

S & W Motor Lines Inc. and Chauffeurs, Teamsters & Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case II-UC-8

December 1, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND ZAGORIA

Upon a petition for clarification of unit duly filed by S & W Motor Lines, Inc. on May 8, 1969, a hearing was held on June 3, and July 2, 1969 before George A. Lawson, Hearing Officer of the National Labor Relations Board. On July 22, 1969, the Regional Director for Region 11 issued an Order transferring the case to the Board for decision. Thereafter, briefs were timely filed by the Petitioner and the Union.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

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 Union involved herein is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer.

3. The Employer is a North Carolina corporation engaged in handling freight in North Carolina and other States. It is a certificated carrier operating under Interstate Commerce Commission (ICC) and various State certificates of convenience and necessity. The Union pursuant to a Board certification represents "all drivers, warehousemen, mechanics and regular part-time employees employed at the Employer's terminal in Greensboro, North Carolina and subterminals in Hickory, North Carolina, Nitro, West Virginia, and St. Albans, West Virginia, excluding all office clerical employees, guards, and supervisors as defined in the Act."¹

The Employer is not a general commodity carrier, but operates only on limited rights which allow it to haul furniture north and to return with loads of yarn and grain. There are approximately 130 drivers who operate tractors owned by the Company; their employee status is not in issue. In addition, ten

drivers own their own tractors and lease them to the Company, and one individual owns five tractors which he leases to the Company. Leased vehicles are driven by their owner or drivers furnished by them.

In this proceeding, the Employer-Petitioner is seeking clarification of the bargaining unit by the specific exclusion of lease operators whom the Union seeks to include in the unit. The Employer contends that these drivers are independent contractors, who are not to be included.

The Employer began leasing operations in the middle of 1968 as a temporary measure while it was awaiting arrival of additional tractors it had ordered. Lease drivers are not used as long as regular drivers are available. Regular drivers are compensated at a rate of 8 1/2 cents per mile. Lease drivers receive 30 cents per mile, when actually carrying cargo, but must pay for all gas, oil, and repairs. If a lease driver returns to the terminal empty he receives 14 cents per mile. Rates of compensation for lease drivers are established by the Employer.

The Employer adheres to the ICC regulations in conducting lease operations in that each vehicle is inspected by an employee of the Employer before it is allowed to operate; all tractors bear the insignia of the Employer on each door; each vehicle bears the ICC number of the Employer; and each tractor is assigned a fleet number by the Employer. The only visible distinction between an Employer owned tractor and a leased tractor is that the fleet number for leased vehicles is a series of 7,000 while fleet numbers of Employer owned vehicles run in the series of 200, 300, 400, or 500.

The lease, signed by a driver before each trip, covers a roundtrip from Greensboro, North Carolina, to points in Pennsylvania, Ohio, or West Virginia, and return. A lease driver is required to post a \$500 bond to cover damages to the Employer's trailer. When a lease driver finishes his delivery, he is required to call the Employer's dispatcher for a return load. He is assigned his return load after all regular drivers of the Employer are dispatched.

The Employer urges that lease drivers should not be considered regular employees and therefore should be excluded from the unit, because the Employer lacks sufficient control over the lease drivers. Lease drivers are not given driver's tests; they are responsible for their own repairs on their vehicles; they are not told what time to leave the terminal, only what time goods are to be delivered; criminal records are not checked as they are for regular drivers; lease drivers do not attend the periodic safety meetings required of regular drivers; no personnel files are maintained on lease drivers; and they do not fill out applications for work. Lease drivers are not covered by the Employer's Workmen's Compensation Insurance or Unemployment Compensation Plan. They are not required to report traffic violations unless an

¹Case II-RC-2474, not reported in printed volumes of Board decisions

accident is involved. They have no checkpoints or specific routes to follow. They are not instructed where to purchase gas. They are not checked by the three road supervisors of the Employer. They are not furnished motel lodging. They receive no disciplinary warning letters in their personnel file since they have no personnel file. Lease drivers have no seniority with the Employer, do not participate in the group insurance program, receive no pay for holidays, lodging, layovers, and delays, as do regular drivers. They do not participate in the pension plan or have paid vacations. Lease drivers are covered by the Employer's liability insurance only when hauling the Employer's trailer.

The Employer acknowledges that ICC regulations require that lease drivers operating under the freight rights of the Employer must be under some control of the Employer. Thus lease drivers cannot haul anything other than the furniture and grain the Employer is allowed to haul. Lease drivers must follow ICC regulations and furnish log books to show that ICC rules as to the number of hours driven and rest periods taken have been followed. The Employer contends that this is the extent of control that it has over the lease drivers and this control is too minimal to allow the lease drivers to be considered as regular employees, relying on Board cases² and ICC and Department of Transportation (DOT) regulations.

The Union argues that the Employer exercises sufficient control over the owner-operators to warrant their being considered employees rather than independent contractors. ICC regulations require that "motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof. . . as if they were the owners of such vehicles . . ." The lease document itself does not reflect any intention by the parties to consider the lease drivers independent contractors, and the usual disclaimer that the lease drivers are not employees of the Employer is absent. The leases used by the Employer are not "trip leases" as that term is usually understood in the industry because the lease covers the return trip instead of only a one-way haul. The relationship between the employer and lease driver is unbroken between leases, since the lessor does not surrender the license plates at the end of each round trip, nor remove the S & W decal from each door. The vehicles are not marked "leased to S & W." The dispatcher calls the owner-operator when a load is ready, indicating that the Employer assumes the relationship is a continuing one. Lessors are not paid at the end of each trip, but anywhere between every two trips and every 2 weeks. The method and amount of compensation in unilaterally fixed by the Employer as is the \$500 maintained in an escrow account. The dispatcher calls the owner-operator for

a trip; there is no evidence that the owner has a right of refusal. The leased vehicle must pass an inspection before every trip and the Employer can refuse to allow the vehicle to leave on the trip. Safety supervisors can stop a lease driver engaged in improper conduct and report this to the home terminal. Lease drivers must report all accidents, turn in logs and sign in on the special board to indicate destination and time of return. The lease provides that the Employer may cancel if the lessor fails to operate his own equipment to the satisfaction of the lessee.

In determining whether or not lease operators (owner-drivers or nonowner drivers) are employees rather than independent contractors, the Board applies the common law "right of control" test.⁴ 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.⁵

The following factors, we believe, establish sufficient control by the Employer over the operations of the owner-drivers and support the conclusion that they are employees of the Employer: (1) The overall effect of the ICC regulations requires extensive employer control over the lessors, the drivers, and the leased equipment; (2) the lease provides for the Employer's exclusive possession, control, and use of the leased equipment; (3) the Employer assigns loads with detailed instructions as to delivery and requires the furnishing of daily log sheets; (4) on return trips owners are not permitted to solicit or obtain return loads without the approval of the Employer, and the Employer generally furnishes the owners return loads; (5) the lease is in fact terminable at the will of the Employer; (6) compensation for the owner is unilaterally determined by the Employer on the basis of a predetermined rate schedule which is accepted by the owner without question; (7) owners are in fact covered by the Employer's master insurance policy; (8) the Employer, without written authorization, withholds a portion of the owner's gross earnings to insure payment of the latter's security deposit.

In view of the foregoing and on the basis of the entire record, we find that the owner-drivers and nonowner-drivers are employees of the Employer within the meaning of the Act. Although we are satisfied that the multiple owner-driver is not an independent contractor under the common law test, an issue arises as to whether he is a supervisor within the meaning of the Act. The record shows that he has and exercises the power to hire drivers and to discharge them. We are satisfied that the

²*Deaton Truck Lines*, 143 NLRB 1372; *Indiana Refrigerator Lines*, 157 NLRB 539; *Chemical Leaman Tank Lines*, 146 NLRB 148; *Steel City Transport, Inc.*, 166 NLRB No. 54.

⁴49 U.S.C. Sec. 304 (e)

⁵*National Freight, Inc.*, 146 NLRB 144, 145-146

⁶*Indiana Refrigerator Lines Inc.*, 157 NLRB 539

foregoing supervisory authority is exercised not only for the purpose of protecting the equipment involved, but also as an integral part of the Employer's business operations. In these circumstances and especially as the multiple owner-driver has effective authority with respect to the tenure of nonowner-drivers whom we have found to be employees of the Employer, we find that the multiple owner-driver is a supervisor within the meaning of the Act.* Accordingly, we shall exclude him from the unit.

In view of the above, we find that owner-drivers and nonowner-drivers of leased equipment are properly with the unit represented by Local 391 and that multiple owner-drivers should not be included in the unit as they are supervisors within the meaning of the Act. We shall therefore clarify the unit accordingly.

ORDER

IT IS HEREBY ORDERED that Petitioner's request for clarification be granted, and the unit represented by Chauffeurs, Teamsters & Helpers Local Union No. 391 is hereby clarified by specifically including therein owner-drivers and nonowner-drivers of leased equipment and excluding multiple-owners of leased equipment.

*Member Brown agrees that the owner-drivers and nonowner-drivers are employees but disagrees that the multiple owner-driver is a supervisor. He finds that the record clearly indicates that the multiple owner-driver is subject to the same degree and manner of control by the Employer over the means as well as the result of the work as nonowner-drivers and shares the same community of interest and working conditions. The multiple owner-driver is an employee rather than a supervisor for, in his opinion, the direction and authority he exercises over drivers of leased equipment are for the protection of the leased property and are not in the interest of the Employer.