

FLSA-30

September 4, 1981

Thank you for your August 5, 1981 letter, with which you enclosed a copy of a letter from *** concerning the investigation of . We have received information on this case from our *** Regional Office.

The investigation under the Fair Labor Standards Act (FLSA) disclosed that the firm employs two classifications of cab drivers at both establishments. It is our understanding the firm acknowledges that the drivers paid on a commission basis are employees. During the investigation period, from March of 1979 to May of 1981, approximately 22 percent of the drivers at and nine percent of those at *** were "commission drivers." The other drivers lease their cabs from the firm and they were not considered by *** Cab to be employees. The "lease drivers" were, however, found to be employees based on the facts developed during the investigation.

The enclosed publication summarizes the criteria for an employment relationship under the FLSA. As may be noted on pages 3 and 4, there are six factors which the Supreme Court considered significant in testing the existence of an employment relationship. These factors were found persuasive in determining that the "lease drivers" were employees:

- (1) The "lease drivers" are an integral part of the business. The firm has 24-hour cab service and there would not even be enough cabs for the first shift without the "lease drivers".
- (2) The firm has the right to terminate the lease contract at any time without notice, and the manager is empowered to pick up a cab before the lease has expired and lease it to another driver. Therefore the employment relationship can be tenuous for the "lease driver".
- (3) The "lease drivers" have no investment in facilities. The firm furnishes the vehicle on a lease basis, gas (at \$.16 per mile), dispatchers, radio communications, mechanics, garage, mechanical service, office facilities, sales service, and any advertisements. The firm pays the liability insurance and accepts responsibility for all damages over \$100.
- (4) The firm has as much control over the "lease drivers" as their other employees. The "lease drivers" must pay a fixed rate for the use of the firm's vehicles, but a large majority of their trips are assigned by the dispatchers. The lease is set out by the firm on a "take-it-or-leave-it" basis. Applicants for the driver job are hired and told what shift they will work. The driver has no choice in the cab he or she is assigned. They must receive permission from the manager before they can be off, and such permission is often refused. The drivers are not permitted to sub-lease a cab and they cannot allow another driver to complete their shift. They must obey the orders of the manager and the

dispatchers. They are responsible to the firm if they fail to give satisfactory service to customers.

(5) The "lease drivers" can make a profit only if they are able to service enough calls from dispatchers and occasional passengers who hail them. They would incur a loss if they did not meet the lease expense or if they had an accident.

(6) The amount of initiative, judgment or foresight in open market competition exercised by these drivers, within the meaning of the Supreme Court's guidelines, is minimal. They have no part in the decisions necessary to the perpetuation of the business.

The investigation disclosed that no time record was kept on the "lease drivers" and they often did not receive the minimum wage for the hours they worked. In addition, the time records maintained by the firm on acknowledged employees were found inaccurate. The records reflected fewer hours than the employees were found to have been employed. With the exception of an office employee at the *** establishment who was found due overtime, all the back wage findings were minimum wage underpayment. The case has been referred to the office of the Solicitor of Labor in *** for appropriate further handling.

I appreciate your interest in this matter. If I can be of further service please let me know.

Sincerely,

James L. Valin
Acting Assistant Administrator
Wage and Hour Division

William M. Otter
Administrator