

International Transfer of Florida, Inc. and International Longshoremen's Association, Local 1922, AFL-CIO, Petitioner. Case 12-RC-7356

September 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered a determinative challenged ballot cast in an election held January 16, 1991,¹ and the hearing officer's report recommending disposition of it. The tally of ballots shows 10 for and 10 against the Petitioner, with 1 challenged ballot and 2 void ballots.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Order.

At issue in this case is the voting eligibility of Winaldo Lagos. The hearing officer found that Lagos was an eligible voter and therefore recommended that the challenge to his ballot be overruled. For the reasons set forth below, we reverse the hearing officer.

International Transfer of Florida, Inc. (I.T.F.) is in the business of forwarding freight and transporting customer-owned containers and trailers by utilizing tractors leased from owner-operators. In October 1990 I.T.F. entered into a lease agreement with Maximo Giron, who retained the right under the lease to hire drivers to operate his tractor. Lagos is the third driver retained by Giron since entering into the lease agreement. After he was hired, Giron sent Lagos to I.T.F. to introduce himself and let I.T.F. know that he would be operating Giron's truck² Under the lease agreement between I.T.F. and Giron, I.T.F. has no control over the financial relationship between Giron and Lagos. Giron and Lagos agreed that, after maintenance and repair expenses were covered, they would split the cost of fuel and divide the remainder equally.

Both I.T.F. and Giron required Lagos to follow the I.T.F. rules, regulations, and requirements applicable to owner-operators. In this regard, I.T.F. required each of the drivers, including Lagos, to take written and driving tests, provide certain documents required under Government regulations and insurance requirements, and comply with all company rules. I.T.F. dispatched its drivers on a first-come-first-serve basis, and Lagos was dispatched in the same manner as the other opera-

tors. Further, Lagos, like the other drivers, was required after every delivery to call I.T.F. to be told of other pickups or deliveries, and could, at his discretion, reject a load³ Finally, Lagos, like the other drivers, was required to notify I.T.F. if he was involved in an accident or was unable to complete a delivery due to truck breakdown or illness. When I.T.F. believed that Lagos had attendance problems, it contacted Giron and advised him of the problem.

At the hearing, I.T.F. argued that Lagos was an employee of Giron or an independent contractor and was not its employee. The Petitioner contended that there were no distinguishing factors between I.T.F.'s treatment of owner-operators and its treatment of Lagos. The hearing officer found that "at the very least" Giron and I.T.F. were joint employers of Lagos because Giron "assigned and directed Lagos to operate the vehicle under the direct day-to-day control of I.T.F.," and that as an employee of I.T.F. on the date of the election, Lagos was an eligible voter.

We agree that Giron and I.T.F. are joint employers⁴ A joint employer relationship exists where "two separate business entities share or codetermine those matters governing the essential terms and conditions of employment," and where the one employer meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction, over the employees employed by the other employer. *TLI, Inc.*, 271 NLRB 798 (1984). See also *Laerco Transportation*, 269 NLRB 324 (1984). Giron hires, fires, and determines the compensation of Lagos. I.T.F. exercises exclusive daily supervision and direction of Lagos, including dispatching and scheduling of work assignments. Through its operational rules and procedures, I.T.F. controls the manner and means of deliveries made by Lagos. In addition, I.T.F. informs Giron of any problems it has with Lagos. In view of these facts, we find that the criteria for a joint employer finding have been satisfied and that Giron and I.T.F. are joint employers of Lagos.

As a general rule, however, the Board does not include employees in the same unit if they do not have the same employer, absent employer consent. *Lee Hospital*, 300 NLRB 9471 (1990). In the instant case, all of the unit employees, except Lagos, are solely the employees of I.T.F. As discussed above, Lagos is an employee of I.T.F. and Giron. Thus, Lagos can only be

³ However, the payment from I.T.F. to Giron was based on the number of loads hauled.

⁴ Our dissenting colleague finds that Giron is an employee based on I.T.F.'s "admission" that he was. His finding ignores the ample evidence presented at the hearing that established that Giron is in fact an independent contractor and the employer of Lagos. The fact that Giron received pay and benefits from I.T.F. does not establish that Giron was an I.T.F. employee. We also note that Giron's name was removed from the Excelsior list, further evidencing his lack of employee status.

¹ In his Decision and Direction of Election issued December 17, 1990, the Regional Director found appropriate a unit of "[a]ll full-time and regular part-time truck drivers including owner-operators and dispatchers employed by the Employer." No party sought review of this decision by the Board.

² Lagos is the only nonowner driver making deliveries for I.T.F.

included in the unit if both Giron and I.T.F. consent to such an arrangement. Although the record does not indicate either Giron's consent or lack of consent, it is clear from I.T.F.'s challenge of Lagos' ballot, as well as from its contentions at the hearing and in its exceptions, that I.T.F. does not consent to Lagos' inclusion in the unit. Accordingly, we find that Winaldo Lagos is not an eligible voter, that the challenge to his ballot must be sustained, and that a certification of results of election should be issued.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Longshoremen's Association, Local 1922, AFL-CIO and that it is not the exclusive representative of these bargaining unit employees.

CHAIRMAN STEPHENS, dissenting.

Contrary to my colleagues, I would adopt the hearing officer's recommendation to open and count the ballot of Winaldo Lagos.

Lagos transported shipments for I.T.F.'s customers, driving a tractor owned by Maximo Giron. At the post-election hearing in this case, Ron Sibilía, the president of I.T.F., testified repeatedly that Giron, who leased that tractor to I.T.F. for its exclusive use in its freight forwarding and transport business, was I.T.F.'s "employee" to whom it gave a weekly "paycheck."¹ I

¹ Giron's name had initially been included on the Excelsior list by I.T.F. Giron did not vote in the election, and I.T.F. appears to argue that this was because his name was removed from the Excelsior list at the behest of the Board's Regional Office. I.T.F. now argues that it is unfair to treat Lagos as an eligible voter if Giron did not vote. As the Petitioner correctly points out, however, I.T.F. filed no timely

would hold I.T.F. to that admission and would not entertain its present claim that Giron was an entirely independent party who had merely entered into a truck-leasing agreement with I.T.F.²

As an employee on I.T.F.'s payroll, Giron was someone whose actions taken at the request of I.T.F. were properly attributable to I.T.F. Because it is undisputed that Giron did not drive the tractor, but merely secured a driver for it and maintained the tractor to meet I.T.F.'s specifications, I would affirm the hearing officer's finding that Giron was I.T.F.'s agent for securing the services of Lagos to work for I.T.F. driving one of its leased trucks under the direction of its dispatcher. Lagos can therefore properly be treated as I.T.F.'s employee. It is irrelevant whether Sibilía or other top I.T.F. managers were personally involved in the hiring or discharge of the drivers of Giron's truck, just as such noninvolvement of top management would be irrelevant in determining whether a driver hired by any regular I.T.F. supervisor to drive for it was an I.T.F. employee.

I would further find that, as an employee working for I.T.F. during the eligibility period and on the day of the election, Lagos was an eligible voter. I would therefore adopt the hearing officer's recommendation that the challenge to Lagos' ballot be overruled and that it be opened and counted.

objection to the election based on impediments to Giron's voting, so any such issue is not properly before us.

² I view the admission as going beyond merely the repeated use of the term "employee." Sibilía sought to present Giron as someone who was on its payroll and entitled to its employee benefits, and not someone with whom it dealt at arm's length. Because Sibilía was the company president, I would treat this testimony as a party admission.