UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

Fort Worth, Texas

SUPERSHUTTLE DFW, INC.
Employer

and

Case No. 16-RC-10963

AMALGAMATED TRANSIT
UNION LOCAL 1338
Petitioner

DECISION AND ORDER

SuperShuttle DFW, Inc. is a Texas corporation engaged in the business of providing shared-ride services in the Dallas-Fort Worth area. Under Section 9(c) of the National Labor Relations Act, Petitioner filed a petition seeking to represent the certain employee classifications. The petition was amended during the hearing to reflect the following:

Included: SuperShuttle drivers (franchisees) and relief drivers.

Excluded: Supervisors, managers, dispatchers, as defined by the NLRA.

A hearing was held before a hearing officer of the National Labor Relations Board.[1] The Petitioner contends that the appropriate unit consists of approximately 89 employees, including 88 driver-franchisees (hereafter drivers) and one relief driver engaged in providing a shared-ride van service.

The Employer asserts that the bargaining unit is inappropriate upon two grounds. First, the Employer argues that the drivers are excluded from the Act's definition of

[1] Both the Petitioner and Employer filed briefs, which were carefully considered.

"employee" because they are independent contractors. Second, the Employer argues that if the drivers are not excluded as independent contractors, they should be excluded as statutory supervisors pursuant to Section 2(11) of the Act. Because I conclude that the drivers are independent contractors, I do not reach the issue of supervisory status.

I. ISSUE

The issues raised by the Employer are whether the drivers, who primarily serve the Dallas-Fort Worth (DFW) Airport, are independent contractors and whether the drivers are supervisors. For the reasons set forth below, I find that the drivers are independent contractors and not employees within the meaning of Section 2(3) of the Act. Because I find that the drivers are independent contractors, I will not address the Employer's alternative contention that the drivers are supervisors. To lend context to my discussion of the issue, I will provide an overview of the Employer's operations and historical background to the extent necessary for my discussion of the issues; a discussion of the statutory law and burdens of proof; and a statement of material facts and legal analysis.

II. FACTS

A. The Employer and Its Service

The Employer is SuperShuttle DFW. SuperShuttle DFW has a corporate relationship with SuperShuttle International and SuperShuttle Franchise Corporation, but is an independent entity. Other similarly named and affiliated companies operate in various cities throughout the United States. Together, the various SuperShuttle-affiliated

entities are involved to some degree in the business of providing transportation in the form of shared-ride shuttle service.[2]

The end product/service provided by the various SuperShuttle entities is a shared-ride service in which passengers are typically transported to or from DFW Airport or Love Field Airport. There are three basic way in which the service operates. First, the van may pick up or drop off multiple customers at multiple locations. For example, several customers may board a van at DFW Airport and ride together as each is dropped off at his/her respective destination. Similarly, several customers going to the airport may be picked up at their respective homes and thus ride together to the airport. Second, a "clear van" may be provided in which multiple customers are picked up or dropped off at the same location and no passengers are picked or dropped off at different locations (essentially the way a typical taxicab operates). Third, a van may pick up or drop off customers on a "hotel circuit." Under the third approach, multiple customers may be picked up or dropped off from multiple hotel locations on a fixed route (a basic shuttle service model of operation). In addition to the three usual ways in which vans operate, occasionally, a group of customers are transported to and from locations (neither of which is an airport), via a charter service.

B. Establishment of the Franchisee Relationship

Prior to 2001, SuperShuttle operated in the normal employer-employee relationship. Due to a significant drop in airline-related travel business following the effects of September 11, 2001, some of SuperShuttle's various affiliates began restructuring operations. SuperShuttle DFW moved to a franchisee-based model of

[2] As discussed below, the Employer disagrees with this characterization of its business and contends that it is in the business of selling franchise agreements that allow franchisees to provide transportation.

business in 2005. Under the new business model, the drivers sign a one-year Unit Franchisee Agreement (UFA). Most of the drivers sign in their own name, but 5 of the 88 drivers have signed as corporations. Before entering into a UFA, potential drivers must go through a disclosure process controlled by Federal Trade Commission franchise guidelines and pass a background check and drug test.

Under the franchise agreement, a driver, subject to certain restrictions, pays for the right to provide transportation to and from DFW and Love Field airports. The driver pays the Employer for this right by paying an initiation fee of $500 or $300[3] and a weekly payment of $575 to be paid 50 weeks per year ($28,750 a year). The weekly payment is a flat payment that is not affected by the revenue a driver generates. The weekly fee covers not only the franchise fee itself, but also the cost of providing the driver his Nextel device, by which he bids on routes, and marketing of the SuperShuttle brand.

The UFA states that the parties are not entering into an employer-employee relationship. Rather, the relationship between the parties under the UFA is a franchise-franchisee relationship. The UFA provides at one point, "persons who do not wish to be franchisees and independent business people but who prefer a more traditional employment relationship should not become SuperShuttle franchisees."

C. Drivers Obtain and Operate Vans

The driver is required to own or lease a van that meets the Employer's specifications, which include the make and model, color, size, age and mechanical condition of the vehicle. The vehicle must not be more than 7 years old, which the

[3] The $500 fee is for access to both DFW Airport and Love Field Airport, whereas the $300 fee is for access only to DFW Airport.

Employer contends is a requirement of DFW Airport. The van must display SuperShuttle's trademark blue and yellow combination and must be affixed with a large SuperShuttle logo. Although the mechanical condition is monitored both by the Employer and by the DFW Airport, including a 60-day check required by the Employer, the driver is responsible for all maintenance and the costs associated with maintenance.

A majority of the drivers own their vans and others lease-to-own their vans. Blue Van Leasing, a SuperShuttle-affiliated company, provides some of the drivers with vans on a three-year lease-to-own basis. The vans are valued between $15,000 and $30,000. One driver testified that his weekly lease payment is $178 per week ($9,256 per year).

The franchisee must purchase insurance through a designated insurer at $165 per week ($8,580 per year). Additionally, the franchisee must obtain certain licensing approval with the DFW Airport, which includes paying licensing fees and undergoing a background check. The driver must also complete training which, according to the disclosure document, consists of 34 hours of classroom training as well as 22 hours of on-the-job training.

D. Drivers Secure Fares and Receive Payments

In exchange for the fee provided to it, the Employer provides the franchisee with the right to bid on trips booked by customers. Additionally, the Employer provides the franchisee with a Nextel device by which the franchisee is offered and may secure trips. The franchisee is entitled to all fares paid by customers and does not share the fare with the Employer in any way. The weekly flat fee that the driver pays does not vary with revenues earned or any other factor.

Passengers may pay in the form of credit cards, vouchers, coupons or cash. Passengers may book their trips online, by calling an 800 number, at the SuperShuttle counter in an airport, through their hotel, or by approaching an idle driver. Drivers have a credit card reader onboard each van. On a weekly basis, drivers submit records of credit card payments from their own machines and confirmation numbers of passengers who paid online for reimbursement. The drivers must honor coupons, but are not refunded by the Employer for the discounted price. From funds processed on behalf of a driver, the Employer deducts money the driver owes (weekly franchise fee, insurance payment, vehicle payment, hotel circuit fees, etc) and then provides the driver with a reimbursement check.

According to the UFA, the driver has the option to purchase either an a.m., p.m. or a 24-hour license. However, the testimony reflected that no matter which license is purchased, the driver is actually unlimited in the hours during which he may operate. The driver may purchase a license that includes only access to and from DFW Airport or a license that includes access to both DFW Airport and Love Field Airport. The driver may provide service anywhere in the Dallas-Fort Worth area, and is limited in this respect only to the extent that the driver must meet the licensing requirements of the cities in which he provides service.

E. Drivers' Hours, Schedules and Bid Process

As previously noted, the driver may purchase certain types of licenses for specific schedules. However, a driver is under no obligation to work any certain days or hours, or even to work at all. A driver also may exceed scheduled hours if so desired. The stream of business is not steady, but is affected by broader economic factors as well as seasonal

cycles. To make up for slower times, one driver stated that he "work(s) like a wounded elephant" when customers are plentiful and could refrain from work during slow periods.

The Employer offers trips through Nextel hand-held devices. For the most part, drivers are free to either accept or decline an offered trip. If no driver accepts the trip the Employer sometimes puts the trip up for bid in a sedan service that it runs.[4] Occasionally, the Employer will combine the trip with a more lucrative trip. Finally, when "worst comes to worst," the Employer will call a taxi to transport the customer whose trip was not accepted. The record indicated that, on rare occasions, drivers are asked by a dispatcher to bid on a trip that no one else has accepted. Only one driver testified that he had found a trip forced into his Nextel device even though he had not accepted the trip. This occurred over one year ago and is the only reference in the record to a "forced bid."

The record reflects four ways in which drivers bid on trips. The first type of bidding is "available bidding." Available biding occurs when a driver is in some location that is not an airport or a hotel. In that case, a driver turns on his Nextel device and indicates that his services are available. The dispatch system, which because of GPS technology is aware of the driver's location, presents him with trips that customers have requested that are within a 20-mile radius. The first opportunity to bid is given to the nearest driver. The driver has a limited time to decide whether or not to bid on the trip. The driver makes the decision of whether to bid on or pass on the trip based on factors such as the amount of the fare, whether there are other trips to bid on in the area and the final destination of the trip. If the driver does not bid on the trip, the trip will be offered to another driver.

[4] No other details of the sedan service were provided.

The second type of bidding occurs when a driver is in a "hold-lot", such as when the driver is parked at DFW Airport, at a hotel, or some other location ("work-list bidding"). In that case, the driver who arrived first to the hold-lot, the hotel stand, or other location is presented with new trips out of the lot. The driver will assess the economics of the trip and decide whether or not to bid on it or to pass. If the first driver in the lot passes, the trip is offered to the next driver and so on.

Another type of bidding is "outbound finals bidding." In this case, the driver has indicated where his final destination will be based on a route that he has accepted. The system will then offer him trips originating in his final location.

Finally, there is "a.m. bidding." In this type of bidding, drivers log into the system during early morning hours (from approximately 1:00 a.m. to 5:00 a.m.) and bid on trips for later that morning. This system works on a first-come, first-serve basis rather than on proximity.

In addition to the four main bid systems, drivers may work the "hotel circuit." The "hotel circuit" is a system in which drivers and hotels negotiate among themselves a system to service the hotels. Drivers are not required to be involved in a hotel circuit and SuperShuttle is not involved in the organization of the hotel circuit. The drivers and the hotels involved craft by-laws and schedules for pick-ups. If a driver elects to participate in a hotel circuit, SuperShuttle deducts a fee of $60 from his weekly reimbursements. This fee is given to the hotels involved to cover costs associated with the hotel circuit. If a franchisee violates the bylaws of a hotel circuit he may be expelled from the circuit. The hotels and fellow circuit drivers are responsible for such an expulsion, not SuperShuttle.

Generally, a driver has no negative consequences for passing on a trip. However, once a driver accepts the trip by bidding on it, he may be fined by SuperShuttle in the amount of $50 if he cancels the trip. That $50 fee is awarded to the driver who bids on and is awarded the canceled trip.

F. Drivers' Pay and Expenses

Drivers are not guaranteed any pay or base salary. A review of two drivers' bidding history shows that the fares associated with the trips to be bid on generally range from $12-$160. The Employer's franchise disclosure shows the average gross revenue per shift in 2009. According to that disclosure form, 3 drivers averaged between $0 and $199 per shift and $37,024 in annual revenue, 17 drivers averaged $200-$249 per shift and $53,690 in annual revenue, 43 drivers averaged $250-$299 per shift and $51,743 in annual revenue, 35 drivers averaged between $300-349 per shift and $64,786 in annual revenue, and 12 drivers earned over $350 a shift (averaging $373 a shift) and $61,772 in annual revenue. The record reflects that cash tips and cash fares may not be accurately reflected in these figures.

Drivers pay for their own expenses, which include gas, tolls, licensing fees, and vehicle maintenance. Neither the testimony nor the disclosure statement provides an estimation of gas and vehicle maintenance expenses. As noted, drivers also purchase insurance through a SuperShuttle designated insurer.

G. Relief Drivers

The franchise agreements provide that the driver has the right to use a relief driver. The agreement requires that the driver provide written notice to the DFW Airport and that the relief driver must complete training with the DFW Airport. The record

reflects that only one driver currently employs a relief driver. The general manager testified that neither he nor any of the SuperShuttle staff direct relief drivers. Relief drivers are paid by the drivers directly. The relief driver testified that he entered into an agreement with a driver whereby the two rotate use of the van on an every-other-day basis. The two split profits earned above expenses. This agreement was one constructed by the two and the Employer is in no way involved in their arrangement. The record shows that in order to be hired as a relief driver, the relief driver had to gain the approval of the Employer and the licensing approval of DFW Airport.

The choice to hire the relief driver is made entirely by the driver (subject to approval by the Employer). The relationship may be terminated by either party at any time. A different driver testified that he had a relief driver at one point and that he had paid the relief driver $120 per shift and that the driver received all fares collected by the relief driver. The driver enjoyed the economic relationship, but the relief driver purchased his own van and franchise after three months. The relief drivers are required to undergo training provided by the Employer.

H. Other Provisions of the UFA

Under the UFA, a driver has the right to transfer his franchise, but may only do so subject to approval by the Employer. Among the conditions for approval is the condition that the transferee must meet all of the requirements of a new franchisee. Additionally, a payment of the lesser of $500 or 10% of the sale price must be made to the Employer for approval.

Further, the UFA provides that the Employer may terminate the contract with the driver if the driver associates or affiliates with a business that is competitive with the

Employer. It also specifies that the driver agrees to indemnify the Employer with regard to the Employer's legal liability if the driver's operation of his vehicle gives a third party rise to a claim against the Employer.

I. SuperShuttle's Contract with DFW Airport

SuperShuttle DFW is licensed to operate its services at DFW Airport by virtue of a contract entered into between it and the DFW Board, a public governmental agency. The terms of the contract entered into between SuperShuttle DFW and the DFW Board describe the way in which SuperShuttle DFW may operate its business. Testimony at hearing indicates that the 130-page documents has extensive terms which describe most of the ways in which SuperShuttle will run its DFW Airport operation. The requirements include that the Employer maintain a customer complaint procedure, screen its drivers for drugs and alcohol, and train its drivers. Additionally, the terms prohibit a driver from either leaving his vehicle or performing maintenance on his vehicle while parked at DFW Airport. The contract governs the marking on the vans as well as their internal conditions and the number of seats that a van may offer and calls for vehicle maintenance and a post-accident safety inspection. The contract provides DFW Airport with the right to inspect vans operated by SuperShuttle as well as to audit SuperShuttle for compliance with the contract.

The contract provides a procedure for customer complaints. Under this procedure, SuperShuttle must provide a response to customer complaints within 10 days and send a copy of all complaint related correspondence to a DFW Airport official. Additionally, SuperShuttle must provide a quarterly summary of complaints and complaint handling.

III. ANALYSIS

As the facts above reflect, the parties here do not have a typical employment relationship and the issue of whether the drivers are employees requires analysis. Based on the foregoing facts and as set forth below, after careful consideration of all aspects of the relationship between the drivers and SuperShuttle, I find that the drivers are independent contractors and not employees under the Act.

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." Accordingly, if the drivers in the instant matter are independent contractors rather than employees as defined in the Act, they are excluded from the Act's protections. Because such a classification would result in the loss of the Act's protection, the burden is on party asserting independent contractor status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). The Supreme Court held that Congress intended that the common law agency definition be applied to the term "independent contractor." *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968). Thus, the common law test of agency as described in the *Restatement (Second) of Agency* has been and continues to be the standard by which the Board and the courts analyze an individual's inclusion or exclusion in the Act's protection. *Arizona Republic*, 349 NLRB 1040, 1042 (2007), citing *Restatement (Second) of Agency* § 220(2).

A. The Ten Restatement Factors For Independent Contractors

The *Restatement* lists ten non-exhaustive factors in determining independent contractor status. However, the Supreme Court cautioned that there is no "shorthand formula" or "magic phrase" and "all incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Insurance Company of*

America, 390 U.S. at 258. In recent years, the Board has also found that entrepreneurial opportunity for gain or loss on behalf of the worker should be considered. See *Roadway Package System*, 326 NLRB 842, 850 (1998) and *Express Delivery Systems*, 332 NLRB 1522, 1526 (2000) enfd. 292 F.3d 777 (D.C. Cir. 2002). Furthermore, the D.C. Circuit has called entrepreneurial opportunity an "animating principle by which to evaluate" the other factors in cases where factors weigh on both sides. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009), reh'g denied, reh'g en banc denied (D.C. Cir. 2009). I will discuss the factors listed by the *Restatement* as well as the entrepreneurial factor below. Finally, I will address the factors in the aggregate.

As discussed above, the *Restatement (Second) of Agency* Section 220 lists 10 factors to be considered in the determination of common law independent contractor status. Those factors are: (1) the extent of control; (2) whether the employed person is engaged in a distinct business; (3) whether the occupation in question normally requires supervision; (4) the skill required by the occupation; (5) who supplies the tools or instrumentalities of work; (6) length of employment; (7) method of payment; (8) whether the work performed is in the business the employer is engaged in; (9) the intent of the parties' when entering the relationship; and, (10) whether the principal is a business. The trier of fact must determine whether "a sufficient group of favorable factors [exists] to establish the employee relationship." *Roadway*, 326 NLRB at 850.

(1) The extent of control which, by the agreement, the master may exercise over the details of the work

The right-of-control is one of the most important factors in any industry, but the Board has held that the control exerted by an employer "over the manner and means by which the drivers conducted business after leaving [the company's garage]" is one of two

factors given significant weight in the taxicab industry. *AAA Cab Services*, 341 NLRB 462, 465 (2004). Because the shared-ride industry is an extension of the taxicab industry, this factor should be afforded significant weight.

In the instant case, drivers are free from control by the Employer in most significant respects in the day-to-day operation of their vans. Drivers are free to work if and when they want, and have total autonomy in this respect. Drivers do not need to even commit to a schedule of their own creating. Drivers simply indicate if they are available and decide whether or not to accept trips. Other than the receipt of data from the Nextel device, there is little record evidence of communication between a driver and the Employer in the driver's day-to-day operation of his/her van. It is well settled that a driver's discretion in deciding if and when to work and which trips to accept weighs in favor of a lack of control. *AAA Cab Services*, 341 NLRB at 465.

In addition to the foregoing factors reflecting a limited exercise of control by the Employer, the record also reflects that drivers are largely free in where they will work. Although they may be limited to the extent that they are confined to the Dallas-Fort Worth area, which is what their licenses provide, the Employer does not otherwise control where the drivers will perform the work. Id. (freedom in geographic area weighed toward finding of independent contractor status).

As noted above, the record reflects that the Employer may fine a driver $50 for instances when he/she accepts a trip and then later decline the trip. The $50 is given to the driver who accepts the previously declined trip. Additionally, Petitioner presented evidence that, in one instance, the Employer forced a trip into a driver's Nextel and that when the driver declined the trip, the Employer fined the driver $50. This incident is the

exception as it was the only example provided on the record. Although the franchise agreement contains a provision by which the Employer may discipline drivers through a point system, no testimony was presented that the point system has been utilized. The fact that the Employer may fine a driver who declines service to a customer that he has previously committed to servicing does not demonstrate employer control sufficient to support a finding that an individual is an employee under the Act.

The fact that the parties have contracted for the driver to indemnify the Employer also reflects a lack of control or at least a lack of a motivation to control. That is, in an ordinary employment relationship, the employer has an incentive to control the employee's work in that he may be liable for harm caused. The indemnification clause here is an attempt to avoid that liability and weighs toward a finding of lack of control by the Employer. See *Dial-A-Mattress*, 326 NLRB 884, 891 (1998) ("in employer-employee relationships, employers generally assume the risk of [] third-party damages, and do not require indemnification from their employees").

The drivers are not free in all details of the work. Although they are free to accept or reject trips, they are not free to set their fares or reject coupons. Neither are they free to choose their own attire, rather they must dress in uniform and maintain certain grooming standards. See *AAA Cab Service*, 341 NLRB at 465; *Argix Direct*, 343 NLRB 1017, 1022 (2004).

Furthermore, the Employer exercises some degree of control over the drivers by inspecting their vehicles, and monitoring their driving by affixing a "How am I driving?" sticker to their vehicle, installing GPS tracking devices on the vehicles, and requiring that the drivers submit records of their trips and fares. Additionally, the Employer has a cell

phone policy which requires the drivers to refrain from cell phone use while driving and requires that drivers undergo some, but not extensive training. The Employer also requires that drivers carry insurance. Additionally, although drivers are required to drive a specified make and model of vehicle (not to exceed seven years old), this requirement is not mandated by the Employer but by DFW Airport. Furthermore, the Employer requires that the vehicles must be painted to specification and bear the Employer's logo. Although these vehicle requirements demonstrate some degree of control on the drivers' decisions in vehicle purchase and selection, they do not demonstrate control "over the manner and means" by which the drivers conducted the actual business of transporting customers. See, e.g. *AAA Cab Services*, supra. (fact that taxicabs were painted according to trade name not discussed in determining that employer's lack of control regarding operations of taxicabs).

Based on the foregoing, I find that the factors of control favor that the drivers are independent contractors. The factors strongly favoring control include scheduling and selecting fares.

(2) Whether the one employed is engaged in a distinct occupation or business; (8) Whether the work is a part of the regular business of the employer; and (10) Whether the principal is or is not in business

These factors are closely related. Certain specialized occupations are commonly performed by individuals in business for themselves and therefore if the employed person is in such an occupation, this factor will weigh toward independent contractor status. However, occupations without such an association are not deemed distinct. See *Bailey Distributors*, 278 NLRB 103, 115 (1986), order vacated on other grounds, 796 F.2d 14 (2nd Cir. 1986) (driver-salesman's helper not engaged in distinct occupation). A van

driver is not a distinct occupation and so this factor weighs in favor of an employee status classification.

The Employer argues that it is not engaged in the business of transportation, but rather in the business of franchising and providing services to franchisees. That the Employer and its various affiliated companies are in the business of marketing transportation and selling transportation is clear. Whether the company directly profits when the actual transportation is provided is secondary to the fact that its revenue is ultimately derived from the transportation it markets and sells. See *Arizona Republic,* 349 NLRB 1040, 1046 (2007) (delivery of newspapers an integral part the newspaper business). Therefore, these factors weigh in favor of an employee classification.

(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision

As no evidence was presented by the Petitioner as to whether van drivers are typically supervised in their work, this factor favors independent contractor status.

(4) The skill required in the particular occupation

The record does not illustrate that the drivers need to have any particular skill or require any specialized training, other than a specific driver's license. Therefore, this factor weighs in favor of an employee classification. *Prime Time Shuttle International, Inc.*, 314 NLRB 838, 840 (1994) (shared ride van drivers did not have particular skill).

(5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work

Three major supplies or instrumentalities are at issue: the vans; the Nextel devices; and, the uniforms. The drivers are responsible for owning or leasing a van, the Employer provides the Nextel devices as part of the franchise agreement, and the

Employer provides one uniform while the drivers buy additional uniforms. The Nextel devices are equipment that the drivers pay for as part of their weekly payments. Consequently, they are equipment in which the drivers have a proprietary interest. *See AAA Cab Services*, supra at 465 (paying leases or rental fees over time results in an investment on the part of the renter/lessee). The van is the most expensive of these instrumentalities and this factor weighs in favor of an independent contractor classification. *Argix Direct, Inc.*, 343 NLRB at 1020; *Dial-A-Mattress*, 326 NLRB 884 (employer provided owner-operators with two-way radios, credit card machines, and spare bed frames, but most costly piece of equipment, the truck, was owned by owner-operators). Compare *Community Bus Lines/Hudson County Executive Express*, 341 NLRB 474 (2004) (drivers who drove vans owned by the employer were not independent contractors).

(6) The length of time for which the person is employed

When the length of time of employment shows a relationship that is more permanent than passing, this factor weighs in favor of a finding of employee classification. Because the franchise agreements have a definite one-year period, this factor does not weigh in favor of an employee relationship, where the relationship is typically indefinite, and instead favors a finding of independent contractor status. *See St. Joseph's News-Press*, 345 NLRB 474 (2005).

(7) The method of payment, whether by the time or by the job;

Form of payment is the other of two factors that the Board has given significant weight to in the context of the taxicab industry. *AAA Cab Service*, 341 NLRB at 465. Where "the lack of any relationship between the company's compensation and the

amount of fares collected" exists, this factor weighs in favor of a classification of independent contractor. Id. When an employer and a driver share in the profits of the driver's fares, the employer has a motive to keep the driver working and working efficiently. *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300, 1309-1310 (2004). Thus, a fare-sharing employer has a motive to control the manner and means of the driver. Id. However, such a motivation is lacking here because the Employer does not share in the profits and the fares collected. Therefore, this factor weighs in favor of classifying drivers as independent contractors. Id.

(9) Whether the parties believe they are creating the relation of master and servant

Three points here favor finding that the drivers are independent contractors. First, the contract specifies that the parties were entering into a non-employee relationship. Such a contract term weighs in favor of independent contractor status. *Arizona Republic*, 349 NLRB at 1045; *St. Joseph News Press*, 345 NLRB at 479. Second, the Employer does not provide drivers with any type of benefits, which also favors independent contractor status. The Employer also does not provide withholding of any sort. Id.

Third, five of the drivers have signed their franchise agreements as corporations. By incorporating, these employees have clearly evinced a belief that they are not in an employer-employee relationship. Such a corporate status is unusual in the employment relationship and tends to be associated with a finding of independent contractor status. These factors, therefore, demonstrate that the drivers and the Employer did not intend to enter into a traditional master-servant relationship, which favors a finding of independent contractor status.

B. Other Factors

Case law also demonstrates that others factors, such as lack of bargaining power and entrepreneurial opportunity for gain or loss, must be considered. These factors will be discussed below.

(1) Lack of bargaining power

The terms and conditions of the UFA are unilaterally promulgated by the Employer, a factor which weighs in favor of an employee status. *Argix Direct*, 343 NLRB at 1020. However, bidding on fares demonstrates that the drivers have some bargaining power.

(2) Entrepreneurial Opportunity for Gain or Loss

This factor strongly favors finding that the drivers are independent contractors because the drivers' decisions and efforts impact their income, which provides them with opportunity to gain as well as to lose.

Because of their contractual obligations, the drivers have opportunity for loss. Here, in addition to making payments for their vehicles, the drivers are obligated to pay almost $30,000 per year to the Employer and another $8,500 in insurance. Thus, this relationship is quite different from the ordinary employment relationship, as a driver who cannot work or whose vehicle cannot function may still accrue these costs. In fact, the franchise disclosure agreement shows that the lowest earning drivers in 2009 averaged only $37,024. When factoring in gas, car payments, maintenance, licensing fees, tolls and other costs, the amounts of which were not disclosed in the record, the operation of a franchise provides a risk of loss. Therefore, entering into a franchise agreement

demonstrates a significant propriety investment in the work. *AAA Cab Services,* 341 NLRB at 461-462.

Drivers make calculated choices between which trips to choose. The fact that the drivers pay for their gas, tolls, and vehicle expenses weighs in favor of independent contractor status. *Dial-A-Mattress*, 326 NLRB at 891 (owner-operators not provided with a fuel subsidy or maintenance support). Because the drivers pay for the costs of operating their vans, their decisions in choosing trips impact their profit margin. Similarly, a driver's determination of when and how much he will work impacts his profit margin. All drivers take similar risks, but by their decisions and efforts, they do not all achieve the same profits. Thus, they have entrepreneurial opportunity and risk.

The drivers may hire relief drivers. If a driver hires a relief driver, he pays him out of his own earnings. The drivers therefore have potential to generate more gross revenue while spending less time driving when a relief driver is hired.

Based on the foregoing, because the drivers make expenditures and take on obligations that may result in either loss or gain, the entrepreneurial factor weighs strongly in favor of finding independent contractor status.

C. Weighing The Factors

Based on the foregoing, I find that the weight of evidence favors a finding that the drivers herein are independent contractors. .Similar to the taxicab industry, significant factors herein include the lack of control exerted by the Employer and the lack of sharing of fares. *AAA Cab Service*, 341 NLRB at 465. Here, drivers do not share their fares with the Employer and drivers operate their vehicles with little Employer control. Additionally, significant weight is given to the belief and intent of the parties in entering

into relationships, and that factor clearly favors a finding of independent contractor status. Finally, I find that the drivers' ownership of their vehicles as well as their opportunities for loss and gain are significant factors in establishing that drivers are independent contractors. I therefore conclude that the drivers are independent contractors and are excluded from the Act.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding and in accordance with the above discussion, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.[5]

3. The Drivers (Franchisees) are independent contractors and not employees under the Act.

V. ORDER

The Undersigned hereby ORDERS that the petition filed in this matter is dismissed.

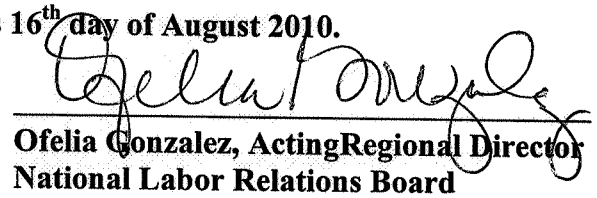
VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-

[5] The parties stipulated, and I, find that the Employer is a Texas corporation with a place of business in DFW Airport, Texas. During the past twelve months, a representative period, the Employer purchased and received at its DFW Airport location goods and services valued in excess of $50,000 directly from points located outside the State of Texas.

0001. This request must be received by the Board in Washington by **August 30, 2010.** The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[6] but may not be filed by facsimile.

DATED at Fort Worth, Texas this 16th day of August 2010.



Ofelia Gonzalez, ActingRegional Director
National Labor Relations Board
Region 16
Room 8A24 Federal Office Building
819 Taylor Street
Ft. Worth, Texas 76102-6178

[6] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUPER SHUTTLE Employer and AMALGAMATED TRANSIT UNION LOCAL 1338 Petitioner	**CASE** 16-RC-10963 **DATE OF MAILING** August 16, 2010

AFFIDAVIT OF SERVICE OF **Decision and Order**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid regular mail upon the following persons, addressed to them at the following addresses:

David Bird
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P.O. Box 612446
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DFW Airport, TX 75261

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Subscribed and sworn to before me on August 16, 2010	DESIGNATED AGENT Dolores Sikes **NATIONAL LABOR RELATIONS BOARD**