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

Utah Supreme Court

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In the Supreme Court of the State of Utah

SALT LAKE TRANSPORTATION COM-
PANY, a corporation,

Appellant,

vs.

BOARD OF REVIEW OF THE INDUS-
TRIAL COMMISSION OF UTAH,
DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

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Clerk, Supreme Court, Utah
Case No. 8442

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The Salt Lake Transportation Company, a corporation with 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, submitted its first quarter unemployment compensation contribution report showing thereon that no wages were reported for its drivers for the month of

March. A representative of the Department of Employment Security of the Industrial Commission of Utah 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 14). The company appealed to the Appeals Referee and a hearing was held and a decision rendered on September 2, 1955 (R 44.) The company appealed to the Board of Review of the Industrial Commission of Utah within the time prescribed by law and the said Board affirmed the decision of the Appeals Referee (R 53.) The company then appealed to this Court within the time and in the manner prescribed by law.

STATEMENT OF FACTS

For a number of years the Salt Lake Transportation Company, operator of Yellow Cabs in Salt Lake City and surrounding areas, owned and operated taxicabs, employed drivers on a commission basis to operate its cabs, and paid unemployment compensation taxes on such wages. On March 1, 1955, the company entered into an arrangement with its drivers whereby the drivers paid a daily rental for the cabs (R 10, 21, 22). Except for the daily rental, the drivers retained all monies collected from passengers carried without any accounting therefor to the company (R 26) except that the driver was required at the end of each shift to turn in a "trip sheet" (R 26) showing, among other things, the total mileage traveled during the shift. The trip sheet did not carry an indication of the passengers carried or the money collected therefor.

In addition to the monies received directly from the passengers, the drivers are paid directly by the company a commission on the sale of sight-seeing tickets, which amounts to 10% of the sight-seeing fare (R 37). Also the company sells coupon books to the general public, and when a driver receives coupons in payment of fares, he turns the coupons into the company at face value for cash (R 37).

The drivers furnish their own gasoline, which they can obtain from the company at a discount, and in addition are responsible for damage to cabs up to \$50.00 (damage which is due to the driver's own negligence) (R 10, 11). The company provides a garage, makes all repairs on taxicabs, keeps the cabs in proper running order including greasing and lubrication, maintains taxicab stands, assigns the drivers to certain shifts (R 23), furnishes a telephone and radio dispatching service, provides training for new drivers, and carries public liability insurance, the effect of which is to hold the drivers harmless for \$5,000 to \$10,000 public liability, and in addition the company maintains \$5,000 property damage insurance (R 10, 13, and 22).

Each driver is furnished a 26-page booklet outlining in detail the driver's responsibility in representing the organization in his contacts with the public, his care of the equipment, use and sale of coupon books, commission sales of sight-seeing tickets, etc. (R 18).

The company has a right to terminate the so-called lease agreements at any time at the end of any shift when no violation has occurred or during any shift when the driver has violated operating rules applicable to the drivers of taxicabs (R 30).

INTRODUCTORY STATEMENT

The Utah Employment Security Act provides:

"35-4-22 (j) (1) 'Employment' means any service performed prior to January 1, 1941, which was employment as defined in the Utah Unemployment Compensation Law prior to the effective date of this act, and subject to the other provisions of this subsection, service performed after December 31, 1940, including service in interstate commerce, and service as an officer of a corporation performed for wages or under any contract of hire written or oral, express or implied."

"35-4-22 (j) (5) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the Commission that—

- (A) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of hire and in fact; and
- (B) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (C) such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service."

"35-4-22 (p) 'Wages' means all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. Gratuities customarily received by an individual in the course of his employment from per-

sons other than his employing unit shall be treated as wages received from his employing unit. The reasonable cash value of remuneration in any medium other than cash and the reasonable amount of gratuities shall be estimated and determined in accordance with rules prescribed by the Commission; provided, that the term 'wages' shall not include:"

"35-4-10 (i) In any judicial proceeding under this section the findings of the Commission and the Board of Review as to the facts if supported by evidence shall be conclusive and the jurisdiction of said court shall be confined to questions of law "

This Court has many times determined that employment, as it is used in the Act, is to be determined by the statutory rules alone and not by any common law definition of master and servant. In this case we are concerned with two questions: (a) Did the taxicab drivers perform services for the Salt Lake Transportation Company and (b) were such services performed for wages?

STATEMENT OF POINTS

POINT I

THE TAXI DRIVERS DID PERFORM PERSONAL SERVICES FOR THE PLAINTIFF COMPANY.

POINT II

THE DRIVERS PERFORMED SUCH SERVICES FOR WAGES.

ARGUMENT

POINT I

THE TAXI DRIVERS DID PERFORM PERSONAL SERVICES FOR THE PLAINTIFF COMPANY.

The decision of the Referee that the taxi drivers were performing personal services for the plaintiff company is supported by the evidence.

In examining any given situation to determine the relationship of the parties as to whether such relationship falls within the scope of the statutory provisions, we are compelled to look beyond the name designation of the relationship to its factual substance. The Employment Security Act does not specifically define the term "service." However, this Court in a number of cases has interpreted its meaning in the light of the statutory language. In the case of *Creameries of America, Inc. vs. the Industrial Commission of Utah and Robert L. Foss*, 98 Utah 571, 102 P 2d 300, Justice McDonough discussed the application of the statutory language to the term "service" at some length. In that case the facts were substantially as follows:

Creameries of America, Inc., entered into a contract called a "Franchise Agreement" with the defendant Foss, who was denominated "dealer" therein, under which contract there was granted to Foss the exclusive right to sell the company's products at retail in a defined franchise area in Salt Lake City. Under the contract the company agreed to sell such products to Foss at a price fixed at a discount from "the retail price posted on the Company's bulletin board," or if no price was

posted, then at a "reasonable price as determined by the company for similar products in the same neighborhood." The company loaned to the dealer a list of names, addresses, and requirements of the persons who at the date of the contract were purchasing its products at retail within the franchise area. The company reserved to itself the good will of the retail trade within the area, a provision being made by the agreement for the "purchase" from the dealer, upon the termination of the contract, of any customers or business acquired by the latter during the life of the contract after deducting any loss thereof suffered during such period. The contract term was for one year and "thereafter from year to year, unless otherwise cancelled or terminated." The agreement was terminable by either party upon giving the other two weeks' written notice. The dealer agreed not to handle products other than those of the company within the area. Upon the dealer's failure to carry out any of the provisions of the contract, the company reserved the right to terminate the agreement upon twenty-four hours' written notice thereof. The agreement was not assignable without the written consent of the company.

Foss was required to keep his truck at the company's garage and repairs were made thereon by the company and charged to the claimant without his knowledge or consent. Books of account were supposed to be kept by claimant, which books were required to be left at the offices of the company unless consent was obtained to take them home. The company maintained a special bank account for claimant and deposited the money collected from customers. The company made "suggestions" and "offered advice" as to how claimant should increase sales, make collections, etc.

Justice McDonough, in discussing the meaning of the term "service" as used in the Employment Security Act, stated:

"Section 19 (p) defines 'wages' as 'all remuneration payable for personal services, including commissions and bonuses and the cash value of all remuneration payable in any medium other than cash.' The term 'services' and 'personal service' used in defining 'wages' are not specifically defined in the Act. In ordinary usage the term 'services' has a rather broad and general meaning. It includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed. The general definition of 'service' as given in Webster's New International Dictionary is 'performance of labor for the benefit of another'; 'Act or instance of helping, or benefiting'. The term 'personal service' indicates that the 'act' done for the benefit of another is done *personally* by a particular individual.

" 'Services' then must be given the broader meaning hereinabove adverted to. No indication is given in the Act that the legislature intended to give a restricted meaning to such term. On the contrary the way in which 'services' or 'personal services' appears in our Unemployment Compensation Act indicates an intention on the part of the legislature to use the term in its broad general sense. If such personal services are found to have been performed for the employing unit, then such service is to be deemed employment subject to the Act. But if the facts required by subdivisions (a) (b) and (c) of subsection (j) (5) are shown to the satisfaction of the commission, the service of the individual is not within the terms of the Act; otherwise it is. We turn now to a consideration of the evidence in this case.

"It is clear that Foss was performing services for the plaintiff. Although by his contract Foss was supposedly

'buying' dairy products from plaintiff and 'reselling' to certain customers, still the purchasers of the dairy products were customers of the company and not of the distributor. The customers were receiving plaintiff's products through the 'distributor.' The plaintiff never relinquished its right to those customers, and at the termination of a contract with a distributor the company had a right not only to a list of all old customers so that it could continue to supply its products to them through some other distributor, it also had the right to purchase for one dollar each the names of any new customers obtained by the distributor during his contract with the company. The dealer could acquire no customers for himself; though he was entitled to remuneration for any he might acquire for the employing unit. Certainly the distribution or 'reselling' of plaintiff's dairy products to plaintiff's customers was performing 'services' for plaintiff within the meaning of the Act."

Justice McDonough concluded that:

"While there is dispute in the evidence as to some of the above facts, the evidence in the record clearly discloses that the commission might reasonably have found that the claimant was not free from 'control' and 'supervision' under his contract with the plaintiff and in fact."

Chief Justice Wolfe in the case of H. L. and Irene Leach, dba, Rusco Window Company vs. Board of Review of the Industrial Commission of Utah, Department of Employment Security, 260 P 2d 744, in his discussion as to whether or not certain dealers and installers for the plaintiff were rendering services for the plaintiff, referred to Justice McDonough's comments in the Creameries of America, Inc., case, *supra*, with approval and said:

“We find in the record competent evidence from which the Board of Review could have reasonably concluded that both the dealers and the installers were rendering services for the plaintiffs for ‘wages’ as that term is defined in the Act. This court held in *Creameries of America, Inc. v. Industrial Comm.*, 98 Utah 571, 102 P. 2d 300, that the word ‘services’ while not defined in the Act, should be given a broad meaning. Said the court, speaking through Mr. Justice McDonough, ‘In ordinary usage the term “services” has a rather broad and general meaning. It includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed.’ We further stated that all remuneration payable for personal services is ‘wages.’ ”

In the matter of *Singer Sewing Machine Company vs. the Industrial Commission of Utah et al*, 104 Utah 175, 134 P. 2d 479, this Court laid down a number of rules to which the Court was committed in applying the statutory provisions of the Utah Employment Security Act, and we quote:

“The examination of these opinions reveals that the members of this court are committed to the following:

(a) The unemployment compensation law was enacted under and as an exercise of the police power of the state.

(b) Its purpose is remedial to protect the health, morals, and welfare of the people by providing a cushion against the shocks and rigors of unemployment.

(c) Being remedial under the police power and not imposing limitations on basic rights, it should be liberally construed.

(d) ‘Employment’ under the act is not confined to common law concepts, or to the relationship of master

and servant, but is expanded to embrace *all services rendered for another for wages*.

(e) The terms 'employment', 'personal services' and 'wages' are much broader in meaning and application than their common law counterparts, and encompass in their coverage many persons and relationships not included in the common law relationship of master and servant.

(f) All situations where one rendering services for another for 'wages' is under the direction and control of such other in the rendering of such service, are service relationships within Sec. 19 (j) (1) of the act.

(g) The absence of direction and control does not necessarily exclude the parties, or the relationship from the operations or scope of the act.

(h) In determining if the relationship is within the act, the Commission and the court will look behind the contract to the actual situation—the status in which the parties are placed by the relationship that exists between them.

(i) The test is twofold: Did he render personal service for another? If so, was he entitled to remuneration (wages) therefor? If both are found, the relationship is within the act.

(j) If the relationship is within the act, we apply Section 19 (j) (5) to determine if he is entitled to benefits, provided the claimant meets all other requirements of the act to bring him within its provisions.

(k) Section 19 (j) (5) is an exception or exclusion section taking or sifting out from the right to receive benefits, certain persons who otherwise come within the act, as 'rendering personal services for wages' and is not a test to determine whether the relationship was a service one."

After discussing the relationship between the Singer Sewing Machine Company and Gorman C. Winget, the Court concluded:

“Each of the above terms are inconsistent with the concept of a vendor-vendee relationship. The business shows it was the Company’s goods, the Company’s accounts; the Company’s risks of profit and loss; the Company’s money; the Company’s customers; the Company’s good will; the Company’s salesman. Many of the services rendered by the salesman were rendered at the specific direction of, and for the Company. It was a service relationship.”

While Justice Wolfe in the case of Fuller Brush Company vs. the Industrial Commission of Utah et al, 99 Utah 97, 104 P. 2d 201, dissented, we think his discussion of the issues and facts to be considered in determining whether or not a service relationship exists, reflects the thinking of the majority of the Court and we quote:

“But any services for ‘wages’, as ‘wages’ is defined by Sec. 19 (p), however small, constitutes a service relationship as distinguished from a non-service relationship. However, it must be a service relationship and it must be services performed for wages. A true vendor-vendee or a lessee-lessor relationship are not service relationships. They fall in the non-service category. Not the only test of a vendor-vendee or lessor-lessee relationship is the contract executed between the parties. This may in *words* and *form* meet the tests of a vendor-vendee contract rather than a service contract, but facts aliunde of the contract may be taken into consideration to determine the real relationship between the parties. And this relationship for purposes of determining whether the applicant may participate in the Fund and whether the other party to the relation-

ship was an 'employer' of the applicant, must be viewed in connection with the Act and the purposes which it is to serve. This is not to say that what is not a service relationship under tests applicable, had this Act never been passed, will become a service relationship because of the Act. What is meant to be said is that the Commission and this Court will look behind the mere form of the relationship to determine what it actually is and not what it is called. If the relationship was to all intents and purposes one for the rendering of services by one party to another, the fact that it may assume the legal habiliments of another type of contract will not avail to defeat the applicant's right to share in the Fund. This I understand to be the real meaning of *National Tunnel & Mines v. Ind. Com.*, *supra*. The Act was meant to cushion unemployment treated as an incident to the service relationship of employment. This objective was not only for the welfare of the individual entitled, but for the benefit of society. The individual needing work is in most cases required to contract in the manner which he who has the job to offer may desire. And if the net result of that contract is to provide what would ordinarily be a service performed for him, it will be looked at in fact as indeed it is—as creating a service relationship.

" Under an agreement of 'employment' which the Company can terminate at will, a 'suggestion' or 'some advice' from a supervisor over a territory in all probability constitutes, in effect, an order to a 'dealer' who wishes to keep his territory and to continue to sell Fuller brushes. It is also noteworthy that the sales organization acknowledging extended down to the last link, including the consumer and the plaintiff—that is, the so-called 'dealer'."

Keeping in mind the reasoning in the above quoted cases, let us examine the situation in the instant case. In our dis-

cussion, we would like to make it plain that we do not consider that the acts of the company in changing its method of operation were taken with the intent to evade unemployment compensation taxes. The company representative testified (R 21) that the company for some time prior to March 1, 1955, had been attempting to obtain an arrangement with Salt Lake City whereby taxicab meters would be used with the apparent idea that the use thereof would lead to an increase in revenue for both the drivers and company. On being convinced that the use of the meters was not going to come into existence, the company decided, after consultation with the unions and the employees, to change their method of operations to one whereby the "driver" "leased" his taxicab from the company at a certain price per shift. The company representative testified (R21): "The Company was losing money under the commission and guarantee basis operation and the drivers were making comparatively small earnings as represented by their take-home checks. And it appeared to us that with the institution of the lease method of operation where the driver pays for the gasoline factor of expenses and was entirely on his own as to the control of his unit on the street that he would do better and that the company's operating cost would be less."

On March 1, employees who formerly were working on a commission guarantee basis commenced "leasing" their taxicabs on a shift basis.

For the purpose of better illustrating the situation, let us examine the series of events under which a new inexperienced driver enters into his relationship with the company and how he operates thereafter.

In the first place a new driver is, in all probability, obtained by newspaper or word-of-mouth advertising. He more often than not is regularly employed at places other than the Yellow Cab Company (R 24). He may be a University student, a school teacher, a shift worker at one of the smelters, a postman, or he may have a different occupation. Generally, he is an ordinary working man who wishes to increase his other income. He meets with the company's "superintendent of taxicabs" and he agrees to "lease" a cab. He obtains no interest in the company's franchise to operate a taxicab business, which franchise, is, of course, nontransferable (R 21). He is told that it will be necessary for him to obtain his own individual licenses, which are required by the state and the city. This he does at his own expense. He deposits \$15.00 with the company to insure payment on his daily use of a taxicab, which cab, incidentally, is not specifically designated in his contract. He is then assigned to a company employee who takes him on a student training trip (R 28 and 34). On this trip he is indoctrinated as to the best methods of operating a taxicab, keeping in mind the public interests. He is advised as to the use and care of the shortwave radio which is in his cab. He is informed as to the various taxi stands and the use of the telephone.

He is given a "Yellow Cab Drivers Guide," (R 18) which starts out on Page 1: "To the public you ARE the Yellow Cab. *You must assume the responsibility of representing the entire organization in your contacts with the public*—pedestrians and motorists as well as your patrons. It is your aim to have this organization take its rightful place among the most reliable and responsible businesses in the community and the success

of this aim rests largely with you In entering into a contract with this company it is taken for granted that you are anxious and willing to cooperate with other Yellow Cab drivers in rendering the best possible service to Yellow Cab customers." (This last sentence appears in italics.) (Incidentally, this Driver's Guide was revised effective March 1, 1955.) (Italics ours).

The introductory statement then informs the driver that special privileges will be granted to none and that the driver should operate in a manner which will continue to be a credit to himself and to "this organization." The Guide then continues to give "advice" to the driver as to what the customer expects. It then goes on to deal with Special Orders; Starters and Dispatchers; Quarreling; Notification; Loading and Unloading Passengers; Handling of Complaints; Reporting for the Shifts; Shift Rules, including a statement that *overtime* will not be allowed unless previously permitted by the office and that drivers will be given *regular days off*; Storms; Handling of Baggage; Handling of Change; Waiting for Customers; Questionable Loads; Passengers who Refuse to Pay; Articles Left in Cab; Soliciting or Influencing Patrons; Drinking; the Law; Suggested Conduct; Appearance; Change of Address; Drivers' Meetings; Reading the Bulletin Board; Drivers' Equipment; Coupon Books—in connection with these books, it is explained to the drivers that the company sells coupon books, a \$5.00 book costing \$4.50; Reports; Responsibility; Mechanical Trouble. Then there follows a detailed statement of what is expected of the driver in taking care of his equipment, how he shall drive, how he shall report

accidents, how to operate when empty, and so on covering the entire field of service to the general public which is embodied in the issuance of the franchise to the company.

The Guide explains to the driver that the driver may sell sight-seeing tours, upon which he will be paid a commission of 10%. It instructs him in the procedures of reporting a sale and obtaining the 10% commission from the company. The Guide ends with the statement: "In our company, we have always been able to feel pride in the moral caliber of *our* drivers. Through drivers such as yourselves, the standing of the taxicab has been recognized to be one of constructive citizenship." (*Italics ours*).

The driver is then informed that he must file a trip sheet (R 10) on forms which are supplied by the company. The superintendent of cabs then assigns the driver to a certain shift and designates his days off. Each day when he reports for work he is required to accept the one taxicab (of the company's 88 cabs) which is on that day assigned to him. He can now continue to drive a taxicab keeping all monies collected from the customers, except that which he spends for gasoline and payment of his shift, and he can so continue until such time as he violates a rule applicable to cab drivers or until such time as his conduct while driving does not conform to the "advice" which he has been given. Upon any violation the company is free to terminate his services at will and to either take the taxicab away from him during his shift (R 30 and 31) or refuse him the right to "lease" a cab.

Whenever the company informs him by radio that he is to "report to garage" he is required to do so as soon as possible.

The contract specifically requires that the driver *personally* drive the cab and that he permit no other person than himself to do so. In this connection we would like again to refer to the language of Justice McDonough in *Creameries of America, Inc.*, *supra*, in which he states:

“The term ‘personal service’ indicates that the ‘act’ done for the benefit of another is done *personally* by a particular individual.”

We would again like to quote in part from Justice Wolfe’s comments in the *Fuller Brush Company Case*, *supra*:

“The Act was meant to cushion unemployment treated as an incident to the service relationship of employment. This objective was not only for the welfare of the individual entitled, but for the benefit of society. *The individual needing work is in most cases required to contract in the manner which he who has the job to offer may desire. And if the net result of that contract is to provide what would ordinarily be a service performed for him, it will be looked at in fact as indeed it is—as creating a service relationship.*” (Italics ours.)

We submit that the entering into the contract for the “leasing” of a taxicab was only the beginning (rather than the end result) of a service relationship, the result of which is the fulfillment of the conditions of service to the public under which the company obtained its franchise to operate as a public service business.

After the driver is given very detailed advice as to how he is to operate and *perform* under his contract in order to maintain the company standards of operation, statements that the company could not require him to do those things carry

very little meaning in the light of the overall factual situation. A driver in his own mind is well aware of the fact that because the company can terminate his relationship at will, the company can, in fact, compel him through its "advice" to do all of those things which are necessary in the proper performance of driving a taxicab and furnishing cab service to the public. Of course he is going to perform in the manner suggested by the company because he knows that unless he does, his earnings are going to cease.

The company representative testified that they could not require the driver to accept calls. This must be examined in the light of subsequent testimony that in order to continue its franchise for the operation of taxicabs, it is actually necessary to perform the public service for which the franchise was given. Since the driver's use of the cab is restricted to the driving of the public for fares, the driver is certainly impelled (if he is going to obtain anything from the arrangement) to accept fares which he picks up himself and which he picks up as a result of telephone and radio communication from the company office. The relationship between the company and the driver is entirely inconsistent with that of lessor-lessee or bailor-bailee. The driver is not subjected to the risks of profit and loss as those terms are generally known. His earnings are dictated by the amount of "fares" which he carries and the money obtained therefor and his costs are fixed and not variable. The customers, the risks of profit and loss, the good will, the property, the franchise, the responsibility to the public for injuries, and for taxi service are those of the company and not of the driver.

Counsel for plaintiff has referred to some extent to cases decided by the Federal Courts with reference to the subject of unemployment compensation coverage. In the case of *United States vs. Silk*, 331 U.S. at Page 712, 67 S. Ct. at Page 1467, the Court said:

“As the Federal Social Security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance to a considerable degree of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.”

And in *Kaus vs. Huston* (Iowa) 35 F. Supp. 327, wherein the facts are substantially the same as in the instant case, the Court said:

“Does the plaintiff engage merely in the leasing of taxicabs or as a common carrier of passengers? When all factors are considered, and particularly the contractual relationship of the plaintiff with the passengers carried, I think there can be little doubt that plaintiff is operating the line of taxicabs, and that while he has adopted an ingenious method of fixing the compensation of his drivers and permits the drivers to exercise some discretion over the cab during the period of the driver's shift, nevertheless I think there is no discretion vested in the drivers inconsistent with the relation of master and servant. From the very nature of the case the drivers, in order to perform their duties promptly, must exercise very complete control over the cabs while they have them on their shifts.”

It will, of course, be noted that the language of the Social Security Act defines coverage within the limits of the master-

servant rule. We would like to point out that the Federal courts, prior to the convening of the 80th Congress, had more and more been inclined to expand the coverage under the Social Security Act thereby including many individuals who would not normally be included under the employer-employee, master-servant rule. As a result of this continued expansion by the courts, the Congress apparently did not agree with the courts' expansion of coverage and considered it a usurpation of congressional legislative function and consequently the 80th Congress, in its second session, amended the Social Security Act, over the President's veto, and specifically limited the coverage definition to the common law rule of "employer-employee." (Public Law 642, 80th Congress, Second Session, Amending Paragraph 1101 (a) (6) Social Security Act.) (Sec. 10 A.L.R. 2d 358.) It is to be expected, therefore, that cases which came before the Federal courts after that action by the 80th Congress would consider the coverage question in the light of the restricted language adopted by the Congress.

Since the Utah statute, as has been many times previously construed, intends a much broader coverage than that of the common law rule of master-servant or employer-employee, we think the federal cases (dealing only with the master-servant rule) carry very little weight in the instant case. We, the respondents, are of the view that the circumstances which indicate that the taxi drivers in this case are performing services "in employment" outweigh those which may indicate otherwise. The Salt Lake Transportation Company owns the taxicabs and the necessary operating franchises. It has a garage where those cabs are housed and serviced, except for gasoline

which is paid for by the drivers. It is listed in the telephone directory as offering taxicabs for hire, and it employs telephone and shortwave radio operators to receive calls for taxicab service. The drivers have no investment in equipment and no separate business apart from operating the plaintiff's taxicabs. They are required to operate their cabs during specified periods and on a day to day basis. Periodically the company advises the drivers by printed material and otherwise regarding such subjects as safe driving, drinking on duty, how to avoid accidents, what to do in case of accidents, what to do with articles left in cabs by passengers, etc. If a driver disobeys any of these company rules or regulations, the company can refuse to permit him to take out or operate a taxicab.

These circumstances would appear to be the determinative factors indicating that these drivers are performing services in employment. The business of the company is the operation of taxicabs for hire. The drivers' jobs are an integral part of that business and not an incident to it. The unlimited right of the company to terminate the services of the driver and the right of the company to control these drivers as to the hours they shall work is sufficient to show an employment relationship within the meaning of the Act.

In addition to the "leasing" of taxicabs, the drivers are asked to act as company representatives in selling sight-seeing tours on the Gray Line busses. For this sales activity the drivers are paid in cash by the company a ten per cent commission—a very definite indication that this is a service relationship.

While the appellants point out that there are no wages going from the company to the drivers, we respectfully call

the court's attention to the fact that the company sells coupon books and that the drivers accept coupons in payment of fares. After accepting such coupons, the drivers then cash them in at the company's office thereby receiving compensation for the fare. The appellants indicate that the Department of Employment Security would be in a difficult position should the "driver-lessee" be considered within the Act. In reply, we would like to point out that the application of the benefit provisions of the Act to the "driver-lessee" would be no different than in the case of individuals working by the hour. Any employee has a right to refuse to accept a job when he finds that the wage level of the job is not sufficient to satisfy him. He also has a right to refuse a job when he considers that the working conditions are not to his standards or liking. This is equally true in regards to the "drivers". The Department would, of course, look into the situation to see whether or not the claimant's unemployment was due to the company's refusal to sign a rental agreement or whether or not it was due to the claimant's refusal to accept the rental agreement or to his having committed some misconduct in connection with his work.

We submit that the relationship between the Salt Lake Transportation Company and its drivers was one of service within the definition of service laid down by this Court in numerous other cases.

POINT II

THE DRIVERS PERFORMED SUCH SERVICES FOR WAGES.

The monies received by the driver from passengers as

fares (less the amount paid for the daily shift for the cab and the gasoline cost), the commissions received from the sale of sightseeing tours, and the monies received from the company in return for coupons collected from passengers for fares were all wages within the meaning of the Utah Employment Security Act and Section 35-4-22(p) *supra*.

In the Creameries of America, Inc., case, *supra*, the Court discussed the meaning of the word "wages" and said:

"That the income received by Foss from the distribution of products for plaintiff comes within the definition of 'wages' is also evident. All remuneration payable for personal services is 'wages.' We have just concluded that Foss performed 'services' for plaintiff which 'services' were performed by him personally. The remuneration, therefore, which he received for those 'services' constituted wages. This remuneration was the difference between what Foss had to pay the company for the products and what he was permitted to charge for such products. He was required to pay plaintiff a fixed price for products and the appeal tribunal might reasonably find from the evidence that as a matter of fact the retail sale price was fixed by plaintiff. The difference between those prices constituted his 'commission.' "

In the Fuller Brush Company case, *supra*, the Court discussed the definition of "wages" at some length and said:

"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 a 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 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."* (Italics ours.)

We cannot agree that the entire risk of profit and loss from the operation of the cabs is solely and exclusively that of the drivers. The driver's sole risk of loss is that during any one shift he may collect passenger fares in an amount less than his shift payment and the cost of his gasoline. The primary risk of profit and loss lies with the company. It is obvious that the company, in determining the amount of monies which were to

be remitted by the drivers to the company, took into consideration the company's cost of operating telephone and radio service, the payment of personnel in handling the company's business, including supervision and the salary of the superintendent of taxicabs; the cost of public liability insurance; the cost of the garage where the taxicabs were housed; the cost of cab repairs and the cost of any public liability payments over and above the amount of insurance; and the general upkeep of taxicabs and other equipment.

On the other hand the driver had no investment in equipment or services. If he didn't carry passengers, naturally he used very little, if any, gasoline.

The success or failure of the undertaking is dependent not so much upon the ability of the driver to carry a sufficient number of passengers, but upon the ability of the company to obtain passengers through its advertising and telephone listings and through the company's ability to keep the drivers informed as to available passengers. It is true that the driver's net remuneration fluctuates in accordance with the number of passenger fares he collects just as it is true in the case of the commission salesman who furnishes his own car and gasoline expenses. The commission salesman in that case retains as wages the difference between his costs and the total commissions earned. In the instant case, the Department representative followed the practice which was followed by other jurisdictions, including the Bureau of Internal Revenue. See *Michigan Cab Company vs. Kavanaugh*, 82 F. Supp. 486. In that case, on the failure of the company to collect the social security tax, the Collector of Internal Revenue assigned a deputy

collector to prepare and file a tax return for the plaintiff company. After interviewing three of the plaintiff's drivers and examining plaintiff's books and records as to the hours worked, the examiner estimated the average earnings of plaintiff's drivers to be \$6.00 per day. The assessment was then based on the estimate obtained as a result of the investigation.

In the instant case, the Department representative followed substantially the same procedures. The appellants argue that since the drivers are not accountable to the plaintiff for the fares they collect, then the plaintiff is not in a position to determine the wages of the drivers so that it can pay the unemployment compensation tax. It occurs to us that the exact earnings of the drivers might well be obtained by requiring the drivers to enter the amounts received on the "trip sheets" which they are compelled to file with the company.

As to the amounts which are received by the drivers as commission for the sale of Gray Line tours, the company already has that information. The company is also in possession of information as to the amounts paid to drivers by the company in redeeming coupons which the drivers receive as fares.

In substance, the instant case falls squarely within the purview of the decision of this Court in the Creameries of America, Inc., the Fuller Brush Company, and the Rusco Window Company cases, all *supra*.

CONCLUSION

In conclusion we submit that the Appeals Referee reason-

ably concluded from the evidence in this matter that the drivers who "lease" cabs from the Salt Lake Transportation Company were performing services for wages within the meaning of the Utah Employment Security Act.

Respectfully submitted,

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