

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD¹
REGION 32

OS TRANSPORT, LLC AND HCA MANAGEMENT, INC.

Employer²

and

Case 32-RC-5761

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
TEAMSTERS LOCAL UNION 350, CTW

Petitioner

SUPPLEMENTAL DECISION ON CHALLENGES AND NOTICE OF HEARING

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, I have caused an investigation of the challenged ballots in this matter to be conducted and hereby set the remaining four challenges for hearing.

The Election

The Petition in this matter was filed on April 14, 2010. On January 14, 2011, I issued the Decision and Direction of Election in this matter, in which I found that O.S. Transport LLC (herein OS Transport) and HCA Management, Inc. (herein HCA) constitute a single employer based on the factors of common ownership, common management, and interrelation of operations. A copy of the Decision and Direction of Election is attached to this Supplemental Decision as Attachment A. In the Decision and Direction of Election, I also found that, contrary to the contention of the Employer, the drivers employed by OS Transport are not independent contractors but are statutory

¹ Herein called the Board.

² On January 14, 2011, I issued a *Decision and Direction of Election* (Decision) in this matter in which I found, inter alia, that OS Transport LLC, herein called OS Transport, and HCA Management, Inc., herein called HCA, constitute a single employer, herein called the Employer, subject to the Board's jurisdiction.

employees who may avail themselves of the Act's protections.³ Therefore, I directed that an election be held in the following appropriate unit:

All full-time and regular part-time drivers employed by the Employer at its 12835 Monterey Highway, San Martin, California facility, excluding all other employees.

Pursuant to the Decision and Direction of Election, an election by secret ballot was conducted on August 29, 2011.⁴ The Tally of Ballots, which was served upon the parties, showed the following results:

Approximate number of eligible voters	21
Number of Void ballots.	0
Number of Votes cast for Petitioner.	10
Number of votes cast against participating labor organization	5
Number of valid votes counted.	15
Number of challenged ballots.	5
Number of valid votes counted plus challenged ballots.	20

The challenged ballots are determinative of the results of the election.

On September 6, 2011, Petitioner filed timely Objections to the Election, a copy of which was served upon the Employer by the Region. On January 27, 2012, Petitioner requested withdrawal of its Objections, which I have approved.

The Challenged Ballots

Petitioner challenged the ballots of Ramiro Del Rio, Raul Arambulo, Lupe Laureano, Rosendo Rodriguez and Sergio Sencion Castro.

³ In the Decision and Direction of Election, I found that the drivers employed by OS Transport are not independent contractors because they have no entrepreneurial opportunity for gain or loss, OS Transport exercises substantial day-to-day control over the performance of their duties, and the Employer establishes, regulates, and controls their rate of pay. I separately found that HCA contracts with a number of independent owner-operators who own, operate, and maintain their own vehicles. The Petitioner does not contend that the HCA owner-operators are employees and does not seek to represent them.

⁴ The election was delayed after the issuance of the Decision and Direction of Election because Petitioner withdrew its request to proceed in blocking charges 32-CA-25100 and 32-CA-25399.

Ramiro Del Rio

Petitioner challenged the ballot of **Ramiro Del Rio** on the basis that he was not an employee or had not worked sufficient hours for eligibility as a full time or part-time employee. On October 26, 2011, I approved the parties' Stipulation that Del Rio was an employee who worked sufficient hours during the payroll period for eligibility and thus was eligible to vote in the election. In order to maintain the secrecy of Del Rio's ballot, it will not be opened and counted until after the status of the four remaining challenged ballots has been resolved.

Raul Arambulo and Lupe Laureano

Petitioner challenged the ballots of **Raul Arambulo** and **Lupe Laureano** on the basis that they are owner-operators who work as independent contractors and thus are excluded from the bargaining unit. In support of these challenges, Petitioner has proffered the names of employees who it asserts would testify that Arambulo and Laureano are not driver employees of OS Transport but are owner-operators for HCA.

The Employer admits that that Arambulo and Laureano are independent owner-operators for HCA but contends that they are eligible to vote because they are also simultaneously employed as employee drivers for OS Transport.

Employee drivers of OS Transport drive trucks that are owned by and registered to OS Transport. The trucks carry signage on their doors indicating "OS Transport." OS Transport insures the trucks, pays to fuel them, and pays for their maintenance and repair. The OS Transport employee drivers are not permitted to take the trucks home and must park them in the Employer's yard. In contrast, the owner-operators for HCA either own their own trucks or lease trucks from HCA. They are required to maintain their own motor carrier permits to operate the trucks pursuant to independent contractor sub-haul agreements with HCA. They pay for the fuel, insurance and maintenance of their trucks. They are not required to leave their trucks in the OS Transport yard and may take them home.

Despite the finding in the Decision and Direction of Election that the driver employees of OS Transport are not independent contractors, the Employer has continued to consider them to be independent contractor owner-operators in its method of paying them and reporting such payments to the Internal Revenue Service. The employee drivers of OS Transport and the owner-operators of HCA are paid by the load that they transport. The Employer uses “Load sheets” to keep track of the loads. The Employer also produces “trip sheets” that indicate the dates that an individual transported each load. The checks that OS Transport issues to the employee drivers based upon these “load sheets” and “trip sheets” indicate that it considers the drivers to be independent contractors. OS Transport does not withhold federal or state taxes from such checks and issues its driver employees IRS Form 1099s for independent contractors instead of IRS Form W-2s for employees.

The IRS Form 1099s for Arambulo and Laureano indicate that they received payments from both OS Transport and HCA during the calendar year of 2011. The Employer has also submitted copies of load sheets, trip sheets, and checks indicating that Arambulo and Laureano were paid by OS Transport for transporting loads during the payroll period for eligibility.

I find that Petitioner’s challenges to the ballots of Arambulo and Laureano raise substantial and material issues of fact or law that can best be resolved by a hearing.

Rosendo Rodriguez

Petitioner challenged the ballot of **Rosendo Rodriguez** on the basis that he is not an employee of OS Transport or had worked too few hours to be eligible to vote as a full-time or regular part-time employee. Petitioner admits that Rodriguez worked for OS Transport in April and May of 2011, but has proffered the names of employee witnesses who it asserts would testify that they did not observe Rodriguez perform any work for OS Transport during the months of June, July or August of 2011. The Employer maintains that Rodriguez was employed as a full-time driver for the Employer starting around June 2011, but was injured around July 2011 and was therefore on a medical leave of absence at the time of the election.

I find that Petitioner's challenge to the ballot of Rodriguez raises substantial and material issues of fact or law that can best be resolved by a hearing.

Petitioner also challenged the ballot of Rosendo Rodriguez on the basis that he has close ties to Oscar Sencion Sr., who Petitioner alleges is a supervisor and/or manager for the Employer. According to Petitioner, Rodriguez is the "compadre" of Sencion Sr., meaning that he is the godfather of Sencion Sr.'s children. Petitioner has presented no evidence that Rodriguez enjoys any specific special privileges or benefits by virtue of his relationship with Sencion Sr. Such evidence of special status is required to exclude an employee on the basis of being closely allied with management, *Peirce-Phelps, Inc.*, 341 NLRB 585 (2004), *Cumberland Farms*, 272 NLRB 336 (1984). Therefore, Petitioner has presented insufficient evidence in support of this basis for its challenge to the ballot of Rodriguez and will not be permitted to produce evidence in support of this basis at the hearing.

Sergio Sencion Castro

Petitioner challenged the ballot of **Sergio Sencion Castro** on the bases that he is either a part owner of the Employer, that he is closely related to an owner of the Employer, or that he is otherwise closely aligned with management of the Employer. Petitioner has presented no evidence to support its contention that Sencion Castro is an owner of the Employer. Rather, the investigation disclosed that the Employer is owned by Hilda Andrade and her two children, Oscar Sencion, Jr. and Crystal Sencion. The father of Oscar Sencion, Jr. and Crystal Sencion is Oscar Sencion Sr., who is also the father of Sergio Sencion Castro. Thus, Sencion Castro is the half brother of two of the owners of the Employer and the son of a person who Petitioner asserts exercises significant control of the OS Transport drivers by designating their routes and assigning their work schedules.

The Employer admits that Sencion Castro is the son of Oscar Sencion, Sr., but asserts that Sencion Sr. has no ownership interest in the company and does not currently exert or possess any decision-making authority within the company. Additionally, the Employer asserts that Oscar Sencion Jr. is a mechanic and has no defined managerial role

and that Crystal Sencion is a minor with no significant role in the company's operations. Furthermore, the Employer asserts that Castro enjoys no special privileges or benefits by virtue of his relationships with Sencion Sr., Sencion Jr. and Crystal Sencion.

I find that Petitioner's challenge to the ballot of Castro raises substantial and material issues of fact or law that can best be resolved by a hearing.

Conclusion

In sum, for the reasons set forth above, I have concluded that the purposes of the Act will best be effectuated by considering the challenges to the ballots of Raul Arambulo, Lupe Laureano, Rosendo Rodriguez, and Sergio Sencion Castro in a hearing before an administrative law judge.

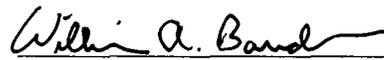
Notice of Hearing

IT IS HEREBY ORDERED that a hearing on challenges in Case 32-RC-5761 be held before a duly designated administrative law judge of the National Labor Relations Board.

IT IS FURTHER ORDERED that the administrative law judge designated for the purpose of conducting the hearing shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the challenged ballots. Within fourteen (14) days from the issuance of said report, any party may file with the Board in Washington, D.C. an original and one (1) copy of exceptions to such report, thereof with supporting brief, if desired. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, on the other party to the proceeding and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may decide the matter forthwith upon the record or may take other disposition of the case.

PLEASE TAKE NOTICE that on February 9, 2012, at 9:00 a.m., at the Oakland Regional Office in Oakland, California, and continuing on consecutive days thereafter until completed, a hearing pursuant to Section 102.69 of the Board's Rules and Regulations will be conducted before an administrative law judge of the National Labor Relations Board upon the aforesaid challenges, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony, and to examine and cross-examine witnesses with respect to said matters.

DATED AT Oakland, California, this 30th day of January 2012.⁵



William A. Baudler, Regional Director
National Labor Relations Board, Region 32
1301 Clay St., Room 300-N
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⁵ Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington, DC by February 13, 2012. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has submitted timely to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding. Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.