AMERICAN ARBITRATION ASSOCIATION

GABRIEL CILLUFFO, et al, Claimants, v. CENTRAL REFRIGERATED SERVICE, INC., et al., Respondents.	77 160 00126 13 PLT (Collective Matter) **ORDER re Claimants' Motion for Partial Summary Judgment**

The Arbitrator has received Claimants' Brief in Support of Summary Judgment; Respondents' Corrected Opposition to Claimants' Motion for Partial Summary Judgment; Notice of Errata Regarding Respondents Opposition; Respondents' Evidentiary Objections to Declarations of [redacted] Submitted in Support of Claimants' Motion for Summary Judgment; and Claimants' Reply Brief.

Claimants are truck drivers who leased one or more trucks from Central Leasing, Inc. ("Leasing") to drive for Central Refrigerated Service, Inc. ("Refrigerated"). Each Claimant entered into an Equipment Leasing Agreement with Leasing, and a Contractor Agreement with Refrigerated. Claimants move for summary judgment that they were employees for purposes of the Fair Labor Standards Act ("FLSA") entitled to receive at least the minimum wage mandated by the FLSA. All evidence must be viewed in the light most favorable to Respondents as the non-moving party. Summary judgment will

be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

The parties generally agree on the applicable law and the factors to be considered in determining whether someone is an employee or an independent contractor. The following quote is from a case cited by both parties:

> The FLSA defines an employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). In turn, "employer" is defined as including "any person acting directly or indirectly in the interest of an employer in relation to an employee."29 U.S.C. § 203(d). The FLSA "defines the verb 'employ' expansively to mean 'suffer or permit to work.' " *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326, 112 S.Ct. 1344, 1350, 117 L.Ed.2d 581 (1992) (quoting 29 U.S.C. § 203(g)). The Supreme Court has emphasized that the "striking breadth" of this latter definition "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Id.* Thus, in determining whether an individual is covered by the FLSA, "our inquiry is not limited by any contractual terminology or by traditional common law concepts of 'employee' or 'independent contractor.' " *Henderson v. Inter–Chem Coal Co., Inc.,* 41 F.3d 567, 570 (10th Cir.1994) (citing *Dole v. Snell,* 875 F.2d 802, 804 (10th Cir.1989)). Instead, the economic realities of the relationship govern, and "the focal point is 'whether the individual is economically dependent on the business to which he renders service ... or is, as a matter of economic fact, in business for himself.' " *Id.* The economic reality test includes inquiries into whether the alleged employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records. *Watson v. Graves,* 909 F.2d 1549, 1553 (5th Cir.1990).
>
> In applying the economic reality test, courts generally look at (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business. *Henderson,* 41 F.3d at 570. In deciding whether an individual is an employee or an independent contractor under the FLSA, a district court acting as the trier of fact must

> first make findings of historical facts surrounding the individual's work. Second, drawing inferences from the findings of historical facts, the court must make factual findings with respect to the six factors set out above. Finally, employing the findings with respect to the six factors, the court must decide, as a matter of law, whether the individual is an "employee" under the FLSA. None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach. *Id.* at 570.

Baker v. Flint Engineering & Const. Co., 137 F.3d 1436, 1440 (10th Cir. 1998). Another case cited by both parties phrases the first factor as "the degree of the alleged employer's right to control the manner in which the work is to be performed," noting that "[e]conomic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA." *Real v. Driscoll Strawberry Associates, Inc.*, 602 F. 2d 748, 754-55 (9th Cir. 1979) (cited with approval by Claimants in their motion for summary judgment and Respondents in their motion to decertify the conditionally certified class).

Claimants argue that Respondents[1] acting together exercise almost complete control over drivers by virtue of their control over the vehicles through the terms of the leases, and control of work assignment, prices charged customers, mileage rates, and most meaningful details of the drivers' schedules and daily activities. Most importantly, drivers could only use the leased trucks to transport shipments for Refrigerated and the leases with Leasing would terminate if a driver were no longer working for Refrigerated, and that Respondents had the unilateral right to terminate the contracts on short notice. Claimants also argue that control retained by drivers was illusory, drivers had little

[1] For purposes of this motion, "Respondents" includes only Leasing and Refrigerated, not Moyes or Isaacson.

opportunity for profit or loss based on entrepreneurial skill and their success was dependent on Respondents, drivers could lease vehicles with little or no investment, Claimant drivers did not exercise special skill or initiative beyond those exercised by company drivers, the relationship between Respondents and drivers was not fixed in light of their open ended nature and Respondents' ability to terminate the contracts on short notice, and the work performed by drivers leasing vehicles was an integral part of Respondents' business.

Respondents dispute almost every one of Claimants' arguments. Respondents point out that the agreements between Refrigerated and Claimants were specifically "independent contractor agreements" in which the driver agreed to furnish a vehicle and all the labor necessary for the transportation of loads for Refrigerated, and each Claimant could accept or reject loads offered. Respondents argue that federal regulations required drivers to operate under Refrigerated's operating authority and many of the controls imposed on drivers are required by law or regulations. Respondents assert that all Claimants had the ability to determine the method, means, and manner of performing services under the agreements, and Claimants had far more choices than company drivers, along with additional responsibility and risk.

Claimants and Respondents cite and discuss numerous cases addressing the factors outlined above, asserting the facts and conclusions of some cases support their positions and distinguishing the cases relied upon by the other side. The Arbitrator concludes that the cases are helpful in providing context to the application of the FLSA to the facts of this case, but are not conclusive given the fact-specific analysis required.

The Arbitrator also concludes that there is no genuine issue as to any material fact that precludes a judgment as to whether Claimants are employees under the FLSA. There are many variations between the Claimants, but the essential facts of their relationship with Respondents is not seriously disputed. Some drivers are more successful than others, and some are given considerably more freedom in operations than others, but any differences are primarily the result of working more or being given more opportunities by Respondents. Under the facts of this case, the Arbitrator concludes that the differences between Claimants are not genuine issues of material fact precluding summary judgment.

Applying the factors outlined above, and the economic realities based on the totality of the circumstances, the Arbitrator concludes that Claimants are employees of Respondents for purposes of the FLSA. Most importantly, each Claimant has both a lease with Leasing and a contractor agreement with Refrigerated. Combined, these two agreements and the actual operations of Respondents give effective control of Claimants' work to Respondents. Claimants do not own their own vehicles and cannot simply stop working for Refrigerated and commence working for a different trucking company. To the extent drivers are given control over certain operational decisions, the economic realities of having to make the lease payments and meeting other expenses that Respondents have shifted to Claimants makes such control, as Claimants assert, illusory.[2]

[2] For this reason, the Arbitrator concludes that the party's disagreement as to the legal standard – "right to control" or "actual control" – is irrelevant. The economic realities gave Respondents' actual control by virtue of the rights and obligations created by the contracts even when it appeared that Claimants had choices.

As Respondents' own expert acknowledges, "[w]hile controlling expenses is important, the biggest driver of profit and loss is on the revenue side. Simply put, Owner Operators who fail to keep their trucks utilized will make less money." In other words, drivers will be more successful if they work more. The economic realities of the leases with drivers encourage and reward drivers who work more, but doing so does not lessen Respondents' control over their activities. If anything, it increases it.

Addressing the specific factors outlined above, Respondents control the manner in which the work is performed. Refrigerated assigns jobs and determines how much drivers will be paid for the jobs. The economic reality of the leases with Leasing effectively control how much drivers have to work because of the expenses imposed on drivers by the leases. While someone can be an independent contractor even if working only for one customer or client, in this case the essential tool of the business, the truck itself, is effectively controlled by the customer. As noted above Claimants cannot take their trucks and go to work for another trucking company. Taking these facts into account, the Arbitrator agrees with Claimants that the right to take time off, right to decline loads, right to choose where to purchase fuel and maintenance, right to choose the delivery route, and other similar rights are of little significance.

Respondents also argue Claimants' right to hire others to drive for them, and to lease more than a single truck, shows Claimants have more control than would an employee. Claimants respond that these rights are only significant if the contribute to a driver's ability to stand as an independent economic entity. The Arbitrator agrees with

Claimants. Hiring another driver or leasing another truck did not diminish the control exercised by Respondents.

The Arbitrator also finds that the second factor, the opportunity for profit or loss depending on managerial skill, favors finding Claimants are employees. As noted above, the biggest driver of profit or loss is on the revenue side. Respondents control the revenue side by controlling work assignments. Claimants can make more money by working more, but as noted in *Baker* "plaintiffs' ability to maximize their wages by 'hustling' new work is not synonymous with making a profit." Pick-up and delivery dates, prices, maximum speeds and time behind the wheel are set by the trucking company or federal regulations, so drivers have only limited ability to increase revenues except as allowed by Respondents.

As for investment, Claimants could enter into a lease with no money down and Refrigerated would finance the costs of operation such as insurance, permits, and fuel. Claimants did not own the trucks and could not retain them to go to work for another trucking company without making significant additional payments. While doing work for Refrigerated, however, there was no investment required except their time. The lease obligations and the potential costs associated with early termination were significant, but the economic realities show that these obligations were less evidence of investment by Claimants than of control by Respondents over Claimants. The result is no different for Claimants hiring helpers or leasing more than one truck. The driver may have taken on more responsibility and risk, which are facts that are more indicative of that driver not being an employee, but the essential relationship between the individual Claimant and

Respondents did not change. Consequently, this factor favors finding Claimants to be employees.

Whether the service rendered requires a special skill is a closer question. As many cases show, drivers can be independent contractors. Nevertheless, the persuasive cases finding drivers to be independent contractors involved drivers who owned their own vehicles, or were allowed to drive for and collect money from a variety of customers. In those cases any special skill went beyond being a driver. In this case, some drivers benefit from their ability to maximize utilization of their vehicles by working closely with and for Respondents, but for most Claimants the skill required to do their job is no different than what is required of company drivers.

The degree of permanence of the working relationship is also a closer question. Although Claimants each have contracts, the working relationship is not actually for a fixed term or for the time necessary to complete a specific task. Claimants can expect to continue to do work for Refrigerated as long as they do a good job completing the shipments. Respondents have the right to terminate the agreements on short notice, which may give claimants more rights than an at-will employee would have, but not by much. The Arbitrator concludes that this factor favors finding Claimants to be employees.

The final factor is whether the services rendered are an integral part of the business. In this case the business is transporting goods by truck. Drivers are essential to this business. For the most part, Claimants are indistinguishable from company drivers.

Under these circumstances, the Arbitrator concludes that this factor favors finding that Claimants are employees.

Taking all of these factors into account, and looking at the totality of the circumstances and the economic realities, the Arbitrator concludes that Claimants are entitled to summary judgment that they were employees of Respondents for purposes of the FLSA.

With regard to Respondents' Evidentiary Objections to Declarations of [redacted] Submitted in Support of Claimants' Motion for Summary Judgment, the objections are overruled. The Arbitrator has, however, considered the objections in according weight to the statements objected to in the declarations.

Therefore, good cause appearing,

IT IS ORDERED that Claimants' Motion for Summary Judgment as to whether they were employees of Respondents for purposes of the Fair Labor Standards Act is granted.

DATED: October 26, 2016.

PATRICK IRVINE
ARBITRATOR

11666583