

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

RELEASE

DATE: February 28, 2013

TO: Mori P. Rubin, Regional Director
Region 31

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Carey Limousine LA, Inc. and Carey 177-2414
International, Inc. (Joint Employers and/or 177-2484-5000-0000
Single Employer)
Case 31-CA-085481

This case was submitted for advice regarding whether chauffeurs were statutory employees or independent contractors outside Board jurisdiction. We conclude that the chauffeurs are employees under Section 2(3) of the Act because they lack meaningful entrepreneurial opportunities, perform the essential functions of the Company's business, and operate under significant Company control. Accordingly, the chauffeurs are afforded the protection of the Act.¹

FACTS

Background

Carey Limousine LA, Inc. ("Carey LA" or "Company") provides chauffeur-driven transportation services in the greater Los Angeles and Orange County areas. These services are the only business of the Company.² The Company uses "Independent Operators" ("IOs") to provide its transportation services. All Carey LA IOs work under an Independent Operator Agreement ("IOA"). The IOA has been standardized across the Carey International franchise system since 2005. Previously, the IOA

¹ The Region has determined that, if the chauffeurs are statutory employees, the Company violated Section 8(a)(1) by retaliating against them for engaging in protected concerted activity.

² Carey LA's parent company, Carey International, Inc., provides its worldwide franchises with reservations, accounting, human resources, and legal services.

language had varied among IOs. Also, the IOA can only be executed between the Company and an incorporated business. Prior to the 2005 standardization, IOAs were executed with individual IOs. IOAs typically run for a period of five years. According to one IO, Carey LA has IOAs in place with approximately 45 IOs and 49 backup drivers (also known as “Hired Professional Chauffeurs”).

Duties and Responsibilities

Prior to beginning work for Carey LA, IOs are required to complete a Professional Chauffeur Certification Program as well as an Advanced Defensive Driving and Safety Program, both of which Carey LA offers. While transporting Carey LA customers, IOs are required to wear a black conservative suit, white shirt, and a Carey LA-designed black and silver tie.

IOs are given driving assignment “bundles” that include multiple driving assignments for a particular day. IOs may accept or reject the bundle, but typically may not reject portions of the bundle. Carey LA keeps a record of instances when IOs reject work. Once an IO has accepted a bundle, he may choose the driving route as he sees fit. IOs have the option of conducting non-Carey LA chauffeur work provided that the work does not include catering to Carey LA customers.³

Insurance requirements for Carey LA drivers include obtaining bodily injury, property damage, and liability insurance at a minimum coverage amount of \$20 million per occurrence. Carey LA has a group insurance policy that meets the IOA’s requirements, which it offers to its IOs at a reduced group rate premium.

Compensation

IOs are not guaranteed minimum compensation under the IOA. IO drivers are paid per driving assignment, receiving 65% of the final amount charged to the customer, including applied discounts. Carey LA solely determines the amount charged to customers, including discounts, and administers all aspects of collecting payment from customers. Although the Company requires IOs to incorporate a business before executing an IOA, the Company typically pays IOs in their individual capacity.

Vehicles and Equipment

Rider 1 of the IOA enables IOs to choose which vehicle they wish to drive from a predetermined list. Any vehicle with an active IOA must be less than three years old. IOs may operate more than one vehicle but must execute a separate IOA for each

³ See *infra* “Entrepreneurial Opportunities” No. 2.

vehicle. Carey LA has an apparent referral relationship with commercial leasing and finance companies that help IOs to secure financing for their vehicles. Older leases from two of the leasing companies contain termination provisions that allow the lessor to terminate the lease if the lessee's IOA with Carey LA is terminated.

Entrepreneurial Opportunities

1. IO's and Their Employees

Carey LA allows its IOs to use Hired Professional Chauffeurs ("HPCs") to function as backup or supplemental drivers for an IO. In at least one case, the IO does not drive at all and instead reservations are assigned to his HPCs. HPCs are subject to approval by Carey LA and must undergo background checks and drug testing prior to driving for Carey LA. Once approved, Carey LA may offer driving bundles directly to a HPC. Carey LA pays the IO for work performed by his HPC, and the IO determines the HPC's compensation amount. Additionally, HPCs may be terminated directly by Carey LA in its sole discretion.

2. Soliciting Carey LA Customers

IO solicitation of "Carey LA customers" for non-Carey LA work is considered a material breach of the IOA and carries monetary penalties. However, IOs may inform Carey LA customers that they may request specific IOs or HPCs when making their future Carey LA reservations. Customer requests for specific drivers are not guaranteed. Additionally, Carey LA approves and provides business cards for IOs and HPCs that may be given to customers. The business cards contain the Carey LA logo, Carey's central reservation contact information, and the driver's name.

3. Cultivating New Business

Because IOs lease or own their vehicles, they may engage in non-Carey LA chauffeur work. The IOA states that IOs may grow their businesses by "employ[ing] capital, market services . . . hire employees, and otherwise exercise judgment to earn profits . . ." However, as described above, any new business may not include Carey LA customers. The IOA defines Carey LA "customers" as anyone who is a client of Carey LA at present or within the previous year, as well as any prospective client to whom Carey LA has made a new business presentation within the previous year. Additionally, if the customer is part of a group of companies that conducts business through more than one business entity (defined as a "Customer Group"), then the IOA also classifies each entity, division, and operating unit of the Customer Group as a

customer, provided that the same management group has decisionmaking authority or significant influence over contracting for limousine services.⁴

Proprietary Interest

IOs may sell their remaining IOA contract time to another business, but Carey LA must first approve any prospective sale. In addition, the IO-seller must provide Carey LA with shareholder information of the potential purchaser, and each shareholder is subject to Carey LA approval.

Farm-out Agreements

In addition to the standard IOA, the Company uses Farm-out Agreements (“FOAs”) to retain professional chauffeur services in the event of work overflow when there are insufficient IOs available to accept reservations. A Farm-out Company performs the same driving functions as an IO, but the FOA is comparatively shorter than the IOA and has fewer contract requirements. The FOA states, inter alia, that the Farm-out Company establishes its own rates and bills Carey LA at a 30% discount, may use any drivers who have the necessary licenses, and may use multiple vehicles under a single agreement. In addition, the FOA states that the Farm-out Company must obtain insurance for \$1 million per occurrence. The Farm-out Company also may use any black Lincoln Town Car or equivalent luxury sedan or a SUV manufactured by a Lincoln Quality Vehicle Modifier or a Cadillac Master Coach Builder.

ACTION

We conclude that the IOs are employees within the meaning of Section 2(3) of the Act because their purported entrepreneurial opportunities are illusory, their work constitutes a crucial and stable part of the Company’s business, and the Company exerts significant control over their work.

Section 2(3) of the Act excludes “any individual having the status of an independent contractor” from coverage. The party asserting independent contractor status has the burden of proof on that issue.⁵

In *NLRB v. United Insurance Company of America*,⁶ the Supreme Court held that Congress mandated the use of the common-law agency test to determine

⁴ See IOA Section I(A)(7) defining “customer.”

⁵ *Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004) (citing *BKN, Inc.*, 333 NLRB 143, 144 (2001)).

⁶ 390 U.S. 254 (1968).

employee status under the NLRA.⁷ This analysis requires examination of every aspect of the employment relationship.⁸ The reviewing body must analyze the entire context, and no single factor is determinative.⁹ Indeed, “decisive” facts in one case may be entirely inadequate in another.¹⁰ Factors that the Board considers in determining whether an individual is an employee or an independent contractor include whether significant entrepreneurial opportunities are available to the individual;¹¹ whether the work performed constitutes a crucial and stable part of the putative employer’s business;¹² and whether the putative employer exercises significant control over the means and method of the individual’s work.¹³

⁷ *Id.* at 256. See also *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (where “employee” is not defined or definition is circular, Court will infer Congressional intent to adopt common-law agency test).

⁸ *Roadway Package System, Inc.*, 326 NLRB 842, 851 (1998), citing *United Insurance*, 390 U.S. at 258. See also Restatement (Second) of Agency, § 220(2) (1958) (laying out non-exhaustive list of factors that should be evaluated in considering master-servant status).

⁹ *United Insurance*, 390 U.S. at 258.

¹⁰ *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982).

¹¹ See *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998) (citing ability “to make an entrepreneurial profit beyond a return on [drivers’] labor and their capital investment” as indicating independent contractor status); *St. Joseph News-Press*, 345 NLRB 474, 479 (2005) (Board looks for conditions that permit individual to take economic risk and reap corresponding opportunity to profit “from working smarter, not just harder”) (quoting *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002), enforcing *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000)).

¹² *United Insurance*, 390 U.S. at 259; *Roadway Package System, Inc.*, 326 NLRB at 851 (finding drivers performing “a regular and essential part of the company’s business operations” favored employee status); *St. Joseph News-Press*, 345 NLRB at 479 n.6 (“[c]ompar[ing] a retail business that ‘hires’ a painter to paint the store” to operators who conduct the same primary business as the company).

¹³ See *Roadway Package System, Inc.*, 326 NLRB at 851 (relying on evidence that drivers “do business in the company’s name with assistance and guidance . . . [and] under its substantial control” as indicating employee status); *Arizona Republic*, 349 NLRB 1040, 1044 (2007) (independent contractor status indicated where carriers not bound by employer’s work rules other than basic safety standards).

I. The Independent Operators' Entrepreneurial Opportunities are Illusory

In determining true entrepreneurial control, the Board considers the extent to which a job provides workers an opportunity to impact their own compensation by taking economic risk and to reap profit by “working smarter, not just harder.”¹⁴ In *St. Joseph News-Press*, for example, the Board found that the newspaper carriers worked under conditions that permitted them to be entrepreneurs because they had the ability to impact their own compensation, namely, they could hire full-time substitutes and control the substitutes' terms and conditions of employment; deliver other products while delivering the employer's newspaper; and solicit new customers.¹⁵

Here, the IOs' purported entrepreneurial opportunities are illusory. The terms of the IOA and Carey LA's business practices substantially limit IOs' ability to impact their own compensation by “working smarter, not just harder,” and to determine HPCs' terms and conditions of employment. Although Carey LA contends that IOs are independent businesses, evidence in support of that contention exists primarily on paper and is not borne out in practice.

The IOs have little opportunity to impact their own compensation as entrepreneurs because of numerous roadblocks stemming from the IOA and Carey LA practices. Although IOs may solicit Company customers to “request” the IO for a future Carey LA reservation, Carey LA is not required to honor the request.¹⁶ For example, one IO states that a lucrative opportunity became available when a regular customer requested him, but the IO was forced to decline the customer because he had already been assigned a standard “bundle” of reservations. When the IO insisted on taking the higher-paid customer request, Carey LA management responded that “it does not work like that,” and that the IO “cannot just pick [his] jobs.”

Furthermore, the IOA effectively precludes IOs from soliciting Carey LA customers for non-Carey LA work, because its broad definition of “customer”

¹⁴ See *St. Joseph News-Press*, 345 NLRB at 479.

¹⁵ *Id.* See also *Standard Oil Co.*, 230 NLRB 967, 972 (1977) (“Unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits”).

¹⁶ Section II(C) of the IOA states only that, “[w]hen a customer requests a specific chauffeur, that chauffeur will be notified and offered the opportunity to accept or refuse the assignment.”

substantially diminishes IOs' ability to meaningfully cultivate outside work.¹⁷ Although some IOs conduct non-Carey LA chauffeur work, Carey LA is the primary source of work and income for those IOs.

In addition, IOs have no meaningful input into the rates charged to customers, and Carey LA can reduce their compensation for a particular assignment by unilaterally giving a customer discount.

Also, although IOs may sell or assign their IOA, Carey LA must approve the sale and may scrutinize any of the shareholders of the prospective buyer. Indeed, evidence shows that Carey LA blocked an IO's attempt to sell his IOA to another IO because Carey LA determined that the seller would realize too much profit. Carey LA did not approve the sale until the price was significantly reduced. Thus, Carey LA impedes the IOs' ability to use sound business judgment to increase earnings.

Carey LA further impedes IOs' ability to make their own business judgments by restricting the IOs' employment of HPCs. Although IOs hire HPCs, the HPCs must first pass a Carey LA background investigation and drug test and otherwise be approved by Carey LA before beginning chauffeur work. And, despite IOA language that Carey LA will not "unreasonably withhold" approval of HPCs, Carey LA has denied HPC approval when a manager did not "like the way that guy looked" or because the applicant was a woman. Although IOs determine how much to pay their HPCs for a particular job, they have little control over HPCs' other terms and conditions of employment, which are dictated by Rider 7 of the IOA. Carey LA also offers daily work directly to HPCs, without consulting the IO. The evidence also demonstrates that Carey LA views HPCs as its training ground for future IOs because several IOs claim that, after a period of time, Carey LA has directly "offered" promising HPCs their own IOA without first consulting the HPC's IO. Additionally, at least one HPC was discharged directly by Carey LA without IO consultation. Therefore, IOs are usurped of their ability to "work smarter" via HPCs because Carey LA hires, fires, and otherwise commandeers purported "employees" from IOs without the IO's input.¹⁸

¹⁷ See *Roadway Package Systems, Inc.*, 326 NLRB at 853 n.43 (noting employee status indicated where customers "belong" to the company (citing *NLRB v. Amber Delivery Service*, 651 F.2d 57, 62 (1st Cir. 1981))).

¹⁸ See *St. Joseph News-Press*, 345 NLRB at 479. See also *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000) (employee status indicated where owner-operators unable to realize even chance of economic gain because ability to hire drivers frustrated by requirement that they first be trained, tested, and approved by company).

Other incidents further support a finding that IOs' entrepreneurial opportunities are illusory. For example, an IO who did not qualify for insurance as an individual driver had to appeal to Carey LA to continue to operate under his IOA using only HPCs. Carey LA "careful[ly] considered" the situation and "as an *accommodation . . . allow[ed]*" the IO to retain his IOA.¹⁹ Thus, rather than giving IOs the freedom to operate their "businesses" and "employees" as they see fit, Carey LA maintains close control over IO operations through its approval processes.²⁰

The fact that the IOs are incorporated businesses, in and of itself, does not demonstrate entrepreneurial opportunity. Many of the IOs formed businesses only in response to Carey LA's policy change under the 2005 IOA standardization. Carey LA assisted those IOs by preparing packets of necessary incorporation documents and referring them to an individual who helped shepherd the IOs through the incorporation process. Moreover, IOs sign their IOAs in both a business and personal capacity and most are paid by Carey LA as individuals.

In sum, any purported entrepreneurial opportunities for IOs are illusory because of IOA language or Carey LA operational practices which stifle IOs' ability to exercise independent business judgment.²¹ Thus, the IOs' only real option to make more money is by working "harder" because Carey LA gives them no real chance to work "smarter."

¹⁹ Letter from Carey LA General Manager, to IO (Feb. 25, 2005) (emphasis added).

²⁰ Cf. *Dial-A-Mattress Operating Corp.*, 326 NLRB at 892 (stating that owner-operator's ability to "interview, select, hire, retain, compensate, and supervise . . . own drivers . . . and solve all problems relating to [drivers]" indicative of independent contractor status); *St. Joseph News-Press*, 345 NLRB at 479 (independent contractor status indicated where carriers have complete control over their employees' terms and conditions).

²¹ See *Roadway Package Systems, Inc.*, 326 NLRB at 851 (employee status indicated where entrepreneurial choice of drivers stifled by "obstacles created by [drivers'] relationship with Roadway"). Cf. *Dial-A-Mattress Operating Corp.*, 326 NLRB at 893 (finding that owner-operators enjoy freedoms and bear risks that are consistent with the operation of an independent business).

II. The Nature of the Company's Business Supports a Finding of Employee Status

The IOs are an indispensable, essential element of Carey LA's business, as they perform the central function of the business—transporting customers in limousines.²² Indeed, Carey LA's public website states that it provides “ground transportation services” and is “the leading provider of Los Angeles limousine services.”²³ Moreover, Carey LA advertises its drivers as “Certified Professional Chauffeurs” who have been trained, certified, and “constantly” evaluated. Although Carey LA managers claim that Carey LA is merely in the business of “marketing the use of chauffeured cars” and “utilizing a reservation system to facilitate the reservations for chauffeured cars,”²⁴ Carey LA managers have also stated that reservations and marketing are actually conducted primarily by Carey *International*. Thus, Carey LA's statements to the general public and its business practices clearly indicate that its core business is providing professional chauffeur services to its customers, and that those core services are primarily provided by the IOs.

III. The Company Exerts Significant Control Over the Manner and Means of IOs' Work

Carey LA controls significant aspects of IOs' work via IOA language and operational practices. For example, although the IOs have the option to decline work, Carey LA enforces an “all or nothing” mode of work acceptance that discourages IOs from declining less lucrative customer reservations. Carey LA, in its sole discretion, assembles reservation bundles that are offered to IOs. The bundles typically contain a mix of reservations, some of which are more lucrative and some of which are deeply discounted. However, Carey LA generally does not allow IOs to decline specific parts of a reservation bundle, and evidence shows that Carey LA often threatens IOs with the loss of the entire bundle should they insist on declining the discounted portions.

²² See *Roadway Package Systems, Inc.*, 326 NLRB at 851 (finding that drivers perform the essential functions of Roadway's package delivery business weighs in favor of employee status); *Slay Transportation Co.*, 331 NLRB at 1294 (finding employee status where, inter alia, owner-operators' functions at core of company's business). Cf. *Dial-A-Mattress Operating Corp.*, 326 NLRB at 891 (finding that owner-operators have a separate identity from the company where company's business is selling and manufacturing rather than delivery).

²³ Carey LA Webpage, <http://www.carey.com/Carey/cities/US/LosAngeles/> (last visited Feb. 8, 2013).

²⁴ A similar statement is included in the IOA.

Therefore, Carey LA, by enforcing an “all or nothing” mode of work acceptance, is able to discourage IOs from declining reservations and accordingly removes meaningful choice from IOs’ ability to accept or reject reservations.²⁵

The Company also disciplines IOs, despite the lack of a formal discipline system, by cutting IO pay based on customer service complaints. Indeed, IOs play no role in collecting customer payments, and the IOA specifically states that it is within Carey LA’s sole discretion to establish customer rates and discounts. Therefore, when Carey LA applies a discount to a complaining customer’s bill, and pays the IO based on the reduced amount, without any input or rebuttal from the IO, Carey LA effectively disciplines the IO.²⁶

Carey LA further establishes control over the IOs by limiting their ability to obtain limousine insurance policies of their own choosing. Carey LA requires IOs to carry insurance for \$20 million per occurrence, which is significantly above state requirements.²⁷ As a result, IOs are unable to find the contractually necessary insurance coverage at affordable rates on the open market and instead must accept Carey LA’s group insurance policy with premiums automatically deducted from IO compensation. Even if an IO could find affordable insurance from an alternate source, the IOA requires that Carey LA approve the insurance company.

Carey LA also strongly influences the IOs’ vehicle choice and lease financing. Rider 1 of the IOA lists the acceptable makes and models of vehicles that IOs may purchase. Despite IOs’ right to choose “any car” from the list, there is evidence that Carey LA has either suggested or discouraged IOs from purchasing a particular vehicle. Indeed, there is evidence that a Carey LA manager helped an IO choose a new make and model of car and further helped him obtain a corporate discount from a Carey LA preferred supplier, only to soon after tell the IO that the make and model he purchased will not be needed to transport Carey LA customers. Moreover, Carey

²⁵ See *Roadway Package Systems, Inc.*, 326 NLRB at 852 (company exertion of control through system of minimum and maximum number of packages and customer stops assigned to drivers suggests employee status).

²⁶ See *Dial-A-Mattress*, 326 NLRB at 892-93 (though majority of factors favored independent contractor status, employer’s informal suspension policy weighed in favor of employee status).

²⁷ The state minimum requirements range from \$800,000 to \$900,000 depending on the passenger seating capacity of the vehicle. See Public Utilities Commission of the State of California, General Order No. 121-A.

LA appears to have had referral relationships with leasing companies that may terminate an IO's lease if the IOA is terminated.²⁸

IV. The Existence of a Farm-Out Agreement Further Demonstrates that IOs are Employees

The fact that Carey LA uses a Farm-out Agreement ("FOA"), in addition to the IOA, is further evidence that IOs are employees because the FOA on its face is structured more like an independent contractor agreement. Although a Farm-out Company performs the same driving functions as an IO, it is held to much less rigid contract requirements, maintains more control over the manner and means of its own work, and enjoys more legitimate entrepreneurial opportunities.²⁹ For example, the FOA states that the Farm-out Company may use any drivers who have the necessary licenses, whereas the IOA gives Carey LA the right to first approve IOs' additional drivers (HPCs). Also, the Farm-out Company establishes its own rates and bills Carey LA at a 30% discount, whereas Carey LA unilaterally sets customers rates and pays the IO 65% of the fare. Additionally, the FOA allows the Farm-out Company to use multiple vehicles under a single agreement, whereas IOs must execute a separate IOA per vehicle. Moreover, Carey LA only requires Farm-out Companies to obtain insurance for \$1 million per occurrence versus \$20 million per occurrence required for IOs, even though Farm-out Companies and IOs perform the same service. Finally, the Farm-out Company may use any black Lincoln Town Car or equivalent luxury sedan, or a SUV manufactured by a Lincoln Quality Vehicle Modifier or a Cadillac Master Coach Builder, rather than be bound by specific make and model requirements like IOs. Accordingly, the FOA's provisions reserve a significant amount of control and business judgment to the Farm-out Company rather than to Carey LA, while the IOA limits IOs' control and ability to exercise independent business judgment. Thus, comparing the IOA and FOA shows that Carey LA believes it has an employer-employee relationship with IOs, and that it is more likely to consider Farm-out Companies to be independent businesses which it contracts with to provide chauffeur services.³⁰

²⁸ One of the leasing companies, Accela, appears to be an assignee of the other, CLI Fleet. Carey LA denies it receives any financial benefit from lease companies.

²⁹ See *Dial-A-Mattress*, 326 NLRB at 892-93 (independent operator status indicated where owner-operators have multiple vehicles, extensive control over drivers, and enjoy entrepreneurial freedoms). Cf. *Roadway Package Systems, Inc.*, 326 NLRB at 852 (employee status indicated where company controls flow of money and stifles potential for additional profit).

³⁰ See Restatement (Second) of Agency, § 220(2)(i) ("whether or not the parties *believe* they are creating the relation of master and servant" is a factor to consider when determining independent contractor status (emphasis added)).

V. The Independent Contractor Factors Do Not Outweigh a Finding of Employee Status

Some aspects of the IOs' work involve factors that are indicative of independent contractor status. For example, the IOs are able to select the best routes to take in completing reservations for the day.³¹ Moreover, the IOs are not guaranteed a minimum amount of compensation.³² Finally, the IOs are not explicitly prohibited from using their vehicles for non-Carey LA work.³³ Nevertheless, on balance, the IOs are employees because any meaningful entrepreneurial opportunity is illusory, the IOs perform Carey LA's essential business function, and Carey LA exerts significant control over the manner and means of the IOs' work.

Accordingly, the IOs are employees and thus afforded the protection of the Act.

/s/
B.J.K.

³¹ *Cf. Corporate Express Delivery Systems*, 332 NLRB 1522, 1524-25 (2000), *enforced*, 292 F.3d 777 (D.C. Cir. 2002) (employee status indicated where company selected drivers' routes and did not allow drivers to deviate from order of stops).

³² *Cf. Roadway Package Systems, Inc.*, 326 NLRB at 852 n.42 (employee status indicated where company minimizes drivers' losses by guaranteeing minimum income).

³³ *See St. Joseph News-Press*, 345 NLRB at 475, 479 (entrepreneurial opportunity and independent contractor status indicated where carriers free to hold other jobs and deliver other products while delivering newspapers for company).