

Hovenkamp, this necessitated placing empty cases of returned bottles on top of new merchandise and involved extra time for the transfer of this merchandise at each stop. According to Respondent, there was ample space to handle this mixed load and, at best, the evidence is again equivocal. The final straw, according to Respondent, was the performance of Hovenkamp on August 28 when he was unable to make two stops. Only one other employee skipped stops that day and he missed but one. As Respondent viewed it, this other employee covered a larger territory and the dereliction was more readily excusable. Indeed, according to President Snyder, the route should have been handled in less than 5 hours by Hovenkamp.

On balance, perhaps the complaint of the employees should have been with their collective-bargaining representative rather than their employer, for they are bound by what their bargaining representative has negotiated in their behalf. *Ford Motor Company v. Huffman*, 345 U.S. 330. Stated otherwise, Respondent signed and attempted to obtain the benefits of a favorable collective-bargaining contract. This hardly constitutes a preponderance of evidence that Respondent was discriminatorily motivated or that Hovenkamp was discharged for engaging in a protected concerted activity. Indeed, the inference may be warranted that Respondent, with some justification, concluded that its employees were engaging in a slowdown.<sup>6</sup>

Actually, further support for Respondent is presented in the testimony of Hovenkamp that 3 or 4 days before his discharge, on either August 24 or 25, Operations Manager Conger spoke with him and pointed out that Hovenkamp had omitted two scheduled stops. Hovenkamp defended this on the basis that he did not have enough time to make them. Still other support for Respondent's position is added by the fact that on August 28 Respondent also discharged for unsatisfactory performance three temporary employees.

In this context, I find that: Respondent, enjoying the fruits of its contract with the Union, sought to influence its employees to work more rapidly; this hope had not been realized for 1 week; fortuitously, Hovenkamp was the most serious offender on August 28; and Respondent decided to discipline and discharge him for this reason. I find that the evidence does not preponderate in favor of the position of the General Counsel. I shall, therefore, recommend that the complaint be dismissed in its entirety. See *Traylor-Pamco*, 154 NLRB 380.<sup>7</sup>

#### CONCLUSIONS OF LAW

1. The operations of Respondent, Southside Distributing Co., Inc., affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

#### RECOMMENDER ORDER

In view of the foregoing findings of fact and conclusions of law, it is recommended that the complaint be dismissed in its entirety.

<sup>6</sup>This is not to say that employees may not strike with statutory protection against unsatisfactory working conditions. It is to say that they must choose between either working or striking and that a slowdown may not be protected.

<sup>7</sup>I deem it unnecessary to pass on Respondent's contention that this discharge should have been processed under the grievance procedure of the contract. But see *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (C.A. 9).

**Indiana Refrigerator Lines, Inc. and Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner.<sup>1</sup> Case No. 25-RC-2648. March 9, 1966**

#### DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer

<sup>1</sup>The name of the Petitioner appears as amended at the hearing.

James M. Pratt on 52 days between October 22, 1964, and April 15, 1965. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Subsequent to the hearing, the Petitioner and the Employer filed briefs with the National Labor Relations Board.

Upon the entire record in this case, including the briefs of the parties, the Board finds:

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

4. The appropriate unit:

The Petitioner requests a unit consisting of all single owner-drivers, multiple owner-drivers, and nonowner-drivers operating equipment under permanent leases with the Employer; all drivers operating the Employer's equipment; and all mechanics and garage employees of Indiana Leasing Corporation and the Employer; but excluding all drivers of equipment not under permanent lease contract with the Employer, office clerical employees, foremen, dispatchers, guards, and supervisors as defined in the Act. The Employer agrees to the inclusion of the drivers who normally drive company-owned equipment and to the above-mentioned exclusions. However, the Employer would also exclude all owner-drivers and nonowner-drivers on the grounds that they are, respectively, independent contractors and employees of independent contractors. In the event that the Board finds the owner-drivers to be employees, the Employer would exclude, as supervisors, all owner-drivers who hire or employ other drivers to operate their equipment, whether as full-time, second, or substitute drivers. The Employer would also exclude the garage employees from the unit on the grounds that they do not have a "sufficient community of interest with the drivers." At the hearing, Petitioner indicated that if the Board finds some other unit appropriate, it "will have to examine it at the time. We are not refusing to represent anybody."

The Employer is a motor vehicle common carrier operating over irregular routes under Interstate Commerce Commission (ICC) certificates. It is authorized to transport certain items covered by ICC regulations, generally meat and meat byproducts, from specific points in Indiana, Illinois, and Iowa to about 30 eastern and southern States.

The Employer's main offices are in Muncie, Indiana. It also operates dispatching offices in Postville, Iowa; Morton, Illinois; and Indianapolis and Schererville, Indiana; and an office in South Kearny, New Jersey. The South Kearny office, which is at a "truck stop" in the

New York metropolitan area, is run by an employee of the Employer who is also a commission agent for another trucking firm. The New York area is the destination of between 15 and 20 percent of the loads dispatched by the Employer.

To provide transportation for its customers' products, the Employer owns approximately 3 tractors and 34 trailers and, as described below, leases from various individuals approximately 80 tractors and 42 trailers. In addition, the Employer leases one tractor and three trailers from Indiana Leasing Corporation (ILC), a related company. The record establishes that the Employer and ILC are a single employer for unit and jurisdictional purposes. Thus, both companies are incorporated in Indiana; they have the same five officers and directors, who are the sole stockholders; and they share the same business address, telephone number, and some of the same clerical and supervisory employees. Further a major portion of the ILC operations consists of leasing equipment to the Employer and of maintaining and repairing equipment owned by or leased to the Employer. The Employer, which has no maintenance facilities in its own name, has held out ILC's facilities as its own in franchise applications before State and Federal regulatory commissions; and the Employer's annual report for 1963 stated that ILC and the Employer were under common control.

### The Drivers

Following are the various categories of owners and drivers of equipment utilized by the Employer:

*Company drivers.* There are three drivers carried on the Employer's payroll as employees. These drivers normally operate employer-owned equipment and the parties agree that they are employees who should be included in the unit.

*Single owner-drivers.* These drivers, 48 in number, own and drive a single tractor or a single combination tractor-trailer unit which they lease to the Employer.

*Multiple owner-drivers.* These drivers, five in number, own more than one tractor and/or combination tractor-trailer unit which they lease to the Employer. A multiple owner-driver normally drives one of his own units; his other units are operated by nonowner drivers.

*Owner-nondrivers.* These are 13 owners of equipment who lease such equipment to the Employer. The parties agree that these individuals, who do no driving, should be excluded from the unit.

(Single owner-drivers and multiple owner-drivers are sometimes referred to herein collectively as owner-drivers. All owners of leased equipment, i.e., the single owner-drivers, multiple owner-drivers, and owner-nondrivers, are sometimes referred to herein as equipment owners.)

*Nonowner-drivers.* These drivers, 24 in number, drive leased equipment which is owned either by owner-drivers or by owner-nondrivers.

*Trip-lessors.* These are the owners and/or drivers of equipment not under permanent lease to the Employer. The trip-lessors generally are persons who, after hauling loads for other carriers into the Midwest, obtain from the Employer loads destined for their home areas. A separate lease is signed for each load carried and the Employer's interest or control in their equipment ceases when the load is delivered. (The equipment owners, as explained below, permanently lease their equipment to the Employer.) The parties agree that trip-lessors are to be excluded from the unit.

The Employer's shipments are made in the following three ways: (1) by drivers of equipment permanently leased to the Employer, who haul a majority of the loads; (2) by drivers of trip-leased equipment, who haul almost 40 percent of the loads; and (3) by company employee-drivers, who haul less than 5 percent of the loads. Prior to 1960 or 1961, the Employer utilized trip-lessors almost exclusively. However, the ICC urged the Employer to exercise more control over the operation of the leased equipment, and, as a result of this pressure from the ICC, the Employer entered into permanent leases with a large number of the trip-lessors.

*Interstate Commerce Act and ICC Regulations.* The Employer is authorized to operate as an interstate motor vehicle common carrier under certificates of public convenience and necessity granted by the ICC. In its operations, the Employer is subject to the Interstate Commerce Act and to the regulations promulgated by the ICC. In order to secure and retain its "certificates," the Employer must show at all times that it is fit, willing, and able properly to perform its services in conformity with the law. The regulations contain extensive provisions relating to the qualifications of drivers, driving of motor vehicles, parts and accessories necessary for safe operations, reporting of accidents, hours of service of drivers, and inspection and maintenance of equipment. The regulations further impose responsibility on the carrier to make certain that the regulations are observed by its drivers. Under the regulations, a carrier is permitted to augment its equipment by means of permanent and trip leases. However, the carrier is required to have "full direction and control of such [leased] vehicles" and is "fully responsible for the operation thereof, in accordance with applicable law and regulations, as if the carrier was the owner of such vehicles."

*Permanent leases.* As noted above, the Employer leases equipment from the equipment owners. These leases, which are the same in all cases, are entitled "operating contracts." They place the leased equipment under the exclusive possession, control, and use of the Employer, and the Employer "assumes full responsibility" for the equipment to

the public, shippers, and ICC. The leases, which state that the parties intend to create a carrier-independent contractor relationship, are for a period of 30 days and thereafter until terminated by either party, without cause on 30 days' notice, or immediately if either party violates the agreement. Under the leases, the carrier (the Employer herein) agrees to pay the amount specified for each trip, contingent upon the proper submission of evidence of proper delivery or of such documents as are required by the ICC or by the Employer; to provide \$500 deductible cargo insurance; and to provide \$250 deductible insurance on the equipment which the carrier owns. Under the leases, the carrier is not required to make Workmen's Compensation insurance payments on behalf of the equipment owners or the nonowner-drivers. The equipment owner agrees to furnish equipment and labor and to perform all work necessary for the transportation of commodities as the carrier may require; to be responsible for hiring, firing, and selecting employees; to employ, as drivers or helpers, employees who are qualified under local, State, and Federal laws, including ICC rules and regulations; to direct the operation of his vehicles in regard to the number of drivers and helpers, points of service, etc.; to be responsible for wages and expenses, social security, unemployment compensation, or other payroll taxes; to pay all maintenance expenses on his equipment and to maintain the equipment as required by the ICC and other regulatory agencies; to maintain records as required by the ICC or other governmental agencies; to pay all taxes, including Federal, State, mileage, and road; to pay all license fees and fines; and to purchase insurance not purchased by the Employer but which is satisfactory to the Employer. The equipment owner also agrees that all freight transported shall be billed through the Employer and that he will not contract for freight in his own name or in the name of anyone else and that he will immediately notify the Employer of his return loads, including such information as consignor, consignee, origin, delivery, description of cargo, time of departure, and estimated time of delivery.

*Hiring of drivers.* In the operation of vehicles, the multiple owner-drivers and the owner-nondrivers must hire drivers for the equipment which they do not drive themselves. The single owner-drivers sometimes hire a substitute driver for trips which they may not be able to make. The equipment owners occasionally hire second, or additional, drivers on some of the trips.

Although the leases provide that the equipment owners shall provide the drivers for their equipment, the Employer requires that all drivers, whether they are to drive their own or the equipment of others, complete a one-page "reference application" form which basically identifies the operator and describes his training, experience, and employment record. This information is used as the basis for a background

investigation conducted by an independent investigating service for the Employer. The Employer occasionally requires that a prospective driver take a driving test. The Employer exercises a veto over the hiring of particular drivers, but at least on one occasion an owner was permitted to hire a driver who was not completely acceptable to the Employer. While the equipment owners normally hire and pay the drivers of their equipment, the Employer has occasionally provided drivers for leased equipment. In addition, the Employer occasionally places a second driver on a leased truck in order to speed delivery of a load or because of an emergency; in this situation, the Employer pays the second driver.

*Dispatch of equipment.* As noted earlier, the Employer has authority to haul from points in Iowa, Illinois, and Indiana to Eastern and Southern States. In dispatching between 80 and 100 loads per week, the Employer generally assigns the shipments in the order that the various pieces of leased equipment become available. To a certain extent, drivers of leased equipment can pick their own destinations. Thus, certain drivers have preferences for or dislike of certain areas of the country, and the dispatcher attempts to satisfy the drivers' desires in this regard. The drivers can and at times do refuse loads assigned to them, and they generally are not disciplined by the Employer for so doing.

For all practical purposes, the Employer has no authority to haul regulated products back to the Midwest, and equipment owners usually do not haul goods for the Employer on their return to the Midwest. However, the Employer dispatches leased equipment to haul occasional loads of lumber from the south to Muncie on behalf of an affiliate lumber company in Muncie, and the Employer's terminal manager at South Kearny, New Jersey, arranges for leased equipment to haul several loads per week for Bolin Foods Transportation Company, which has authority to haul west from Delaware and Maryland. (The Employer is in the process of requesting ICC permission to purchase the operating authority of this company.) The "dispatching" of these loads appears to be done in much the same manner as the Employer dispatches its other loads, except that the documents on the Bolin loads state that the Employer is the trip-lessor to Bolin and the Employer obtains revenue from these loads. With the above exceptions, the return or backhaul loads are sought and secured primarily by the equipment owners from other shippers on a trip-lease basis. In addition, the Employer's terminal manager at South Kearny, New Jersey, also assists drivers in obtaining backhauls from companies other than Bolin, and drivers who have hauled loads to other areas on the east coast may call him in an effort to secure a backhaul. The equipment owner may choose to return the equipment to the Midwest without a load, and some do this to return more quickly to Muncie in order to secure another east- or south-bound load.

Under the ICC regulations and the terms of the permanent leases between the Employer and the equipment owners, trip-leases on backhauls must be made in the Employer's name and the permanent leases require the equipment owners immediately to advise the Employer as to the details of the backhauls. Although the Employer has been lax in enforcing these regulations and lease terms, it does require that the owners of leased equipment eventually submit a record of the backhauls. In addition, the Employer has instructed the equipment owners not to accept backhaul loads from certain carriers as, for example, where the ICC had ruled that the carriers were operating illegally and hauling for such carriers would jeopardize the Employer's ICC certificates, and where there had been difficulty in obtaining payments from the carriers involved.

The Employer does not specify that any particular route be used in hauling its goods, and the drivers utilize a variety of routes. However, the driver is instructed as to date and time of delivery and the temperature to be maintained in the trailer, and if the driver fails to make a delivery at the proper time or fails to maintain the proper temperature, he is liable for any claims by the customer which may result.

At various times, the Employer has set up checkpoints, which in the main are "truck stops," on several of the major routes utilized by drivers. The Employer originally had established these checkpoints while it operated solely through trip-lessors. It discontinued the use of checkpoints in 1962, about the time it was converting to permanent contracts, but it reinstated the system in March 1964. The Employer has a \$10 fine for drivers who fail to stop at a checkpoint. However, from March 1 to July 24, 1964, only a small percentage of the dispatching documents required the drivers to use a checkpoint, the Employer has not insisted on strict compliance with this requirement, and no fines have been assessed. The Employer also has a \$25 fine for a driver who fails to call in in case of late delivery, and, although there is no record of the latter regulation being enforced, there is evidence of a driver being fined for arriving late to pick up a load at a customer's terminal.

On a majority of the loads dispatched by the Employer, the driver, upon arrival at a destination city, hires a local laborer or "city man" to help direct him to the points of delivery and to assist in the unloading. Although the drivers can select their own city men, in the New York City area city men are normally designated by the terminal manager in South Kearney, New Jersey. The Employer may pay the city man directly, or the owner may pay the city man, in which event the owner is reimbursed by the Employer.

*Equipment owner's and nonowner-driver's compensation.* Generally the equipment owner is paid a percentage of the "drivers' rates" for hauling employer-dispatched loads. The schedule of drivers' rates

is unilaterally established by the Employer for purposes of fixing the compensation of equipment owners. These drivers' rates are somewhat less than the published ICC rates which the Employer charges the customer. The usual payment to owners is 65 percent of the rate shown on the "drivers' rate" schedule, with an extra 5 percent if the owner's trailer is being used. On some trips an owner is paid a flat sum or a dollar rate per 100 pounds of cargo. The Employer sets the rates and method of compensation unilaterally, but the equipment owner at times can obtain a higher rate for a specific trip, as for example, if the load or trip is undesirable.

The equipment owner receives all of the revenue from the backhaul loads not dispatched through the Employer. However, if the return cargo is a commodity exempt from ICC regulations, since the Employer's insurance covers such trips, the equipment owner pays the Employer 5 percent of his revenue to defray the cargo insurance costs, and, where the Employer's trailer is used for the backhaul, the equipment owner pays trailer rental of 8 or 9½ cents per mile, depending upon the size of the trailer. The Employer has, at various times, changed its rules regarding empty returns. Thus, as of July 1964, if, with the Employer's permission, the Employer's trailer is returned empty, no rental is charged; between January and June 1964, one-half rental was charged on empty returns; and prior to January 1964 no rent was charged. In addition, if the Employer's trailer is kept out over 6 or 7 days, the equipment owner is charged an additional \$20 per day.

Although the equipment owner is primarily responsible for collecting for backhaul loads not dispatched by the Employer, the Employer at times assists in attempts to collect these charges. As required by the leases, the backhaul loads are normally taken in the Employer's name, and therefore the checks paying for these loads are also made out to the Employer. However, the Employer permits the equipment owner to endorse and cash these checks without notifying the Employer.

At the request of the owner of equipment, the Employer will give a substantial cash advance to the driver at the time he is dispatched to pay for the expenses of that trip and, in addition, the Employer will make advances to cover emergency expenses which arise during the course of a trip. These advances are deducted by the Employer from the sum due the owner at the settlement for each trip and at times the advance may total more than the amount due the owner, in which event the Employer will carry the deficit and apply it to a subsequent trip. Normally, the nonowner-driver receives 25 percent of the gross amount received by the equipment owner.

*Other factors.* Although, as provided in the leases, equipment owners pay the expenses incurred in operating their equipment, including the cost of licenses, fuel, taxes, tolls, and overweight fines, the Employer clerically assists the owners in making these payments. Thus, various States require that fuel taxes be paid on the amount of fuel consumed within the State, rather than that purchased in the State. The Employer pays these taxes on a quarterly basis, and requires that the drivers keep a record showing the miles driven in each State, fuel purchases, and fuel taxes paid to make it possible to compute these taxes. Further, although the equipment owner pays the fee for all permits and licenses, these permits and licenses are generally obtained by the Employer. The equipment owners are responsible for the servicing and repair of their equipment. They may have their equipment serviced at ILC, but there is no requirement that they do so, there is no discount given to owners on repairs performed there, and the owners have much of their work performed elsewhere.

Under the ICC regulations, the Employer is required to place its name and an identification number on all of the leased equipment. ICC regulations also require all drivers to keep a daily log of their activities while on the road. The Employer requires strict compliance with its instructions that the driver prepare and submit to it copies of these daily logs. The Employer provides log books for the drivers, which have the Employer's name imprinted on each sheet and, in addition to the normal log information as to driving time, sleeping time, and the like, the Employer's log books have a space for a daily equipment inspection report. The driver may buy his own log book which meets ICC requirements.

At an Indiana Public Service Commission hearing in January 1964, the Employer testified as to its extensive safety program. However, in actuality, this program has not been put into effect to any considerable extent. The Employer itself makes road checks on drivers, a road patrol is maintained by its insurance carrier, the Employer has warned drivers about unsafe conduct which may have been observed and has instructed the drivers to remove certain heaters from the leased trucks which were considered to be unsafe. The Employer occasionally distributes at its terminal safety letters from the American Trucking Association.

One equipment owner purchased a specially designed trailer through the Employer and the Employer financed the transaction. The Employer has sold approximately eight other trailers to equipment owners, but these were financed through a finance company.

When the Employer operated solely with contractors on a single-trip basis, it issued drivers' manuals and shirts with the Employer's

insignia to a number of the drivers. Some of the manuals and shirts are still in the hands of some of the drivers, but since converting to permanent leases, it has not issued manuals or shirts.

About three-fourths of the owner-drivers and nonowner-drivers have been associated with the Employer for over a year and about 40 percent of them for a period of more than 2 years.

The company drivers, who drive employer-owned equipment, are given no choice as to which loads they will take, either outbound or on return trips; they are paid prescribed flat rates per round trip (the amounts depend only upon destination and are not affected by whether the equipment returns empty or with a load); they receive certain employer-paid fringe benefits; and the Employer makes social security and withholding tax deductions from their pay. Like all the other drivers driving under the Employer's authority, they record hours on log sheets and they are subject to the ICC regulations and to the Employer's operating rules.

In making determinations whether an individual is an independent contractor or employee, the Board has frequently stated that it will apply the common law "right-of-control test." Under this test, the employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in reaching such ends. However, the Board has made it clear that the application of the test is not a "perfunctory exercise" but demands a balancing of all the evidence relevant to the relationship.<sup>2</sup>

The following factors, we believe, establish extensive control by the Employer over the operations of the owner-drivers and support the conclusion that they are employees of the Employer:<sup>3</sup> (1) The overall effect of the ICC regulations requires extensive employer control over the lessors, the drivers, and the leased equipment; (2) the leases provide for the Employer's exclusive possession, control, and use of the leased equipment, require the equipment owners to perform all the work which the Employer may require, and give the Employer control over all of the hauling operations of the lessors including loads not dispatched by the Employer; (3) the Employer investigates and exercises a veto over the hiring of new drivers and it may and does provide drivers for leased equipment; (4) the Employer checks the activities of the drivers through the use of logs, checkpoints, and a highway patrol and has the right to fine drivers for a failure to utilize checkpoints and for failing to call in case of late delivery; (5) the Employer makes provisions for and pays "city men" or laborers to assist the

<sup>2</sup> *National Freight, Inc., et al*, 153 NLRB 1536.

<sup>3</sup> *National Freight, Inc., supra*; *Chemical Leaman Tank Lines, Inc.*, 146 NLRB 148; *National Freight, Inc.*, 146 NLRB 144. See also *Deaton Truck Lines, Inc.*, 143 NLRB 1372, ptn for review denied 337 F. 2d 697 (C.A. 5), *Western Nebraska Transport Service Division of Consolidated Freightways*, 144 NLRB 301.

drivers in making the deliveries; (6) either party may terminate the permanent leases without cause on 30 days' notice; (7) payments made to the equipment owners are unilaterally set by the Employer; and (8) the Employer renders financial assistance to the drivers through substantial cash advances.

The fact that the owners of the leased equipment have the responsibility for obtaining most of their backhauls and that they receive all of the revenue of these return trips does not, in the circumstances of this case, require a different conclusion. It is true that the Board has considered the individual's opportunity to affect his profit as a factor indicating that he is an independent contractor,<sup>4</sup> and that here the equipment owners have an opportunity to affect their earning by arranging desirable backhauls. However, most of the compensation of the equipment owners is derived from the outbound loads which are all dispatched by the Employer and which are paid for at rates unilaterally set by the Employer. Further, most of the backhauls are for other employers and the equipment owners' ability to earn additional income from these trips does not affect their income with respect to the Employer. In addition, when the Employer's trailers are used on the backhauls, the Employer can and does significantly affect the equipment owners' profit on the backhauls, and thereby their profit on the entire trip, by charging rent on the trailers at rates unilaterally established by the Employer. Also, in addition to retaining the right of exclusive control over the permanently leased equipment at all times, the Employer exercises control over backhauls by requiring backhaul-trip leases to be made in the Employer's name, requiring equipment owners and drivers to submit records regarding backhauls, and forbidding equipment owners to obtain backhauls from certain carriers. In view of the foregoing, we think that the equipment owners' ability to increase their earnings through backhauls is insufficient to outweigh the other factors, which have already been enumerated, establishing the Employer's extensive control over their hauling operations.

Accordingly, in view of the foregoing and on the basis of the entire record, we find that the single owner-drivers, multiple owner-drivers, and the nonowner-drivers of permanently leased equipment are employees of the Employer within the meaning of the Act.

Although we have found that the multiple owner-drivers are not independent contractors, we conclude that they are supervisory employees within the meaning of the Act. In accord with the terms of the permanent leases, the equipment owners possess and exercise the power to hire drivers to operate their equipment. And although the Employer may veto the hiring of a particular driver, the multiple owner-drivers hire, fire, discipline, assign, transfer, and otherwise

<sup>4</sup> *Smith's Van & Transport Company, Inc., et al.*, 126 NLRB 1059, footnote.2; see also *William P. Riggitt & Son, Inc.*, 153 NLRB 1358.

responsibly direct the drivers of their equipment. Since each of the multiple owner-drivers normally has one or more pieces of equipment which is being operated by a nonowner-driver, this authority, it is clear, is exercised on a regular basis. Further, it is apparent that this authority is exercised not only for the purpose of protecting the lessor's equipment but also in the interest of the Employer and as an integral part of the Employer's operations. In these circumstances and particularly as the multiple owner-drivers have effective authority relating to the tenure of nonowner-drivers, whom we have found to be employees of the Employer, we find that the multiple owner-drivers are supervisors within the meaning of the Act. We shall, therefore, exclude them from the unit.<sup>5</sup>

There is also an issue as to the status of the single owner-drivers who normally drive their own equipment but who may occasionally hire substitute drivers or second drivers. All of the single owner-drivers have the right to hire substitute and second drivers and some of them have done so in the past. However, the record indicates that this has taken place primarily in emergency situations. In these circumstances, and since they exercise their supervisory authority only sporadically, we find that the single owner-drivers are not supervisors under the Act.<sup>6</sup>

#### The Maintenance Personnel

In addition to requesting the approximately 80 drivers of the equipment owned by or leased to the Employer, the Petitioner also seeks to represent in the same unit approximately 6 mechanics and garage employees employed by the Indiana Leasing Corporation. The record establishes, as stated above, that the Employer and Indiana Leasing Corporation are a single employer for unit and jurisdictional purposes. In urging the exclusion of the mechanics and garage employees, the Employer, in effect, relies on the facts that there is little contact between the drivers, on the one hand, and the maintenance employees on the other; that there is minimal interchange of employees between the two groups; and that drivers and maintenance employees are under separate immediate supervision. However, the record establishes that

<sup>5</sup> *National Freight, Inc., supra*; *Chemical Leaman Tank Lines, Inc., supra*; *National Freight, Inc., supra*, and *Deaton Truck Lines, Inc.; supra*.

Member Brown agrees that the multiple owner-drivers, the single owner-drivers, and the nonowner-drivers are employees but disagrees that the multiple owner-drivers are supervisors. He finds that the multiple owner-drivers of equipment are not supervisors on the grounds that they are subject to the same degree and manner of control by the Employer over the means as well as the result of the work as the nonowner-drivers, they share the same community of interest and working conditions with the drivers, and the direction and authority which the multiple owner-drivers exercise over drivers of leased equipment is for the protection of their leased property and is not in the interest of the Employer. See *National Freight, Inc.*, 146 NLRB 144, footnote 2; *Chemical Leaman Tank Lines, Inc.*, 146 NLRB 148, footnote 3.

<sup>6</sup> See *Meijer Supermarkets, Inc.*, 142 NLRB 513, footnote 9; *Huntley Industrial Minerals, Inc.*, 131 NLRB 1227.

the maintenance employees are an essential part of the Employer's total operation. Further, a unit of operation and maintenance employees of an employer in the transportation industry, like a unit of production and maintenance employees of an employer engaged in manufacturing, is not only presumptively appropriate, but may be viewed as an optimum unit. In analogous situations in the bus<sup>7</sup> and taxi<sup>8</sup> transportation industries, the Board has found that a unit of operation and maintenance personnel is presumptively appropriate. The fact that the drivers and the maintenance employees might also separately constitute appropriate units does not preclude a finding that both groups together also constitute an appropriate unit. For these reasons, and as there is no separate bargaining history, and no labor organization is seeking to represent the maintenance employees in a separate unit, we find a unit including the drivers and the mechanics and garage employees appropriate, and we shall include mechanics and garage employees in the unit.

Accordingly, we find that the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All single owner-drivers and nonowner-drivers operating equipment under permanent leases with the Employer; all drivers operating the Employer's equipment; and all mechanics and garage employees of Indiana Leasing Corporation and the Employer; but excluding all drivers of leased equipment not under permanent lease contract with the Employer, foremen, office clerical employees, dispatchers, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

<sup>7</sup> See *Tennessee Coach Company*, 88 NLRB 253.

<sup>8</sup> *Cab Operating Corp., et al., eto.*, 153 NLRB 878.

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**Atco-Surgical Supports, Inc. and Amalgamated Clothing Workers of America, Cleveland Joint Board, AFL-CIO**

**Atco-Surgical Supports, Inc. and Amalgamated Clothing Workers of America, Cleveland Joint Board, AFL-CIO, Petitioner.**  
*Cases Nos. 8-CA-3946 and 8-RC-5937. March 10, 1966*

### DECISION AND ORDER

On December 8, 1965, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Deci-