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Issue Date: 24 April 2012

MSHA CASE NO.: 2011-MSPA-P-00003

OALJ CASE NO.: 2011-MSP-00003

In the Matter of:

ROBERT W. ZAHARIE and ALPHA SERVICES, LLC,
Respondents,

Appearances: M. Patricia Smith, Esq.
Mary K. Alejandro, Esq.
Bruce L. Brown, Esq.
Jeannie Gorman, Esq.
U.S. Department of Labor
Office of the Solicitor
for the Administrator

Edward J Anson, Esq.
Witherspoon-Kelley
for Respondents

Before: Steven B. Berlin
Administrative Law Judge

DECISION & ORDER

Introduction

This case considers the narrow question of whether Respondent was acting unlawfully by transporting migrant seasonal workers in certain custom built vehicles while trailers were attached. *See* 29 C.F.R. §500.105(b). I will find that, although the vehicles were manufactured and purchased as trucks, Respondents modified them. As modified, the vehicles come within the regulatory definition of buses, not trucks. I therefore find that Respondents' use of the vehicles to transport workers, even with a trailer attached, did not violate the applicable regulation.

Facts and Procedural History

After an investigation extending over more than two years (September 10, 2007 to April 1, 2010), the Wage and Hour Division determined that Alpha Services, LLC, and its owner Robert W. Zaharie failed to meet the regulatory requirements of the Migrant and Seasonal Agricultural Worker Protection Act¹ in three ways:

- Respondents failed to include the Company's Employer Identification Number for tax purposes on the workers' pay stubs. *See* 29 C.F.R. §500.80(d).
- Respondents impermissibly transported workers to their work areas in a truck with an attached trailer. *See* 29 C.F.R. §500.105(b)(2).
- Respondents told the workers about several jobs they might be assigned but told them the wage rates for only one of those jobs. *See* 29 C.F.R. §500.75(b).

The Administrator did not assert that Respondents owed any back wages. Rather, he asserted only that civil money penalties of \$1,700 should be imposed as follows:

- For the failure to recite the Employer Identification Number on the wage statement: \$400 (\$100 for each of four instances);
- For the unsafe transport of workers: \$800 (\$400 for each of two instances); and
- For the failure to disclose wage rates: \$500 (\$100 for each of five violations).

Respondents objected to the findings and timely requested a hearing. Their objection was limited to the findings of the violations, not the amount of civil money penalties. If this Office found them in violation, Respondents stipulated to the amount of the penalties.

In pre-trial meetings, the parties agreed to far-reaching stipulations. Essentially, they agreed:

- On the pay stub issue, Respondents paid the workers with a one-page form that contained the check on one portion and a wage statement (or pay stub) on another portion. In some instances, Respondents included the Employer Identification Number on the wage statement. In the other instances, they did not include it on the wage statement but instead put it on the attached check.
- On the transport vehicles, the parties agreed on the design and function of the vehicles and disputed only whether the vehicles should be characterized as "trucks" or as "buses" for purposes of the regulation. They agreed that, if the vehicles were trucks, there was a violation; if they were buses, there was not.

¹ 20 U.S.C. §§1801-72.

- On the disclosure of wage rates, Respondents conceded that when they listed the jobs into which the workers might be assigned, they failed to state the wage rates for all but one of the jobs. Respondents argued, however, that there was no violation because in fact they assigned the workers only to the job for which they'd disclosed the wage rate. Although the Administrator disputed the adequacy of this argument, he conceded the factual predicate: Respondents had disclosed the wage rate for the one job into which they actually placed the workers.

I concluded that there remained no disputed facts; the issues could be decided as a matter of law. I therefore vacated the hearing and set a schedule for the parties to submit a written factual record and closing briefs.

The parties timely filed these materials. The Administrator submitted declarations from two investigators, Respondents' discovery responses, photographs of the vehicles, and Idaho Motor Vehicle Records to show that Respondents registered the vehicles as trucks, and other exhibits. Respondents submitted the declaration of Mr. Zaharie with attached exhibits. I admit all of the offered evidence and close the record.²

In "Second Stipulations" filed on February 7, 2012, the parties resolved two of the three issues. Respondents withdrew their objections to the Administrator's findings that they failed to disclose the wage rates applicable to some of the jobs. They agreed to pay \$500.00 in civil money penalties no later than thirty days after the stipulations were concluded. For his part, the Administrator withdrew the charge related to the failure to include the Employer Identification Number on the wage statements. This left for decision only the question of whether Respondents' vehicle for transporting workers was a bus (and thus in compliance with the regulation) or a truck (and thus not in compliance).

Discussion

The regulations set standards for the safe transport of workers to and from job sites. For transport other than in automobiles or station wagons, the regulations provide that:

Workers may be transported in or on only the following types of motor vehicles: A bus, a truck with no trailer attached, or a semitrailer attached to a truck-tractor provided that no other trailer is attached to the semitrailer. Closed vans without windows or means to assure ventilation shall not be used.

29 C.F.R. §500.105(b)(2)(ix).

² In an Order on January 13, 2012, I overruled objections to photographs of similar vehicles that the Spokane County Sheriff uses to transport passengers with a trailer attached. To the extent that the regulations are ambiguous, it could be relevant that county officials consider similar vehicles to be safe for similar purposes. As it happens, I will find the regulations sufficiently unambiguous on their face and therefore do not reach this evidence.

I admit the Administrator exhibits 1 through 3, including 11 subparts to exhibit 3; and Respondents' exhibits E through H. I also admit the declarations of the two Wage & Hour investigators and of Mr. Zaharie.

Respondents' fleet includes vehicles originally sold to them as pick-up trucks. After purchase, Respondents fitted the trucks with structures bolted or chained over the truck bed to provide cover, seating, windows that open, passenger safety belts, and an escape hatch. *See* P. Brief Ex. 1; Declaration of Robert Zaharie ("Zaharie Decl.") ¶¶1, 4, Ex. E. Respondent Zaharie refers to these structures as "crew carriers." Zaharie Decl. ¶¶1, 4. Respondents used the vehicles to transport workers to and from worksites with a trailer attached. *See* Stipulations ¶(5)(f). They used the trailer to haul worker equipment and a portable field toilet. *Id.*

If an employer uses a truck to transport workers, it must be "a truck with no trailer attached." 29 C.F.R. §500.105(b)(2)(ix). The restriction on trailers, however, does not extend to buses. *Id.* Thus, Respondents use of the vehicles was a violation unless their refitting them with the "crew carriers" converted them into buses.

The implementing regulations do not expressly define a "bus" or a "truck." Rather, the Secretary adopted certain Department of Transportation regulations that are published at 49 C.F.R. Part 398. 29 C.F.R. §500.101(d), 500.105(b). Those regulations supply the following definitions:

(e) "Bus" means any motor vehicle designed, constructed, and used for the transportation of passengers: Except passenger automobiles or station wagons other than taxicabs.

(f) "Truck" means any self-propelled motor vehicle except a truck tractor, designed and constructed primarily for the transportation of property.

49 C.F.R. §398.1.³

I begin with the plain language of the Department of Transportation definitions. As I find these definitions generally unambiguous, I need look no further. The definitions focus on whether the purpose of the vehicle is to transport passengers on one hand or property on the other. Considering that central distinction, I conclude that Respondents converted the vehicles from trucks into buses.⁴

Indeed, Respondents modified the vehicles precisely to convert their primary use from transporting property to transporting passengers. The "crew carrier" decreases the vehicles'

³ The Secretary does not expressly adopt the definition sections of the DOT regulations. *See* 29 C.F.R. §500.105(b). However, she does adopt the DOT regulations at 49 C.F.R. Part 398 to establish the restriction on attaching trailers to trucks while transporting workers. *Id.* 29 C.F.R. §500.105(b)(2)(ix). I infer that, when she adopted the restrictions in 49 C.F.R. Part 398, she must have adopted the relevant DOT definitions from Part 398 as well; otherwise, the terms have no defined meaning. From their briefs, the parties appear to agree.

⁴ Neither the Administrator nor the Solicitor cites any authority or offers any opinion on the purpose of the applicable regulations. What was the Secretary's safety concern when prohibiting the use of trailers with trucks, while allowing them with buses? A possible concern is that a worker riding in a moving open truck could be thrown from the truck and immediately run over by the trailer. The shell that Respondents affixed to the vehicle would avert this danger: It is closed, and workers cannot be thrown from it. Nonetheless, given the unambiguous language in the DOT definitions, I will decide the issue without determining the Secretary of Labor's purpose in adopting the DOT regulation. *See* Secretary's reference at the time of adoption of the regulations to reports of the President's [Eisenhower] Committee on Migrant Labor. 21 Fed. Reg. 10517 (1956).

capacity for hauling property. It gives up this capacity to accommodate passengers by providing them cover from the elements and enhanced safety and comfort with seating, seat belts, windows for ventilation, and an escape hatch. The cover, seating, seat belts, and windows serve no purpose for hauling property.⁵

The Administrator's argument that Respondent registered several of the vehicles as trucks with the Idaho Department of Motor Vehicles is unavailing for three reasons. First, the registrations all pre-date September 2007, when the Administrator began the investigation. Nothing on the record shows that Respondents had modified the vehicles as of the time it registered them as trucks. *See* Zaharie Decl. ¶¶2, 4; Letter dated August 17, 2010.

Second, the Administrator fails to demonstrate that a vehicle defined as a "truck" under Idaho's motor vehicle registration laws cannot meet the definition of a "bus" under the federal migrant worker regulations. It is possible that some vehicles that must be registered as trucks under state vehicle registration laws would come within the expansive definition of "buses" under the regulations applicable here.

Finally, the Administrator offers no authority or argument for the proposition that some kind of judicial or other estoppel keeps Respondent from asserting its current arguments here.

Conclusion and Order

The vehicles Respondents used to transport workers were buses under the applicable regulations. Respondents could lawfully use them with an attached trailer. Respondents' use of the vehicles did not violate the regulations. Accordingly,

As the parties stipulated, Respondents will pay civil money penalties in the amount of \$500.00 on account of their failure to disclose the wage rates for some of the jobs to which the workers might have been assigned. 29 C.F.R. §500.75(b). If they have not already paid the penalties,

⁵ I reject the Administrator's argument that the DOT definitions address only the configuration at the time of initial manufacture. Nothing in the regulations states that a vehicle cannot be modified to a different use and thereby have a change in characterization from truck to bus. Nor would such a rule make sense from a safety perspective: If the modified vehicle provides safety and comfort appropriate for human passengers and not merely for cargo, the regulatory purpose is better served by characterizing it by its actual configuration, not according to its status at the time of manufacture.

Respondents will remit the payment forthwith to the District Director, Wage and Hour Division, Seattle District Office, 300 Fifth Avenue, Suite 1130, Seattle, Washington 98104.

The remainder of the Administrator's claims is DENIED.

SO ORDERED.

A

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Issuance of a Notice of Intent ("Petition") to modify or vacate that is received by the Administrative Review Board ("Board") within twenty (20) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. §§500.263 and 500.264; Secretary's Order 1-2002, 67 Fed. Reg. 64272 (2002). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. A copy of the administrative law judge's decision must be attached to the Petition that is filed with the Board. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. *See* 29 C.F.R. §500.264(b).

If the Board declines to modify or vacate the administrative law judge's decision, then the decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §500.262(g).