UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FIVE

SHUTTLE EXPRESS, INC.
D/B/A SUPERSHUTTLE BALTIMORE[1]

Employer

and **Case 05-RC-112774**

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1994, MCGEO[2]

Petitioner

DECISION AND ORDER

I. INTRODUCTION[3]

On September 6, 2013, Petitioner filed the petition in the instant case, seeking to represent a unit of "[a]ll full-time Shuttle Drivers including relief drivers employed by [the Employer] serving BWI Airport" but excluding "[d]ispatchers, guards, and supervisors as defined in the [National Labor Relations] Act." A hearing was held before a hearing

[1] The name of SuperShuttle appears as amended at hearing.
[2] The name of the Petitioner appears as amended at hearing.
[3] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds that during the past 12 months, a representative period, SuperShuttle purchased and received goods and services at its Hanover, Maryland location valued in excess of $50,000 from points located directly outside the State of Maryland. Per the parties' stipulation at hearing, the undersigned further finds that SuperShuttle is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. No question affecting commerce exists concerning the representation of certain employees of SuperShuttle within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

officer on September 16, 2013.[4] A timely brief from SuperShuttle has been received and considered.[5]

Shuttle Express, Inc., d/b/a SuperShuttle Baltimore (SuperShuttle) is a shared-ride airport shuttle service providing, through franchisees, door-to-door ground transportation to and from the Baltimore Washington International Thurgood Marshall (BWI) Airport.[6] SuperShuttle argues the petition should be dismissed because the franchisees are independent contractors, not employees within the meaning of Section 2(3) of the Act. Additionally, SuperShuttle contends that even if the franchisees are not independent contractors, they are Section 2(11) supervisors because they have the authority to hire, assign, reward, and/or discharge relief drivers, using their independent judgment. There are approximately 87 franchisees and approximately 48 relief drivers in the petitioned-for unit.

This case presents an almost identical question as Case 05-RC-16601, for which a hearing was held on October 26-28, 2010, and a Decision and Order issued on November 19, 2010. In the prior case, the Acting Regional Director declined to decide the issue of whether franchisees were independent contractors, instead finding that, even if he assumed that franchisees were employees within the meaning of Section 2(3) of the Act, the franchisees were nonetheless Section 2(11) supervisors because they had the authority to hire, assign, reward, and/or discharge relief drivers using their independent judgment. The

[4] The hearing officer's rulings are free from prejudicial error and are affirmed.

[5] Petitioner failed to submit a timely brief; briefs were due no later than September 23, 2013, seven days after the close of hearing, whereas Petitioner submitted its brief on September 25, 2013 after being denied an extension of time for filing, which it only requested after SuperShuttle had submitted its brief.

[6] Under SuperShuttle's Unit Franchise Operations Manual (Manual) states, "[e]ach of the operating policies and procedures specified in this Manual may be delegated in part or in whole by you to other Operators of your vehicle." *See* J1D in Case 05-RC-112774. Nevertheless, while franchisees may delegate part, or all, of their driving to relief drivers, franchisees generally opt to operate as drivers of their vans, even if they share that responsibility with a relief driver. The franchisees are the "shuttle drivers" referenced in the Petition.

Acting Regional Director concluded that the representation petition, which only sought to represent franchisees, should be dismissed. Although Petitioner filed a Request for Review with the National Labor Relations Board, Petitioner withdrew its petition before the Board considered it.

Given the substantial record developed in Case 05-CA-16601, the parties in the instant case stipulated at hearing to admit the prior record as joint exhibits and to limit the record in the present case to evidence of changed circumstances.

Based upon my review of the record, I find no reason to disturb the findings and conclusion that were reached in Case 05-CA-16601, and I am dismissing the instant petition. First, Petitioner has not demonstrated a material change in circumstance since the prior case was decided. Nevertheless, I also find that even if Petitioner had demonstrated changed circumstances, and I assume, as the prior decision did, that franchisees are not independent contractors, the franchisees would nevertheless be beyond the jurisdiction of the Board as Section 2(11) supervisors. I find the franchisees possess the authority of supervisors under Section 2(11) to hire, assign, reward, and/or discharge relief drivers, using their independent judgment. Given that a majority of individuals in the petitioned-for unit are supervisors, and Petitioner failed to indicate it would proceed to an election in a unit limited to relief drivers, I shall dismiss the petition.

II. FACTUAL SUMMARY

SuperShuttle is in the business of selling franchises to individuals or corporate entities to provide shared-ride shuttle service to and from BWI Airport utilizing SuperShuttle's reservation

system and services.[7] SuperShuttle does not provide any shared-ride services. Such services are provided solely through franchisees. In turn, the franchisees provide the shared-ride services themselves and, if applicable, relief drivers the franchisees may individually choose to use to assist them in providing the transportation services.

SuperShuttle has a lease and concession contract with the State of Maryland Aviation Administration (MAA) for the non-exclusive right to operate scheduled shared-ride ground transportation service to and from Maryland, the District of Columbia, northern Virginia, and BWI Airport. This lease and concession contract sets forth numerous detailed requirements regarding several topics, including customer service, fares, equipment, maintenance, reporting and record keeping, insurance, and security. SuperShuttle, in turn, under the contract, sells unit franchises to provide shared-ride shuttle services using SuperShuttle's reservation system. The unit franchise agreement (UFA) contains the requirements set forth in the lease and concession contract, as well as the additional obligations SuperShuttle imposes as the franchisor. SuperShuttle and the franchisees are subject to heavy regulation by state and federal laws. In particular, SuperShuttle and the franchisees are subject to the Maryland Public Service Commission's (PSC) rules and regulations covering the operation of motor vehicles in the transportation of passengers for hire, which set forth specific licensure, training, and certification requirements. These rules and regulations also set forth detailed requirements including, but not limited to: (1) the securing of permits to provide service; (2) the condition, maintenance, and operation of the vehicles used to provide service; (3) insurance coverage; and (4) passenger limit requirements for operating a vehicle for hire. The UFA contains a detailed procedure through

[7] Since 2010, SuperShuttle has required new franchises to be purchased by an incorporated entity; franchisee drivers have been free to choose their preferred method of incorporation, and some drivers who purchased their franchises prior to 2010 have been incorporating.

which the franchisees can be found to be in default, and possibly lose their franchise, if they fail to comply with the terms of the UFA or other applicable rules and regulations.

A franchisee may purchase a one-year or a ten-year franchise from SuperShuttle. There are currently 87 franchisees.[8] Franchisees are not limited in how many franchises they may own, and several franchisees own multiple franchises. A significant majority of franchisees have ten-year franchises, for which they pay a $25,000 franchise fee if they purchase their franchise directly from SuperShuttle, or a negotiated sum if purchased directly from a franchisee. They may pay the full amount at signing or finance the amount. A franchise is transferable if the seller is in good standing, the buyer meets the requirements for becoming a franchisee (and is therefore acceptable to SuperShuttle), and part of the revenue of the sale is assigned to SuperShuttle for facilitating it.

The franchisee may choose to operate the franchise as a 14-hour AM franchise, a 14-hour PM franchise, or a 24-hour franchise. The franchisee is responsible for paying SuperShuttle 10% of revenues, along with a flat weekly fee, known as the system fee, in exchange for using SuperShuttle's systems, which includes access to its dispatch system and a mobile data terminal (MDT) communication device. The systems fee is lower for AM and PM franchisees than for 24-hour franchisees.

Each franchisee is responsible for acquiring, insuring, and maintaining a van that complies with the UFA. The franchisees may purchase or lease a van on their own, or SuperShuttle will assist them in leasing a van through Blue Van Leasing. The franchisee also may arrange with SuperShuttle to have the lease payments deducted from their revenues on a weekly basis. Franchisees may receive assistance from SuperShuttle to obtain insurance for their

[8] Petitioner identified on the petition that the sought-after unit, including franchisees and relief drivers, was approximately 125 individuals.

vans, and the franchisees may arrange to have SuperShuttle deduct and remit the premiums from their revenues to the insurance company.

Through the use of SuperShuttle's MDT device system, franchisees are alerted to inbound reservations of people wanting to be driven to the BWI airport, and they can bid on or pass on those reservations if they are within a certain mile radius of the customers. Also, the franchisees can bid on or pass on outbound reservations, and typically will do so while waiting in a holding lot at the BWI Airport. With very limited exceptions, franchisees are free to choose whether to bid on or pass on any reservation sent to them on their MDT devices.

Each week the franchisees will cash out for the jobs they performed and the money they received for the prior week. SuperShuttle will deduct any monies the franchisee owes to SuperShuttle for franchise fees and interest, insurance, vehicle lease payments and interest, system fees, and/or any other miscellaneous costs or fees. SuperShuttle also will deduct its portion of the revenues each franchisee is required to remit to SuperShuttle under the terms of their UFA (10 percent), as well as deduct a portion of revenues for all outbound reservations (17.5 percent) each franchisee is required to remit to the MAA under the lease and concession agreement and the UFA. After these deductions are made, SuperShuttle will issue the franchisee a reimbursement or reconciliation check. SuperShuttle does not deduct any federal or state withholding or other employment-related taxes from the check, and it does not pay unemployment insurance or workers' compensation insurance for these franchisees. As previously stated, the franchisees are solely responsible for all costs associated with operating a franchise (e.g., purchase or lease payments, insurances, gasoline, vehicle maintenance and repairs, tolls, etc.).

Under the UFA, each franchisee is permitted to utilize one or more substitute operators, more commonly referred to as relief drivers. The UFA requires that the franchisees notify SuperShuttle of any relief driver(s) being used, as well as evidence that each relief driver meets all the necessary training, certification, and licensure requirements to operate the franchisee's van. Other than verifying that the relief drivers meet these requirements, SuperShuttle has no other involvement in who the franchisee utilizes as a relief driver. Any issues or problems SuperShuttle has with a relief driver, such as failing to abide by the terms or conditions of the UFA or applicable regulations, are directed to the franchisee, and the franchisee is responsible for addressing those issues with the relief driver. Similarly, if SuperShuttle or the State of Maryland has an issue with a franchisee's van or how the van is being used, SuperShuttle will speak with the franchisee, not the relief driver, and the franchisee is responsible for addressing those issues.

III. ANALYSIS

SuperShuttle contends there are three issues presented in this case, any of one of which could be dispositive: (1) did Petitioner establish changed circumstances from the 2010 hearing in Case 05-RC-016601; (2) did SuperShuttle meet its burden to show the franchisees are independent contractors, and not statutory employees under Section 2(3) of the Act?; and (3) did SuperShuttle meet its burden to show the franchisees are statutory supervisors under Section 2(11) of the Act?. As mentioned above, the Acting Regional Director in the prior case assumed, without deciding, that franchisees were not independent contractors, and only addressed the matter of franchisees' Section 2(11) status. I find that there are no meaningful changed circumstances and that, even if there were, they would not warrant departure from the prior

decision's finding that franchisees are supervisors under Section 2(11) and, therefore, constitute an inappropriate unit.

Changed Circumstances

At the outset, SuperShuttle argues that Petitioner has a threshold burden to establish changed circumstances from when the matter was first litigated in 2010. Relying on *Crown Cork & Seal Company, Inc.*, 255 NLRB 14, 18 (1981) and *Heartshare Human Services*, 320 NLRB 1 (1995), SuperShuttle maintains that Petitioner may not re-litigate the prior hearing's findings unless Petitioner produces changed circumstances and/or additional evidence not available through reasonable diligence for the prior hearing. However, I do not read these cases as mandating such a burden for Petitioner in the instant case. That being said, I do not view Petitioner's evidence as indicating materially changed circumstances since 2010.

SuperShuttle's contention that Petitioner has a burden of proving changed circumstances from the 2010 hearing draws on the doctrine of *res judicata*. Under the doctrine of *res judicata*, a final judgment on the merits of a question or a fact bars further claims by parties or their privies based on the same cause of action. *See, e.g., Sabine Towing and Transportation Co.*, 263 NLRB 114, 119 (1982)(discussing the distinction between *stare decisis* and *res judicata*). However, a necessary element of *res judicata* is that there must be some consistency between the parties in the prior litigation where the merit determination was made on the issue in question and the parties in the instant litigation where one party seeks to re-litigate the same issue. That element is not present in this case, as Petitioner is not the same labor organization that filed the representation petition in Case 05-CA-16601. In the cases that SuperShuttle relies on for its argument that Petitioner has the burden of proving changed circumstances, the parties in the instant case were the same as the parties in the prior case, where a merit determination was made

on the issue sought to be re-litigated. Accordingly, I find these cases to be distinguishable and I conclude that Petitioner did not have an initial burden of proving changed circumstances. That said, I am mindful of the findings of the Acting Regional Director from the 2010 case involving SuperShuttle, and it is perhaps appropriate to afford those findings a degree of administrative comity. *See, e.g.*, *Serv-U Stores, Inc.*, 234 NLRB 1143, 1144 (1978)(recognizing the persuasive relevance to an unfair labor practice case of prior findings of a Regional Director from a representation case). In any event, with or without affording comity to the prior decision, I find, in accord with that decision, that franchisees are supervisors as defined Section 2(11) of the Act.

As an initial matter, I note that on September 13, 2013, prior to the start of hearing, SuperShuttle served Petitioner with subpoena duces tecum B-721623.[9] At the hearing, Petitioner argued that it did not have the requested documents in its possession and that Petitioner had no custodian of records.[10] Notwithstanding, Petitioner failed to file a petition to revoke the subpoena at the hearing or after its close.[11] Petitioner may not use evidence that it claims it does not have in its possession and that it did not turn over pursuant to a subpoena duces tecum as both sword and shield; it cannot refuse to produce the requested information, or allege the information was not in its possession, but also use that information to support its contention that circumstances changed, and/or that additional information not previously ascertainable surfaced from the prior 2010 hearing through the present hearing.

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[9] The subpoena was entered into the record as Super Shuttle Exhibit 1. At hearing, the hearing officer determined that he saw no need to keep the record open, although Petitioner still had time to file a Petition to Revoke. The hearing officer's ruling was free from prejudicial error and is hereby affirmed.

[10] Although Petitioner asserted orally at hearing that Amy Millar was not its custodian of records, SuperShuttle's subpoena duces tecum was directed at Amy Millar <u>or</u> Custodian of Records. (emphasis added)

[11] The Board's Rules and Procedures at § 102.31(b) state that "Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena." Additionally, the Board has held that "it is well established that a respondent that has refused to produce subpoenaed materials that are the best evidence of a fact may not introduce secondary evidence of matters provable by those materials." *The Smithfield Packing Company, Inc.*, 344 NLRB 1, 8 (2004)(citing to *Bannon Mills,* 146 NLRB 611 (1964) and *Avon Industries*, 329 NLRB 1064, 1244-1245 (1999)).

Of particular relevance and bearing to these proceedings are requests 5 and 6 of the subpoena duces tecum, which request all documents from June 2012 through the present that Petitioner reviewed, studied, or discussed relating to the alleged employment status of the petitioned-for unit, and all documents reflecting, relating, or referring to any alleged changed circumstances from the prior hearing through the present, respectively. Although the requests are, by their nature, broad, they are relevant to determine what documentary evidence, if any, Petitioner obtained to constitute additional information unknown at the time of the last hearing, or documentary evidence showing a change in circumstances.

Petitioner's most significant pieces of evidence of changed circumstances came in the form of exhibits relating to the Maryland Department of Labor, Licensing, and Regulation ("DLLR").[12] The most relevant of those exhibits, Petitioner's 1, is a decision from DLLR finding that payments made to a franchisee constituted employment wages. The State of Maryland uses a statutory test to determine whether an individual is an employee.[13] When determining employer liability for the purposes of unemployment, Maryland law presumes that "when wages are paid to an individual for services performed "covered" employment exists."[14] Maryland law allows an employer to rebut that presumption.[15] DLLR determined that, for the purposes of unemployment, franchisees were statutory employees under Maryland law.[16] Unlike the State of Maryland, the Board uses a common law agency test to determine whether an individual is an employee under Section 2(3) of the Act.[17] Despite Petitioner's urging at hearing,

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[12] Petitioner's Exhibits 1-3.
[13] *See* Md. Code Ann., Labor & Employment Article, Section 8-205.
[14] *See Warren v. Board of Appeals*, 226 MD. 1, 172 A.2d 124 (1961).
[15] *See* Md. Code Ann., Labor & Employment Article, Section 8-205.
[16] Maryland Department of Labor, Licensing, and Regulation ("DLLR") Decision #13-SE-13 (August 27, 2013). The decision is presently under appeal. *See* Petitioner's Exhibit 3.
[17] In determining whether an individual is an employee or an independent contractor, the Board applies the common-law agency test and considers all the incidents of the individual's relationship to the employing entity with no one factor being controlling. *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968). See also

the Board is not obligated to defer to Maryland's decision, or its statutory test, when considering employee status. Thus, even if the issue of the subpoena duces tecum, and Petitioner's lack of a response, is set aside, DLLR's decision is insufficient to constitute changed circumstances from the 2010 hearing.

None of the purported changes in SuperShuttle's practices from 2010 referenced at hearing through Petitioner's exhibits – such as SuperShuttle's offering of a loaner van to franchisees, the establishing of a Franchise Resale Opportunity Program to facilitate the sale of franchises by franchisees, changing the dates reimbursement checks are issued, contributing to third-party commissions that were previously strictly franchisees' responsibility, and adjusting fares so customers are responsible for paying tolls – are in any way indicative of a material change in circumstances that requires a revisiting of the prior hearing's findings.[18] Neither is the fact that franchisees are placing new franchises under corporate entities and even doing the same for older franchises.[19]

Testimony elicited at hearing also failed to establish changed circumstances that would bear upon a finding of independent contractor status or supervisor status. Whether franchisees are now included as co-insured payees along with SuperShuttle on franchise van insurance and indemnification policies, and whether government compliance agencies such as MAA or the Department of Transportation (DOT) are more strictly monitoring and/or enforcing regulations not established by SuperShuttle, are factors that do not weigh, one way or another, upon the

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BKN, Inc., 333 NLRB 143, 144 (2001); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998); and *Roadway Package System*, *Inc.*, 326 NLRB 842 (1998). The Board has held the party asserting independent contractor status has the burden of proof. *BKN, Inc.*, 333 NLRB at 144.

[18] Petitioner's Exhibit 5, a flyer regarding franchisee and relief driver trainer, does not evince any change in circumstances, as there was testimony at both hearings that SuperShuttle conducts such training to fulfill MAA requirements.

[19] There was mixed testimony as to whether requiring new franchises to be placed under an incorporated entity was a new requirement of SuperShuttle or something that SuperShuttle was already implementing for new franchises prior to the October 26, 2010 hearing.

issues the petition raises.[20] Similarly, testimony as to whether customers are more likely to pay with a credit card or through third-party operators, such as Shuttlefare Express, than in cash, also fails to support a meaningful change in circumstances, since testimony on the use of credit card payments as a method of payment was elicited at the prior hearing.

In summary, Petitioner has not demonstrated that there are changed circumstances that differentiate the current petition from the petition dismissed in 2010. Thus, Petitioner has not provided an evidentiary basis for me to conclude that the 2010 decision's findings are no longer relevant or applicable.

Supervisory Status

Section 2(11) of the Act defines as "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the prior decision correctly stated, these powers are to be read in the disjunctive, and possession or one or more of them does not convert an employee into a Section 2(11) supervisor unless the exercise of those powers is not of a merely routine or clerical nature, but requires the use of independent judgment. *Adco Electric Inc.*, 307 NLRB 1113, 1120 (1992).[21]

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[20] Driver Wonedwosan Taye testified to have received a four-week credit from the Employer when his van was inoperational due to an accident. However, SuperShuttle's Exhibit 3 at the prior hearing, a copy of the UFA, establishes that SuperShuttle can offer such a credit for up to four weeks in a calendar year at a franchisee's request.

[21] In *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006), the Board adopted a definition of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise….professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare, Inc.*, *Id.* at 693. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "not of a merely routine or clerical nature." *Id.* at 694. Consistent with the view of the Supreme Court, the Board held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* (citation omitted). However, "…the

Section 2(11) requires that the purported supervisor has the authority to (or effectively recommend the) hire, transfer, suspend, lay off, recall, promote, discharge, assign, responsibly direct, adjust grievances, reward, or discipline *other employees*. Thus, the previous decision found relief drivers to be Section 2(3) employees.[22] The decision then proceeded to find franchisee drivers to be Section 2(11) supervisors because they could hire, assign, reward, and or discharge relief drivers using their independent judgment. In light of an absence of changed circumstances, the evidentiary foundation upon which the Acting Regional Director concluded Section 2(11) status in 2010 remains sound, and I find, in agreement with him, that franchisees are supervisors as defined in Section 2(11).

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mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.* The Board held as follows on the meaning of "independent judgment":

> To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term. "Independent" means "not subject to control by others." *Webster's Third New International Dictionary* 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Webster's Third New International Dictionary* 1223 (1981). Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

Oakwood Healthcare, Inc., *Id.* at 695.

[22] In the 2010 decision, the Acting Regional Director found relief drivers to be Section 2(3) employees. His findings read: "Based upon the record, I conclude that the relief drivers are Section 2(3) employees. While the franchisees can operate without relief drivers, the witnesses who testified relied heavily on their relief drivers in order to effectively operate their franchises. Similarly, the relief drivers are dependent on the franchisee because they cannot operate a Super Shuttle van without being covered under a unit franchisee agreement. Furthermore, each relief driver's schedule, wage, and other terms and conditions of employment are determined primarily by the needs of the franchisee for whom he/she is working. The relief drivers are subject to and must abide by the same policies and regulations applicable to the franchisee drivers, as well as any additional rules or policies the franchisee adopts. The franchisee supplies the franchise, the van, the Nextel phone, and the reservation system. Without those items, the relief driver would not be able to provide shared-ride services under the lease and concession agreement. And, in contrast to the Petitioner's contention that these relief drivers are temporary or casual employees, the record reflects that most of the relief drivers work as such on a regular basis (from a couple of hours a week to 50-80 hours a week), and that most of the relief drivers have done so for months or years. While some of the relationships may be for limited periods of time, most appear to be open-ended. Of course, there are certain factors favoring finding that the relief drivers are independent contractors, such as that a few of the relief drivers work for multiple franchisees, several franchisees do not appear to deduct or pay state or federal withholdings, workers compensation insurance, unemployment insurance for the relief drivers, etc. Overall, however, I conclude the evidence establishes they are Section 2(3) employees." The hearing in the present case produced insufficient evidence upon which to disturb the prior finding.

Now, as in 2010, franchisees are free to hire relief drivers provided they meet the same eligibility requirements to drive as are applicable to franchisees. Many franchisees use relief drivers to enable their franchise to operate 24 hours, to keep their franchise operating if they go on vacation, and/or if the own multiple franchises. Franchisees make the decision to hire relief drivers independently, without SuperShuttle's involvement. While SuperShuttle may provide candidate names to franchisee drivers who are interested, the decision of who to hire remains solely with the franchisee, and there is no dispute that SuperShuttle does not obligate any franchisee to hire a specific relief driver. SuperShuttle's role in the hiring process is exclusively to ensure that relief drivers meet driver licensure, certification, and training requirements set forth by MAA and PSC, as well as state and federal regulations. A franchisee is only required to provide SuperShuttle with basic information regarding the relief driver as well as documentation showing that he/she meets the above-referenced requirements.

Should a franchisee hire a relief driver, it is up to the franchisee to decide how much the relief driver will be paid and whether the relief driver will be responsible for any of the costs associated with the franchise. Sometimes the arrangement between a franchisee and his or her relief driver will be a subject of negotiation between them, while, in other situations the franchisee will make the decision. In either case, SuperShuttle is not involved. Franchisees may choose to split costs and revenues equally with relief drivers. Alternatively, they may allow a relief driver to operate a van exclusively and keep most of the revenues provided they pay all the costs. Franchisees and their relief drivers may also reach different manners of arrangement, such as having franchisees pay for their relief drivers' training, or loaning their relief drivers money for van repairs, or pay them in advance. Whatever the arrangements covering terms and wages of employment, however, SuperShuttle issues one check to the franchisee (or the appropriate

incorporated entity). The franchisee remains solely responsible for making sure their franchise is in compliance with all applicable laws and regulations; should a relief driver commit a violation, responsibility for it still falls upon the franchisee.

Franchisees may also terminate a relief driver at any point, also without SuperShuttle's input.[23] Whether franchisees give their respective relief drivers an opportunity to correct any deficiencies is entirely up to the franchisees. The record at the prior hearing provided examples of such terminations, which occurred without SuperShuttle's involvement. While SuperShuttle may suggest a franchisee terminate a relief driver who repeatedly violates the terms of the UFA, SuperShuttle has no authority to terminate the relief driver and its actions are only against the franchisee, who is ultimately responsible for ensuring a franchise's compliance.

In the absence of any new material evidence since the prior hearing to dispute the finding that franchisees would be Section 2(11) supervisors if one were to assume that they were not independent contractors, and given the present record fully supports those same findings, I find, as did the Acting Regional Director in 2010, that franchisees are supervisors as defined in Section 2(11) of the Act. Because a majority of individuals in the petitioned-for unit are franchisees, whom I find to be statutory supervisors, and, as indicated above, Petitioner did not express a desire to proceed to an election in a unit limited to relief drivers, I dismiss the petition.

IV. ORDER

IT IS HEREBY ORDERED that the petition filed in this case is dismissed.

[23] The prior hearing's record, which was entered into evidence as Joint Exhibit 1, contains testimonial evidence to this regard.

V. RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street NW, Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business on **December 9, 2013**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website **is accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[24] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

[24] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under the Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Issued at Baltimore, Maryland this 25th day of November 2013.

(SEAL)

/s/ Wayne R. Gold

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