

1956

Salt Lake Transportation Co. v. Board of Review of the Industrial Commission of Utah, Department of Employment Security : Brief of Appellant

Utah Supreme Court

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Clerk, Supreme Court, Uta

In the

Supreme Court of the State of Utah

SALT LAKE TRANSPORTATION
COMPANY, a corporation,
Appellant,
vs.

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF
UTAH, DEPARTMENT OF EM-
PLOYMENT SECURITY,
Respondent.

Case No.
8442

BRIEF OF APPELLANT

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Respondent.

Case No.
8442

BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an appeal from a decision of the Board of Review of the Industrial Commission affirming a written opinion of L. Stanford Wooten, Appeals Referee of the Department of Employment Security, which held plaintiff responsible for payment of unemployment compensation taxes based on the earnings of drivers who leased cabs from Salt Lake Transportation Company.

For many years, Salt Lake Transportation Company has held nontransferable franchises from the Utah Public Service Commission, Interstate Commerce Commission and Salt Lake City to operate taxicabs, known as Yellow Cabs, in Salt Lake City and surrounding areas. It owns and maintains taxicabs and prior to March 1, 1955, employed drivers on a commission basis to operate its cabs, paying unemployment compensation taxes on such wages. Because of competitive conditions, on March 1, 1955, the company changed its method of operation. Since that date, cabs have been leased to drivers under the lease agreement set out in the Record, pp. 10-12. No wages are paid to the drivers. The drivers pay a daily rental for the cabs (R. 10, 21-22) and collect and retain all fares received from the customers without any accounting therefor to the company (R. 26). The company leases its cabs for either 6, 10 or 12 hours at a specified rental. In addition, the drivers keep a deposit of \$15.00 with the company to insure payment of rental and agree to be responsible for damage to the cabs up to \$50.00, to obey all federal, state and municipal laws, to accept the cab assigned by the company and not allow the cab to be driven by others (R. 10-11). Ordinary upkeep and maintenance of the cabs is the responsibility of the company (R. 11). The company provides a garage, maintains taxicab stands and furnishes a telephone and radio dispatching service. Public liability insurance is kept by the company. The only compensation received by the company for the cab and accompanying services is the specified rental plus whatever gas is purchased by the drivers from the company (the gas is sold at a discount) (R. 21-22).

Except in the case of irregular drivers (R. 24), the particular time when the cab is to be used by the driver is determined by mutual agreement and a so-called shift agreement (R. 13) is signed by the driver and made a part of the rental agreement. Each driver is furnished a short booklet giving certain advice and suggestions to the drivers (R. 18). These suggestions are not regulations of the company and there is no provision in the rental agreement or any other agreement between the company and the driver that requires the driver to conform to the recommendations and suggestions contained in the pamphlet. Since March 1, 1955, when the leasing arrangement was initiated, the labor union to which most of the drivers had theretofore belonged, has been dissolved and the company now has no contract with any labor union (R. 25).

When the company submitted its first quarter 1955 unemployment compensation report, no wages were reported for the drivers for the month of March. The company noted on the report "No taxicab drivers were employed during March. Taxicabs were leased to drivers". The Department of Employment Security thereupon investigated and on June 16, 1955, determined that the company should have reported "wages" of the drivers and made an order to that effect (R. 1-4). Thereafter, the plaintiff appealed to the Appeals Referee in the manner prescribed by law, a hearing was held and a decision was rendered September 2, 1955 (R. 40-44). A further appeal was taken to the Board of Review of the Department of Employment Security in the manner and within the time prescribed by law. The Board of Review thereafter considered the case and

on October 14, 1955, affirmed the decision of the Appeals Referee (R. 53), whereupon the company appealed to this court within the time and in the manner prescribed by law.

INTRODUCTORY STATEMENT

It is well settled that what constitutes an employer and employee under the Utah Unemployment Compensation Act is determined by the statutory rules alone and not by the common law definitions of master and servant. *Globe Grain & Milling Co. v. Indus. Com.*, 98 Utah 36, 91 P. 2d 512, reh. den., 97 P. 2d 582; *Creameries of America v. Indus. Com.*, 98 Utah 571, 102 P. 2d 300; *Fuller Brush Co. v. Indus. Com.*, 99 Utah 97, 104 P. 2d 201, 129 A. L. R. 511; *Singer Sewing Mach. Co. v. Indus. Com.*, 104 Utah 175, 134 P. 2d 479, reh. den., 104 Utah 194, 141 P. 2d 694; *Northern Oil Co. v. Indus. Com.*, 104 Utah 353, 140 P. 2d 329. These statutory rules are found in Secs. 35-4-22 (j) (1) and (5), U. C. A. 1953, and require a showing, first, that the alleged employee performed services for the alleged employer, second, that such services were performed for wages or under a contract of hire and, third, that such services for wages or under a contract for hire are not excluded from the operation of the act by the tests specified in 35-4-22 (j) (5) (A, B & C). See the above cited cases and in addition *National Tunnel Mines Co. v. Indus. Com.*, 99 Utah 39, 102 P. 2d 508; *Powell v. Indus. Com.*, 116 Utah 385, 210 P. 2d 1006; *Johanson Bros. Builders v. Bd. of Review*, 118 Utah 384, 222 P. 2d 563; *Leach v. Bd. of Review*, (Utah), 260 P. 2d 744. We are here not concerned with the third element,

the so-called A, B, C exclusionary test, and will limit our brief to a discussion of the first two questions, to-wit, did the lessees of plaintiff's cabs perform services for plaintiff and, if so, were such services performed for wages?

STATEMENT OF POINTS

POINT I

THE LESSEES OF PLAINTIFF'S CABS DID NOT PERFORM SERVICES FOR PLAINTIFF.

POINT II

THE LESSEES OF PLAINTIFF'S CABS DID NOT RECEIVE WAGES FROM PLAINTIFF.

ARGUMENT

POINT I

THE LESSEES OF PLAINTIFF'S CABS DID NOT PERFORM SERVICES FOR PLAINTIFF.

It has been recognized by this Court as well as the courts of other jurisdictions that service performed essentially for one's self is not service performed for an employer covered by the act. The most common instances of such a situation are where a sale or a lease is involved. Thus a Fuller Brush salesman was held not covered by the Act since he purchased the products he sold from the company and thereafter worked free from control of the company.

Fuller Brush Co. v. Indus. Com., supra. It has also been recognized that a lessor-lessee relationship is not a service relationship under the Act (*National Tunnel Mines Co. v. Indus. Com.*, supra; *Combined Metals Reduction Co. v. Indus. Com.*, 101 Utah 230, 116 P. 2d 929; *Powell v. Indus. Com.*, supra) although in none of these cases did the facts show such a relationship. The exclusion of lessees from the coverage of the Act has also been recognized and applied in other jurisdictions. See Anno. 152 A. L. R. 520, 164 A. L. R. 1411, 10 A. L. R. 2d 369.

In *Magruder v. Yellow Cab Co.*, (C. C. A. 4th 1944), 141 F. 2d 324, 152 A. L. R. 516, affirming 49 F. Supp. 605, the precise question here involved was discussed. There, as here, the company leased cabs to drivers at a flat rate per day. The driver collected and retained all fares and made no accounting therefor. Drivers were free to drive where and when they wished within the city limits, but were required to obey all laws and regulations concerning the operation of taxicabs. Public liability insurance was maintained by the company. The court held this relationship to be merely a lease and not an employment under the Social Security Act.

In *U. S. v. Davis*, (C. A. Dist. Col., 1946), 154 F. 2d 314, the same result was reached. The facts were virtually identical to the facts in the Yellow Cab case and this case. It should be noted that the Davis case involved a company who, like plaintiff, maintained a central switchboard for the convenience of its lessees, restricted use of the cabs to the city limits and required lessees to keep trip records as provided by law.

See also *New Deal Cab Co. v. Fahs*, (C. A. 5th, 1949), 174 F. 2d 318; *Economy Cab Co. v. Fahs*, (C. A. 5th, 1949), 174 F. 2d 321; and *Co-op Cab Co. v. Allen*, (D. C. Ga., 1947), 82 F. Supp. 695.

In the case of *Jones v. Goodson*, (C. C. A. 10th, 1941), 121 F. 2d 176, the 10th Circuit reached a contrary result because the control of the lessees was much greater. The drivers were required to buy all oil and gas from the company, were subject to discharge at will for disorderliness, violation of city ordinances or overcharging. The drivers were required to inform the company of their whereabouts at least once each hour. Such strict control was held to create an employment situation.

The Goodson case was distinguished in both the Yellow Cab and Davis cases and in the later 10th Circuit case of *Woods v. Nicholas*, (C. C. A. 10th, 1947), 163 F. 2d 615. In the Nicholas case, the court emphasized that the taxpayer "did not have any right of control in respect to the method and manner in which [the lessees] did their work." Among other things, the lessee was not controlled as to where or when he drove, was paid no wage by the taxpayer and received and retained all fares from customers without accountability. "[The taxpayer] merely furnished the license and certificate of convenience and necessity, as well as certain facilities, for which he was compensated [by the lessee-drivers]." In holding that an employment relationship did not exist, the court did not apply the common law principles of master-servant, but treated the question as being governed by the purposes sought to be accomplished

by the Social Security Act, that is, a statutory definition rather than a common law definition of employee was used.

That lack of control is an important element in determining the existence of a service or non-service relationship is established by the decisions of this court. *Fuller Brush Co. v. Indus. Com.*, supra; *Singer Sewing Mach. Co. v. Indus. Com.*, supra; *National Tunnel Mines Co. v. Ind. Com.*, supra (where a lessor-lessee relationship was involved); *Powell v. Ind. Com.*, supra. Note particularly Justice Wolfe's concurrence in *Combined Metals Reduction Co. v. Ind. Com.*, supra, where a detailed analysis of the elements of control was made.

The Appeals Referee conceded that "the company has sincerely attempted to reduce to a minimum the element of control in the performance of the service," (R. 43), yet implied that control was still present in that the company assigned vehicles, assigned shifts and required reports. An identical contention was made in *Party Cab Co. v. U. S.*, (C. A. 7th, 1949), 172 F. 2d 87, 10 A. L. R. 2d 358, a Social Security case. In answer, the court stated (10 A. L. R. 2d at 366) :

"The weakness of this argument on control lies in the fact that the elements relied upon by the Board are matters which concern the plaintiff's business rather than the services performed by the drivers. The matter of control which is material is that which the plaintiff exercised over the drivers during the period they were in possession of the cabs rather than what the plaintiff might do either prior or subsequent to such period. Considered in this light, any control exercised by the plaintiff was quite meagre."

Similarly, the company here exercises an extremely limited control of the drivers while they are in possession of the cabs. They are not required to wear uniforms, nor to remain at any specified place (Rental Agreement, Par. 6d, R. 12). So far as the company is concerned, the drivers can choose the most likely spot within the city for customers, leaving other cab stations unattended (R. 29, 30). The drivers are not required to accept any calls (Rental Agreement, Par. 6c, R. 12). They are not required to avail themselves of the telephone and radio dispatching service of the company (R. 22, 29). They may drive or not drive during the period of the lease, or for that matter, can use the cabs for their own personal use rather than in the carriage of passengers. They are not required to obey any rules and regulations of the company, although they are required to attend safety meetings. (However, such meetings are not, in fact, held, R. 27.) They are not required to purchase gasoline from the company, although they agree to do so whenever possible. They are not required to accept a shift assignment. That is a matter arrived at by mutual agreement (R. 23). They are required to obey the laws and regulations of the federal, city and state governments with respect to the operation of the taxicabs; yet that is a requirement imposed by operation of law, binding upon them regardless of any specification in the Rental Agreement. The only real limitation on the drivers while they are in possession of the cab is the restriction on out-of-town trips; yet this is merely a reasonable restriction to safeguard the company's ownership of the cab similar to the common provisions in conditional sales con-

tracts that the vehicle will not be taken outside the state. It should be noted that out-of-town is not merely outside the city limits, but a trip of 15 miles outside the city limits. Thus in practical operation, the driver is able to serve the principal area of business, that is, Salt Lake City and its suburbs, and will be governed by the restriction only in the rare case where a customer requires transportation for a greater distance.

Consideration should also be given to the fact that the company, under this method of operation, has no contract whatsoever with the customers who use the cabs. The drivers are not fulfilling a contract between the customers and the company as was the case in *Singer Sewing Machine v. Indus. Com.*, supra; *Creameries of America v. Indus. Com.*, supra; *Salt Lake Tribune v. Indus. Com.*, 99 Utah 259, 102 P. 2d 307; and *Leach v. Bd. of Review*, supra. Here the drivers themselves contract with the customers and the company has nothing to do with either the initiation or performance of such contracts.

The Appeals Referee emphasized that the advertising of cab service was done by the company and in the name of the company, and that the driver had nothing to do with this nor received any benefit from it. Certainly, more people are likely to use a Yellow Cab as opposed to some other cab after an advertising campaign is carried on and certainly this will benefit the drivers by increased patronage and thus increased driver profits. Such an arrangement can make no difference to the relationship of the parties. Indeed, it has the effect of confirming a more

definite lessor-lessee relationship. As stated by the District Court in *Magruder v. Yellow Cab Co.*, 49 F. Supp. at 609:

“The cab company’s public advertisements, uniform color scheme and maintenance of call boxes were an effective means of making popular its cabs *and thereby enabling it to lease or hire them to drivers on terms it deemed satisfactory.*” (emphasis added.)

See also *Martin v. Wichita Cab Co.*, 161 Kan. 510, 170 P. 2d 147 at 152.

In essence the business of the company has in fact changed from a business of providing taxicab service to the public to a business of leasing cabs to drivers who may or may not provide such service as their self-interest dictates. The Appeals Referee seemed to assume that because the city license and certificate of public convenience and necessity from the Public Service Commission is held by the company and is nontransferable, that the company could not change its business to that of leasing cabs. Such an argument ignores the actual facts of the situation. It is basically irrelevant, for the question to be determined here is the relationship between the company and the drivers, not the relationship between the company and the city and state. The company-driver relationship depends on the contract between the parties. *Magruder v. Yellow Cab Co.*, 141 F. 2d 324 at 326, 152 A. L. R. 516 at 520. As was stated in *Parks Cab Co. v. Annunzio*, 412 Ill. 549, 107 N. E. 2d 853 at 855:

“The Unemployment Compensation Act deals with realities of economic life. It is with these

same realities that we are concerned in determining questions which arise in the course of its administration. Issues as to status are determined by applying the terms of the statute to the facts as they exist * * *.”

and further,

“* * * the fact that the contract may have violated the city ordinances is not determinative of the actual relationship between Parks Cab and its drivers. We need not and do not decide whether there has been, in fact, a violation here. * * * In our view economic facts as they actually exist are determinative here.”

Even if the company is still considered to be in the taxicab business, that fact can make no difference to the relationship between the drivers and the company for this taxicab business can be operated by drivers who are not employees. As the court in *New Deal Cab Company v. Fahs*, supra, stated:

“But it is undeniable that the company itself was running a business of carrying passengers for hire rather than the mere casual rental of cars; for it had a city license so to do, and there would be little demand for its cars otherwise. But it could, if it chose, get the work done by independent contractors instead of by hired employees. This is in effect what it did, *but in a very loose way, because the drivers did not expressly agree to accomplish this work*. Self interest alone seems to have been relied on, for hauling passengers would be the driver's best source to make money, and to meet his positive obligation to pay rental and for gasoline.” (emphasis added.)

The Appeals Referee also considered that a service relationship existed because the lease was not a lease of specific property, that is, a particular cab was not leased but merely any cab available and assigned to the driver by the company. With all due respect to the Referee, we are unable to agree with this contention. Concededly, a true lease is not involved here for the correct nomenclature for a lease of personal property is a bailment (*Wasatch Livestock Loan Co. v. Nielson*, 90 Utah 331, 61 P. 2d 616 at 619), but there is no requirement that a bailment be for a specific piece of property. A bailment is merely a transfer of possession of personal property to be used by the transferee temporarily and returned by him in accordance with his agreement with the transferor. It could certainly not be contended that the lease of a "drive-it-yourself" car was any the less a lease because a specific car was not agreed upon in advance. Customers of such a business rent a car of a certain type or sometimes of a certain make, but rarely designate a specific car which they will lease. Similarly, the driver leases the use of a cab and when that cab is transferred to him he has a well established property right in the cab for the period of the bailment or lease. No such question has ever been raised in any of the cases concerning the question of employment as defined in the Social Security Act or Unemployment Compensation Acts. Indeed, such contracts have specifically been characterized as bailments. See *Magruder v. Yellow Cab Co.*, *supra*, where the court said:

"We see in this contract the hired use of a thing, the classical bailment known as *locatio rei*, only that and nothing more."

See also *Martin v. Wichita Cab Co.*, *supra*.

Should this court affirm the decision of the Department of Employment Security, a very unusual situation will exist. The Industrial Commission has already determined that the rental arrangement under which the company is now leasing cabs does not make the drivers employees of the company under the Workmens' Compensation Act. (*Bacell O. Angell v. Salt Lake Transportation Company*, Claim No. 5618, R. 14-17). To the same effect are *Rockefeller v. Industrial Commission*, (Utah), 197 Pac. 1038 and *Rose v. Black & White Cab Co.*, (Ark., 1953), 258 S. W. 2d 50. Is it not an anomalous situation, therefore, to require the company to provide unemployment benefits to the drivers and yet not compensate the same drivers in case they are injured or killed in the course of their driving? If public policy is to be considered, certainly the preference should be given to compensation for injury or death, rather than to compensation for mere unemployment.

Apart from this situation, the Department of Employment Security will itself be in a difficult position should the driver-lessees be considered within the Act. How will they determine, for example, whether a driver is entitled to benefits when he voluntarily refuses to sign a rental agreement on the company's terms or will he be considered unemployed only when the company refuses to renew the rental agreement? Even in the latter situation, the discontinuance of the agreement is for good cause—the driver's breach of contract.

POINT II

THE LESSEES OF PLAINTIFF'S CABS DID NOT RECEIVE WAGES FROM PLAINTIFF.

As previously stated, the drivers who lease cabs from the plaintiff pay plaintiff a flat rate per 6, 10 or 12 hour period. The company at no time pays the drivers anything, nor do they pay any obligations of the driver which could be considered a constructive payment. The entire consideration received for the driver's services is paid by the customers who use the cabs. The entire risk of profit and loss from the operation of the cabs is solely and exclusively on the drivers. If they do not haul enough customers to pay their rental and gas costs, they lose money. To the extent that their earnings exceed the rental and gas costs, they make a profit. This cannot be considered wages paid by the plaintiff.

In *Fuller Brush Company v. Indus. Com.*, supra, this court defined wages as used in the Unemployment Compensation Act. It was stated there:

“But it is not all personal service performed for another that comes within the act, but only such as is performed ‘for wages or under any contract of hire.’ ‘Wages’ is defined as all compensation payable for personal services, rendered for another under a contract of hire, express or implied. This compensation is based upon and computed upon service rendered, and is not derived from the accomplishment of a purpose or achievement of an objective, by the person receiving the remuneration, through a difference in two prices. *The essential elements of wages are that they form a direct obligation against*

the employer, in favor of the employee; that when the service is performed the compensation, if any, accrues and becomes payable regardless of the success or failure of the undertaking; that any profits or earning over and above costs of the service accrues to the employer, and any loss as a result of the undertaking or service must be borne by the employer. It is not essential that the wage move directly from the employer to the employee, as where the employee works on commissions, deducts his commission from a collection and remits the 'nets', but it is essential that the remuneration accrues from the product or service of the employer, and would accrue to him except for the fact that the employee is entitled to retain or receive it as remuneration under his contract of hire. The term 'contract of hire' is not defined in the act probably because the legislature felt that the expression was so well established, understood and definite, that it needs no further amplification or exposition. It is used in its common meaning and acceptance. It is an agreement whereby one undertakes or obligates himself to render personal service for another for a remuneration to be paid because the service was rendered, regardless of the element of profit or loss resulting from the work, endeavor, or undertaking." (emphasis added.)

Here there is no obligation of the plaintiff to pay the drivers anything whatsoever. The success or failure of the undertaking is dependent upon the ability of the driver to carry a sufficient number of passengers to make a profit over his costs. None of this profit accrues to the plaintiff and the entire loss is the responsibility of the driver. The "essential elements of wages" as defined in the Fuller Brush case are not present here. We do not here contend that

merely because no remuneration passes directly from the plaintiff to the drivers that no wages are paid, for in certain circumstances a third person can pay the “wages” without affecting the employment status under the Act. See *Creameries of America v. Indus. Com.*, supra, and *Salt Lake Tribune v. Indus. Com.*, supra. We do contend, however, that where the compensation is paid by a third person to the alleged employee, where the risk of profit or loss is exclusively on the “employee” and where the “employer” receives no part of such compensation, that wages are not paid within the meaning of the Act.

Of equal importance, perhaps, is the fact that the drivers are not accountable to the plaintiff for the fares they collect. How, then, is the plaintiff to determine what the “wages” of the drivers are so that it can pay the unemployment compensation tax? Certainly, it is not fair or proper to do as the Department of Employment Security did and pick a wage figure out of thin air. See the letter of June 16, 1955, to the plaintiff (R. 1-4) where, on page 2, the writer stated, “However, the company had no record of the earnings of such drivers so it was necessary to arbitrarily arrive at an equitable wage figure. The total number of hours the cabs were leased was divided by 8 to determine the number of 8-hour shifts and an average earning computed at \$6.00 per 8-hour shift.”

Thus, the Department assumed each lessee made a profit of \$6.00 every eight hours, despite the undisputed evidence that the profits of drivers fluctuated from time to time (R. 26) and that the company has no way of determining the amount of fares collected (R. 26). It is no

answer to say, as the Appeals Referee did, that the company "could if it so chose again determine the amount of such remuneration as it did in the past". The company cannot so choose for, like the drivers, it is bound by the rental agreement which does not require drivers to account for the fares they collect. To collect a tax based on such an arbitrary figure is erroneous, unjust and unlawful.

CONCLUSION

For the foregoing reasons, we contend that the decision of the Appeals Referee is not supported by the evidence but, on the contrary, the evidence shows as a matter of law that the drivers who lease cabs from the Salt Lake Transportation Company are not performing services for nor receiving wages from the company within the meaning of the Utah Unemployment Compensation Act.

Respectfully submitted,

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