

**Time Auto Transportation, Inc. and Time Auto Transport, L.S. and Randy Hill and Ernest L. Blake.** Cases 7-CA-43641-1 and 7-CA-43641-2  
November 22, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On April 10, 2002, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Time Auto Transportation, Inc., Troy, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER BARTLETT, dissenting.

Unlike my colleagues, I find that lease drivers Hill and Blake were independent contractors, not employees. I would therefore dismiss the complaint.

The Board applies the common-law agency test to distinguish between independent contractors and employees. *Roadway Package System*, 326 NLRB 842 (1998);

<sup>1</sup> The judge found that the Respondent committed several unfair labor practices against Charging Parties Randy Hill and Ernest L. Blake, culminating in their unlawful discharge. In doing so, he rejected the Respondent's argument that Hill and Blake—who haul vehicles for the Respondent using tractor-trailers that they lease from the Respondent—are independent contractors, finding to the contrary that they are statutory employees. Member Cowen joins in affirming this finding for the following reasons. In Member Cowen's view, considering in isolation the structure of Hill's and Blake's work relationship with the Respondent, the balance tips in favor of finding independent contractor status. However, the terms of both Hill's and Blake's truck-lease contract give the Respondent the right to terminate the lease at will on 5 days' notice, and the Respondent used that right to control the manner of Hill's performance of his work. Specifically, the Respondent's owner and president, James D. Ferns, Sr., threatened Hill that he would "sell" Hill's truck—i.e., terminate the lease on that truck—unless Hill "learned how to do his logs." The logs in question are meant to verify that drivers are conforming to drive time limits imposed by the Department of Transportation (DOT). Hill reasonably understood Ferns to be threatening him with job loss unless Hill began exceeding DOT drive-time limits and falsifying his logs. By demanding over-limit drive time and backing that demand with a threat of job loss, the Respondent sought to exercise a degree of control over the manner of work performance that Member Cowen finds inconsistent with independent contractor status.

Based on all of the factors set forth in the judge's decision, including the factors relied on by Member Cowen, Member Liebman finds that Hill and Blake are statutory employees.

*Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998). That test requires an examination of all relevant factors, including but not limited to those that involve a right of control. *Id.*

Here, numerous factors tend to support a finding of independent contractor status. Thus, the lease agreements with the Respondent signed by Hill and Blake identified them as independent contractors; the Respondent did not withhold social security taxes, issued 1099 forms to the drivers' companies, and did not provide the drivers with any benefits; the drivers formed their own corporations and paid their own expenses to maintain the vehicles, including repairs, inspections, permits, and fees; the Respondent's payments were made to the drivers' corporations, which in turn hired additional drivers and filed federal corporate income tax returns; the lease drivers, such as Hill and Blake, were responsible for paying the additional drivers (whom they could terminate) and for providing them with insurance coverage; and, except for deliveries in Canada, the drivers could choose their own routes.

Despite this strong evidence of independent contractor status,<sup>1</sup> the judge found Hill and Blake to be employees, essentially because he found that the Respondent controlled the manner and means by which they generated income. For example, the judge noted that the Respondent required its drivers (who received their assignments, generally on a "first-come, first-serve" basis, through the Respondent's Troy, Michigan dispatch office) to contact the dispatch office every day. The apparent purpose of this requirement, however, was simply to enable a driver to receive his next assignment and report the status of deliveries. Indeed, given the nature of the Respondent's business and of the tasks performed by Hill and Blake for the Respondent, it would be surprising if the Respondent did not require at least this minimal contact. The Respondent is engaged in long-haul and over-the-road trucking. Those, like Hill and Blake, who contract to drive for the Respondent, make trips that can last for days or even weeks, generally choosing their own routes. The Respondent simply requires that a delivery be made at a particular place and (approximate) time. The reporting requirement is a commonsense measure that enables the Respondent to track the progress of the deliveries, as it must. Clearly, such a minimal requirement is insufficient to infer an employer-employee relationship.<sup>2</sup>

<sup>1</sup> See *Central Transport*, 299 NLRB 5 (1990).

<sup>2</sup> The judge also found that the Respondent exercised control by threatening to terminate the lease agreement unless a driver exceeded DOT hourly restrictions and falsified his logbook. While I agree that this is significant evidence of control, it is insufficient to outweigh the substantial countervailing evidence supporting independent contractor status in this case.

Further, the cases relied on by the judge to find employee status are distinguishable. For example, *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), unlike the instant case, concerned a city package pick-up and delivery service whose drivers had to report to the office at the beginning and end of each workday. They received daily assignments to a route schedule from which they could not deviate. The drivers were also required to adhere to a mandatory dress code or wear uniforms.

Similarly, the drivers at issue in *Elite Limousine Plus*, 324 NLRB 992 (1997), transported passengers from one place to another within a small geographical area. Their trips were measured in minutes or at most hours, not in days or weeks. There, unlike here, the employer provided at least some fringe benefits, and the employer maintained and enforced many rules, beyond those required by government agencies, pertaining to, inter alia, strict time limits for pickup and delivery as well as the conduct of drivers while they transported customers. The vehicles involved in *Elite* were equipped with on-board computer systems that continually kept track of the vehicles' movements and whereabouts throughout the workday.

In *NLRB v. Corporate Express O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991), also relied on by the judge, the employer transported customers to and from two Chicago airports. Thus, if anything, the scope of this operation was even narrower than the ones at issue in *Elite* and *Corporate Express*. In addition, each driver had to select a shift which he could not change without the employer's permission, there was a mandatory dress code for the drivers, and the company had its own specific rules governing customer service and the collection of fares.

Likewise, in *City Cab Co. of Orlando v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980), the company supplied the cabs to the drivers on a daily basis; indeed, each driver had to report to the company every day for a cab assignment. Unlike the Respondent's drivers, no *City Cab* driver either leased his vehicle for purchase or already owned it. The *City Cab* drivers were subject to a mandatory dress code and, pursuant to the company's own directive (as opposed to government regulations), maintained a daily trip sheet detailing each trip and fare.

Finally, in *NLRB v. Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981), also cited by the judge, the employer operated a same-day pickup and delivery service in the Boston area. The drivers had to report for work each day by 8 a.m., and the company mandated the sequence of deliveries on their assigned routes. Unlike the Respondent's drivers, none of the *Amber* drivers operated as a corporation or partnership.

The Respondent here has done virtually everything possible to structure the relationship with the lease drivers in such a way as to make clear to all that they are independent contractors rather than employees. Indeed, it is difficult to see how, if Hill and Blake are not independent contractors, there could be any independent contractors among drivers in the long-haul trucking industry. Accordingly, I dissent.

Amy Roemer, Esq. and Kelly Gackie, Esq., for the General Counsel.

William L. Hooth, Esq. and Ryan Perry, Esq., of Troy, Michigan, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Detroit, Michigan, on November 13, 14, and 15, 2001. The charges were filed by Randy Hill and Ernest L. Blake against Time Auto Transportation, Inc. (Time Auto) and Time Auto Transport, L.S. (Time Auto L.S.) jointly referred to as Respondent. The consolidated complaint issued on March 30, 2001, alleging that Time Auto and Time Auto L.S. are a single employer within the meaning of the Act; that on about November 16, 2000, Respondent created the impression that its employees' union activities were under surveillance, interrogated employees about their union activities, and threatened to discharge employees because of their union activities in violation of Section 8(a)(1) of the Act. It is also alleged that on November 17, 2000, Respondent discharged and terminated the leases of Hill and Blake in violation of Section 8(a)(1) and (3) of the Act.<sup>1</sup> Respondent asserts in its answer that Hill and Blake were independent contractors and not its employees within the meaning of Section 2(3) of the Act.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Time Auto and Time Auto L.S. are each Michigan corporations, with an office and place of business in Troy, Michigan, where Time Auto has been engaged in the interstate transportation of freight and Time Auto L.S. has been engaged in the purchase and leasing of trucks and trailers. Respondent admits that each corporation derived gross revenues in excess of \$50,000 by activities outside the State of Michigan, and I find, as Respondent admits, that Time Auto and Time Auto L.S. are each employers within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits and I find that Time Auto and Time Auto L.S. are a single integrated enterprise and single employer within the meaning of the Act. Respondent admits

<sup>1</sup> All dates are in 2000 unless otherwise indicated.

<sup>2</sup> The General Counsel's unopposed motion to correct the transcript, dated December 20, 2001, is granted and received in evidence as GC Exh. 17.

and I find that Local 299, International Brotherhood of Teamsters, AFL-CIO, (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

James D. Ferns Sr. (Ferns Sr.), is the owner and president of Time Auto and Time Auto, L.S. During the year 2000, Cynthia Morefield served as office manager and controller for Time Auto and Time Auto L.S. Respondent admits and I find that Ferns Sr. and Morefield, during times relevant here, served as its statutory supervisors and agents within the meaning of Section 2(11) and (13) of the Act. Respondent also admits that dispatchers James Ferns Jr. (Ferns Jr.), Scott Zabel, and Darrell (J.D.) Fulford are Respondent's agents within the meaning of Section 2(13) of the Act for the purpose of conveying work assignments and scheduling off-duty time for drivers.

Hill and Blake are car haulers who signed lease agreements for trucks and trailers with Respondent and independent contractor agreements with Respondent in order to haul for Respondent. The parties stipulated at the outset of the hearing that Respondent terminated the contracts of Hill and Blake because they engaged in activities on behalf of the Union. Respondent asserts that it could legally terminate Hill and Blake because they are independent contractors and not statutory employees. The parties agree that if Hill and Blake are found to be statutory employees their November 17 terminations were violative of Section 8(a)(1) and (3) of the Act and Respondent violated Section 8(a)(1) of the Act as alleged in the consolidated complaint. The parties also agree that if Hill and Blake are found to be independent contractors that the complaint will be dismissed in its entirety.<sup>3</sup>

### *A. Respondent's operations and the employment status of Hill and Blake*

The General Counsel called Morefield as a witness. Morefield began working for A.T.T. S. & L., a company owned by Ferns Sr. in 1992. She left A.T.T. S. & L. and became an employee of Time Auto L.S. in January 1999. Morefield's services were leased to Time Auto during the whole course of her employment with Ferns Sr.'s companies. Morefield left Respondent's employ in February 2001, which was prior to the hearing in this case.<sup>4</sup>

Time Auto hauls automobiles for a variety of customers throughout the United States and Canada. Time Auto uses two categories of drivers, owner-operators who own their own tractors and trailers and lease drivers who sign lease agreements with Time Auto L.S. for these vehicles, which on their completion results in the lease driver owning the equipment. Hill

hauled cars for Respondent as a lease driver beginning in September 1999, and Blake started in the same capacity on August 17, 2000. Respondent terminated both their contracts and leases by letters dated November 17, 2000. During the years 1999 and 2000, Time Auto had between 32 to 44 trucks operating for it the vast majority of which were operated by lease drivers. The drivers reside throughout the United States and Canada and do not report to Time Auto's Troy facility for the receipt of their assignment or their compensation. The owner-operators and the lease drivers have basically the same car hauling responsibilities.

Morefield put together an information packet for Time Auto for a driver applicant. It consists of a Department of Transportation (DOT) driver's application; a request for a copy of the applicant's driver's license and motor vehicle record; and a Bank One or NBD credit application. Morefield maintained a checklist of items she was to receive from new drivers including copies of their CDL, a physical card, vehicle registrations, an exemption form from worker's compensation, an annual inspection of the tractor and trailer, and a contractor's lease agreement.<sup>5</sup> A new driver was required to read Respondent's safety brochure, and sign a safety regulation book. Morefield gave new drivers fuel and mileage report forms, a copy of the contractor lease agreement, Respondent's licenses, permits and decals, inspection report forms, Federal Express information, a drug kit, an insurance certification, Respondent's safety manual and a DOT safety book. Morefield testified that the minimum requirements for a driver include 2 years of car hauling experience and a "pretty good" motor vehicle record. The driver also had to pass a drug screen as part of the application process. Morefield arranged the applicant's drug screen, which the driver eventually paid for as a deduction from their weekly settlement check issued as their pay by Respondent.

Time Auto maintains the following information on the drivers, a paid file, a log file, a qualification file,<sup>6</sup> their application, a permit file showing the registrations and the permits, and a confidential file showing their drug test results. Time Auto keeps audit logs for all of the drivers based on the logs they turn in showing the date, their driving hours, and their on duty hours. A driver can be on duty and not driving. Time Auto keeps track of the total hours to show that the drivers do not go over 70 hours in 8 consecutive days or over 10 hours a day of driving which the witnesses testified are DOT requirements and that DOT requires that the drivers fill out and maintain daily logs showing duty hours and hours driven. They submit copies of the logs to Time Auto. Any repair work performed on a leased truck is paid for by the driver but a record of the work is

<sup>3</sup> The parties stipulation is set forth in Jt. Exh. 23.

<sup>4</sup> Morefield testified that she quit Respondent's employ due to an argument. However, considering her demeanor, I found her to be a credible witness and have credited her testimony as set forth in this decision. In this regard, Morefield's testimony was uncontradicted as Respondent called no witnesses during the course of the hearing. I have also credited the testimony of Hill and Blake as set forth in the body of this decision unless otherwise noted. In doing so, I have considered their demeanor, and I note that their testimony was for the most part substantiated by Morefield or Respondent's records.

<sup>5</sup> Morefield testified that DOT requires: drug testing of the drivers, a bi-annual physical for the drivers; and annual inspections of their trucks and trailers copies of which are to be maintained by Respondent. The cost for all these procedures are paid for by Respondent's drivers.

<sup>6</sup> Included in Hill and Blake's qualification files are documents stating that they employed only themselves, that they understood that they were not entitled to workers compensation benefits under Michigan Law, and that they would hold Time Auto harmless for injuries sustained while performing services for Time Auto.

maintained in a file kept by Time Auto.<sup>7</sup> Time Auto does not keep repair records for owner-operators, aside from their vehicles annual inspections.

Morefield reviewed a driver's application and Ferns Sr. had the final say on whether a driver is offered a position. After the driver is offered a position, they may be required to ride a week with another of Respondent's driver to learn Time Auto's paper work and car loading procedures. Time Auto does not compensate the applicant for driving during this week, nor do they compensate the driver with additional money for driving with the applicant. Hill and Blake each had extensive car hauling experience before they started driving for Respondent. They each filled out applications and took drugs screens, which were arranged by Respondent. Both were required to ride with another driver to learn Respondent's procedures. Hill made arrangements to ride with driver Don McClung, who paid Hill for the work Hill performed while riding with him. Blake rode with and was paid by Hill for work during Blake's training. Hill and Blake were friends and Hill, who was already hauling for Time Auto, recommended that Blake do the same. Hill received authorization from Morefield before he could ride with McClung, and Blake had to sign a waiver of liability for Respondent before he could ride with Hill.

Morefield prepared a manual for Time Auto entitled, "Time Auto Transportation, Inc. Safety Manual and Lease Requirements," which was distributed to all of the drivers during their orientation. Morefield testified that the manual is "basically little bits and pieces of th(e) actual DOT Safety Manual plus some of Time Auto's requirement." The manual states at the outset that it is "not for the control of an owner/operator. It is for the benefit and safety of the driver and the general public." However, it also states that any lease contractor leased for more than 7 consecutive days "must abide by these requirements."

The manual provides as follows: Maintenance records must be maintained for vehicles under contract for more than 30 consecutive days and copies submitted to Time Auto on a weekly basis. Pre-trip inspections are required. Drivers must complete at the end of each day, driver's inspection reports of the vehicle and submit a copy to Time Auto. It states that DOT requires that all vehicles and equipment undergo an annual inspection and that any driver not in compliance with an annual inspection will receive written notice and allowed 30 days to comply. Vehicles will not be loaded for noncompliance. The manual states that a reportable accident is any accident involving damage or injury to any property or person and that drivers are supplied accident report forms. It states that should there be a fatality, DOT must be notified within 24 hours. The manual states that if it is determined, after investigation, that an accident was preventable, a driver may receive a written warning and may not be loaded on a temporary basis. It also states that depending on the seriousness of an accident and proof of driver negligence, immediate termination of the lease contract may occur.

The manual states that no driver can drive more than 10 hours per day or after being on duty for 15 hours before taking an 8-hour break and that no driver can drive over 60 hours in a

7-day period (driving or on duty) or more than 70 hours in an 8-day period.<sup>8</sup> The manual provides that driver logs concerning driving and on-duty hours must be completed and forwarded to Time Auto every 2 weeks and that 6 months of logs must be retained on file. Drivers are required to notify dispatch of the hours performed on a daily basis and dispatch should be aware of the last 7 days of service performed by drivers. It states that a driver in violation of hours of service or not recapping hours will be given a written warning, that if the situation is not corrected the driver will not be loaded and that the final result for noncompliance will be termination of the lease contract. The manual requires that drivers complete a mileage and fuel report for each month, and forward a copy to Time Auto along with fuel receipts. The drivers are required to submit signed-off bills of lading on a weekly basis to Time Auto. It states that drug and alcohol testing is a DOT requirement and a lease contract will be terminated immediately for any driver failing a drug test, consuming alcohol while on duty, or convicted of a driving violation involving the same. The manual states that, drivers not complying with any requirements that are not considered serious will be given a written warning and that if non-compliance continues, termination of lease contract will occur. The manual states that DOT requires the provision of a driver's prior employment history covering the past 10 years of employment when applying as a operator of a motor vehicle.

Morefield testified that a driver does not have input in the truck or trailer that they lease from Time Auto L.S. if the company has already placed an order at the time the driver is signing a lease agreement. If there was no order placed, a driver might have input in the truck, but it mainly depended on what Ferns Sr. wanted to order. Hill and Blake's credited testimony reveals that they had no choice in the truck or trailer that they leased from Respondent. Blake was required to put down a \$1000 deposit in order for Respondent to order the equipment, and Hill, after talking to Morefield, was allowed to put down a \$500 deposit. They signed their leases after their trucks came in. At that time, each had to put down a total deposit of \$10,000, including their prior deposits, as part of the lease agreement. Blake's testimony revealed that the engine on Blake's truck was smaller than the one he was told was ordered. When Blake questioned Morefield about this, he was told that Ferns Sr. had taken some money off of the price. However, Blake was not told the amount the price had been reduced. In response to Blake's question, Morefield told him that he could not use the truck to haul for any other company besides Respondent. Morefield testified that there are no negotiations between Respondent and the driver regarding the price of the truck, the interest, or the monthly payments. Morefield testified that the down payments were sometimes negotiable and on occasion they were reduced during the negotiations. The title and registration of the trucks and trailers are under Time Auto L.S.'s name. Respondent keeps the titles, copies of which are not given to the lease drivers.

On September 17, 1999, Hill signed a standard form equipment lease agreement presented by Time Auto L.S. (Lease

<sup>7</sup> Other carriers Hill had hauled for did not require him to turn in repair records.

<sup>8</sup> Driver hours are regulated by DOT.

Agreement) and signed by Ferns Sr. for Respondent.<sup>9</sup> The agreement specifies the tractor and trailer Hill (the lessee) was to receive. It is a 60-month lease setting forth the monthly payments. The agreement provides, in pertinent part, that Time Auto L.S. (the lessor) may cancel the agreement for any reason with 5 days written notice to the lessee. On receipt of written notice of cancellation, the lessee agreed to pay the lessor the full balance remaining on the lease agreement within 7 days. The agreement obligates the lessee to pay for collision, fire, and theft insurance naming the lessor as the insured using an insurer approved by the lessor. The lessee is obligated, at his expense, to maintain the vehicles in good operating condition and to have preventive maintenance performed as required by DOT regulations and the manufacturer's warranty. The lessee is required to pay for all State inspections and fines. The lessee is required to provide license plates and have a valid CDL, to pay registration fees, taxes, and other governmental charges for the vehicles. The lease provided for a 2-percent penalty if the lease was paid off before 36 months.<sup>10</sup>

On September 17, 1999, Hill and Ferns Sr., also signed an agreement entitled "Time Auto Transportation, Inc., Independent Contractor Lease Agreement Only" (Independent Contractor Agreement). This agreement had an effective date of September 13, 1999. The agreement is on a typewritten form and there appears to be no changes to the form language aside from the insertion of the dates, Hill's name, and the handwritten signatures. The agreement refers to Time Auto as "shipper" and Hill as "carrier." It states that the shipper agrees to pay to the carrier 80 percent less any agent fees for the transport of commodities. The agreement provides, in pertinent part, that "Carrier, as an independent contractor, desires to furnish motor carrier services to the shipper . . ." It states that the shipper represents that it is a duly qualified common carrier with a permit issued by the Interstate Commerce Commission (ICC). The carrier is required to tender to the shipper delivery receipts and invoices and the shipper is obligated to pay the carrier within 7 days after the receipt of the invoices. The carrier is obligated at its expense to provide motor vehicles and equipment for use in the services to be performed which are satisfactory to the shipper, and to maintain the vehicles in good condition as to operation and appearance. The carrier is obligated to procure licenses and permits as are required by local, State, or Federal authorities. The agreement states that the "Carrier shall be an independent contractor and shall have exclusive control and direction of the persons operating vehicles or otherwise engaged in such transportation services. Carrier assumes full

responsibility for taxes for unemployment" . . . "or other social security and related protection with respect to the person engaged in the performance of such transportation services, and agrees to comply with applicable rules and regulations . . ." "under such laws." The agreement provides that "all contractors having employees and/or independent contractors driving their trucks must provide workman's compensation certificates. All lease contractors not in compliance with workman's compensation requirements will not be loaded." It states that the carrier shall maintain at its own expense liability insurance and sets the minimum coverage amounts. The carrier is obligated to furnish the shipper with copies of the insurance policies. It states that carriers on the Time Auto insurance policy are responsible for the first \$1000 deductible per vehicle, and that payment for liability, cargo, and physical damage insurance is at a cost of 10 percent of gross sales per trip for the driver and that they are only covered while hauling Time Auto cargo. The agreement provides that it will become effective on September 13, 1999, and terminated by either party on 72 hours' written notice. The agreement provides that it will be construed under and governed by the laws of the State of Michigan. It states that, "All carriers are responsible to check in with the office before 10 a.m. and after 5 p.m." It states that lease contractors will be charged on a quarterly basis for fuel tax based on their fuel and mileage reports. It states that, "In the event that any Independent Contractor hauls loads for any other carrier, under Time Auto Transport, Inc., ICC Authority and Insurance, the Independent Contractor forfeits all equity in their Equipment and will be automatically terminated." It states that effective January 1, 1996, "any Independent Contractor with a truck six years or older has to have equipment updated to a newer model." It also states that "In the event that this lease is cancelled or terminated by either party, the Independent Contractor understands that there is "NO REHIRE POLICY." The agreement sets forth the rate a driver pays for COMCHECK charges. COMCHECK is a company contracted with Respondent to provide cash advances to drivers who are on the road.<sup>11</sup>

Blake signed the Independent Contractor Agreement on August 17, 2000. Blake signed both the lease and independent contractor agreements under his corporate name as Dimarlou Enterprise/Ernest L. Blake. The Independent Contractor Agreement signed by Blake contained an insurance provision stating that the insurance was to be "8 percent of gross sales per trip."<sup>12</sup> Blake's agreement differed from Hill's in that it provided that "Effective 1/1/96, any Independent Contractor with a truck five years or older has to have equipment updated to a newer model." The agreement Blake signed also contained the following provisions not contained in Hill's agreement: "I agree that I will perform at the current, Company Monthly

<sup>9</sup> The lease agreement was signed in Hill's name as an individual. Hill formed and operated as a corporation at a later date. However, the lease agreement was never changed.

<sup>10</sup> On August 17, 2000, Blake signed a very similar equipment lease agreement. It was also for 60 months, although the price of Blake's equipment varied from that of Hill's. Blake's agreement contained a 10 percent late payment penalty not contained in Hill's agreement. Moreover, the 2 percent prepayment penalty clause in Hill's lease was replaced by the following provision in Blake's lease, "If this lease is paid off before the lease ends, and you do not enter into a new lease agreement, there will be a 5-percent prepayment penalty on the balance owed at that time."

<sup>11</sup> Morefield testified that when an owner-operator contracted with Time Auto they would not sign the Lease Agreement, but they would sign the Independent Contractor Agreement with a few revisions, but that it is basically the same agreement as that signed by the lease drivers.

<sup>12</sup> Blake's insurance cost at 8 percent of his gross was a reduction from the 10 percent of the gross reflected in Hill's agreement. Morefield testified that, as a result of complaints from the drivers, Respondent reduced the insurance rate across the board in January or February 2000 to 8 percent for all lease drivers, including Hill.

Gross Average, example, currently between \$20,000 and \$21,000 per month"; "Requests for time off should be submitted to the office of Time Auto Transport four (4) days before taking the time off"; "holiday time off will be selected by seniority and must be designated two weeks before the actual time off"; and "You will be allowed five days off before Christmas or three days before New Years and three days after New Years." Blake's agreement also contained the statement that, Blake understood that he was required to call into Respondent's office twice per day every day, and once per day when he was not on duty.

Morefield's testimony reveals that there are no negotiations between Respondent and the drivers as to the terms of the Independent Contractor Agreement. Morefield was present when a driver signed the Independent Contractor and Lease Agreements. She reviewed certain points of the agreements with the driver including Respondent's call-in requirements. Morefield testified that if either party terminates an equipment lease the driver loses their down payment and equity in the vehicles unless the driver arranges to refinance the equipment loan through another lender.<sup>13</sup> Morefield testified that there is no penalty to Respondent for terminating a Lease Agreement. Under the Lease Agreement, Time Auto provides insurance for the truck, tractor, and cargo, which the driver pays for through deductions from their weekly settlement check. Morefield testified that the driver had no choice in the insurance company. Time Auto is named as the primary on the driver's insurance and the policy is under Time Auto's name. Time Auto files any claims made under the policy. An owner-operator is also required to take out insurance under Time Auto's policy, except for physical damage to their vehicles, although an owner-operator has the option of taking complete insurance coverage through Time Auto.

Time Auto employs a system of weekly settlement checks as a means of paying the car haul drivers. Time Auto formulates a weekly settlement sheet showing the driver's gross pay, the deductions allocated to Time Auto, and the driver's net check. A copy of the settlement sheet goes to the driver and to Respondent's file clerks. Hill's initial settlement sheet was dated September 15, 1999, and is made out to Hill as an individual. For the week ending October 13, 1999, Time Auto began issuing settlement sheets to Hill in the name of Hill's corporation, Four Hills Auto Transport (Four Hills). Time Auto pays the driver's or their corporations at the rate of 80 percent of Time Auto's receipt for transporting the load minus deductions such as insurance. On certain loads the customer will pay a fuel surcharge to help compensate the drivers for cost of fuel. This payment is reflected on the settlement sheet. The customer pays the money to Time Auto, all or a portion of which is in turn remitted to the driver. The lease driver pays a weekly or monthly lease fee for the truck and trailer to Time Auto, which is reflected on the settlement sheet. The driver is also charged a fee for COMDATA withdrawals on the settlement sheet. A

<sup>13</sup> Morefield testified that towards the end of December 2000, at the time they signed the lease agreements, some of the drivers were allowed to finance their trucks and trailers through another bank, rather than through Time Auto.

fuel tax is calculated on a quarterly basis based on the driver's fuel reports to Time Auto and taken out of a driver's settlement check. An owner-operator receives the same settlement sheet as a lease driver, but there is no deduction for a truck or a trailer, and they may pay a lower insurance rate as set forth above. Respondent maintains the underlying documents for the settlement sheets for each of the drivers. Respondent either sends the settlement check to the drivers by Federal Express or it mails it to them at the driver's election. The driver pays for the cost of Federal Express. Drivers are not paid vacation or other fringe benefits. They are only paid when they were hauling vehicles. Time Auto does not pay employment taxes for the drivers, or deduct social security. Time Auto issues a 1099 form to the drivers.

Morefield's testimony reveals that: The drivers are not required to wear uniforms. The drivers do not have an exclusive territory or an exclusive right to any customers. Once a driver starts hauling for Time Auto, they are required to call Time Auto's dispatchers to receive a load which originates from Time Auto's customers. The dispatcher determines the loads the driver receives. They are supposed to dispatch drivers on a first-come first-serve basis taking into consideration their location and the location of the load. Morefield testified that this procedure is not followed all of the time. It depends on the driver and how long they had been at their location. If someone is doing poorly, or been in trouble for not calling in, they are not going to get the next load if they are first in. Morefield testified that drivers are told that they are going to go to the bottom of the list if they refuse a load and that if they refuse a load they will sit until the dispatchers are ready to send them out, but the driver does not know when that is going to be.

A driver is required to inspect their cargo when they pick it up, and they obtain the customer's signature when they pick it up and drop it off. They turn in their inspection reports to Time Auto. Usually the dispatcher tells the driver that the customer would like to have the load delivered by a specific date and time. However, Morefield testified that Time Auto does not guarantee a delivery date and that depending on who the driver is with a late load they may be punished but usually nothing happens to the driver.<sup>14</sup> Morefield testified that if a customer has a complaint they would talk to the driver or call in to Time Auto. Drivers do not solicit work for Time Auto or negotiate the cost of loads with customers. Time Auto uses the drivers to haul loads for other carriers, but Time Auto dispatches these loads to the drivers who continue to use Time Auto's ICC license and logo on their trucks and they are paid by Time Auto.

Morefield testified that Time Auto requires a driver to produce a certain minimum monthly gross earnings, that Respondent maintained quarterly summary sheets showing the driver's earnings, and that if a driver continually fails to perform up to

<sup>14</sup> On May 31, 2000, a driver was issued a warning for failing to deliver a load within 72 hours of pick up in violation of Time Auto's contract with its customer. Another driver's lease was terminated because there was a problem with customs in Canada, and he ended up going home without finishing his route and someone else had to pick up his load.

the average they would be let go.<sup>15</sup> Respondent issued a letter to driver Howard Glover on November 25, 1998, stating that its bank performed a periodic audit of independent contractors revenues and that Glover was 45 percent below the average. The letter stated that "We advise at this time that you should bring your gross revenue up to at least the average so that the bank stays satisfied." Respondent issued a letter to driver Norman Palaszkeski on February 19, 1999, stating that he was terminated because his equipment was not reliable, that he had been late in his lease payments, and that the average independent contractor gross earnings in 1998 was \$30,000 over what Palaszkeski earned. On April 30, 1999, Ferns Sr. sent a letter to Gary Winters & Gail Harbin terminating their lease agreement. The only explanation in the letter was that it was not in the financial best interest of Time Auto, independent contractors and employees to continue the agreement. On July 13, 2000, a warning letter issued to a driver for maintaining a negative balance on his settlement. Morefield testified that during the period of 1999 to 2000, driver Richard Irvin was terminated because he would go home a lot and was not available to drive. On October 19, 2000, Respondent issued warning letters to two drivers threatening termination for failing to earn the monthly average.

Morefield testified that Respondent has enforced the requirement that the drivers call in two times a day. On July 2, 1996, a driver was issued a letter stating that he had been warned twice about not calling in to the office twice a day. The letter stated, "once more you will be looking for a new place to work." On June 9, 1999, a driver was issued a letter stating that they had been given 5 days off for not calling in, that the next time it happened they would be given 10 days off, and that if it happened again he would be terminated. Respondent's records reveal that a driver's contract was terminated in January 2000 for not calling in. On August 23, Respondent issued a final warning letter to a driver for not calling in. Respondent has also issued disciplinary action to drivers for safety concerns, hauling passengers without permission, and damage to cargo. On June 9, 1999, a driver was given a written warning for excessive damage to his cargo. On June 20, 1999, a warning letter issued to a driver for carrying his four children on the truck at the same time and without authorization. On November 11, 1999, a driver was issued a final warning for unsafe driving. Morefield testified that another driver was terminated because a car fell off of the top of his truck.

Morefield testified that Time Auto, per Federal regulations, requires that lease drivers and owner-operators put Time Auto's logos and ICC license numbers on the side of their trucks when

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<sup>15</sup> Time Auto runs a weekly spread sheet on the drivers for Ferns Sr.'s review showing the truck's monthly gross, monthly average, and year to date gross, loaded miles, year to date loaded miles, how much they are receiving per loaded mile. Morefield testified that Ferns Sr. uses the information to make sure that every one was working and that no one was receiving poor loads. On November 24, 1999, Ferns issued a document to the drivers showing the monthly gross average for all drivers and the individual driver's monthly average. The document states that "If you have the desire and ambition to put on another truck, you would have to meet the Company's Monthly average in order to qualify."

hauling for Time Auto customers.<sup>16</sup> These items are difficult to remove from the sides of the trucks, and Morefield testified that Time Auto does not allow a driver to take down Time Auto's license and logo and haul for another carrier under that carrier's license and insurance. Morefield testified that there were no drivers that she was aware of who did this, and that Ferns Sr. made the statement that if they did do it they would be cut off. During the time that they hauled for Time Auto, Hill and Blake never hauled for another carrier without being dispatched by Time Auto. Hill testified that he did not think that he could haul for another carrier even if he used that carrier's ICC number in that it would take quite a bit of effort to remove Time Auto's numbers and stickers from his truck. Blake testified that when he was filling in the paper work to pick up his truck, Morefield told him that he could not use the truck to haul for another company. Hill and Blake never refused to haul a load for Time Auto when they called in to dispatch. Blake explained that, while he had the right to refuse an assignment, if he did he would not make his \$20,000 a month gross as required by Respondent's contract and Blake would not be able to make the payments on his truck.

Hill hauled his first load for Time Auto on September 14, 1999, although Hill did not sign his contracts with Time Auto until September 17, 1999. On September 17, 1999, Ferns Jr. told Hill that he had to call in to dispatch twice a day and the times he had to place the calls. Ferns Jr. also told Hill that he took a little too long in loading his first load and that Hill had to be on time. Blake hauled cars for Respondent as a lease driver beginning in August 2000. Blake met with Morefield when he was signing Respondent's contracts and she emphasized Respondent's call in requirements. Morefield told Blake that he had to turn in his paper work on time to be paid. Blake met with Ferns Sr., and the dispatchers that same day. Dispatcher Scott Zabel told Blake that he had better follow the rules to the "T" because he did not "want the old man on (his) ass."

Hill and Blake drove for Respondent in the United States and Canada. They received their assignments by calling Respondent's dispatchers. Their testimony revealed that there were no negotiations with dispatch about what the loads would pay or the loads the driver received, although some loads paid more than others. The driver had to turn in daily logs, mileage trip sheets, bills of lading, cargo inspection reports, and fuel receipts to Time Auto. While the drivers were paid 80 percent of the gross per load by Time Auto, Blake testified that he had no way of verifying Time Auto's calculation of the gross for a load.

As set forth above, Federal regulations limited the number of hours a driver could drive a day, and over the course of an 8-day period, and the drivers kept daily logs which were turned in to Respondent showing their driving and on duty hours. Hill's testimony reveals that, shortly after Hill started with Time Auto, on one occasion Hill asked dispatcher Fulford if Hill could go home after he loaded his truck. The response was yes, but that there would be no insurance on the truck or cargo and that if anything happened it would be Hill's responsibility. When Hill decided to go home, Ferns Sr. phoned Hill and told

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<sup>16</sup> Drivers also have their own company name or their individual name on the truck.

him that he should not be running out of the route when Hill had 3 hours of driving time remaining. Ferns Sr. told Hill that he needed to learn how to do his logs or that Ferns Sr. would sell his truck. Hill testified that he went home because he was low on hours and that it sounded to him like he should never run out of hours and that Ferns Sr. was instructing him to falsify his logs.

Blake testified that under U.S. law he was limited to driving 10 hours a day, but "I normally went way over that." Blake explained that when he called Respondent's dispatch the dispatcher told him where the load was going and when it had to be there. Blake had to fill in a daily log reporting the number of hours that he worked. He testified that he did not put on the log that he was driving more than 10 hours a day, "Because if I did, I would be fired." Blake testified that the dispatcher did not tell him to drive more than 10 hours a day or to falsify his log. Rather, the dispatcher just told him that the load had to be delivered at the specified time, which according to Blake required him to drive more than 10 hours a day. Blake testified that he would not be loaded, and that "You would be more or less starved if you didn't play the game."

Hill testified that when a dispatcher assigned him a load running through Montreal, Canada, the dispatcher would tell Hill to go through Thousand Islands to cross into Canada rather than crossing through Windsor. Hill testified that this was because the truck and trailer were over length under Canadian laws and the route change avoided the scale where the drivers were receiving tickets. Similarly, Blake testified that he was instructed by Respondent's dispatch to take a specific route for deliveries in Canada because Blake's truck was over length and over weight under Canadian laws.<sup>17</sup>

Morefield testified that, at the time she left Respondent's employ in February 2001, all of the lease drivers but one were incorporated. Ferns Sr. had instructed Morefield, around October or November 2000, to tell the drivers to incorporate. However, prior to this directive, Morefield had started helping drivers incorporate based on driver's requests to allow them to obtain certain tax writeoffs. Hill and Blake operated as Kentucky corporations while hauling for Respondent. Hill had filed his corporation papers prior to hauling for Time Auto, but the filing had not been approved until after Hill started to haul for Respondent. Hill decided to incorporate based on the advice of a friend. Blake formed a corporation named Dimarlou Enterprise Inc. (Dimarlou) just prior to the time he started driving for Time Auto. Ferns Sr. told Blake at the time Blake ordered his truck that he should incorporate for purposes of workmen's compensation insurance.

Time Auto maintains a file for the extra drivers who drive for its the lease drivers. These extra drivers are required to submit an application to and to be approved by Time Auto, to take a drug test arranged by Time Auto, to have a physical, and Time Auto maintains a record of these documents.<sup>18</sup> Six differ-

ent individuals drove Hill's truck for him for brief periods of time during the period Hill operated a truck for Time Auto. Hill paid these drivers through his corporation at rates he negotiated with them. Hill did not receive a copy of the drivers' applications that they submitted to Respondent or their drug test results. Drivers that drove Hill's truck were required to maintain a separate daily log, which was tendered to Time Auto. The drivers submission of the time logs to Time Auto and the drug testing of these drivers was done, according to Hill, pursuant to DOT requirements. The loads these drivers hauled were dispatched by Time Auto dispatchers. Hill's corporation provided workmen's compensation insurance for these drivers, although the corporation charged the drivers for the cost of the insurance. Hill took a vacation in 2000 and he asked Ferns Sr. if he could take the time off. Ferns Sr. said yes, but that Hill would have to get someone to run the truck because the truck could not remain idle. Hill also looked into leasing a second truck through Time Auto in June or July 2000. Hill testified that Jerry Posey was going to operate the truck for Hill, but it did not happen because Ferns Sr. stayed on Posey's back when Posey substituted for Hill causing Posey to quit. Hill testified that Ferns Sr. was on the cell phone with Posey every day.

Blake used another driver in his truck for about a 2-week period while Blake was driving for Time Auto. Ferns Sr. told Blake he had to have workmen's compensation insurance for that driver whose name is Jack Johnson. Johnson was required to submit an application to Respondent, and Ferns Sr. initially refused to approve Johnson's driving with Blake. Ferns Sr. told Blake that Johnson had insufficient experience. Blake told Johnson to obtain letters of recommendation from companies he had driven with and to submit them to Ferns Sr. Johnson followed Blake's advice and Ferns Sr. subsequently approved Johnson's application. Blake paid Johnson based on an agreement reached between the two drivers. Blake remained in the truck while Johnson drove. Ferns Sr. told Blake that if he had a co-driver he would get longer loads and earn more money. However, Blake's assignments did not change while Johnson was in the truck. Blake testified that he decided to let Johnson go after around 10 days since Blake's income did not increase to absorb the cost of paying Johnson. Blake issued a 1099 tax form to Johnson. Both Hill and Blake filed corporate tax returns for their corporations. They deducted wages, lease payments, vehicle depreciation, and operating expenses for their trucks on their corporate taxes.<sup>19</sup>

By separate letters dated November 17, Ferns Sr. terminated the lease agreements of Hill and Blake. The letters state that Hill and Blake jeopardized two major accounts "by soliciting our Independent Contractors to join a union." The letters state that Hill and Blake no longer had permission to operate under

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a form holding Time Auto harmless "for any or all liabilities" while they are in the vehicle.

<sup>19</sup> Hill and Blake used the same accountant to prepare their corporate taxes. Hill's tax income statement became separated from his corporate tax form at the hearing and was submitted as a separate exhibit as R. Exh. 6. I find that Hill's tax records entered into evidence as R. Exhs. 6 and 8 should have been entered into evidence as one document. Blake's income statement was attached to his tax form when entered into evidence.

<sup>17</sup> Blake's claim that he went to Canada almost every trip was not substantiated by Respondent's records.

<sup>18</sup> Time Auto also requires that the lease drivers obtain authorization to have a passenger in their trucks and the passenger is required to sign

Time Auto's ICC license, and that they were required to remove all door plaques, license plates, and decals and remit them to Time Auto along with their copy of the lease agreement. The letters state that all insurance coverage provided under Time Auto's policies would be cancelled effective November 24. The letters set forth the remaining amounts that Hill and Blake owed under their lease agreements for their vehicles and state that if they paid off those amounts the titles would be turned over to them. The letters state that if they chose not to pay off the equipment it should be returned to Time Auto for auction. Neither Hill or Blake paid off their truck and trailer on receipt of these letters, and they lost their deposits as well as any equity they had in the vehicles.

Morefield testified that some of Respondent's lease drivers have leased more than one truck from Respondent and have other drivers driving for them in the operation of these trucks. However, Respondent's records reveal that only three lease drivers operated more than one truck at any time during 1999 to 2000 time period although Respondent used between 32 and 44 trucks during that period. Lease driver Stowers showed two truck numbers after his name on Respondent's records for the quarter ending June 30, 1999. Lease driver Smith showed three truck numbers after his name beginning for the payroll records ending January 26, 2000, and Smith operated three trucks throughout 2000. Lease driver Ashabaugh began operating two trucks for Respondent as reflected in Respondent's records for the quarter ending June 28, 2000, and he operated two trucks for the remainder of the year.<sup>20</sup>

#### B. Analysis

##### 1. Legal principles

In *NLRB v. United Insurance Co.*, 390 U.S. 254 (1967), the Court reversed the Seventh Circuit to find that an insurance company's debit agents were statutory employees as opposed to independent contractors. The Board had found that they were statutory employees but was reversed by the Seventh Circuit. In reversing the Board, the Seventh Circuit held in *United Insurance Co. of America v. NLRB*, 304 F.2d 86, 90 (7th Cir. 1962) as follows:

<sup>20</sup> Morefield testified that there were no owner-operator's hauling for Respondent in 1999 or for the first part of 2000, until Motor City, owned by Ferns Jr., began operating two trucks in June 2000. Morefield testified that driver Roach is an owner-operator whose name appears on Respondent's quarterly records ending June 28, 2000. Roach was operating one truck at that time. Morefield's testimony and Respondent's records reveal that for the third quarter of 2000, Respondent had 39 trucks hauling for it. At that time, Motor City (Ferns Jr.) owned three of those trucks, and Roach owned and operated one of them. At the end of the fourth quarter of 2000, there were 44 trucks hauling for Respondent of which owner-operators owned nine. Roach had left, but Respondent had contracted with 6 additional owner-operators in December 2000, with each only operating one truck, plus the three operated by Motor City. Morefield testified that none of the owner-operators acquired their vehicles through Respondent's lease agreements. Rather, they started hauling for Respondent already owning their own vehicles. She testified, however, that one of the owner-operators had previously worked for Respondent as a lease driver and had purchased a truck before he left.

We hold the debit agents are independent contractors. A debit agent is "on his own." He sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments. As admitted by the trial examiner, the agent pays his own travel expense, rent postage, telephone, bond expense and salaries of assistants; he may take holiday when he desires without notice to United. Agents may transfer polices among themselves and are not required to do so by United. An agent retains his own commission from collected premiums. As to selling insurance, the agent . . . is free to follow the superintendent's suggestion or to devise his own methods.

The Supreme Court, on review, stated that, "there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor." *NLRB v. United Insurance Co.*, supra. at 255-256. The Court noted that the agents were paid based on a commission plan under which they retained between 10 to 20 percent of their weekly insurance premium collections, and that they also retained 50 percent of the first year's premiums of ordinary life policies that they sold. The agent was required to turn in his collected premiums to the office once a week and file a weekly report. It was stated that agents who had poor production records were cautioned. The district manager also submitted a weekly report to the home office, stating the agents whose records were below average and what had been done to remedy the "letdown." If there was no improvement the company asked the agent to resign, or exercised its right to fire them at any time.

The Supreme Court applied the following principles in concluding that the debit agents were statutory employees:

There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor, and these cases present such a situation. On the one hand these debit agents perform their work primarily away from the company's offices and fix their own hours of work and work days; and clearly they are not as obviously employees as are production workers in a factory. On the other hand, however, they do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor. In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles. When this is done, the decisive factors in these cases become the following: the agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission Plan" that contains the terms and conditions under which they operate is promul-

gated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory. *Id.* at 258–259.

In *Roadway Package System*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, (1998), following oral argument, the Board issued decisions on the same date as to the status of certain delivery drivers finding those driving for the former company to be statutory employees and those hauling for the latter to be independent contractors. The Board stated in *Roadway Package System*, *supra* at 850, that in determining independent contractor versus employee status that:

. . . the common-law agency tests encompasses a careful examination of all factors and not just those that involved a right of control. See *NLRB v. Amber Delivery Service*, 651 F.2d 57, 61 (1st Cir. 1981) (“The determination of ‘independence’ . . . ultimately depends upon an assessment of ‘all of the incidents of the relationship . . . with no one factor being decisive.’” *NLRB v. United Ins. Co.*, 390 U.S. at 258; . . . see also Restatement (Second) of Agency Sec. 220 (1958).) As the Board stated in *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982): “Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors.” And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in another.

In concluding that the drivers in *Roadway Package System*, *supra*, are statutory employees the Board noted that the drivers devote a substantial percentage of their time performing functions that allow *Roadway* to compete in the small package business and that these functions constitute a regular and essential part of the company's business. The Board noted that while a few operate as incorporated businesses, all do business in the name of *Roadway*. The drivers' vehicles were designed by *Roadway* and display that company's name, logo, and colors. While the drivers had a contractual right to use their vehicles for other commercial purposes none of the drivers in dispute had exercised that right. The Board concluded in that instance that this was a result of obstacles created by *Roadway* in that the drivers work schedules prevented them from taking on additional business in their off duty hours. The Board noted that while truck ownership can suggest independent contractor status, “the form of truck ownership, here, does not eliminate the Ontario and Pomona drivers' dependence on *Roadway* in acquiring their vehicles” *Id.* at 851. The Board noted that *Roadway* provides the source for equipment required by agreement, albeit using third parties, under a system which it controls. *Id.* at 853.

In *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000), the Board majority, in concluding that certain owner-operators are statutory employees stated the following:

Having considered *all* of the incidents of the owner-operators' relationship with the Employer, we find that the various factors of the common law agency test weigh heavily in favor of employee status for the petitioned-for owner-operators. Thus, the employer controls the manner and means by which the owner-operators perform their work through its training, testing, dispatch operations and procedures. Further, the Employer controls the compensation the owner-operators receive, and sharply limits their entrepreneurial opportunities, by requiring that each individual who leases a tractor to the employer enter into a contractual agreement which sets forth specific compensation rates for the type of work that the tractor will be used to perform (either by the owner-operators themselves or by drivers they hire and compensate directly.)

The Board majority stated in *Slay Transportation Co.*, *id.* at 1294, that, “despite the fact that an owner-operator may hire a driver to operate the tractor he leases to the Employer, the owner-operator can only negotiate that driver's wages within the compensation rate set by the Employer. See *Roadway*, *supra*; *R.W. Bozel Transfer, Inc.*, 304 NLRB 200 (1991).”

In *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), the Board found certain owner-operators to be statutory employees. The Board stated that they perform work that “constitutes essential functions of the Respondent's normal operations as a package pickup and delivery service.” They were trained by the respondent, do business in the respondent's name with substantial guidance and control by the respondent. They were not permitted to use their vehicles to deliver for any other company, and they purchased insurance with a company designated by the Respondent. They displayed the Respondent's logo on their vehicles, and their routes and base pay are determined by the respondent. The owner-operators had no right to add or reject customers, and the company incurred no liability for unilaterally terminating an owner-operator's contract.

As the Board's decisions in *Slay Transportation Co.*, *supra*, and *Corporate Express Delivery Systems*, *supra*, suggest, while the Board has sought to de-emphasize the right to control test in determining whether an individual is an independent contractor or statutory employee, it has not eliminated the test as a significant factor for consideration. Moreover, various circuit courts of appeal place significant reliance on the right to control test in determining independent contractor status. See *Labor Relations Division v. Teamsters Local 379*, 156 F.3d 13, 19 (1st Cir. 1998), where the court stated:

Applying the common law to determine whether owner-operator truck drivers are employees or independent contractor[s] is nothing new to this or other federal appellate courts. In doing so, the fundamental inquiry is whether the employer has the “right to control the manner and means by which the product is accomplished.” This is the so-called “right to control” test. In applying this multi-factored test, “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” [Citations omitted.]

In *Labor Relations Division v. Teamsters Local 379*, supra at 21, the court in concluding that certain owner-operators were independent contractors distinguished its decision in *NLRB v. Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981), holding that certain owner-operators were statutory employees, as follows:

In *Amber*, the owner-operator delivery truck drivers were required to report to work by 8:00 a.m. with their vehicles loaded, were required to phone the employer every two hours during the day, were not allowed to reject loads, were prohibited from providing similar services to other employers, were required to attend training and safety meetings and were required to wear company uniforms and paint their vehicles with company colors affix company sign. See *id.* at 62–63 (explaining that these specific facts were important to the resolution of that case). At the Boston Harbor Project, the owner-operators can begin their work day at any time, occasionally reject loads, provide similar services to other employers, are not required to attend any meetings, and are not required to identify with a given employer by wearing uniforms, painting their trucks or using company signs. Ultimately, despite factors such as the drivers receiving an hourly wage, which would tend to support a finding of an employer-employee relationship, there is insufficient evidence of management control over the manner in which owner-operators work to support the arbitrator's opinion.

In *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692, 695 (7th Cir. 1991), the court held as follows concluding that certain drivers are statutory employees:

The Regional Director's decision, upon which the ALJ relied, cites numerous aspects of O'Hare-Midway's relationship with its drivers which provide ample support for the Board's conclusion that Berg was an employee. When O'Hare-Midway's drivers are first employed they may select the a.m., p.m. or all-day shift, but a driver may not change his or her work schedule, or terminate a shift early, without the Company's permission. Drivers keep only 40 percent of the gross fares they take in and they must turn in the remaining 60 percent to O'Hare-Midway. The drivers are required to adhere to company rules regarding the manner in which they collect fares and service passengers, including maintaining records of each fare received. O'Hare-Midway has the right to fine or reprimand the drivers for failure to comply with company procedures and the Company also retains discretion to refuse to provide a driver with a vehicle. All drivers must also follow a mandatory dress code which requires them to wear a black suit, dark tie and a white shirt. Although drivers buy their own gasoline and absorb the losses for delinquent passengers, and although the Company provides no benefits to its drivers, makes no deductions for social security and does not withhold state and local income taxes, on balance, the evidence was substantial that Berg was not an independent contractor.

Cases cited by O'Hare-Midway holding that lessee cab drivers are independent contractors do not compel a different result. See *Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978); *Yellow*

*Taxi Cab of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983); *NLRB v. Associated Diamond Cabs*, 702 F.2d 912 (11th Cir. 1983). The decisive factor in those cases was the lack of any financial interdependence between the taxicab companies and the cab drivers. The cab companies earned the same income irrespective of any individual driver's fare intake since the companies profited solely from lease contracts with the drivers, and the cab drivers did not account for their earnings nor did the companies control the hours the lessee drivers operated the leased cabs. By contrast, O'Hare-Midway has a direct financial stake in the amount of fares collected by its drivers, requires extensive reporting of each driver's productivity and the Company determines the hours its drivers may work. Unlike the taxicab companies, O'Hare-Midway has significant control over the manner and means by which its drivers perform their jobs.<sup>21</sup>

## 2. Hill and Blake are statutory employees

I conclude, on consideration of the cited precedent, as well as weighing all the factors here including the "right of control" test described above that Respondent's lease drivers are employees within the meaning of Section 2(3) of the Act. Respondent orders the trucks and trailers for the lease drivers and arranges financing for those vehicles. The drivers have little or no choice in the vehicles that are ordered, and Hill and Blake's testimony reveals that they, in particular, had no choice. The lease drivers sign 60-month leases for the trucks which specify the gross contract amount as well as the monthly payments. The contracts do not show the interest rates the drivers are charged for the loan. Hill and Blake were required to put down a \$10,000 deposit for the truck and trailer, and to take out liability insurance secured by Respondent in the amounts speci-

<sup>21</sup> See, *Elite Limousine Plus*, 324 NLRB 992, 1002, (1997), where drivers were found to be employees where their fares were recorded by a voucher system maintained by the company and the company retained 17 to 20 percent of the voucher. It was found there that, "the Employer has a substantial and direct financial stake in the amount of fares collected by the drivers." See also, *NLRB v. United Insurance Co.*, 390 U.S. 254 (1967), where debit agents were paid on a percentage basis of the policies they sold with the remainder of the money going to the employer. The employer closely monitored their performance and terminated agents for insufficient sales. Similarly, in *Seafarers Local 777 (Yellow Cab)*, 603 F.2d 862, 878–879 (D.C. Cir. 1978), the court held that one of the dispositive factors in finding that the drivers there were independent contractors was that the drivers paid a fixed rental for the cabs regardless of their daily earnings. The court held that the cab companies had no financial incentive to impose controls on their lease drivers. In *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 377 (D.C. Cir. 1983), the court distinguished its decision in *Seafarers* and its findings in another decision by stating that "In *Orlando*, on the other hand, we found that the company closely monitored fares chronicled on trip sheets and, on that basis, had changed the financial details of the drivers' lease arrangement seven times in 6 months. Thus, because the company's compensation was effectively tied to the revenues generated by the drivers, we concluded, upon consideration of all the circumstances that the 'goodwill' of the enterprise inured to the Orlando company, not to the drivers. 628 F.2d at 265." The court had concluded that the drivers in the *Orlando* case were statutory employees. See *City Cab Co. of Orlando, Inc. v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980).

fied by Respondent with Respondent named as the principle in the policy. The lease agreements are terminable at will by Respondent for any reason without penalty,<sup>22</sup> at which time the driver will lose any equity in the truck if they fail to secure alternative financing to pay the remainder of the lease amount within 7 days.<sup>23</sup> The titles to the leased vehicles are in Respondent's name and the drivers do not receive copies of the title. Thus, Respondent selected and controlled the equipment used by the drivers in its car hauling operation. See *Roadway Package System*, 326 NLRB 842, 851, 853 (1998).<sup>24</sup>

The lease driver's car hauling assignments constitute the central operation of Respondent's business and Respondent engaged in strict oversight in the manner and means in which the drivers performed their work. While Hill and Blake had extensive car hauling experience before they began hauling for Respondent, they each were required to undergo training with another of Respondent's drivers to learn how to complete Respondent's paperwork and how to load and unload the vehicles. At the outset of their employment they were told that they had to call in to Respondent's dispatch office twice a day at times specified by Respondent and this requirement was memorialized in Respondent's Independent Contractor Agreements. Morefield's testimony reveals that this requirement was enforced, and Respondent's records reveal that drivers were issued warning letters, one driver was suspended for 5 days, and another driver's contract was terminated for not calling in as required in the contracts. Along these lines, Hill was required to obtain approval from Ferns Sr. before he could take time off at which point he was told that he had to employ a substitute driver because his truck could not remain idle. The Independent Contractor Agreement Blake signed set forth procedures for

requesting time off, and stated that requests for time off for holidays would be based on seniority.

The lease drivers received their assignments through Respondent's dispatch office, which operated on a first call in first out basis taking into consideration geographic requirements. However, drivers hauled throughout the United States and Canada and only received their next assignment after they dropped off their current load of cars. Respondent's dispatchers penalized a driver if they refused a load by dropping them to the bottom of the dispatcher's referral list thereby stranding them where they were at the time they called in. Hill and Blake testified that they never refused a load and Morefield's testimony revealed that if a driver refused a load the timing of their next assignment would be at the dispatcher's discretion. Thus, a driver is punished by Respondent's dispatch procedures for refusing a load a factor that tends to suggest employee status. See, *Elite Limousine Plus*, 324 NLRB 992, 1002 (1997).<sup>25</sup>

Respondent, per its form agreement, pays its drivers 80 percent of the gross per load. Respondent does not conduct individual negotiations or vary this rate for any of its drivers.<sup>26</sup> Respondent determines a driver's weekly settlement pay minus deductions based on the extensive records the driver submits to Respondent. Ferns Sr. reviews weekly and quarterly computer generated spread sheets to determine a driver's productivity including year to date gross earnings and average monthly gross earnings. Morefield's testimony reveals that if a driver continually fails to generate the average monthly earnings they would be let go. In November 1998, Respondent issued a letter to a driver stating that his revenues were 45 percent below average, and that he should increase those revenues to the average amount so that the "bank stays satisfied." In February 1999, a driver's contract was terminated, in part, because his earnings the prior year were \$30,000 below the average annual gross earnings. A letter issued in April 1999 terminating the lease of two drivers stating that it was not in Respondent's financial interest to retain them. In October 2000, Respondent issued disciplinary letters to two drivers threatening termination for failure to earn the monthly average. Respondent incorporated the requirement drivers perform at the current monthly average in Blake's independent contractor agreement, which he signed in August 2000.<sup>27</sup>

<sup>22</sup> See *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), where the Board specifically cited the fact that an employer incurred no liability for terminating an owner-operator's contract as an indication that the owner-operator's there were statutory employees.

<sup>23</sup> Respondent concedes at p. 3 of its posthearing brief that most drivers "do not have the ability to finance their tractor/trailers or to acquire the necessary insurance coverage." In fact, Hill and Blake lost all equity in their trucks when Respondent terminated their contracts in November 2000 because they had engaged in union activity. Blake had only been hauling for Respondent for 3 months at the time and lost his \$10,000 deposit in the leased equipment.

<sup>24</sup> The vast majority of Respondent's drivers were lease drivers as opposed to owner-operators. Moreover, Morefield could only name one of Respondent's owner-operators who had purchased a truck through a lease arrangement with Respondent. The status of this individual was unclear as he had stopped hauling for Respondent and then returned as an owner-operator. Morefield testified that the remainder of Respondent's owner-operators came to work already owning their own vehicles. While Hill and Blake each signed 5-year lease agreements with Respondent for them to pay off their trucks and trailers, the Independent Contractor Agreement Hill signed prevented him from using a truck more than 6 years old, and the one signed by Blake prevented him from using a truck more than 5 years old. The lease agreement Blake signed contained a 5-percent prepayment penalty on the balance owed if the agreement was paid off before the lease ended and Blake did not enter into another lease. Thus, the agreements were designed and Respondent's driver history reveals that they operated to keep the drivers in a permanent leasehold status with Respondent.

<sup>25</sup> Blake explained that if he refused a load he would not make his \$20,000 a month gross as required by his contract and he would not be able to make the payments on his truck.

<sup>26</sup> The drivers do not solicit work from customers, nor do they negotiate prices for the transport of vehicles with customers.

<sup>27</sup> While the monthly gross provision was not specified in Hill's agreement, both Hill and Blake's contracts were terminable at will by Respondent. Moreover, Respondent's disciplinary records and Morefield's testimony reveal that Respondent maintained this requirement during the course of Hill's employment there as a car hauler. Respondent's pressure on the drivers to generate income also manifested itself in statements by its officials to Hill and Blake. Dispatcher Ferns Jr. told Hill that he took too long to haul his first load. On another occasion, Hill asked the dispatcher if he could go home after he loaded his truck. Hill testified that, at the time, he was low on lawful driving hours. The dispatcher told Hill he could go home but that he would lose insurance coverage on the truck and cargo. Hill decided to go home, but he then received a call from Ferns Sr. who stated that Hill

I find that Respondent has a direct financial stake in the amount of cargo hauled by its drivers as it received a percentage of the gross for their loads. As a result, Respondent engages in extensive oversight and review of each driver's productivity. The Board and the courts have concluded that this type of relationship demonstrates that Respondent has significant control over the manner and means by which its drivers perform their jobs suggesting that the drivers are statutory employees. See *NLRB v. United Insurance Co.*, 390 U.S. 254 (1967); *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692, 695 (7th Cir. 1991); *Seafarers Local 777 (Yellow Cab)*, 603 F.2d 862, 878-879 (D.C. Cir. 1978); *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 377 (D.C. Cir. 1983); *City Cab Co. of Orlando, Inc. v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980); and *Elite Limousine Plus*, 324 NLRB 992, 1002 (1997).

I have also considered the fact that the Respondent's drivers hire drivers as codrivers or replacement drivers and that both Hill and Blake did so during brief periods of their employment by Respondent. However, the evidence reveals that Respondent plays an integral role in this process. First, any of these extra drivers must be approved by Ferns Sr. They submit applications to Respondent, copies of which do not go to the lease drivers.<sup>28</sup> Respondent arranges for these extra drivers to be drug tested and copies of the testing results are supplied to and maintained by Respondent, not the lease drivers. Respondent requires that the lease drivers provide workmen's compensation insurance for these extra drivers. Respondent's dispatchers dispatch these extra drivers, and Respondent maintains paperwork similar to that of the lease drivers for the extra drivers. Respondent's control of the hiring of these substitute drivers was also evidenced in other ways. Ferns Sr. directed Hill to hire a substitute driver to keep Hill's truck running while Hill took time off. He similarly initially rejected a substitute driver recommended by Blake, causing Blake to suggest to the driver to obtain additional references to satisfy Ferns Sr., which allowed the driver to eventually be hired. Blake had to let the extra driver go after about 10 days of operation because his truck income did not change while driver was in the truck in that Respondent's dispatchers did not increase Blake's assign-

should not go off of his route when he had 3 hours of drive time available. Ferns Sr. threatened Hill by stating that he better learn how to do his logs or Ferns would sell his truck. Hill and Blake testified that the vehicles Respondent ordered for them were over length to legally run in Canada. Their dispatch logs reveal that they made regular runs to Canada. They testified that when they were required to go to certain portions of Canada, Respondent's dispatcher specified a certain route to avoid being ticketed. Respondent does not take issue, in its brief, that "Time Auto tractor/trailers were 'too long to run in Canada.'" (R. Br. at 12, fn. 5.) Rather, it argues concerning the instructions from its dispatchers regarding Canadian runs that, "Other than this one situation, of which it is arguable whether this was an instruction or guidance, it is not disputed that the operators were free to select their own route to the scheduled destination." (R. Br. at 12, fn. 5.) I do not find these instructions to be isolated as Respondent contends. Rather, I find that Respondent issued a variety of instructions to the drivers requiring them to maximize Respondent's earnings including directions on how to avoid scales in Canada.

<sup>28</sup> In fact the lease drivers must obtain approval from Respondent to even have a passenger in their truck.

ments. Similarly, Hill contemplated leasing another truck through Respondent. Hill's file contains a letter stating that he would have to be generating at least the driver's monthly average before he would be allowed to lease another truck. However, it never reached that point as Hill's testimony reveals that the driver quit as a result of frequent phone contacts by Ferns Sr. with the driver.

I do not find the fact that Hill and Blake were able to hire extra drivers establishes that they were independent contractors in the circumstances here where Respondent was involved in the hiring process and maintained the ability to prevent the hiring of a driver when it chose to do so. Moreover, Hill and Blake could only negotiate the extra driver's wages in the context of the compensation rate set by Respondent, which in Blake's case caused him to lose money resulting in the termination of the extra driver. See *Slay Transportation Co.*, supra at 1294.<sup>29</sup>

Respondent's independent contract agreement signed by Hill and Blake provides that in the event the driver (independent contractor) hauls loads for another carrier under Respondent's ICC authority and insurance the independent contractor forfeits all equity in their equipment and will be automatically terminated. Morefield's testimony reveals that Respondent went further than the contract provisions in practice and that Ferns Sr. announced that Respondent would prohibit drivers from taking Respondent's logo and license off the vehicles to use them to haul for another carrier. Morefield was not aware of any driver who did this, and Hill and Blake's testimony reveals that they were only dispatched by Respondent during the time they hauled for Time Auto. Blake credibility testified that, in response to his question, Morefield told him that he could not haul for another company. Moreover, Hill's testimony reveals that Respondent's ICC license and logo were affixed to his vehicle in such a manner that it would make them difficult to remove. Finally, Respondent required the drivers to generate a certain amount of monthly income. The drivers hours were limited by federal regulations and as Blake's testimony reveals he could not generate the necessary income required by Respondent if he turned down loads, and he certainly could not have done so if he used limited drive time to haul loads for another company. The witnesses credited testimony reveals that Respondent's procedures and its policies prevented drivers from performing similar services for other companies, a factor relied on by the Board and courts in concluding that individuals are statutory employees. See *Roadway Package System*, 326 NLRB 842, supra; *Corporate Express Delivery Systems*, 332

<sup>29</sup> I have also considered the fact that Respondent lease driver Smith operated three trucks during 2000, and that two other drivers who appear to be lease drivers operated two trucks for brief periods of time during the 1999 or 2000 period. I do not consider these numbers to be significant because Respondent had between 30 and 44 trucks hauling for it during this time period. Given these odds, I do not feel that there is a strong likelihood that a lease driver will have an opportunity to operate more than one truck under Respondent's current format. I do not find that the ability to lease more than one truck presented itself as viable means for Hill and Blake to generate income outside of Respondent's control. I make no findings here as to the employee status of Respondent's owner-operators or of its lease drivers who operate more than one truck as their status was not fully litigated here.

NLRB 1522 (2000); and *NLRB v. Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981).

As contended by Respondent, there are factors here that would tend to support a finding that Hill and Blake were independent contractors. The agreements Hill and Blake signed identified them as independent contractors. Respondent did not withhold social security taxes, issued 1099 forms to Hill and Blake's companies, and did not provide them with any benefits. The drivers have formed their own corporations, and pay their own expenses to maintain the vehicles, including repairs, inspections, permits and fees. Respondent's payments were made to Hill and Blake's corporations. These corporations hired drivers and filed Federal income tax returns on a corporate basis. The lease drivers are responsible to pay the extra drivers, and to provide them with insurance coverage, and they can decide to terminate these additional drivers. Outside of Canadian deliveries, the drivers could choose their own routes. Respondent also asserts that either party had the authority to terminate Respondent's driver agreements and that when Respondent terminated the agreement or warned an operator of possible termination, it occurred when the operator was not performing up to standard or in a careless manner and this occurs in normal contractual relations between businesses and does not necessarily evidence an employer-employee relationship. Respondent contends that while Hill and Blake lost the equity in their vehicles, they did not exercise their right to refinance and keep them at the time Respondent terminated their contracts.<sup>30</sup>

The Board and the courts have found the factors cited by Respondent to be insufficient to establish independent contractor status, in circumstances such as here, when a company controls manner and means in which an employee generates income. See, *NLRB v. United Insurance Co.*, 390 U.S. 254 (1967), where the Court found debit agents to be employees although they set their own hours and paid their own expenses including assistants' salaries;<sup>31</sup> *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991), where drivers were found to be employees although they received no benefits, absorbed losses for delinquent passengers, the employer made no deductions for social security and did not withhold State and local taxes; *City Cab Co. of Orlando, Inc. v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980), where drivers were found to be employees although their contract with the company stated that the parties do not intend to create an employment relationship and that drivers are to work without interference or control by the company; *Roadway Package System*, 326 NLRB 842 (1998), where drivers were found to be employees although some of them were incorporated, the drivers could hire extra drivers, a few of the drivers operated more than one vehicle, the drivers were responsible for their own withholdings and Roadway provided no paid holidays, vacations, disability or retirement benefits;

<sup>30</sup> Despite making this argument, as set forth earlier, Respondent states in its posthearing brief that "most operators do not have the financial ability to individually finance their tractor/trailers or to acquire the necessary insurance coverage."

<sup>31</sup> For reasons set forth above, I have found Hill and Blake's hiring of additional drivers to be severely circumscribed and in fact controlled by Respondent's practices and procedures.

and *Elite Limousine Plus*, 324 NLRB 992 (1997), where drivers were found to be employees although they signed franchise agreements stating it was the intent of the parties not to create an employer-relationship, the drivers filed profit, loss, and self employment statements with the IRS, they were issued 1099 forms by the employer which did not withhold Federal income tax, FICA, or unemployment insurance from their pay, the company did not provide them with disability or workmen's compensation insurance, and they could employ other drivers.

The cases Respondent cites in its brief do not require a different result. In *North American Van Lines v. NLRB*, 869 F.2d 596, 601-602 (1989), the court noted that drivers there routinely turned down particular loads and had the ability to chose between available loads which impacted on their income. The court specifically stated that, "In other situations, the ability to refuse particular loads may not bear so decisively in favor of the independent contractor status. Especially in cases where the worker (1) gains little control over the nature or performance of the job by declining particular loads; (2) bears a heavy burden for exercising the option to decline loads; (3) has little incentive in practice to decline loads . . . . In the instant case, Respondent produced no evidence to show that drivers routinely decline loads and Hill and Blake's credited testimony reveals that they never declined a load. Morefield's testimony shows that a driver was punished for declining a load by being placed at the bottom of the dispatcher's referral list with the driver not knowing when they would receive their next assignment. In *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 879 (D.C. Cir. 1978), cited by Respondent, the court found that the drivers were independent contractors because they paid a fixed rental on their vehicles and retained all their fares raising a strong inference that the cab company did not exercise control because it had no financial interest to do so. It has been previously discussed that, unlike the situation in *Local 777*, Respondent here received 20 percent of the driver's gross per load, had a strong incentive, and did in fact exercise control over means and manner of a driver's performance. While Respondent is in a heavily regulated industry, I have concluded that it has gone beyond any government requirements in its control over the drivers by its setting earnings minimums, adapting dispatch procedures which punish drivers for refusing a load, and maintaining a system which in effect prevents a driver for hauling for another carrier. *Central Transport*, 299 NLRB 5 (1990), cited by Respondent, involved the status of three drivers who were found to be independent contractors and is clearly distinguishable from the facts present here. One of the drivers there owned or leased between two to five tractors and at the times that he operated more than two tractors he regularly hauled for other companies including the respondent employer's competitors. In *Central Transport*, the company accommodated driver preferences in terms of assignments, and the company used outside delivery services when it could not persuade its drivers to make particular runs. The Board, in finding the drivers were independent contractors, also noted that they purchased or leased their tractors from sources other than the respondent, and that the drivers had never been disciplined even informally.

Accordingly, I find that Hill and Blake are statutory employees within the meaning of Section 2(3) of the Act in that their equipment was selected and controlled by Respondent, and they were required to be trained in and implement Respondent's operating procedures. Their activities were closely monitored by Respondent including: the pace of their performance, their ability to take vacations, their ability to hire substitute drivers, and the minimum income they needed to generate since Respondent received a percentage of their gross income. They were prevented from hauling for other employers, they were subject to punishment for refusing loads, and to disciplinary action for failing to call in or failing to generate enough income, and Respondent could terminate their contracts at will without penalty. Based on the parties' stipulation, since I have concluded that Hill and Blake are statutory employees I find that Respondent has violated Section 8(a)(1) and (3) of the Act by Hill and Blake's discharge and the termination of their leases and by statements by its officials as alleged in the consolidated complaint.

### 3. Procedural arguments and other matters.

#### a. Hill and Blake's district court suit

On February 7, 2001, Hill and Blake, through counsel, filed a lawsuit against Respondent in the United States District Court for the Western District of Kentucky. I allowed Respondent to enter the complaint in the lawsuit into evidence in the instant case over the General Counsel's objection. The General Counsel renews its objection in its posthearing brief. It is alleged in paragraph 3 of Hill and Blake's district court complaint that Hill and Blake provided services to Respondent "purportedly as an independent contractor." Paragraph 6 and 7 of the complaint assert that Hill and Blake entered into a written agreement with Respondent which, among other things, provided that "as a purported independent contractor" they were to drive a motor vehicle in Respondent's car hauling business. Paragraphs 12 and 13 of the complaint states in pertinent part, "At all times pertinent herein, following the start of their operation as 'independent contractors,' Blake and Hill . . ." The gravamen of the district court suit is that Respondent failed to comply with Federal regulations of the trucking industry in its dealings with Hill and Blake, that Respondent allegedly made unlawful deductions from Hill and Blake's financial settlements, and that Respondent fraudulently refused to pay Hill and Blake 80 percent of the gross which was the agreed on compensation. This lawsuit was not decided that the time of the unfair labor practice hearing, and no party has provided me with any update as to the status of the lawsuit. Respondent's counsel stated at the hearing that this unfair labor practice proceeding should not be delayed by the lawsuit. Respondent contends in its brief that "Hill and Blake have identified themselves as independent contractors in their civil district court lawsuit against Time Auto" and it argues that this constitutes a conclusive admission in this case under Federal Rules of Evidence 801(d)(2) that they are independent contractors. The Board has found statements by counsel to be admissible as evidence in that they can constitute admissions and I adhere to my decision admitting the district court complaint into evidence. See, *McKenzie Engineer-*

*ing Co.*, 326 NLRB 473, 485 fn. 6 (1998). However, the referenced district court complaint clearly uses the term "purported" in reference to Hill and Blake's alleged independent contractor status or otherwise places the term independent contractor in quotes signifying that the label was gleaned from the Respondent's documents and not necessarily adopted by Hill, Blake, or their attorney as suggestive of Hill and Blake's actual status. Accordingly, I do not find that the terminology used in the district court complaint constitutes an admission that Hill and Blake are independent contractors, nor would I find that such an admission would be binding on me here where the facts of the parties' relationship have been fully litigated and, in my view, warrant a finding that Hill and Blake are statutory employees.

#### b. Blake's statements that he drove in excess of DOT limits

A common carrier engaged in interstate transportation by motor vehicle, is subject to the DOT Federal Motor Carrier Safety Regulations which provide, in pertinent part at Section 395.3, (a) that:

. . . no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:

(1) More than 10 hours following 8 consecutive hours off duty; or . . . 49 CFR Ch. III (10-1-01 Edition).

Section 395.8 (e) of the same regulations provides details for driver reporting requirements concerning hours of work and states that "making of false reports in connection with such duty activities shall make the driver and/or the carrier liable to prosecution." 49 CFR Ch. III (10-1-01 Edition). Respondent, pursuant to these regulations requires that its drivers maintain daily driving logs, which are turned in to Respondent on a bi-weekly basis. Both Hill and Blake testified that they felt pressured by Respondent to falsify their logs and to drive over the legal limit in hours.<sup>32</sup> However, neither driver testified that they were told directly by Respondent's officials to falsify their logs, although Hill interpreted certain remarks by Ferns Sr. to constitute such an instruction. When asked by the General Counsel about his driving schedule Blake testified that "The law is 10 hours a day but I normally went way over that." Blake went on to testify as follows:

JUDGE FINE: You say you were driving more than 10 hours a day during the weeks you were there?

THE WITNESS: Yes.

JUDGE FINE: Didn't you have to fill in a Daily Log to show how many hours you were driving?

THE WITNESS: Yes.

JUDGE FINE: Did you put down that you were driving more than 10 hours a day?

THE WITNESS: No sir.

JUDGE FINE: Why not?

THE WITNESS: Because if I did, I would be fired.

<sup>32</sup> Hill, unlike Blake, did not testify that he drove over the DOT limits or that he recorded false information in his logs.

Blake explained that the dispatcher gave him delivery deadlines, that he had to meet those deadlines, and that his truck would not be loaded “if you didn’t play the game.”<sup>33</sup>

At the close of the hearing, I asked counsel for the General Counsel why Hill and Blake’s testimony should credit that Respondent was requiring them to run illegal when Hill recommended to Blake that he should haul for Respondent. Counsel for the General Counsel argue at page 23 of their brief concerning Blake’s falsification of reported hours that:

As questionable a practice this may be for those of us sitting behind desks, and reaping the benefits of the interstate trucking industry, being directed to avoid scales, and to leave off of a log some hours here and some hours there is a small price to pay to obtain a rig of one’s own. As evidenced by the daily logs and settlement checks, although their hours were long and grueling, the deductions sometimes astronomical, and the dispatches uncertain, the potential to earn a more than decent living appeared to present itself through Respondent. Between them Blake and Hill have upwards of 40 years in the car hauling business . . . . Each has worked for varied and numerous carriers throughout that time, but always driving someone else’s truck. It is wholly understandable that they perceived driving for Respondent as an opportunity to get into the car haul business for themselves. It is neither inconsistent or inherently incredible that Hill would recommend this opportunity to Blake, and Blake would seize it regardless of periodically running over the limits.

I do not find these contentions on the part of the General Counsel particularly convincing. First, contrary to the General Counsel’s assertion, Blake testified that he “normally went way over” the 10-hour-a-day limit, thereby indicating that he regularly falsified his logs for pecuniary advantage. Blake’s willingness to falsify his logs for monetary gain does not serve to enhance his credibility in this proceeding where it was to his monetary advantage to testify against Respondent.

Enforcement of DOT safety regulations is not part of this proceeding. However, I do not condone conduct that may violate those regulations putting the driver and others who use the highways at risk so that someone can own their own truck, nor do I find this conduct “wholly understandable” as the General Counsel contends. Noting that Respondent has tacitly admitted in its brief that its dispatchers suggested to drivers the means by which to evade scales in Canada, as well as the concentrated effort made by Respondent to monitor and maximize drivers’ earnings, I have concluded that it was also not beyond Respondent’s officials to indirectly pressure drivers to under report their hours as Hill testified. I do not condone this conduct on part of Respondent or on the part of Blake, nor do I condone Respondent’s instructions to Hill and Blake and their acquiescence to those instructions to avoid Canadian truck scales.

<sup>33</sup> Blake’s testimony on this point is somewhat undercut by that of Morefield who testified that Respondent did not guarantee the delivery date of a load, and that while a driver may be punished, usually nothing happens to a driver with a late load. However, on May 31, 2000, Ferns Sr. issued a letter to a driver stating that he was late for the drop off of certain vehicles and that, “If this should ever happen again you will not be allowed to haul out of Canada.”

I have considered counsel for the General Counsel’s statement in their brief that Hill and Blake perceived driving for the Respondent as an opportunity to “get into the car haul business for themselves,” but do not consider it to be an admission warranting a finding that they are independent contractors. Rather, the Board and the courts have directed that I consider all of the factors of the parties’ relationship including the employer’s “right to control” which I have set forth in detail in concluding that Respondent’s lease drivers are statutory employees. I do not find that inopportune statements by counsel in the circumstances here should warrant a different result.

#### CONCLUSIONS OF LAW

1. Time Auto and Time Auto L.S. are, and each is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Time Auto and Time Auto L.S. (jointly referred to as Respondent) are a single employer within the meaning of Section 2(2) of the Act.

3. Local 299, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent violated Section 8(a)(1) of the Act by:

(a) Creating the impression of surveillance of employees’ union activities.

(b) Coercively interrogating employees about their union activities.

(c) Threatening to discharge employees because of their union activities.

5. Respondent violated Section 8(a)(1) and (3) of the Act by on November 17, 2000, discharging and terminating the lease agreements of its employees Randy Hill and Earnest Blake because they engaged in union activities.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees Randy Hill and Earnest Blake, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>34</sup> Included this recommended

<sup>34</sup> Both Hill and Blake testified to the effect that they acquiesced in the instructions of Respondent’s dispatchers to improperly run oversized loads in Canada under Canadian law. However, Blake in particular testified that, when driving in the United States, he also normally ran way over DOT prescribed hours and under reported those hours in apparent violation of DOT regulations. Such conduct presents a clear safety hazard to himself and others. It is therefore with great reluctance that I have issued a reinstatement order for Blake in this proceeding and the Board may view the matter in a different light. However, in issuing a reinstatement order for Blake, I have found that Respondent created an environment that seemed to foster such behavior. Moreover, despite the admissions on the record by Blake as to his apparent DOT viola-

remedy is that Respondent make Hill and Blake whole for the equity lost in their trucks and trailers, plus interest, resulting from their unlawful discharges and Respondent's termination of their leases.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>35</sup>

#### ORDER

The Respondents, Time Auto Transportation, Inc., and Time Auto Transport, L.S., Troy, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Creating the impression of surveillance of employees' union activities.
  - (b) Coercively interrogating employees about their union activities.
  - (c) Threatening to discharge employees because of their union activities.
  - (d) Discharging employees and terminating their leases because they engaged in union activities.
  - (e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employees Randy Hill and Earnest Blake full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Randy Hill and Earnest Blake whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Randy Hill and Earnest Blake, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days after service by Region 7, post at its facility in Troy, Michigan, copies of the attached notice marked "Appendix A."<sup>36</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in con-

tions, Respondent did not argue at the hearing or in its posthearing brief that such conduct by Blake should serve to bar his reinstatement. Thus, this issue was not briefed to me or raised by Respondent as a defense to Blake's reinstatement.

<sup>35</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>36</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

spicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Additionally, within 14 days after service by the Region, Respondent shall duplicate and mail at its own expense a copy of said notice to all lease drivers who haul or have hauled for Respondent at any time since November 16, 2000. The notice shall be mailed to the last known address of each of these drivers after being signed by the Respondent's authorized representative. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent on or after November 16, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT create the impression of surveillance of employees' activities on behalf of Local 299, International Brotherhood of Teamsters, AFL-CIO, or any other labor organization.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT threaten to discharge employees because of their union activities.

WE WILL NOT discharge employees or terminate their leases because they engaged in union activities.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days of the Board's Order, offer Randy Hill and Earnest Blake full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Randy Hill and Earnest Blake whole for any loss of earnings and other benefits suffered as a result of their discharges and termination of their leases as directed in the Board Order.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges

of Randy Hill and Earnest Blake and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

TIME AUTO TRANSPORTATION, INC. AND TIME AUTO TRANSPORT, L.S.