

Propane Transport, Inc., and Propane Chemical Leasing Co., Inc. and Teamsters Local Union No. 144, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 25-RC-7198

February 7, 1980

DECISION ON REVIEW

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

On July 20, 1979, the Regional Director for Region 25 issued a Decision and Direction of Election in the above-entitled proceeding, in which he directed an election in a unit of truckdrivers at the Employer's¹ Oaktown, Indiana, facility. He excluded from the unit of truckdrivers, as not employees of the Employer, the owner-operators of leased equipment whom he found to be independent contractors and the nonowner-drivers of leased vehicles whom he found to be employed by the independent contractors and not by the Employer. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's decision contending the Regional Director made erroneous findings of fact and departed from precedent. On August 14, 1979, by telegraphic order, the request for review was granted and the election stayed pending decision on review. Thereafter, the Employer filed a brief on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board had 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, including the brief on review, and makes the following findings:

The Employer contends that the Regional Director erred in finding that the owner-operators of leased equipment are independent contractors and that the nonowner-drivers are employees of independent contractors. We agree.

Propane Transport, Inc. (hereinafter called PT), a California corporation, is a common carrier of LP gas operating pursuant to a license from the Interstate Commerce Commission (ICC) and subject to the regulations promulgated by that agency, to the perti-

nent regulations of the Department of Transportation (DOT), and to the regulations of the various regulatory agencies existing in the 13 States where PT is licensed to operate. Propane Chemical Leasing Co., Inc. (hereinafter called PCLC), an Indiana corporation, leases equipment and supplies drivers to PT for PT's Oaktown, Indiana, facility. California Liquid Gas Corporation, a Delaware corporation, with principal offices in Sacramento, California, markets LP gas and related products, and owns all outstanding shares of stock in both PT and PCLC. PT and PCLC share common ownership, common officers, and a common board of directors. PCLC does approximately 99 percent of its business with PT.

The Oaktown terminal is leased and operated by PT, and the immediate supervisor (Oaktown terminal manager or dispatcher) of the drivers operating out of the Oaktown terminal is a PT employee. PT also employs at the Oaktown terminal an office clerical employee and two mechanics.² The Employer employs seven drivers (company drivers) who are admittedly its employees. These company drivers are assigned to drive the two tractors owned by PT and the five additional tractors leased by PCLC to PT. The Employer's "company drivers" are supplemented by owner-operators of equipment which is leased to PT and by nonowner-drivers hired by owner-operators to drive their equipment. There are approximately 17 owner-operators with lease agreements with the Employer.³

Government regulations require the exercise of considerable control by the Employer over owner-operators, covering such things as safety of equipment and drivers, physical health of drivers, identifying markers on vehicles, and qualifications of drivers.

Under the terms of the uniform lease agreement utilized by the Employer, PT has the exclusive possession, control, and use of owner-operators' equipment and retains the exclusive right to sublease leased equipment. Under the lease, owner-operators have the responsibility to provide all fuel, oil, grease, tires, parts, and other operating necessities, including all safety equipment and devices required by law. Owner-operators also have the responsibility to maintain their leased equipment in good repair and in a safe and proper mechanical and operating condition. The lease further requires owner-operators to comply with all applicable laws and regulations, and this includes the responsibility to supply and pay the fees for all required state licenses, permits, plates, cards, stickers,

¹ The Regional Director found that Propane Transport, Inc., and Propane Chemical Leasing Co., Inc. (hereinafter jointly called the Employer), constitute a single integrated business enterprise and are joint employers of the employees in the unit. This finding is uncontested.

² The parties stipulated that the Oaktown terminal manager is a supervisor and that the office clerical employee and two mechanics should be excluded from the unit.

³ There is some uncertainty in the record about the exact number of owner-operators. Propane Transport's vice president, Thomas Kenobbie, testified there were 13 owner-operators. However, he had previously testified that there were 17 owner-operators. In any event, the record establishes that the number of owner-operators fluctuates depending on the amount of work available. There are approximately four nonowner-drivers driving trucks leased to PT.

and decals, and to pay all other taxes and fees connected with the operation of leased equipment. Responsibility for paying all fines or penalties assessed for a violation of any law or regulation pertaining to the leased equipment is also the owner-operators'. Furthermore, they must display the Employer's insignia and ICC certification number on leased equipment, as required by ICC rules. PT must have all leased vehicles inspected in accordance with ICC regulations and furnish a copy of the inspection report to the owner-operators.

PT is required to supply public liability and cargo insurance to protect against claims for personal injury, property damage, and cargo loss, or damage arising out of the operation of the leased equipment when it is engaged in PT's business. Owner-operators have the responsibility to provide "Bobtail" insurance, and any fire, theft, collision, or other insurance they may desire.⁴

Under the lease, owner-operators are obligated to furnish, at their own expense, competent, experienced, and qualified drivers for the operation of leased equipment. Owner-operators must also supply PT with medical certificates and all other records PT is required to maintain for drivers of leased equipment. Furthermore, owner-operators have the responsibility to satisfy workmen's compensation law requirements for nonowner-drivers and are required to supply PT with a certificate of insurance evidencing that these requirements have been satisfied. The lease provides that drivers of leased equipment shall not be considered the employees of PT at any time or for any purpose.⁵ Under the lease, owner-operators are paid a set percentage of the revenues earned by the leased equipment while it is under lease. Finally, the leases are terminable on 30 days' notice by either party.

Prior to entering into a lease with an owner-operator, PT requires that an application to drive on behalf of PT be filed. Nonowner-drivers must submit the same application, as must company drivers. All drivers, including company drivers, owner-operators, and nonowner-drivers, must undergo a physical examination before they are allowed to drive for PT.

The Employer has the ultimate responsibility to see that all of its drivers are in compliance with the requisite governmental regulations and company rules. The responsibility of all drivers, whether they be company drivers, owner-operators, or nonowner-drivers, to follow all applicable regulations and company rules is the same. All drivers are subject to discipline for violating governmental regulations and company

rules. In some instances company drivers have been suspended or discharged for such violations, while owner-operators have had their leases canceled. Before entering into a lease with an owner-operator, the Employer discusses with the prospective lessee the requirement of handling hazardous substances and provides instructions on the safe handling of such materials. It is the terminal manager's responsibility to inspect and road test all equipment utilized by PT.

All drivers are dispatched in essentially the same manner. Owner-operators drive the same runs and handle the same materials as company drivers, and all drivers are expected to wait in line when necessary to pick up an assigned load. Owner-operators are expected to take all assigned runs, including those which are less lucrative and those involving hazardous substances. According to Kenobbie, he has disciplined owner-operators who have refused to accept assigned loads by cancelling their leases. One exception to the requirement that an owner-operator accept all assigned loads are instances involving an interstate run to a State in which the owner-operator is not licensed to drive. The Employer normally dispatches company drivers before it utilizes owner-operators. Company drivers are normally assigned specific routes for a run. Because owner-operators are compensated according to a set percentage of the gross revenues generated by their trucks, the particular route they select does not affect their compensation and, accordingly, the Employer does not assign them set routes. However, owner-operators receive specific delivery times which they are expected to meet.

Company drivers are paid by check twice a month by PCLC. The compensation they receive is based on the mileage they drive plus additional unloading and waiting fees. They also receive certain fringe benefits, including insurance, retirement benefits, and a profit-sharing plan. The Employer deducts social security and other taxes from company drivers' paychecks. Owner-operators, consistent with the standardized lease, receive a set percentage of the revenues generated by their trucks. Owner-operators leasing both tractors and trailers to the Employer receive an increased percentage. No deductions are made from owner-operators' checks, and they do not receive any of the fringe benefits paid to company drivers. Nonowner-drivers are paid whatever amount is negotiated between a particular nonowner-driver and a particular owner-operator. All drivers are required to keep logbooks and other records which they submit to the Employer. Company drivers have company credit

⁴ Bobtailing involves operation of a tractor without a trailer.

⁵ The fact that the lease contains a provision stating that the drivers of leased equipment are not to be considered employees is not, of course, determinative of the status that these drivers actually occupy. Our concern is to determine whether the parties to the relationship have in fact established

the drivers as true independent contractors or have clothed them with employee status. Moreover, we note that despite the presence of this provision in the lease, one of the parties to the lease, the Employer, has vigorously contended that the actual relationship between a driver of the leased equipment and the Employer is that of employee/employer.

cards to cover their road expenses, while owner-operators and nonowner-drivers pay their own operating costs. Repairs of PT and PCLC equipment are handled by PT mechanics; owner-operators must arrange for and finance any necessary repairs for their equipment. PT provides parking for PT and PCLC equipment; however, owner-operators must make their own parking arrangements.

As previously discussed, the standard lease between the Employer and owner-operators grants the Employer the exclusive right to control the operation of a leased vehicle, including the sole right to sublease during the term of the lease. While there was some testimony of instances of owner-operators subleasing their equipment while the equipment was under lease to the Employer, Kenobbie testified that his duties included enforcing the provision granting sole and exclusive possession of leased equipment to the Employer and that he was unaware of any instances of unauthorized subleasing of leased equipment by owner-operators.

In making our determination concerning the status of these owner-operators, we are guided by the common law right-of-control test, whether the carrier exercises control over the means used to achieve the ends desired or merely over the ends to be achieved.⁶ In applying this test, we must consider the degree of control exercised over the owner-operators regardless of the reasons for the imposition of that control; that is, whether required by governmental regulations or inspired for other business reasons.⁷

Although we are aware of various factors which indicate a degree of freedom by the owner-operators, we find that these factors are outweighed by others which establish extensive Employer control over owner-operators and lead us to conclude that they are employees of the Employer. In reaching our determination we rely particularly on the following facts: (1) the Employer requires that leased vehicles display its insignia and its ICC certification number; (2) the Employer has the exclusive possession, control, and use of the leased equipment;⁸ (3) the Employer unilaterally determines owner-operators' compensa-

tion on the basis of a predetermined rate schedule, and that compensation rate is generally accepted by owner-operators without question;⁹ (4) the Employer requires owner-operators to accept virtually all assigned loads, and disciplines owner-operators who refuse assigned loads; (5) the Employer assigns loads with instructions on delivery times and requires the furnishings of logsheets and other records; (6) the Employer requires drivers of leased equipment (like the company drivers who are admitted employees) to fill out employment applications, take physical examinations and road tests; (7) the Employer maintains cargo and liability insurance for owner-operators; (8) the Employer instructs owner-operators regarding the handling of hazardous commodities; (9) the Employer inspects owner-operators' trucks and requires owner-operators to make necessary repairs; (10) the Employer establishes a uniform set of company rules that apply uniformly to all drivers and the Employer imposes discipline for infractions of these rules by company drivers, owner-operators, and nonowner-drivers; and (11) the overall effect of the degree of control over equipment and personnel required by state and Federal regulations of motor carriers.

For these reasons, we find that the owner-operators and the nonowner-drivers hired by them to operate their leased equipment are employees of the Employer. In these circumstances, we conclude that the following unit is appropriate herein for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All truckdrivers employed by the Employer at its Oaktown, Indiana, facility, including owner-operators,¹⁰ and nonowner-drivers of equipment leased by the owners to the Employer; excluding all mechanics, office clericals, guards and supervisors as defined in the Act.

Accordingly, the case is hereby remanded to the Regional Director for Region 25 for the purpose of conducting an election pursuant to his Decision and Direction of Election, as modified herein.¹¹ The eligibility payroll period for the election shall be that

⁶ *Deaton Truck Lines, Inc.*, 143 NLRB 1372 (1963), enf'd. 337 F.2d 697 (5th Cir. 1964).

⁷ *Robbins Motor Transportation, Incorporated*, 225 NLRB 761 (1975); and *Dixie Transport Company*, 218 NLRB 1243 (1975).

⁸ While there is some testimony that owner-operators have subleased their trucks without the Employer's knowledge, it is clear that under the terms of the lease the Employer has the sole right to control and restrict the use of a leased vehicle. See *John Himmer Transfer, Inc.*, 221 NLRB 284 (1975).

⁹ The fact that the Employer unilaterally establishes what an owner-operator's percentage of load revenues shall be for the use of leased equipment and the driver's service is indicative of the lack of an arm's-length relationship typical of a true independent contractor relationship. See *Robbins Motor Transportation, supra*.

¹⁰ Since it is unclear how many owner-operators have lease agreements

covering more than one tractor, there is an inadequate factual basis for determining whether or not they are supervisors as defined in the Act. Accordingly, if there are such "multiple" owner-operators, they shall be permitted to vote under challenge.

¹¹ At the hearing, Petitioner indicated an interest in proceeding to an election in the broader unit asserted by the Employer to be appropriate. It is unclear from the record whether Petitioner has made a sufficient showing of interest for such an expanded unit. Accordingly, Petitioner is hereby accorded a period of 10 days in which to submit the requisite showing of interest to support an election herein. In the event Petitioner does not wish to proceed with an election herein, it may withdraw its petition without prejudice by notice to the Regional Director within 7 days from the date of this Decision on Review.

ending immediately before the date of issuance of this Decision on Review.¹²

¹² In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that a revised election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 25 within 7 days of this

Decision on Review. The list may initially be used by the Regional Director to assist in determining an adequate showing of interest. The Regional Director shall make the list available to all parties to the election when he shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with the requirement shall be grounds for setting aside the election whenever proper objections are filed.