Yellow Cab, Inc. *and* Independent Drivers' Association of Denver, Petitioner. Case 27-RC-3651

December 3, 1969

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND JENKINS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before J. Donald Meyer, Hearing Officer. Thereafter, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, and by direction of the Regional Director for Region 27, this case was transferred to the National Labor Relations Board for decision. Briefs have been timely filed by the Employer, the Petitioner, and the Intervenor.[1]

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 Petitioner seeks to represent a unit of all taxicab drivers employed by the Employer in Denver, Colorado. The parties, including the Intervenor, have stipulated that the Employer is engaged in commerce within the meaning of the Act and the Board so finds. However, the Employer and Intervenor contend that the Board lacks jurisdiction over the present petition for certification because the drivers in question are independent contractors and not employees of the Employer within the meaning of the Act.

Pursuant to a series of collective-bargaining agreements[2] with the Intervenor, the most recent of which expired, after a 3-year term, on May 31, 1969, the Employer has "leased" taxis to approximately 860 drivers whom Petitioner seeks to represent.[3] The majority of these are regular full-time drivers, who are committed by Intervenor's contract to drive 5 or 6 days per week, and who pay a daily fee of $9.75 plus 5 cents a mile for the use of a cab owned and maintained by the Employer. A minority of drivers are otherwise classified and have lesser driving obligations at slightly different rates. The Employer is self-insured and provides the drivers with liability insurance coverage. In addition to the vehicle itself, the Employer furnishes radio equipment, a dispatching service, and use of the Employer's public franchise. The taxis are painted a distinctive color and carry the Yellow Cab name and telephone number. The recently expired collective-bargaining agreement between the Employer and Intervenor deals with such matters as the suspension and termination of "lease" arrangements, providing generally that leases may be suspended or terminated for just cause after a warning notice, or without a warning notice if the cause is dishonesty, insubordination, incapacity, loss of insurability, drinking while driving, drunkenness, or substantiated carelessness resulting in serious accident. On timely appeal, a grievance procedure (and binding arbitration) from such adverse action, and for other complaints, is provided. The aforementioned agreement also provided that during the first 30 days of a lease to a new driver the Employer had the right to cancel the lease without showing cause. Finally, that agreement recognized the Employer's right to establish such reasonable rules as were deemed necessary to its operations.

Pursuant to this provision, the Employer furnishes all drivers with an operating manual which contains work rules, and in addition details the requirements of the Public Utilities Commission and city ordinances applicable to cab operators. Drivers are required to be familiar and comply with this manual.

Typical manual rules establish dress requirements for drivers, including particularly the wearing of a yellow cap in public places while working, and normal service periods for picking up customers downtown, within city limits, and in outlying areas. Accurate trip sheets are required of each driver showing times and fares charged. Drivers are required to be clean shaven and have their hair neatly shorn. Sleeping in cabs is forbidden. Drivers must make full payment of their daily "lease" fee each day. While the manual states that drivers are not required to use the radio dispatching service, detailed instructions governing its use are included in the manual, and the fact that 75 percent of the Employer's total cab trips (about 700 per hour) are radio-dispatched is also set forth therein. In addition, testimony in the present case shows that drivers, although not required to do so, normally use the radio to preclude the chance of their picking up customers already assigned by the dispatcher to other drivers, an action which may result in discipline, and also in order to receive and respond to main office calls from the Employer, and to promptly return to the garage when so directed. The

[1] Local Union No. 775, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was permitted to intervene in this proceeding on the basis of a contract interest

[2] The latest agreement provided that the parties intended that the drivers be considered "independent contractors," and that the agreement would terminate if an "appropriate judicial authority" should finally declare that an employer-employee relationship existed

[3] There are, in fact, no leases signed between the Employer and the drivers

manual also contains tariffs set by the Public Utilities Commission, and maximum hours to be worked in a single day, which are established as no more than 10 in any one 24-hour period. Drivers may be disciplined for the violation of the Employer's or Public Utility Commission rules, and the Employer maintains a "spot check" surveillance of their operations, using a roving safety inspector.

The Employer does not make deductions from daily "lease" payments for social security or income tax purposes, and although it pays workmen's compensation premiums, the cost is charged to the drivers. The Employer does not exercise direct control over the number of drivers working on a given shift, or over which drivers work particular shifts. These matters are arranged by the drivers themselves, pursuant to a seniority system as provided by the contract. Once a driver has reported in on a shift, he is free to begin work whenever he wishes, and he may, if he desires, attend to personal business. A driver is theoretically free to secure fares in any manner, and is not contractually bound to use the radio-dispatch system. The Public Utilities Commission, not the Employer, sets the rates which the drivers may charge. The Employer's income is not directly proportional to the business done by the drivers, although there is undoubtedly a long-range relationship between the two. The evidence shows that employee profits may vary from $10 to $50 a day, indicating that employee initiative (and good fortune) may contribute to the value of the job.

The Board has held that in determining the status of persons alleged to be independent contractors, the Act requires the application of the "right of control" test.[4] Where the person for whom the services are preformed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment, and where control is reserved only as to the result sought, the relationship is that of independent contractor. On the basis of the entire record in this proceeding, we are of the opinion that the Employer has retained significant control over the manner and means by which all taxicab drivers operating under its Denver franchise perform their duties. Although in some respects required by its public carrier certificate, the rules promulgated by the Employer are in many other respects intended to serve the Employer's self interest in operating an efficient and reputable service. The fact, for example, that a driver can be disciplined for being "insubordinate" indicates that the Employer has expressly recognized the need to reserve to itself one of the normal prerogatives of the employer-employee relationship. While it is true that drivers need not avail themselves of the radio-dispatch system if they do not wish to, it appears from the record that this is equivalent to saying that they need not breathe if they do not wish to. As previously noted, about 75 percent of the Employer's business is done by radio dispatch; and other salient reasons, discussed previously, lead employees to listen to the dispatch system even if they have no need to. Once logged in on the system, the drivers are subject to a close system of controls in the dispatching procedure. While the Employer argues that these controls are imposed by law, they are in effect controls which the law requires the Employer to assume as part of its relationship with its employees, if it wants to stay in business.

The Employer contends that it is merely a lessor of cabs, interested primarily in obtaining the flat rate payoff from the drivers. This is a narrow view of the Employer's business. While it is true that the Employer's sole financial income is derived from its "lease" arrangements with the drivers, it is also vitally interested in making such arrangements lucrative and successful, in order that it may continue to employ drivers; in order to derive the greatest income from its capital investment; and in order to satisfy the conditions of its certificate of public necessity. To these ends, it has imposed a network of regulations upon the drivers which, in practical effect, result in the kind of control over the manner in which the drivers' jobs are accomplished that is characteristic of the employer-employee relationship. Therefore, we find merit in Petitioner's contention that all such drivers are employees of the Employer within the meaning of Section 2(3) of the Act.[5] Accordingly, jurisdiction over the present petition for certification is established, and we find that it will effectuate the purposes of the Act to assert that jurisdiction herein.

2. The Petitioner and Intervenor are labor organizations claiming to represent certain employees of the Employer.

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

4. Employer and Intervenor contend that the petition filed on June 12, 1969, is barred by their contract negotiations within the 60-day insulated period, negotiations which, in their view, first had the effect of properly extending the contract (expiring on May 31, 1969) to June 14, 1969, and then culminated in a "new contract" that assertedly became effective, or could have become effective, during the extension period and prior to the filing of the petition.

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[4] *Mound City Yellow Cab Company*, 132 NLRB 484, *Albert Lea Cooperative Creamery Association*, 119 NLRB 817

[5] Cf *Mound City Yellow Cab Company*, *supra* Subsequent to the submission of briefs in this case, the Employer moved the Board to reopen the hearing for the purpose of adducing evidence that the Internal Revenue Service has recently rendered an administrative decision holding that the drivers are independent contractors and not employees of the Employer Although we consider such a decision to be relevant, and we accept as true for the purposes of this proceeding the Employer's assertion that such a decision was rendered, we respectfully decline to follow it, for the reasons described *supra* The motion to reopen is, accordingly, denied

In this regard, the record shows that, after extensive negotiations for a new contract to replace the one expiring on May 31, 1969, the Employer, on May 28, made a final contract proposal to the Intervenor, which its negotiators found acceptable, but sought to have ratified by the union's general membership in a mail referendum. Because there was insufficient time to complete such a referendum before May 31, Intervenor orally requested an extension of the old contract to June 14, which the Employer agreed to provide on condition that duly authorized officers of Intervenor promptly confirmed the extension by a letter. This document, signed by Intervenor's president, was received by the Employer on May 29. However, the Employer never signed the letter to indicate its own concurrence in the contract extension, nor did the parties execute in writing any other contract-extension document. On June 11, 1969, at the behest of three individuals employed under Intervenor's expiring collective-bargaining agreement, a state court at Denver, Colorado, issued a temporary restraining order which prevented completion of the Intervenor's mail referendum. On June 12, 1969, the same day that the mail ballots were to be counted, the present petition was filed. On June 13, the restraining order was dissolved and the ballots counted. While the employees voted against the proposal by a tally of 228-126, it appears that such a vote constitutes acceptance under the Intervenor's constitution. However, the contract terms were never thereafter executed in written form.

We find no merit in the contention of the Employer and Intervenor that the petition herein must be dismissed as one which was barred either by an extension of the contract expiring May 31, 1969, or by the results of the mail referendum which, they contend, would have resulted in a contract executed in writing, were it not for intervening state court litigation. Neither the contract extension nor the "new contract" which we are asked to speculate about comply with the well-established requirement that a contract, to constitute a bar, must be signed by all the parties before a petition is filed, and that unless such a contract precedes a petition, it will not constitute a bar, even though the parties consider the contract properly concluded and put into effect some or all of its provisions.[6]

Accordingly, we agree with Petitioner that its petition herein was not barred under the relevant rules, and we shall direct an election herein in the unit which the parties agree is appropriate.

We find, in accordance with the stipulation of the aforementioned parties, that the following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All taxicab drivers employed by the Employer in its operations at Denver, Colorado, excluding dispatchers, mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act.

[Direction of Election[7,8] omitted from publication.]

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[6] *Appalachian Shale Products Co*, 121 NLRB 1160, 1162

[7] See *Jat Transportation Corp*, 128 NLRB 780. Cf *Cab Operating Corp. et al*, 153 NLRB 878

[8] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them *Excelsior Underwear Inc*, 156 NLRB 1236, *N L R B* v *Wyman-Gordon Company*, 394 U S 759 Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 27 within 7 days of the date of this Decision and Direction of Election The Regional Director shall make the list available to all parties to the election No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed