

C.C. Eastern, Inc. and Local 701, International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 22-RC-10594

December 16, 1992

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On March 26, 1992, the Regional Director for Region 22 issued a Decision and Direction of Election in the above-entitled proceeding. He found that the owner-operator drivers of the Employer are employees within the meaning of Section 2(3) of the National Labor Relations Act (the Act), and that a unit of drivers is an appropriate unit for the purpose of collective bargaining.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending that the Regional Director's decision that the owner-operators were employees is contrary to the Board's decision in *Central Transport*, 299 NLRB 5 (1990), and that the drivers are independent contractors. On April 24, 1992, the Board granted the Employer's request for review.¹ The election was held as scheduled on April 24, 1992, and the ballots were impounded pending the Board's Decision on Review. The Employer and the Petitioner filed briefs on review in support of their positions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the briefs on review with respect to the issue on review and has decided, for the reasons set forth below, to affirm the Regional Director's decision.

The pertinent facts are fairly set forth in the attached Regional Director's decision (pertinent portions are attached). Briefly stated, the Employer operates a freight terminal in North Brunswick, New Jersey, out of which 14 owner-operator drivers make local freight deliveries or pickups that have originated with or are destined for line freight haulage. These drivers own their own tractors, for which they pay all expenses, and are responsible for their own costs such as insurance, maintenance, tires, and tolls. Drivers sign a contract with the Employer that designates them as independent contractors. They are provided no fringe benefits, and no taxes or other payments are withheld from their compensation, which is based on mileage and weight computation.

Drivers service Employer-assigned geographic areas in which they are to make deliveries in the mornings

and pickups in the afternoons. Those areas are subject to change on a daily or permanent basis, by the dispatcher or terminal manager, depending on the Employer's needs. Drivers usually arrive in the morning to find fully loaded or almost fully loaded trailers, the order of which usually determines the order of delivery. The order of loading, controlled by the dock supervisor, is not necessarily the most efficient order for purposes of delivery, as freight is loaded onto the delivery trailers in the order in which it comes off the line haul trailers. Four of the drivers regularly or occasionally reload their trailers without compensation—a function that may take anywhere from one-half to 3 hours.

The drivers are not permitted to work for competitor employers or accept work from other employers during normal weekday business hours. They are permitted to accept other employment during evening and weekend hours, and to hire their own assistant or replacement drivers. The record shows no instances of drivers working for other companies during evening or weekend hours, and only one instance of a driver hiring a replacement while on a 2-week military leave 5 years ago.

Drivers are eligible for a yearly bonus. The individual owner-operator has a pool amount of \$3000 per calendar year, and receives 50 percent of the pool amount the first year with the remainder deferred over the next 2 years. In subsequent years, the owner-operator will receive one-third of the pool amount plus previous deferred amounts with the remainder deferred over the next 2 years. This amount may be eroded based on driver deficiencies, such as lack of availability, accidents, or deficient administrative work. Warnings are issued to drivers for these and other offenses, and are reflected in deductions from the earlier established bonuses. Most drivers have one or more warnings.

Based on the foregoing and the record as a whole, we conclude, in agreement with the Regional Director, that the owner-operators are employees and not independent contractors. We find that *Central Transport*, supra, which concerned the status of owner-operator drivers at a corporate affiliate of the Employer, who were found by the Board to be independent contractors, is significantly distinguishable from the instant case.

The owner-operators in *Central Transport* were engaged in greater entrepreneurial activity than those in the instant case. In that case, unlike here, owner-operators were permitted to work for competitor companies, and one of the three owner-operators at issue regularly hauled for other firms, including competitors, and regularly hired his own drivers to drive for other companies and *Central Transport*. The Board found that the size and scope of this latter person's operation tended

¹ A corrected order was issued on April 27, 1992.

to indicate that he was in the hauling business. By contrast, in the instant case there is no evidence that any of the 14 owner-operators themselves worked for other companies or hired their own drivers to do so, or that they hired drivers to work for the Employer. We additionally note that all owner-operators in *Central Transport* were required to provide replacement drivers when on vacation or otherwise unavailable; in the instant case the Employer has no such requirements and replacement drivers are virtually never used.

Finally, the drivers in the instant case receive warning notices with respect to defects concerning their availability, accident record, and administrative work which affects the amount of bonus money they collect at the end of the year. By contrast, the drivers in *Central Transport* were not subject to any kind of disciplinary system, not even an informal one.² Instead, the employer would threaten to find another driver to work on a particular run or to cancel the driver's contract if it was displeased with the driver's performance.

In conclusion, we find this case to be distinguishable from *Central Transport* because of the owner-operators' comparative lack of entrepreneurial activity and the disciplinary system which the Employer uses to exert control over the manner and means by which the owner-operators perform their work. Accordingly, we find the owner-operators to be employees within the meaning of Section 2(3) of the Act.

ORDER

This proceeding is remanded to the Regional Director for further appropriate action, including the opening and counting of the ballots cast in the April 24, 1992 election.

²We note that in *North American Van Lines v. NLRB*, 869 F.2d 596 (D.C. Cir. 1989), the court found that the company's incentive system of owner-operator driver rewards and punishments allowed the employer to ensure that the drivers' overall performance met its standards, but that this did not render the drivers' employees, since the incentives and disciplinary measures were not used to control the manner and means of the drivers' performance. We find that case, however, to be distinguishable from this case. In *North American Van Lines*, unlike here, the drivers had complete discretion to turn down assignments, and the incentive system was designed to motivate drivers to accept assignments by rewarding those who took undesirable loads, and disciplining those who did not over long periods of time have a sufficient number of loads. The court found that the "drivers' ability to decline particular loads is manifest and the exercise of that ability leads to significant independence in practice." *Id.* at 602. Here, by contrast, drivers are not permitted to turn down assignments except for stops outside of their designated territory, and the disciplinary system apparently functions to exert control over the manner and means by which they perform their work.

APPENDIX

Regional Director's Report

An initial petition in Case 22-RC-10572 was filed by the Petitioner on December 23, 1991, naming Central Transport, Inc. as the appropriate employing entity. During the course of a hearing held pursuant to that petition on January 22, 1992, significant record evidence indicated that C. C. Eastern, Inc. and not Central Transport, Inc. was the appropriate employing entity and should have been so named in the petition. Despite being offered an opportunity to amend the petition at hearing to reflect the appropriate Employer, the Petitioner declined to do so. Based on the record resulting from that hearing, I concluded that there was insufficient evidence to find the named Employer, Central Transport, Inc., to be the appropriate employing entity. I therefore issued on February 6, 1992, a Decision and Order dismissing that petition. A subsequent petition was filed on February 10, 1992, identifying the Employer as C. C. Eastern, Inc. The parties have stipulated that the record resulting from the January 22, 1992 hearing would form the basis of the instant decision.

The name of the Petitioner appears as amended at the hearing.

A brief filed by the Employer and closing argument by the Petitioner have been duly considered.

The Employer contends that the instant petition is inappropriate because the petitioned for drivers are not employees within the meaning of Section 2(3) of the Act but rather independent contractors. To support its position the Employer points to the agreement signed by the drivers establishing them as independent contractors; the fact that the drivers have made substantial investments, between \$20,000-\$40,000, to purchase their own tractors; that they are free to hire assistants and/or substitute drivers; that they are provided no fringe benefits and no taxes or other payments are withheld from their compensation which is based on mileage and weight computation; that there are no scheduled hours of work or uniforms; that there is no disciplinary procedure and that the Employer exercises no day-to-day control over the accomplishment of their tasks. The Petitioner's position is the converse, that the drivers possess significant indicia of employee status and should be found to be employees of C. C. Eastern, Inc.

The Employer operates a freight terminal in North Brunswick, New Jersey, the only facility involved herein. Freight is transported in and out of the North Brunswick terminal by Central Transport, Inc., a line hauler covering 24 states from Texas to the East Coast. Freight that is brought into the terminal by line haul is then unloaded, sorted and progressively reloaded onto local delivery trailers, i.e., the freight is loaded as it comes onto the dock as determined by the dock supervisor. Fourteen drivers working out of the North Brunswick terminal make the local freight deliveries or pickups that have originated with or are destined for line freight haulage. These drivers own their own tractors for which they pay all expenses and pull trailers designated by the Employer. Their workday begins between 7-9 a.m. when they report to the terminal to pick up their assigned trailers which have been loaded during the night. The order in which the freight has been loaded generally determines the order of delivery. Drivers record the time they leave the terminal and the time they arrive at and leave each stop during the day. Drivers service

designated territories and must make all stops in their territories. They can only refuse stops outside their territories. Extra work or even a part of a regular driver's territory may be covered by a floater. These decisions are made by the dispatcher or terminal manager based on the Employer's need. Drivers call in several times a day to ask about charge exceptions, damaged goods, collection problems, and information about pickups. Drivers are responsible for their own costs such as insurance, maintenance, tires, tolls, and any other expense associated with vehicle ownership. Only the parking of their tractors at night on the Employer's premises is free.

Turning to the single issue before me, whether the petitioned-for drivers are employees within the meaning of the Act and therefore appropriately the subject of the instant petition, I have fully considered the record evidence and find that the drivers enjoy an employer/employee relationship with C. C. Eastern, Inc. I base my decision on the significant impact of the Employer's requirement on driver autonomy, discussed *infra*, as measured against the common law right-of-control test employed by the Board to determine whether individuals are employees or independent contractors. As noted by the Board in *Roadway Package System*, 288 NLRB 196 (1988), citing to *Amber Delivery Service*, 250 NLRB 63, 64 (1980), *enf. in relevant part* 651 F.2d 57 (1st Cir. 1981): "[A]n employer/employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but . . . the means to be used in achieving such ends." For an independent contractor relationship to exist, entrepreneurial or proprietary characteristics should be exhibited. *Roadway*, *supra* at 198, citing to *Mission Ford Corp.*, 280 NLRB 251 (1986).

Despite the Employer's assertion that there are no restrictions on drivers except to service accounts, the record indicates otherwise. Drivers service assigned areas in which they are to make deliveries in the mornings and pickups in the afternoon. Those areas are subject to change on a daily or permanent basis, by the dispatcher or terminal manager, depending on the Employer's need. It was also asserted by the Employer that drivers controlled the order in which they serviced customers except for appointments, i.e., calls from customers requesting specific pickup times which were estimated to be approximately 10 percent of the stops. However, the order in which freight was loaded onto trailers was often the determining factor in how a driver ordered his deliveries. As freight is progressively loaded from midnight to morning, i.e., it goes on to the local delivery trailer in the order in which it comes off the line haul trailers, not necessarily in the most efficient delivery order. Drivers usually arrive in the morning to find fully loaded or almost fully loaded trailers. Although the Employer noted that a driver could load or reload a trailer himself, and one or two do so, the driver is not paid for time spent loading and unloading. Thus, the order of loading which is controlled by the dock supervisor, usually determines the order of delivery. Pickups are similarly controlled by the Employer in that the dispatcher, to whom the drivers call in several times per day, will tell the drivers what pickup should be made and often in what order they should be made. Combined with the pickups by appointment, the record indicates that drivers have little discretion in determining their day.

In support of entrepreneurial indicia, the Employer indicates that in addition to generating income by an efficient method of customer pickup and delivery, thereby allowing more service to more customers and controlling their operating costs, drivers are expected to cultivate relationships with people that result in more business. Yet the record reflects not a single instance in which a driver gave a lead to a member of the Employer's sales staff that resulted in new business. Given that drivers have limited contact with the customer personnel, have no input into what the company charges, do not usually take payment from the customers, it being paid directly to the company, and that the Employer, not the drivers, controls the drivers' service area, it is difficult to envision significant entrepreneurial opportunities. Despite the Employer's assertion that drivers are free to engage in entrepreneurial activities, with the exception of servicing competitors, when not making deliveries to and pickups from the Employer's customers, the record indicates that drivers work 40-50 hours per week for the Employer, making any additional driving work unlikely. Moreover, the record is devoid of evidence that any driver engages in significant entrepreneurial endeavors outside his regular employment.

Despite the Employer's disclaimer of a disciplinary procedure, the Employer asserts significant control over driver performance and accountability by its bonus system. At the beginning of the year a certain percentage of generated income is earmarked for the driver as a bonus. That bonus, however, may be eroded throughout the year by lack of availability, accidents, or deficient administrative work. Warnings are issued to drivers for these and other offenses. Those warnings are reflected in deductions from the earlier established bonus. Most drivers have one or more warnings. In addition to the bonus for established drivers, the Employer also provides a guarantee for new drivers. The guarantee is \$1000 per week for 8 weeks. To be eligible for the guarantee a driver must be available for Saturday work as well as Monday through Friday, during which days he is expected to work 9 hours per day packing, delivery, and soliciting.

The factors cited, *supra*, indicate a significant erosion of the entrepreneurial enterprise in which an independent contractor would be expected to be engaged. The Employer controls the customer base by controlling the service areas which it may choose to enlarge, curtail, or switch at any given time. The Employer also controls the rates charged to customers, offering discounts to some but not others, areas in which the driver is allowed no input. Nor is the driver able to negotiate rates for his own services, all drivers being paid a standard mileage and freight rate. The bonus program, while it might have been indicative of entrepreneurial incentive, is a *de facto* if not *de jure* disciplinary tool. Additionally, the Employer imposes significant restrictions on the drivers' ability to work at a similar enterprise by restricting the drivers' ability to work for competitors and requiring attendance to the Employer's customers for 40-50 hours per week.

The Employer directs my attention with particularity to *Don Bass Trucking*, 275 NLRB 163 (1985); *Capitol Parcel Delivery Co.*, 269 NLRB 52 (1984); and *Central Transport*, 299 NLRB 5 (1990), as supportive of its position that the drivers involved herein are independent contractors and not employees. Having reviewed those cases I find them distinguishable. The instant case involves significant control of

employee conduct in the completion of a task, not merely the securing of an end result. Cases cited by the Employer exhibited less concern with how the task was completed, thereby permitting greater entrepreneurial enterprise, and none with disciplining the drivers for various infractions of the work rules imposed by the Employer. Because no one factor

is controlling in determining whether one is an employee or an independent contractor, all the factors must be considered together and a conclusion drawn from the weight of the evidence. Based on all of the record evidence I find the drivers to be employees of C. C. Eastern, Inc. within the meaning of the Act.