DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

PRECEDENT DECISION NO. 31

IN RE HUCKABEE T/A RED CARTAGE
(Adopted July 3, 1996)

STATEMENT OF CASE:

This case came on to be heard before Guy C. Evans, Deputy Commissioner, on Wednesday, July 25, 1990, at the local office of the Employment Security Commission (ESC) in Fayetteville, North Carolina. The matter came on for a hearing pursuant to an order referring the matter to a Deputy Commissioner to determine whether or not certain individuals were employees of or independent contractors with J. Walter Huckabee T/A Red Cartage.

This matter was originally scheduled to be heard on March 14, 1990 and was continued at the request of the employer's wife. The matter was subsequently scheduled to be heard on Wednesday, May 2, 1990 and was continued at the request of the employer's attorney.

Appearing at the hearing before the Deputy Commissioner and offering testimony were: Vickie V. Burton and Lorraine Huckabee, witnesses for the employer; Coy Thomas Stewart and Dennis K. Crumpler, subpoenaed witnesses for the ESC; and Tom Holmes, Field Tax Auditor, and Phil Smith, Field Tax Auditor Supervisor, both with the ESC. The employer was represented by Steven J. O'Connor, Attorney at Law. The ESC was represented by C. Coleman Billingsley, Jr., Staff Attorney. Present as an observer was Kaye Corbett, Field Tax Auditor with the ESC.

Guy C. Evans, Deputy Commissioner, issued an opinion on January 8, 1991, holding the loaders to be employees and not independent contractors.

The employer entered exceptions to the opinion of the Deputy Commissioner and a hearing before the undersigned Chairman of the ESC was held on April 18, 1991. An Order Overruling Exceptions and affirming the opinion of the Deputy

Commissioner was issued on April 30, 1991. From that order, the employer entered Notice of Appeal to the Superior Court.

The matter came on for hearing before the Honorable George R. Greene, Judge of Superior Court, on September 9, 1991. He issued an order making findings of fact and reversed the opinion of the ESC. From the judgment or order of the Superior Court, the ESC entered an appeal to the Court of Appeals. The Court of Appeals vacated and remanded the matter to the Superior Court on January 5, 1993 [No. 9112SE1211, Reported per Rule 30(e)].

The matter was heard on October 11, 1993 before the Honorable Gary E. Trawick, Judge Presiding of the Cumberland County Superior Court. On October 31, 1993, Judge Trawick entered a judgment affirming the findings of fact of the ESC in their entirety and remanding the matter to the ESC for the ESC to make additional findings of fact based on questions in the judgment and for rendering of a new decision.

FINDINGS OF FACT:

The following seventeen (17) findings of fact are the original findings of fact of the Deputy Commissioner and affirmed by the Superior Court in the order of October 31, 1993.

1. This hearing was the result of a protest entered by the employer to an Unemployment Tax Assessment and Demand for Payment mailed September 21, 1989.

2. J. Walter Huckabee T/A Red Cartage is a sole proprietorship. It was formed in 1987.

3. Red Cartage has a contract with various trucking companies to load tires onto their trailers at the Kelly Springfield Tire Manufacturing Plant. The trucking companies bring empty trailers to the Red Cartage lot and pick up loaded trailers for delivery. Red Cartage takes the empty trailers to Kelly Springfield to be loaded with tires. Red Cartage brings the loaded trailers from Kelly Springfield to the business location of Red Cartage for the trailers to be picked up by the various trucking companies.

4. Red Cartage reports its office personnel and its truck drivers as employees. Red Cartage contends that the individuals who load the trailers at Kelly Springfield are independent contractors and not employees.

5. The Unemployment Insurance Tax Assessment and Demand for Payment mailed September 21, 1989, was the result of an audit investigation by Tom Holmes and Phil Smith. They determined that the loaders of the trailers were employees of Red Cartage. A Form NCUI 685 was completed for the 3rd and 4th Quarters of 1987; the lst, 2nd, 3rd, and 4th Quarters of 1988; and the lst and 2nd Quarters of 1989 showing the wages of the loaders and the taxes plus penalties and interest due on those wages. (Commission Exhibits 24-26)

6. Tires may be loaded five days a week at Kelly Springfield beginning at 7:30 a.m., 1:30 p.m., 7:30 p.m., or 1:30 a.m. Coy Thomas Stewart and Dennis K. Crumpler are both loaders. Crumpler has worked for Red Cartage since 1987 and Stewart since 1988. Crumpler works at 1:30 p.m. and is the number one loader on that shift. Stewart works at 7:30 a.m. and is the number five loader on that shift. Red Cartage (the employer) obtains the services of various individuals to load the trailers it takes to and removes from Kelly Springfield (Kelly). Crumpler was doing this work for another employer prior to going to Red Cartage.

7. The employer obtains the services of loaders and, in some cases, trains them. The employer apparently stopped training loaders in 1988. It takes approximately one or two days to train a loader. They train with other loaders. Crumpler has trained loaders at the request of Vickie Burton, the employer's bookkeeper, or John Burton, the employer's office manager. The employer and Kelly will only allow an individual to be trained one or two days. If an individual is not able to learn the work in one- or two-days' training, he is not retained.

8. The employer maintains a list of loaders by shift. The employer telephones loaders to report to Kelly when needed. Stewart, who is number five on the 7:30 a.m. shift, will be the fifth loader called. If there are not five loads available on that shift, he may be called for another shift. Loaders are called at approximately 6:00 a.m. for the 7:30 a.m. shift.

9. Crumpler, number one loader on the 1:30 p.m. shift, will be called at approximately 11:00 a.m. He is the first loader called. He will be told what

loads are available and given his choice of what trailer to load. A loader will normally load one trailer per shift. It takes two or more hours to load a trailer.

10. Loaders are paid by trailer size and weight. A loader may make more money if he is able to load more tires into a trailer. The type of tire also affects the weight. A trailer load of truck tires would weight more than a trailer load of car tires. Some jobs do not call for full loads.

11. Stewart and Crumpler normally work five days per week. Kelly at one time was working six days per week but has reduced its operations to five days per week. Stewart and Crumpler normally take the jobs assigned. If they do not take a job, the employer calls the next loader.

12. While there is a turn-over in loaders, some unspecified number of loaders work on a regular basis for the employer and have done so for a period of time.

13. The only equipment involved in loading a truck is a hand-truck and that belongs to Kelly. When the loader reports to Kelly, he had to go through the gate guard. He then reports to Kelly personnel at the loading dock. Only one individual is permitted to load a truck. If the Kelly personnel do not recognize or know the loader, they will verify the loader's identity with Red Cartage. The only time more than one loader is allowed is when a loader is training another individual.

14. The loader knows from the telephone call which truck he is to load and what he is to load. He will load the tires provided by Kelly personnel onto the trailer. He will keep a record of the tires loaded and verify the number loaded with Kelly personnel. When the Kelly tally and the loader tally match (either initially or after recount), the loader is given a pass to leave the Kelly property. The loader gives the pass to the gate guard on his departure.

15. The employer had the loader sign a contract that stated that they were contractors. The contract provided for the method of pay. The loaders did not negotiate the contract and had no input into the amount of money to be paid. Loaders had to sign the contract in order to work.

16. During a meeting with Smith and Holmes, J. Walter Huckabee told them that the loaders were employees.

17. The employer could terminate the services of the loaders at any time without incurring any penalty or financial obligation to the loaders other than for work already performed. The loaders could cease doing work for Red Cartage at any time without incurring any liability to Red Cartage.

The following findings of fact numbered 18 to 27 are the questions posed by the Superior Court with the corresponding answer.

18. Could the loaders work for other cartage companies and did they work for other cartage companies? Loaders were apparently not prohibited from working for other cartage companies though there is no evidence that any of them did so. The two employees who appeared at the hearing did not do so. Those two individuals generally performed all work that was available working five or six days per week for Red Cartage.

19. Were the loaders required to work every day or to inform Red Cartage of their whereabouts? Workers were not scheduled in advance but were telephoned prior to the beginning of the shift in an order set forth on a list maintained by the employer. There was no requirement that workers inform Red Cartage of their whereabouts, but those that worked on a regular basis for Red Cartage apparently contacted Red Cartage if they were not at home to be telephoned.

20. Did Red Cartage have control or supervision over how the trucks were loaded? Red Cartage did not control and-supervise how the trucks were loaded, Kelly Springfield did so.

21. Could the loaders refuse loads when called, did the loaders refuse loads, and did the loaders sometimes load for other haulers? Loaders could refuse loads and did refuse loads. Loaders working for Red Cartage did not normally work for other loaders. One of the two witnesses worked for another cartage company for one load with the approval of Red Cartage.

22. Under the written contracts, were the loaders liable for their own negligence? Yes.

23. Did Red Cartage furnish equipment or materials to the loaders to be used in performing their services? Red Cartage furnished no equipment. Kelly Springfield furnished any equipment required.

24. Could the loaders increase their earnings by loading more weight on specified trucks and by choosing a particular loading job that had a greater potential for profit? Loaders were paid by weight of tire loaded. A special order called for a specific load, and the loader got paid for the weight of that specific load. A full trailer called for the loader to fill the trailer and Kelly required that the loader completely fill the trailer. An experienced loader might be able to get more weight in a trailer than an inexperienced loader. Also, weight varied by the type of tire. A special load might weigh more than the full load due to the type of tire. The loader does not have control over the length of the trailer (longer trailers would carry more tires and potentially more weight) and loads the trailer to which he has been assigned by Red Cartage when he arrives at Kelly Springfield. The first-called loader or loaders might get a choice of loads, but eventually there would be no choice.

25. Did the loaders carry liability insurance for any loss or damage to themselves or to Red Cartage or to Kelly Springfield? There is no indication that any of the loaders carried liability insurance.

26. Was the job site of the loaders an "at risk" situation because the loaders were classified as independent contractors with no employer provided benefits such as insurance, etc.? Loaders had no benefits, were potentially personally liable for any damage, and had no protection from Red Cartage or Kelly Springfield for any at-work injury or death.

OPINION:

G.S. 96-8(5) defines "employer" as an employing unit which has individuals in his employment for a certain number of weeks or a certain amount of wages for a calendar quarter. G.S. 96-8(6) defines "employment" as service performed for wage under any contract of hire in which the relationship of the individual performing such service and the employing unit for which such service is rendered is the legal relationship of employer and employee. If an employing unit is an employer with individuals in employment, he is liable for unemployment insurance contributions. G.S. 96-9(a), et seq.

It becomes necessary, then, to consider the elements of employment under the common law. One of the landmark cases in determining the question of the indicia necessary to constitute employment under the common law is Hayes vs. Board of Trustees of Elon College, 22 4 N.C. 11 (1944). In that case, the court held that independent contractors must:

(a) Be engaged in an independent business, calling or occupation.
(b) Is to have the independent use of his special skill, knowledge or training in the execution of the work.
(c) Is doing a specified piece of work at a fixed price or a lump sum upon quantitative basis.
(d) Is not be subject to discharge because he adopts one method of work rather than another.
(e) Is not in the regular employ of the other contracting party.
(f) Is free to use such assistants as he may think proper.
(g) Has full control over such assistants.
(h) Selects his own time to perform.

The court went on to say that the presence of no particular one of these indicia is controlling nor is the presence of all required. Id.

Taking each of the items cited in Hayes vs. Board of Trustees of Elon College, following observations must be made:

(a) The individuals involved loaded trucks. That loading required one- or two-days training and would not be classified as an independent business, calling, or occupation. The loaders had no business themselves and did not hold themselves out to be in business;

(b) The loaders loaded trucks, which requires one- or two-days training and does not involve special skill, knowledge, or training to execute the work;

(c) Workers are paid based on the weight of tires and the size of the trailer loaded based on a formula established by the employer;

(d) Workers can be separated for any reason;

(e) Many of the loaders work for Red Cartage five days per week on a regular and ongoing basis;

(f) Workers cannot use assistants;

(g) Not applicable;

(h) Workers worked specific shifts when work was available. A worker could request a shift, but work had to be performed during the specified shift.

In Scott v. Waccamaw Lumber Company, 232 N.C. 162, 59 S.E.2d 592 (1950), it was held that in the question of whether the relationship is that of employer and employee or independent contractor, the test is whether the party for whom the work is being done has a right to control the work with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right to control, it is immaterial whether he actually exercises it.

The Supreme Court expressed the test in everyday language when in Pressley v. Turner, 249 N.C. 102, 105 S.E.2d 289 (1958), it said: "Tersely stated, the test which will determine the relationship between parties while work is being done by one which will advantage another is 'who is boss of the job?'"

An employer should not be able to avoid the impact of the Employment Security Law because the structure of the industry and its method of operation permits the employer to operate without giving orders in the conventional sense. In other words, control can be implicit if the nature of the business is such that all the control needed can be affected by establishing a certain pattern of operations and engaging persons, who if they respond normally, will conform to the established pattern. Foster v. Michigan Employment Security Commission, 15 Mich. App. 96, 166 N.W.2d 316 (1968); Grant v. Director, 71 Cal.App.3rd 647, 139 Cal. Rptr. 533 (1977). There is no evidence that the employer retained the right to control.

The employer's reliance on Reco Transportation, Inc. vs. Employment Security Commission, 81 N.C. App. 415, 344 S.E.2d 294, pet. disc. rev. denied, 318 N.C. 509, 349 S.E.2d 865 (1986) is misplaced. The court specifically noted that the drivers had investments. The drivers could refuse to haul a load of freight assigned by Reco and using Reco trucks, could haul freight that the driver secured. Finally, the purchase price of the tractor-trailer rigs has risen to an extent to make it not financially feasible for would-be owner/operators to purchase they own tractor-trailer rigs.

More on point is State, ex rel ESC vs. Faulk, 88 N.C. App. 369, 363 S.E.2d 225, pet. disc. rev. denied, writ of supersedeas denied, 321 N.C. 480, 364 S.E.2d 917 (1988) wherein taxi drivers were held to be employees and Youngblood vs. North

State Ford Truck Sales, 321 N.C. 380, 364 S.E.2d 433 (1988) wherein the Supreme Court held that the trainer obtained by North State Ford to train its employees was an employee of North State Ford because North State Ford designated the equipment to be used in training and designated the hours of training.

Also of note is Service Trucking, Inc. vs. United States, 347 F.2d 671 (4th Cir. 1965), wherein it was held that individuals obtained by truck drivers to unload the trucks in cities where the trucking company had no terminals were employees of the trucking company.

Here, the workers did not report to the place of duty or call if they were not able to report to work as is customary in most businesses. In this business, the employer telephoned the employee several hours prior to the beginning of the shift to notify the worker whether or not there was work.

The loaders did not have the ability to make a profit or suffer a loss. The workers were paid based on the size of the trailer loaded and the weight loaded into the trailer. This is nothing more than a worker being paid based on production.

Also important is the employer's admission that these loaders were employees. His wife's allegation that he was somehow not competent or capable of carrying on his affairs is not supported. J. Walter Huckabee is an individual and is the employer. There is absolutely no showing that any Court has removed him from the handling of his business or that he is not competent and capable of handling his affairs. Therefore, his admission carries great weight.

There was not a meeting of the minds and the employees and the employer did not, collectively, have a common intent for the loaders to be independent contractors. See, ESC vs. Paris vs. Emmerson, 101 N.C. App. 469, 400 S.E.2d 76, affirmed 330 N.C. 114, 408 S.E.2d 852 (1991). The individuals performing services as loaders were providing manual labor requiring little training or skill to perform the work. These individuals were loading tires onto a truck. This work is not the type of work where someone has a special business or occupation utilizing skill, knowledge, and training. It is a manual labor type situation where the employer is attempting to avoid its tax responsibilities by labeling employees as independent contractors. Whether Red Cartage supervised and controlled the activities of the loaders or it was delegated to Kelly Springfield, who did have the right to supervise and control the loading of the trucks, is not material. Under the arrangement, Kelly Springfield had the right to supervise and control the activities and work of the employees of Red Cartage.

It is concluded that the loaders were employees of J. Walter Huckabee T/A Red Cartage. Taxes plus penalties and interest as noted on the Unemployment Tax Assessment and Demand for Payment mailed September 21, 1989 are due. Interest at the statutory rate of one-half of one percent (.5%) per month on the unpaid tax continues to accrue.

ORDER:

It is NOW THEREFORE, ORDERED, ADJUDGED, AND DECREED that J. Walter Huckabee T/A Red Cartage is the employer of the loaders it engages to load trailers at Kelly Springfield Tire Plant. Taxes plus penalties and interest as noted on the Unemployment Tax Assessment and Demand for Payment mailed September 21, 1989 are due. Interest accrues at the statutory rate of one-half of one percent (.5%) per month.

Commentary:

A Cumberland County Superior Court Judge reversed this tax opinion on June 30, 1994. ESC appealed to the N.C. Court of Appeals and a divided three-judge panel (Judge Cozort dissenting) entered a decision reversing the judgment of the Superior Court Judge in State ex rel. Emp. Security Commission v. Huckabee, 120 N.C. App. 217, 461 S.E.2d 787 (1995). Upon appeal by the employer, the decision of the Court of Appeals was affirmed, per curiam, by the N.C. Supreme Court in 343 N.C. 297, 469 S.E.2d 552 (1996).