

OKLAHOMA TRAILER CONVOY, INC., PETITIONER *and* TULSA GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 523, AFL.
Case No. 16-RM-45. June 27, 1952

Decision and Order

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Charles Y. Latimer, hearing officer. 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:¹

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organization involved claims to represent certain employees of the Employer.
3. No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act, for the following reasons:

The Union seeks to represent the assistant dispatcher and the drivers of trucks either owned or leased by the Company, Oklahoma Trailer Convoy, Inc. The Company, although agreeing that the unit should include the assistant dispatcher and the drivers of its own trucks, contends that drivers of leased trucks are not in its employ, but are independent contractors, employees of independent contractors, or supervisors, who should be excluded from any unit found appropriate.

The Company, operating under an Interstate Commerce Commission certificate of convenience and necessity, is engaged in the delivery of house trailers from Tulsa, Oklahoma, to various parts of the country. In these operations it utilizes about 94 trucks, of which it owns 4 and leases the rest. The trucks it owns are driven by individuals who are concededly employees of the Company. With respect to the leased trucks, the relations between the Company and the owners of those trucks are governed by a standard lease. Such leases have been used by the Company virtually since the inception of its operations in 1947.

The lease provides substantially as follows: The owner will provide such vehicles as the Company requires, with competent drivers, to perform such carriage as is required; the owner will be responsible for setting and paying the wages of any drivers supplied, who are under-

¹ On May 19, 1952, the Board permitted International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, herein called Teamsters, with which the Union is affiliated, to intervene in this proceeding and to file a brief. The Employer was permitted to file a reply brief.

The Teamsters and the Union also filed requests for oral argument which were heretofore denied by the Board.

stood to remain employees of the owner and not of the Company; the owner will be responsible for keeping the vehicles in good operating condition as required by the rules and regulations of the Interstate Commerce Commission, and will furnish all materials necessary for that purpose; the owner will

comply with all pertinent rules and regulations whenever said transportation may occur or be required, and shall further comply with the instructions given by the Carrier [i. e., the Company] with relation to the manner and method of caring for and handling the traffic transported for the Carrier under this agreement. It is understood that as between the operator [i. e., the owner] and the Carrier, the Carrier shall have the entire supervision concerning direction and control over the transportation of traffic under this agreement, such as the designation of points of origin and destination, and issuance of general instructions to be observed and carried out by operators for the proper handling of the Carrier traffic in compliance with the rules and regulations of the Interstate Commerce Commission;

the owner shall also indemnify the Company up to a certain amount (left blank in the contract) for any damage to traffic under the owner's control; the owner shall comply with all applicable employer's liability, workmen's compensation, and workmen's insurance provisions, shall submit proof of such compliance to the Company when required to do so, and shall indemnify the Company for any losses resulting from failure to comply. Despite any agreement to the contrary, the Company remains liable to the public for the performance of the obligations of a motor carrier as prescribed by the Interstate Commerce Commission. If workmen's compensation is required, the Company may insure for the benefit of the owners, but this shall not be construed to make the drivers or owners employees of the Company. Payment is on a sliding scale based upon the mileage covered, as determined by a standard guide, and size of the trailer hauled. The leases are all for a 1-year period, but may be terminated by either party upon a 30-day written notice.

The Company has such leases with about 73 truck owners, 6 of whom lease from 2 to 7 trucks to it.² The trucks, which are required to bear the Company's name and ICC certificate number, are not of any special design. The owners supply most license plates,³ and are required to post a bond of \$100 per vehicle. Although the Company suggests to owners that they carry insurance, they are not required to do so. How-

² The record indicates that when the Company instituted its lease system it sold about 20 of the 30 trucks it then owned to its employees. There is no evidence that any such sales have occurred since that time.

³ The Company, in addition to ICC plates, supplies certain unidentified State plates and permits.

ever, the Company does carry a fleet policy which protects vehicles while engaged in its business.

Approximately two-thirds of the leased trucks are driven by the owners themselves; in the remaining instances, the owner generally furnishes the driver. All prospective drivers must fill out an application for employment, take a physical examination,⁴ and be approved by supervisory personnel of the Company. This is true for both owner-drivers and those who are going to drive for owners who have already approved them. Any owner can discharge his drivers without company approval, and, in certain isolated instances, the Company has exerted pressure to effect the termination of drivers of whom it did not approve.

Drivers of leased trucks are assigned trailer deliveries in the order of the drivers' availability.⁵ They need not stay on company premises while awaiting such assignment. Nor need they accept any assignment offered. The penalty for refusal, not always enforced, is dropping to the bottom of the availability list, although in one instance a driver who refused an assignment was asked to resign. In assigning trailers for delivery, the Company does not specify times of departure or arrival, nor does it give the driver any instructions other than his destination and the general admonition to get there safely.⁶ It does, however, attempt to make a safety inspection of every truck going out.⁷ Drivers are not given routings unless they request them, although they will be told, when necessary, that State regulations may require them to go through certain points. Owners of leased trucks engage in hauling for the Company substantially to the exclusion of any other work. However, they are not required to do so, and occasionally make side trips for their own purposes in returning from deliveries. They are also permitted to do hauling on their own account, although where the Company has heard of "wildcatting," i. e., unauthorized interstate trucking, it has reprimanded the driver involved.

All drivers, admitted company employees as well as those here in issue, are paid on a mileage basis, generally after each trip. As to leased truck owners, the rates paid were originally those fixed in the leases. However, because the trailers currently manufactured are larger than those made when the lease was drawn up, a higher rate, unilaterally determined by the Company, is now being paid without formal amendment of the lease. The base rate of drivers of company trucks is 1 cent per mile less than that paid others, because no truck

⁴The Company supplies the form for this examination, but it can be given by any physician of the applicant's choice.

⁵Company employees and drivers of leased trucks are included in one list.

⁶However, the Company maintains a road patrol which can take a driver off the road if his driving is not satisfactory. It also contemplates the establishment of a class for student drivers.

⁷One of the owners testified that he tried to do the same thing with respect to his trucks; this is in addition to the company inspection.

maintenance is involved. In the case of owner-drivers, the above gross payment is their compensation. In the case of drivers of leased trucks who do not own trucks, the cost of gas and oil is deducted, and the remainder is divided equally between the owner and the driver. The latter method applies also between the Company and its admitted employees, so that to this extent payment is similar for all nonowner drivers. The Company grants advances against earnings to drivers of its own trucks without charge. Owners and drivers of leased trucks are charged \$1 per \$25 advanced.

Payments with respect to drivers of leased trucks are made to the owner unless an arrangement for direct payment to the driver has been made. The Company does not deduct any social security, withholding taxes, etc., from the earnings of the owners and their drivers,⁸ nor, it appears, do most of the operators. However, Bland, who leases seven trucks to the Company, gets directly from the Company the pay due his drivers, and then settles with them, withholding any taxes, and paying social security and workmen's compensation, for them.

As the Board has frequently held, the determination of whether an individual is an independent contractor or an employee under the amended Act requires the application of the common law "right of control" test. Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved but also the means to be used in reaching such end.⁹ The resolution of this question depends on the facts of each case and no one factor is determinative.¹⁰

On the entire record in this case, we are of the opinion that the owners of leased trucks are independent contractors, rather than employees, and the nonowner drivers of leased trucks are employees of independent contractors, not of the Company.

⁸ One owner of more than one truck testified that the Company paid social security and withholding taxes on his drivers. However, the Oklahoma Employment Security Commission has held, in effect, that the drivers and owners here involved are not employees of the Company, in a proceeding that arose as a protest by the Company against assessment for nonpayment of withholding taxes and social security. It would therefore appear unlikely that the Company made such payments after having successfully contested that very issue.

⁹ Contrary to the implication of our dissenting colleague, the application of this test does not in any manner disregard the congressional intent. Rather, as the Board has frequently held, this test conforms to the mandate of Congress that the Board give to the terms "employee" and "independent contractor" their conventional meanings, and that the Board, in determining coverage under the Act, follow the usual tests of the law of agency. See e. g., *Steinberg & Company*, 78 NLRB 211, set aside on grounds not here material at 182 F. 2d 850 (C. A. 5); *J. Howard Smith*, 95 NLRB 21; *Spickelmier Company*, 83 NLRB 452.

¹⁰ *Southern Shellfish Co., Inc.*, 95 NLRB 957.

The Union contends that, under the Interstate Commerce Act, 49 U. S. C. § 301 *et seq.*, and the Company's certificate of convenience and necessity as a carrier, the relation of employer and employee between the Company and the drivers of leased trucks is established as a matter of law. We find this contention to be without merit. *Greyvan Lines, Inc., v. Harrison*, 156 F. 2d 412 (C. A. 7), affirmed *sub nomine U. S. v. Silk*, 331 U. S. 704; *U. S. v. Mutual Trucking Co.*, 141 F. 2d 655 (C. A. 6).

We note particularly the bona fide and absolute ownership of the trucks by the owners. Such ownership of the facilities to be used gives rise to an inference of that control over the manner of performance which is associated with the status of an independent contractor.¹¹ Also significant in demonstrating the entrepreneurial nature of the owners is the fact that the *owners* determine whether to drive the trucks themselves or to employ others to do so. Indeed, some owners lease up to seven trucks to the Company. Moreover, the owners can control in part their profit or loss not only by determining whether or not to drive themselves, but also by such matters as their diligence and efficiency in the repair and maintenance of trucks, which are solely their responsibility and which can be performed by persons of their own choosing.

While the Company has reserved and exercised certain control over the work of the owners and their drivers, such reservation and exercise of control have been directed essentially to the end to be accomplished, namely the delivery of trailers in conformity with the rules and regulations of the Interstate Commerce Commission, and are not inconsistent with the independent contractual relationship.¹² That the owners retain substantial independence in their operations is clearly revealed by their virtual freedom in deciding when or whether they will take an assignment, in selecting routes, and in fixing the time of delivery and time of return, as well as their determination as to whether they or others will drive and their selection of maintenance facilities, discussed above. Furthermore, they are free to haul for others and their trucks are not specially designed for the Company's operations.

The expressed intent of the parties as to the nature of the relationship has also been considered of some significance by the Board and the courts in determining the existence of an independent contractual status.¹³ Here the parties, in their agreement, specifically indicated that the owners and drivers of leased trucks are not employees of the Company; the owners are required to post bonds and supply most of their own license plates; and the Company does not withhold the taxes, not pay the social security taxes, of the drivers of leased trucks.

The total circumstances surrounding the relationship of the drivers of leased trucks to the Company, set forth above, are closely analogous to those considered by the Supreme Court in the *Greyvan* case.¹⁴

¹¹ See *Nelson-Ricks Creamery Company*, 89 NLRB 240; *American Factors Company*, 98 NLRB 447. Cf. *N. L. R. B. v. Nu-Car Carriers, Inc.*, 189 F. 2d 856 (C. A. 3), cert. den. 342 U. S. 919, where the Court, although finding certain drivers to be "employees" on facts manifestly different from those in the present case, recognized that ownership of equipment raises "the inference of right of control. . . ."

¹² See *Greyvan Lines, Inc. v. Harrison*, footnote 10, *supra*.

¹³ *Nelson-Ricks Creamery Company*, footnote 11, *supra*; *U. S. v. Mutual Trucking Co.*, footnote 10, *supra*.

¹⁴ *Greyvan Lines, Inc. v. Harrison*, footnote 10, *supra*.

There, as here, the issue was whether truckmen, who drove trucks for a company which was a common carrier by motor truck operating under an ICC certificate, were employees or independent contractors. The truckmen in that case, who were covered by a union contract, hauled exclusively for the company under contracts terminable at will by either party, and were not permitted to do any hauling on their own account. They furnished their own trucks, which bore the Greyvan name, and all equipment and labor needed to pick up, handle, and deliver shipments, and were paid on a sliding percentage basis. They also furnished all insurance the company required, although the company carried cargo insurance; paid all losses or damage to shipments; indemnified the company for any losses caused by themselves or their servants; made collections; and had to post bonds. The company prescribed that the truckmen drive their trucks at all times or be present when a competent relief driver was driving "except in emergencies, when a substitute might be employed with the approval of the company." With respect to the manner in which the work was to be done, the company directed the truckmen when and where they were to load freight, and had a staff of dispatchers who issued orders, and to whom the truckmen were required to report their position at intervals. In addition, truckmen were required to take a course in the company's manner of operating, and to "follow all rules, regulations, and instructions of the company." The company had some trucks driven by truckmen who were admittedly company employees and operations under the two systems were carried out in the same manner.

The Supreme Court, applying a *broader* test of the meaning of "employee" based on the purposes of the Social Security Act, found that the truckmen in *Greyvan* were independent contractors. In our opinion, that decision is clearly controlling in the present case.¹⁵ Indeed, the present case more strongly indicates an independent contractual relationship because, for example, the drivers of leased trucks here, unlike those in *Greyvan*, are *not* required to haul exclusively for the Company, or to report their position to the Company; no course is presently conducted in the method of the Company's operations; there are some differences in the working conditions of admitted employees; and the owners are not limited in selecting substitutes to times of emergency or relief.¹⁶

¹⁵ See also the *Mutual Trucking* case, footnote 10, *supra*.

¹⁶ The Teamsters, in attempting to distinguish the *Greyvan* case, alleges that the cost of equipment supplied by the truckmen there was substantially larger than that furnished by the owners here. Even assuming the validity of such allegation, which is not supported by the record and fails to account for owners supplying more than one truck, it is clearly not controlling.

The dissent also seeks to distinguish the *Greyvan* case on grounds such as the present Company's restriction of the transportation of passengers by drivers, and the absence in *Greyvan* of a road patrol and of company control over the selection of helpers and drivers. However, the Company's requirement as to passengers merely conforms with ICC regula-

We therefore find that the owners of these leased trucks are independent contractors and that the nonowner drivers are their employees.

Having found that the owners and drivers of leased trucks are not employees of the Company, we would, ordinarily, exclude them from any unit found appropriate. If we did this here, however, the unit which would remain would be so much smaller and so substantially different from that sought by the Union, that, on this record, we believe it would serve no useful purpose to direct an election therein.¹⁷ We shall therefore dismiss the petition, without prejudice to the right of the Union to seek an election in the small unit if it so desires.

Order

Upon the basis of the entire record in this case, the National Labor Relations Board hereby orders that the petition filed herein be, and it hereby is, dismissed without prejudice.

MEMBER STYLES, dissenting:

Contrary to the majority, I would find the unit sought by the Union to be appropriate and would direct an immediate election therein.

The Union seeks a unit consisting of the following categories:

(1) The drivers of trucks owned by the Employer, and the assistant dispatcher. (It is not disputed that these individuals are employees of the Employer.)

(2) The operators of trucks leased to the Employer, who may be classified as follows:

(a) Those who own and drive one such truck. (This applies to about two-thirds of the leased trucks.)

(b) Those who own more than one truck, drive one, and procure drivers for the others.

(c) Those who drive a truck without owning it.

As to all these classes of operators of leased trucks, the Employer contends, and the majority finds, that they should be excluded from the unit because they are independent contractors, or employees of independent contractors. I do not agree. In my view of the case,

tions. The maintenance of a road patrol is not determinative. (See, for example, *Mutual Trucking*, footnote 10, *supra*). Helpers are unnecessary here, the transportation of trailers being essentially a one-man job. And, as to the selection of drivers, company approval of a substitute driver was also required in *Greyvan*, and such approval appears necessary to insure compliance with ICC regulations as to driver qualifications. More important, as already noted, the owners here are virtually free to determine whether they or others will drive, and as the court of appeals stated in the *Greyvan* case, in connection with the choice of helpers: "We think it cannot be said that a truckman to whom is left the determination of whether to do the work himself or to engage others to do it is a mere employee." *Greyvan Lines, Inc. v. Harrison*, 156 F. 2d 412, 416.

¹⁷ Cf. *American Broadcasting Company, Inc.*, 93 NLRB 1410; *Wm. Wolf Bakery, Inc.*, 97 NLRB 122.

all the operators of leased trucks, including the owner-drivers, are employees of the Employer, and, together with its admitted employees, constitute a unit appropriate for the purposes of collective bargaining.

In reaching this conclusion, I regard the following factors as more persuasive than those relied upon by my colleagues:

(1) As recited in the majority opinion, the "lease-contract" between the Employer and the truck owners requires the owners "to comply with the Employer's instructions with relation to the *manner* and *method* of caring for and handling the traffic transported" for the Employer. [Emphasis added.]

(2) The drivers who are not truck owners, while hired in the first instance by the owners, must be approved by the Employer.

(3) While the drivers who are not owners may be discharged by the owners, the Employer has, in fact, secured the discharge of drivers not acceptable to it. Moreover, the lease agreements, themselves, are terminable upon 30 days' notice by either party.

(4) Apart from occasional side trips and hauling jobs done for others, the owners haul exclusively for the Employer.

(5) The Employer maintains a road patrol, which can take a driver off the road if his driving is not satisfactory. (See footnote 6 of the majority opinion.)

(6) No passengers are allowed on the trucks without the written permission of the Employer.

It should not be forgotten that we are dealing here with the construction of a provision excluding a particular category of individuals—"independent contractors"—from the protection of the Act. It is a well-settled rule that exceptions to the general provisions of a statute are to be strictly construed, particularly where, as here, the statute has a remedial purpose.

As the majority acknowledges, the critical test of the existence of an employer-employee relation is the reservation of the right to control not only the end result but also the means by which it is to be achieved.¹⁸ It seems to me to be beyond dispute that such a right to control is reserved in the lease agreement, which expressly requires the owners to comply with the Employer's instructions with respect "to the *manner* and *method* of caring for and handling traffic."

If, then, the *right* to control exists here, it is immaterial whether or not it is actually exercised.¹⁹ However, as already stated, the Employer does, in fact, exercise substantial control over the method of operation of the owners by supervising their selection of drivers, by requiring the termination of drivers not acceptable to it, by super-

¹⁸ *N. L. R. B. v. Nu-Car Carriers*, 189 F. 2d 756 (C. A. 3), enfg., 88 NLRB 75, cert. den., 342 U. S. 919. In that case, the court affirmed the finding of the Board, on the basis of facts analogous to those presented here, that owner-drivers were employees under the Act.

vising, through its road patrol, the conduct of drivers, including owner-drivers, while on the road, and by regulating the transportation of passengers by the drivers. None of these elements of actual control over the conduct of drivers was present in the cases cited by the majority in support of its conclusion that the drivers of leased trucks are not employees of the Employer.²⁰ For that reason, as well as the fact that those cases dealt with a different statute,²¹ I do not deem them controlling.

My colleagues, while not disputing that the right to control the drivers is reserved to the Employer by the contract, rely principally on the fact that (1) the trucks are not owned by the Employer but are supplied by the drivers and others pursuant to lease agreements; (2) the Employer does not in fact exercise control over all the details of operation of the leased trucks; and (3) the earnings of the owner-drivers depend on their diligence and efficiency. However, it is difficult to see the relevance of these factors, if, as the Board and the courts have frequently stated, the *right* to control the method of operation is alone sufficient to establish an employer-employee relation.

Moreover, as to the matter of ownership of the trucks, it appears that many State and Federal courts, applying common law tests, have held that owner-drivers are employees of the persons for whom they regularly render services under contract, so as to make such persons liable in tort for the negligence of such drivers.²²

The fact that the net compensation of the owner-drivers depends on their diligence and efficiency places them in no different position from employees who are paid on a piecework or incentive basis. My colleagues would hardly contend that an hourly paid employee who is assigned an incentive rate thereby ceases to be an employee and becomes an independent contractor because his earnings thereafter will depend on his efficiency and diligence.

It is mere semantics to say, as the majority does, that the reservation and exercise of control by the Employer in this case is "directed essentially to the end to be accomplished, namely, the delivery of

¹⁹ *N. L. R. B. v. Nu-Car Carriers, supra.*

²⁰ Thus, neither in the *Greyvan* nor in the *Mutual Trucking* case, cited in the majority opinion, was there any evidence that the carrier exercised any control over the hiring of helpers or drivers by the "owner-operators." The absence of such control was one of the principal factors relied upon by the court in the *Nu-Car Carriers* case, *supra*, in distinguishing those cases.

²¹ Both *Greyvan* and *Mutual* arose under the Social Security Act and the related taxing statute. In *Greyvan* the court stated that its finding that owner-operators were not employees turned upon its view as to the purpose of the statutes involved.

²² See cases collected in footnote 15 in the opinion of the Supreme Court in the *Greyvan* case. Many cases to the same effect are cited in the Union's brief filed in the case at bar.

trailers in conformity with the rules and regulations of the Interstate Commerce Commission. . . .” While this may be the ultimate purpose of the Employer, the fact remains (and my colleagues do not dispute this) that the Employer, in addition, retains the right to control the means to be used in achieving this purpose, and—if it be relevant—exercises that right to a significant degree. It is meaningless to say that control over the means is directed to the achievement of a particular end. This is true in every case, and cannot negate the existence of an employer-employee relation.

Finally, no mention is made in the majority opinion of the language in the Report of the House Committee on Education and Labor, defining the term “independent contractor” as used in the Bill which became the Taft-Hartley Act.²³ In distinguishing “independent contractors” from “employees,” the Report stated :

“Independent contractors” undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor, and what they receive for the end result, that is upon profits.

The foregoing statement is the clearest indication in the legislative history of the amended Act as to the intent of Congress in excluding “independent contractors” from the definition of “employee” in Section 2 (3) of the Act.²⁴

As already stated, the owner-drivers do not have unfettered discretion to “decide how the work will be done.” That discretion is reserved to the Employer in the contract, and in actual practice the Employer exercises an important degree of control over how the job will be done. Most of the owner-drivers do not “hire others to do the work,” but own only one truck, which they drive themselves. Moreover, the hiring of nonowner drivers of leased trucks is subject to the approval of the Employer. The drivers of leased trucks do not purchase any goods or materials for resale. Accordingly, there is no warrant in the legislative history of the amended Act for finding all the owner-drivers to be independent contractors, or that the nonowner-drivers of leased trucks are employees of independent contractors.

For all the foregoing reasons, I would find that the owner-drivers and nonowner-drivers of leased trucks are employees, not independent contractors. Accordingly, I would direct an election in the unit sought by the Union.

²³ House Rep. No. 245, 80th Cong., 1st Sess., at p. 18.

²⁴ See *Spickelmier Company*, 83 NLRB 452.