United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 18, 2015

TO: Olivia Garcia, Regional Director
Region 21

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pacific 9 Transportation, Inc.
Case 21-CA-150875

177-2414-0100-0000
177-2414-2200-0000
177-2484-5067-3500
512-5006-5031-0000
512-5006-5050-0000
512-5006-5067-0000
512-5006-5053-0000
512-5006-5096-0000
512-5006-6767-0000

The Region submitted this case for advice as to whether the Employer's misclassification of its statutory employees as independent contractors in itself violates Section 8(a)(1). We conclude that the Region should issue a Section 8(a)(1) complaint alleging that the Employer's misclassification of its employees as independent contractors interfered with and restrained employees in the exercise of their Section 7 rights. Initially, we agree with the Region's conclusion that the Employer's drivers are statutory employees and not independent contractors. We further conclude that in the circumstances here, where the Employer told its drivers that they were independent contractors and had no right to form a union but treated them as employees in virtually every respect, the Employer's misclassification of its drivers as independent contractors interfered with and restrained the drivers in their exercise of Section 7 rights, in violation of Section 8(a)(1).

FACTS

Pacific 9 Transportation (Employer or Pac9) operates a drayage company servicing the ports of Los Angeles and Long Beach. Specifically, the Employer uses a fleet of approximately 160 trucks and 180 drivers to transport containers to and from the ports, rail locations, and customer warehouses.

The Employer requires each of its drivers to execute a Lease and Transportation Agreement (Agreement). The Employer presents prospective drivers a uniform pre-drafted Agreement without giving them an opportunity to negotiate over its terms.

The Agreement states that drivers are independent contractors and goes on to state that the "contractor will act solely in the capacity of an independent contractor and not as an employee, agent, joint venture or partner of carrier for any purpose whatsoever. Each party is aware of this classification and willingly accepts same as factually descriptive of their intended working relationship."[1]

The Agreement contains several terms that—on their face—purport to govern the drivers' relationship with the Employer:

1. Drivers may accept or decline any shipment offered and work at times the driver alone chooses;

2. Drivers are not required to rent or purchase trucks from the Employer, but if they do, the Employer deducts rental, parking, fuel, and maintenance fees from the driver's paychecks;

3. Drivers are compensated by the load—not by the hour—at a rate set by the Employer, not subject to negotiation; and

4. Drivers must acquire and maintain insurance for their trucks.

The Agreement provides that it shall be for a term of 119 days, but after that date shall continue unless cancelled by either party or the driver is "terminated or suspended."

The Employer's day-to-day operations differ from the purported terms set forth in the Agreement. The Employer maintains extensive control over the drivers' schedules through its dispatchers, who determine the drivers' schedules and hours of work. Dispatchers contact the drivers with their assignments. Drivers are assigned a single load at a time, and are not permitted to exchange loads or request specific loads from the dispatchers. Drivers who decline loads are likely to be passed over for additional work in the immediate future. Although drivers are permitted to accept work from other carriers, in actuality none do because of the Employer's scheduling requirements. Over ninety percent of the Employer's drivers rent their vehicles from the Employer. Additionally, the Employer holds insurance on all of its trucks contrary to the requirement in the Agreement that the drivers do so. When drivers begin working for the Employer, they are issued handbooks setting forth the Employer's expectations on driver job performance and trained on how to prepare and fill out the Employer's proprietary paperwork for each load. Furthermore, the Employer routinely issues memoranda to its drivers advising them of the Employer's expectations for its drivers and disciplines drivers for traffic infractions. Finally none

[1] Emphasis omitted.

of the Employer's drivers have created entities in order to operate as independent businesses.

Beginning in late 2012, the Union began a non-traditional organizing campaign among the Employer's drivers. As part of its campaign, the Union began filing individual wage and hour claims with the California State Labor Commissioner on behalf of the drivers, alleging that the Employer had misclassified them as independent contractors. To date, the Union has filed sixty individual misclassification claims.[2] Additionally, the Union has organized several strikes of the Employer's drivers lasting from several hours to a week. To date, the Union has been unable to obtain a neutrality agreement from the Employer, nor has it secured a sufficient number of authorization cards to file a representation petition.

On November 4, 2013, the Union filed a charge in Case 21-CA-116403 against the Employer alleging, among other things, discreet violations of Section 8(a)(1) for threatening drivers that the Employer would close its facility if its drivers supported the Union and interrogating a driver concerning other drivers' support for the Union. During the investigation of that charge, the Employer asserted that its drivers were not statutory employees and the Board did not have jurisdiction over them. The Region ultimately concluded that the Employer's drivers were statutory employees and that the Employer's conduct violated Section 8(a)(1).

On February 25, 2014, the Region informed the Employer of its intent to issue complaint, absent settlement, in Case 21-CA-116403 and its determination that the Employer's drivers were statutory employees. On March 19, 2014, the Employer entered into an informal settlement agreement that provided for a standard "Notice to Employees" posting remedying the alleged violations of Section 8(a)(1).

On March 28, 2014, the Employer distributed a memorandum to its drivers with their paychecks. The memorandum stated:

> Since last Friday (03/21/2014), there have [sic] been news about [sic] Pac9's relations with its drivers have been changed. We would like you to know that this is not true.
>
> - Pac9 only has Owner Operators and IC Drivers under contract. Pac9 only contracts with owner operators and independent contractors.

[2] The Labor Commissioner has issued decisions on approximately six of these claims, finding in each instance that the claimant was misclassified and is an employee under the relevant statute.

- Pac9 [d]oes not have any employee drivers.

- Pac9 did settle with the NLRB last week. The agreement was Pac9 employees (not owner operators or independent contractors) have the right to form a union if they chose to.

- [The Union has] taken this settlement and used it to make allegations that are completely false and without fact [sic], which they hope will draw attention and support for their unsuccessful organizing campaign.

- Pac9 did not admit to the NLRB of any wrong doing [sic] nor incurred any fines and penalties.

The Region requested that the Employer retract its memorandum or else it would invoke the default provisions of the informal settlement agreement. The Employer refused to comply. On August 29, 2014, after the Region's negotiations with the Employer reached an impasse, the Region revoked the settlement agreement and issued complaint in Case 21-CA-116403 but determined not to invoke the default provisions because of an apparent misunderstanding about the terms of the settlement.

In preparing for the administrative hearing in Case 21-CA-116403, the Administrative Law Judge informed the Region, the Employer, and the Union that he would only hear evidence as to the employee status of the two individual drivers who heard the alleged Section 8(a)(1) statements and would not reach the issue of whether all of the Employer's drivers are statutory employees. On April 24, 2015, the Union filed the instant charge alleging that the Employer's misclassification of its drivers as independent contractors in itself violates Section 8(a)(1).

ACTION

We conclude that the Region should issue a Section 8(a)(1) complaint alleging that the Employer's misclassification of its employees as independent contractors interfered with and restrained employees in the exercise of their Section 7 rights. Initially, we agree with the Region's conclusion that the Employer's drivers are statutory employees and not independent contractors. We further conclude that in the circumstances here, where the Employer told its drivers that they were independent contractors and had no right to form a union but treated them as employees in virtually every respect, the Employer's misclassification of its drivers as independent contractors interfered with and restrained the drivers in their exercise of Section 7 rights, in violation of Section 8(a)(1).

A. The Employer's drivers are employees within the meaning of Section 2(3)

In *FedEx Home Delivery,* the Board recently reaffirmed that in determining whether a particular worker is an independent contractor or an employee under Section 2(3) of the Act, the Board will apply the traditional common-law factors enumerated in the Restatement (Second) of Agency § 220, with no single factor being determinative.[3] Thus, the following factors are relevant:

> (a) The extent of control which, by the agreement, the [employer] 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.
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> (d) The skill required in the particular occupation.
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> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
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> (f) The length of time for which the person is employed.
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> (g) The method of payment, whether by the time or by the job.
>
> (h) Whether or not the work is part of the regular business of the employer.
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> (i) Whether or not the parties believe they are creating the relation of master and servant.
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> (j) Whether the principal is or is not in the business.[4]

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[3] 361 NLRB No. 55, slip op. at 2 (Sept. 30, 2014) (concluding that package delivery drivers were statutory employees rather than independent contractors).

[4] *Id.* (quoting Restatement (Second) of Agency § 220 (1958)).

The Board also clarified that it will consider "whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*."[5] The "independent-business factor" includes consideration of whether the putative contractor has a significant entrepreneurial opportunity, has a realistic ability to work for others, has a proprietary or ownership interest in his or her work, and has control over important business decisions, such as scheduling of performance, hiring and assignment of employees, equipment purchases, and investment of capital.[6] The Board also noted that when applying these common-law agency factors and determining employee status under Section 2(3), it will "construe the independent-contractor exclusion narrowly" so as to not "deny protection to workers the Act was designed to reach."[7]

In the instant case, the evidence overwhelmingly demonstrates that the Employer's drivers are statutory employees and not independent contractors. Indeed, the facts involving the drivers here are strikingly similar to those relating to the *FedEx Home Delivery* drivers. First, the Employer exerts extensive control over its drivers on a day-to-day basis. Thus, its dispatchers set the drivers' schedules and hours of work and assign a single load at a time. Drivers are not allowed to request a specific load or trade loads with one another, and they are penalized with loss of work if they refuse a specific load.[8] Second, drivers "are fully integrated into [the Employer's] organization and receive 'considerable assistance and guidance from the company and its managerial personnel.'"[9] Third, the Employer effectively supervises the performance of work through standards set forth in a handbook and numerous memoranda, and drivers are subject to discipline or termination.[10] Fourth, drivers

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[5] *Id.*, slip op. at 11 (emphasis in original).

[6] *Id.,* slip op. at 12.

[7] *Id.*, slip op. at 9–10.

[8] *See id.,* slip op. at 12–13 (FedEx controls the number of packages delivered, the stops to be made, and the time in which the deliveries were to be). *See also Time Auto Transportation,* 338 NLRB 626, 637 (2002) (fact that drivers were assigned one load at a time and were penalized for refusing a load found to be indicia of employee status), *affirmed,* 377 F.3d 496 (6th Cir. 2004).

[9] *FedEx Home Delivery,* 361 NLRB No. 55, slip op. at 13 (quoting *United Insurance Co. of America,* 390 U.S. 254, 259 (1968)).

[10] *See id.* (FedEx essentially directs the drivers' performance via the enforcement of rules and tracking mechanisms and can impose disciplinary measures).

are not required to have any special training or skills, other than a commercial driver's license, and receive all necessary skills through Pac9 training.[11] Fifth, although most of the drivers arguably provide their "own" vehicles, over ninety percent of those vehicles are rented from, insured by, and maintained by the Employer, and so "aspects of the instrumentalities factor cut both ways[.]"[12] Sixth, the drivers in effect "'have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.'"[13] Seventh, the Employer establishes and controls the drivers' rates of compensation, which are nonnegotiable, and also fixes the rates charged to customers.[14] Eighth, the drivers' work is not only part of the Employer's regular business, the work the drivers perform is literally the entirety of the Employer's regular business.[15] Ninth, although the parties execute an agreement that purports to create an independent-contractor relationship, and the drivers acknowledge that characterization in the agreement, "the drivers do not have an opportunity to negotiate over that term . . . [and] the intent factor is therefore inconclusive."[16] Tenth, the Employer is in the same business as the drivers, so that "this factor weighs in favor of employee status."[17]

Finally, the evidence tends to show that the drivers are not rendering services as part of an independent business. They have no significant entrepreneurial

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[11] *See id.* (drivers receive all necessary skills via two weeks of training provided by FedEx).

[12] *Id.*, slip op. at 13–14 (FedEx drivers own their own vehicles but FedEx plays a primary role in dictating vehicle specifications and facilitating the transfer of vehicles between drivers).

[13] *Id.,* slip op. at 14 (quoting *NLRB v. United Insurance Co. of America,* 390 U.S. at 259).

[14] *See id.* (FedEx establishes, regulates, and controls the rate of compensation and rates charged to customers).

[15] *See id.* (drivers "perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business." (quoting *Roadway Package System, Inc.,* 326 NLRB 842, 851 (1998)).

[16] *See id.* (noting as well, however, that a majority of the FedEx drivers had voted to be represented as employees in a collective-bargaining unit).

[17] *Id.,* slip op. at 15.

opportunity—they do not set their own rates or have the option of selling routes. They also have no realistic opportunity to work for others and do not do so. Indeed, drivers lose work from the Employer if they turn down a dispatcher's assignment. Lastly, they have no control over important business decisions. Instead, the Employer "has total command over its business strategy, customer base and recruitment, and the prices charged to customers" and "unilaterally drafts, promulgates, and changes the terms of its Agreement with drivers[.]"[18]

In sum, under *FedEx Home Delivery,* the Employer's drivers are employees within the meaning of Section 2(3).

B. The Employer violated Section 8(a)(1) by misclassifying its drivers as independent contractors

Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of" employees' Section 7 rights.[19] Although the Board has never held that an employer's misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1), there are several lines of Board decisions that support such a finding.

First, the Board has held that an employer violates Section 8(a)(1) when its actions operate to chill[20] or curtail future Section 7 activity of statutory employees.[21] In *Parexel International*, the Board made clear that an employer's "preemptive strike to prevent [an employee] from engaging in activity protected by the Act" violates Section 8(a)(1) because of its chilling effect on employees' future exercise of their

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[18] *Id.*

[19] 29 U.S.C. § 158(a). In contrast, an employer does not violate the Act if it interferes with, restrains, or coerces the exercise of what would otherwise constitute Section 7 rights by individuals who are not statutory employees. *See Wal-mart Stores, Inc.* 340 NLRB 220, 223 (2003) (employer's instruction to group of 22 putative Section 2(11) supervisors that they could not engage in union activity only violated Section 8(a)(1) with respect to the four who were actually statutory employees).

[20] *Cf. Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (maintenance of rules that would reasonably tend to chill employees in the exercise of their Section 7 rights violates Section 8(a)(1)), *enforced mem.*, 203 F.3d 52 (1999).

[21] *See, e.g.*, *Parexel International, LLC*, 356 NLRB No. 82, slip op. at 3–4 and cases cited at n.9 (Jan. 28, 2011) (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees).

Section 7 rights.[22] Even if an employee has no history of Section 7 activity, if the employer acts to prevent that employee from engaging in protected activity in the future, "that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more."[23] In *Parexel,* the Board noted that it is the suppression or chilling of future protected activity that lies at the heart of unlawful employer retaliation against past protected activity.[24] Similarly, Board precedent holding unlawful an employer's adverse action taken on the mistaken belief that an employee engaged in protected concerted activity is premised on the notion that the chilling of future protected activity violates the Act.[25]

Second, employer statements to employees that engaging in Section 7 activity would be futile violate Section 8(a)(1).[26] Thus, in *Sisters' Camelot*, the Board found that the employer violated Section 8(a)(1) by indicating that union organizing would be futile when it informed its canvasser employees, who had been misclassified as

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[22] *Id.*, slip op. at 4.

[23] *Id.*

[24] *Id.*

[25] *See, e.g., United States Service Industries, Inc.*, 314 NLRB 30, 31 (1994) ("[A]ctions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engaged in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity." (internal quotation marks omitted)), *enforced,* 80 F.3d 558 (D.C. Cir. 1996) (unpublished table decision); *Metropolitan Orthopedic Associates, P.C.*, 237 NLRB 427, 427 n.3 (1978) ("The discharge of 4 employees in a unit of 13 employees because of Respondent's belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act"). *See also Parexel International, LLC,* 356 NLRB No. 82, slip op at 4, relying also upon *Majestic Molded Products v. NLRB,* 330 F.2d 603, 606 (2d Cir. 1964), and cases cited therein (holding unlawful a mass discharge undertaken without concern for whether all of the individual employees were engaged in protected activity).

[26] *See, e.g.*, *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, slip op. 1 (Dec. 16, 2014) (concluding that employer's statement that employees' grievance would go nowhere constituted unlawful threat of futility); *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (employer's statement that collective bargaining would not result in employees obtaining benefits other than what the employer chose to give them and unionization would lead employer to choose to give them less violated Section 8(a)(1), because employees "could reasonably infer futility of union representation.").

independent contractors and were attempting to organize, that it would never accept an employer-employee relationship with its workers.[27]

Third, the Board has also found misstatements of law to constitute an unlawful interference with employees' Section 7 rights if the statement reasonably insinuates adverse consequences for engaging in Section 7 activity.[28] For example, employer statements that suggest that employees could "lose their jobs" as a consequence of engaging in an economic strike inaccurately describe employee rights under *The Laidlaw Corporation*[29] and therefore constitute unlawful threats of reprisal.[30]

In the instant case, the Employer's misclassification of its statutory employees as independent contractors operates as a restraint on and interference with its drivers' exercise of their Section 7 rights. The Employer asserts in the language of its Agreement with its drivers that they are independent contractors, but even assuming that the Agreement arguably create an independent-contractor relationship, the

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[27] 363 NLRB No. 13, slip op. at 6 (Sept. 25, 2015).

[28] *See, e.g.*, *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617, 618, n.22 (2007) (employer's flyer that misled employees by creating impression that employees would have to give up customary wage increases as a "lawful and ineluctable consequence" of bargaining violated Section 8(a)(1)); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 799 n.2 (1980) (misstating law by implying that union would have right to demand that employees pay union fines and assessments and accede to contractual dues checkoff in order to retain their jobs, unlawful in context of other threats), *enforced*, 679 F.2d 900 (9th Cir. 1982) (table).

[29] In *The Laidlaw Corporation*, 171 NLRB 1366, 1368–70 (1968), *enforced,* 414 F.2d 99 (7th Cir. 1969), the Board delineated the rights accorded to economic strikers: they remain employees if they have been permanently replaced before they make unconditional offers of reinstatement, and must be placed on a preferential hiring list and reinstated when substantially equivalent positions become available.

[30] *See Fern Terrace Lodge,* 297 NLRB 8, 8–9 (1989) (statement that permanently "replaced striker is not automatically entitled to his job back just because the strike ends" unlawful, because economic strikers are automatically entitled to their jobs back, or, if their job is unavailable, preferential hiring to similar openings); *Larson Tool,* 296 NLRB 895, 895–96 (1989) ("you could lose your job to a permanent replacement," without further explanation, unlawful); *Hajoca Corp.,* 291 NLRB 104, 106 (1988) (informing employees they would be permanently replaced and would "no longer have jobs" if they went on an economic strike held unlawful), *enforced*, 872 F.2d 1169, 1177 (3d Cir. 1989).

Employer does not abide by its terms. Further, the Employer continued to insist in its communications with drivers that they are independent contractors, even after the Region determined that the drivers are statutory employees. This conduct—treating the drivers as employees on a daily basis while continuing to insist that they are independent contractors—is without any legitimate business purpose other than to deny the drivers the protections that inure to them as statutory employees, and operates to chill its drivers' exercise of their Section 7 rights. The Employer's misclassification suppresses future Section 7 activity by imparting to its employees that they do not possess Section 7 rights in the first place.[31] The Employer's misclassification works as a preemptive strike, to chill its employees from exercising their rights under the Act during a period of critical importance to its employees—the Union's organizing campaign.

Furthermore, in light of its March 28, 2014 memo, the Employer's misclassification conveys that unionization would be futile.[32] Thus, that memo stated that the Employer "only contracts with owner operators and independent contractors[,]" that it "[d]oes not have any employee drivers[,]" and that only "employees (not owner operators or independent contractors) have the right to form a union[.]"[33] The Employer's continued misclassification of its drivers after it had purportedly settled prior unlawful activity also demonstrates to employees that resort to the Board's processes are futile.

Finally, in light of the Employer's extensive control over its drivers' day-to-day operations and its awareness that the Region already determined that its drivers are statutory employees, the Employer's continued insistence to its drivers that they are independent contractors is akin to a misstatement of law that reasonably insinuates adverse consequences for employees' continued Section 7 activity. Because independent contractors may lawfully be terminated for engaging in Section 7 activity, the Employer's continued insistence to its employees during a union organizing campaign that they are independent contractors is tantamount to the

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[31] *Cf. Parexel International, LLC*, 356 NLRB No. 82, slip op. at 4 (finding discharge violated Section 8(a)(1) because it was undertaken in order to be certain employee did not engage in future Section 7 activity).

[32] *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6.

[33] Although the memo was distributed to employees outside the 10(b) period, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period . . . ." *Local Lodge No. 1424 (Bryan Mfg.) v. NLRB,* 362 U.S. 411, 416 (1960).

Employer telling its employees that they engage in Section 7 activity at the risk of losing their jobs.

For these reasons, we conclude that on these facts, the Employer's misclassification of its employees as independent contractors acts to interfere with and restrain its employees in the exercise of their Section 7 rights. Accordingly, the Region should issue a Section 8(a)(1) complaint, absent settlement, alleging that the Employer's misclassification of its employees as independent contractors violates Section 8(a)(1).[34]

/s/
B.J.K.

[34] As a remedy for this violation, the Region should seek an order requiring that the Employer cease and desist from interfering with, restraining, or otherwise coercing its employees in the exercise of their Section 7 rights by communicating to its drivers that they are independent contractors and not employees within the meaning of the Act. The order should also require that the Employer take affirmative action to rescind any portions of its Agreements with its drivers that purport to classify them as independent contractors and to post the appropriate notice.