

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

LIQUID TRANSPORTERS, INC.,
a wholly owned subsidiary of
TRIMAC TRANSPORTATION, INC.¹

Employer

and

Case 4-RC-19705

TEAMSTERS LOCAL UNION NO. 107²

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ The Employer's name appears as amended at the hearing.

² The Petitioner's name appears as amended at the hearing.

5. The Employer is engaged in the interstate and intrastate transport of liquid and dry bulk chemicals. The Petitioner seeks to represent a unit consisting of owner-operators, and other persons who drive vehicles owned by owner-operators, who are based at the Employer's trucking terminal in Bristol and Croydon,³ Pennsylvania. The Employer contends that the owner-operators are independent contractors and not employees within the meaning of Section 2(3) of the Act, and therefore the petition should be dismissed. The Petitioner contends that the owner-operators are statutory employees.

The Employer is the exclusive shipper for Rohm & Haas Company at two Rohm & Haas plants in Bristol and Croydon which produce liquid and dry chemicals used by manufacturers in the paint, paper, and glass industries. Some of these chemicals are considered hazardous materials. Under a license from the Interstate Commerce Commission (ICC), the Employer ships tanker loads of Rohm & Haas product to customers throughout the United States and Canada. The Employer leases its Bristol-Croydon terminal facilities from Rohm & Haas pursuant to the exclusive shipping agreement. The Employer also operates a number of other terminals or branches around the United States and performs similar work for other chemical manufacturers.

The Employer carries no drivers or dispatchers on its own payroll to perform its shipping responsibilities to Rohm & Haas. Instead, it uses the petitioned-for drivers, including 18 owner-operators who drive tractors they own but have leased to the Employer, and 3 other individuals who also drive tractors owned by owner-operators. The Employer also uses 21 drivers, 5 dispatchers, 5 wash rack employees and 6 mechanics "leased" by the Employer from Transpersonnel, Inc.⁴ All of these individuals work at or out of the same Bristol-Croydon facility which is managed by interim Branch Manager Bill Held, Operations Manager Terrence Heinz, and Shop and Washer Manager Bill Winthrop. Held, Heinz and Winthrop all employed by the Employer. At some other Employer branches, the Employer directly employs drivers on its own payroll. Drivers who are not owner-operators, and who are employed directly by the Employer or through Transpersonnel, are referred to as "company drivers."

Owner-operators for the Bristol-Croydon operation are hired by the Employer's Branch Manager. According to the Employer's written "Operating Standards," owner-operators "must satisfy the branch manager that they and their employees, if any, meet the same minimum criteria and standards required of company drivers." The Operating Standards require that company drivers and owner-operators have an acceptable previous employment and driving record, the physical capability to do the job, and "the willingness to adhere to [the Employer's] policies, procedures and practices." Owner-operators and company drivers must have a commercial driver's license (CDL) and certain minimum years of experience. The Employer verifies the applicant's employment history, checks the applicant's driving record through the Motor Vehicles Registry, and administers a physical examination and drug test that are required by the U.S. Department of Transportation (DOT). The owner-operator applicant must also own a standard tractor.

³ The terminal straddles the boundary between Bristol and Croydon.

⁴ I take administrative notice that Region Four is currently processing a separate petition in Case 4-RC-19776 in which the Petitioner seeks to represent a unit of Transpersonnel drivers, dispatchers, washers and mechanics at the Bristol-Croydon terminal.

If the owner-operator applicant passes these tests and meets the minimum requirements, and the Employer decides to engage him as an owner-operator, then the Employer offers him a "Lease Agreement." All of the petitioned-for owner-operators have entered into Lease Agreements with the Employer. The terms of the Lease Agreements are set forth on a standard form, they are identical for all the petitioned-for owner-operators, and the Employer does not negotiate over the terms. The Lease Agreement obliges the owner-operator to "furnish and make available to" the Employer certain specified equipment, i.e., the owner-operator's tractor, and "to provide all necessary drivers and labor for the proper transportation of such freight as may be provided by" the Employer. The Agreement has a three-year term, terminable upon mutual agreement, 10-day notice by either party, or "material breach by either party." However, in practice the relationship continues indefinitely for as long as the owner-operator's work performance is satisfactory and the owner-operator wants to stay. The Lease Agreement states that neither party to the Agreement is an "agent of the other," that the parties intend to create "the relationship of carrier and independent contractor and not that of employer and employee," and that the owner-operator is not to be considered an employee of the Employer "at any time for any purpose." According to the two owner-operators who testified at the hearing, however, they consider themselves employees and not independent contractors.

The Employer conducts a "training trip" for a newly hired owner-operator where a trainer observes the owner-operator's freight-handling abilities on a paid run, and provides training if needed or requested. New owner-operators must also have or obtain an "HM-126 certificate," issued by the DOT to certify sufficient training in the handling of hazardous materials. The Employer provides owner-operators with a four-day training session to obtain the HM-126 certificate, and pays owner-operators for their attendance.

The Employer provides owner-operators no assistance or financing for the purchase of tractors, which cost about \$50,000 to \$60,000.⁵ The Employer owns and maintains the tanker trailers hauled by the owner-operators. Liability insurance for the tractors is provided by the Employer so long as the tractor is pulling one of the Employer's trailers or is "under dispatch" by the Employer. When an owner-operator is "bobtailing" (returning without a trailer attached) or otherwise not under dispatch by the Employer, liability insurance is the owner-operator's responsibility. The Employer may obtain such insurance for the owner-operator, and charge him for its cost. Owner-operators also need certain specialized equipment for their tractors, such as a particular coupling device used only for hauling tanker trailers which cannot be used with ordinary box trailers, and compressors, pumps and fittings needed to unload chemicals from tankers. Owner-operators needing this specialized equipment, the cost of which may exceed \$3,000, can acquire it from, and have it installed by, the Employer but must repay the Employer through installment payments. The Employer also provides, free of charge, training on how to use the specialized equipment. The DOT requires that trucks hauling hazardous materials carry a particular safety kit, and the Employer provides this to owner-operators at the Employer's expense. The owner-operators are responsible for maintaining and cleaning their tractors. They may have this work performed elsewhere, but the Employer will provide maintenance and cleaning at its terminal and charge the cost to the owner-operator. The Employer also requires

⁵ One owner-operator testified, however, that before he purchased his tractor he sought and received assurances from the Employer's Branch Manager that the Employer would "lease" his tractor.

and pays for a safety inspection of the owner-operator's tractor every 90 days.

The Lease Agreement does not require that owner-operators have any governmental license or authority to carry freight, and the record suggests that none of the owner-operators have any such license or authority other than a standard commercial driver's license to operate a truck, and registration for their tractor. The Employer may obtain this registration for the owner-operator and charge the owner-operator for the cost. The owner-operators operate under the Employer's ICC license number, and display this number, along with the Employer's name, on their tractors. The Employer also provides, at its expense, stickers showing the payment of highway use taxes for the states where the owner-operators drive. The Employer's trailers display the Employer's name, color and design. The Lease Agreement does not require that owner-operators wear uniforms or paint their tractors with the Employer's color and design, but states that some of its customers may require such conditions and that the Employer "prefers" that the owner-operator do these things. Owner-operators are not required to leave their tractors at the Employer's terminal and do not routinely do so.

Each Friday, owner-operators select an initial run for the following week. The Employer offers runs by seniority, with the most senior driver getting first pick and normally selecting the highest paying run and the next driver choosing from the remaining available runs. Each run has a specified loading time at Rohm & Haas and delivery time at the destination. Variations in delivery time, including deliveries ahead of schedule, are not permitted without approval from the Employer, and owner-operators may not contact customers directly about such variations. Owner-operators drive to the Rohm & Haas plant and wait while the product is loaded into the tanker. The owner-operator then hauls the load to the delivery destination, and remains with the truck until the product is unloaded from the tanker. The owner-operator informs the Bristol-Croydon terminal that the load has been delivered, then contacts the Employer's nearest branch to find out if it has a load for him. If not, he calls the Employer's main dispatching office in Louisville, Kentucky to find out where they are going to send him next. If the Employer has no delivery for him, he returns to the Bristol-Croydon terminal either without a trailer (bobtailing) or with an empty trailer (deadheading). When returning, he must provide the Bristol-Croydon terminal with his expected return time and availability for the next dispatch. Upon return, if it is not the end of the week, the Employer may offer him another load consistent with his "available hours" under DOT hours of service regulations. Trips that are assigned during the week (i.e., after the initial Friday assignments) are offered first to visiting drivers from other branches, and then to the Bristol-Croydon drivers in the order of their return times.

When the owner-operator is on the road, he decides when and where to take breaks or spend the night, subject to the constraints of the scheduled delivery time and DOT's hours of service regulations. Bristol-Croydon Operations Manager Heinz testified that owner-operators are free to choose the routes to their destinations. However, the Employer provides the owner-operators with routing assistance if requested. Moreover, if the owner-operator takes a route through states other than those for which the Employer has paid highway usage taxes, then the owner-operator may have to pay highway taxes out of his own pocket. While en route, an owner-operator must inform the Employer immediately if there will be a delay in the owner-operator's scheduled loading, delivery, or return time, or in the event of an accident, breakdown, or product spill or shortage. Owner-operators must report to their dispatch office before and

after every trip, and no less than every 24 hours while on a trip.

Owner-operators are compensated for Rohm & Haas runs based on flat rates determined by the destination's zip code. Other runs are paid at a flat percentage (61%) of the revenues received by the Employer for the run. Owner-operators who suffer equipment breakdowns en route are paid only for the portion of the trip they completed, but not for breakdown time. Ordinarily, all expenses associated with the delivery, including fuel, oil, tolls, meals and hotels, are borne by the owner-operators. Occasionally, where special circumstances make a run undesirable or unprofitable, owner-operators may request and receive extra compensation, such as reimbursement for tolls or lodging. Where loading or unloading takes longer than two or three hours, or where a Rohm & Haas customer rejects a load of product and the owner-operator must wait while it is tested and reloaded, the Employer pays the owner-operator \$25 an hour. On occasion, when an owner-operator is delayed en route for reasons beyond his control, the Employer may pay the cost of the owner-operator's hotel expenses. Owner-operators may also be paid on a per-mile basis for hauling an empty Employer trailer to pick up a load at a distant site. Owner-operators receive no fringe benefits paid by the Employer, though the Employer offers participation in its group benefit plans at full cost to the owner-operator. The Employer does not deduct employment taxes from its payments to owner-operators, and issues them an IRS form 1099 rather than for W-2 at the end of the year. Under the terms of the Lease Agreement, the owner-operators are responsible for any and all taxes and workers' compensation insurance for drivers they hire.

The Lease Agreement requires that all owner-operators "shall conform to the principles, standards and rules of conduct contained in the 'Trimac Drivers Manual' and shall perform services required under this Agreement in a safe and competent manner without any unreasonable delay and in accordance with [the Employer's] 'Quality Assurance Program.'" The Employer gives all drivers, including owner-operators, copies of its fifty-three page "Trimac Driver's Manual" and requires that they sign a receipt stating that the driver agrees "as a condition of employment, or of performing work as a lease operator or a lease operator driver, to adhere to the principles and standards contained herein, to the laws of the land, and to other reasonable standards that may be introduced by the company from time-to-time." The Manual's instructions are not limited to laws and regulations; they also include the Employer's "principles, standards and rules of conduct that are consistent with satisfying the needs of our customers." For example, drivers are directed to "project their professional image in their daily contact with shippers, consignees, the general public and fellow workers." Drivers are advised that "personal appearance is important" and that they "must present [themselves] in a clean, neat and well-groomed way at all times while on duty." The Driver's Manual includes a detailed set of rules, procedures and practices for the safe and efficient operation and maintenance of equipment, including tractors, trailers and loading/unloading equipment. While some of these are required by law or regulation, many are not so mandated. For example, the Employer requires running with low beams and frequent tire checks and brake adjustments, and prohibits any use of radar detectors, unauthorized passengers, and speeds no greater than 60 miles per hour, even where posted speed limits are higher. A warm-up and cool-down period is imposed on drivers of diesel engines, and drivers are required to follow additional "guidelines" recommended but not mandated by the DOT, such as certain procedures for hooking and unhooking trailers. The Manual also prohibits drivers from towing or pushing disabled vehicles, and requires drivers to

be with their loads and equipment at all times, even if they arrive at their destinations early and must wait hours before they can present the shipments for unloading. Drivers are required to be “in attendance” during loading and unloading, defined by the Employer as being outside the tractor cab.

Like all drivers for the Employer, owner-operators must complete a daily log. The log form includes a number of procedures they must follow if they are involved in an accident, some of which are not required by law, such as being “courteous” and making no statements about the accident to anyone but the police, the Employer and its insurance representative.

Owner-operators and company drivers are also given a handbook of “Trimac Operating Standards” that set forth performance, hiring, equipment and facility standards. The Operating Standards are defined as “statements of belief that all employees are expected to conform to in order that they may perform their duties in a safe, methodical, and cost-effective manner,” and “represent an expectation of our performance by our customers.” The handbook states, “All employees in the Trimac group will conduct themselves at all times in ways that will bring credit to the company or their fellow employees.” According to the Operating Standards, “Leased Operator and Independent Contractors” must “meet the same minimum criteria and standards required of company drivers.”

The Employer gives owner-operators copies of DOT guidelines, a hazardous materials handbook, and the Employer’s drug and alcohol policies. The Employer holds quarterly safety meetings for owner-operators and other drivers where attendance is mandatory. Owner-operators are compensated for their attendance. The Employer also requires that owner-operators participate in its quality assurance activities.

The Employer has, on occasion, sought to enforce its rules, procedures and standards for owner-operators through discipline. One owner-operator received written warnings and disciplinary time off for such infractions as failing to make a delivery on time, unloading a tank improperly, showing up late to work, and giving a dispatcher “verbal abuse.” The disciplinary notices threatened more serious discipline, including time off and termination, if the conduct continued, and stated that a copy of the notices would be placed in the owner-operator’s “personnel folder” where they would become part of his “permanent record.”

The Lease Agreement permits owner-operators to employ their own employees to perform work under the Agreement. The Lease Agreement states that the owner-operator has the “responsibilities, liabilities and duties” to “direct and control” his “drivers and employees,” including hiring, supervising, firing, training, setting wages, hours and working conditions,” and to “determine the method, means and manner of performing this Agreement.” The Agreement adds, however, that this “method, means and manner” must include adherence to the Employer’s “standards, procedures and policies,” which include those set forth in the Employer’s Driver’s Manual and Operating Standards. Drivers hired by owner-operators must be screened by the Employer under the same procedures, meet the same qualifications, and complete the same training, as the owner-operators themselves. At least one driver whom an owner-operator proposed to hire was rejected by the Employer because he had been terminated for cause by Transpersonnel. According to the two owner-operator witnesses who testified at the hearing, the

Employer's Branch Manager told them they could not to hire drivers to help them. Only one of the twenty-one petitioned-for drivers, Patt Webb, employs anyone other than himself. Webb owns three tractors that he has leased to the Employer, drives one tractor himself, and employs three other drivers to operate the other two.⁶ One other owner-operator supplies equipment and driving services through a corporation rather than directly as an individual, and is paid by a check issued to his corporation. Except for these two situations, the petitioned-for owner-operators drive their own equipment and are paid directly by the Employer.

The Lease Agreement requires that the owner-operator hold the Employer harmless for any "liabilities, claims, expenses or damages" arising from the owner-operator's relationship with his employees, his ownership, operation, maintenance and control of the leased tractor, or the performance of his duties under the Agreement. The owner-operators also waive any claim for personal injury suffered by the owner-operator or his employees no matter how caused, even if it arose from the Employer's "sole negligence," and any claim for damage to their equipment, even if it resulted from a failure of the Employer's equipment.

The Lease Agreement does not limit the extent to which the Employer may use the tractor it is leasing from the owner-operator, or the extent to which the Employer may require the owner-operator's availability to operate the tractor for the Employer. Bristol-Croydon Operations Manager Heinz testified that owner-operators are free to refuse runs offered to them, but not if it would "hamper or interfere with the running of the business on a daily basis." According to the two owner-operator witnesses, if the Employer has loads for them, they must accept the loads or risk termination or time off. Further, if an owner-operator rejects an offered load during the week, then the Employer drops his name to the bottom of the dispatch list the following day, and the owner-operator must wait until later-arriving owner-operators are offered work before he will be sent out again. Operations Manager Heinz testified that owner-operators take time off as they please. According to the two owner-operator witnesses, owner-operators must submit written requests for time off, and if an owner-operator takes time off without approval, the Employer may withhold work from the owner-operator as punishment. The owner-operators also testified that they must request vacation time off, again by submitting a form for approval, and that vacation requests are granted on the basis of seniority. Owner-operators receive no paid time off.

The Lease Agreement permits the Employer, and only the Employer, to sub-lease the leased tractor to another carrier. The Lease Agreement prohibits "trip-leasing," which the Agreement does not define, but which Bristol-Croydon Operations Manager Heinz described as the owner-operator engaging someone else to pull the Employer's trailer and deliver the load. The Lease Agreement does not indicate that the owner-operator may use the equipment he has leased to the Employer to perform work for someone else. Heinz testified that owner-operators may perform work for other companies with the tractors they have leased to the Employer. However, the Employer offered no evidence that any owner-operator has ever done so, though if they had done so they would have been required to include this work on the daily logs they must

⁶ The parties stipulated that Webb is not a supervisor within the meaning of Section 2(11) of the Act, and that he and the drivers of his trucks should be included in the petitioned-for unit of owner-operators if it is found that such a unit would be appropriate.

submit to the Employer. The two owner-operator witnesses testified that they do not use their tractors to perform work for other carriers, and that they were specifically told by Employer Branch Managers that they are not permitted to do so.

Section 2(3) of the Act provides that the term “employee” shall not include “any individual having the status of an independent contractor.” Recently, in *Roadway Package System*, 326 NLRB No. 72 (1998), the Board reexamined the test for determining whether an individual is an employee or an independent contractor. The Board observed that the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992); and *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), applied the traditional common law of agency standard, and the Board concluded that it had no authority to apply a different one. The multifactor common law analysis, articulated in terms of masters and servants, is set forth in the Restatement (Second) of Agency, Section 220, pp. 485-86 (1958):

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;

- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

The Board in *Roadway* rejected the argument that the predominant factor in the analysis is whether an employer has a “right to control” the manner and means of the work performed by the individual whose status is at issue. *Roadway*, supra, 326 NLRB No. 72, slip op. at 9. Noting that the Restatement factors are not exclusive, and specifically permit the consideration of other relevant factors, the Board stated that the test “encompasses a careful examination of all factors and not just those that involve a right of control.” In summary, the Board held that “in determining the distinction between an employee and an independent contractor under Section 2(3) of the Act, we shall apply the common-law agency test and consider all the incidents of the individual’s relationship to the employing entity.” *Id.*

Roadway and its companion case, *Dial-A-Mattress Operating Corp.*, 326 NLRB No. 75 (1998), both involved the status of delivery drivers who owned or leased their trucks. In *Dial-A-Mattress*, the Board found the drivers to be independent contractors, while in *Roadway*, the Board found the drivers to be statutory employees. The Board summarized its analysis of the common law factors in *Roadway* as follows:

As in *United Insurance*, the drivers here do not operate independent businesses, but perform functions that are an essential part of one company’s normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company’s name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company’s business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss.

Roadway, 326 NLRB slip op. at 10. I find that these same conclusions hold true for the petitioned-for owner-operators here. I also find that the circumstances of their relationship with the Employer differ in critical respects from the independent operator relationship described in *Dial-A-Mattress*.

The petitioned-for owner-operators do not operate independent businesses. They use their tractors to perform work exclusively and indefinitely for the Employer. They perform functions that are not merely a “regular” or “essential” part of the Employer’s normal operations, but are the very core of its business: shipping tankloads of chemicals for Rohm & Haas and other customers. In order to work for the Employer, the owner-operator must have trucking experience, a CDL and a good driving record, but needs no qualifications or experience beyond those the Employer requires of its company drivers. In particular, the owner-operators need not be experienced in handling tankers, chemicals or hazardous materials. Unlike *Dial-A-Mattress* where the owner-operators arranged their own training, *Dial-A-Mattress*, supra, 326 NLRB No. 75, slip op. at 8, the Employer provides all training needed to handle tankers and operate the

specialized unloading equipment and to obtain a HM-126 certificate. Contrary to the Employer, there is no evidence that DOT requires *the Employer* to provide hazardous materials training (or any of the other training the Employer provides), only that the drivers possess an HM-126 certificate if they handle hazardous materials.

Like the drivers in *Roadway*, the owner-operators here do business in the Employer's name, not their own. They haul freight under the Employer's ICC license and must show the Employer's name and ICC license number on their tractors, while the trailers they haul are painted with the Employer's name and design. The independent contractor owner-operators in *Dial-A-Mattress*, in contrast, delivered freight under the names of their own trucking companies, and filed their own applications with the appropriate governmental authorities to transport Dial-A-Mattress's products. *Dial-A-Mattress*, supra, 326 NLRB No. 75, slip op. at 2, 4, 8. Unlike the owner-operators in *Dial-A-Mattress* who were held out to the public by Dial-A-Mattress as "independently owned and operated trucking delivery services," *id.* at 8, there is no evidence that the Employer holds out the owner-operators as independent businesses, or independent in any way from the Employer's business. Indeed, they are not even permitted to contact customers directly about the scheduling of deliveries, but must contact the Employer which alone takes responsibility for the delivery and makes arrangements for it.

The owner-operators receive the Employer's guidance and assistance in carrying out the business they perform in the Employer's name. While the owner-operators must provide a standard tractor, the Employer provides the trailer. The Employer will also obtain and install all specialized equipment needed to adapt the owner-operator's standard tractor to the Employer's chemical-handling work, and permit the owner-operator to pay the cost through installments. The Employer then trains the owner-operator, free of charge and on paid time or during paid runs, how to use the specialized equipment and handle chemical and hazardous freight. The Employer will also arrange for registration and insurance coverage for the owner-operators' tractors, and deduct the cost of such items from their paychecks. The Employer provides the DOT-required safety kit to the owner-operators free of charge, and pays the owner-operators for their time when they attend the Employer's quarterly safety meetings. The Employer inspects the tractors at the Employer's expense, and provide maintenance and cleaning for the tractors at the terminal, at a cost to the owner-operator. The Employer provides the owner-operators with detailed manuals to guide them in their work, and will even provide routing assistance. The Employer covers the cost of highway use taxes for the states through which the owner-operators must travel.

The owner-operators do not ordinarily engage in outside business. While the Employer asserts the owner-operators may use their tractors to perform work for other carriers, the owner-operators have been told they may not do so, and there is no evidence that any owner-operator has ever done so. The owner-operators have "leased" their tractors to the Employer, and thereby surrendered ultimate control over the tractor's use. The Lease Agreement expressly prohibits "sub-leasing" or "trip-leasing" by the owner-operator. Work for other carriers during the same period in which they have leased their tractor to the Employer would appear to be contrary to terms or spirit of the Lease Agreement, and indeed that is essentially what the owner-operators have been told. The *Dial-A-Mattress* owner-operators, in contrast, were free to perform work for others. *Id.* at 8-9, 10.

The owner-operators constitute an integral part of the Employer's business under the Employer's substantial control. The Employer relies on the owner-operators to carry its freight, and retains the right to require that they perform assignments as needed. The owner-operators lack the contractual right to reject the Employer's work assignments. The Lease Agreements binds them, without limitation, "to furnish and make available" to the Employer their tractor for "the proper transportation of such freight as may be provided by" the Employer. The owner-operators must obtain approval for time off and vacations. They must remain in daily contact with the Employer when they are on the road with the Employer's loads, and must advise the Employer of their availability for additional dispatches. Unlike the *Dial-A-Mattress* owner-operators who could decline orders without penalty, *id.* at 8, 9, an owner-operator here who rejects an offered run during the week suffers an economic penalty by being dropped to the bottom of the dispatch list.

The Employer also substantially controls, and retains the right to control, the manner and means by which the owner-operators perform their work. The owner-operators must follow the Employer's Driver's Manual and Operating Standards and participate in the Employer's quality assurance program. These extensive sets of rules, procedures and standards, which even include directives on grooming and personal appearance, are unilaterally determined by the Employer and subject to change any time, and the Employer can enforce them with discipline, including termination, time off, and written warnings that are placed in the owner-operator's "personnel record." Contrary to the Employer, its rules, procedures and standards are not limited to policies mandated by Federal and State laws and regulations. Many of these rules, procedures and standards are the Employer's own, and are clearly designed solely to advance the Employer's business interests. The Employer continuously monitors the owner-operators' performance of work. While much the work they perform is away from the Employer's facilities, the owner-operators are required to report each loading and delivery, advise the Employer of availability and expected return times, maintain daily contact with the Employer, and make immediate contact if any problems arise or there are any changes in reported availability.

The owner-operators are expected to act in a manner loyal to the Employer's business enterprise. The Employer's Driver's Manual and Operating Standards require that the owner-operators' manner of performing their work, and not just their work product, advance the Employer's interests. Like the Employer's company drivers, owner-operators are expected to carry out their duties in a way "consistent with satisfying the needs of [the Employer's] customers." They must conduct themselves "at all times in ways that will bring credit to the company or their fellow employees." They are expected to convey a "professional image" in their contact with customers, fellow workers, and the general public. Thus, the owner-operators' "physical activities are controlled by their sense of obligation to devote their time and energies to the interests of [the Employer's] enterprise." Restatement, *supra* at 479.

The owner-operators have no substantial proprietary interest in their work beyond their investment in their tractors and the various specialized attachments they must purchase to handle the Employer's freight. While the Lease Agreement permits an owner-operator to own and lease multiple tractors, only one of the eighteen petitioned-for owner-operators owns and operates more than a single tractor.

The owner-operators have no significant entrepreneurial opportunity for gain or loss. The owner-operators are paid by the job rather than by the hour, but the level of the compensation depends, to a large extent, on the distance the owner-operator must haul the cargo, and therefore on the time it will take him to complete the job. The owner-operators are limited in how fast they can complete a job by, among other things, speed limits and DOT hours of service rules. Even if they could get a job done faster than expected, they do not control delivery times, and cannot make an early delivery without the Employer's approval. The owner-operators' opportunities for increased income or profit are also limited by the Employer's complete control over work assignments. The Employer assigns work each week first by seniority, and then during the week by the time of return to the terminal. The owner-operators do not bid against each other for work, or generate business on their own. When out on the road, they call other branches of the Employer's operation to look for work, but those dispatches too are under the Employer's control. The owner-operators do not negotiate with the Employer over the terms of the Lease Agreements or their rates of compensation, both of which are unilaterally set by the Employer. They can choose where to eat or spend the night, but discretion over such expenses is unlikely to have a significant effect on profit and loss.

The Employer also provides various kinds of compensation to owner-operators that reduce their risk of loss. The Employer pays by the hour for certain delays at loading or unloading points. The Employer may also pay for tolls or lodging where the short distance of the run makes it difficult for the owner-operator to cover costs, or pay mileage if the owner-operator must carry an empty trailer out of his way to pick up a new load. Even when the owner-operator's equipment breaks down, and he fails to effect delivery, the Employer pays him for the portion of the trip completed.

As in *Roadway*, the Employer "establishes, regulates and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers," and "there is little room for the drivers to influence their income through their own efforts or ingenuity." The Employer has "simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities." *Roadway*, supra, 326 NLRB No. 72, slip op. at 10, 11. Cf. *Dial-A-Mattress*, supra, 326 NLRB No. 75, slip op. at 8, 9, 10-11 ("significant entrepreneurial opportunity for gain or loss").

In reaching its finding of independent contract status in *Dial-A-Mattress*, the Board relied heavily the fact that all the owner-operators in that case employed their own employees, and that they had sole control over and complete responsibility for their employees. *Id.* at 8, 9, 10. In contrast, only one of the petitioned-for owner-operators employs employees. While the Lease Agreement contemplates the possibility of owner-operators employing employees, in practice the Employer controls who is hired, how they are trained, and how they perform their jobs. According to the owner-operators who testified at the hearing, the Employer also dictates who may hire employees and who may not.

Accordingly, I find that the factors of the common law agency test weigh heavily in favor of employee status for the petitioned-for owner-operators, and conclude that the owner-operators are not independent contractors but are employees within the meaning of Section 2(3) of the Act.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All owner-operators, and other persons who drive vehicles owned by owner-operators, employed by the Employer at its trucking terminal in Croydon, Pennsylvania, excluding guards, office workers, dispatchers, tank washers, mechanics, company truck drivers and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,⁷ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

TEAMSTERS LOCAL UNION NO. 107

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759

⁷ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

(1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the *full* names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be clearly legible, and computer-generated lists should be printed in at least 12-point type. In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **October 12, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, NW, Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **October 18, 1999**.

Dated October 4, 1999

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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