Ace Doran Hauling & Rigging Co. *and* Teamsters Union Local No. 413, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Joint Petitioner. Case 9–RC–10277

November 8, 1974

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, on September 5, 1973, a hearing was held before Hearing Officer James E. Murphy on September 26 and 27, 1973; October 23, 24, and 25, 1973; and November 26, 27, and 28, 1973, for the purpose of taking testimony with respect to the issues raised by the petition. On December 12, 1973, the Regional Director for Region 9 issued an order transferring this case to the National Labor Relations Board, and the Petitioners and the Employer filed briefs with the Board.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings 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 policies of the Act to assert jurisdiction herein.

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

3. No 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.

The Petitioners seek a unit of all single owner-operators and nonowner-drivers of leased equipment driving any equipment throughout the entire system of the Employer. The Employer, on the other hand, contends that the unit sought is inappropriate on the basis that the single owner-operators who lease their tractors and trailers to the Employer are independent contractors, and that the nonowner-drivers are the employees of the owners who are also independent contractors.

The Employer, an Ohio corporation with its principal place of business in Cincinnati, Ohio, is engaged in the interstate transportation of steel, aluminum, machinery, and other heavy items throughout 12 Midwestern and Eastern States as a common carrier under license from the Interstate Commerce Commission (ICC). The Employer operates through variously located terminals, which are in most instances owned and maintained by commission agents who are paid on a percentage or commission basis out of the general tariff realized from each and every hauling job. The Employer has no drivers in its direct employ and operates basically through truck leases with approximately 305 single owner-operators, 118 fleet owner-nondrivers, and 50 fleet owner-drivers.

The Employer is authorized to operate as an interstate motor vehicle common carrier under a Certificate of Public Convenience and Necessity granted by the Interstate Commerce Commission. In its operations, the Employer is subject to the Interstate Commerce Act and to the regulations promulgated by the ICC and is further subject to pertinent regulations of the Department of Transportation (DOT). Under the Interstate Commerce Act, a carrier is permitted to augment its equipment by means of leases, but the carrier is not thereby relieved from certain duties and responsibilities imposed by that Act.

The relationship between the Employer and the single and multiple owner-operators is based on the terms of a lease entitled "Equipment Lease Agreement Between Owner and Carrier." The term of the lease is for a minimum of 30 days, and may be terminated by either party at any time after the initial 30-day period, or automatically, according to the lease, by either party's breach of its major provisions. The lease provides, *inter alia,* that the owner guarantees title to the equipment and warrants that such equipment "is in good, safe and efficient operating condition"; the owner is to submit the equipment to the carrier for the latter's inspection at the time the carrier (Employer) takes possession of the equipment, and periodically thereafter, as required by the ICC and DOT regulations; the Employer is to pay the owner a set percentage of the total tariff received, ranging from 70 to 76 percent depending on the commodity and destination with higher percentages dependent on individual negotiations for special loads; any person hired by the owner is considered to be an employee of the owner and not an employee of the carrier, and any such driver hired by the owner is to be under the direction and control of the owner; the owner shall pay all salaries, wages, etc., and provide workmen's compensation and make all necessary payroll deductions required by applicable law or regulation; and the owner shall pay for all licenses, registration fees, toll charges, decals, use permits, axle, weight, gasoline, or other types of taxes, etc. The lease also provides that the owner agrees to provide a qualified driver and any necessary helpers that may be required, to maintain the equipment at owner's expense, and to carry public liability and property insurance on the equipment when it is not

being operated in the service of the carrier, and bear all other expenses necessary for the operation of the equipment. The lease further provides that the carrier may sublease the equipment (presumably to another carrier) and that the carrier shall maintain and pay for the costs of public liability, property damage, and cargo insurance on the equipment while the same is being operated in its service.

New drivers, whether they be owner-operators or nonowner-drivers working for the owners, are required to fill out company applications and undergo a physical examination. The Employer then checks the applicant's driving record and his character and credit standings. If the applicant is an owner, his equipment must be inspected. As to the inspection of equipment, the Employer has no fixed requirement as to where the equipment is to be inspected, permitting the owner to have the inspection performed at any authorized inspection station of his choice. As noted above, an owner receives a fixed percentage of the gross tariff for any hauling work that he does. As to the pay of the nonowner-drivers, the record shows that these drivers are paid on the basis of their agreements with the owners. In addition, the owners withhold all Federal and state income taxes and social security taxes and provide for their coverage under workmen's compensation insurance. The drivers receive no holiday or vacation pay from the Employer and, although the Employer does permit the drivers to participate in a voluntary group insurance program, the record indicates that very few participate in this program. The Employer does not assist the owners in the purchase of their equipment or in the maintenance and repairs of the equipment. However, the owners can secure an advance for any one haul, but generally these advances are made by the commission agents who operate the terminals out of which the owners generally operate. The Employer is required by regulations to adhere to certain safety requirements. However, the Employer does not maintain any field safety inspectors, but rather operates its safety department on a postaccident review basis with reprimands or penalties being determined after an investigation and review of the reported accidents.

The record shows that the Employer operates through commission agents who generally maintain direct and immediate contact with the owner-drivers and the nonowner-drivers. These commission agents usually own and operate truck terminals throughout the Employer's authorized area. The record shows that many of these terminal owners also own trucks that they lease to the Employer with drivers employed by and under the exclusive control of the owners. These terminal owners, in addition to owning and leasing trucks to the Employer, also provide parking and dispatch facilities to various owner-drivers who use the facilities and generally have their trucks under lease to the Employer. Clarence Schneider, owner of Schneider Trucking Company, testified that he owns the terminal land and buildings, employs approximately 10 employees, leases 3 trucks to the Employer, owns 2 more trucks that he uses in his own hauling business, and operates a wrecking service out of the same facilities. Richard Tannert, president of Tannert, Inc., testified that his company employs approximately 30 employees, operates a terminal and warehouse at his place of business, leases 8 trucks and 30 trailers to the Employer, and has approximately 20 owner-drivers who operate out of his terminal and who have leased their trucks to the Employer. Tannert also testified that he has been operating his trucking business and terminal for approximately 20 years but has only been associated with the Employer for the last 2 years. The record further shows that many of the commission agents who own and lease trucks to the Employer have most, if not all, of their drivers qualified to drive for more than one carrier and that the drivers are frequently interchanged.

In these circumstances, we are of the opinion that nondriving-multiple owners are independent contractors and that those individuals driving their equipment under leases to the Employer are employees of these independent contractors.[1]

The issue as to the status of individual owner-drivers is a more difficult one. In a previous case involving a smaller petitioned-for unit of this same Employer, this Board found the individual owner-drivers to be employees and the Sixth Circuit in the decision cited at footnote 1, *supra,* affirmed this Board's findings. There the court pointed to previous decisions of this Board, some of which have been affirmed in the courts. These cases included *Deaton, Inc.,* 187 NLRB 780 (1971); *Deaton Truck Line, Inc.* v. *N.L.R.B.,* 337 F.2d 697 (C.A. 5, 1964); *The Maxwell Company,* 164 NLRB 713 (1967), affd. 414 F.2d 477 (C.A. 6, 1969); and *Tryon Trucking Inc.,* 192 NLRB 764 (1971). The Sixth Circuit cited these cases as having "developed the principle that owner-drivers of vehicles leased to a company are 'employees' of the company within the meaning of the Act, and are therefore appropriate members of a bargaining unit with respect to the company." Thus, the court approved the Board's findings in the previous *Ace Doran* case stating (p. 194):

[1] *Ace Doran Hauling & Rigging Co* v *N L R B*, 462 F 2d 190 (C A 6, 1972)

> We do not find any substantial difference in the present case from those cases cited above involving single-owner drivers, which would justify a different result. Indeed, to hold that the single owner-drivers were not employees under the Act would be a substantial departure from these authorities, and would serve as a disrupting influence on well-established collective bargaining relationships.

The Employer here argues to us, however, that while this Board has in certain circumstances held owner-drivers to be employees, in other cases, depending on the specific facts with respect to the degree of control exercised over such persons by the alleged "employer," this Board has held such individual owner-drivers to be independent contractors and not employees, citing such cases as *Reisch Trucking and Transportation Co., Inc.,* 143 NLRB 953 (1963); *Conley Motor Express, Inc.,* 197 NLRB 624 (1972); *Fleet Transport Company, Inc.* 196 NLRB 436 (1972); and *Portage Transfer Company, Inc.,* 204 NLRB 787 (1973). The Employer, recognizing that this Board continues to find owner-drivers to be employees in cases where substantial employer control is exercised (*The Aetna Freight Lines, Incorporated,* 194 NLRB 740 (1971)), argues that the facts of the instant case do not parallel those in such cases as *Aetna* but rather more closely parallel those in *Conley, Fleet,* and *Portage,* and thus compel a finding that the owner-drivers here are independent contractors.

The petitioning labor organization on the other hand argues that, consistent with its decisions in *Pony Trucking, Inc.,* 198 NLRB No. 59 (1972), affd. 486 F.2d 1039 (C.A. 6, 1973), *Florida-Texas Freight, Inc.,* 197 NLRB 976 (1972); *Aetna Freight Lines, Incorporated, supra;* and *Tryon Trucking Inc., supra,* this Board should find the owner-operators here to be employees within the meaning of the Act and should also hold that Ace Doran is a joint employer of all nonowner-drivers employed by the multiple owners. Petitioner asserts that the facts of this record demonstrate a degree of control by Ace Doran sufficient to require this legal conclusion and particularly urges this Board, in making the said determination, to take into account both such control over drivers as is required under applicable ICC and DOT regulations as well as the degree of control reserved in Ace Doran pursuant to the leases with the owner-operators and other indicia of control which it asserts are here exercised, although arguably not required by either governmental regulation or the terms of the lease.

Both Ace Doran and the Petitioner argue their positions eloquently and ably. In addition to their respectively able, although differing, analyses of the record facts each also presents, with clarity and forcefulness, what each perceives to be the equities of the situation. Ace Doran characterizes the owner-operators as true independent businessmen who should be entitled to carry on their businesses as individuals and not be subject to the majority rule principles which govern "employees" under the scheme of this Act. Petitioner on the other hand argues that the drivers are entitled to be given a chance in a Board election to decide whether they want to "enhance the market for their labor by limiting its supply through the device of offering themselves as a class and under conditions that their union will accept."

We do not purport to decide, nor do we think it is our proper role to decide, the equities of the respective positions. We are persuaded, however, of the necessity for carefully examining all of the facts in this record so that, to the best of our ability, we may properly apply the test imposed upon us by the Congress; i.e., determining whether these individuals are employees or independent contractors under applicable common law principles. In making out examination of the facts we must consider the degree of control exercised over the owner-operators regardless of the reasons for the imposition of that control; that is, whether inspired by governmental regulations or for other business reasons. At the same time, however, we must recognize that the degree of control required under governmental regulations does not necessarily mean that an employer-employee relationship has been created. This seems plain enough in light of the Supreme Court decision in *Greyvan Lines* v. *Harrison,* 156 F.2d 412 (C.A. 7), affd. 331 U.S. 704 (1947), wherein independent contractors status was found even though the entities and persons there involved were subject to governmental regulations applicable to interstate carriers. In making our analysis we have in the instant case the advantage of a full and complete record covering the Employer's total operations, whereas in the representation case underlying our decision in Volume 191, we had exercised our discretion not to grant a full review of the Regional Director's decision therein, which in any event related only to a portion of its total operations. In the instant case, the Regional Director transferred the case to the Board for decision, as a result of which we have the complete record before us.

As evidenced by the cases cited *supra* it is apparent that this Board does not decide these cases on the basis of inflexible categorizations universally applied. We have not held, for example, that all owner-operators must necessarily be found to be employees or on the other hand that all owner-operators must necessarily be deemed independent contractors. The specific facts of each case are determinative of the issue.

On the record here we are persuaded that the owner-drivers are in fact independent contractors and that the nonowner-drivers employed by them are employees of the independent contractors rather than of the Employer.

We note in this connection that the individual owner-drivers freely exercise their own business judgment as to what loads to accept or whether to accept a load at all. The testimony of several such owner-drivers indicates that they exercise this judgment, choosing loads with a careful eye, for example, to their ability to obtain backhauls at the point of initial destination. While in other cases such as *Aetna Freight Lines, Incorporated, supra,* the truck line carefully restricted "trip leasing" initiated by the owner-operators, Ace Doran does not. "Trip leases" are in theory a lease between two carriers. Thus Ace Doran, since it has the equipment under lease to it, has the option of trip leasing that equipment only to such carriers as it may designate or to set the conditions under which such leases will be authorized. While Ace Doran here would prefer that trip leases not be executed with carriers that endeavor to hold Ace Doran liable for their freight movements, it is evident from the testimony that this desire is not implemented by Ace Doran in such a manner as to restrict the trip leases which its owner-operators may initiate. Instead it has obviously extended broad authority to its owner-operators with respect to trip leasing.

The evidence is to the effect that this discretion is widely utilized so that, in effect, owner-operators select backhauls either through trip leasing or through arrangements to haul exempt commodities (no trip leases required) in the exercise of their own business judgment. John Howard, for example, an owner-operator, testified that he "shops around" for the best freight to haul back and frequently trip leases with another carrier, Midwest Emory, on about 40 percent of his return trips. He testified that he calls both Ace Doran and Midwest Emory and selects the best load available. Yet another driver, Robert Crouse, utilizes his equipment on his returns to transport concrete block and farm machinery for resale in another business which he operates.

Yet another owner-operator testified that he does not desire return loads and exercises his independent discretion in the selection of loads so that his trucks will go only to a point where they can return the same day.

When trip leasing is engaged in, the employer does not derive any revenue and the owner-operators receive the full revenue therefrom except for a deduction to cover the cost of insurance. Contrary to our dissenting colleague, we express no opinion as to whether the broad authority here granted to owner-operators to enter into trip leases on behalf of the employer is inconsistent with applicable ICC or DOT regulations; we do not believe that it is a part of this Board's responsibility to police those rules and regulations. The only relevance of these facts to our decision, as we see it, is to enable us to determine whether the *modus operandi* evidenced by this record is one in which day-to-day supervision is or is not exercised over owner-operators in initiating trip leases; or whether, on the other hand, owner-operators can and do have and use broad authority to trip lease in such manner as to independently control their earnings through their freedom to use their time in accord with their own individual preference or business judgment. The independence and freedom evidenced in this record as to trip leasing is, in our judgment, of considerable persuasive effect in showing lack of control by the Employer and, instead, substantial independence by the owner-operators.

Similarly, the freedom of the drivers to decide whether or not to accept an initial load and their freedom to decide which loads they desire to take also evidences their freedom from control on a day-to-day basis and, again, demonstrates their substantial independence.

The record indicates that owner-drivers are free from controls in a number of other areas. Routes of travel are not prescribed for them; the frequency and number of hours they work is not prescribed; and they park their trucks wherever they please. These facts, too, are quite different from those in cases like *Aetna Freight Lines* where drivers were shown to have been disciplined for load rejections, where trip leasing was carefully and regularly controlled by the employer, and where all equipment was required to be parked on company property.

In addition, the owner-operators here do not wear any identifying uniforms; select their own repair stations, fuel, and part supply sources; decide whether to drive themselves or hire a driver; set work rules and rates of pay for their hired drivers; and pay both the initial cost of the equipment (a very substantial investment) and the necessary maintenance repair costs, license fees, and collision and "bobtail" insurance.

There are, however, certain factors which do limit the full freedom of the owner-operators. The percentage of the total revenue which is paid to owner-operators is unilaterally set in most cases by the employer although the record indicates that in about 10 percent of the cases the rates are negotiated—primarily instances where special types of hauls are involved. The share of the revenue which is due to the owner-

operator is, as the dissent points out, paid to him by the employer. These factors, however, we do not regard as controlling.

It is a commonly known fact in the business world that in certain business relationships one party to the transaction may be in a position essentially to fix unilaterally the terms on which he will do business with another, but that fact does not make the other his "employee." Nor is an employer-employee relationship created merely because a lessee is willing to agree to lease terms which require payments to the lessor even if the lessee is not able profitably to use the leased property, as is true here where the shipper does not promptly pay Ace Doran's bills. The issue of who assumes the financial risk of slow payment or nonpayment by the ultimate consumer of the trucking service seems to us quite tangential to the central issue of "control" of lessor by lessee, which is the determining common law factor in our consideration.

More relevant, though, to the control issue are the restrictions placed here on the owner-operators with respect to safety items. It is true that the Employer actively encourages all drivers, whether owner-operators or employees of multiple owners, to comply with governmental safety regulations. This encouragement, however, appears to be accomplished with a minimum of detailed control. Owner-operators and other drivers, for example, are subject only to a bare minimum of required training or safety instructions at times and places specified by the Employer. While medical examinations are required by the governmental regulations, the Employer does not specify that they be taken at a time and place designated by the Employer nor does the Employer specify the physician. Instead, owner-operators and other drivers are merely informed of the DOT requirements regarding medical examinations, and they undergo such examinations by a doctor of their own choosing and at a time chosen by themselves. Owners who hire drivers conduct their own training of drivers, since the Employer here conducts no such program, and holds only a brief "orientation" session with new drivers, designed primarily to acquaint them with applicable governmental regulations. Unlike some other carriers, the Employer here maintains no road patrols, nor does it in any other significant way impinge upon the time or operational techniques of the various multiple and single owner-operators.

The Employer, however, does require each driver to file a detailed application with it; the employer also has a few regulatory policies going beyond DOT regulations with respect, for example, to such matters as "on or off duty" use or possession of drugs, and with respect to its procedures to be followed in the event of accidents. The evidence also indicates that the Employer has occasionally "disqualified" drivers whose physical condition or accident record indicated to the Employer that they were unsuitable as drivers. Except for the "disqualifications," the above appear to us to be relatively minor infringements upon the freedom of action of the owner-operators, and are not totally uncommon in other arms-length business relationships which are not of an employer-employee variety. (New franchises, for example, may well be required to attend some initial orientation program sponsored by a franchisor, and yet the relationship does not thereby become one of employer and employee. Nor does such a relationship result, in other contexts, from the existence of detailed understandings or agreements as to how contracting parties shall conduct themselves vis-a-vis each other in the event of emergencies, such as accidents here.)

The "disqualification" issue is more troublesome. If the Employer here were shown to have promulgated an extensive set of regulations of driver conduct, and enforced those regulations by a predetermined set of reprimands, penalties, and other discipline up to and including "disqualification" or discharge, there could be little question but that the Employer effectively controlled the conduct of the drivers, and that an employer-employee relationship was the legal effect thereof. The facts here, however, appear to show that such "disqualifications" are few in number and are limited to instances where either the safety record or the physical condition of the individuals would, in the opinion of the Employer, have made their continued assignment to driving tasks risky and unwise. There is no showing that drivers are subject to "disqualification" for any broader purpose, or that there is any pattern of discipline for inefficiency, inattention to the details of the work, insubordinate conduct, or any of the other wide variety of items which are normally regarded as misconduct giving rise to disciplinary action in a typical employer-employee setting.

While even this narrowly confined exercise of control of continued employment gives us pause, we are not persuaded that, on balance, it is sufficient to offset the proven wide degree of freedom of action of these owner-operators. Standing virtually alone as a limitation upon that freedom, it is, we hold, not sufficient to compel a finding of employer-employee relationship. No single factor is per se decisive. Among the factors that persuade us are: (1) The owner-drivers exercise a very substantial degree of freedom in scheduling the use of their equipment, including whether they will drive themselves or hire other drivers, what routes they will take, where to have repairs made and fuel purchased, what type or make of equipment they will use, and where to park their trucks when not in use; (2) the owner-drivers are free

to refuse loads without penalty; (3) the owner-drivers, if they hire other drivers, have exclusive control over the wages and working conditions of those drivers; (4) the owner-drivers pay all of the costs of maintaining their equipment; (5) the owner-drivers are not subject to any normal day-to-day supervision or control by supervisory or management officials of the Employer; (6) the owners and their hired drivers do not participate in any of the Employer's employee benefit programs; and (7) the entrepreneurial nature of the owner-driver's operations established on the record before us shows individuals making substantial capital investments in equipment, in many instances such investments being for more than a single piece of equipment, while in other cases the owners operate their equipment in conjunction with other established business operations.

In view of the foregoing, we conclude that the owner-drivers are independent contractors, and that the nonowner-drivers employed by them are employees of the independent contractors rather than of the Employer.[2] In these circumstances, and in view of the fact that there are no employees driving directly for the Employer, we shall dismiss the petition.

ORDER

It is hereby ordered that the petition herein be, and it hereby is, dismissed.

MEMBERS FANNING AND JENKINS, dissenting:

We agree with our colleagues' conclusion that the nondriver-multiple owners are independent contractors and that those drivers employed by these individuals or companies are the employees of these independent contractors. However, we do not agree with the conclusion that the owner-drivers who own and have leased to the Employer one or two vehicles are also independent contractors.

On August 10, 1970, Local 100, a sister local and affiliate of the Petitioners, was certified in a unit of the Employer's drivers limited to the Employer's Cincinnati operations (Case 9–RC–8470). Thereafter, the Employer refused to bargain with Local 100 and on June 23, 1971, the Board issued its Decision and Order (Chairman Miller dissenting) finding that the instant Employer violated Section 8(a)(5) of the Act in its refusal to bargain with Local 100.[3] Thereafter, the United States Court of Appeals for the Sixth Circuit affirmed in major part the Board's Order, denying enforcement only as to that portion of the bargaining order relating to those drivers employed by non-driver-multiple owners whom the court then, as we do here, found to be independent contractors. What is important now is that the court upheld the underlying unit finding of the Regional Director that individual owner-drivers were employees of the Employer. The majority would now reverse this finding.

In affirming the Board's earlier finding, the court of appeals relied on the degree of control required by ICC regulations and exercised by the Employer over the single owner-drivers, as well as the "additional controls" over and above the ICC requirements. In *N.L.R.B.* v. *Pony Trucking, Inc.*,[4] the court specifically reaffirmed its finding in the earlier *Ace Doran* case, noting that the "additional control" factor most relied on was the fact that under the lease, the individual owner could not sublease (presumably triplease) his equipment without the consent of the lessee carrier.

The majority, in its Decision, cites various testimony that would indicate that the owner-drivers now frequently trip lease their vehicles to other carriers without the consent of the Employer and, on occasion, against the best interests of the Employer. On the record before us, we do not question this testimony. However, we seriously question the majority's reliance on this testimony as justification for finding these owner-drivers to be independent contractors. The ICC regulations *and the lease* provide that the equipment is leased into the carrier's "exclusive possession, control, use, and responsibility." It is clear that under existing law, a carrier cannot lease a truck for interstate hauling without the carrier's securing "exclusive" control of the vehicle, and, in our opinion, this exclusive control of the vehicle also carries with it the exclusive control and authority over the driver while that vehicle is engaged in transporting goods in interstate commerce.

We agree with the majority that it is not the Board's responsibility to police the ICC and DOT regulations. However, we do not believe that the National Labor policy is effectuated by our closing our eyes to the positive mandates of those regulations and Ace Doran's violations thereof. This is one of those rare occasions where "form" (the regulations and the lease) must take precedence over "substance" (the practice). We do not believe that we are being hypertechnical in insisting that interstate carriers abide by those rules and regulations properly promulgated for the benefit of the interstate trucking industry and, in our opinion, the flouting of these regulations by Ace Doran is antithetical to the public interest which the existing Federal regulations were meant to protect.[5] Since the Employer *possesses* the

[2] *George Transfer & Rigging Co, Inc*, 208 NLRB 494 (1974)
[3] 191 NLRB 428 (1971)
[4] 486 F 2d 1039 (C A 6, 1973)
[5] Apart from this facet this case is essentially the same as *George Transfer*

authority and control over the owner-drivers, that reason alone is sufficient to discount the efficacy of the testimony that the owner-drivers are able to trip lease as they choose. In addition this independence of operations is illusory at best, and whatever independence the drivers might now have is solely at the absolute sufferance of the Employer, a very recent sufferance we might add, which we fear is compelled by but one motive: to forestall the organizational efforts of the owner-drivers heretofore found to be employees of the Employer by both this Board and the United States Court of Appeals for the Sixth Circuit.

There are other factors that also exhibit a high degree of control over the owner-drivers. Foremost among these is the Employer's safety program and the drivers' compliance therewith. It is true that the Employer has no field inspectors checking the daily activities of the drivers. However, the record clearly shows that the Employer's safety department is an efficient and effective operating department dealing with infractions of the safety rules and regulations. Reprimands are frequently issued, and, if at any time the safety department feels that a driver should give an accounting of his part in an accident, that driver *must* come to the Employer's home office in Cincinnati, Ohio, to give his account. Another factor that we believe is of critical importance is the relationship among the owners, the Employer, and the customers. The drivers deliver the loads for the customers, but it is the Employer to whom they look for their compensation. It is expected of course that the shipper will pay his bill, but even if the shipper does not promptly pay the shipping bill, the Employer pays the owner-driver the required percentage of the assessed tariff just as any other employee would receive his wages for services rendered. Thus, it is the Employer who assumes the risks, and, in our opinion, one of the critical factors relating to the independent contractor status of an individual is who assumes the risks.

In our opinion, the record now before us does not support the Employer's contention that single owner-drivers are independent contractors. The record shows that the Employer is the legally and operational entity responsible for the critical means and methods whereby freight entrusted to it is moved from shipper to consignee. Since the Employer is directly involved in the means as well as the results, we would find the single owner-drivers to be employees of the Employer and we dissent from the majority's contrary conclusion.

& Rigging Co, Inc, 208 NLRB 494 (1974), where we likewise dissented