City Cab Company of Orlando, Inc.; Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Co. and Dixie Cab Co. *and* Yellow, City, Dixie Independent Cab Drivers Association, Petitioner. Case 12–RC–5243

September 19, 1977

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer C. W. Hunt, Jr. Following the hearing, this case was transferred to the National Labor Relations Board in Washington, D.C., pursuant to Section 102.67 of the Board Rules and Regulations and Statements of Procedure, Series 8, as amended. Thereafter, briefs were filed by the Employer[1] and the Petitioner.

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 Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:[2]

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The appropriate unit: Petitioner seeks a unit of all taxi drivers working in Orlando and Winter Park, Florida. The Employer contends that drivers who work under a service-lease arrangement (contract drivers) are not employees but independent contractors and therefore should not be included in the unit. It also takes the position that drivers in the city of Winter Park should be excluded both because they lack community of interest with the Orlando employees and because they are temporary employees.

City Cab Company of Orlando, Inc., and Yellow Cab Company of Orlando, Inc.,[3] are Florida corporations engaged in the operation of taxicabs in the Orlando, Florida, area under authority granted by the city of Orlando and the Florida Public Service Commission. The two corporations are under common ownership and control with Paul S. Mears, Sr., being chairman of the board and Paul S. Mears, Jr., being president and chief operating officer of both corporations. Both operate out of a common facility located at 324 West Gore Street, Orlando, Florida.[4]

City Cab Company of Orlando, Inc., employs approximately 30 taxicab drivers who work on a commission of gross revenue basis (commission drivers).[5] Yellow Cab Company of Orlando, Inc., uses the services of approximately 90 contract drivers who drive Yellow cabs or Dixie cabs on a regular basis. It also employs 22 commission drivers who drive Yellow cabs in the city of Winter Park.

Prior to July 16, 1976,[6] all drivers of both corporations worked on a commission basis. On July 16, the Employer instituted a lease agreement system whereby those who wished to continue driving were required to lease a taxicab from the Employer. At first this arrangement extended to all drivers and was instituted as a means of avoiding the increasing costs of operation, particularly in the area of workmen's and unemployment compensation. A schedule of rates was attached to the contract and made a part thereof. The rates were changed by the Employer five times between July 16 and October 1.

On October 1, a second contract was presented to the drivers changing the lease agreement to a contract for the sale of services. The Employer stated that the change was made in order to save drivers the expense of a sales tax, since under Florida law leases are taxable while sales of service are not. The second contract contained the additional provision that the Employer reserved the right to change the rate at any time.

On November 1, a third contract was offered to the drivers, containing essentially the same terms as the second contract, with a change in the rate schedule. During the life of the third contract, however, the Employer informed the drivers that it had decided there was a need for some commission drivers as well as contract drivers. Those desiring to change back to

[1] The two corporations involved herein, City Cab Co. of Orlando, Inc., and Yellow Cab Co. of Orlando, Inc. d/b/a Yellow Cab Co. and Dixie Cab Co., are referred to collectively as the Employer for the purposes of this proceeding.

[2] The Employer's request for oral argument is hereby denied as the record and the briefs adequately set forth the issues and positions of the parties.

[3] Yellow Cab Company of Orlando, Inc., does business as Yellow Cab Co. and Dixie Cab Co.

[4] The two corporations agree that any unit found to be appropriate should include the employees of both corporations, with the exception of those employed at Winter Park.

[5] The Employer concedes that commission drivers are employees within the meaning of the Act.

[6] All months and dates are in 1976 unless otherwise indicated.

commission driving were asked to arrange for an interview with a company official. By November 22, a number of drivers were employed on a commission basis.

On January 10, 1977, a fourth contract was presented to those drivers continuing to work as contract drivers. It contained a change in the rate schedule and a change in the name of the contracting party from City Cab Company of Orlando, Inc., to Yellow Cab Company of Orlando, Inc. The Employer stated that, for insurance purposes, they wanted contract drivers to drive only Yellow cabs. This contract was in effect at the time of the hearing. It provides that the Employer is to furnish a cab, liability insurance, payments of those licenses, taxes, and fees required by law, maintenance and wrecker service, training of drivers, and dispatch and telephone answering service. Drivers wishing to purchase these services may choose one of three rates. Under rate I, the driver pays a fixed charge for up to 10 hours, plus a mileage charge. Under rate II, a driver pays a certain amount per mile. Under rate III, a straight flat rate is paid with no reference to mileage. If, however, the cab is driven more than 160 miles in a day, there is a charge per mile for any mileage over 160 miles. In contrast to the other rates, rate III is only available starting at 6 p.m.

The contract also provides that the drivers must keep themselves in a "neat and clean" condition, conduct themselves in conformity with all applicable laws, ordinances, and regulations, keep a record of all trips as required by the city of Orlando and the Orlando airport concession agreement, and pay a security deposit. The driver is not permitted to assign any rights or duties. Further, the contract requires that the owner and the driver agree that there is no employment relationship between them and the driver is to perform taxicab service free from interference or control on the part of the owner. The term of the agreement is for a period of 12 months, but a driver's failure to purchase services for 5 consecutive days and/or the Employer's failure to deliver services results in a cancellation of the agreement.

In addition to the above, the contract requires drivers to honor provisions of the concession agreement between the Orlando airport and the Employer. Under the terms of the airport concession, the Employer promises that its drivers shall accept all passengers desiring service and that no selection of passengers according to destination shall be permitted at any time. To meet this obligation, the Employer published rules governing the operation of cabs at the airport. Under the rules, the Employer's supervisors, called starters, are responsible for assisting arriving passengers obtain a cab. The starter determines which of two methods of rotation of the order of picking up passengers is to be used. A starter also may skip over the cab which is next in line if he thinks another vehicle is more appropriate. Contract drivers may refuse to take a passenger, but, if they do, they may be required to go back to the end of the line.

The cabs driven by contract drivers are wholly owned by the Employer. Employer advertisements are placed on the trunks of the cabs and income realized from these advertisements is not shared with the drivers. Both commission and contract drivers are provided with cards containing the Employer's name and address, which may be given to passengers. The cards do not show the driver's name, but the driver's name may be written on the card.

Both contract and commission drivers must report to the Employer's facility at West Gore Street to get a cab. Commission drivers are required to work shifts, while contract drivers may report to work whenever they want. However, the Employer's office is closed between 11:30 a.m. and 2:30 p.m. each day, preventing a driver from beginning or ending work during these hours. The cabs are assigned on a first-come, first-served basis, regardless of the driver's status. If a contract driver wants to drive the same cab daily, he must get to the office before another driver, whether commission or contract, is assigned that cab. Therefore, as a practical matter, contract drivers report at the same time as commission drivers.

Upon checking in, the Employer's personnel at the desk review the drivers' appearance. The Employer's practice has been to require that the contract drivers be clean shaven, wear a shirt with a collar, and refrain from wearing blue jeans, shorts, or tennis shoes. A hat may be worn, but it must be one designated by the Employer as a cabdriver's hat. If a contract driver fails to meet these standards of appearance, he is not allowed to drive a cab.

After receiving a cab, the contract driver is provided with a trip sheet. While driving, he may use the Employer's dispatcher to receive customer calls. Unlike commission drivers, contract drivers are, at least theoretically, not bound to the dispatch system and may give service to customers obtained by prearrangement without the Employer's knowledge. However, a number of contract drivers have received oral reprimands from a dispatcher when they refused his request to pick up riders, preferring to seek their own customers.

The Employer frequently agrees to haul groups of passengers for a rate less than the metered rate,

because of the volume of business. Most of these arrangements come from the airport.[7] A commission driver must take these group passenger arrangements, while contract drivers may refuse to do so. If the latter refuse, however, they lose their place in the line at the airport. If they take the fixed rate passengers, they are not compensated for the difference between the fixed rate and what would have been the metered rate.

In addition to arranging for fixed rates with groups of passengers the Employer also arranges a flat rate for hauling of luggage alone. The Employer sets this rate and, if the contract driver elects to take the luggage, he is not compensated for the difference between hauling the luggage at a flat rate and hauling it at the metered rate where it is treated as a passenger. Contract drivers may make individual arrangements with airlines to haul luggage, while commission drivers may not. One contract driver has done so.

In determining whether individuals are employees or independent contractors under the Act, the Board has consistently applied the right-to-control test. Under this test, an employer/employee relationship exists when the employer reserves the right to control both the result to be achieved and the means to be used in achieving it. When, however, the employer reserves only the right to control the result to be achieved, an independent contractor relationship exists. The test requires an analysis and balancing of the facts in each case.[8]

In our view, a balancing of the facts in the instant case results in a finding that the factors pointing toward employer control outweigh those pointing toward independent contractor status. A major indication of the contract drivers' lack of independence can be found in the manner in which the contract was established and in the terms it contains. While the contract purports to cover a 12-month period, in practice the Employer changed the contract whenever it desired. The drivers did not negotiate any of these contracts with the Employer, and in every case they were required to sign the agreement if they wanted to continue driving. Further, the terms of the contract reserved to the Employer the right to change the rate schedule at any time and the Employer exercised this right eight times in 6 months. Thus, through its ability to make unilateral changes in the contract and the rates at any time, the Employer effectively controls the conditions under which the drivers will work and the amount of money they can earn.

Other terms in the contract also result in the exercise of a large degree of control by the Employer. Many, if not all, of the contract drivers service the airport. When they work at the airport, under rules established to meet the obligation of the concession agreement, they must follow the Employer's starters' directions or suffer a penalty in terms of lost opportunities for failure to do so. The Employer is thereby able to assert control over which passengers the drivers will take and how much they will earn. Similarly, by fixing rates for hauling luggage from the airport, the Employer predetermines the earnings of contract drivers who choose to engage themselves in this service.

Further, the contract requirement that drivers be "neat and clean" is so broad that the Employer may and does interpret it in such a way as to effectively prescribe its own dress code for the drivers. The Employer has refused cabs to drivers who did not conform. In practice the Employer, by cab assignments and its hours of operation, regulates the contract drivers' hours of work. In addition, the drivers have no investment in the instrumentalities of their work and are not permitted to sublease. The work performed by them is an essential part of the Employer's normal operations, and the income and goodwill arising from the advertisements on the cabs they drive inure entirely to the Employer's benefit.

True, factors are present which point toward independent contractor status. There are no fringe benefits. Contract drivers may refuse Employer-arranged passengers and independently prospect for fares. However, as indicated above, in our view, these factors are outweighed by those discussed earlier which support the finding of an employer/employee relationship. Accordingly, we find that the contract drivers are employees within the meaning of the Act and are included in the unit.

Remaining for consideration is the question of whether the drivers working in the city of Winter Park should be included in the unit. All of these individuals are commission drivers; hence, as the Employer admits, they are employees under the Act. The Employer first contends, however, that they are temporary employees and should therefore be excluded from the unit. In support of this, the Employer points to the following facts:

Yellow Cab Co. of Orlando, Inc., had previously sold a number of cabs to Safety Cab Co. of Winter Park, Inc., and held mortgages on this equipment. Safety Cab Co. went bankrupt on January 31, 1977, and Yellow Cab Co. repossessed the cabs and applied to the city of Winter Park for franchised authority to take over Safety's operations. It received the authority to operate approximately 20 cabs, took over Safety's 22 employees, and began operations.

[7] Approximately 50 percent of the Employer's business comes from the airport.

[8] *Yellow Cab Company*, 229 NLRB 1329 (1977); *Twin City Freight, Inc., S & B Nelson, Inc.*, 221 NLRB 1219 (1975).

However, two other cab companies have pending applications with Winter Park. Yellow Cab has notified the city that the permit it has been granted allows for the operation of an insufficient number of cabs to make the operation profitable, and that it will therefore cease operations if the other two companies are granted permits. Thus, the Employer argues, the Winter Park drivers are temporary employees. We disagree. At the present time the Employer has full and unconditional authority to operate in Winter Park and is in fact doing business there. The question of whether or not the operation will continue is solely within the Employer's control, and it has as yet made no decision on this question. Winter Park drivers, therefore, can only be found to be temporary employees on the basis of a future possibility. Our findings, however, are based on what is and not on what may be. Accordingly, we find that the Winter Park drivers are regular employees.

The Employer further contends that, in any event, the Winter Park drivers do not share a community of interest with unit employees.

The Winter Park drivers report to the Employer's Gore Street facility to pick up their cabs. They then travel 15 to 20 miles to Winter Park where they operate out of former facilities and a dispatch system of Safety Cab Co. While on duty, the drivers operate under the direction of the Winter Park dispatcher, advertise and charge different fares pursuant to the Winter Park ordinances, and can only pick up fares within the Winter Park area. At the close of the workday, they return the cabs to the West Gore Street facility. The cabs are serviced and maintained at the Employer's garage. The drivers are under the supervision and control of the Employer's supervisors and are paid by the Employer. All records pertaining to their operation are maintained at the Gore Street facility by the Employer's clerical employees.

Contrary to the Employer's contentions, we find that the Winter Park drivers share a community of interest with the other unit employees. Although they use a different dispatch system, charge different fares, and are confined to a specific geographic area, they share the same supervision, report to work at the same facility, have their cabs stored and serviced at the same facilities, and have records kept at the same office as the other unit employees. Accordingly, we find that these employees are included in the unit.

On the basis of the foregoing, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular and part-time taxi drivers at the West Gore Street, Orlando, Florida, facility, including contract drivers and Winter Park drivers; excluding all other employees, dispatchers, starters, office clerical employees, guards and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]