

**Don Bass Trucking, Inc. Employer-Petitioner and
Chauffeurs, Teamsters and Helpers, Local
Union No. 301. Case 13-RM-1313**

24 July 1985

DECISION AND ORDER REMANDING

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held on various dates between 15 August 1980, and 25 September 1980, before Hearing Officer Margo R. Newman. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, the Regional Director for Region 13 transferred this case to the National Labor Relations Board for decision. Thereafter, the Employer and the Union filed briefs.¹

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

The Board has reviewed the hearing officer's rulings made at the hearing and finds no prejudicial error was committed. They are affirmed.

On the entire record in this proceeding, 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 here.

2. The parties stipulated, and we find, that the Union, which claims to represent certain employees of the Employer, is a labor organization as defined in the Act.

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

The Employer provides the services of hauling and dumping gravel as well as carrying nursery stock and other commodities. The Employer's president Don Bass conducted the business from his home until 1975, when he erected a small office along with a parking area, and in 1979 he erected a garage. The Employer also employs, inter alia, two truckdrivers, Mark Zieman and Scott Grovner, who are admittedly employees within the meaning of the Act and are undisputedly in the unit. The Employer's "company drivers" are supplemented by nine owner-operators of equipment which is leased to the Employer.²

¹ The Employer and the Union have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The nine owner-operators are Doug Westerfield, Ken Barlett, Robert Papke, John Pence, Oz Solidivar, Robert Runge, Vern Anderson, Richard Jones, and Jerry Ruckdeschel. Two owner-operators (Jones and

The issue here concerns the status of the owner-operators. The Employer contends that they are independent contractors. The Union contends that they are employees within the meaning of the Act.

Since 1972 the Employer and the Union have been parties to a series of collective-bargaining agreements covering the Employer's truckdrivers, including the owner-operators. The Employer filed the instant petition after the most recent agreement expired. During the period of these agreements, the Employer also entered into lease agreements with the owner-operators. The current leases were drafted and signed after the latest collective-bargaining agreement expired and at a time while the hearing in this case was already in progress.

The record shows that the Employer is a common carrier operating almost exclusively intrastate. The Employer is subject to the regulations of the Illinois Commerce Commission (IICC), which issues the Employer a certificate of convenience covering the transportation of certain commodities within the State of Illinois. These regulations require that an authorized carrier (i.e., the Employer) may perform authorized transportation under certain conditions in equipment it does not own. Among these conditions are that the carrier shall identify the equipment with its insignia and that the carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. Another condition is that there shall be a written lease granting the use of the equipment that meets certain requirements.

The Employer's leases with the owner-operators here are for at least 30 days and from month to month thereafter for a period not to exceed 3 years or until canceled by either in writing. The lease provides that "the said Equipment leased hereby shall be under the exclusive possession, use, control and responsibility of Carrier during the term of this lease whenever such equipment is operated by and for Carrier as lessee of said equipment."³ The leases also provide that the owner-operator reserves the possession, use, control, and responsibility of the equipment at all other times and that he has the right to haul for other carriers. Under the lease, the owner-operator is responsible for maintaining the equipment, including the expense of such maintenance and repair, in conformance with IICC regulations and to furnish proof of compliance to the Employer. This responsibility includes

Ruckdeschel) signed lease agreements shortly before the close of the hearing, and there is little information on them. Anderson employs one driver and Ruckdeschel employs four drivers.

³ This quoted language comports with the requirements contained in sec. 18-201 of the IICC regulations.

displaying the requisite safety sticker issued by the State of Illinois on each piece of equipment.

Although the IllCC regulations state that the "lease shall clearly specify the legal obligation of the authorized carrier" to maintain certain insurance coverage for the protection of the public,⁴ the leases here contain no such provision and instead provide that the owner-operators shall provide and maintain in force such insurance. The leases also contain certain indemnity clauses by which the owner-operators agree to save harmless the Employer for certain claims and liabilities arising from the operation of the leased equipment.

The Employer provides parking spaces for owner-operators at a reduced rate, sells them fuel at wholesale prices, allows them to use its credit to purchase materials and parts, and stores fuel for one owner at no charge. In addition, the Employer has financed tractors for two owner-operators at a savings to them.

The Employer does not require a job application form, but makes its decision on acknowledged employees and owner-operators on their individual reputations or through checks of their background, including checks with former employers. Nor does the Employer require a prehire driving test from either the acknowledged employee drivers or the owner-operators; instead, it is satisfied if they possess an Illinois license to drive a truck.⁵ Under the lease, the contractor (owner-operator) agrees to furnish a driver to operate the leased equipment who meets all driving requirements imposed by the IllCC and to warrant that the driver will comply with all laws and regulations of Federal, State, and local governments applicable to intrastate hauling while the Employer's authority is being used. Don Bass testified that failure to comply with these terms of the agreement will result in the termination of the agreement. The leases also make the owner-operators responsible for nonowner drivers, including their workmen's and unemployment compensation, and provide that the Employer's work rules do not apply to owner-operators. The leases provide that the parties intend to create the relationship of carrier and independent contractor.

Customers contract with the Employer for the services of drivers and equipment. The rates charged to the customers are determined by the customers and the Employer after recommendations from a tariff commission. Under the IllCC

regulations, the Employer is required to state on the face of the lease the amount to be paid to the owner-operator for the driver's service and equipment.⁶ In practice, the owner-operator telephones the Employer to receive the assignments that are located and arranged by the Employer. The Employer tells the owner-operator the location of the job as well as the expected arrival time at the site. Don Bass testified that the customers call him if problems arise over the owner-operator's performance. Although Bass denied that he supervises the owner-operators, he testified that he will terminate an owner-operator for failure to comply with the terms of the lease agreement and for using drugs or fighting.

Following the completion of the job, the owner-operator turns in to the Employer a manifest for jobs performed on a per-tonnage basis, or a time ticket for jobs paid by the hour. The lease provides that the Employer "will bill to and be responsible for collecting from customers procured by the Carrier on the contractor's behalf" and that payment must be made to the owner-operator within 15 days after receipt of the gross revenues by the Employer. At another section of the lease, it is provided that "Contractor bears the principal risk of nonpayment by customers billed by Carriers on Contractor's behalf."

The lease provides that the owner-operators may reject loads and determine work schedules and routes. Although the owner-operators retain the right to carry for other carriers under the lease, they may "do so only upon timely notice to the [Employer], or upon completion of the delivery procured by the Employer on the contractor's behalf." Don Bass testified that the owner-operators have rejected particular job assignments.

In making our determination concerning the status of these owner-operators, we are guided by the common law agency test⁷ and most importantly the right of control test:

Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while on the other hand, where control is reversed only as to the result sought, the relationship is that of an independent contractor.

⁴ Both the IllCC regulations and the leases described the insurance coverage for the protection of the public as that required by sec 18-701 of the Illinois Motor Carrier of Property Law

⁵ Illinois requires that an owner-operator must be at least 18 years of age and must pass a driver's test that includes loading and unloading maneuvers. State law also limits the hours a driver may drive in a given period and during 1 week

⁶ There is little variation in the negotiated percentage rates of gross receipts that the owner-operators pay to the Employer under the leases. Generally, the owner-operators pay approximately 10 percent for the use of the Employer's operating rights and another 10 percent if they rent a trailer from the Employer. Rates also are affected by the size of the trucks being operated and, in a few instances, the owner-operator's doing his own bookkeeping

⁷ *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968)

The resolution of this question depends on the facts of each case, and no one factor is determinative.⁸

This test has been applied by the Board and numerous courts.⁹ Applying these principles to the evidence of the entire working relationship in this case, we have concluded that the owner-operators at issue here are independent contractors.

The Union position that these owner-operators are employees within the meaning of the Act rests primarily on the IIICC regulations, which the Union contends substantially dictate the terms of an employment relationship. At the outset we note that in *Air Transit* the Board cited with favor *Seafarers Local 77 (Yellow Cab) v. NLRB*,¹⁰ in which the court rejected the argument that Government-imposed regulations constitute company control over drivers.¹¹ Thus, in *Air Transit* the Board commented as follows:

Government regulations constitute supervision not by the employer but by the state," the court reasoned that more extensive governmental regulations afford less opportunity for control by the putative employer "because the employer cannot evade the law either and in requiring compliance with the law he is not controlling the driver."¹⁷

¹⁷ 603 F 2d at 875 Accord *Air Transit* [679 F 2d 1095 (4th Cir 1982)] supra at 1100. *SIDA of Hawaii v. NLRB*, 512 F 2d 354, 359 (9th Cir 1975)

Turning to the particular regulations here, we note that the subject matter of many of the regulations relied on by the Union do not substantially involve issues concerning wages, hours, and other terms and conditions of employment nor do they dictate that the Employer retain the right to control the actual manner and means by which the owner-operators carry out deliveries for the Employer. Indeed, in this latter regard the regulations as a practical matter appear to be honored more in the breach than in the observance.¹² Thus, the

⁸ See *News Syndicate Co.*, 164 NLRB 422, 423-424 (1967), quoted in *Air Transit*, 271 NLRB 1108, 1110 (1984)

⁹ See, e.g., *Ace Doran Hauling Co.*, 191 NLRB 428 (1971), enf granted in part and denied in part 462 F 2d 190 (6th Cir 1972) *Pony Trucking, Inc.*, 198 NLRB 686 (1972), enf'd 486 F 2d 1039 (6th Cir 1973), *Deaton, Inc.*, 203 NLRB 1099 (1973), enf'd 502 F 2d 1221 (5th Cir 1974), *Aetna Freight Lines*, 209 NLRB 850 (1974), enf'd 520 F 2d 928 (6th Cir 1975), *Am-Del-Co, Inc.*, 234 NLRB 1040 (1977), enf denied sub nom *Merchants Home Delivery Service v. NLRB*, 580 F 2d 966 (9th Cir 1978), *Yellow Cab Co.*, 229 NLRB 1329 (1977), enf'd sub nom *Seafarers Local 777 v. NLRB*, 603 F 2d 862 (D C Cir 1978), *A Duie Pyle, Inc.*, 236 NLRB 1220 (1978), enf denied 606 F 2d 379 (3d Cir 1979)

¹⁰ *Air Transit*, supra at 1110

¹¹ 603 F 2d 862 (D C Cir 1978)

¹² Member Dennis does not rely on evidence that the lease provisions are inconsistent with IIICC regulations in some respects, as she finds even total compliance with such regulations would not constitute company

IIICC regulations expressly require the Employer to maintain liability insurance on the trucks: the parties' lease however provides that the owner-operators bear the responsibility for providing and maintaining such liability insurance. The leases also contain indemnity clauses by which the truck owners agree to save harmless the Employer for certain claims and liabilities arising from the operation of the trucks leased to the Employer.

Another example of the conflict between the Government regulations and the leases involve provisions bearing on entrepreneurial risk. The IIICC regulations require the Employer to pay the owner-operator for his trucking services within 15 days after the owner-operator submits the necessary documentation showing delivery of the shipment. The parties' leases, however, assign to the owner-operator the ultimate risk of loss (i.e., non-payment) if one of the Employer's customers fails to pay the Employer for trucking services performed by an owner-operator on behalf of the Employer.

There are various other factors on the record that indicate that the owner-operators enjoy certain freedoms and bear certain risks consistent with the operation of independent businessmen. The owner-operators own their own trucks which they purchase privately. They maintain and repair their own trucks. They purchase the fuel used in performing hauling services for the Employer. They pay the Employer to park their trucks on the Employer's premises. The owner-operators may reject assignments from the Employer. They determine their own work schedules and delivery routes. They are free to perform hauling services for other carriers when not actually engaged in hauling for the Employer.

The Employer maintains no personnel or payroll records on the owner-operators, provides them no employment benefits, and does not deduct taxes or social security from payments it makes to them. The truck lease agreements between the Employer and the owner-operators expressly provide that the Employer's work rules do not apply to the owner-operators and that the parties intend to create an independent contractor relationship.¹³

control over the manner and means of the owner-operators' performance of their functions *Air Transit, Inc.*, 271 NLRB 1108, 1111 (1984)

¹³ The independent contractor relationship between the Employer and the truck owner-operators is demonstrated by the sharp contrast to the acknowledged employment relationship between the Employer and its two nonowner employee truckdrivers. Thus, the latter simply drive trucks owned and maintained by the Employer, while the former invest large sums of capital in the purchase and upkeep of their trucks. The nonowner employee truckdrivers are paid an hourly wage, while the owner-operators instead receive the entire gross receipts earned by their trucks, minus a percentage brokerage fee paid by the owner-operators to

On the whole record, we find that the owner-operators here are independent contractors. Thus, the Employer has not retained the right to control the actual manner and means by which the owner-operators perform their services and the common law agency test for employee status has not been met.¹⁴

the Employer. The nonowner employee truckdrivers are assigned work and are required to maintain regular hours, while the owner-operators work according to their own schedules, accept or reject specific work assignments at their own discretion, and follow delivery routes of their own choosing.

¹⁴ This result is consistent with numerous recent Board decisions. See *Austin Tupper Trucking*, 261 NLRB 183 (1982), *Kentucky Prince Coal Corp.*, 253 NLRB 559 (1980), *Tarheel Coals Inc.*, 253 NLRB 563 (1980), and *Georgia Pacific Corp.*, 249 NLRB 1280 (1980). See also *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379 (3d Cir. 1979), denying enforcement of 236 NLRB 1220 (1978), *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271 (9th Cir. 1977), denying enforcement of 220 NLRB 540 (1975).

To the extent that *Mitchell Bros. Truck Lines*, 249 NLRB 476 (1980), relied on by the Union, is inconsistent with this decision, we overrule it.

As described above, the record shows that the Employer employs two truckdrivers who are undisputed employees within the meaning of the Act and in the following appropriate unit:

All employee drivers but excluding owner-operators and their nonowner drivers, office clerical employees, supervisors and guards as defined in the Act.

Our decision to find the nine owner-operators to be independent contractors, who are not appropriately in the unit, substantially changes the unit. We shall therefore remand this proceeding to the Regional Director for further appropriate action consistent with this decision.

ORDER

The proceeding is remanded to the Regional Director.