

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

BRT TRANSPORT LLC, :
Appellant, : Case No. 14CVF-367
v. : JUDGE BROWN
OHIO STATE DEPARTMENT OF JOB :
AND FAMILY SERVICES, :
Appellee. :

**FINAL JUDGMENT ENTRY AFFIRMING THE DECISION OF THE UNEMPLOYMENT
REVIEW COMMISSION OF THE OHIO STATE DEPARTMENT OF JOB AND FAMILY
SERVICES**

Introduction

Appellant appeals a Decision by the Unemployment Review Commission of the Ohio State Department of Job and Family Services (hereinafter “the Commission”), holding that BRT Transport, LLC (hereinafter “BRT”) is liable for contributions to the unemployment compensation fund for misclassified BRT employees for 2007, 2008, 2009, 2010, and 2012. The Director of the Department of Job and Family Services (hereinafter “the Director”) re-determined that BRT had an employer-employee relationship with its drivers because BRT retained the right to direct or control the manner or means of work performed by individual truck drivers.

At the administrative hearings, BRT maintained that its drivers were not employees. Rather, BRT’s drivers entered into a “lease” agreement whereby BRT leased tractors used for picking up trailers from Menards and American Weld & Tank Company (hereinafter “American”). The Director found several facts which contradicted BRT’s assertion. The Director noted that BRT billed Menards and American directly for the work and that BRT in turn paid the drivers a non-variable percentage (25%) of the amount billed to Menards and American. BRT paid the drivers weekly and their paystubs were labeled as “payroll.” The

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Director also found that drivers had to provide BRT with delivery receipts, bills of lading, completed logs, and vehicle inspection reports for each trip. Additionally, the trucks and work tools were not only supplied by BRT, but also maintained by BRT. Menards and American were at all times BRT customers and not customers of the drivers. The Director found that, while Menards and American exercised some supervision of the drivers, the drivers remained under the ultimate control and direction of BRT.

BRT appealed the Director's redetermination to the Commission. The Commission referred the appeal to Hearing Officer Kevin W. Thornton for a hearing on November 4, 2013. The Commission issued a Decision upholding the Director's redetermination, finding that BRT had an employer-employee relationship with its truck drivers. From that decision BRT timely filed the instant appeal.

For the reasons which follow, this Court **AFFIRMS** the Decision of the Commission in all respects.

Standard of Review

The standard of review for appeals from the Unemployment Compensation Review Commission is found in R.C. § 4141.26(D)(2), which states that a common pleas court may affirm the Commission's decision where it is "supported by reliable, probative and substantial evidence and in accordance with law." *Resource Title Agency, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 14AP-39, 2014-Ohio-3427.

Discussion

The Commission found the following to be the operative facts:

"BRT Transport, LLC-Dan Barnett is a trucking company.

The Ohio Department of Job and Family Services performed an audit of BRT Transport, LLC-Dan Barnett as a result of receiving information that indicated BRT Transport, LLC-Dan Barnett might have misclassified workers or failed to correctly report workers in accordance with the laws and rules governing Ohio Unemployment Compensation Law.

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BRT Transport, LLC-Dan Barnett performs hauling services for Menards and American Weld and Tank Company. BRT Transport, LLC-Dan Barnett has its drivers sign an equipment lease for a tractor. The lease provides that the driver will pay the carrier an amount equal to 75% of the gross revenue generated by the equipment as rent, that the carrier will collect all revenues generated by the drivers for use of the equipment and shall pay the driver the amounts collected, less the rent. The lease requires the driver to provide the carrier with all delivery receipts, bills of lading, completed logs and vehicle inspection reports. The lease also provides that the driver may hire other drivers to operate equipment, as long as they are qualified under applicable laws, regulations. The agreement further provided that BRT Transport, LLC-Dan Barnett will pay for all licenses and permits, including base plate, fuel and other permits and decals required for the lawful operation of the equipment. The lease provides that the equipment is to be used solely for the purpose of transporting, loading and unloading on behalf of customers of the carrier or on behalf of other certified carriers as BRT Transport, LLC-Dan Barnett may designate through an authorized trip lease or interchange agreement. The lease agreement continues for a period of 12 months and continues on a year to year basis unless canceled by either party.

BRT Transport, LLC-Dan Barnett pays the drivers on weekly (sic).

The drivers took direction from Menards and American Weld and Tank Company as to where and when to pick up the load and where and when to deliver it”.

From those factual findings, the Commission reasoned that:

“[T]he weight of the evidence indicates that BRT Transport, LLC-Dan Barnett is a liable employer. The individuals the employer failed to previously report as employees are engaged in services that would be considered covered employment by Ohio Unemployment Compensation Law.

The determining factor is control exercised by BRT over their office employees and truck drivers. BRT’s brief correctly points out the applicable law, citing to *Bobik v. Indus. Comm.*, (1946) 146 Ohio St. 187, *Foram v. Fisher Foods, Inc.*, (1985) 17 Ohio St.3d 193, *Pusey v. Bator*, (2002) 94 Ohio St.3d 275, *Behner v. Industrial Commission*, (1951), 154 Ohio St. 433, *Gillum v. Inus. Comm.*, (1943), 141 Ohio St. 373, the statutory definition of employment found in R.C. 4141.01 (B)(1), and the test factors found in Administrative Code 4141-3-05.

Although BRT does not advert to *Prime Kosher Foods, Inc. v. Bur. of Emp. Serv.* (1987), 35 Ohio App. 3d 121 in its brief, BRT should be well aware that the substantive law mandates that BRT bears the burden of proof before the Commission to demonstrate that BRT is not responsible for contributions to the Unemployment Compensation Fund. BRT did not meet its burden of proof before the Commission.

In this instance, the services performed by the drivers are part of the regular business of BRT Transport, LLC-Dan Barnett. The drivers do not get paid directly by the customers, but are paid by BRT Transport, LLC-Dan Barnett, which deducts 75% of the gross revenue, paying the drivers 25%. BRT Transport, LLC-Dan Barnett pays the drivers on a weekly basis. While the lease agreement provides that the drivers can have other drivers operate the equipment, the equipment can only be operated for the business of BRT Transport, LLC-Dan Barnett. In addition BRT Transport, LLC-Dan Barnett pays all expenses for the drivers.

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A thorough review of the record in this matter establishes that the Director properly found that the individuals identified in the audit to be covered employees. The Director also established the proper liability rates for the employer.”

BRT cited *United States v. Mutual Trucking Co.* for the proposition that because BRT “leased” the tractors to its drivers and the drivers were directed by American and Menards that BRT’s lack of control precluded a finding of an employer-employee relationship, 141 F.2d 655 (6th Cir. 1944). However, *Mutual Trucking*, a federal tax case, concerned owner-operators that not only determined what work to perform, but also completely controlled their own wages. *Id.* at 659. *Mutual Trucking* is actually detrimental to BRT in that BRT remained responsible for payment of wages to its drivers and paid them on a weekly basis. “As was persuasively said in an analogous decision of the Supreme Court of Ohio, “The undisputed facts in this case show the impossibility of determining premiums based upon a payroll when there is none, and there can be none in such a situation.” *Id.*, citing *Coviello v. Industrial Commission*, 129 Ohio St. 589, 196 N.E. 661 (1935). Such is not the case here, the indisputable facts show that BRT was in complete control of paying wages to its drivers, even going so far as to label the payments as “payroll.” (ODJFS Ex. 4).

Other indicia of control establishing an employer-employee relationship are present as well: (1) the lease agreement provided that BRT would pay for all licenses and permits, including base plate, fuel and other permits and decals required for the lawful operation of the equipment; (2) the lease provided that the equipment was to be used solely for the purpose of transporting, loading and unloading on behalf of BRT customers or on behalf of other certified carriers as BRT designated through an authorized trip lease or interchange agreement; (3) the lease agreement provided that although the drivers could have other drivers operate the equipment, the equipment could only be operated for the business of BRT; and (4) BRT Transport paid all expenses for the drivers, including tolls.

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The certified record contains reliable, probative, and substantial evidence supporting the facts found by the Commission. The Court agrees that the “weight of the evidence indicates that BRT Transport, LLC-Dan Barnett is a liable employer.” Applying analogous case law to the factors in Rule 4141-3-05 of the Administrative Code demonstrate that BRT had an employer-employee relationship with its misclassified employees. Further, as Appellee notes, not every factor found in the Rule must be present to establish an employer-employee relationship. Sufficient factors exist to establish that BRT misclassified its employees as independent contractors when in fact BRT exercised control over the workers to the extent that they were “employees.”

As for BRT’s non-driver employees, the Commission clearly found wanting BRT’s explanation that they were given gifts unrelated to work performed. The more persuasive evidence in the record establishes that non-driver employees of BRT were remunerated for their labors. A gift is a voluntary transfer of property by one to another, without any consideration or compensation therefor. (Ohio Jurisprudence 3d, Volume 52, Gifts §1.) The Commission sensibly found that, although some office workers were paid in gift cards, the office workers were, in fact, paid employees. Despite evidence that office employees set their own schedules, the fact remains that “but for” their performance of job duties, BRT would not have supplied them with the gift cards.

Conclusion

Accordingly, the decision of the Unemployment Review Commission of the Ohio State Department of Job and Family Services is lawful and is **AFFIRMED** in all respects. Costs to Appellant.

IT IS SO ORDERED.

JUDGE KIM BROWN

Franklin County Court of Common Pleas

Date: 09-10-2014

Case Title: BRT TRANSPORT LLC -VS- OHIO STATE DEPARTMENT JOBS
FAMILY SERVI

Case Number: 14CV000367

Type: JUDGMENT ENTRY

It Is So Ordered.

A handwritten signature in black ink is written over a blue circular seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY OHIO" around the inner edge, and "ALL THINGS ARE POSSIBLE" at the bottom. The signature is a stylized, cursive "KRB".

/s/ Judge Kim Brown

Court Disposition

Case Number: 14CV000367

Case Style: BRT TRANSPORT LLC -VS- OHIO STATE
DEPARTMENT JOBS FAMILY SERVI

Case Terminated: 18 - Other Terminations