contractors rather than employees within the meaning of Section 2(3) of the Act. Accordingly, we reverse the Regional Director's decision and dismiss the petition.

ORDER

The Regional Director's Decision and Direction of Election is reversed, and the petition is dismissed.

¹⁹ As the Board stated in *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982):

Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.