Exhibitors Film Delivery & Service, Inc. *and* Local Delivery Drivers Union, Petitioner. Case 17–RC–8736

January 22, 1980

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On May 25, 1979, the Regional Director for Region 17 issued his Decision and Order in the above-captioned case in which he found that the Employer's city and country route contract delivery drivers operating from the Employer's Topeka and Lawrence, Kansas, facilities were independent contractors rather than employees. Thereafter, pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed a timely request for review of the Regional Director's decision, contending, *inter alia,* that he had departed from officially reported precedent and made findings of fact that were clearly erroneous in concluding that the owner-operator delivery drivers were independent contractors rather than employees.

By telegraphic order dated July 13, 1979, the National Labor Relations Board granted the request for review insofar as it relates to the status of the delivery drivers.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review and hereby makes the following findings:

The Employer, a Missouri corporation, is a common carrier operating under authority issued by the Interstate Commerce Commission and is engaged in a small package express transportation service at various facilities, including its facilities in Topeka and Lawrence, Kansas. There are 3 owner-operators working at the Lawrence facility and 11 owner-operators working at the Topeka facility. Each of these owner-operators has executed a motor vehicle lease agreement with the Employer which either party may cancel on 30 days' notice and which the Employer may cancel immediately upon nonperformance by the owner-operator. The agreement provides that the contract delivery drivers own their own truck and that they will paint their vehicles with the Employer's colors and identification, perform any necessary repairs or maintenance, provide liability insurance, pay taxes, and register the vehicle with the proper authorities. It provides that drivers shall deliver cargo which is dispatched and loaded on the vehicle to the consignee with reasonable diligence, speed, and care.

Drivers are paid on a flat daily rate plus commission for stops over a certain number, depending on their particular lease agreement. The extra amount does not substantially increase the compensation of the drivers over the flat rate that is guaranteed. Routes are drawn so as to distribute the work and make compensation relatively uniform. Unlike the Employer's admitted employee-drivers at its North Kansas City, Missouri, facility, these drivers do not observe any starting or quitting time or receive any benefits such as vacation, insurance, paid holidays, or sick leave.[1] No deductions for workmen's compensation, social security, or state or Federal taxes are made from their biweekly paychecks. Each driver is responsible for any fines or traffic violations incurred.

Each of the drivers owns only one truck, and the contract provides that the truck is to be used exclusivly by the Employer. The contract requires that these drivers wear uniforms. The Employer exercises exclusive control over designating the geographic area that each driver will service, but the drivers exercise their own discretion in determining the order in which their customers are served. The Employer does require that the drivers check in once each day for call-in orders or to be advised of customers with special time requirements.

The Employer furnishes each vehicle with a Kansas Corporation Commission tag at a charge to the contract delivery driver of $10 per tag and furnishes Interstate Commerce Commission decals free of charge. The Employer requires that all contract drivers provide $100,000/$300,000/$50,000 liability insurance.

According to the agreement, each driver is responsible for providing a replacement driver whenever he or she is unable to drive and for providing replacement equipment when his or her own truck is inoperable.

The Employer sets prices for service and bills customers with open accounts. It supplies drivers with a customer list and with advertising brochures. Drivers turn in c.o.d. reports, express reports, and delivery manifests to the Employer either daily or every few days. The money is turned in with the reports for the corresponding period of time.

Prior to entering into the lease agreement, the contract drivers complete an application giving credit references, personal references, and a list of previous employers. The country drivers must also take a physical examination as required by ICC regulations.

[1] The absence of particular benefits, however, is merely an aspect of compensation and is not a significant indicator of an independent contractor relationship.

The contract drivers are trained regarding the route they have been assigned for 2 to 3 days by a supervisor of the Employer. Occasionally, the Employer's supervisors drive the routes in company vehicles in emergency situations.

The standard which the Board applies in determining whether such owner-operator drivers are employees rather than independent contractors is the common law "right to control" test as set forth by the Supreme Court in *N.L.R.B.* v. *United Insurance Co. of America et al.*, 390 U.S. 254, 259 (1968). Applying those factors considered significant by the Supreme Court in *United Insurance, supra,* to the instant case, we note that (1) the drivers perform functions that are an essential part of the Employer's business rather than those of an independent business; (2) the drivers have a permanent working arrangement with the Company, which would ordinarily terminate only for unsatisfactory performance; (3) they do business in the Employer's name with the assistance and guidance of the Employer's supervisors and sell only the Employer's services; (4) the agreements which contain the terms and conditions under which the drivers function are promulgated and changed unilaterally by the Employer; (5) the drivers account to the Employer for the funds they collect at least every few days under a regular reporting procedure prescribed by the Employer; (6) the routes belong to and are determined by the Employer, and the drivers thus have no proprietary interest in them; and (7) since they are limited in practical effect to certain geographic areas of primary responsibility, and limited in terms of prices for the services they perform, they do not have the opportunity to make decisions which involve risks taken by an independent businessman which may result in profit or loss.

In sum, we conclude that the owner-operator drivers are employees[2] and not independent contractors. Accordingly, we find that a question concerning representation exists as to the following employees who constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All city and country route delivery drivers employed by the Employer at its Topeka and Lawrence, Kansas, facilities, excluding all office clericals, professionals, warehouse employees and supervisors as defined in the Act.

[Direction of Election omitted from publication.][3]

MEMBER PENELLO, dissenting:

I disagree with my colleagues' finding that the Employer exercises such control over the owner-operator drivers herein with respect to the means to be used in achieving the desired results as to make them employees within the meaning of Section 2(3) of the Act. For the reasons set forth by the Regional Director in his Decision and Order, I would find them to be independent contractors.

As the Board reasoned in *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Brothers, Inc.),*[4] both the Supreme Court and the Board have repeatedly held that employer controls imposed by governmental regulation are not dispositive of the issue of independent contractor or employee status. Rather, it must be determined whether or not there is a layer of regulation or control put upon owner-operators over and above that mandated by governmental requirements. Thus, although the owner-operator drivers herein are subject to ICC (Interstate Commerce Commission) and DOT (Department of Transportation) regulations which must be enforced by the Company, there is no significant degree of control exercised by the Employer in addition to the governmental requirements which would operate to impair the drivers' independence.

As found by the Regional Director, the owner-operator drivers exercise substantial freedom in scheduling the use of their equipment in that they determine their starting and quitting times, when and where to purchase fuel, and where to park their vehicles when not in use. They pay virtually all costs of maintenance and operation. Their compensation is not subject to deductions for Federal or state income taxes or social security taxes, and neither workmen's compensation nor unemployment compensation benefits are provided by the Employer. The drivers are subject to minimal day-to-day supervision by the Employer and do not receive any instructions controlling precise routes which they must take, the precise times they must make particular deliveries, or the loading of their trucks. They do not participate in the benefits supplied to other admitted employees. The Company permits contract drivers to hire assistants or substitutes and requires that the owner-operator driver be responsible for all wages, taxes, or expenses regarding the substitute's employment. The Employer does not exercise any disciplinary authority over the contract drivers

[2] We note that the lease agreement requires owner-operator drivers to hire replacements when they are unable to work. The record reveals that this has happened a few times with at least one driver. Questions concerning the supervisory status of particular drivers stemming from this provision may best be resolved through the challenge procedure.

[3] [*Excelsior* footnote omitted from publication.]

[4] 223 NLRB 752 (1976), enfd. 546 F.2d 989 (D.C. Cir. 1976). See *Harrison* v. *Greyvan Lines, Inc. (sub nom. United States* v. *Silk, doing business as Albert Silk Coal Co.),* 331 U.S. 704 (1947); *Reisch Trucking and Transportation Co., Inc.,* 143 NLRB 953, 957 (1963) ("The control exercised by the Company over the work of owners and drivers is for the purpose of complying with the rules and regulations of the Interstate Commerce Commission and is not inconsistent with the independent contractor relationship."); *Fleet Transport Company, Inc.,* 196 NLRB 436 (1972); *Conley Motor Express, Inc.,* 197 NLRB 624 (1972).

and does not evaluate their performance or conduct periodic inspections of their equipment.

For all the foregoing reasons, I would find the owner-operator drivers herein to be independent contractors and not employees within the meaning of the Act and would therefore dismiss the petition.