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

Advice Memorandum

DATE: March 26, 1997

TO : Richard L. Ahearn, Regional Director
Region 9

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

SUBJECT: Reading Rock
Case 9-CA-34502

177-1650
400-5075
440-3350-5000
596-0175-5025-3300

This Section 8(a)(5) case was submitted for advice as to whether the certified unit of Employer employees includes five individuals, if they are jointly employed with another entity, in light of Greenhoot, Inc., 205 NLRB 250 (1973), and four individual owner operators alleged to be independent contractors.[1]

The Region is authorized to issue complaint, absent settlement, alleging that the Employer and Greschel Trucking are joint employers of the five drivers in question; that the Greenhoot rationale is not applicable since the drivers share a strong community of interest with the Employer's solely employed drivers; that even under the Greenhoot rationale Greschel, a sole proprietorship, sufficiently consented to their inclusion in the unit; and that the Employer is estopped from litigating whether owner operators are independent contractors since it previously consented to a stipulated election specifically including them in the unit.

Under the Board's traditional joint employer approach, an insubstantial amount of actual control over employment conditions will support a joint employer finding.[2] Potential control or the right to control employment conditions, standing alone, is also sufficient under the

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[1] The Region has determined that if they are unit employees, the Employer unlawfully insisted on their exclusion during contract negotiations,[*FOIA Exemptions 2 and 5*

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[2] See AMP, 218 NLRB 33, 35 (1975).

traditional approach.[3] Additionally, the Board has long recognized that the commercial reality of the business relationship is an important consideration.[4] The General Counsel recently urged the Board in several matters (Jeffboat Division, American Commercial and Marine Services, 9-UC-406 et al.)[5] to return to its traditional test of viewing control, actual or potential, over some employment conditions, in light of the parties' commercial relationship. The General Counsel believes that the traditional approach is consistent with Congress' intent that the Act's definition of "employer" be construed broadly.

We agree with the Region that the Greschel drivers are at least jointly employed by the Employer and share a community of interest with the Employer's other drivers. The Employer supervises and directs the work of both groups, including dispatching and scheduling, plays some role in discipline and hiring, and effectively discharges Greschel drivers. Both groups of drivers are paid pursuant to the Employer's incentive pay plan, are covered by the Employer's health insurance program and are eligible for Employer safety bonuses; attend the same meetings; wear the same uniforms; are subject to the same work rules, using the same timeclock and accident paperwork; and regularly are assigned to operate the other company's vehicles, most of which have

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[3] See Hoskins Ready-Mix Concrete, 161 NLRB 1492 (1966); Jewel Tea Co., 162 NLRB 508, 510 (1966); S.S. Kresge, 161 NLRB 1127 (1966), 169 NLRB 442 (1968), enfd. in rel. part 416 F.2d 1225 (6th Cir. 1969); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 531 (9th Cir. 1968), enforcing 162 NLRB 498 (1966); Thriftown, 161 NLRB 603 (1966).

[4] See Jewell Smokeless Coal, 170 NLRB 392, 393 (1968), 175 NLRB 57 (1969), enfd. 435 F.2d 1270 (4th Cir. 1970); Hoskins Ready-Mix Concrete, 161 NLRB at 1493; Floyd Epperson, 202 NLRB 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974); S.S. Kresge Co., 161 NLRB at 1128; Thriftown, 161 NLRB at 604-605, 607.

[5] The Board held oral argument in Jeffboat on December 2, 1996. The General Counsel's brief, attached to Memorandum OM 96-86, "Joint Employer Status and Appropriate Joint Employer Units," dated December 9, 1996, sets forth the arguments to be presented in all joint employer ULP cases prior to the issuance of the Board's Jeffboat decision.

the Employer's insignia. Only Employer drivers are eligible for the Employer's 401(k) plan.

Over the last 20 years about 95% of Greschel's business was leasing trucks, trailers and drivers to the Employer, which has financed the purchase of several Greschel trucks. Pursuant to an apparently arms-length lease agreement, the Employer issues Greschel a weekly check based on combination tonnage rate and total miles each truck drives.[6] Greschel issues its drivers their weekly paychecks, prepared by the owner's wife at his home office, and withholds tax and social security deductions. Along with Employer officials, Employer drivers and Greschel drivers, Greschel's owner sat on joint committees which formulated and revised the incentive pay plan. Greschel also procures and maintains workers compensation coverage for the Greschel drivers leased to the Employer. Like the Employer, Greschel issues disciplinary warnings to its drivers. Finally, Greschel shares a substantial amount of control over hiring with the Employer. Thus, Greschel conducts a preliminary interview of applicants seeking to operate Greschel trucks, and ultimately selects drivers for hire after they are jointly interviewed by Greschel and the Employer and pass a road test administered by Greschel. The fact that the Employer can ultimately reject applicants based on background checks it makes or drug tests/physical examinations it arranges does not detract from Greschel's not insignificant role in hiring. Accordingly, Greschel is a joint employer of its drivers.

Further, given the amount of Greschel's control over employment conditions set forth above, we conclude that Greschel's owner is not merely an owner-operator of multiple trucks and a supervisor of the Employer. There is no persuasive evidence that Greschel is other than a separate business entity from, although economically dependent on, the Employer. Moreover, as discussed above, Greschel disciplines and pays drivers whom it hires to drive for the Employer, and participates in setting the incentive pay plan under which Greschel drivers are compensated. Therefore, this matter is not controlled by cases like R. W. Bozel Transfer, 304 NLRB 200 (1991), and C. C. Eastern, 309 NLRB 1070 (1992), where the Board found owner-operators were

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[6] The Employer deducts 7% for liability insurance (on which both companies are listed as co-insured) and property insurance the Employer carries for the trucks, as well as for health insurance premiums for Greschel drivers.

employees rather than independent contractors even though they could hire helpers, given the employers' control over how they performed their work and the owner-operators' "relative lack of entrepreneurial freedom." Those owner-operators, in contrast to Greschel, were not separate entities that, along with the employers, controlled or had the right to control employee employment conditions, and therefore would not be viewed as joint employers.

In our pre-argument Jeffboat brief at 41-42 and 48-55, and our post-argument brief dated January 15, 1997, at 1-20 (copy attached), we took the position that the touchstone of whether a multiemployer or joint employer relationship exists is some common right to control the workforces of both employing entities and traditional community of interest principles. Applying that analysis here, since the Region has found a clear community of interest among the Employer and Greschel drivers, it should argue that consent of the joint employers is irrelevant. However, as set forth in our post-argument brief, competition among employers, or lack thereof, is not determinative of whether a multiemployer or joint employer relationship exists. Thus, application of Greenhoot principles to joint employer relationships is unwarranted and, regardless of the parties' consent, a joint employer, which may control working conditions of only a segment of a combined unit of employees jointly and solely controlled by the other joint employer, should legally and practically incur a bargaining allegation in a unit where all employees share a community of interest.

Moreover, even assuming the Board decides that principles governing employer relationships as here are more like multiemployer groups than joint employers and that "Greenhoot consent" is required, we would argue that Greschel and the Employer gave the requisite consent for Greschel drivers to be included in the certified unit. Thus, while there is no evidence that the joint employers "expressly consented to joint negotiations... they have by an established course of conduct unequivocally manifested an intent to allow group collective bargaining to bind them."[7] In this regard, Greschel's drivers had formerly been included in a certified unit with the Employer's drivers represented by the Union and neither employer sought to exclude Greschel drivers (or, for that matter, individual owner operators) from contract negotiations covering that

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[7] Hughes Aircraft Co., 308 NLRB 82 (1992), citing Greenhoot, at 251.

unit. Moreover, although not formally informed by the Region, Greschel was aware of the 1996 stipulated election agreement and that his drivers were voting in the election won by the Union in the ultimately certified unit of employees "including drivers of owner operated trucks of the Employer." No objection to their inclusion was raised by either the Employer or Greschel prior to 1996 contract negotiations. Under these circumstances, the Region should alternatively argue that the Employer and Greschel had unequivocally manifested by their conduct from 1993 to 1996 an intention to be bound by group bargaining.

Finally, we agree with the Region that regardless of whether the four individual owner operators are independent contractors or statutory employees, the Employer is estopped from refusing to bargain over them since it specifically agreed to include in the stipulated unit "drivers of owner operated trucks of the Employer," did not file objections to the election, and proffers no newly discovered or previously unavailable evidence or other special circumstances justifying relitigation of their inclusion in the unit. See I.O.O.F. Home of Ohio, 322 NLRB No. 167, slip op. at 2 (January 24, 1997), and cases cited. Moreover, since Greenhoot principles do not apply as to the Greschel drivers or, alternatively, they were properly included in the certified unit because the joint employers unequivocally consented by a course of conduct to their inclusion, the Employer is similarly estopped from insisting on their exclusion during 1996 contract negotiations based on the Employer's stipulated agreements to their inclusion prior to the Union's 1993 and 1996 certifications.

B.J.K.