

Contractor Members of the Associated General Contractors of California, Inc. and A. R. Kramer, Petitioner and Teamster Local Union Nos. 94, 137, 150, 216, 287, 291, 315, 386, 431, 439, 490, 533, 624, 684, 890, 912, and 980, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Contractor Members of the Associated General Contractors of California, Inc.; The Building Industry Association of California, Inc.; and the Engineering and Grading Contractors Association, and Neal Hecker and James E. Bays, Petitioners and Teamster Local Union Nos. 42, 87, 166, 186, 235, 381, 420, 692, 898, and 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 20-RD-721 and 21-RD-1008

January 17, 1973

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
FANNING, JENKINS, AND KENNEDY

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Robert C. Grace, in Case 20-RD-721, and before Hearing Officer Theodore B. Horn, in Case 21-RD-1008. Following the hearings and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, by directions of the respective Regional Directors, these cases were transferred to the National Labor Relations Board for decision. Briefs have been filed on behalf of all parties in each case.¹

The Board has reviewed the rulings of the Hearing Officers made at the hearings and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in these cases, the Board finds:

1. The Employers are engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employers.

3. The Petitioner and Intervenor in Case 20-RD-721 seek an election in a bargaining unit of construction industry drivers under the so-called Northern California Master Agreement, covering northern and central California, between the Team-

sters Locals herein involved and the contractor associations. The Petitioners in Case 21-RD-1008 seek an election in a similar bargaining unit under the so-called Southern California Master Labor Agreement between the Teamsters Locals involved herein and the contractor associations. This agreement covers the southern area of California, with the exception of San Diego County. Petitioners and Intervenor seek decertification of the Unions involved herein in the respective units. Both petitions state essentially that the Petitioners and others similarly situated are advised and believe that they are independent contractors, but that the recognized bargaining agents involved herein and their International Union have consistently contended that such persons are employees, and that the Board on occasions has so held. Petitioners assert that they seek and are entitled to an adjudication of the issues on the facts of these cases and that, in the event they are held to be employees, a substantial number of such employees assert that the recognized bargaining agents are no longer their representatives for the purpose of collective bargaining.

In both cases, the Unions have moved to dismiss the petitions. The Unions assert basically that the Petitioners and Intervenor claim to be independent contractors, and not employees. Citing *Modern Hard Chrome Service Company*,² the Unions in Case 21-RD-1008 contend the Regional Director is without jurisdiction to entertain a petition filed by, and/or on behalf of, nonemployees. The Unions in Case 20-RD-721 take essentially the same position. Additionally, they contend the petition should be dismissed on the ground that the Petitioners' true purpose in filing the petition is not to obtain an election but rather to obtain a Board ruling (in a representation context) that these owner-operators are independent contractors and to use that finding to substantiate the unfair labor practice charges that have been filed against the Unions.

Section 9(c)(1)(A) provides that a decertification petition may be filed:

[B]y an employee or group of employees or *any individual* or labor organization acting in their behalf alleging that a substantial number of employees . . . assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a). [Emphasis supplied.]

The record reveals that from time to time the status of owner-operators such as those included herein has

somewhat similar. the motions to consolidate are hereby granted, solely for determination of the status of the owner-operators.

² 124 NLRB 1235.

been the subject of litigation. While these individuals assert a belief that they are independent contractors, the Unions have purported to represent them as employees along with the employees in the unit whose status as such is undisputed. In cases involving the status of individuals in the trucking industry which have come before the Board, the issue has been a close one, turning on the facts of the individual case. Against this background, we are of the view that the Petitioners' bare assertions that they believe they are independent contractors do not constitute a substitute for an evidentiary hearing from which a conclusion can be drawn as to their independent contractor or employee status. Accordingly, the Petitioners' alleged status as independent contractors must be determined because if they are in fact employees they are entitled to vote. Therefore, as it is necessary to determine the status of these individuals, we affirm the Regional Directors' refusals to dismiss the petitions.

The Unions further contend that on the merits the owner-operators herein are employees within the meaning of the Act. This contention is predicated on *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (J. K. Barker Trucking Company)*, 181 NLRB 515, enf. *sub nom. Joint Council of Teamsters No. 42 v. N.L.R.B.*, 450 F.2d 1322 (C.A.D.C.), wherein the Board found similar owner-operators to be employees.

In the present cases, we are concerned with the same question posed in *General Teamsters* as to whether certain owner-operators who operate their own vehicles, some working directly for the contractors and some working for the contractors through overlying carriers, are employees within the meaning of the Act. In *General Teamsters*, the Board examined the relationship between the contractors and the owner-operators and, although it viewed several elements there as indicative of an independent contractor relationship, it regarded certain other factors as negating any basis for finding that the owner-operators were in fact independent contractors or self-employed persons. In reaching this result, the Board relied, in large part, on the fact that once on the job the owner-operators, like the employee-operators, were at all times subject to the supervision of the contractors. Additionally, the Board viewed the contractors' retention of the control over the loaders which were essential for loading the trucks, as well as control over the place where the materials were to be unloaded, the owner-operators' inability to control their hours or rates of pay, and their lack

of face-to-face contact with the contractors for whom they worked as indicative of their status as employees who lacked the means to accomplish results through the exercise of independent judgment and skill.

The facts in the present cases show that owner-operators involved herein own and operate dump trucks throughout the State of California and perform hauling services for the various contractors (employers) who are association members. In some instances, the contractors utilize the services of their own driver-employees, whose status as employees is not disputed, to drive company-owned trucks for hauling material to and from a construction site. Many contractors, however, do not have a sufficient number of trucks and therefore utilize the services of owner-operators. In some instances the contractors and owner-operators will contact each other directly and enter into an agreement (usually oral) for the rendition of services by the owner-operator. In such circumstances, the owner-operator will bill the contractor for an amount equal to 100 percent of the minimum tariff for the particular piece of equipment involved.

In the vast majority of cases, however, the contractors and owner-operators are brought together by overlying carriers. The overlying carrier is an individual who contracts (usually orally) with a contractor to provide transportation service for the latter. In so doing he may use his own equipment, vehicles, and employee-drivers. In most cases, however, the overlying carrier will arrange to have such services performed by owner-operators, who function as subhaulers. When such an arrangement is used the overlying carrier and the owner-operator execute a subhaul agreement which basically obligates the owner-operator, upon instructions from the overlying carrier, to proceed to a point of loading and transport materials. Typically, the overlying carriers will have subhaul agreements with numerous owner-operators. Conversely, the typical owner-operator has subhaul agreements with many overlying carriers. In addition to having contacts with contractors and referring owner-operators to jobs, the overlying carriers collect from the contractor sums due for services rendered, deducting 5 percent of the minimum tariff for bringing the owner-operator and contractor together and paying the remaining amount to the owner-operator.³ Although the subhaul agreements require owner-operators to have their services available for dispatch by the overlying carrier, in practice, the owner-operator is not obliged to accept a particular job, or complete one on which he has started. The activities of both the owner-operators and overlying carriers are closely regulated

³ Some overlying carriers are not members of the associations. They do, however, execute with the Union a "short form" agreement which embodies

within it the provisions of the Master Labor Agreement between the Unions and the associations

by the California Public Utilities Commission(PUC). Although the PUC establishes the minimum tariff which must be charged, there is testimony in both cases that, on occasion, owner-operators have negotiated higher rates than those specified in the PUC tariff.

Owner-operators are paid on an hourly basis in most instances. On occasion, they are paid by tonnage and mileage rates. The minimum tariff however reflects a certain amount for the labor element and a certain amount for the value of the equipment used. While the contractors' driver-employees are paid on straight labor hourly basis from the time they are told to report to work until the workday is completed, the owner-operators are paid only from the time they are told to report with their truck to the loading site and until the last return trip is made. Generally, owner-operators are not paid for any time during which their equipment is not functioning. In contrast, employee-drivers are paid at their hourly rate when the equipment is inoperable. Whether working directly for a contractor or through an overlying carrier, the owner-operators keep a record of their time and at the end of the day (or job) present a freight bill to the appropriate representative for billing purposes. No deductions are made for State and Federal income tax, social security, or disability insurance. These payments are made by the owner-operators themselves. The owner-operators are responsible for all traffic violations including overloading, load spillage, or defective equipment whereas employee-drivers are not responsible for these types of traffic violations.

As the dump truck industry is highly regulated by the PUC, the owner-operators must obtain a permit from that body in order to operate their trucks for hire, subject to the PUC's minimum tariffs and other regulations. Thus, the owner-operator must meet certain bonding and liability insurance requirements as specified by the PUC and must display his name and registration number on the outside of the equipment.

The equipment utilized by the owner-operators consists mainly of dump trucks. These include the single-unit truck, tractor-semitrailer unit, and transfer trailers.⁴ In addition, most of the owner-operators own additional equipment for the maintenance of their main equipment. The record indicates the average cost for trucking equipment is in the \$15,000-\$20,000 range. Owner-operators arrange their own financing for the purchase of such

⁴ There appears to be a conflict with regard to the percentage of Los Angeles owner-operators who own both tractors and trailers. Long, a union witness, testified that 80 to 85 percent of the owner-operators in the area own only the tractor unit and must rent the trailer unit from overlying carriers or contractors. Blackman, who testified for the Petitioners and

equipment. They are responsible for its maintenance and upkeep.

Once on the job, the owner-operators work under the same conditions as do employee-drivers. The contractor establishes the starting time, quitting time, and the lunchbreak for all dump truck drivers, be they owner-operators or employee-drivers. Representatives of either the contractor, overlying carrier, or both, direct owner-operators, as well as employee-drivers, in such matters as location of material, dump site, and routes to be taken.⁵ Disciplinary action can be taken against owner-operators for unsatisfactory performance. This can take the form of a reprimand, dock in pay, removal from the job, and/or refusal to hire in the future.

The Board has frequently held that, when a question arises as to whether individuals are employees or independent contractors, its determination requires application of the right-of-control test, and that where the person for whom the services are performed retains the right to control the manner and means by which the result is accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this determination depends on the facts of each case and no one factor is dispositive.

In our view, the owner-operators herein are employees rather than independent contractors. We note in particular that once on the job the owner-operators work under the same conditions as do the employee-drivers of the contractors. Thus all drivers, be they owner-operators or undisputed employees of the contractors, observe the same starting and quitting times and the same lunch breaks which are established by the contractors. There also is evidence that the contractors control the loading and sites at which the excavated material is to be dumped, and in most instances, designate the routes to be traveled to dumpsites. In both cases there is evidence of detailed jobsite supervision by the contractors. In Case 21-RD-1008, testimony indicates the existence of a "load checker" on many jobs. This person is employed by the contractor to watch the operation of dumptrucks on the job, whether driven by owner-operators or employee drivers. He makes certain that the trucks get their loads and deliver them without side trips for such things as hair cuts, as one contractor put it.

Testimony in Case 20-RD-721 shows a contractor

Employers at both hearings, stated that only 20 percent of the area owner-operators did not also own their trailers. The Unions did not raise this matter at the San Francisco hearing

⁵ In some instances, however, contractors rely on owner-operators to find a site and dispose of excavated material

normally employs a person known as a dump man or "spotter" at the dumpsite who tells the owner-operator where to dump his material, and who on occasion directs the owner-operator to take material to another dumpsite on the same construction project. The record also reveals that the contractor or overlying carrier representative to whom the owner-operator's freight bill is presented for billing purposes keeps such records and compares them with the records of company and all other drivers to enable the contractor to determine which drivers, be they owner-operators or company drivers, are driving efficiently, and to ". . . make sure they don't goof off some place." The record further discloses instances wherein owner-operators have been switched by contractors to other jobs because of a contractor's dissatisfaction with his performance, or because of a personality conflict, in which the owner-operator may be involved. In other instances, owner-operators have been reprimanded and/or docked time by contractors for standing around and talking, for dumping at a site not designated by the contractor, and for taking excessively long lunch breaks.⁶

Thus, as was the situation in *General Teamsters*, although the owner-operators have substantial financial investments in their trucking equipment and some other indicia of independent contractor status, the contractors nevertheless have retained and exercise such control over the manner and means of achieving the desired results at the jobsite that any finding of independent contractor would be inconsistent with the application of the common law right-of-control test. Accordingly, we conclude these individuals are employees within the meaning of the Act, and that a question affecting commerce exists concerning the representation of the employees of the Employers within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

While we have found the owner-operators to be employees and that they are entitled to participate in an election, the present records before us disclose that the only issue fully litigated at the hearings related to the question of whether they were employees or independent contractors, and the parties are not all in agreement regarding other issues. Thus, as a means of illustration and not limitation, the parties would appear not to agree as to the unit which will be appropriate, the eligibility of employees now entitled to vote, and whether or not a joint employment situation exists where owner-oper-

ators are supplied by overlying carriers. Accordingly, we deem it necessary to remand each case to the appropriate Regional Director for such further action as the Regional Director deems appropriate regarding the above-mentioned and any remaining issues preparatory to directing elections.

ORDER

It is hereby ordered that Case 20-RD-721 and Case 21-RD-1008 be, and they hereby are, remanded to the Regional Directors for Regions 20 and 21, respectively, for such further action as deemed appropriate by the respective Regional Directors. MEMBER KENNEDY, dissenting:

Contrary to my colleagues, I would find that the owner-operators here involved are independent contractors, and would exclude them from any appropriate unit.

The majority, in finding that owner-operators are employees, purports to apply the right-of-control test and concludes that the contractors have retained sufficient control over the manner and means by which the owner-operators perform their duties to establish an employment relationship. In so doing, they rely essentially upon the following: the owner-operators, once on the job, work under the same conditions as do employee-drivers, observing the same starting and quitting time and lunchbreaks; designation by the contractors of the material to be hauled and, in most instances, dumpsites and routes thereto; and the contractors' ability to reprimand owner-operators, dock their pay, and deny them future employment for unsatisfactory performance.

I have no quarrel with the relevance of the common law right-of-control test to the issues at hand. My disagreement stems from the majority's failure to apply the test to the facts of this case in a manner which also considers and gives weight to factors which, in my opinion, when viewed in totality, establish the entrepreneurial status of these owner-operators.

In my view, the conclusion of the majority that the owner-operators here are employees rather than independent contractors is based upon an erroneous view of the controlling facts. My colleagues' application of the right-of-control test fails to balance all of the evidence relevant to the relationship. We should avoid the "kind of legal legerdemain that Congress sought to prevent when it enacted Section 2(3)," for

⁶ Chairman Miller notes his dissenting colleague's reference to the Chairman's special concurrence in *Aetna Freight Lines, Incorporated*, 194 NLRB No. 120. In that same concurrence, the Chairman noted the importance of examining the degree of control exercised over the means and manner of the individual's performance, and stated that true "independent contractors" must be shown to have a very high degree of independence. In

the Chairman's view, such independence is not consistent with being subject to reprimand and discipline over such details of the means of performance as excess talking, length of lunch breaks, and other such typically employee-employer concerns, which surely do not relate to the end to be accomplished, but rather evidence direct control over hour-to-hour, minute-to-minute minutiae.

which this Board was criticized by the United States Court of Appeals for the Ninth Circuit in a case involving facts similar to those here. *Associated Independent Owner-Operators, Inc. v. N.L.R.B.*, 407 F.2d 1383 (1969). Nor should we disregard the teachings of *Brown v. N.L.R.B.*, 462 F.2d 699 (C.A. 9, 1972), cert. denied *sub nom. San Francisco Printing Co., Inc. v. N.L.R.B.*, 409 U.S. 1008, in which the Court of Appeals for the Ninth Circuit again admonished this Board for ignoring relevant factors in testing for independent contractor status, particularly risk of loss and opportunity for profit and personal investment in the business.

There is no dispute on the facts. The record makes clear that the owner-operators are engaged in the closely regulated "for-hire dump truck industry," and that they are required to obtain and maintain a dump truck carrier permit from the Public Utilities Commission. Under the California Public Utilities Code, enforced and administered by the PUC, no such term as "owner-operator" exists. Owner-operators are simply referred to as "carriers," and their customers are known as "shippers." When a carrier utilizes other carriers to perform transportation services contracted for he is said to be acting as an "Overlying Carrier." An "Underlying Carrier" is a term applied to one used by an "Overlying Carrier" to perform a transportation service. The use of the two terms merely serves to distinguish the capacity in which a carrier is acting in performing work on a particular job. The work of the carriers, the owner-operators here involved, is also closely regulated by the California Department of Motor Vehicles, as well as other state and local law enforcement and regulatory agencies. Thus, as an example, owner-operators must guard against prohibited spilling, blowing, or overloading of materials being hauled.

An owner-operator, typically, maintains an office in his home, purchases business stationery, invoices, and other business documents necessary to his business, owns office equipment such as a typewriter and a calculating machine, and may also have a business telephone number listed in the yellow pages of the local telephone directory. He decides, in his sole judgment, what type of equipment to purchase for his business. He negotiates the purchase of the equipment with the dealer and arranges for the necessary financing. Typically, an owner-operator will purchase his truck from a truck manufacturer's dealer and will finance it through a bank or a finance company. Once he purchases his equipment, he is required by law to place his name and PUC "Cal-T" number on it.

An owner-operator files a self-employment income tax return annually, pays estimated income tax, both state and federal, on a quarterly basis, and hires an

accountant of his choice to assist him with the return. Most owner-operators maintain a commercial account for receipts and expenses related to their business. An owner-operator is billed for and pays for property taxes and vehicle taxes levied by the State of California, and the Highway Use Tax levied by the Federal government. Typically, such taxes range anywhere from \$500 to \$1,200 per year.

The cost of the trucking equipment which a typical owner-operator purchases in order to conduct his business varies from \$5,000 to in excess of \$40,000, depending on the nature of the equipment, with an average cost of from \$15,000 to \$20,000. The typical owner-operator has an equity investment in his equipment of anywhere from \$10,000 to \$15,000. In addition, an owner-operator usually purchases and maintains a service vehicle such as a pickup truck, in which he keeps welding equipment and other tools which he needs to repair and maintain his equipment. The cost of this service vehicle ranges anywhere from \$1,000 to \$4,000, and the cost of his tools ranges anywhere from \$500 to \$1,500.

An owner-operator is required to pay all costs involved in maintaining his equipment in an operable state. Such costs include the costs of all repairs, the parts needed to maintain the equipment in operable condition, the costs of preventive maintenance, which includes the regular servicing of such vehicles, and the cost for labor and parts involved in any major repair or overhaul of such equipment. Maintaining dump truck equipment in operable condition is a key factor in the success of any owner-operator, and a breakdown of such equipment is a key risk he, and he alone, assumes.

An owner-operator is required to obtain, maintain, and pay for a permit to operate issued by the State of California Board of Equalization, as well as a permit to operate issued by other local governmental bodies. The PUC requires every owner-operator to carry a \$100,000-\$400,000 bodily injury liability insurance policy and \$30,000 property damage liability insurance policy. In addition, an owner-operator normally carries fire, theft, and collision insurance policies to protect his equipment, and the investment therein. The owner-operator is the owner of the insurance policies acquired on his equipment, and he acquires those policies in the usual insurance market through the normal market sources. The average annual premium paid by an owner-operator varies, depending upon the size and amount of the equipment, limits of the policy, and the area in which the unit operates. The range, however, in terms of annual premium, is from \$500 to as high as \$3,500 per year.

In addition to the costs involved in maintaining his equipment in an operable state, an owner-operator must bear all expenses of operating his equipment.

Such expenses include gasoline, oil, tires, and tubes, as well as spare parts for the equipment. With respect to the materials, products, and services required to maintain the equipment in an operable state, an owner-operator usually purchases those items from the normal commercial channels, and is not reimbursed for them by any overlying carrier or contractor. In addition, he must pay for the cost of garaging his equipment. Owner-operators are free to garage their equipment any place they choose; they are never required to keep their equipment on the premises of either an overlying carrier or contractor.

An owner-operator's cost of operation, which does not include such fixed items as depreciation, insurance, taxes, and licenses, runs anywhere from 15 percent to 20 percent of his gross revenue. The gross revenue of the equipment operated by an owner-operator will depend upon its size, the ability of the owner-operator to keep his equipment in an operable state, his ability to solicit and obtain work for his dump truck equipment, and, finally, the quality of his work and his business reputation and ability. The typical owner-operator receives anywhere from \$15,000 to \$40,000 as gross revenue for his dump truck operations.

An owner-operator is always free to, and occasionally does, hire a substitute driver for his equipment. Obviously, it is important for any owner-operator to keep his equipment in operation and on the job earning revenue. As a consequence, a substitute driver is often hired as vacation relief, and for other reasons, by an owner-operator. However, many owner-operators prefer not to employ substitute drivers because of the substantial investment they have in their equipment and in their goodwill. In those cases where owner-operators hire drivers to drive their equipment, they select the driver, negotiate the wage to be paid him, and make the standard employee deductions from the driver's pay. An owner-operator has the right, once on a job and performing transportation services, either to hire such a substitute driver or to obtain another owner-operator to substitute for him on such job. On those occasions, it is not necessary to report the substitution of an owner-operator or the hiring of a driver, as the case may be, to overlying carrier or to the contractor. In situations where an owner-operator employs a driver to drive his equipment, that driver is under the exclusive control and direction of the owner-operator, which control and direction is required by the PUC of all carriers.

An owner-operator has the right to negotiate any rate he can obtain for transportation services which include traveling on a public highway, regardless of whether he is dealing with an overlying carrier or a contractor, as long as such rate is in excess of the

applicable PUC minimum tariff rate. The rate negotiated by an owner-operator on any given job is governed primarily by the prevailing supply and demand for trucks. On those occasions where trucks are scarce, it is not unusual for an owner-operator to receive as much as 25-30 percent over the minimum rate called for by the tariff.

An owner-operator is free to reject a referral from an overlying carrier with whom he has a subhaul agreement, and such rejections occur on a regular basis. The reasons for rejection of a referral might be the fact that he is engaged elsewhere, that his equipment is inoperable, that he cannot arrive at an agreement concerning the rate for his transportation services, that the terrain involved in the haul is too rough on his equipment, or that the type of haul is one which he is not interested in performing, either because it is more difficult than other jobs then available or because the material to be hauled would cause damage to his equipment and thereby jeopardize his investment in such equipment.

Within the construction industry, the average owner-operator may well perform transportation services for anywhere from 25 to 100 different contractors in any given calendar year. The relationship between an owner-operator and any given contractor typically is of a very short duration. It is not unusual for an owner-operator to perform services for more than one contractor during any 1 workday; it is typical for him to perform services for more than one contractor during any 1 workweek. While the typical owner-operator performs approximately 90 percent of his transportation services as an underlying carrier, he is free to solicit, and often does solicit work from other sources.

When an owner-operator is performing transportation services on a construction job in the capacity of an underlying carrier, the overlying carrier does not supervise those services. In the vast majority of instances, the overlying carrier will not have any representative on the jobsite. Occasionally, on large projects, when a large overlying carrier is included, a representative of the overlying carrier will be present to make sure that things are running smoothly. In the usual case, however, either the overlying carrier or his representative will visit the jobsite no more than once a day in order to chat briefly with the owner, and his function in doing so is one of customer service and relations rather than the supervision of owner-operators. It is not unusual for an owner-operator to report to a job, commence working, and work through to the end of the day without having any communication with an overlying carrier or the contractor, or his representative (other than when he tenders to the contractor or his representative a copy of his daily freight bill at the end of the day). In those

instances when the contractor's representative is not on the job when an owner-operator arrives, the owner-operator receives instructions concerning what job the contractor wants accomplished from other owner-operators who are present and are familiar with the job. The instructions that are received from other subhaulers, as in the case with instructions received from the contractor's representative, consist of, and are limited to, what the contractor wants accomplished.

Once on the job performing transportation services, the directions which an owner-operator receives from a representative of a contractor are limited to what the contractor wants accomplished. Thus, typically, an owner-operator will be advised where the point of origin of the haul is located and where to deliver the material transported. In those cases where there is a choice of routes between the point of origin and the point of delivery, an owner-operator generally is free to select the route he deems best. A typical exception, however, is on those jobs in urban areas where the route must be approved before the commencement of work by representatives of the local governmental agencies or the California Highway Patrol.

In approximately 50 percent of the construction jobs where loading equipment is used, such loading equipment is operated by independent contractors who own the equipment. In the remaining 50 percent of those instances in which a loader is utilized, such loading equipment is either leased or is owned by the contractor and is operated by an employee of such contractor. Owner-operators typically give directions to the persons who operate the loading equipment at the point of origin of the haul concerning the manner in which he wants his truck loaded and the amount, quantity, or tonnage to be loaded. Owner-operators are free to, and often do, refuse to provide transportation services in cases where, in their sole judgment, their equipment is subject to the risk of damage because of the manner in which it is being loaded or because of the nature of the material being hauled. Moreover, owner-operators are free to, and often have, ceased performing transportation services in cases where, in their sole judgment, the amount and/or quantity of material which is being loaded into their dump truck equipment would subject them to the possibility of a citation for violation of the rules of the road concerning overloading, blowing, or spilling. Owner-operators are never issued any written rules and/or regulations or operating manuals by any of the overlying carriers and/or contractors for whom they perform transportation services. Nor do they receive instructions concerning the

operation of their dump truck equipment from overlying carriers and/or contractors.

Owner-operators often perform work outside the construction industry which they obtain through their own solicitation. Such work includes providing transportation services for private homeowners, shippers who own commercial rock, sand, gravel, or asphalt and concrete processing plants, and, finally, shippers who have no nexus with the construction industry whatsoever. Within the construction industry itself, a subhauler usually does not limit the type of transportation services he renders to any particular type of material or haul.

In sum, the record shows that the owner-operators have substantial financial investments in their equipment. They are responsible for maintenance and upkeep costs and must exercise care and judgment in the selection of financing arrangements and in keeping maintenance costs at a minimum in order to realize a profit from the operation of their vehicles. Unlike the employee-drivers, who are responsible only for ordinary traffic violations, owner-operators are responsible for traffic violations stemming from overloading, spillage, or defective equipment. The business of some owner-operators has been profitable; others have gone bankrupt. The opportunity for profit or loss clearly depends on the initiative and ability of the owner-operators to operate their trucks efficiently and economically. The businesslike nature of their opportunities is further shown by the fact that the more successful ones become overlying carriers or own a large number of vehicles. The owner-operators secure work through referral or by their own solicitations and may, during a given period of time, perform work for several different contractors, none of whom make social security or income tax deductions. They may refuse employment, and are not dependent on any particular contractor for continued employment. As the owner-operators must secure their own life, accident, and equipment insurance, they may readily increase their profits by the careful businesslike selection on such insurance. While in many instances they are hourly paid, the record reveals the hourly rate is basically determined by the minimum tariffs.⁷ They also keep their own records, which they present for billing and tax purposes.

When measured against the above background, and in view of the totality of the relationship between the contractors and the owner-operators, the factors relied upon by the majority fall far short of establishing an employee-employer relationship. Thus, the contractors' direction of the owner-operators in such matters as location of material, dump-

are able to affect such rates.

⁷ In this regard, it would appear that to the extent the lobbying efforts of the trade associations which represent them are successful owner-operators

sites, and routes to be taken appear minimal and more akin to descriptions of what the contractors want done, rather than how it is to be done. See, e.g., *International Union of Operating Engineers, Local 12 (Associated Independent Owner-Operators, Inc.)*, 180 NLRB 293; *Claremont Development Co.*, 106 NLRB 611; *Local 348, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Jesse Holland)*, 132 NLRB 1120. The observance of common starting and quitting and lunch times would appear necessary since the very nature of the construction industry dictates that the multiplicity of tasks performed on a construction site be performed and coordinated in an atmosphere of discipline and order. Nor do I find significance in the contractors' ability to reprimand owner-operators or dock their pay for unsatisfactory performance. The record does not reveal that these practices are widespread or often employed. Every party to a contract as a matter of law has a right to contest the faithful performance of the terms of such contract.⁸ Furthermore, the fact that the contractor can terminate or refuse future employment to an owner-operator is not inconsistent with an independent contractor finding since, generally, the owner-operators involved herein perform services for many contractors and therefore have no recurrent dependence on any particular contractor for employment.

⁸ General contractors often do withhold funds from subcontractors for improper or unfinished work, and criticize poor performance, whether paid

As I view the facts, the owner-operators have little resemblance to employees. They are engaged in a venture in which they assume all risks and, through the exercise of judgment and investment of capital, can materially affect personal opportunities for profit. While the contractors control the results and describe what they want done, the owner-operators control the manner in which their services are performed. They "enjoy a degree of independence in their operations, and assumed responsibilities and risks, normally associated with entrepreneurs rather than employees." *Hugh Major d/b/a Hugh Major Truck Service*, 124 NLRB 1387, 1389. Cf. *National Van Lines*, 117 NLRB 1213.

I must echo here the words of Chairman Miller in his concurring opinion in *Aetna Freight Lines*, 194 NLRB No. 120 (1971), in which he stated: "My colleagues are sometimes too ready to find an employee status in cases involving [the trucking industry]. There has been a trend in finding employee status in nearly every case, and to virtually eliminate, by a sort of decisional fiat, any possibility of independent contracting in the trucking field . . . with that trend I disagree." I, too, disagree, and here must dissent. In my opinion, the owner-operators are independent contractors, and their inclusion in the unit would clearly violate the statutory mandate.

for on an hourly basis or pursuant to a contract.