

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

TOP LINE EXPRESS, INC. AND TOP
LEASING, INC.

Joint Employers

and

Case No. 8-RC-16383

TRUCK DRIVERS, WAREHOUSEMEN AND
HELPERS UNION, LOCAL 908 a/w THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a bargaining unit of approximately 55 truck drivers and mechanics employed at the Employer's Lima, Ohio facility.¹ The Employer maintains that the petitioned-for unit is not appropriate because it does not include approximately 26 "owner-operator" truck drivers. The Petitioner seeks to exclude the owner-operators from the unit, based on the Petitioner's claim that they are independent contractors and, therefore, not employees within the meaning of Section 2(3) of the Act.

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.²

¹ The Employer is engaged in commerce with the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. Top Line Express, Inc. and Top Leasing, Inc., collectively referred to as the Employer, have stipulated, and I hereby find, that they are joint employers. The labor organization involved claims to represent certain employees of the Employer. 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.

² I hereby correct the inadvertent error on page 1 of the transcript referring to the hearing officer as Barbara Kyle. The evidence reflects that the hearing officer was Richard F. Boguski. The hearing officer's rulings made at the

The sole issue at the hearing was whether the Employer's owner-operators are employees within the meaning of Section 2(3) of the Act and therefore must be included in the unit of truck drivers and mechanics that the Union seeks to represent.

Based on the entire record in this case, I conclude that the owner-operators are statutory employees and included in the unit.³ Accordingly, I hereby find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time truck drivers, including owner-operators, and mechanics employed by the Employer at its Lima, Ohio facility but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

APPLICABLE LAW

Section 2(3) of the Act provides that the term "employee" does not include independent contractors. In deciding whether an individual is an employee or an independent contractor, the Board considers "all of the incidents of the individual relationship" to the employing entity, "with no one factor being decisive." **NLRB v. United Insurance Co., 390 U.S. 254, 258 (1968).**

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

hearing are free from prejudicial error and are hereby affirmed. The Petitioner and Employer filed post-hearing briefs that have been duly considered.

³ The Board has delegated its powers in connection with this case to me as Regional Director, pursuant to Section 3(b) of the Act.

factual background leads to an analysis that makes that factor more meaningful in one case than in the other.”

In applying the above principles to truck drivers, the Board in 1998 decided two cases, with opposite results, on the same day: **Roadway Package System, Inc., 326 NLRB 842 (1998)**, and **Dial-A-Mattress operating Corporation, 326 NLRB 884 (1998)**.

In **Roadway, supra, at 850**, the Board reiterated 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.”

In **Roadway, supra, at 851**, the Board concluded that the disputed drivers were employees as defined in the Act. The drivers in dispute performed functions that were an integral part of Roadway’s normal business of transportation. They did not need any prior training or experience receiving all necessary training from the employer. The drivers did business in the company’s name, with guidance and assistance from the company. That assistance included a “business support package” (a computer and scanner, a vehicle washing service, an annual DOT inspection, and vehicle maintenance at Employer-negotiated prices from outside vendors.) The drivers did not ordinarily engage in outside business. The drivers had no substantial proprietary interest in the company beyond their investment in the trucks. The drivers had no significant entrepreneurial opportunity for gain or loss. In summary, the drivers’ work was an integral part of the employer’s business and was under the substantial control of Roadway.

In **Dial-A-Mattress, supra at 891**, the Board concluded that the disputed drivers were independent contractors. The owner-operators, who delivered mattresses, were not engaged in

Dial's business of selling mattresses, but merely served as an outsource for their delivery. They were able to make an entrepreneurial profit beyond a return on their labor and capital investment. A significant number of the owner-operators owned several trucks, for which Dial had no specifications or objection. The owner-operators had their own employees who drove the trucks. Dial played no role in the training and hiring of these employees. Dial guaranteed no minimum compensation to owner-operators. The owner-operators could decline loads without penalty. Dial referred to the owner-operators as an "independently owned and operated trucking delivery service." The trucks did not carry Dial logos, but those of the owner-operators.

As set forth in detail below, the facts in the instant matter are more closely aligned with those in Roadway, supra, wherein the disputed owner-operators were found to be statutory employees.

FACTS IN THE INSTANT MATTER

A. Joint Employers

As stated previously, Top Line Express, Inc. and Top Leasing, Inc. are joint employers. "Top Line Express" is a trucking company that primarily hauls auto parts for manufacturers. It owns the trailers. However, "Top Line Express" does not own any tractors, nor does it employ any drivers. Instead, it leases tractors, along with what are currently approximately 55 drivers, from "Top Leasing". In addition, "Top Line Express" also leases tractors and drivers from approximately 26 owner-operators, who own and operate their own tractors for the Employer.

B. Trailers and Tractors

"Top Line Express" enters into written equipment lease agreements with either "Top Leasing" or the owner-operators, for every tractor that is used. All of the tractors, as well as all

of the trailers, display the “Top Line Express” logo, including those owned by the owner-operators.

The tractor owners and the owner-operators are paid mileage for the loads that they haul. Out of this mileage payment, “Top Leasing” and the owner-operators pay the drivers. The company drivers are also paid on a mileage basis, with a small per diem.

The evidence reflects that most of the owner-operators drive their own trucks. If the owner-operator does not drive the truck, the owner-operator must substitute a driver approved and trained by the Employer. Top Line Expresses Vice President Ralph Whetsel testified that some of the owner-operators from whom “Top Line Express” leases trucks own more than one truck.

The Employer is responsible for providing public liability cargo and property damage insurance for the operation of all tractors and trailers, and therefore is responsible for any accidents caused by any of the drivers whether a company driver or an owner-operator.

None of the drivers work directly for “Top Line Express”. Approximately 55 of the drivers work for “Top Leasing”, which keeps its own seniority list. “Top Line Express” keeps a separate seniority list of the owner-operators.

Owner-operators may not lease their equipment to other carriers unless they get prior approval from “Top Line Express.” Vice President Whetsel testified that because owner-operators work full-time for “Top Line Express”; this type of leasing is uncommon.

C. Driver Qualifications And Training

All drivers, whether company employees or owner-operators, must meet the same qualifications. After they submit employment applications, their driving records are checked,

they are subject to a background check, and their prior employment is verified. Thereafter, they are given a road test by the Employer and a physical examination from a doctor selected and paid for by the Employer. They are also subject to pre-employment drug tests.⁴

All newly-hired drivers complete the same orientation and training. This includes a review of the Employer's policy manual, the procedure for picking up and delivering loads, and a review of the paperwork required. All drivers are required to watch the same training videos. The files for all of the drivers are kept at the Employer's Lima, Ohio facility where the dispatchers work. The dispatchers supervise all drivers.

D. Working Conditions

Most of the drivers initiate and complete their runs at the Employer's Lima facility. For the Employer's convenience, some drivers occasionally keep their trucks at their homes where they begin and end their runs, including those drivers who live in the Sandusky, Ohio area. All drivers are given the load information they need by the dispatchers in Lima. This information includes the appointment time for loading, the appointment time for delivery, directions on the approved route to the loading and unloading points, and any special handling requirements. The evidence reflects that drivers cannot refuse a load without discipline. Whetsel testified that this is true for the owner-operators, even though the lease agreement (Petitioner Ex. #1) seems to imply that the owner-operator has a choice of whether or not to accept the load.

⁴ Some of the standards, requirements and qualifications required by the Employer are dictated by federal regulations, promulgated by the Department of Transportation. The Board does not consider requirements imposed by the government to constitute employer control; these requirements are considered government control. **Air Transit, 271 NLRB 1108, 1110 (1984); Elite Limousine, 324 NLRB No. 182 (1997)**. However, the evidence reflected that the Employer requires additional standards other than those imposed by the DOT regulations. For example, the Employer requires all applicants to have a pre-employment physical even though the DOT regulations assert that a physical is good for two years.

All drivers communicate with the dispatcher throughout the day using the “QUALCOM” satellite tracking and communication system. All drivers are required to notify the dispatchers when they arrive at a destination. If there are delays encountered in loading or transportation, the driver must contact the dispatcher.

If any driver suffers a breakdown, the Employer provides the driver, including owner-operators, with an alternate tractor. In such cases, the owner-operator is paid the same mileage rate for the loads as other company drivers (approximately \$.24 - \$.36 per mile). The additional mileage pay normally received by the owner-operator is paid to “Top Leasing” for use of the replacement tractor. The Employer’s tractors are repaired at the Employer’s facility. The Employer allows the repair of owner-operators’ trucks at the Employer’s facility; those repairs are billed at the Employer’s costs.

E. Pay, Benefits, Work Rules

All of the drivers are paid by the mile. The owner-operators’ mileage, about \$.80 per mile, includes pay for the use of the equipment. The company drivers’ pay ranges from \$.24 to \$.36 a mile, depending on seniority. They also receive a small per diem. All drivers are paid by the week regardless of whether the Employer is paid by the customer. All drivers are required to work weekends at least twice a month for which they receive an additional 10% in pay.

No taxes are withheld from the pay of owner-operators and they receive no benefits such as paid vacation, holidays, health insurance and participation in the 401K plan. The Board does not regard as determinative the fact that the employer does not make payroll deductions and the drivers pay their own social security and other taxes. **Miller Road Dairy, 135 NLRB 217, 220 (1962).**

All drivers are eligible to receive the same quarterly performance bonuses for delivery of loads on time. All are eligible for the annual safety award. All are invited to company functions, such as banquets and picnics.

The drivers are not required to wear uniforms; however, all receive company jackets and hats to use at their convenience. All drivers are subject to the same safety and work rules and to the same disciplinary rules, which are reviewed at the orientation and training session. All drivers are subject to the Employer's random drug tests. All drivers are required to keep daily log books, recording how they use all of their time during the day. All drivers must turn these in, with other work records and documents, weekly.

F. Job Bids

The Employer has several dedicated runs subject to bid by all of the drivers. The bid sheets are posted in the dispatchers' office in Lima; occasionally, they are placed in drivers paycheck envelopes. Whetsel testified that bid awards are based on a variety of factors, including location of the run, driver's prior record, and seniority. Whetsel stated that both owner-operators and company drivers are permitted to bid on the dedicated runs. He testified that several owner-operators currently have dedicated runs, and that the Sandusky bid list is kept separately, because Sandusky is some 98 miles north of Lima. The record reflects that at least one Sandusky bid has been awarded to an owner-operator.

G. Lease Agreement

The lease agreement (Petitioner Ex. 1) identifies the lessors as "independent contractors" and specifically states that the "INDEPENDENT CONTRACTOR will not, for any purpose whatsoever, act or propose to act as an agent, representative or employee of CARRIER."

However, the Board does not regard as determinative the fact that the written agreement defines the relationship as one of “independent contractor.” **National Freight, 153 NLRB 1536 (1965); Big East Conference, 282 NLRB 335, 345 (1986).**

ANALYSIS

An employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. **Lakes Pilots Assn., 320 NLRB 168 (1995).** Significantly, the owner-operators in this case perform work which is essentially the same as that of the company drivers. Their work constitutes the “core” or essential function of the Employer’s normal operations as a transportation company. The fact that owner-operators perform an essential function of the employer is a factor indicating an employer-employee relationship. **See Roadway, supra at 851. Slay Transportation Company, Inc., 331 NLRB No. 170, pg. 3 (August 25, 2000); Corporate Express Delivery Systems, 322 NLRB No. 144 (December 19, 2000).**

In **Roadway, supra**, the owner-operators were found to be employees is defined by the Act. In that case and in the instant matter, the owner-operators own their vehicles. As in **Roadway**, the owner operators are provided with a business support package. They are given replacement vehicles when their vehicle becomes inoperative. Likewise, as in **Roadway**, they have no significant entrepreneurial opportunities, because they are prohibited from using their vehicles for other carriers during the day. The Employer also controls the manner and means of making pick-ups and deliveries, as in **Roadway**. In **Roadway**, the owner-operators received no benefits and were treated as independent contractors for tax purposes. However, the Board concluded that these factors did not outweigh the other *indicia* of employee status. **Roadway**,

supra at 854. Thus, the owner-operators in **Roadway** had job functions, conditions and responsibilities very similar to the owner-operators in dispute.

In **Slay Transportation, supra**, the Board also concluded that the owner-operators were employees. In that case, the Employer provided trailers to its owner-operators, leased the tractors from them and paid them on the same basis as company drivers, making separate payments for the lease of their tractors. The owner-operators could only hire other drivers to operate their tractors who were trained and approved by the Employer. All drivers received the same training and were subject to the same physical examinations and drug testing. Trailers and tractors displayed the employer's logo and uniforms were not required. All drivers were given specific instructions regarding the way their work was to be performed and all were held accountable to the same performance and disciplinary standards. Based on these factors, the Board held that the owner-operators were employees. **See also, Corporate Express, supra**, wherein similarly situated owner-operators were also found to be employees.

The relationship between the Employer and the owner-operators in the instant case is remarkably similar to that in **Roadway, Slay Transportation, and Corporate Express**. They work full-time for the Employer. Their tractors and trailers bear Employer's name. They are required to use the Employer's satellite communications and monitoring. They receive insurance protection from the Employer. They are trained by the Employer and need no prior experience to be hired. They cannot reject a load without discipline. They must receive permission from the Employer to haul for other carriers. Drivers trained and approved by the Employer must drive their trucks. The owner-operators use the Employer's repair shop. The owner-operators have no proprietary interest in their routes. Due to the hours they work and the control that the Employer exerts over them, they have no significant opportunity for entrepreneurial gain or loss.

Their routes, their loads and their pay are determined by the Employer. Accordingly, they do business in the Employer's name, with substantial guidance and control from the Employer.

The drivers in dispute are supervised by the same dispatchers, have the same qualifications and training, drive similar vehicles using the same pool of tractors, work the same hours and are dispatched out of the same terminal as the employees in the unit. Both groups carry on the essential function of the Employer, the transportation of goods. All are paid on a mileage basis, although the owner-operators are paid more for the leasing of their vehicles.

Accordingly, I find that the owner-operators at issue herein are statutory employees and should be included in the unit found appropriate.⁵

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, 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

⁵ The Petitioner agreed to proceed to an election in any unit found appropriate herein.

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 **Truck Drivers, Warehousemen and Helpers Union, Local 908 a/w the International Brotherhood of Teamsters, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters 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 that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969).** Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994).** The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by July 24, 2002.

Dated at Cleveland, Ohio this 10th day of July 2002.

/s/ Randall A. Malloy

Randall A. Malloy
Acting Regional Director
National Labor Relations Board
Region 8

177-1633-5017-0000