AMERICAN ARBITRATION ASSOCIATION

GABRIEL CILLUFFO, et al, Claimants, v. CENTRAL REFRIGERATED SERVICE, INC., CENTRAL LEASING, INC., JON ISAACSON and JERRY MOYES, Respondents.	77 160 00126 13 PLT (Collective Matter) ORDER

Claimants Gabriel Cilluffo, Kevin Shire, and Bryan Ratterree, individually and on behalf of others similarly situated (collectively "Claimants"), and Respondents Central Refrigerated Service, Inc., Central Leasing, Inc., Jon Isaacson and Jerry Moyes (collectively "Respondents") were asked to address the following questions:

1. What, if any, findings or rulings by the U.S. District Court in case number EDCV 12-00886 VAP, are binding on the Arbitrator in his conduct of the arbitration?

2. Whether a collective arbitration is authorized or required by the agreements between the parties, or other authority?

3. Which rules of the American Arbitration Association apply to this proceeding?

4. How will fees and expenses of the arbitration be allocated between the parties under the applicable rules and/or the agreements between the parties?

The parties filed detailed briefs regarding these issues. A telephonic hearing was held on November 25, 2013, during which counsel for the parties made additional arguments. Having considered the arguments of the parties, the Arbitrator rules as follows.

I. The District Court's Order that Claimants' FLSA Claims be Collectively Arbitrated is Binding on the Arbitrator.

Respondents cite numerous authorities for the proposition that whether an arbitration should be conducted as a class or collective arbitration is an issue that is properly left to the arbitrator. Nevertheless, the United States Supreme Court has "not yet decided whether the availability of class arbitration is a question of arbitrability." *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068, n. 2 (2013). Moreover, the Arbitrator reads the trend in the case law to be for courts to decide the class issue, which is a fundamental question relating to the identity of the parties to an arbitration, unless the parties agreement to submit the issue to an arbitrator is "clear and unmistakable." *Id.*; *see also Reed Elsevier, Inc. v. Crockett,* 734 F.3d 595, 598 (6th Cir. 2013).

In any event, however the issue is ultimately resolved by the courts, in this case the district court specifically ordered the Fair Labor Standards Act ("FLSA") claims be collectively arbitrated. Whether correct or not, the Arbitrator has no authority to ignore that order. Respondents cite cases where appellate courts have remanded the issue for determination by an arbitrator, but appellate courts have the authority to overturn the rulings of trial courts. An arbitrator does not.

II. The District Court's Determination that Claimants are Employees for Purposes of the Federal Arbitration Act Exemption is Not Binding on the Arbitrator for FLSA Purposes.

For the reasons stated by Respondents, the issue of whether Claimants are employees for FLSA purposes was not decided by the district court. During oral argument, counsel for Claimants agreed.

III. The Arbitrator Independently Determines that the Parties Consented to Collective Arbitration.

As noted above, the district court ordered collective arbitration and that order is binding on the Arbitrator. Because of that binding order, it is not technically necessary for the Arbitrator to independently determine whether the contracts between the parties provide for collective arbitration. Nevertheless, the Claimants argue that the Arbitrator can do so, and the Respondents argue the Arbitrator should do so. Given the uncertain state of the law on whether the issue should be decided by a court or an arbitrator, and in the interests of judicial and arbitration economy, the Arbitrator will address the issue. After careful consideration, the Arbitrator concludes that the contracts allow collective arbitration.

The arbitration agreements between the parties read in relevant part:

> Any dispute (including a request for preliminary relief) arising in connection with or relating to this Agreement, its terms, or its implementation including any allegation of a tort, or of breach of this Agreement, or of violations of Applicable Law, including by not limited to the DOT Leasing Regulations, will be fully and finally resolved by arbitration in accordance with (1) the Commercial Arbitration Rules (and related arbitration rules governing requests for preliminary relief) of the American Arbitration Association ("AAA"); (2) the Federal Arbitration Act (ch. 1 of tit. 9 of the United States Code, with respect to which the parties agree that this is not an exempt "contract of employment") or if the Federal Arbitration act is held not to apply, the arbitration laws of the State of Utah; and (3) the procedures that follow. Notwithstanding anything to the contrary contained or referred to herein , no consolidated or class arbitrations will be conducted. If a court or arbitrator decides for any reason not to enforce this ban on consolidated or class arbitrations, the parties agree that this provision, in its entirety, will be null and void, and any disputes between the parties will be resolved by court action, not arbitration.

These agreements broadly apply to "any" dispute, which must include any FLSA claim. Because the FLSA includes both individual and collective claims, the arbitration clause necessarily applies to both.[1]

Respondents argue the exclusion of any "consolidated or class arbitrations" also applies to "collective" claims. This argument almost certainly reflects Respondents' subjective intent as to the meaning of the agreements. Nevertheless, the issue is what the agreements actually say. The agreements specifically refer to class and consolidated actions, so this is not a case where the agreement between the parties is silent on the issue of class arbitration. The agreements here do not, however, extend the exclusion to "collective" actions, which are distinct from class and consolidated actions, and specific to the FLSA.[2] Respondents argue that they wrote the agreements to make Claimants be independent contractors, so it was unnecessary to include any reference to "collective" actions or any other employee claims. This argument actually goes against Respondents' position, because it shows that the exclusion clause was never intended to apply to

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[1] The Arbitrator rejects the argument that the FLSA preempts the application of the Utah arbitration act, or that cases interpreting the Federal Arbitration Act are not persuasive authority in interpreting the Utah law. The Arbitrator also rejects the arguments based on the National Labor Relations Act. *See, e.g., D.R. Horton, Inc. v. NLRB*, 2013 WL 6231617 (5th Cir. Dec. 3, 2013).

[2] Even Supreme Court justices have recognized the distinction between an "opt-in" and "opt-out" proceeding. *See Oxford Health Plans*, 133 S.Ct. at 2071-72 (Alito, J., concurring) ("Accordingly, at least where absent class members have not been required to opt *in*, it difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used.").

"collective" actions. Consequently, the provision requiring arbitration of "any" dispute applies to collective claims and actions.

The Arbitrator recognizes that Respondents can easily revise future agreements to exclude collective arbitrations, and that allowing a collective arbitration in this matter reflects what is arguably a gap in the existing provision. Nevertheless, the Arbitrator must interpret the language agreed to by the existing parties, including the gaps. As written, the agreements allow for a collective arbitration for those parties who opt-in.

IV. This Arbitration Will Be Conducted Under the Employment Rules.

The agreements between the parties make specific reference to the Commercial Arbitration Rules. When the arbitration demand was filed with the AAA it was processed under the AAA's Employment Rules. Respondent's objected, arguing the specific terms of the agreements required use of the Commercial Rules. The two sets of rules cross-reference each other in ways intended to have the appropriate set of rules apply to different claims.

In this case, the FLSA claims are employment claims. The Claimants argue they are not independent contractors, but are employees for FLSA purposes. Simply asserting they are employees does not make it a fact. Equally, however, simply applying the Employment Rules will not make it any more likely that the Arbitrator will determine that Claimants are employees. Under these circumstances, the Employment Rules apply to this action.

The fact that the agreements specifically refer to the Commercial Rules does not require a different result. As noted above, Respondents did not consider Claimants to be

employees, so the agreements did not address issues relating to employment. Consequently, the Arbitrator does not interpret the reference to the Commercial Rules as intended to expressly exclude the application of a different set of AAA rules when appropriate.

V. Fees.

The agreements provide:

> Each party will pay its own AAA arbitration filing fees and an equal share of the fees and expenses of the arbitrator, provided that if CONTRACTOR owns, leases (to COMPANY and other motor COMPANYs combined), or controls only one commercial motor vehicle, COMPANY will pay the full fees and expenses of the arbitrator as well as (i) the full arbitration filing fee, if COMPANY is the claimant, or (ii) the portion of the arbitration filing fee that exceeds the filing fee then in effect for civil actions in the United States district court for the district that includes Salt Lake City, Utah, if CONTRACTOR is the claimant. In all other respects, except to the extent otherwise determined by law, the parties will be responsible for their own respective arbitration expenses, including attorneys' fees.

The Arbitrator first notes that he does not control what fees are charged by the AAA, or how they are calculated. The Arbitrator may allocate fees and costs between the parties, but AAA fees are determined by the AAA.

Respondents argue they are not required to pay any fees for a collective arbitration. Given the federal district court order that the claims be arbitrated collectively, and the Arbitrator's independent determination that the agreements allow collective arbitrations, the Arbitrator rejects this argument.

Furthermore, the Arbitrator interprets the agreements as providing for Respondents to pay the full fees and expenses of the arbitrator for arbitrations involving Claimants who lease only one commercial vehicle, even if the individual claimants are

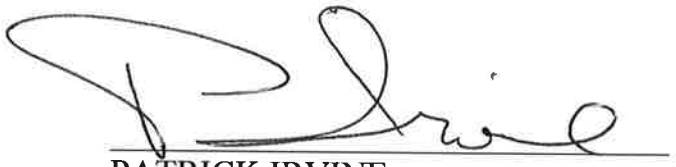
participants in a collective arbitration. Claimants represent that all of the claimants in this arbitration leased only one vehicle. Respondents state that in district court at least on claimant leased two vehicles. If Claimants are correct, all fees and costs of the Arbitrator will be paid by Respondents. If it is determined that any of Claimants, or any future claimants opting-in, lease more than one vehicle, a proportionate share of the fees and costs may be allocated to them under the agreements.

In light of the above rulings,

IT IS ORDERED that this matter will proceed as a collective arbitration under the AAA Employment Rules.

IT IS FURTHER ORDERED that the parties will confer to develop a joint scheduling order for this matter. The parties will notify the Arbitrator of their agreement, and any matters that they could not reach agreement to, on or before December 31, 2013. If necessary, a telephonic conference will be scheduled to discuss scheduling after January 5, 2014.

DATED: December 9, 2013.



PATRICK IRVINE
ARBITRATOR