STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

MILTON M. DIAMOND, JOHN ENRIQUEZ, DOMINIC FUGARINO, LEO HENSIAK, GENE T. HOWARD, WILLIAM W. KUENZI, RICHARD A. NOWAK, H. O'DONNELL, JR., H. O'DONNELL, SR., MARIE M. O'DONNELL, CHARLES OGDEN, WILLIE D. PONDS, FRED P. PRESTI, JOSEPH SANFELIPPO, CHARLES J. SANSONE, THOMAS SANSONE, ROBERT WIDISH, HERMAN A. WETZEL, JR., JOHN SPARACINO, PHILIP A. SPARACINO, ROBERT LEE COPELAND and JAMES W. WILLIAMS,

Case No. 149-310

Plaintiffs,

MEMORANDUM DECISION

vs.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Defendant.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

Each of the plaintiffs in this action has filed an appeal pursuant to Sections 102.23 and 108.10(4), Wis. Stats., of a November 21, 1975, decision of the defendant department which affirmed the appeal tribunal's decision which determined that each plaintiff was an "employer" within the meaning of sec. 108.02(4)(c), Stats., and consequently subject to the payroll tax and reporting provisions of ch. 108, Stats.

Initial determinations had been made during the months of May and June, 1974, that all but four of the plaintiffs were subject to the provisions of ch. 108, Stats., effective January 1, 1972; and plaintiffs Howard, Kuenzi, O'Donnell, and Wetzel were held to be so subject effective January 1, 1973. These initial determinations were appealed by the plaintiffs and the appeal tribunal conducted hearings on these appeals on January 7, February 6, and February 19, 1975. The appeal tribunal's decision of March 3, 1975, affirmed all of these initial determinations.

THE ISSUES

The plaintiffs raise these issues:

(1) Did the department make a proper finding under sec. 108.02(3)(a), Stats., that the "drivers" of plaintiffs' taxicabs performed services for the plaintiff "owners" of the cabs?

(2) Whether there is credible evidence to support the findings made that the plaintiff "owners" were not exempt from payroll contributions under the provisions of sec. 108.02(3)(b), Stats.?

THE APPLICABLE STATUTES

Sec. 108.02(3), Stats., provides:

> "(3) EMPLOYE. (a) 'Employe' means any individual who is or has been performing services for an employing unit, in an employment, whether or not he is paid directly by such employing unit; except as provided in par. (b). If a contractor performing services for an employing unit is an employe under this subsection and not an employer subject to the contribution provisions of this chapter, a person employed by the contractor in fulfillment of his contract with the employing unit shall be considered the employe of the employing unit.
>
> "(b) Paragraph (a) shall not apply to an individual performing services for an employing unit if the employing unit satisfies the department as to both the following conditions:
>
> "1. That such individual has been and will continue to be free from the employing unit's control or direction over the performance of his services both under his contract and in fact; and
>
> "2. That such services have been performed in an independently established trade, business or profession in which the individual is customarily engaged."

SUMMARY OF EVIDENCE AND FINDINGS OF FACT

Each of the plaintiffs owns a non-transferable taxicab franchise, sometimes referred to as a permit, issued by the City of Milwaukee. The holders of these franchises are referred to in the findings of fact as "owners". By virtue of this franchise each plaintiff "owner" is allowed to operate one taxicab in and around the City of Milwaukee. In all cases

legal title to the franchised taxicab is in the plaintiff "owner" but in the cases of the plaintiffs Diamond and Howard the actual owners are the drivers Cornelius and O'Donnell.

Each plaintiff "owner" has leased his franchised taxicab at least part of the time to a driver for a set period of time such as a month, week, or day, for a set fee, except the plaintiff Howard.

The arrangement between plaintiff Howard and the lessee O'Donnell is that O'Donnell, who actually owns the taxicab, title to which is in Howard's name, pays nothing to Howard for the use of the latter's franchise, it being Howard's purpose to keep the franchise in use until Howard's son ends his service in the Navy.

The plaintiff Diamond held a taxicab franchise while the driver Cornelius owned a taxicab but had no franchise. There is a long waiting list for franchises so Cornelius made an arrangement with Diamond whereby title to the taxicab was placed in Diamond's name and Cornelius agreed to pay Diamond $45 per month for the right to operate under Diamond's franchise. The benefit which Diamond derives from Cornelius driving the taxicab is it keeps his franchise from lapsing.

No evidence was adduced that any "owner" ever exercised any control over the driver's operation of the leased taxicab in so far as providing the public with taxi service, and there was much positive evidence that such control was not exercised.

It is the compensation earned by each driver over and above expenses upon which the department imposed an unemployment tax by its initial determinations.

The plaintiffs' brief concedes that no material facts are in dispute.

The appeal tribunal's material findings of fact read:

"MILTON M. DIAMOND, et al., d/b/a VETERAN TAXICAB #44, hereinafter referred to as 'owner' or 'owners', is a holder of a taxicap franchise granted by the City of Milwaukee to operate a taxicab on the streets of that city. Some 'owner(s)' are the only drivers of a taxicab operating under a specific franchise; some do not drive a taxicab under their franchise but lease the taxicab to another person, hereinafter referred to as 'driver' or 'drivers'; and some drive the taxicab under their franchise part of the day and another 'driver(s)' drives at different hours of the day for an agreed upon rental payment.

"Some 'owner(s)' own taxicabs, taximeters, radios and other equipment and some do not. However, legal title to taxicabs is always in the name of the 'owner', the same name appearing on the taxicab franchise issued by the City of Milwaukee. Public liability insurance policies for the protection of the public must be in the name of the 'owner'. A metal plate with the name of the 'owner' and the franchise taxicab number must be affixed to the inside of the taxicab and the number must be painted on the taxicab fenders or body informing the public of the name and number of the 'owner' of the taxicab. 'Owner' must have his taxicab inspected two times a year and is required to be in the taxicab or accompany it at the time of actual inspection by City officials.

"Most 'owner(s)' involved herein lease taxicabs and equipment to 'drivers' for use as taxicabs and receive a mutually agreed upon rental fee from 'drivers'. Most arrangements between 'owners' and 'drivers' are based on oral agreements at fees paid to 'owner' ranging from about $40 a month to about $85 or $90 a week, with the exception of GENE T. HOWARD, d/b/a VETERAN TAXICAB #83, who leases his taxicab franchise to a 'driver' without a rental payment. In most cases 'owner' requires 'drivers' driving taxicabs to deposit the sum of $250 in escrow, the deductible amount of public liability insurance, in case a 'driver' has an accident. This requirement indemnifies 'owner' of any monetary liability caused by accidents of 'drivers'.

"Most 'owners' subscribe to a radio dispatch service and pay from $60 to $90 a month for such service. 'Drivers' are permitted to use this radio dispatch service without any additional rental fee or payment. Most 'owners' pay for complete maintenance of the taxicab such as repair service, new tires, battery, oil changes, etc., and 'owners' and 'drivers' each pay for the gasoline used by them when operating the taxicab.

"The Milwaukee Code of Ordinances under which taxicabs are operated on city streets and the conditions imposed on the 'owner(s)' of a franchise require the 'owner' to furnish safe and adequate service at just and reasonable rates; require the 'owner' to exercise control over persons who drive their cabs in so far as the amount of hours such persons are allowed to drive a cab; requires the 'owner' to provide the 'driver' with daily trip sheets for the driver to record certain information; and makes taxicab rates binding on the 'owner' and 'driver'.

* * *

"If a 'driver' failed to perform his services to the satisfaction of 'owner' or abused the equipment used by him in performing such services or through accidents caused public liability insurance to be cancelled or premiums increased, 'owner' could refuse to allow use of the taxicab or franchise granted by the city. The franchise granted by the City of Milwaukee to 'owner' was not transferable to 'driver' and 'owner' could refuse, at any time, to permit 'driver' from driving a taxicab under the franchise. The grantor of the franchise - City of Milwaukee - and the public looked to 'owner' for safe operations of the taxicab. The relationship between 'owner' and 'driver' was terminable at will from which it can reasonably be found that 'owner' had an inherent right to control the manner in which 'driver' expended his time. The question is not, as 'owner' contended, whether control and direction was, in fact, exercised by 'owner' over 'driver', but whether 'owner' had the right of direction and control over 'driver'. It is clear that 'owner' had the right of direction and control over 'driver' in the performance of services.

* * *

"Under the circumstances 'owners' failed to establish that 'drivers' were free from control or direction over the performance of services both under oral contracts of employment and in fact and that such services were performed in an independently established trade, business or profession in which they were customarily engaged.

"The appeal tribunal therefore finds that the 'drivers' were employes of the 'owners', within the meaning of Section 108.02(3) of the statutes." (Emphasis supplied.)

THE COURT'S DECISION

A. Alleged Lack of a Proper Finding that Drivers Performed Services for the "Owners"

In Transport Oil, Inc. v. Cummings (1972), 54 Wis. 2d 256, 195 N.W. 2d 649, the Supreme Court considered the issue of whether the Department of Industry, Labor and Human Relations had made the proper factual determinations with respect to whether the respondent lessee of a service station was the employee of the appellant lessor under sec. 108.02(3), Stats., and declared (p. 262):

". . . Under Sec. 108.02(3), Stats., a two-step process is required to determine whether an individual is an 'employee'. The first step is to decide whether a person falls within the purview of Par. (3): That he is an 'individual who is or has been performing services for an employing unit, in an employment.' If the person meets the test of Par. (a), the second step is to determine whether the individual is exempted by both of the provisions of Par. (b). . . ."

The Supreme Court held that it was reversible error for the department to have failed to make a basic finding with regard to coverage under sec. 108.02 (3) (a), Stats.

It is obvious that the appeal tribunal in the instant case failed to adopt the two-step approach required by the holding in the Transport Oil case. This, however, does not require that this Court remand the matter to the department to make a proper finding under Par. (a) of sec. 108.02(3), Stats., if the appeal tribunal's findings of fact are such as to actually find that the drivers performed services for the 'owners'.

The Court is of the opinion that the underlined portions of the appeal tribunal's findings of fact, as quoted supra, are open to the reasonable construction that they constitute a finding that the drivers did perform services for the "owners". Clearly that was the appeal tribunal's intent. The Court must assume that this also was the department's intent when it affirmed the appeal tribunal's decision containing such findings of fact.

The driving of the "owners'" cabs was the service which the drivers performed for the "owners". In cases where the "owners" did not operate the franchised taxicab at all, this service kept the franchise alive, because unless the franchise was so exercised it would lapse and be lost. In all cases where the "owners" received remuneration from the "drivers", they did so as a result of the "drivers" operating the leased taxicabs. Although the rentals were not dependent on the drivers operating the leased taxicabs, it is a reasonable inference that the only reason the lessees paid these rentals was in the expectation of making money through operating the leased vehicles.

B. Credible Evidence Supporting Findings of Fact that Plaintiff "Owners" Were Not Exempt Under Par. (b) of Sec. 108.02(3), Stats.

Par. (b) of sec. 108.02(3), Stats., provides two conditions, both of which must concur, which will exempt an alleged employing unit from

having to pay unemployment tax, viz., (1) the alleged employee has been and will be free from control of the alleged employing unit in the performing of his services; and (2) these services were performed in an independently established trade, business, or profession.

It has long been held that the principal test for determining if a relationship of employer-employee exists is whether the alleged employer has the right to determine the details of the work. Scholz v. Industrial Comm. (1960), 267 Wis. 31, 37, 64 N.W. 2d 204, 65 N. W. 2d 1; Phaneuf v. Industrial Comm. (1953), 263 Wis. 376, 378, 57 N.W. 2d 406. While this is not a worker's compensation case but an unemployment compensation case, the Court is satisfied that the statutory words "will continue to be free from the employing unit's control or direction" in par. (b) of sec. 108.02(3) are concerned with the right of control.

One of the elements to be considered in determining whether the alleged employing unit has the right of control is whether the contract is subject to termination at the will of the alleged employing unit. See Scholz v. Industrial Comm, supra, at page 38. Here the evidence is undisputed that the "owners" could have terminated the verbal leases to the drivers at any time.

In the cases of the drivers Cornelius and O'Donnell leasing from plaintiffs Diamond and Howard, where the lessees were the actual owners of the taxicabs, a termination of the lease would place the lessees under a serious handicap because they would then be without a taxicab franchise under which to operate their taxicabs. Therefore, even in these two situations it was a permissible reasonable inference for the appeal tribunal to draw that the lessor's right of instant termination gave him a right of control.

A case very much in point is that of Kaus v. Unemployment Compensation Commission (1941), 230 Iowa 860, 299 N.W. 415. There, as here, the drivers "leased" vehicles from the franchise owners

for a set fee for a set period of time under a verbal agreement terminable at will. The Iowa court held that (299 N.W. at pp. 417-419):

> "The city ordinances require a license for anyone engaging in the taxi business and the procurement of insurance for a bond for the benefit of those injured or damaged through the negligence or misconduct of any driver. A violation of the ordinances constitutes a misdemeanor. Appellee procured such a license and took out the required insurance covering himself and his employes while operating the cabs. No such license was ever issued to any driver.
>
> * * *
>
> "It is well settled that a failure to exercise control does not mean that the right of control does not exist. Also, that a servant may be given by his master much freedom in the method and means whereby he does his work (Citations omitted.) It should be remembered also that the absence from an agreement of a provision recognizing the right of control does not mean that no such right exists. The reservation of control is presumed unless the contrary appears.
>
> * * *
>
> "The fact that appellee procured a license to operate the cabs has a bearing upon the relation between the parties and indicates that appellee and not the driver is engaged in the taxi business (Citations omitted....)
>
> * * *
>
> "We think it is not inconsistent with the employer-employe relationship that the drivers can, if they see fit, reject calls which would prove unprofitable. Jones, Collector v. Goodson and Scott, supra. In the very nature of things, no driver will pay $3 and furnish the gasoline to use a taxi for twelve hours and reject many calls or make extensive personal use of the car."

The Supreme Court of Iowa also rejected the argument advanced by plaintiffs herein that the relationship between franchise owner and driver was merely that of bailor and bailee.

Plaintiffs' brief cites Kress Packing Co. v. Kottwitz (1973), 61 Wis. 2d 175, 212 N.W. 2d 97, for the proposition that only a bailment relationship existed where the only control exercisable by the "owners" was limited to how the drivers cared for the physical condition of the taxicabs and did not extend to the operation thereof in carrying on the taxicab

business. The essential and material difference between the facts of that case and the instant situation is that the truck in the Kress Packing Co. case was not being operated under a franchise, which franchise the owner had an interest in protecting so as to gain an income therefrom.

The Court determines that upon the undisputed evidence the appeal tribunal and the department could draw the reasonable inference set forth in the findings of fact "that 'owner' had the right and direction and control over 'driver' in the performance of services", and "Under the circumstances [the] 'owners' failed to establish that 'drivers' were free from control or direction over the performance of services . . . under oral contracts of employment." The burden of proof to establish the exemption provided in par. (b) of sec. 108.02(3), Stats., was upon the plaintiffs and the appeal tribunal and the department were not required to draw the inference that no right of control or direction existed in the plaintiff "owners" from the evidence that the "owners" had not exercised such control.

The Court now turns to the finding of fact that under the circumstances the "owners" failed to establish "that such services [by the drivers] were performed in an independently established trade, business, or profession in which they were customarily engaged." Even if this finding were to be held not to be supported by credible evidence, it would not affect the outcome of the case because in order to establish the exemption under par. (b) of sec. 108.02(3), Stats., the plaintiffs are required to establish both lack of right of control in themselves, and that the services performed by the drivers were in an independently established trade, business, or profession in which the drivers are customarily engaged.

The Court is of the opinion that the appeal tribunal and the department could reasonably conclude that there is no independent trade, business, or profession of taxicab driving in the City of Milwaukee divorced from ownership of the taxicabs. It is not, for example, similar to the trade of a carpenter in which a carpenter can carry on his trade

either as an independent contractor contracting with the property owner, or as an employee of a contractor. The independent trade or business here involved is the taxicab business and that can only be carried on by means of ownership of one or more taxicabs franchised by the City.

In Radley v. Commonwealth (1944), 291 Ky. 830, 181 S.W. 2d 417, the Kentucky Court of Appeals had before it a "lease" arrangement whereby taxicab drivers retained 30 percent of their gross receipts. The Kentucky taxicab licensing statute was very similar to the Milwaukee taxicab franchise ordinances. In its decision determining that the drivers were employees for the purposes of Kentucky's unemployment compensation act, the Kentucky court declared (181 S.W. 2d at p. 418):

> "Under this [taxicab license] statute it is clearly the appellants, and not the drivers, to whom the cars are purportedly leased, who are engaged in a taxi business. The Statutes contemplate that the driver who operates the taxicab for the person holding the license is an employe of the latter and not an independent contractor. It is only the person who makes application and receives a license that can be regarded as a taxicab operator."

In Transport Oil, Inc. v. Cummings, supra, the Supreme Court stated (pp. 266-267):

> "'... for an individual to be customarily engaged in an independently established business, it must be such a business as the person has a proprietary interest in, an interest which he alone controls and is able to sell or give away.'"
>
> * * *
>
> "While the 'proprietary interest' test is not found in the statute [sec. 108.02(3)], it is the interpretation given the statute by the department. This court has often said that practical interpretations of ambiguous statutes by the agency charged with the enforcement of the statutes are given great weight and are often decisive. . . ."

The department in affirming the appeal tribunal's decision In the Matter of the Contribution Liability and Status of Arrow Cabs, Inc., Wis. U.C. Digest, 1960, EE-432; 53-A-2S(C) held that taxicab drivers who leased taxicabs on a mileage basis from a taxicab company were nevertheless its employees:

"The services performed by the drivers were not performed in an independently established trade, business or profession in which they were customarily engaged. They had no business life apart from their association with appellant, and could not themselves form and operate a taxicab service independently without first establishing a place of business and securing approval from the common council of the city which they may or may not receive."

The Court concludes that the finding made that the plaintiffs had not established that the services performed by the drivers were not in an independently established trade, business, or profession, is supported by credible evidence.

Let judgment be entered confirming the department's decision which is the subject of this appeal.

Dated this 27th day of September, 1976.

By the Court:

Reserve Circuit Judge