

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERMODAL BRIDGE TRANSPORT

and

Case Nos. 21-CA-157647
21-CA-177303

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

RESPONDENT'S REPLY TO THE CHARGING PARTY'S ANSWERING BRIEF

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INTRODUCTION¹

On March 2, 2018, Respondent, Intermodal Bridge Transport (“IBT”), filed its Exceptions to the Administrative Law Judge’s November 28, 2017 Decision (the “ALJ’s Decision”) in the referenced case. IBT established in its Exceptions that the Charging Party waited too long to bring its misclassification-as-unfair labor practice claim, and IBT further established error by the ALJ in his misclassification decision as well as his finding that such a misclassification could, itself, be considered an unfair labor practice. Finally, IBT established error with respect to the ALJ’s findings that unfair labor practices were committed through the conduct of Oswaldo Zea and Marlo Quevedo.

The Charging Party responded to IBT’s Exceptions by reiterating its argument that drivers were misclassified and that misclassification, standing alone, violated the Act. That being said, recognizing that the General Counsel abandoned the misclassification as a per se violation claim, the Charging Party asserts a new claim, 18 months after the close of evidence, alleging IBT’s actions associated with misclassification actively chilled Section 7 activity. The Charging Party’s arguments should be rejected.

ARGUMENT

I. IBT Provided Credible Evidence Of Proper Independent Contractor Classification

The Charging Party opens its arguments by questioning the credibility of IBT’s

¹ Given the reply brief limitations contained in Rule 102.46, IBT cannot address each point raised in the Charging Party’s 80-page Answering Brief. IBT in no way concedes any points made in the Answering Brief, and IBT continues to rely on the points made in its Exceptions Brief as warranting reversal of the ALJ’s Decision.

efforts with respect to its primary contracting document, the revision of documents to reflect the true relationship, and the outlier nature of driver David Cabral, who essentially without contest exhibited the behavior of a *bona fide* independent contractor. The Charging Party's arguments do not lead to the result it seeks.

A. The Relationship is Reflected in the Lease and Transportation Agreement

The Charging Party seeks to make headway by claiming the documents IBT used to reflect the independent contractor relationship did not in fact reflect the relationship as it existed in practice. The Charging Party is wrong on several fronts, most notably with respect to the Lease and Transportation Agreement ("LTA"). Although union supporter Eduardo Quintero stated he had not read the LTA, he testified that he knew it was an independent contractor agreement, he could accept or reject loads, he could decide to work on a particular day or not, he had to turn in a daily manifest to get paid, he was responsible for fuel and expenses, insurance costs and costs associated with damage to equipment would be deducted, and Quintero further testified that he understood several other operational points, all of which were contained in the LTA. GC31; Quintero 1241. In other words, the LTA reflected the actual relationship between the parties.

B. Revamping Documents is Natural

The Charging Party also spends a great deal of time asserting an improper motivation was behind IBT's 2014 revamping of documents. Specifically, the Charging Party claims the renaming of a document titled "Application for Employment" to "Independent Contractor Application" in 2014 was done to hide the realities of the relationship.

Fatal to the Charging Party's argument, the Application was re-named outside the 10(b) period, as the Charge in this case was filed in August 2015 and the Application (and revamped LTAs) were completed in 2014. *R19; GC9; GC38*. Thus, even if the act of renaming or rewording documents could somehow be seen as improper, it was done well outside the 10(b) period.

Renaming the document, however, was not improper. The initial version of the document was a form obtained from J.J. Keller, an industry provider of forms and other information, and it parroted the DOT requirement that motor carriers retain an "Application for Employment" on each driver regardless of whether the driver is an independent contractor. 49 CFR 391.21, 391.51(b)(1). Although IBT originally used the standard form application, it changed the name of the document in 2014 to more accurately reflect the actual independent contractor nature of the relationship. Likewise, IBT updated the LTA in 2014 to spell out in even more detail the freedoms drivers contractually maintained. *See e.g. GC9; Bradley 1744, 1747*.

Presenting in this way IBT's own understanding of the relationship in clear terms is entirely proper. Indeed, clarifying the relationship is natural to help ensure the documents accurately reflect the relationship in practice. Such a clarification becomes even more important in a climate in which independent contractor classification is under attack.²

² By way of example of Charging Party's overreaching, Charging Party acknowledges the 2014 removal of IBT handbook language requiring compliance with the manuals and consequences for failing to comply. *CP's Answering Brief* at 37. Charging Party, however, refuses to acknowledge the testimony that, at last as of 2014, the handbooks only provide suggestions and helpful hints. *Bradley 1789-97, 2019-21*. Rather

C. Cabral Exhibited the Opportunities Available to All

The Charging Party seizes upon the ALJ's characterization of driver Cabral as an "outlier," attempting to diminish the import of the freedoms Cabral exhibited. Neither the ALJ nor the Charging Party dispute that Cabral carried on his business with an intense amount of freedom – thereby impliedly recognizing that at least Cabral is an independent contractor. Even if no other driver exercised the same level of freedom and entrepreneurial spirit as Cabral displayed, it is without question that each and every driver had the *opportunity* to exercise every freedom Cabral exercised. And it is that *opportunity*, regardless of whether it was exercised, that forms the key in determining whether a driver was an independent contractor. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501-02 (D.C. Cir. 2009).³

D. Compliance with Federal Regulations is Consistent with Independent Contractor Status

Finally, the Charging Party seeks to apply governmental requirements as evidence of an employment relationship, even though courts have universally recognized that compliance with regulatory requirements is not evidence of employer-like control. *FedEx*,

than recognizing the elimination for the updating that it is, Charging Party baldly alleges the 2014 removal of such language may be part of an attempt to "color the record." Charging Party does so without citing a single instance in which IBT ever penalized non-compliance with a handbook. In fact, substantially all of the information highlighted by Charging Party involved instances occurring well before the 10(b) period, let alone the relevant period for determining independent contractor status. *See, e.g. U25* (2014), *U26* (2011), *U27* (2014), *U28*, (2013), *U32* (2012), *U35* (2011), *U36* (2013), *GC79* (2014), *GC80* (2011), *GC81* (2011), *GC84* (2012), *GC95* (2010).

³ Charging Party, with the General Counsel, have culled out drivers who own their own trucks from the group they claim to be misclassified. The fact that *several* drivers do in fact own their own trucks shows that *all* drivers had the opportunity to purchase their own trucks, and some simply made the business decision to lease trucks instead.

563 F.3d at 497; *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989). The Charging Party nevertheless claims that no law forced IBT to be a motor carrier. *CP's Answering Brief* at 23.

Having no case law support for its position, the Charging Party essentially asserts that a motor carrier cannot at once require compliance with governmental regulations while at the same time use independent contractor drivers. But the use of independent contractor drivers is expressly contemplated in U.S. DOT regulations, pre-dating even the Act in 1935. *See Ex Parte No. MC 43 (Sub-No. 12), Leasing Rules Modifications*, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982). *See also American Trucking Assns, Inc. v. U.S.*, 344 U.S. 298, 303 (1953). The Charging Party therefore cannot wipe out the use of independent contractors in the trucking industry with such a wave of a wand.

II. IBT Drivers Exhibited Extensive Freedom To Operate As They Saw Fit

Not surprisingly, the Charging Party attempts to diminish the freedoms available to the drivers, and the Charging Party focuses on the narrow, self-serving testimony of the few union supporters. The Charging Party ignores the admissions of those same individuals, as well as the testimony of the remaining witnesses, in arguing IBT controls the drivers. When the complete evidence is considered in its totality as required, it becomes clear that the drivers are independent contractors.

Evidence of the freedom of drivers to operate as they see fit is legion. The ALJ even recognized that drivers exhibit freedoms with respect to delivery routes, start times, whether to work at all, when to take breaks, how often and how long to work, whether

to reject loads, whether to cancel loads, which loads to accept, and exclusive driver control over the vehicles. *ALJD* 13. Indeed, the record is replete with drivers refusing runs, canceling runs after having accepted them, finding their own work without being dispatched, and deciding not to provide services despite runs being available. *R62-81*.

In addition, drivers choose the runs to accept based on a menu of runs provided to them, and drivers choose the dispatch order. *Kirkbride* 4113, *Nunez* 2714, *Miranda* 935, *Quintero* 1175, *Vaea* 1604, 1634. Drivers in fact get up to four choices at a time. *Osoy* 367, *Portillo* 800, *Miranda* 936-37, *Quintero* 1092-93, *Uaina* 1395.

Additional freedoms of drivers include:

- Drivers decide the order of movements (*Quintero* 1178-80);
- Drivers swap loads regularly (*Granados* 2880-81; *R80*);
- Drivers drop loads at IBT's facility to carry other loads and maximize income (*Vaea* 1654, *R42*);
- Drivers, on their own, go to Sony and pick-up containers (*R3*, *R4*, *R26*, *R30*);
- Drivers choose day or night runs (*Miranda* 900, *Quintero* 1252);
- Drivers request lease breaks and IBT sometimes agrees (*Vaea* 1632-33; *Uaina* 1424).
- Drivers decide whether to purchase their own trucks, lease a truck from IBT, or lease a truck from a third party. *Bradley* 3810, *Ortiz* 559. Indeed, eighteen current drivers have chosen to own their own trucks. *Bradley* 3860.⁴

The Charging Party questions the ability of drivers to determine the order in which to make deliveries, claiming drivers only accept one load at a time. The Charging Party is wrong, as drivers can often accept up to three at one time. *Granados* 2877-79. What is

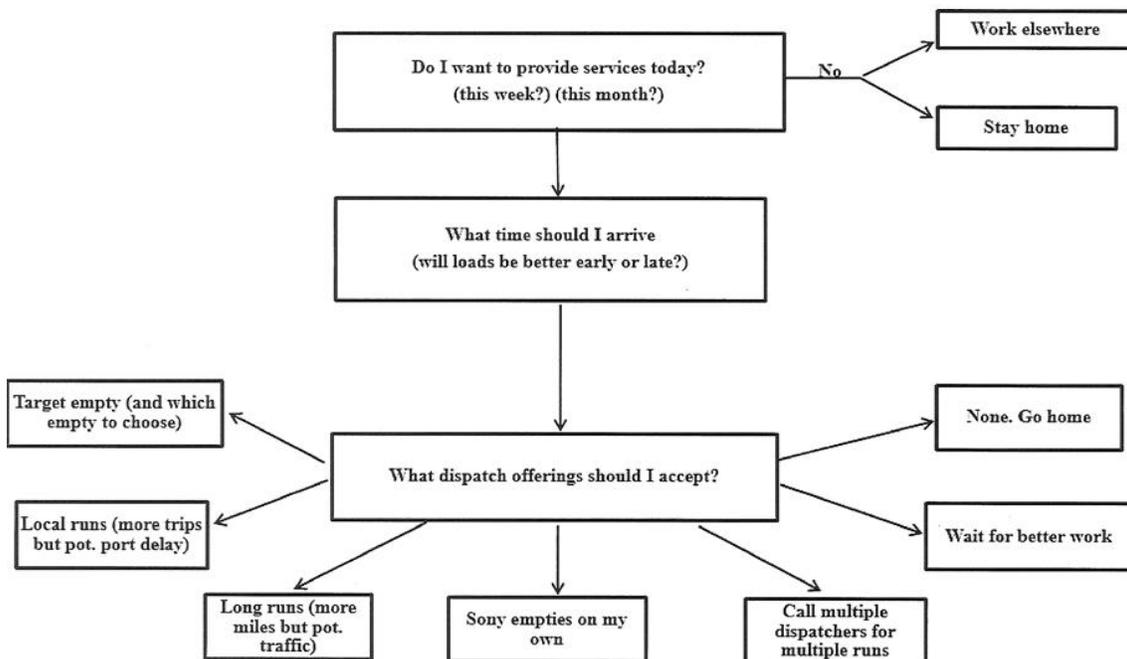
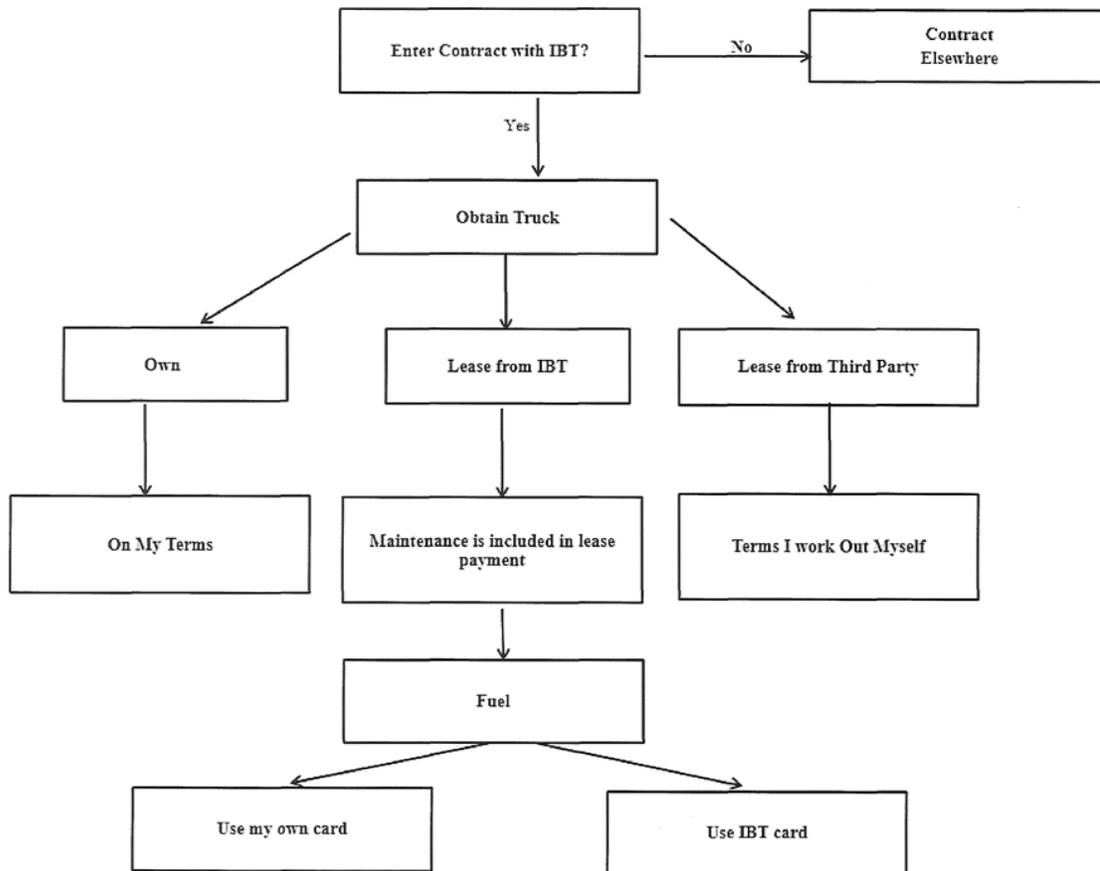
⁴ Charging Party downplays the choice by drivers to own or lease trucks, claiming drivers could not afford to purchase trucks. The fact that at least 18 have done so suggests the eradication of whatever financial stressors that may have been present in 2011 when the employee mandate was found unconstitutional.

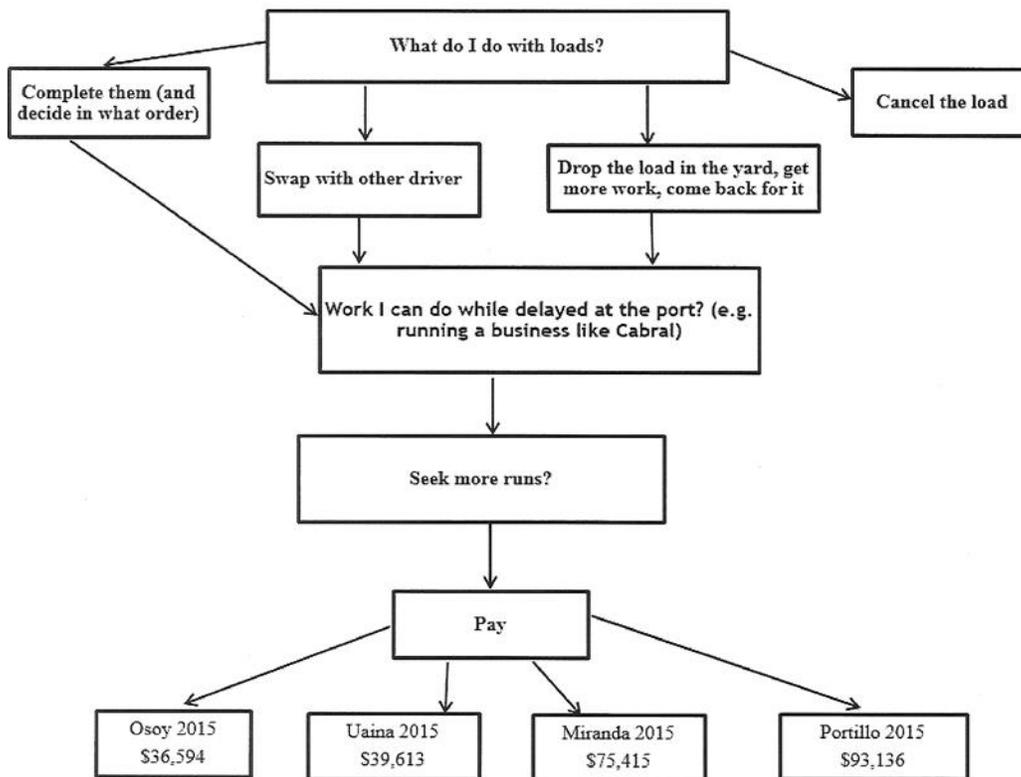
more, drivers regularly drop loaded and empty containers in the IBT yard in order to accept another dispatch offering and then return to later complete the original dispatch. *Vaea* 1641, *R42*.

The Charging Party also claims drivers have only had the freedoms they now enjoy, including a choice of loads, starting in April 2015 with the first strike. The Charging Party is incorrect - - IBT has always offered a choice of loads. *Kirkbride* 4117-18, *Moreno* 3318, *Rosas* 3408, *Quevedo* 3551.

Even if the Charging Party had correctly identified April 2015 as the date load choices and other freedoms began, the Charging Party impliedly establishes that date as the latest date independent contractor relationships formed. However, the events giving rise to the alleged liability occurred on May 16 and June 16, 2015, and February 16, May 3, and May 26, 2016. *GC1(cc)*, ¶¶ 7-11. In other words, drivers were undoubtedly operating with independent-contractor-like freedom when the allegedly unlawful conduct occurred.

In the end, the drivers have always controlled their own individual destinies. Indeed, as the following shows (based on the evidence), drivers not only had numerous choices to make each day, but the product of their choices stood to dramatically affect their income.





Drivers held those choices, and drivers understood the relationship. Indeed, drivers knew how an employment relationship looked - - they experienced it with Staffmark. Under Staffmark, the drivers had set start and end times as dictated by Staffmark, were paid hourly, received forced dispatch, were required to request time off, and were not responsible for their own expenses of operation. *Phan* 3042-43; *Rosales* 1303; *Cabral* 3113-14. The relationship present in 2015 differed from the prior Staffmark relationship at every turn. Thus, the drivers were and are independent contractors, thereby precluding any application of the Act against IBT.

III. The Misclassification As A *Per Se* Violation Issue Is Moot Because The General Counsel Abandoned The Claim

The Charging Party persists with misclassification as a *per se* violation of the Act without regard for the fact the General Counsel has abandoned the claim. Without question, the Charging Party cannot expand the legal theories or claims made by the General

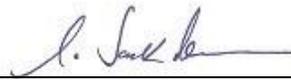
Counsel, and the Charging Party's arguments should be disregarded. *Kimtruss Corp.*, 305 NLRB 710, 711 (1991) ("the Charging Party cannot enlarge upon or change the General Counsel's theory of the case.") The Charging Party is therefore precluded from maintaining this misclassification as a *per se* violation theory.

The Charging Party, perhaps recognizing the limitations on its ability to proffer a legal theory beyond the General Counsel, next settles into the General Counsel's new argument that actively using misclassification to chill⁵ Section 7 activity should be an unfair labor practice. The claim, however, as more fully-explained in IBT's Reply to the General Counsel's Answering Brief, was not raised in the Complaint, the time period leading up to the hearing, or in the hearing, itself. IBT simply had no opportunity to defend against such a claim. At this juncture, 18 months after the close of evidence, the new claim should be disallowed.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in IBT's Exceptions Brief and its Answering Brief to the General Counsel's Exceptions and Charging Party's Cross Exceptions, IBT respectfully requests the findings in the ALJ's Decision that violations of the Act occurred, be rejected and that the Complaint be dismissed in its entirety.

⁵ The impropriety of adding a new legal theory at this juncture aside, the Charging Party can provide no evidence of chilled activity. Indeed, drivers have consistently and freely engaged in Union activities including multiple strikes, leafletting, handbilling, wearing Union vests, and publicity for two years prior to the hearing in this case. *Portillo* 699-700, 704, 706; *Osoy* 188, 199, 212-13; *Miranda* 966; *Ortiz* 514, 516; GC4; GC5. In short, no chilling of Section 7 activity has occurred.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Reply in Support of Respondent's Exceptions was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on May 11, 2018. A copy of the Reply in Support of Respondent's Exceptions was also served upon the following by electronic mail on May 11, 2018:

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