

**Friendly Cab Co., Inc. d/b/a, a.k.a. Metro Cab Company, Inc., California Cab Company, Bay Area Taxi Management, Grkwss Enterprises, Inc., Metro-Yellow Taxicab Co., Friendly Cab Company, California Cab, Yellow Cab Company, Greyline Cab Company and East Bay Taxi Drivers Association, Petitioner.** Case 32-RC-5060

April 30, 2004

#### DECISION ON REVIEW AND ORDER

BY MEMBERS LIEBMAN, WALSH, AND MEISBURG

On November 15, 2002, the Board granted the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached as an appendix), in which the Regional Director found that the Employer's taxi drivers were employees, not independent contractors.

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

Having carefully considered the entire record, we affirm the Regional Director's decision for the reasons stated therein, with one modification. Contrary to the Regional Director, we find that the voucher system supports a finding that the drivers are employees. The record reveals that voucher trips are fairly common; the Employer's dispatcher has complete discretion in assigning voucher work; drivers must redeem vouchers through the Employer; the Employer charges drivers a significant percentage of the voucher amount when it is redeemed; and the drivers perform voucher work for Friendly Transportation Company when its employee drivers are not available.

#### ORDER

The Regional Director's Decision and Direction of Election is affirmed.

#### APPENDIX

##### DECISION AND DIRECTION OF ELECTION

5. The Employer contends that the petitioned-for taxicab drivers are independent contractors and, therefore, not statutory employees. For the reasons set forth below, I find that the taxi drivers are employees within the meaning of Section 2(3) of the Act and I will direct an election among them.

##### Facts

All seven entities constituting the Employer operate out of the same facility in Oakland, California, and are under the ultimate authority of Surinder Singh, chief administrator. Her husband, Baljit Singh, is president of each company; Leo Bazile is general manager; and Kevin Ito is head dispatcher. Currently, the Employer has approximately 80 cabs on the street, 50 of which are designated as airport cabs, thereby allowing the

drivers access to Oakland International Airport. In addition to the airport permit, the Employer has permits to operate in the cities of Emeryville, Oakland, Berkeley, and Alameda.

The Employer owns all of the taxicabs. All drivers must sign a lease. Although a cab can be leased by the hour or day, most leases are for a 7-day period, which allows the driver to drive on 6 days with 1 day for maintenance, and then the lease automatically renews. In order to sign a lease, the prospective driver must submit a printout of his/her driving record from the Department of Motor Vehicles (DMV) to the Employer. If the printout is acceptable, the Employer sends it to its insurance company to determine if the person is insurable. If approved, the person must go to the police department to obtain a permit. If the person obtains a permit, the Employer will lease a cab for the location specified in the permit. The prospective driver must also pass a drug test that is paid for by the Employer. Although the drivers designate which entity they would prefer to work for, the actual assignment depends on the availability of cabs and is ultimately determined by the Employer. Drivers are not required to post a bond.

Each week, the driver is required to pay a fee or "gate" which ranges from \$450 to \$600 depending on the cab model, employee driving record, driving ability, and number of accidents. Thus, the amount of the weekly gate varies among the drivers, at the Employer's discretion. The Employer also owns 16 natural gas (CNG) cabs for which the gate is \$750. The Employer from time to time unilaterally increases the amount of the lease and the driver has no recourse other than to turn in the cab and stop driving.<sup>1</sup> Under the terms of the lease, the Employer is not responsible for withholding any Federal or State taxes or providing worker's compensation insurance. Although drivers may request certain cabs and runs, it is based on availability. Permits for the airport are in high demand and are generally held by drivers with more experience.

As part of the lease, drivers agree to abide by the Employer's policy manual and standard operating procedures, which cover a wide range of topics including safety, courtesy, respect, radio procedures, training requirements, and drug testing. Under the operating procedures, the Employer's policy requires drivers to keep themselves and their vehicles clean and sanitary. Specifically, they must wear collared shirts with sleeves, slacks, or knee high skirts, closed shoes with socks or hose. The cab must display the name and logo of the appropriate entity. Drivers may not discriminate against customers and must provide service in response to any reasonable request. All calls for service must be conducted over an Employer provided communication system; drivers may not provide individual business cards or phone numbers to customers or develop their own independent relationship with individuals or businesses. Although drivers may decline a particular dispatch, they do not do so because the dispatcher will ignore them or bypass them in

<sup>1</sup> Driver Dabb testified that his lease came up for renewal in June 2002, at which time General Manager Bazile told him he would be restricted in his new lease to driving for only 10 hours per day pursuant to the California vehicle code. When Dabb questioned this, Surinder Singh told him she was raising his gate by \$50 per week because he argued with her.

the future. If the drivers do not follow the Employer's policies, the Employer can terminate the lease. Drivers are required, at their own expense, to attend a 3- to 6-hour class conducted by the Employer on an annual basis covering policies and the laws dealing with discrimination. Drivers may not use the cabs for nonemployer business nor may they sublease them. Nor may they smoke or use cellular phones while in the vehicle. They must report all accidents and incidents immediately to dispatch. There are additional policies governing airport drivers; anyone violating those policies can be suspended and fined by the airport authority. The Employer has recently hired a road manager who monitors the appearance of the drivers and the cabs and ensures drivers are conducting themselves in a manner to avoid problems for the Employer with regulatory agencies. General Manager Bazile investigates customer complaints, as a result of which he may issue a warning or terminate a lease. It is the Employer's policy to provide all customers with 15-minute service. The dispatcher also tells drivers they must respond to a dispatch within a certain amount of time. Drivers must also carry with them a Thomas Brothers map, a clip board, and flashlight.

Each cab has a meter that records the charge based on mileage.<sup>2</sup> Drivers pay for their own gasoline. Drivers are required to accept scrip, issued by Oakland and Emeryville, from elderly passengers and others who are eligible, pursuant to the Employer's contract with those cities to provide taxi service. The Oakland contract (City of Oakland Paratransit Taxi Service Agreement) provides under section V.B. that "All drivers of vehicles under this Agreement shall be employees of the Provider (i.e., the Employer) or of the Fleet Management Company managed by the fleet manager." Under section D, the provider/Fleet Manager must provide to all drivers, at its own expense, 8 hours of classroom training, which includes sensitivity training, passenger assistance techniques, service animal protocols, emergency procedures and defensive driving techniques. Under section K, living wage requirements, the provider must pay minimum compensation of \$8.65 with health benefits or \$9.95 without health benefits and 12 compensated days off per year for sick leave, vacation, or personal necessity to drivers performing work under the contract.

Although there was conflicting testimony as to whether drivers must accept credit cards, when they do so and turn them in for payment, the Employer charges a 6-percent fee. Drivers working for Friendly Cab also transport passengers and packages pursuant to contracts between Friendly Transportation, a related employer, and various private companies such as UPS, Federal Express, and Union Pacific. This occurs whenever Friendly Transportation does not have a sufficient number of its own vehicles and drivers to perform the work. (It is not clear how often this occurs.) On those occasions, the taxi drivers are paid by voucher, which they turn into the Employer for payment. The amount of the voucher is determined by mileage or

<sup>2</sup> Drivers must complete and turn in waybills for each shift, as required by State regulations. It is unclear from the record exactly what information is contained therein. However, the drivers apparently do not account to the Employer for the number of passengers or amount of fares collected.

distance traveled. On vouchers up to \$50, the Employer keeps 10 percent of the total amount; from \$50 to \$100, 15 percent; from \$100 to \$125, 20 percent, from \$125 to \$200, 25 percent and over \$200, 30 percent.<sup>3</sup> There are occasions when a driver may have scrip, vouchers and/or credit cards receipts which exceed his weekly gate; however, the Employer does not pay the driver cash but only credits his account against the next week's gate. The Employer does not charge any fees for crediting scrip to a driver's account. It is not clear from the record how often drivers transport passengers who pay with scrip. Drivers are responsible for any traffic tickets issued to them; the Employer pays any tickets issued to the cab itself, such as parking violations, and then collects the amount from the driver. The Employer may also collect liquidated damages from a driver for violations of any rules that might result in a lawsuit against the Employer.

On any occasion when a driver's cab is not available, such as for repairs or maintenance, the driver must still pay the gate for the week. The same is true for any times when the driver is not available for work such as illness or vacation. During these times, drivers are not allowed to secure replacement drivers. The driver may surrender the cab and not pay the gate for the week but has no assurance of being assigned the same cab or any cab in the future since assignments are based on availability. Many of the cabs carry advertisements on the roofs; the drivers cannot refuse this but receive no revenue from it. Although the Employer pays the insurance on the taxicabs, drivers have been required to pay extra fees, at times in excess of \$1000, when involved in accidents.

Drivers with airport cabs can work at the airport only on alternate days depending on the vehicle license number. The driver can work on city streets the rest of the period for which he has paid the gate. It appears that the Employer has recently begun requiring at least some of the drivers to sign leases whereby they are restricted to only 10 hours of driving in any 1 day pursuant to California vehicle code.

#### Sedan/Van Drivers

In addition to the taxicab drivers, there are approximately 6 to 10 sedan or van drivers who, the Employer maintained at the hearing, are employed by Friendly Transportation. Despite some testimony about these drivers, Petitioner never sought to amend the petition to include them in the unit or to name Friendly Transportation as Employer. In fact, during the hearing Petitioner never took a position as to whether the sedan or van drivers' should be included in the unit. It was not until its brief that Petitioner finally sought to include them in the unit, to the extent that any of them are employed by the Employer rather than Friendly Transportation.

<sup>3</sup> Employer's General Manager Bazile testified these fees are charged only when the drivers want immediate payment; that the drivers could submit the credit card receipts and vouchers directly to the appropriate company and receive payment by mail. However, driver Zadrán testified he attempted to submit the vouchers directly to at least two airlines and was told he must go through the Employer for payment. Zadrán also would need to form his own business and acquire a merchant number in order to deal directly with the credit card companies.

### Analysis

In *Roadway Package System*, 326 NLRB 842, 850 (1998), the Board concluded that the common-law agency test is the standard to determine whether individuals are independent contractors or employees under the Act, that “all of the incidents of the relationship” must be considered and that the “right to control” test is not to be considered as the predominant factor in such a determination. In *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000), the Board also stated that the common-law agency test, “ultimately, assesses the amount or degree of control exercised by an employing entity over an individual,” and then explained that those aspects of the test that do not include the concept of “control” are equally significant as those that do. With regard to rules and requirements that are imposed on drivers because of governmental regulations, the Board has held that such rules and requirements generally do not constitute control by the employer. *Elite Limousine Plus, Inc.*, 324 NLRB 992 (1997).

In applying the common-law agency test in taxicab cases, the Board has held that when a driver pays an employer a fixed rental and retains all fares he collects without accounting for those fares, there is a strong inference that the Employer does not exert control over the means and manner of his performance. *City Cab Co. of Orlando, Inc.*, 285 NLRB 1191 (1987). The theory underlying this inference is that in a flat rate system, the employer makes its money irrespective of the fares received by the drivers; therefore, the employer has no compelling reason to try to control the means and manner of the drivers’ performance. Rather, the employees have a strong financial incentive to provide good and efficient service in order to cover the flat rate and to make a profit.

In this case, the drivers pay this type of flat fee,<sup>4</sup> the drivers are not required to account to the Employer for the amount of fares or tips they have collected and the flat rate fees constitute the bulk of the Employer’ income from this enterprise. Therefore, there is a strong inference that the Employer does not exert sufficient control over the means and manner of the drivers’ performance to warrant a finding of employee status. In addition to this inference, there is other evidence supporting a finding that the drivers are independent contractors. In particular, the evidence establishes that the Employer does not require

<sup>4</sup> There is evidence that the Employer does not use a flat fee when drivers redeem their vouchers. On vouchers up to \$50, the Employer keeps 10 percent of the total amount; from \$50 to \$100, 15 percent; from \$100 to \$125, 20 percent, from \$125 to \$200, 25 percent and over \$200, 30 percent. Thus, drivers who do a greater amount of voucher work, pay a higher percentage to redeem their vouchers. While this evidence shows that the voucher system is somewhat more akin to a commission system, the significance of this evidence is diminished because there is insufficient evidence to establish the dollar amount of vouchers that employees submit in a typical week. Similarly, the Employer takes a 6 percent fee for processing credit card receipts for the drivers. Because the amount of the credit card charges is related to the number of miles the driver drove the passengers, the credit card fee is another example of how the Employer’s income is tied in part to the amount of work performed by the drivers. The evidence does not establish the dollar amount of credit card receipts that the drivers submit in a typical week.

the drivers to work set hours or even a minimum number of hours. I also note that the lease agreement provides that the drivers are independent contractors; the Employer does not provide the drivers with benefits; and the Employer does not withhold social security or other taxes on behalf of the drivers.

In light of the above, it must be determined whether there is sufficient evidence supporting a finding of employee status to overcome the flat rate inference and the other evidence supporting a finding of independent contractor status. The most significant evidence of Employer control in this case is that the drivers are not permitted to operate independent businesses. The drivers are not allowed to solicit customers or to use their cabs for personal reasons or an outside business. In addition, other than their lease fee, the drivers have no investment in their vehicles, and they may not sublease the vehicles that they lease. The Employer requires the use of leases and sets and changes the terms unilaterally.

Additional examples of the Employer’s control are the Employer’s discretion to determine which entity a driver is assigned to, the model of the vehicle assigned to a driver, the weekly gate a driver is required to pay, and whether a driver may drive an airport cab. Although the weekly gate is a flat fee, the amount varies among the drivers and is determined by the Employer after taking into account a number of variables such as driving ability and driving record. I also note that the evidence is uncontroverted that, on at least one occasion, the Employer raised a driver’s weekly gate because that driver argued with the chief administrator, effectively punishing the driver for his conduct.

The Employer also requires drivers to carry advertising on their cabs, but the Employer does not give the drivers a share of the advertising revenue it receives. The Employer has the authority to require drivers to come in for an inspection or to change advertising materials, even during periods when the drivers are most likely to secure fares. In addition, the Employer mandates a set color scheme and logo for its vehicles, and drivers are not permitted to alter the cabs.

Under the Employer’s policy manual and standard operating procedure, drivers must adhere to a dress code, attend Employer and government mandated classroom training and follow procedures concerning the use of the radio, operation of the vehicle and reporting of accidents and incidents. Drivers may not use private business cards and must accept credit cards, vouchers, and scrip. The Employer has the right to discipline drivers or terminate their leases for any infractions. To ensure that the Employer’s policies are followed, the road manager monitors the drivers’ activity while on the job. The Employer also investigates customer complaints and may terminate the lease or issue discipline as a result. Thus, the Employer maintains and enforces rules that go beyond, and do not involve, government regulations.

Considering the large amount of evidence of the Employer’s extensive control over the means and manner of the drivers’ performance of their duties, I conclude that the evidence is sufficient to overcome the strong inference of minimal control that is created by the Employer’s use of a flat rate system. Moreover, in light of the evidence as a whole, including the evidence of Employer control and the evidence that the drivers

are not permitted to use the leased cabs for personal matters or other business, I find that the taxicab drivers are employees within the meaning of the Act.

#### Conclusion

I find that the evidence as a whole, including the large amount of day-to-day control exercised by the Employer over the drivers, warrants a finding that the taxicab drivers are employees, not independent contractors. Therefore, I will direct an election among the Employer's taxicab drivers. However, because Petitioner never sought to amend the petition to include the sedan/van drivers, or to name Friendly Transportation as the Employer, and did not take a position at the hearing on the status of the sedan/van drivers, the record is not complete in

this regard and I will not include the van/sedan drivers in the unit.

Accordingly, I shall direct an election among the following employees:

All full time and regular part time taxicab drivers employed by the Employer at its 4849 E. 12th Street, Oakland, California facility; but excluding all other employees, office clerical employees, dispatchers, mechanics, guards, and supervisors as defined in the Act.

The only record evidence concerning the number of employees in the unit is a driver list dated June 6, 2001, which was attached to the Employer's insurance policy. There were 298 names on that list.