

## TAXI DRIVERS NOT INDEPENDENT CONTRACTORS, NINTH CIRCUIT AFFIRMS

The Ninth Circuit rules that the National Labor Relations Board (NLRB) acted reasonably in deciding that taxi drivers working for an Oakland, California, company are employees, rather than independent contractors, with the right to seek union representation under the National Labor Relations Act (NLRA). Writing for the court, Judge Consuelo M. Callahan says that Friendly Cab Co. violated Section 8(a)(5) of the NLRA by refusing to recognize and bargain with a labor union selected by drivers in an NLRB election. Agreeing that the company retains “considerable control” over the drivers, the court says the NLRB’s finding of employee status is a “well-reasoned conclusion,” and is supported by substantial evidence. According to the court, Friendly and several commonly controlled companies operate approximately 80 taxicabs that Friendly leases to drivers. The drivers sign taxicab leases providing that they are not employees of Friendly, and that the company is not responsible for payroll taxes or workers’ compensation insurance for the drivers.

The East Bay Taxi Drivers Association filed an election petition with the NLRB in 2002, seeking certification as the bargaining agent for the Friendly drivers. The company argued that the drivers were independent contractors rather than employees, but an NLRB regional director ruled that the drivers were employees and directed that an election be conducted. The board affirmed the regional director’s decision in 2004. After balloting, the NLRB certified the union as the drivers’ representative, but Friendly refused to recognize or bargain with the association, contending that the certification was improper. The NLRB found the company’s refusal violated Section 8(a)(5) of the Act, and the company petitioned the Ninth Circuit for review.

Friendly’s leases typically provide that cabs are rented for seven days, providing a driver with six days to drive the vehicle, but requiring that the cab undergo mandatory maintenance one day a week. Drivers are required to pay a fee ranging from \$450 to \$600 per week for use of a cab, but Friendly has the discretion to set the fee, taking into account the cab model as well as the individual’s driving and accident record.

Friendly operates both “street” taxis and airport cabs, and drivers can request assignment to drive either, but the company retains the discretion to assign drivers to different models and types of cabs, as well as assigning them to any of the seven companies controlled by the same owners. The company maintains manual and written procedures that included driving instructions such as “[a]cceleration should be smooth” and gave drivers a mandatory, detailed, dress code. Drivers are required to respond to all “reasonable customer calls” from Friendly’s dispatchers, and are restricted in a number of ways from conducting any outside business. Drivers are not allowed to use individual phone numbers or business cards. They are required to conduct all taxi business over telephones provided by Friendly, and they are not permitted to use personal cell phones while driving. Drivers who rent taxis from Friendly are not allowed to sublease the vehicles to other drivers, and are required to carry advertisements on the taxis they lease. The company also requires drivers to respond to dispatches for “voucher service,” where Friendly has a contract to provide transportation service to a company or organization. Friendly reimburses drivers a specified rate for such trips, but keeps 15 percent to 30 percent of the voucher amounts.

Unlike *SIDA of Hawaii Inc. v. NLRB*, 512 F.2d 354 (9<sup>th</sup> Cir. 1975) and *Merchants Home Delivery Serv. Inc. v. NLRB*, 580 F.2d 966 (9<sup>th</sup> Cir. 1978), Friendly restricts the outside business opportunities of its drivers, and that is a fact of “particular significance,” according to Callahan. “These limitations do not allow Friendly’s drivers the entrepreneurial freedom to develop their own business interests like true independent contractors.” The NLRB’s determination that the Friendly drivers are employees also is supported by evidence that the company sought to control the “means and manner of its drivers’ performance.” Friendly’s dress code is indicative of employee status, as is the requirement that drivers carry advertising on their cabs, an activity that generates revenue for the company, but not for its drivers. The court finds that Friendly maintained a “strict disciplinary regime” that showed that the drivers were its employees, rather than independent contractors. In addition to insisting that the company respond to calls from its dispatchers, Friendly disciplined drivers for any refusal to cooperate with a dispatcher, and the drivers could be punished if they simply disagreed with Friendly’s management.

The court affirms the conclusion that the company unlawfully refused to bargain with the drivers’ union and enforces the board’s order.

The decision is available at <http://op.bna.com/dlrcases.nsf/r?Open=ldue-7annx6>.

(Source: *NLRB v. Friendly Cab Co.*, 9<sup>th</sup> Cir., No. 05-73752, January 8, 2008, as reported in BNA, *Daily Labor Report*, No. 5, January 9, 2008, pp. AA1-AA2, E10- E16.)