

carefully pointed out the method of marking the ballots and repeated such instructions to each voter more reliable evidence that the field examiner adequately explained election processes than the hearsay evidence to the contrary.

The Employer also excepts to the Regional Director's finding that there was no evidence that Edwards was intoxicated when he voted but that no material question is raised because the Employer's observer did not challenge Edwards on that ground at the time he came to vote. We agree with the Regional Director's findings, but would in any event find that the mere use of intoxicants by several voters would not warrant setting an election aside.<sup>1</sup>

The Employer also contends that the field examiner improperly permitted Young, an organizer for the Petitioner, to vote and cast a challenged ballot and that his being permitted to vote, in itself, exerted undue influence and had a coercive effect upon the voters in the election. Like the Regional Director, we agree that the field examiner properly permitted Young, who claimed to be a laid-off employee and who was, at least, a former employee, to cast a challenged ballot, despite his possible status as a union official, and that the voting of such an official at the election did not exert undue influence, or have a coercive effect, upon the voters.<sup>2</sup>

Accordingly, we will adopt the recommendations of the Regional Director, dismiss the Employer's objections, and certify the Petitioner as the exclusive bargaining representative for the appropriate unit.

[The Board certified United Stone & Allied Products Workers of America, CIO, as the designated collective-bargaining representative of all production and maintenance employees, including the one truckdriver of the Watkins Brick Company, but excluding all office clerical employees, professional employees, the brick burner guards, and supervisors as defined in the Act.]

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<sup>1</sup>A. Werman & Sons, Inc , 106 NLRB 1215.

<sup>2</sup>See Soerens Motor Company, 106 NLRB 1388 (presence as an observer of a union official)

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MALONE FREIGHT LINES, INC. *and* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL. Case No. 32-CA-307. December 23, 1953

### SUPPLEMENTAL DECISION AND ORDER

On September 15, 1953, the Board issued a Decision and Order<sup>1</sup> in the above-entitled proceeding, adopting the findings,

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<sup>1</sup>106 NLRB 1107.

conclusions, and recommendations of the Trial Examiner, dismissing the complaint for the reason that the owners-drivers herein were independent contractors, not employees within the meaning of the Act. On September 21, 1953, the charging Union filed a request for reconsideration and oral argument<sup>2</sup> and, on October 14, 1953, a memorandum in support. The Respondent filed a response to the Union's request on October 26, 1953.

The Union, in its memorandum supporting the request for reconsideration, recites matters which allegedly indicate that the owners-drivers were employees within the meaning of the Act and not independent contractors. These purported indicia of employee status appear in the record and were presented in the Union's exceptions to the Intermediate Report; also, arguments in support of the Union's position on these matters were previously presented in the Union's brief in support of its exceptions. As noted in the initial Decision and Order herein, the Board has already given full consideration to the exceptions and briefs and the entire record in the case.

The question of whether owners-drivers are employees within the meaning of the Act or independent contractors depends upon the facts of each case and no one factor is determinative. That the Union subscribes to this proposition is clear from its brief in support of exceptions to the Intermediate Report. Basic to the controversy involved herein is the presence of factors tending to support in some instances the existence of an employer-employee relationship and in others of independent contractor status. The decided cases believed to be most similar factually to the instant case are Nu-Car Carriers,<sup>3</sup> in which the drivers-owners were found to be employees within the meaning of the Act, and Greyvan<sup>4</sup> and Oklahoma Trailer,<sup>5</sup> in both of which the drivers were found to be independent contractors. We, like the Trial Examiner, have found that the facts of the instant case are more like those in the Greyvan and Oklahoma Trailer cases than those in Nu-Car Carriers.

There is one particularly significant factual distinction between this case and Nu-Car Carriers relating to the nature of the ownership of the trucks. In Nu-Car Carriers the drivers did not own their vehicles when they started working for the employer; the company and the drivers executed simultaneous sale and lease agreements whereby the company sold tractors to the operators for small down payments and the drivers then leased the tractors to the company. Installment payments on the balances due on the vehicles were deducted from the

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<sup>2</sup> The Union's request for oral argument is hereby denied, because, as the Board stated in its initial Decision and Order herein, the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>3</sup> *N L R B. v. Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C. A. 3), cert. denied 342 U. S. 919.

<sup>4</sup> *Greyvan Lines, Inc. v. Harrison*, 156 F. 2d 412 (C. A. 7), affirmed subnomine *United States v. Silk, etc.*, 331 U. S. 704

<sup>5</sup> *Oklahoma Trailer Convoy, Inc.*, 99 NLRB 1019.

drivers' subsequent earnings. Of particular significance is the fact that title to the tractors remained in the company with the reserved right to repurchase the vehicles upon termination of the lease agreements. On the other hand, the owners-drivers in this case owned their tractors exclusive of any proprietary interest by the Respondent at the time they started hauling for the Respondent and thereafter.

There are some factual similarities between this case and Nu-Car Carriers, which the Union cites in support of its contention that the owners-drivers in this case are employees within the meaning of the Act. However, we believe that the dissimilar features of these two cases (particularly the ownership factor detailed above) and other factors, which were stressed as indicia of independent contractors in the Greyvan and Oklahoma cases, outweigh the effect of the similarities between the instant case and Nu-Car Carriers. Some of the more significant of such other factors relating to the owners-drivers' relationship to the Respondent are: (1) Responsibility for the payment of necessary license fees and taxes;<sup>6</sup> (2) obligation to pay any labor costs incidental to the loading or unloading of freight; (3) responsibility for keeping equipment in good operating condition; and (4) obligation to pay for tractor repairs and upkeep.

In addition, there are facts peculiar to this case which we believe are further indicia of independent contractor status. The Respondent did not deduct or pay for its owners-drivers any of the following: Social security, withholding taxes, State employment taxes, or workmen's compensation. Furthermore, the drivers did not participate in any of the following benefits which the Respondent's ordinary employees received: Paid vacations, group life, health, and accident insurance, bonus plan, or retirement plan.

To summarize the Board's position in this case, we believe the language of Justice Reed in the Greyvan case is particularly applicable, "It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound judgment, that marks the drivers-owners as independent contractors." Therefore, we affirm our initial Decision herein, and we shall deny the Union's request for reconsideration.

[The Board denied the request for reconsideration.]

Member Murdock took no part in the consideration of the above Supplemental Decision and Order.

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<sup>6</sup> The Respondent did, however, pay the Alabama State mileage tax for the drivers.