

Stamford Taxi, Inc. and International Union, United Automobile, Aerospace & Agricultural Implementation Workers of America, Local 376. Case 34–CA–7532

December 15, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On May 20, 1999, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions as

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent additionally argues that the judge's conduct demonstrated bias against the Respondent; that he prejudged legal issues against the Respondent; and that the judge thus improperly refused to recuse himself from this proceeding. On careful consideration of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The Respondent requests that the Board take administrative notice of (1) proposed regulations by the Connecticut Department of Transportation (CDOT) of the taxicab industry in that state; and (2) *Hanson v. Transportation General, Inc.*, 245 Conn. 613, 716 A.2d 857 (1998). We decline to take administrative notice of the former, because the proposed regulations were not in effect during the time period relevant to this case. We shall take administrative notice of the latter, in which the Connecticut Supreme Court found one taxicab driver to be an independent contractor for purposes of that state's workers' compensation system. That case involved another employer and different facts, however, and thus is of limited relevance to this case.

² We find meritless the Respondent's exception to the judge's refusal to admit into evidence business cards assertedly used by five drivers to generate their own taxicab business. The record shows that the Respondent was unable to authenticate the business cards. We further find that the judge, for the reasons set forth in his decision, properly refused to rely on an affidavit which the Respondent asserted supports its interpretation of the recognition agreement executed by the parties. Finally, the Respondent contends that the judge erred in failing to consider a deposition in which one driver described himself as self-employed. However, we find that even if we were to receive this evidence, it would not alter our agreement, discussed *infra*, with the judge's finding that the drivers are statutory employees.

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

further discussed below, and to adopt the recommended Order as modified and set forth in full below.

The relevant factual background is set forth in full in the judge's decision and briefly summarized here. The Union campaigned to organize the Respondent's taxicab drivers in the summer of 1995. On January 11, 1996,⁴ the drivers went on strike, which resulted in the parties entering into a written agreement granting recognition to the Union as the representative of a bargaining unit of approximately 70 drivers. As a consequence of having secured the recognition agreement, the drivers ended the strike and returned to work.

The parties thereafter held seven negotiating sessions between January and May 1996. The main point of contention was the amount of fees the drivers are required to pay the Respondent pursuant to their lease agreements with the Respondent. On May 14, about 42 drivers refused to pay to the Respondent the daily train station fee required by their lease agreements. In response the Respondent terminated their leases. The NLRB's Regional Office 34 subsequently refused to issue complaint on the Union's charge alleging the lease terminations to be unlawful, and the General Counsel's Office of Appeals found the withholding of fees to be an unprotected partial strike. The Respondent thereafter withdrew recognition, refused to bargain with the Union, unilaterally changed unit drivers' lease terms, and engaged in direct dealing with the drivers regarding those terms.

On May 20, the drivers authorized a strike. Continuing to show their prounion adherence in support of the Union were the drivers whose leases had been terminated. Between May 20 and November 27, 13 or 14 of the drivers who had had their leases terminated and had been prounion adherents individually returned to the Respondent and requested new leases. The Respondent accepted 10 or 11 of those drivers back to employment, on condition that they repay withheld fees, and enter into new leases containing the new flat-fee weekly terms which the Respondent unilaterally implemented on May 20. The Respondent refused, however, to hire discriminatees Augustine Solinaire, Andre Chery, and Max Lucien, as further discussed *infra*.

On November 27, the Union made "an unconditional offer to return to work on behalf of all your employees that it represents." Between December and June 1997, the Respondent entered into lease agreements with seven newly hired drivers. It refused to consider as applicants for those openings, however, any of the drivers it had formerly employed whose leases had been terminated and who had remained prounion adherents.

⁴ All dates are in 1996 unless otherwise noted.

1. We agree with the judge that the Respondent's taxicab drivers are employees within the meaning of Section 2(3) of the Act. The judge correctly observed that in determining whether an individual is a statutory 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 decisive. *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968). At other points in his decision, however, the judge described the test he was applying as the "right-of-control" test.

Recently, in *Roadway Package System*, 326 NLRB 842 (1998), the Board reexamined the test for determining whether an individual is an employee or an independent contractor. On the basis of its analysis of Supreme Court precedent, the Board concluded that the common-law agency test is the standard to determine the distinction between employee and independent contractor status. The Board emphasized that under the common-law agency test "all of the incidents of the relationship" must be considered. 326 NLRB at 850. The Board rejected the argument that the predominant factor in the analysis is whether an employer has a "right to control" the manner and means of the work performed by the individual whose status is in issue, stating:

While we recognize that the common-law agency test . . . ultimately assesses the amount or degree of control exercised by an employing entity over an individual, we find insufficient basis for the proposition that those factors which do not include the concept of "control" are insignificant when compared to those that do. [Id.]

We accordingly examine the facts of this case under the common-law agency test and "consider all the incidents of the individual's relationship to the employing entity." Id.

The judge exhaustively reviewed the record evidence of all the incidents of the taxicab drivers' employment relationship with the Respondent. Our review of the record confirms the judge's conclusion that the drivers are statutory employees.

The drivers here, like the drivers in issue in *Roadway*, do not operate independent businesses, but rather devote virtually all of their time, labor and equipment to providing the essential functions of the Respondent's taxicab business.⁵ The record supports the judge's finding that the rules maintained and enforced by the Respondent severely restrict the drivers' entrepreneurial opportunities to engage in taxicab business independent of the Respondent. Thus, the Respondent does not permit the

drivers to operate its registered vehicles independently or for another taxicab company. The Respondent retains title to the vehicles, restricting the drivers' ability to work for themselves, or for another taxicab company, and severely diminishing their proprietary interest in the taxicabs. It warns drivers that personal use of their vehicles on and off duty will not be covered for insurance purposes, further restricting the drivers' use of the vehicles to business use only on behalf of the Respondent. The Respondent also maintains a commission-based system whereby the Respondent's income is directly correlated to the amount of fares collected by the drivers. Accordingly, the drivers here, like those in *Roadway* found by the Board to be statutory employees, do not ordinarily engage in outside business, have no significant entrepreneurial opportunity for gain or loss, and lack meaningful proprietary interest in the taxicabs. Id. at 851.

In addition, the Respondent requires that all taxicabs be painted black and carry only the Respondent's logo. "Thus, the drivers' connection to and integration in [the company's] operations is highly visible and well publicized." Id. Further, the drivers operate under the Respondent's elaborate and regular reporting procedure. The Respondent maintains a system of financial accounting by drivers and other rules of conduct exceeding CDOT requirements, and imposes discipline on drivers for not complying with those rules. All these rules, along with the imposition of a dress code and the requirement that the drivers use the Respondent's dispatch service, establish that the drivers operate under the substantial control of the Respondent. The judge additionally observed that the Respondent unilaterally drafts, promulgates, and changes the terms of the lease agreements the taxicab drivers are required to sign. All these factors weigh heavily in favor of employee status.

The judge appropriately considered countervailing factors, including that the lease agreements define the drivers as independent contractors, the drivers pay their own taxes, and the Respondent makes no payroll withholdings on their behalf. These factors are outbalanced, however, by the factors summarized above demonstrating employee status. Substantial evidence in the record as a whole amply support the judge's finding that the taxicab drivers are statutory employees.

2. The judge found, and we agree for the reasons set forth by him, that the Respondent unlawfully withdrew recognition from the Union as the exclusive collective-bargaining representative of the drivers.⁶ In its excep-

⁵ See *Slay Transportation*, 331 NLRB No. 170 (2000).

⁶ Thus, we agree with the judge's findings that the Respondent, when it entered into the binding, written agreement recognizing the Union as the representative of the bargaining unit of 70 drivers, agreed

tions, the Respondent reiterates its affirmative defense, rejected by the judge, that its duty to bargain with the Union was suspended, because the Union condoned the withholding by approximately 42 drivers of the daily train station fee required by their lease agreements with the Respondent. The General Counsel does not allege that the withholding of those fees was protected conduct, or that the Respondent's termination of the lease agreements of those drivers who withheld fees was unlawful.⁷ The Respondent asserts in its brief that an employer is not obligated to continue bargaining during periods when the union has endorsed unprotected conduct, citing *Arundel Corp.*, 210 NLRB 525 (1974); *Phelps Dodge Copper Products*, 101 NLRB 360 (1952); and *Johns-Manville Products Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), cert. denied sub nom. *Oil, Chemical & Atomic Workers v. Johns-Manville Products Corp.*, 436 U.S. 956 (1978). These cases are distinguishable from the instant proceeding, however, and do not provide a basis for privileging the Respondent's withdrawal of recognition and subsequent course of direct dealing with employees.

In *Arundel Corp.*, a Board majority held that the respondent was under no obligation to meet or bargain with the union, so long as the union's unprotected strike continued in violation of the parties' no-strike agreement. The respondent thus lawfully conditioned bargaining on the union's abandonment of the unprotected strike. 210 NLRB at 527. Similarly, in *Phelps Dodge Copper Products*, the Board held that the respondent's obligation to bargain was suspended while the union engaged in an unprotected work slowdown during negotiations for a new contract. The respondent resumed negotiations as soon as the union called off the unprotected slowdown. 101 NLRB at 367-369. In each of these cases the bargaining obligation was suspended only for the period of the unprotected conduct.

The Respondent here, in contrast, did not merely suspend bargaining for the duration of the unprotected conduct. Rather, the judge correctly found that the Respondent "seized" on the drivers' withholding of fees to withdraw recognition entirely from the Union and engage in

direct dealing with its employees. As the Board explained in *Phelps Dodge Copper Products*, "the Union's majority standing remained unaffected during the course of the [unprotected conduct.]" Id. at 368. Such conduct did not negate the Respondent's duty to honor the Union as the employees' exclusive bargaining representative and to refrain from direct dealing with unit employees. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684-685 (1944) (circumventing the designated representative and dealing directly with employees undermines the fundamental representation and collective-bargaining scheme established by the Act).⁸ Accordingly, we agree with the judge's finding that the Respondent unlawfully withdrew recognition from the Union as the exclusive collective-bargaining representative of the drivers in violation of Section 8(a)(5) and (1) of the Act.

3. The judge applied the *Wright Line*⁹ test and found that the Respondent discriminatorily refused to hire Augustine Solinaire, Andre Chery, and Max Lucien when they appeared in person at the Respondent's facility, offered to pay the fee amounts they previously withheld and to work under the new lease terms unilaterally implemented by the Respondent.¹⁰ We agree with the judge's unfair labor practice finding for the reasons set forth by him and for the additional reasons set forth below.

In *FES*, 331 NLRB No. 20 (2000), the Board recently clarified the elements of a discriminatory refusal-to-hire violation:

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, [supra], first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for dis-

to recognize the Union on behalf of "all of its drivers." As the judge correctly explained, the 42 drivers whose leases were cancelled were only a portion of the larger unit of 70 employees the Respondent had agreed to recognize. The Union therefore continued to represent the drivers who did not withhold fees and have their leases terminated; and further that the Union continued to represent the 10 or 11 drivers whose leases were terminated but whom the Respondent took back on their individual applications, as discussed infra.

⁷ As stated above, the Regional Director refused to issue a complaint on the Union's unfair labor practice charge that the Respondent unlawfully terminated the drivers' leases. The Union's appeal was denied.

⁸ *Johns-Manville Products Corp. v. NLRB*, supra, is inapposite. In that case, the respondent never suspended or withdrew recognition but rather expressed a "continuing desire to negotiate and [accord] full recognition and acceptance of the Union," despite employee sabotage of plant equipment which the court found justified the Respondent's decision to lock out employees. 557 F.2d at 1133.

⁹ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹⁰ The judge described this violation as a refusal to reinstate the three drivers. Because the Respondent had previously lawfully terminated their lease agreements, the violation is more aptly described as a refusal to hire.

crimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. [Footnotes omitted.]

FES, supra, slip op. at 4.

The judge's findings comport with this test. The Respondent was hiring drivers at the time the three discriminatees applied; it had hired 10 or 11 drivers who abandoned the strike and agreed—as did these three discriminatees—to pay withheld fees and work under the new lease terms. There is no dispute that the three discriminatees had appropriate experience; they previously had worked as taxicab drivers for the Respondent. Finally, the judge found that antiunion animus contributed to the decision not to hire, and that the Respondent failed to show it would not have hired them even in the absence of their union activity.

b. The judge applied the *Wright Line* test and found that the Respondent unlawfully refused to consider for employment the drivers on whose behalf the Union made an unconditional offer to return to work.¹¹ We agree with the judge's unfair labor practice finding for the reasons set forth by him and the additional reasons set forth below.

In *FES*, supra, the Board also clarified the elements of a discriminatory refusal-to-consider violation:

To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. . . . If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established.

FES, supra, slip op. at 7.

The judge's findings comport with this test. The judge found that none of the approximately 32 drivers who stayed the course of the strike were considered for employment, and that antiunion animus contributed to that

¹¹ The judge described this violation as a refusal to consider the drivers for reinstatement to their former positions. Because the Respondent lawfully terminated the drivers' lease agreements, this violation is appropriately termed a refusal to consider them as applicants for employment.

decision. In contrast, the Respondent considered for employment and in fact offered new leases to 10 or 11 drivers who abandoned the strike, made individual offers to return to work, and agreed to repay withheld fees and execute new lease agreements. The Respondent did not, however, grant the option of repaying fees and executing new lease agreements to the drivers who supported the Union's strike for its duration and who did not make individual offers to return to work.¹² We agree with the judge that this disparate treatment warrants the inference that the Respondent's refusal to consider the remaining drivers for employment was motivated by their prouction sympathies. The Respondent did not show that it would not have considered the remaining drivers for employment absent their support of the Union.

AMENDED REMEDY

In *FES*, supra, the Board held that the appropriate remedy for a refusal to hire violation is a

cease-and-desist order, and an order to offer the discriminatees immediate reinstatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them. [Id., slip op. at 4.]

We shall accordingly provide this remedy for the three discriminatees the Respondent unlawfully refused to hire: Augustine Solinaire, Andre Chery, and Max Lucien.

The Board further held in *FES* that the appropriate remedy for a refusal to consider violation is a

cease-and-desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions.

If job openings arise after the beginning of the hearing on the merits, the General Counsel must initiate a compliance proceeding for the purpose of de-

¹² Rather, the Union made an unconditional offer to return to work on their behalf. We find without merit the Respondent's contention that the Union's unconditional offer to return to work on behalf of the remaining drivers was "a nullity" because it had lawfully terminated their leases. The judge correctly explained that the drivers remained statutorily protected from discriminatory treatment subsequent to their lawful discharge, including for consideration as applicants for employment. Thus, the unconditional offer to return to work in the circumstances of this case is tantamount to an application for employment.

termining whether the discriminatees would have been selected for the openings in the absence of the proven discriminatory failure to consider them for employment. [Footnotes omitted.]

Id., slip op. at 7.

Here, the record shows that the Respondent hired at least 7 new drivers following its discriminatory refusal to consider approximately 32 drivers for employment. In these circumstances, it is established that the Respondent had seven job openings for drivers, and that absent its unlawful conduct it would have hired seven of the drivers who it had previously employed. Under the framework set forth in *FES*, instatement to three of those seven job openings shall be offered to discriminatees Solinaire, Chery, and Lucien; and instatement to the remaining four of those seven job openings shall be offered to four of the discriminatees the Respondent unlawfully refused to consider for employment.¹³

The number of applicants the Respondent unlawfully refused to consider for employment, however, exceeds the number of available jobs. Thus, if job openings arise subsequent to the beginning of the hearing, the General Counsel must initiate a compliance proceeding for the purpose of determining whether the remaining discriminatees would have been selected for the openings in the absence of the proven discriminatory failure to consider them for hire. *FES*, supra, slip op. at 7.¹⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Stamford Taxi, Inc., and Tibbetts Enterprises, Inc., a single employer, of Stamford and Greenwich, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹³ The identity of the four discriminatees is to be determined in the compliance stage of this proceeding. This is the appropriate remedy because, for the same reasons set forth above in Sec. 3 regarding discriminatees Solinaire, Chery, and Lucien, the General Counsel has established that the Respondent unlawfully refused to hire four of the discriminatees into these four additional open positions.

¹⁴ The Respondent has excepted to the judge's recommended remedy requiring it to preserve and, on request, provide at the office designated by the Board or its agents, copies of specified records necessary to analyze the amount of backpay due under the terms of the Board's Order. The Respondent's exception, however, does not meet the minimum requirements of Sec. 102.46(b) of the Board's Rules. The Respondent merely cites to the judge's decision and fails to allege, either in its exceptions or its supporting brief, the particular error it contends the judge committed or on what grounds it believes the judge's remedy should be overturned. In these circumstances, we find, in accordance with Sec. 102.46(b)(2), that the Respondent's exception on this point may be disregarded. See *Show Industries*, 312 NLRB 447 (1993).

(a) Failing and refusing to hire employees because they engaged in protected concerted activities in support of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376.

(b) Failing and refusing to consider applicants for employment because they engaged in protected concerted activities in support of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376.

(c) Refusing to recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit:

All drivers, lessees and sub-lessees, employed by Respondent; excluding all other employees, guards, and professional employees and supervisors as defined in the Act.

(d) Withdrawing recognition from the Union as the collective-bargaining representative of the employees in the above-described unit; failing and refusing to bargain with the Union on its request to do so; bypassing the Union and dealing directly with the unit employees by soliciting them to enter into new lease agreements; and unilaterally changing the terms and conditions of employment of unit employees, including the amount and payment of lease rates, without notifying or affording the Union an opportunity to bargain with respect to this conduct.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days from the date of this Order, offer Augustine Solinaire, Andre Chery, and Max Lucien instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions.

(c) Make Augustine Solinaire, Andre Chery, and Max Lucien whole for any loss of earnings and other benefits sustained by reason of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Offer instatement to four additional discriminatees, whose identity is to be determined in the compliance stage of this proceeding consistent with the amended

remedy section of this Decision and Order, to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions and we will make them whole for any loss of earnings and other benefits sustained by reason of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(e) Consider the remaining discriminatees for future job openings that arise subsequent to the beginning of the hearing in accord with nondiscriminatory criteria, and notify the discriminatees, the Charging Party, and the Regional Director for Region 34 of such openings in positions for which the discriminatees applied or substantially equivalent positions, in the manner set forth in the amended remedy section of this Decision and Order.

(f) If the Union so desires, revoke and cease giving effect to the changes in the unit employees' terms and conditions of employment which were implemented on or after May 20, 1996; and make the employees whole for any losses they may have suffered as a result of such changes, in the manner set forth in the remedy section of the judge's decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Augustine Solinaire, Andre Chery, and Max Lucien, and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(h) Remove from its files any reference to the unlawful refusal to hire four additional discriminatees, whose identity is to be determined in the compliance stage of this proceeding, and notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(i) Remove from its files any reference to the unlawful refusal to consider for employment the remaining discriminatees, whose identity is to be determined in the compliance stage of this proceeding, and notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

(j) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(k) Within 14 days after service by the Region, post at its places of business in Stamford and Greenwich, Connecticut, copies of the attached notice marked "Appendix,"¹⁵ which shall be printed in Haitian and in English. Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also duplicate and mail, at its own expense, a copy of the notice to all drivers then employed by it during the week of May 13, 1996, upon whose behalf the Union unconditionally requested reinstatement on November 27, 1996, but who have not, to the date of this Order, been considered for employment. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 16, 1996.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to hire employees because they engaged in protected concerted activities in support of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376.

WE WILL NOT fail and refuse to consider applicants for employment because they engaged in protected concerted activities in support of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit:

All drivers, lessees and sub-lessees, employed by us; excluding all other employees, guards, and professional employees and supervisors as defined in the Act.

WE WILL NOT withdraw recognition from the Union as the collective-bargaining representative of the employees in the above-described unit; fail and refuse to bargain with the Union on its request to do so; bypass the Union and deal directly with you by soliciting you to enter into new lease agreements; and unilaterally change your terms and conditions of employment, including the amount and payment of lease rates, without notifying or affording the Union an opportunity to bargain with respect to this conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Augustine Solinaire, Andre Chery, and Max Lucien instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make Augustine Solinaire, Andre Chery, and Max Lucien whole for losses sustained by reason of our discrimination against them, plus interest.

WE WILL offer instatement to four additional discriminatees to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make them whole for losses sustained by reason of the discrimination against them, plus interest.

WE WILL consider the remaining discriminatees for future job openings in accord with nondiscriminatory criteria, and notify them, the Charging Party, and the Regional Director for Region 34 of future openings in positions for which the discriminatees applied or substantially equivalent positions.

WE WILL if the Union so desires, revoke and cease giving effect to the changes in the unit employees' terms and conditions of employment which we implemented on or after May 20, 1996; and make the employees whole, with interest, for any losses they may have suffered as a result of such changes.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Augustine Solinaire, Andre Chery, and Max Lucien, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire will not be used against them in any way.

WE WILL remove from our files any reference to the unlawful refusal to hire four additional discriminatees, whose identity is to be determined in the compliance stage of this proceeding and WE WILL notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WE WILL remove from our files any reference to the unlawful refusal to consider for employment the remaining discriminatees whose identity is to be determined in the compliance stage of this proceeding, and WE WILL notify each of them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

STAMFORD TAXI, INC. AND TIBBETTS ENTERPRISES, INC.

Rick Concepcion, and Jennifer F. Creaturo, Esqs., for the General Counsel.

Sigismund L. Sapinski Jr., Esq. (Updike, Kelly & Spellacy, P.C.), for the Respondent.

Thomas W. Meiklejohn, Esq. (Livingston, Adler, Pulda & Meiklejohn, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on January 12, 13, and 14, February 25, 26, and 27, and March 17, 1998, in Hartford, Connecticut. The complaint alleges that Stamford Taxi, Inc. (Respondent) withdrew its recognition of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376 (the Union) as the exclusive collective-bargaining representative of its drivers, lessees and sublessees, has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative, and bypassed the Union and dealt directly with its employees in the unit by soliciting employees to enter into new lease payment agreements, and changed the amount of payment terms of its lease rates without prior notice to the Union, and without affording the Union an opportunity to bargain with Respondent with respect to this conduct, in violation of Section 8(a)(1) and (5) of the Act.

The complaint also alleges that, following a strike engaged in by certain employees of Respondent and an unconditional offer to return to work made by the Union on their behalf, Respondent, by letter, failed and refused to consider reinstatement of the employees to their former positions of employment, in violation of Section 8(a)(1) and (3) of the Act.

By amendments to the complaint, offered and approved during the trial, Tibbetts Enterprises, Inc. (Tibbetts, or TE) is alleged to constitute, with Respondent, a single-integrated business and a single employer. By further amendments, similarly approved, an alternative jurisdictional allegation was made regarding Respondent's functioning as an essential link in the transportation of passengers in interstate commerce. In another allegation, approved at trial, Respondent is alleged to have bypassed the Union and dealt directly with the drivers in the unit by soliciting then to enter a new lease agreement. Finally, during trial, a further amendment to the complaint was approved alleging the discriminatory failure and refusal to reinstate three named Union affiliated drivers in violation of Section 8(a)(1) and (3) of the Act.

Respondent, by its timely filed answer, denied the commission of any alleged violations of the Act, as well as other allegations relating to the Union's status as exclusive bargaining representative of the drivers. Respondent denied the original conclusionary complaint allegations and amendments asserting jurisdiction over its operations, while admitting certain related commerce allegations. Respondent also denied the amendments to the complaint alleging further violations of Section 8(a)(1) and (5) soliciting new lease agreements, asserting the 10(b) time bar, among other defenses, and also denied the other conclusionary 8(a)(1) and (3) allegations, as well as the status of Respondent and Tibbetts as a single employer. Respondent also admitted the status of Bruno Necatera as its manager and agent, in an allegation added, with approval, to the complaint, but denied his status as a supervisor within the meaning of Section 2(11) of the Act.

In its answer, Respondent also asserted affirmative defenses; denying jurisdiction; that it is an employer within the meaning of Section 2(11) of the Act; that all taxicab drivers with leases with it are independent contractors; that any agreement it entered with the Union was expressly conditioned on their status as independent contractors, and, was further, the product of duress and is unenforceable.

The issues thus posed by the pleadings are the following:

1. Are Respondent and Tibbetts a single employer, and are they engaged in interstate commerce?
2. Are Respondent's drivers employees within the meaning of Section 2(3) of the Act?
3. Is Respondent's assistant manager, Bruno Necatera, a supervisor within the meaning of Section 2(11) of the Act?
4. Did Respondent agree to recognize the Union as exclusive collective-bargaining representative of its drivers?
5. Did Respondent violate Section 8(a)(1) and (5) of the Act:
 - (a) By withdrawing recognition from the Union as exclusive bargaining representative since May 16, 1996.
 - (b) By refusing to recognize and bargain with the Union as exclusive representative of its drivers since the same date.
 - (c) By bypassing the Union and dealing directly with its drivers to enter new lease payment agreements on May 16, 1996 and by offering new lease agreements on or about February 12, 1998.
 - (d) By unilaterally changing the amount and payment terms of its lease rates on or about May 20, 1996, without prior notice to or affording, the Union, an opportunity to bargain about these matters.
6. Did Respondent violate Section 8(a)(1) and (3) of the Act:
 - (a) By failing to reinstate Max Lucien, Andre Chery, and Augustine Solinaire since about May 20, 1996.
 - (b) By refusing to consider for reinstatement all other drivers who remained affiliated with the Union since about November 27, 1996, the date of the Union's unconditional offer made on their behalf to return to their former positions of employment.
7. As a consequence of an argument made by the Union in its posttrial brief, a further issue is posed by it, as to whether, assuming I answer each of the above issues in the affirmative, shall an additional remedy be imposed against the Respondent under Section 8(a)(1) and (5) of the Act, requiring Respondent to offer reinstatement and a make-whole remedy to each driver

represented by the Union who was terminated for failing to make lease payments allegedly immediately after the Respondent withdrew recognition from the Union.

Each party was represented by counsel and all were provided a full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, to make opening and closing statements and to file briefs with me. Each of the parties has filed a timely posttrial brief and they have been carefully considered.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Respondent, a Connecticut corporation, with an office and place of business in Stamford, Connecticut (facility), has been engaged in the business of providing local and interstate taxicab service to the general public. During the hearing, Respondent stipulated in writing that during the period June 1, 1996, through May 31, 1997, it derived gross revenues in excess of \$50,000 from its operations. This period covered the year immediately preceding the issuance of complaint in this proceeding on June 20, 1997. During the hearing, Respondent also agreed to change its earlier denial in its answer, to an admission to the allegation in the complaint that during the same 12-month period ending May 31, 1997, Respondent in conducting its business operations described, purchased and received at its facility goods valued in excess of \$5000 from other enterprises located within the State of Connecticut, each of which other enterprises had received these goods directly from points outside the State of Connecticut. In doing so, Respondent has thereby admitted that its activity in interstate commerce exceeds the de minimis level, *Pioneer Concrete Co.*, 241 NLRB 264 (1979), enfd. 637 F.2d 698 (9th Cir. 1981), and statutory jurisdiction exists.

The complaint alleges that during the same 12-month period ending May 31, 1997, Respondent, in conducting its business operations as described above, derived gross revenues in excess of \$500,000. In its Federal tax return filed for the year of 1996, the last year for which a return had been completed during the trial, Respondent reported \$700,720 in gross receipts derived from its operations for that year. This allegation, if true, provides the basis for the Board to assert that this Employer meets its discretionary standard for asserting jurisdiction over all retail enterprises, including taxicab companies, such as Respondent, which provides, through its drivers, direct transportation services to the public. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958); *Union Taxi Corp.*, 130 NLRB 814 (1961). As to this allegation, after acknowledging the figures appearing in Respondent's Federal income tax return, early in the hearing, its counsel, on its behalf, entered a stipulation that in the tax year ending 1996, Respondent received gross receipts and sales in excess of \$700,000 from its operations. (Tr. 187.) At this point in the hearing Respondent had not produced income tax information regarding Respondent's business operations from the years 1991 through 1996, nor did Respondent ever produce this subpoenaed material.

Subsequently, following an adjournment of the hearing of over a month, during which Respondent had ample time to seek to properly contest the validity of the figure representing gross receipts appearing in its 1996 Federal tax return, Respondent offered a single-page facsimile transmission from an accountant claiming that \$277,888 of the \$700,720 gross receipts figure were actually reimbursement of expenses from the drivers for liability insurance and a collision insurance pool. The accountant was not produced to testify. The document was rejected. In making the offer of the document, counsel for Respondent did not seek to be relieved of the earlier entered stipulation.

Respondent made a belated and inadequate offer. I cited in support of my ruling, *Bannon Mills*, 146 NLRB 611 fn. 4 at 614, and 633—634 (1964), which permits the General Counsel to produce secondary evidence in lieu of subpoenaed but unproduced records and denies Respondent leave to introduce subpoenaed but unproduced records to counter those offered by the General Counsel. I also cited *Tropicana Products*, 122 NLRB 1121 (1958), which authorizes the Board to assert jurisdiction here where the de minimis test is met, even though the discretionary standard is not met, if the employer, as Respondent has failed to do, fails to disclose information with respect to its business in interstate commerce. The *Tropicana* doctrine has been applied in unfair labor practice proceedings. *Pickle Bill's*, 224 NLRB 413 (1976). See also *Perdue Farms v. NLRB*, 144 F.3d 830 (D.C. Cir. 1998), affirming *Perdue Farms*, 323

NLRB 345 (1997). (In an unfair labor practice proceeding, the court of appeals affirms preclusion order of Administrative Law Judge Albert Metz, precluding Respondent from entering evidence on any subjects mentioned in a subpoena, which it complied with only in part. The court notes a party cannot “pick and choose which parts . . . it will obey and which parts it can ignore.” (144 F.3d at 834.)

Apart from the foregoing, Respondent also stipulated that during the period June 1, 1996, through May 31, 1997, the drivers who operated taxicabs under lease with Respondent received fares from such operations in excess of \$500,000. Assuming the drivers are found to be employees rather than independent contractors, these fares may be deemed gross receipts to the business for providing taxi service, see *Major Cab Co.*, 255 NLRB 1383, 1384 (1981), and thereby meet the Board’s discretionary \$500,000 retail standard for asserting jurisdiction.¹

A separate ground for asserting jurisdiction relied upon by the counsel for the General Counsel is that by virtue of the degree to which the record shows that a significant portion of Respondent’s business consists of picking up from, and delivering customers to, the Stamford railroad station for interstate trips from and to New York City and, further, that Respondent’s drivers on a regular basis take customers to New York State Airports for interstate trips and pick up customers from those airports, Respondent’s operation functions as an essential link in the transportation of passengers in interstate commerce. See *Major Cab Co.*, Id. Since Respondent has stipulated to receiving gross revenues in excess of \$50,000 from its business of providing local and interstate taxi operations, I conclude that the Board may assert jurisdiction over Respondent under this standard. *HPO Service*, 122 NLRB 394, 395 (1958).

On the basis of the foregoing, I conclude that Respondent is engaged in commerce within the meaning of that Act. Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Respondent’s Corporate Relationships and Management and the Single-Employer Status of Respondent and Tibbetts

Hubert Tibbetts has been Respondent’s president and sole owner for many years. His wife, Gunhill Tibbetts, is Respondent’s secretary and treasurer. Tibbetts is also the sole owner and president of two related enterprises, TE and Greenwich Taxi. Greenwich Taxi provides taxicab service to the city of Greenwich, Connecticut, and surrounding communities, just as Respondent does in Stamford and its surrounding area.

TE maintains an office and place of business at Respondent’s office at 26 Grenhart Road in Stamford and another at Greenwich Taxi Office at Greenwich Plaza, city of Greenwich. Tibbetts works out of TE’s Stamford and Greenwich offices, as well as from his home in Greenwich. TE employees between 5 and 10 dispatchers at each of its Stamford and Greenwich locations who provide dispatching services for the drivers of both Respondent and Greenwich Taxi. Joseph Buddy Boskello, Respondent’s manager, also serves as vice president of TE.

Boskello, who is paid his salary by Respondent, Greenwich Taxi and TE, and is also general manager of Greenwich Taxi and TE, spends about 90 percent of his time at the Greenwich Taxi office. He is thus responsible for supervising the dispatchers employed by TE. The drivers, directed by these dispatchers, make fee payments to Tibbetts, TE’s owner, and Boskello, its general manager. In managing Respondent, Boskello is also assisted by Bruno Necatera, assistant manager, who works from an office located at a service station, Mark’s Service Center, which he owns and operates and which is located approximately 60 yards away from Respondent’s Stamford facility. At this office, Necatera maintains all the files relating to Respondent’s operation, including all files related to Respondent’s drivers.

The evidence establishes that in all significant matters relating to Respondent’s personnel relations with its drivers, including labor relations with its drivers and their representatives, as well as with TE’s dispatchers, Tibbetts exercises final control and direction. Thus, Tibbetts oversees Boskello’s supervision of both TE’s dispatchers and Respondent’s drivers, and Tibbetts acts as final authority and consults frequently with Boskello regarding Respondent’s

and TE’s labor relations. Necatera as agent of both Respondent and TE is involved in the day-to-day direction of both dispatchers and drivers.

As a consequence of the presence here of the important elements of common ownership, common management, centralized control of labor relations, and integration of operations, I conclude that Respondent and TE comprise a single employer under the Act. *Broadcast Employees NABET Local 2364 v. Broadcast Service of Mobile, Inc.*, 379 U.S. 812 (1964); *South Prairie Construction Co. v. Engineers*, 425 U.S. 800 (1976). *Burgess Construction*, 227 NLRB 765, 773 (1977), enfd. 596 F.2d 378 (9th Cir. 1979).

B. Respondent’s Prior Labor Relations

Between 1973 and 1991, Respondent and the International Brotherhood of Teamsters (Teamsters) were parties to a series of collective-bargaining agreements pursuant to which the Teamsters were the exclusive bargaining representative of the drivers. Sometime around 1982, Respondent changed its relationship with its drivers, who had been, admittedly, employees up to that time, operating out of its own garage, and now required them to enter lease agreements in which they were described as “independent contractors.”

In 1991, the Teamsters filed unfair labor practice charges against Respondent and Greenwich Taxi in Cases 34-CA-5065 and 34-CA-5066 alleging that they had unilaterally changed the driver’s health plan and failed to tender union dues.² On March 27, 1991, the Region dismissed the charges, relying on a determination that the drivers were independent contractors and not employees, and citing *Yellow Cab*, 285 NLRB 1191 (1987), in support of its dismissal. The Teamsters appealed the Regional Director’s refusal to issue complaint. In a letter dated November 8, 1991, denying the appeal, the General Counsel, by its Director Office of Appeals, relied on insufficient evidence to show a unilateral change in the employee health plan or that there was a dues-checkoff provision in the last executed agreement. The letter specifically noted that these grounds were relied upon to sustain the dismissal, apart from the issue of whether the drivers were employees or independent contractors, which was not resolved on the appeal. Later in 1991, the teamsters ceased their representation of the drivers.

C. The Evidence Regarding Employee Status for the Drivers

The State of Connecticut Department of Transportation (DOT) has issued 51 Public Certificates of Convenience and Necessity to Respondent to operate cabs in Stamford and neighboring areas. To operate the cabs Respondent maintains a complement of approximately 70 drivers.

Four individuals who were hired as drivers and drove taxicabs for Respondent during the relevant periods were called as witnesses by counsel for the General Counsel. The following is a composite of their testimony, and, includes, as well, references to various exhibits, which they identified and were received in evidence. Respondent admissions have also corroborated driver testimony.

Individuals interested in driving a cab for Respondent are referred to Necatera at his office at Mark’s Service Center where they fill out an “Application for Employment.” The application is used to fill both driver and dispatcher positions. The application ask for basic information, including name, address, marital status, education, and references. But the form also requests information on past arrests and whether the applicant prefers working days, nights, weekends, or holidays. No specified taxicab driving test or course is required nor does Respondent require applicants to demonstrate any specific knowledge regarding Stamford area streets or locations. Respondent does require driver applicants to hold a public service license required by the DOT to operate a taxicab in the State of Connecticut. Such a license is issued in addition to a regular driver’s license and requires a satisfactory physical examination and background check.

After Necatera reviews the application and interviews the prospective driver, he decides whether or not the individual should be hired by Respondent. Necatera’s functioning in this regard as hiring agent, satisfies at least one of the indicia for achieving supervisory status under the Act. The record shows Necatera meeting other statutory criteria as well in his dealing with drivers. Thus, depending upon the status of the drivers as employees under the Act. I find Necatera to be a statutory supervisor, as alleged in the complaint amendment.

¹ Whether this alternate method of proving jurisdiction may be relied upon will be determined in the analysis and conclusion section of this decision.

² Apparently, the Teamsters represented the Greenwich Taxi drivers as well as Respondent’s.

Once hired, a driver who doesn't own a vehicle is provided a vehicle by Necatera which he can finance through Respondent or Necatera assigns the driver as a sublessee to another of Respondent's drivers. Once provided, the vehicle is equipped with a two-way radio, a meter is painted black if it is not already that color, and Respondent affixes the "Stamford Taxi" logo to the vehicle. Necatera supplies the drivers with the equipment and logo, which are purchased by the driver and installed at Mark's Service Center.

If the driver already owns a vehicle at the time of hire, Necatera will make a determination as to its suitability for use as a taxi, and then, if approved, will then arrange for the proper equipment to be purchased and installed in the vehicle by Mark's Service Center. Either at the time of hire or shortly afterward, Necatera presents the driver with a lease agreement which he must sign in order to drive a cab for Respondent. Necatera will also assign the driver to one of two possible work shifts established by Respondent, depending upon Respondent's needs at the time. The shifts are a day shift from 5 a.m. to 4 p.m. and night shift from 4 p.m. to 3 a.m.

Respondent also requires the drivers to work 6 days a week, and Necatera selects the driver's day off. Drivers are required to report to the dispatcher upon beginning their shift and continue to report their location to the dispatcher throughout their shift, including when they leave duty to take a break for lunch, coffee, or dinner. A driver cannot change his hours of work, by starting or ending work earlier or later, without first obtaining Respondent's permission, in particular, Necatera's permission. Respondent has permitted drivers to continue to work behind their shift but it alone determines the circumstances, which includes a continuing demand for customer services beyond the capacity of the drivers on duty to supply.

In presenting the lease agreement to the drivers, Necatera does not explain the lease terms nor the specific amounts of money representing weekly and daily fees the drivers are obligated to pay under the agreement. Neither are the drivers provided with the time or opportunity to review the agreement overnight or to have it reviewed by a representative of their choosing.

The lease describes the relationship as one between lessor and lessee "with the lessee being an independent contractor, free from interference or control by lessor in the operation of the taxicab." (GC Exh. 20, p. 3.) While Payson Ayres, the only driver witness called by Respondent, had the amounts filled in on the schedules attached to his last 1996 agreement, each of the drivers who testified for the Government, had the amounts blank on these schedules which otherwise described the weekly and daily fees the drivers were required to pay. None of the driver witnesses, including Ayres, however, could explain what some of the "management" or "lease" fees represented. In addition to the other fees described, the driver must pay Respondent a weekly lease fee and, if the driver is financing the vehicle and equipment through Respondent, he must make a weekly payment on his vehicle and equipment loan.

The drivers are required to insure their vehicles through Respondent and are required to make weekly payments for automobile liability insurance and an internal collision repair pool. Group medical insurance is also available through Respondent for those drivers willing to make a weekly payment. In addition to the weekly lease payments and the other weekly payments, including car and equipment loan repayments, for group medical, automobile liability, and the collision repair pool, the drivers are also obligated to pay certain daily fees for dispatching services, described in the lease agreement as covering "telephone call service, radio dispatch service, customer billing and advertising support." As earlier noted, none of the amounts were set forth in the drivers' lease agreements executed in 1994, and received in evidence.

The lease agreements, which by their terms were weekly and automatically renewed until cancelled by written notice by either lessee or lessor, continued in effect for substantial periods of time exceeding 1 or 2 years or more, until Necatera or Boskello required drivers to sign new ones. Respondent presented new leases when it decided to change lease terms or to increase the amount of weekly or daily fees paid by drivers. One of these occasions arose in 1992 or 1993 when the DOT increased the regulated fares, which cabs could charge for metered rides. On another occasion, Respondent unilaterally withdrew the workmen's injury pool it had offered to drivers because in its view the associated costs became too high and removed this term from its lease agreement. The drivers had no input into either decision. Neither had drivers any say on lease terms, the amounts of payments required under the lease, or the drafting of the agreements.

With respect to the vehicles, whether supplied by the drivers or Respondent, the title and registration must be transferred to Respondent and placed in Respondent's name. Respondent registers and obtains the license plates for the vehicle, but the costs of both are borne by the

driver. Once the driver completes all financing and loan payments on a vehicle provided by Respondent, the title is not transferred to the driver but is retained by Respondent until the vehicle is no longer being used as a taxicab for Respondent. Drivers who have requested the transfer of title after completing such payments, have been denied. The ostensible reasons provided by Respondent for this requirement varied from witness to witness, but were in each case, unsatisfactory. Tibbetts claimed the title was retained for insurance purposes but without providing a satisfactory rationale. Boskello, at one point, offered to return the title to drivers who had fully paid all charges, including loan charges, for the vehicle, but then repeated Respondent's position of retaining title while the vehicle was still servicing Respondent customers. Necatera, who handled insurance matters for Respondent, did not assert that Respondent's policy mandated title in Respondent, but saw its retention as providing collateral for possible repairs a driver might have done on the vehicle. The inconsistent and flimsy responses point to title retention under the circumstances described as a device to permit Respondent to maintain constructive control over the vehicle which for the driver is his sole means of operation.

The black colored vehicles must display the Stamford Taxi logo on the exterior driver and passenger side front doors. The logo, which is affixed at Mark's Service Center, is paid for by the driver. Necatera informs drivers that no other advertisement may be displayed on the interior or exterior of the vehicle, although the lease agreement, to the contrary, appears to permit such display, but only with the lessor's written consent. This restriction reinforces Respondent's position that the vehicle its drivers operate may not be operated for any other taxicab company. Although, as noted, the driver pays the cost of the meter and radio installed on all vehicles, on lease termination these items of equipment must be returned to Respondent.

In terms of vehicle maintenance and repairs, the drivers are responsible. They may have the work done at Mark's Service Center or another service station. Drivers pay for the cost of gasoline, towing, tolls, parking tickets, and traffic tickets. All taxicab vehicles must be inspected by the State of Connecticut, twice a year, in order to renew the vehicle registration. All of Respondent's vehicles are registered in the month of March. Respondent also performs its own vehicle inspection and allows drivers 5 working days to correct any problems at the cost of the driver. If the problem still exists upon re-inspection by Respondent, the driver's lease will be terminated.

With respect to insurance, drivers are informed by Necatera that they must insure vehicles through Respondent and cannot purchase their own policy. Necatera makes arrangement for the insurance coverage through a particular agent. The drivers are charged weekly by Respondent for liability and collision pool insurance. If a driver has an accident or an insurance claim is made, Necatera handles the matter. Any deductibles that must be satisfied are paid by the driver. Although Boskello and Necatera both testified that the vehicle is covered by insurance 24 hours a day, the drivers testified credibly that they were informed by Necatera that the vehicle is only covered by insurance when the driver is on duty or working and that the vehicle cannot be driven by drivers off duty because the vehicle is not covered by insurance for personal use. Necatera, who denied informing drivers of this limitation, admitted that his medical condition, as well as a recent injury to his head, adversely affects his memory, and that he does not remember every conversation he has with the drivers. He is not credited on this conflict.

Drivers obtain passengers through Respondent's dispatch service, by picking up customers who flag them on the street, and by undischarged pickups at either the Stamford train station or the Stamford Marriott Hotel. Regardless of the means of obtaining passengers. Respondent charges its drivers a fee.

As to dispatched fares, Respondent's dispatchers make customer calls to drivers through the driver's car radio by either issuing a "general dispatch" over the radio requesting drivers in the area of the customer to respond to the call or "bid" for the call, or by specifically calling a driver in the area where the customer is located. The dispatcher knows the location of each driver because they must continually report their location to the dispatchers during their shift. In each instance, once the driver makes the pickup he is obligated to pay Respondent a 77-cent "dispatch" or "unit" fee for each such dispatch call. Thus, while Respondent argues in its brief that the fee does not vary based upon the amount of the actual fare collected for one dispatch call, the fee can quickly multiply and become a significant portion of the fares collected for multiple dispatch calls made during 1 day. There is thus a direct correlation between the Respondent's income and the amount of fares collected by its drivers. *Yellow Cab of Quincy*,

312 NLRB 142, 144 (1993). Respondent provides the drivers with a chart showing the dispatch fee due to Respondent for dispatch calls between 1 and 50. For example 10 dispatch calls require a payment of \$7.70 and 40 require a payment of \$30.80. This fee is paid daily. The 77-cent fee is solely determined by Respondent and is not set by the State of Connecticut.

Respondent requires its drivers to perform a minimum of 10 dispatch calls per day. The dispatchers maintain a log of all of the dispatched calls each driver performs on a daily basis. This log is then compared with the number of dispatch calls claimed and paid for by the driver each day. When a driver does not report or pay for a call recorded by the dispatchers, Respondent will contact the driver to remit payment or explain why the call was not reported.

Besides requiring drivers to report their locations to the dispatchers, drivers must answer dispatcher's page and cannot turn down or refuse a dispatch call. Drivers are subject to discipline, denial of further dispatched calls, or lease termination if they do not answer a dispatcher's page or refuse a dispatched call.

Regarding *flagged fares*, notwithstanding the absence of dispatch involvement, Respondent requires that its drivers inform the dispatcher whenever they pick up a flagged fare. Once informed, Respondent requires payment of the 77-cent unit fee on all flagged fares. Respondent enforces this requirement by informing drivers they would not be covered by Respondent's insurance policy in the case of an accident while transporting an unreported flagged fare.

Drivers do not pay the 77-cent unit fee for customer pick-ups at the train station or Marriott hotel. Instead, Respondent charges its drivers an \$8 daily fee for the privilege of making pickups at these locations. This daily fee is not set by the DOT but is determined solely by Respondent. This daily fee was unilaterally instituted by Respondent after it ceased providing or maintaining a dispatch stand at the Stamford train station in or about 1992. After the dispatch stand was no longer maintained and Respondent thereby lost its ability to check the actual fare trips of its cabs to and from the train station, Respondent instituted the daily fee to cover the lost unit fees which it could no longer regularly calculate. But it is important to note that Respondent prohibits its drivers from working their entire shift from the train station or Marriott hotel. Necatera enforces this policy by policing the train station on a frequent basis and then directing drivers to leave the train station in order to answer dispatch calls.

While the metered fares for local travel in and around Stamford, Connecticut, and rates per mile for travel between Stamford and other Connecticut towns and cities are set and regulated by the DOT, Respondent unilaterally determines how much a driver must charge a customer in all other instances depending on the location of the customer's departure and destination. Respondent also unilaterally determines the charge to the driver for trips within Connecticut. Even within greater Stamford, depending upon the number of passengers and their relationship, Respondent sets the fare.

Respondent, by Necatera, distributes fare schedules to its drivers, which must be adhered to. The schedules contain four categories: (1) shared travel within the greater Stamford area or zone; (2) in-state travel outside of the Stamford area or zone; (3) out of state travel and; (4) a fare schedule for the New Canaan Train Breakdown.

For a "shared ride," defined by Respondent as passengers unknown to each other who share the same cab, Respondent requires its drivers to charge each passenger a fee depending upon the distance traveled among each of six zones it has established with the greater Stamford area. Each zone represents a distance from the Stamford train station, with zone 1 closest and zone 6 farthest away. The fare varies between \$3 per passenger in zone 1, to \$11 per passenger for travel to zone 6. For customers dispatched to the drivers away from the train station, the required 77-cent unit fee is due Respondent from the driver for each customer in a shared ride. While the DOT approves the shared ride schedule, it is created in the first instance by Respondent.

While the DOT determines and sets the rate for what Respondent can charge per mile from one town to another within Connecticut, it is Respondent alone who sets the charge payable to it by the driver for such "out of zone" (out of Stamford) travel. These charges are listed on the schedule and expressed in absolute amounts, but in each case they comprise a percentage of the fare collected. For example, up to \$24.99 collected as fare, the driver must remit \$3 or 12 percent to Respondent. Between a fare of \$25 and \$34.99, the driver's charge is \$4.50 or between 18 and 13 percent. For a fare exceeding \$95 the drivers are directed to contact Necatera or Boskello so that Respondent may determine what percentage of the fare must be paid by the driver.

With respect to out-of-state travel, Respondent, alone, determines the fare to be charged for travel to a location outside the State of Connecticut. For example, a customer traveling from Stamford to Kennedy Airport located in Queens, New York, is charged \$67, exclusive of tolls and gratuities. Respondent has no input from the drivers in setting these fares. Neither does the DOT have any involvement. Periodically, Respondent will unilaterally change the fares for out-of-state travel. The same percentage amounts paid to Respondent are calculated based on the amounts due Respondent for fares charged for in-state travel. Thus, the trip to Kennedy Airport requires a \$10 payment to Respondent.

Respondent also determines the fares to be charged when drivers pick up passengers who have been stranded by a breakdown of the train traveling between Stamford and New Canaan, Connecticut. Respondent submits the fare schedule to the DOT for its approval.

Respondent permits customers to open charge account with it. When a customer charges a ride, the customer submits a voucher to the driver. The completed voucher lists the driver's name, customer's name, the fare amount including a 20-percent service and gratuity charge, the tip amount and tolls, if any. The customer fills in the tip amount, and signs the voucher. Upon its submission to Respondent by the driver, the driver receives back the amount of the fare plus the tip, less a 5-percent service charge on the fare deducted from the tip for handling the charge account. For example, where the fare was \$10 and the tip amount was \$2 Respondent retains 5 percent of the fare or 50 cents from the \$2 tip, leaving the driver with only a \$1.50 tip. (Tr. 971.)

It is apparent from the foregoing that the drivers' income is derived from the fares and tips they collect from passengers. Out of this revenue, the drivers must pay Respondent the weekly lease and insurance payments and the daily fees, including the unit fee, the \$8 train station fee, Respondent's portion of the tips for charge account customers and the percentage of fares owed to Respondent on all out-of-zone fares. From the balance remaining, the drivers pay for operational expenses, including gasoline, oil changes, and repairs. Respondent does not withhold Federal taxes, State taxes, or social security from the driver's revenue and does not issue any tax forms, W-2s or 1199s, to the drivers. Neither does Respondent contribute toward unemployment insurance or workers compensation coverage. Under these circumstances, the drivers have no choice but to file tax returns as independent contractors, listing their business income, and itemizing expenses in a schedule C as part of their Federal tax return. Interestingly, in its own Federal tax return, Respondent lists deductions for depreciation of the taxicabs, radios, meters, apparently including those owned by drivers in which all lease and finance payments have been satisfied, as well as for gasoline, oil, and other maintenance expenses borne by the drivers. These expenses would appear to be allowable only for the driver owners as expenses or costs of their doing business. By taking these deductions Respondent undercuts its claim, that the drivers are independent entrepreneurs who control the financial return on the operation of their vehicles. To the extent Respondent argues that even those taxicabs leased and not fully owned by the drivers are controlled in their operation by the drivers as independent contractors, Respondent has removed from the drivers a major business expense normally attributable to their individual taxi service operation.

While the drivers may choose to sublease their taxicab to another individual, subleasing is subject to certain restrictions. Even the lease agreement prohibits subleasing without Respondent's approval. Subleases have to be approved by Necatera, who also approves the hours of work and workshift of the sublessee. The driver and sublessee are free to decide how to divide the money earned by the sublessee, but Respondent charges an additional daily fee of \$10 to any driver who has a sublessee. Respondent also increases the amount of insurance payment to the collision insurance pool to any driver who has a sublessee as well as charging the driver more for the weekly payments to cover liability insurance.

Drivers are subject to a host of rules and procedures governing their conduct and operation of the taxicabs. These are communicated to the drivers verbally by Necatera, Boskello, and the dispatchers, as well as by memoranda, notices, and letters distributed to the drivers. The rules are enforced by them by means of discipline issued to the drivers, including verbal warnings, denial of dispatching services, suspensions of one or multiple days, and, finally, lease termination. Respondent makes the sole determination as to whether to issue discipline in the first instance, and then, what level of discipline to issue for the infraction of the rule or procedure. None of the following rules described are mandated by the DOT. Because in this instance as well as a number of others, including its setting of the fees payable by the drivers, Respondent's

pervasive control exceeds governmental regulations to a significant degree, employees status, is justified. See *Seafarers Local 777 v. NLRB*, 603 F.2d 862, 876 (D.C. Cir. 1978).

With respect to the dispatching service provided and the driver's relations with the dispatchers, Respondent enforces a number of rules. Drivers are required to answer the call or page by a dispatcher. A failure to respond results in discipline, up to and including termination of the lease. Respondent has disciplined drivers for not answering a dispatcher's page and for not reporting their location to the dispatchers. Discipline is also imposed against drivers for not reporting to dispatchers when they take a break for coffee, lunch, or other reasons. Drivers must also accept a dispatch call and, if they refuse to do so they are disciplined by being denied further dispatch calls and have also been suspended for such conduct. Drivers are also subject to discipline for engaging in certain behavior towards dispatchers, such as fighting with them, hitting them, or swearing at them. While the DOT restrains such conduct when it occurs on public property and affects the public at large, Respondent imposes discipline when such conduct occurs on its own property, for example, inside its dispatching office.

As noted earlier, drivers do not select their own work hours, but are assigned either a day or night shift by Necatera at the outset of their association with Respondent. Work outside their regular shift hours must be expressly approved by Necatera. Respondent determines what, if any, circumstances warrant the driver working beyond his shift. A driver who works beyond his shift without Respondent's approval has been denied the opportunity to earn fares by being excluded from receiving dispatch calls. Respondent also issues verbal and written warnings to drivers for failing to start their shift on time.

As also noted earlier, the drivers, who must pay an \$8 daily fee for customer pickups at the Stamford train station, cannot remain at the station throughout their shift. Necatera, who policies the train station directs drivers to leave and answer dispatch calls. Respondent also imposes a requirement that drivers must perform a minimum of 10 dispatch calls a day. For a failure to meet this minimum requirement, Respondent has assessed drivers the \$7.70 fee for 10 dispatch calls and has also denied one driver a change he requested in his shift until he met the requirement and threatened a change in shift of another driver who failed to make or answer sufficient dispatch calls.

Respondent also maintains minimum dress requirements, which prohibit drivers from wearing jeans (dungarees), sandals, sneakers, shirts without collars, T-shirts, and jogging suits while operating their vehicles. Respondent enforces this dress code by issuing verbal and written warnings to drivers who violate it. In a letter dated February 1, 1994, copy to Necatera, General Manager Boskello, after noting that he had warned the recipient, driver A. Torzia, many times about his dress attire, informed him that Respondent would be having a meeting with all drivers to discuss this unwritten rule [forbidding jeans and a colorless shirt] and that it "will not tolerate at [sic] one breaking this rule." (GC Exh. 42.) Respondent also requires courteous conduct toward customers, going so far as to warn drivers in writing for arguing with customers. Drivers are also required to assist customers with luggage and place their baggage in the trunk.

Respondent prohibits drivers from having a personal rider, whether a friend or relative, in the taxicab at any time during a driver's work shift. In a multipage document dated January 11, 1995, issued to the drivers, listing various procedures, which they are obligated to follow, Respondent includes a prohibition against "personal riders in cars while on duty." (GC Exh. 22.) The term "on duty" is not defined. Respondent has issued warnings against drivers for having personal riders in the taxicab at any time, on or off duty, and directed drivers to remove the personal rider even when there was no customer in the cab at the time. On one occasion, driver Joseph Spencer was reprimanded by Necatera for taking his son home from school in his cab as his sole passenger. Even though this was clearly a time period when the driver was not on duty and was therefore in accordance with Respondent's own rule, Necatera threatened the driver that using the cab for this personal use, or any other, would result in his lease being terminated. Owner Tibbetts first confirmed that during a driver's work shift, he would be continuously on duty. Then, when confronted with a 1986 DOT letter to his general manager prohibiting drivers from co-mingling friends and/or relatives with paying passengers, but not prohibiting drivers from carrying friends or relatives while not "on duty," Tibbetts retreated and acknowledged that drivers can carry friends or relatives when not using the vehicle for taxi purpose, even during their shift. Respondent's rule does not so specify and its assistant manager's interpretation reinforces Tibbetts' original restriction. Respondent has made no effort to

explain the meaning of on or off duty as it applies during the course of a driver's work shift. Thus, while the DOT acknowledges that taxicab drivers may remove themselves from duty during their shifts, to engage in personal errands and the like, Respondent's rule as enforced by its management makes no such distinction and prohibits a driver's transportation of friends or relatives or for personal errands during the work shift whether or not the driver is in revenue service and available to pick up passengers.

Personal use of a taxicab outside of shift hours is also prohibited by Respondent. Driver Etienne Decembre was informed by Necatera during the course of providing a police report of an accident he had with his cab, that in any such accident after work, the vehicle was not covered by insurance. This warning effectively denies driver use of his vehicle outside his workshift.

Respondent also goes well beyond DOT rules by requiring that drivers' vehicles be inspected by Respondent and that any problems discovered are corrected within 5 days. If not, the driver's lease will be terminated. DOT requires taxicab inspections twice a year by its own employees and that the cab must be in good and safe condition before being permitted to go into service on any shift. If not in such condition, DOT requires the vehicle be immediately removed from the road until the problem is corrected. Respondent's 5-day requirement goes well beyond the DOT's own regulations. Under another rule of its own making, all of Respondent's drivers must have the state inspection completed before March of each year, subject to nonrenewal of the registration as well as lease termination for failure to do so.

Respondent allows drivers to take 2 sick or vacation weeks per year, during which time they are relieved of paying weekly lease, vehicle, or insurance fees. But Respondent does not permit drivers to take their first sick or vacation week until the first week of June and may only take the second week thereafter.

Another requirement imposed by Respondent on its drivers is that they must maintain trip sheets, recording the points of origin, destination, and fares charged to customers during the course of a driver's shift of work. These sheets provide a ready means of calculating the moneys in terms of unit and other changes, which the drivers become obligated to remit to Respondent.

D. The Circumstances Regarding Union Recognition and Bargaining, Followed by Withdrawal of Recognition, Refusal to Bargain, Unilateral Changes, and a Refusal to Reinstatement Certain Drivers or to Consider Others for Reinstatement

1. The union organizing drive

Julie Kushner, International representative for the UAW, became involved in the Union's organizing effort among Respondent's drivers in the summer of 1995. At that time, accompanied by Russell See, president of the Union, she attended a meeting with about 30 drivers at which they voiced their complaints and the representatives explained the role of the Union and how it might help them. After reviewing a copy of the contract, or lease agreement drivers had signed, with UAW counsel, and reviewing copies of previous Board decisions on the status of taxi drivers, Kushner met again, with a smaller group of six drivers, to explore their working conditions. Convinced of their employee status, another meeting with Russ See and 35 to 40 drivers was arranged where Kushner and See told them the Union was prepared to organize them but made them aware of the struggle that lay ahead. The drivers voted privately for union representation, and union authorization cards were distributed and signed at the meeting and drivers were encouraged to approach and sign up others not present.

2. The January 1996 strike and resulting recognition agreement

On Thursday, January 11, Kushner received word that the drivers were on strike. The next morning, January 12, during a heavy snow fall she arrived in Stamford at 8:30 a.m., and met with a large group of drivers, close to 40, at the city of Stamford Government Center, a quarter to half a mile from the Stamford train station, where they were standing in a group, saying they wanted their grievances resolved. Kushner learned of an incident at the train station where a driver, after refusing to leave with his taxicab when told to do so by a dispatcher, was punched by Bruno Necatera through an open window of his cab after Necatera had been summoned to the station from his garage.

Kushner arranged for a conference room inside the center and spent the next hour reviewing the drivers' grievances and problems they had with their treatment by Respondent. They complained about the high rates of their cab purchase agreements, other requirements, and disciplinary actions against them. Kushner obtained their agreement to seeking union recognition and a contract from Respondent. By the afternoon, DOT and Respondent officials had arrived. The company officials were Boskello and Necatera. In a joint meeting, a DOT official and then Boskello, asked what it would take to get the drivers to go back to work. Kushner responded they would like union recognition and a union contract. Boskello now said he would do whatever he had to, to get the drivers back to work.

At this point the two sides separated. Kushner arranged for faxes of the signed authorization cards to be forwarded from union headquarters and received advice from union counsel on drafting the recognition agreement. Kushner suggested that the parties ask someone from the City Corporation Counsel office in the Government Center to witness the cards as a neutral so the Union's majority status could be established. Kenneth Provodator, an attorney from that office, came from another floor and met with Kushner and Boskello in the hallway. Provodator asked Boskello to confirm the number of drivers Respondent had. Boskello told him there were 70 drivers. Kushner agreed to this figure, and then showed Provodator copies of the signed cards and he counted them. Provodator then wrote out a document, which he dated January 12, 1996, and signed. In it, after first noting that he had been advised by Joseph Boskello, general manager of Stamford Taxi, that there are no more than 70 drivers, he acknowledged he had received authorization cards, and witnessed that the UAW represents more than 35 drivers of Stamford Taxi.

Kushner next presented Boskello with the recognition agreement she had drafted. After first reciting that it has been established by an impartial third party that the UAW represents a majority of all of the drivers of Respondent, the agreement goes on to provide for Respondent's recognition of the UAW as the drivers' exclusive bargaining representative and its agreement to commence negotiations for a collective-bargaining agreement no later than January 17, 1996. The agreement also went on to deal with an issue involving the claimed discharge of two drivers, Rene Job and Meres Blanc. The draft asks Respondent to agree to meet and discuss the discharges, and, if the parties cannot resolve these cases, to agree to an arbitration before the American Arbitration Association no later than February 12, 1996.

The recognition agreement, dated January 12, 1996, was signed by Boskello for Respondent after two corrections or changes were made to the document. In the first, the word "leasee" was inserted before the word "drivers" in the first paragraph reciting the establishment of the Union's majority status. In the second, the words "cancellation of the contracts" was inserted, replacing the phrase "discharge," and the words "leasee drivers" replaced "drivers" in the third paragraph dealing with the two drivers, Job and Blanc. Boskello and Provodator initialed the second set of corrections, but Kushner also agreed to them.

According to Kushner, after showing him the draft agreement, Boskello excused himself and left to telephone Tibbetts. On his return he said they wanted to change the language in the agreement to refer to the drivers as leasee drivers. Kushner said she was prepared to do that if that's what they called them but she also asked for a clear understanding that the Union and Respondent were talking about all the drivers, and Boskello agreed they were. Boskello also claimed the drivers were independent contractors and wanted that in the agreement. Kushner said she didn't care what he called them, but the Union believed them to be employees and that they had the protection of the Act. Kushner said we will call them what you call them, leasee drivers, but they are what they are and we believe they are employees. Boskello then signed the agreement with no further changes. Under Kushner's testimony, which is credited, and contrary to Boskello's and Respondent's claim, the Union never agreed to the driver's status as independent contractors, and made clear its view as to their employee status. It is evident that the Respondent signed the agreement with full knowledge of the Union's position and with the agreement clarified only to identify the drivers as lessee drivers, who had been requested to sign lease agreements with Respondent prior to assuming their driving duties. Kushner was not confronted with policemen or any other city officials on the matter of the drivers' strike or return to work. Upon execution of the recognition agreement her role ceased and under UAW policy it assigned the follow up negotiations and representation of the drivers to the Union, Local 376.

Kushner acknowledged during her cross-examination by Respondent's counsel that the DOT representatives present at the Stamford Government Center on January 12, 1996, had expressed concern about the taxicab drivers being on strike, which was denying services to the citizens of Stamford. Kushner also explained that she readily agreed to the change in terminology that Boskello had requested because she didn't consider relevant whether the agreement said cancellation of contract or discharge; rather, what is relevant and important is what the person does, what the conditions are, not what the employer calls them. Kushner also repeated that she very clearly informed Boskello that the Union believed the drivers to have the protection of the NLRB, that it considered them to be employees. And while Boskello claimed the drivers were independent contractors, he also had informed Kushner and the others present that he would do whatever he had to, to get these people back out in the street.

As a consequence of the agreement the drivers returned to work.

3. Negotiations are held between January and May 1996

Robert Cerritelli testified that between January 1996 and July 1997, he was employed by the UAW and various of its locals in negotiating, servicing and organizing. In January 1996, he became involved in representing the drivers at Stamford Taxi, assisting Local 376 President See in negotiations, meeting with the drivers, preparing proposals, and acting as spokesperson with See at the bargaining sessions. By letter dated January 16, 1996,³ See wrote Boskello seeking the information itemized on a four-page attachment. By attachment to a letter dated January 25, then Respondent's Counsel, Mark Katz, submitted certain information and agreed to provide additional information as they were able. He also confirmed a bargaining meeting for January 30. Earlier, an initial bargaining session was held on January 17. In addition to Cerritelli and See, the four members of the drivers negotiating committee also attended, Decembre, Jean Max Lucien, Fritznel Noelzil, and Augustine Solinaire, known as "Poppie." For the Respondent, present were Attorney Katz, Boskello, and Necatera. The Union presented a full set of bargaining proposals comprising seven pages, as well as a demand for the immediate reinstatement of Blanc and Job. The Respondent, representatives noted that where the proposal refers to "employee" and "employer" it should read "lessee" and "lessor." The meeting lasted two hours. It was Cerritelli's understanding that the Respondent was prepared to respond by counterproposal to the Union's proposal which had placed all the issues on the table.

At neither this initial meeting, nor at any of the six which followed until negotiations broke off in early May, did any representative of Stamford Taxi say it was not going to recognize the Union for any reason, or that they had been under duress when Boskello first signed the recognition agreement.

Cerritelli testified that the parties had reached agreement on almost all of the proposals the Union had made except for the amount of the weekly fee and the deduction of dues. Union proposal article 10 provided that the bargaining unit members shall pay a fee for leasing and dispatching services provided by the "Employer" in the flat amount of \$175 per week. After providing for a union-security provision in article 3.0, the Union included a dues and initiation fee checkoff clause in article 3.1. During negotiation, Respondent had agreed to take back driver Blanc but refused to restore driver Job, so on April 16 and 18 the Union wrote Boskello proposing to arbitrate the cancellation of sublease of Rene Job before a named arbitrator and requested certain documents relating to Job's sublease cancellation. On May 7, the Union wrote the arbitrator it had selected, with company agreement, requesting the matter of Job's lease termination be set down for arbitration, and enclosing a copy of the recognition agreement and other communications between the parties concerning this matter, apparently the Union's April 16 and 18 communications. According to Cerritelli a date for the arbitration, July 24, had been selected and had even been agreed to at one point by Respondent.

At the last session, held on May 6, the parties were apart \$24 a week on the amount of the weekly fee. In contrast to the unit fees then imposed, comprising payment of a portion of each fare the driver collected, as well as an \$8 daily fee for utilizing the train station and a weekly leasing fee, the drivers were seeking the payment of a flat weekly fee regardless of how many fares they collected. At the last session, the Union was proposing a fee of \$250 a week for a single driver and \$310 if they had a second driver or sublease. The Company was at \$274 and \$334.

³ All dates hereinafter shall refer to 1996, unless otherwise noted.

All along the Company had offered to have the Union review its books and financial records, but because of conflicting UAW negotiations, the Union had been unable to secure the services of an auditor from the International Union's Detroit, Michigan offices for this purpose. Thus, in a letter to the Union dated February 1, Attorney Katz had confirmed a willingness of owner Tibbetts and Boskello to meet with its auditor for the purpose of substantiating the overhead and expense numbers previously provided.

At the conclusion of the last session on May 6, the Union agreed to take the Company's final and last best offer to the drivers. That offer was limited to the weekly financial terms. Other terms were still being negotiated. At the subsequent meeting the union representatives held with the drivers on May 13, the Company's last offer was rejected and the negotiators were authorized to make a counter offer increasing the Union's last offer on the weekly fee by \$5. In a motion made by a driver at the meeting, the drivers agreed that the negotiating committee was authorized to continue negotiations for a week to reach agreement, failing which the drivers would cease payment of the daily \$8 train fee by the following Monday, May 20.

On or about May 10, Respondent had posted a notice at its Stamford facility signed by Tibbetts and Boskello in which it first informed drivers about the reasonableness of Respondent's offers throughout negotiations, and then threatened to "cancel immediately the insurance on any vehicle" from a driver who continued to support the Union's offers with regard to the weekly fees, because, according to the notice, "the lease agreement will have been broken" by such demands (G.C. Exh. 11). The Union was not provided with the document which was addressed to the lessee drivers of Stamford Taxi.

Following the membership meeting on May 13, Cerritelli, See, and the drivers' negotiating committee went directly to Boskello's office in Greenwich. The Union presented its counterproposal to Boskello and See also informed Boskello that the drivers would cease paying the \$8 train station fee beginning May 20 unless an agreement was reached between the parties by that date. Boskello became upset and replied that Respondent needed that money in order to operate its business. Cerritelli responded that they had a week to negotiate the fee and the Union was available, just let him know when and where.

Following this meeting between the union committee and Boskello, Respondent distributed to all drivers and/or posted another notice addressed "to all lessee Drivers of Stamford Taxi" and signed by Tibbetts and Boskello. In it, Respondent informed the drivers that it would cancel the lease agreement of any driver who refused to pay "our present fee structure." (GC Exh. 12.) The notice also stated, "The Union bosses apparently don't care about some of you losing your income. They don't lose theirs. They are paid by the Union. So be it if you wish to listen to them." On Tuesday, May 14, approximately 42 drivers failed to pay the \$8 daily train station fee. In response, on the same date, Respondent mailed a letter to each of these drivers informing them that Respondent was terminating their respective leases effective May 20.

4. The evidence regarding Respondent's withdrawal of recognition, refusal to bargain any further, direct dealing with the drivers, and unilateral changes without notice to, or opportunity to bargain with, the Union

On Thursday, May 16, Cerritelli called Boskello at Respondent's Stamford facility to inform him that the Union's Detroit-based auditor was finally available to travel to Connecticut to review Respondent's financial records. Cerritelli, unaware that the drivers had already begun withholding certain fees, sought to establish dates for the auditor's review. Cerritelli also told Boskello that once the auditor had reviewed the records the Union might be more receptive to the Company's offer as to the weekly fee. Boskello responded that he wasn't going to let the auditor in, that the Union didn't represent the drivers anymore and they weren't going to recognize the Union. Cerritelli asked Boskello to reconsider, they were extremely close and should be able to work out their differences, but Boskello said the Company would not reconsider. After a heated discussion the conversation ended.

Union President See also wrote Tibbetts by letter dated May 16, responding to the notice of cancellation. See disputed that the railroad station fee was part of the lease agreement, and, in any event, the lease required the Company to provide a full week's notice of cancellation. See requested that the drivers be allowed to continue to operate under existing conditions and terms until the auditor can review the books on the next Tuesday (May 21) and the Union will be able to verify the Company's claim that the railroad fee is required to enable it to run its business.

There is no evidence that Respondent replied to this letter. Instead, Respondent posted and distributed to its driver's a two-page notice on Friday, May 17, responding to what it learned was a strike vote meeting for that evening. This union meeting had been called to deal with Respondent's withdrawal of recognition and threat to cancel drivers' leases.

After first noting that the Union had called a strike vote for that evening, the notice signed by Tibbetts and Boskello, goes on to inform the drivers, inter alia, that: (1) "The Union does not represent all lessee drivers. They lost that possibility when they said you could break your lease by not paying required fees" and; (2) "Beginning next Monday (May 20) we will be offering *new* weekly pay leases to qualified drivers" (GC Exh. 14) (emphasis added). The notice goes on to list the amounts payable weekly under the new lease for single-driver leases for insurance, lease, and dispatch overhead. Another paragraph also changed the existing sublease fees. The notice also advised that drivers who have not had their leases canceled may continue under the present daily pay system or sign up under the new weekly pay program.

The weekly flat fee described in this notice was clearly significantly different from the existing terms and conditions of employment. Cerritelli testified credibly that Respondent had never offered to negotiate with the Union the new weekly lease terms, nor had it ever notified the Union about the plan to offer the weekly pay leases.

Although not present at the union meeting that evening, Cerritelli later learned that the drivers had authorized a strike on Monday, May 20. On Monday, May 20, approximately 45 drivers struck and a picket line was set up at the train station and at the Company's headquarters in Stamford. The picket signs read "UAW on strike" and "unfair labor practice strike." Following the strike, all of the drivers who did not go on strike, ultimately accepted the new terms and entered into new lease agreements with Respondent. These agreements contained the weekly fee Respondent now offered, and to that extent, at least, they differed markedly from the lease agreements drivers had entered prior to May 20, all of which contained the daily fee provision.

Cerritelli tried to approach Boskello at the Stamford train station, but Boskello wouldn't speak with him. Since the strike began on May 20, Respondent has continued to refuse to recognize the Union as the drivers' bargaining representative. Also beginning on May 20, Respondent and its agents began towing taxicabs from the homes of striking drivers, including taxicabs which had been fully paid for by their respective driver-owners.

Following the strike, between May 20 and November 27, approximately 13 or 14 of the 45 striking drivers abandoned the strike, individually returned to Respondent and requested a new lease. Respondent informed about 10 or 11 of these drivers that it would offer them new leases provided they reimbursed Respondent for any fees which they may have withheld during the week of May 13. Each of these 10 or 11 drivers accepted Respondent's terms, repaid any amount due Respondent, and entered into new lease agreements which provided for the new flat weekly terms Respondent unilaterally implemented beginning May 20.

Respondent, however, refused to reinstate three other drivers. These are Max Lucien, the drivers' union steward and negotiating committee member, Augustine Solinaire, another member of the four-person negotiating committee, and Andre. Just as in the case of the 10 or 11 who each individually returned to Respondent seeking to enter into new leases, Lucien and Solinaire each sought to enter a new lease and offered to repay Respondent for any outstanding fees due. Respondent nonetheless refused to reinstate these three drivers ostensibly because of certain acts or conduct in which they engaged prior to the strike. Those defenses will be explored in a later section of this decision dealing with Respondent's presentation and defenses.

During his cross-examination by Respondent counsel, Cerritelli testified that the reason Boskello gave at the parties' negotiations for objecting to the use of the terms "employer" and "employee" in the Union's draft collective-bargaining agreement, was that use of those terms would have left Respondent vulnerable to an obligation to pay unemployment tax, withholding tax, and make normal employee payroll deductions. Cerritelli assured Respondent the Union's only goal was to achieve an agreement and if Respondent wanted to call the drivers, "lessees," and Stamford Taxi, the "lessor," the Union had no problem with that. Cerritelli could not recall Respondent using the term "independent contractor" during the negotiations.

Cerritelli also strongly denied that when the drivers rejected Respondent's last best offer on the weekly fee arrangement, that the parties were at impasse. Indeed, the drivers willingness to modify their last position and provide a counterproposal of a weekly fee increased by \$5 per week, thereby narrowing the parties' difference on the weekly fee from \$24 to \$19, was never

directly acknowledged by Respondent when it broke off negotiations and withdrew union recognition. Cerritelli had also suggested to Boskello that the union audit might convince it to be more receptive to the Company's offer.

After almost 6 months of striking, during which time Respondent continued to ignore the Union's offer to continue to bargain, by letter, dated November 27, signed by Union President See and directed to Owner Tibbetts, the Union made "an unconditional offer to return to work on behalf of all your employees that it represents. We are prepared to continue working pending negotiation of a new agreement. The employees will report to work on December 5, 1996." (GC Exh. 15.) By a letter dated the same date, on its attorney's letterhead, signed by its attorney, Sigismund L. Sapinski, Jr., on its behalf and addressed to See, Respondent replied: "This is to advise you that Local 376 does not represent any individuals who are employees with Stamford Taxi. Although Local 376 may have had some sort of relationship with certain independent contractors of Stamford Taxi, such individuals violated their lease agreements and *have no further rights with the Company.*" (GC Exh. 16.) (Emphasis added.)

In view of Respondent's response, virtually refusing to consider for reinstatement any of the drivers affiliated with the Union who withheld the daily train fee, none of the drivers reported to Respondent on December 5 as originally planned. In fact, Respondent refused to consider any of the union-affiliated drivers whenever a subsequent opening occurred. Thus, between December 9 and June 1997, Respondent entered into new lease agreements with seven new drivers, but did not offer such an arrangement to any of its drivers who had remained on strike. As one driver, Eugene Poteau, called as a witness by the General Counsel, testified, on cross-examination, when asked why he had not repaid the money he owed Stamford Taxi, "I never been there. I'm on strike and the Union tried to negotiate with Mr. Buddy. I don't know what's going on, if I'm going back to work and Mr. Buddy never asked me to come pay or call me. I've talked to him after that because he hold my title. I call him and talk to him. He don't tell me, 'Oh, you are owing me 5 calls.' If he told me that, I go pay him [sic]. Until now, if you want, I'll pay you now." (Tr. 469.)

On February 13, 1997, Respondent posted another notice at its facility addressed to its drivers in which it informed them, *inter alia*, that they were able to: (1) choose their own hours; (2) use their vehicles for personal business during off-hours; and (3) reject a dispatch call. All of these conditions of employment represented changes from what was uniformly in place prior to May 20. Despite this fact, Respondent failed to notify the Union that it was instituting changes in the lease terms affecting working conditions and failed to send a copy of this notice to the Union.

On February 12, 1998, as a result of newly available positions for drivers, Respondent sent a letter directly to the drivers who had remained on strike, described by Tibbetts in his testimony, as "Union members who had their leases cancelled." (Tr. 850.) Respondent did not provide the Union with a copy.

The letter provides, in relevant parties [sic], as follows:

Since the cancellation of the leases, several drivers have approached the Company asking if it was possible to enter into a new lease agreement. Some drivers entered into such new lease agreements. Before doing so, each of these drivers offered and repaid the outstanding sums due the Company.

Because questions may still exist, this letter states what is, and has been, our position about new lease agreements. The Company will consider new lease agreements for former leaseholder on the same conditions applied to the other drivers, namely, all moneys due the Company are repaid, plates and registrations are returned, and drivers must meet all Department of Transportation requirements. Then, as we did with the other drivers, lease requests will be reviewed on a case-by-case basis.

If you are interested in a lease arrangement and will meet the above-stated conditions, please contact Buddy Boskello, Manager, and Stamford Taxi before February 24, 1998. If we do not hear from you, we will accept this to mean that you have no further interest.

In the letter, Respondent failed to recognize the Union as the representative of any drivers who returned to drive for it and also failed to state that Respondent was prepared to consider its drivers as employees rather than as independent contractors or was prepared to remedy its past alleged unfair labor practices. Accordingly, the union affiliated drivers to whom the letter was addressed refused to contact Respondent regarding reinstatement. The letter does make clear,

however, that Respondent, at least, was prepared to condone the unprotected conduct in which it claimed the drivers had engaged who had withheld daily fees from Respondent during the week preceding their strike.

E. The Region Refuses to Issue Complaint on an 8(a)(3) Allegation in the Underlying Charge in this Proceeding

In an amended charge filed by the Union in this proceeding on December 2, 1996, it alleged, *inter alia*, that since on or about May 20, 1996, Stamford Taxi has suspended its employees for engaging in protected, concerted activity in violation of Section 8(a)(3) of the Act, and that since on or about May 20, the employees have been engaged in an unfair labor practice strike. After an investigation, the Regional Office notified the Union that it was refusing to issue a complaint on this allegation. The Union then filed an appeal of this decision with the General Counsel of the Board.

By letter to union counsel dated May 30, 1997, the General Counsel, by Yvonne T. Dixon, Director, Office of Appeals, denied the Union's appeal. In the letter, the General Counsel concluded that the fees the employees had paid to the Employer were part of their working conditions. By withholding and ceasing the payment of certain required fees, the employees had engaged in a partial strike, which is not protected by the Act. Thus, the Employer's notification to the employees on or about May 14 that they would be discharged the following week for failing to make the payments was not unlawful, notwithstanding that they subsequently engaged in a full strike.

By letter dated June 20, 1997, the Regional Director, Region 34 of the Board approved the Union's request to withdraw the 8(a)(3) allegation concerning Respondent's failure to hire striking drivers since November 27. Nonetheless, the complaint, as issued, does allege a respondent failure and refusal to consider reinstatement of the drivers upon whose behalf the union made an unconditional offer, as well as a discriminatory refusal to reinstate the three named drivers who made individual applications to return to work and were rejected.

F. Respondent's Defenses to the Alleged Unfair Labor Practices

1. Respondent witnesses' testimony regarding drivers status under the Act, execution of the recognition agreement, subsequent offers of new leases, and alleged discriminatory hiring practices

In the presentation of the Government's case supporting employee status, I referred from time to time to admissions made by Respondent's management to various indicia of such status which I reviewed. In its presentation at trial, Respondent relied in seeking to establish independent contractor status almost exclusively upon the testimony of a single witness, Payson B. Ayres III. Unlike all of the drivers who appeared as The General Counsel's witnesses, and who are native Haitians, Ayres, who had previously been a general manager with another taxi company, had a preferred status and a special alignment with Respondent which none of the other drivers had achieved.

Ayres left a position as general manager of Metro Taxi in New Haven, Connecticut, because of family considerations to work in Hartford for Stamford Taxi from May 1994 to July 1996. The first vehicle he drove for Respondent was his own 1987 Ford Taurus. Although not asked, it is clear that Ayres was required to have his Taurus painted black. He later testified he had the Stamford Taxi logo affixed and purchased the meter and radio from Respondent and had them installed at Necatera's service station. His second vehicle used as a cab was a 1989 Lincoln Town car which he purchased. On both vehicles Ayres turned over the title to Respondent and had the vehicles registered in its name, as required by Stamford Taxi.

Ayres also agreed to drive during a certain core period, the day shift. Ayres was free to start driving before his shift started and "on occasion," to drive beyond his shift. He cultivated what he called his own clientele, who requested his driving services either through dispatch or by contacting him directly on the pager and cellular telephone numbers listed on his business cards. In promoting his services, he distributed these cards to the passengers he carried in the taxicabs.

While Ayres did not have to seek permission to take lunch or other breaks from service, he was required to report to dispatch whenever he would be off the road. Similarly, whenever

Ayres received a call to pick up a passenger at an airport, he was obliged to notify dispatch he would be out of town on this assignment.

Ayres also exercised discretion on picking up fares who sought to flag him down. He also was not assigned to a particular geographic area. Unlike the Government's driver witnesses, Ayres testified he had the ability to turn down dispatch calls and he did so. Ayres did not explain the circumstances.

When he left Stamford Taxi, the Company transferred a bill of sale on his vehicle to him in exchange for \$1 and transferred title to the vehicle back to him. But he had to return the meter and radio he had purchased. While driving for Respondent, Ayres determined how many miles he would drive each week. He paid for his own gasoline, oil change, and servicing at a garage of his choice and paid for his own towing. Also contrary to the drivers who testified for the Government, Ayres claimed he could have used his vehicle for his own purposes after his shift ended and was not told that he couldn't use it off hours.

In Ayre's July 5, 1996 lease agreement received in evidence, unlike all those signed by the union affiliated drivers who had previously testified, the schedule attached had figures listed for each category of payments for which Ayres was responsible. Thus, his weekly lease management payment was \$87, weekly lease and management fee (including taxes) was \$53, weekly dispatching/overhead fee was \$114.50, and collision repair pool, if in effect, was \$19. Ayres acknowledged that these fees had not been explained to him by management. It is clear that these lease fees are part of the new lease agreement which Respondent started offering its drivers beginning May 20. There is no mention or inclusion in Ayres' July 5, 1996 lease, of a Schedule C—dispatching service payment calculation, payable daily in addition to weekly payments, listing day or evening dispatching periods. This schedule C was included in all prior leases issued prior to May 20, 1996. It is this schedule which required the unit payment of 77 cents for each fare or local call on a daily basis, which has been previously described in detail. In this connection, whether, and to what extent, the freedom which Ayres' enjoyed to drive beyond his shift, to refuse dispatch calls, and to use the vehicle, personally, after his shift, and to which he testified, related only to the period following May 20, 1996, or included an earlier time frame, is unclear from his testimony. For example, Ayres' testimony at Transcript 635, that he was not required to give Stamford Taxi a percentage of his day's fares, can only be true for the period after May 20, and not before, when each driver, including Ayres, was required to account daily for each fare (trip) and to pay Respondent the unit fee of 77 cents for each. Ayres denial was also not true for the percentage fares which Respondent charged under schedules it issued to drivers for shared rides in zones 1 to 6, rides outside Stamford, Darien, or Greenwich, out-of-state rides, listed fares for rides throughout Connecticut and for passengers picked up on a New Canaan Train Breakdown. During his cross-examination by counsel for the General Counsel, Ayres was compelled to admit that his denial was incorrect.

Ayres did acknowledge Respondent's requirement to maintain and provide a daily trip sheet listing starting and ending mileage and fares he had picked up and what they were charged. While Ayres noted that the DOT requires the maintenance of such records, he did not mention that these sheets also provide Respondent with information necessary to calculate the daily fees due it, at least until May 20, 1996, as well as other daily fees due it arising from shared rides, even after May 20.

Ayres testified he did not withhold any fees due Respondent when the other union affiliated drivers did so in the week of May 13.

During Ayres' cross-examination, it became clear that he was a friendly Respondent witness who had voluntarily spoken with both Necatera and Respondent counsel prior to his testimony, although he had received a subpoena which counsel had advised he would be receiving. It was Necatera who had offered him the position as taxicab driver.

Unlike earlier driver witnesses, Ayres was given an opportunity to review his first lease before signing it. There is no evidence, however, that Ayres sought, or was able to, modify or change any of the written terms.

Ayres now explained that he first started as a driver on the night shift in 1994 because Necatera told him there was a need, although it was also his preference, but after 7 months Necatera agreed to switch him to days at his request.

Interestingly, Ayres quit Respondent on July 14, so his new lease was only in effect for 9 days, from July 5. It was only in the new lease that Ayres was offered the flat fee arrangement as described so that the unit fee continued to be charged by Respondent, at least in his case,

from May 20 to July 5, 1996. Also, Ayres, knew, until July 5, that he was required to report all flagged fares and was responsible for the 77-cent unit fee for each such fare.

Ayres now admitted that over the 2-year period of his tenure with Respondent, he had only turned down a dispatch call, "once or twice, maybe . . . possibly three times." (Tr. 669.) This admission severely undercuts Ayres' claim of other occasions in which he claimed during his direct examination he was free to drive outside his shift or to use his vehicle on personal trips on which he was similarly vague and taciturn.

Once or twice, among the 10 or so times Ayres visited the Stamford train station to pick up all passengers, he saw Necatera, observing. This is consistent with other drivers' claims of their time at the station having been monitored and limited.

Ayres paid the \$8 daily fee without question and did not sublease his vehicle, although permitted to do so. He also was required to comply with Respondent's dress restrictions. And he understood he was supposed to follow the rules and procedures set forth in Respondent's detailed three-page memorandum to all drivers dated January 11, 1995, regarding work period, answering pages by dispatchers, payment of fees, customer courtesy, recordkeeping, time limits on correction of car problems disclosed on company inspection, insurance payments, and procedures on lease termination (G.C. Exh. 22). Thus, Ayres both admitted he was obliged to follow Respondent's rule that a failure to answer a dispatcher's call was a direct attack on its obligation to service the public (G.C. Exh. 22, p. 1) and also asserted he could refuse the dispatch at any time. Such an inconsistent and contradictory position, seriously erodes Ayres' credibility as a witness, and supports my conclusion that he exhibited a strong bias in favor of Respondent's claim of independent contractor status for the drivers not consistent with the facts culled from The General Counsel's witnesses and managerial admissions.

Ayres noted that because of Respondent's rule prohibiting personal riders in cabs while "on duty" he refrained from having such riders while he was providing services to the public.

Ayres agreed that he did not join the drivers' strike in May 1996, and he did not support the union movement while he was a driver for Stamford Taxi.

Ayres testified that if the "need was there" he could stay on the road beyond his shift hours of 5:30 a.m. to 4 p.m. (Tr. 699). He learned of the need by listening to the cab radio and hearing the amount of work put out to bid. He stayed on the road beyond his shift possibly twice a week. To this extent, it appears that Ayres probably enjoyed privileges beyond those available to the predominantly Haitian drivers who incurred discipline for working extended hours without company permission. Yet, at the same time, Ayres knew that his extended work hours were not authorized in the lease agreement.

During his examination by counsel for the General Counsel as an adverse witness called pursuant to Fed R. Evid 611(c), F.R.E., Boskello claimed, falsely, that he had adjusted the recognition agreement to read "independent lease drivers" where, in fact, the agreement only added the word "leasee" to the word "drivers" before he signed it. Boskello did not say anywhere in the document that he was signing under duress, nor did he provide the Union with any document during the subsequent negotiations in which he claimed he signed the original agreement under duress.

Boskello testified that he offered new leases during the week of May 13 to commence on Monday, May 20. Ultimately, all of the drivers who didn't go on strike accepted the terms. The weekly lease payments have been previously described as set forth in Ayre's July 5 lease agreement. Boskello agreed that neither the daily 77-cent fee per fare, the daily \$8 train station fee nor, the extra \$18 sublease fee were dictated by DOT regulations, and, further, Respondent had discretion to change those amounts. Indeed, Respondent changed them, by eliminating them in its offer of the new lease on May 20.

Well after the Teamsters Union ceased representing the drivers, in 1991, Boskello acknowledged that Respondent issued a 3-day suspension in 1993 to a driver for a physical altercation with and swearing at a dispatcher, and issued a written warning in 1994 to another driver for violating Stamford Taxi's unwritten rule about proper attire while driving its taxicabs.

In his pretrial affidavit, Boskello swore that the drivers also do not owe the dispatch fee for any "flagged" call. This conflicts with Boskello's testimony that once a driver reported a flagged fare he was responsible for the unit charge. (Tr. 548.) Boskello also swore in his affidavit that drivers could stay at the Stamford train station as long as they desired and he would not discipline any driver for staying at the station for an excessive period, including their entire work period. Yet, on April 17, 1995, Boskello issued a written first warning to driver

Rene Job for a failure to answer dispatch calls and working only at [the] railroad. (GC Exh. 35.) Drivers have previously testified credibly that they were required to respond to dispatched calls at the risk of discipline for failing to do so.

Boskelo swore in his affidavit that drivers could choose to work 24 hours straight, yet on January 9, 1991, he terminated the lease of a driver, R. Gervais, for, among other infractions, working other work periods without permission (G.C. Exh. 37). Boskelo also denied in his affidavit that he ever disciplined or suspended the lease of any driver who worked a different service period, used his cab for personal reasons during or after or before their respective work period, or had failed to check in with the dispatcher at the beginning of his shift. Yet, Boskelo terminated Gervais for failing to comply with two of these work rules, and drivers called by the General Counsel testified credibly to discipline for violating the third rule. While the discipline of Gervais and some others took place while the Teamsters Union was the drivers' representative, it is clear that the same warning form continued to be used by Respondent 4 years after the Union ceased its representation and the same infractions continued to be assessed against the drivers.

After the strike commenced on May 20, Boskelo acknowledged that 8 to 10 drivers ceased striking, and sought to return to work and he accepted them all back under the new lease system when they agreed to pay the fees they had withheld during the week of May 13. But Boskelo also noted that the alleged discriminatees in this case, the three drivers denied positions as drivers, may have asked to come back, and probably were refused.

Later, when called as a witness by Respondent during the presentation of its defense, Boskelo testified he learned in the morning of January 12, during a heavy snow, that Stamford taxi drivers had started a work stoppage, refusing to move their cars from the line of taxis at the Stamford train station, blocking the circle there, and jamming the two-way radio. By the time he arrived, the drivers, who had dispersed when local police arrived, were picketing outside the Stamford government center. After consulting with Ken Gabriella and his assistant, Bob Carlucci, of DOT, who pressed him to get the cabs back on the road or suffer the loss of some certificates to a competitor, Boskelo told the woman union representative present that he would agree to negotiate. Without testifying at all about the third-party card check, Boskelo related his dealings with Kushner which led to his signing the recognition agreement.

Boskelo claimed that it was only after he said he couldn't sign the document unless it said lessee, "which indicated independent contractor" (Tr. 894), that Kushner agreed to the insertion of "lessee" before "driver." While he claimed Kushner physically changed the document "based on their demand" (Tr. 894) he failed to note any response by Kushner to his request for the amendment. Kushner also agreed to the changes to "cancellation of the contracts" and "lessee drivers" in the paragraph dealing with the drivers Job and Blanc after he wanted her to be sure that we understood these are lessee/independent contractors.

Boskelo did not explain why he did not insist on insertion of the words "independent contractor" in the agreement, or why, Kushner, who had interviewed the drivers, consulted union counsel and engaged in her own legal research, would have acquiesced in Boskelo's assertion as to the status of the drivers. Boskelo, whose testimony is replete with inconsistencies and evasions, is not credited on his understanding of the intent and meaning of the use of the phrases "lessee driver" and "cancellation of the contracts" in the agreement and Kushner is credited whenever her testimony conflicts with Boskelo's on the negotiations leading to his execution of the recognition agreement. It is clear that the parties agreed to identify the drivers by the document which they signed as a condition to entering a relationship with Stamford Taxi, but that neither abandoned their position that the drivers could ultimately be found to be either employees or independent contractors if that issue were ever litigated. Likewise, Cerritelli is credited over Boskelo as to the statements and positions Cerritelli attributes to Boskelo during their negotiations.

While Boskelo claims, at one point in his testimony, that "I was sort of forced into it," at no point did he indicate to Kushner, orally, or in writing, in the agreement, or separately, that he was negotiating and signing the recognition under duress. Indeed, in the agreement itself, as a predicate to its written recognition of the UAW as exclusive-bargaining agent of all of its drivers, Respondent acknowledges that the Union's status as majority representative had been established by an impartial third party. While Boskelo may have been acting under pressure, the pressure was created by a legitimate strike of his drivers, and under circumstances where he

became convinced by virtue of the card count and his own observation of the unity and adherence of a clear majority of his drivers, that the Union did represent a majority of them.

At some point after November 27, when the Union made its unconditional offer to return to work on behalf of the striking drivers, Boskelo acknowledged that Max Lucien and Andre had come in, there were three or four in all, and he had rejected them. He recalled having rejected because of his involvement in some type of gambling operation which someone had told him about.

Boskelo claimed that Tibbetts had told him that if any of the striking drivers came in after the Union offered their unconditional return to work, he was to talk to them, and he never refused to consider them for driving positions. Yet, Respondent's counsel in his November 27 letter, replied to the Union's offer with a firm rejection both of the Union's status as the drivers' bargaining representative (because they were not employees) and of these drivers having any further rights with the Company. By those rejections, Respondent was clearly signaling that the striking drivers would not be given any consideration on a return to work for Stamford Taxi and the Union and the drivers took it as such, making any approach to Respondent a futile one. In spite of this rejection, the three alleged discriminatees came in to seek reinstatement to their prior positions as drivers.

Although Boskelo claimed that drivers use of business cards was widespread, and that there was no requirement that the dispatch office number appear on the card, Respondent did not subpoena or demand the production of any business cards from the drivers who were Government witnesses, and the five business cards which Respondent produced were never offered in evidence after Respondent failed to provide proof that any of the drivers named on the cards had worked as a driver for Stamford Taxi prior to May 1996. (Tr. 912.) Thus, the only concrete testimony relating to business card use was that of Payson Ayres, which has been previously described. Ayres, however, failed to produce or offer the business card he testified about.

During his cross-examination Boskelo confirmed that Respondent continues to the present to maintain two separate work periods, day and night, to which drivers are assigned. Boskelo also admitted he told the DOT on the January 22 strike day, that he was willing to negotiate with the drivers about what was going on to get them back on the road. He also never told the union agent there that he would not negotiate with them because of their disruption of service. Neither did he claim duress before he signed the document or afterward during the negotiations. He also agreed that at the conclusion of one of those sessions, there was a document prepared by the Union described as tentative agreements between the parties which the Union submitted. Not included in the document were items on which the parties still had differences, including the amount of the flat fee, the dues-checkoff clause, and the status of the drivers. However, Boskelo did not ask the Union to change the phrase "lesser" and "lessee" in the document to "independent contractor."

Boskelo also acknowledged that when he told the union agents during the week of May 13 that Respondent would no longer recognize the Union any more since it had encouraged drivers to not pay their fees, there were other drivers who had continued to make their payments that week. Boskelo took this position of withdrawing recognition in spite of the fact that he had signed a recognition agreement recognizing the Union as exclusive representative for all of its drivers.

As to his refusal to reemploy Max Lucien, Boskelo could not recall the circumstances. He did know that Lucien was one of the four union representatives on the drivers' negotiating committee who attended the bargaining sessions on behalf of the Union. Regarding Andre, who he was aware was a union member who refused to pay his fees and then gone on strike, he was rejected for allegedly running a gambling establishment for drivers at his house, although Boskelo never saw him gamble, including on Stamford Taxi premises, and he was never disciplined for gambling during the 15 years he drove for Respondent. According to Boskelo, had just started the gambling enterprise, but was vague on dates or circumstances. Although he was aware five drivers gambled at [Andre]'s house, he took no action against any of them.

Boskelo acknowledged that when Tibbetts wrote his February 12, 1998 letter to the prior drivers whose leases had been cancelled for withholding lease payments, Respondent was prepared to forget about the past and take them back if they would like to come back. This offer included both Lucien, whose gambling habit, so far as he was aware, has subsided, and as well the third driver (Solinaire), who he had rejected.

Mark Katz testified he participated in the negotiations as counsel for Respondent. When he objected to the Union's proposed agreement because it used the terms employer and employee, See readily agreed to substitute the terms lessee and lessor. However, when Katz said he agreed to that substitution because that's the same as an independent contractor relationship, See didn't say yes or no, and the parties just went on to the next issue. Thus, just as I have found with respect to the parties' positions on driver status taken at the negotiation and execution of the recognition agreement, during the bargaining, the parties agreed on language to describe the drivers the Union represented derived from the contract they were required to sign, but neither side conceded its respective position that the drivers were employees or independent contractors.

Attorney Katz' rudimentary knowledge of labor law was best illustrated when he confused the concepts of bargaining unit and compulsory union membership. While Respondent counsel sought to get Katz as a witness to testify that Respondent disputed the article 2 recognition clause of the Union's proposal contained in the tentative agreement it submitted near the end of bargaining, Katz, instead, testified, that Respondent was disputing not recognition (which, after all, Boskello had previously bound Respondent to accept) but rather the union security clause, article 3. (Tr. 1017, LL. 9 to 1019, L. 7.) It is probable that since the union-security clause was contained in the tentative agreement which Cerritelli credibly testified included clauses agreed to at the bargaining table, that Katz may have been further confused, and that Respondent was really disputing the dues-checkoff clause not included in the tentative agreement.

Katz agreed on cross-examination that he did not seek to nullify the recognition agreement on grounds of duress, even after learning of the pressure the drivers had applied at the Stamford train station in the morning of January 12. Katz was frank in stating that Respondent was not contesting the recognition agreement, but continued to insist it recognized the Union as representative of only independent contractors, not employees, in spite of the failure of the agreement to so specify and his ignorance of the Union's position on the drivers' employee status expressed or understood by it at the meeting on January 12 when the recognition agreement was signed. Katz finally also agreed the terms "lessee/lessor" may mean different things for legal purposes, such as employee or independent contractor status.

Attorney Katz was also sure that at the bargaining sessions he made the Union aware of the worker's compensation insurance premiums that would be due and probably mentioned the IRS ramifications as well, in terms of withholding of payroll taxes and the like which would be required, were the drivers to be deemed employees rather than independent contractors. Katz agreed he also explained to the Union the additional bookkeeping requirements and liability for sales which would be imposed on Respondent as reasons why Stamford Taxi didn't want to agree to referring to the drivers as employees in any collective-bargaining agreement.

Although Katz claimed the Union agreed to an independent contractor relationship before the negotiations terminated, he admitted there was no proposal memorializing such an understanding, and he did not draft one. Katz' claim is not credited, and neither is his testimony where it conflicts with that of Cerritelli on the discussions held and positions taken at the negotiations. In particular, Katz' assertion that the parties reached an understanding on the drivers' status at the last session when the Union submitted its tentative agreements is negated by his testimony characterizing such an understanding arising from agreement of the parties to enter into the same contract the drivers are using now, but with a change in the amount of the fees, and conforming their understanding to a union collective-bargaining agreement (Tr. 1049).

In calling as a witness, Robert Cumpstone, manager of motor transportation services for the DOT, Respondent was clearly seeking to establish that its lease agreements including its relationship with its lessee drivers, established their status as independent contractors. Respondent did not achieve its objective. Cumpstone repeatedly carefully hedged his responses to establish that while Stamford Taxi and other taxi companies take the position that their drivers are independent contractors, their lease arrangements do not establish that status but are only one factor in determining such status. Cumpstone's department, the DOT, does not have jurisdiction to determine that status. The Connecticut Department of Labor (DOL) does have jurisdiction to investigate and determine such status, for purposes of compliance with state minimum wage laws. In some cases, the DOL has determined taxi company drivers were employees, although they were subject to lease agreements. While performing services as cab drivers under certificates of public convenience and necessity issued by his department, the DOT exercises oversight over the day-to-day operations of the

company issued the certificates, to insure that the company is responsible for the behavior and conduct of the drivers as their agents while they are in revenue service. Thus, Cumpstone signed a letter dated November 3, 1997, directed to Connecticut Limousine, copy to Boskello, responding to its complaint about the behavior of a Stamford Taxi driver (in operating a vehicle in an erratic manner in front of Connecticut Limousine's terminal location), in which he informed the complainant that "Stamford Taxi like any other certificate holder has 'control' over who they allow to drive their vehicles and is responsible to take corrective action over a driver's behavior". (R. Exh. 17.) An earlier section of this decision has made clear that whether to take action at all, and the nature and severity of that corrective action, is solely within the discretion of the cab company, in this case Stamford Taxi.

As an expert witness, Cumpstone offered his opinion that based upon his review of Respondent's 77-cent dispatch call computation of unit fees due it for calls between 1 and 50 in a day, as well as Respondent's fee schedules for shared ride zones and daily lease fees, all in effect prior to Respondent's unilateral imposition of a flat fee after May 20, there was no shifting of the risk to the drivers, that the system continues to be almost a commission type basis, under which the drivers would be considered to be employees. Under a flat rate per shift or per week system, where the revenue the driver generates by the meter or by flat rates for the over-10-mile trips he keeps for himself, the drivers would more likely be considered to be independent contractors.

Cumpstone also confirmed that the phrase "on duty" means a driver available for service, and drivers have the ability to "book off," remove themselves from revenue service, even during their work shifts. The DOT does not regulate whether and when drivers may go off duty; it is up to the taxicab company to determine that. In a previous section of this decision, Stamford Taxi's restrictions on permitting drivers off-duty use of their cabs, by engaging in personal and family errands and the like, has been described. Cumpstone opined that if the Respondent's drivers were truly independent contractors they could book off at any time.

Cumpstone pointed out that even in Stamford Taxi's February 13, 1997 self-serving notice to all of its "Independent Contract Drivers," prepared months after it unilaterally issued the new lease agreements, Respondent, in paragraph 10, improperly placed the responsibility for the upkeep of the cabs on the drivers, whereas the maintenance of the cabs is the Company's absolute responsibility, putting aside the question of who pays for it. This responsibility encompasses as well as the responsibility for the clean and sanitary condition of all equipment and the safety of the vehicle for operation on the highway. As to the Company's decision to terminate a driver's lease for not correcting a maintenance problem within 5 days, as required in the Company's rules and procedures, that, said Cumpstone, is Stamford Taxi's decision and it is not compelled by DOT regulations.

Tibbetts, Respondent's owner, testified that when he received the Union's unconditional offer to return to work on behalf of the employees it represented, on or about November 27, he instructed his counsel to inform the Union that he had no employees, and also told Boskello to consider the strikers who showed up on December 5, as noted in the letter, the way he had with others who came to him wanting to sign new leases. But, as earlier noted, no union drivers showed up. Tibbetts admitted he did not instruct his attorney to advise the Union that the drivers the Union represented could just show up on December 5, and be considered for driving positions, as he claims he told Boskello. Tibbetts just didn't "think of that." (Tr. 795.) Instead, of course, Respondent counsel's reply to the Union made no offer to consider the union-affiliated drivers, but instead, asserted that by virtue of their having violated their lease agreements, they had no further rights with the Company. It is little wonder then that none of the union-represented drivers reported to Stamford Taxi on December 5.

This was not the first time that Respondent, in writing, had issued threats to deny any consideration to drivers who had affiliated with the Union. In its notice to lessee drivers issued on or about May 10, Respondent threatened to cancel immediately the insurance on any vehicle with a bargaining demand that does not permit us to cover its operating costs, thereby resulting in the lease agreement having been broken.

During his cross-examination by counsel for the General Counsel, Tibbetts agreed that after May 20, Stamford Taxi had not recognized the Union as the exclusive bargaining representative of the drivers. As to the drivers whose leases had been canceled, they no longer had a relationship to Stamford Taxi. As to the drivers who remained, according to Tibbetts, they did not indicate in any way that they wanted the Union to represent them. In this response, Tibbetts

ignored both the January 12 recognition agreement in which, on its face, Respondent granted the Union status as bargaining representative for all of its drivers after recognizing its establishment of a majority status as a result of a card count, as well as its bypassing of the Union and direct dealing in its May 17 notice posted and distributed to the individual drivers.

Tibbett's claim that it is the DOT regulations which mandate Stamford Taxi's exercise of control over the conduct and appearance of drivers under lease with it, is not credited. The record makes abundantly clear that Stamford Taxi imposes its own system of discipline, decides which elements of behavior will be subject to control and to what extent, and determines its own dress requirements. Respondent never produced state regulations governing personal appearance or grooming of drivers, although the claim was repeatedly made of their existence. Tibbetts is also not credited in his assertion that drivers were free to work their own hours beyond or outside their work shifts without Respondent's approval, and that drivers were free to carry family members in their cabs or engage in personal errands during their shifts unless they informed the dispatcher they were available for a call. It is clear that the company rule prohibiting personal riders during the drivers' "on-duty" period exceeds the state DOT's concerns expressed in Robert Cumpstone's letter to Boskello of August 7, 1996, objecting to "personal" use of a cab which is carrying paying passengers.

During Boskello's recall as a witness by Respondent, he testified on cross-examination that in addition to a list of 22 union-affiliated drivers Respondent had prepared whose leases were canceled and who have since not returned to work, there were 10 or 11 other drivers who came in after May 20 and signed new leases after also withholding certain fees earlier in May. The Company told them they would have to square up the fees they owed and any delinquent payment on their car leases and permitted them to come back after they paid what they owed. All had good driving records as well. As to Max Lucien, he had started driving for Respondent for possibly 10 years, and had a driving record which was neither the best nor the worst. After the Union's unconditional offer to return to work, Lucien did come back looking for a job and like the 10 or 11 other drivers offered to pay the Company what he owed in withheld fees, but Boskello told him no.

During Respondent's redirect examination of Boskello, after the General Counsel had successfully amended the complaint to allege Respondent's discriminatory failure to hire Lucien on or about May 21, Boskello disclosed that in an accident Lucien had had with his vehicle, he had submitted an estimate of repair which exceeded the actual costs of repair. Boskello learned later that Lucien had been paid from the collision pool for work which had not been done on the vehicle, based on an inflated estimate he had submitted.

Boskello agreed that Max Lucien, Andre Chery, and Augustine Solinaire had each approached Boskello to ask for their driver's positions back and in each case, had offered to pay back the fees that were due. In each case, Boskello refused to take them back. They each had come in sometime after May 20, 1996. Had driven for Stamford Taxi for approximately 10 to 15 years. Solinaire had driven for about 3 years. Boskello noted that Solinaire had hid his vehicle when his contract was canceled. (Respondent had used a tow truck to pick-up the vehicles used by drivers after cancellation of their leases.) But Boskello acknowledged that others had done the same thing. Solinaire still owed about \$12,000 on the vehicle under a lease with Respondent.

Boskello also admitted that Respondent's letter to drivers whose leases had been canceled dated February 12, 1998, asking if they were interested in a lease arrangement, was forwarded to Lucien and Solinaire.

Boskello agreed that many of its drivers who received this letter had accidents while driving cabs for Stamford Taxi. However, Lucien's insurance scam reflected on his character and was a separate issue. Yet, Boskello was willing to admit that Lucien's character had improved from the time of the padded insurance estimate and that "[e]verybody's entitled to a second chance." (Tr. 1326.) Boskello also noted that Lucien's accident insurance claim had occurred prior to May 1996 and that when he found about it, he did not cancel Lucien's lease agreement.

As a consequence of counsel for the General Counsel's cross-examination of Boskello, he moved, successfully, to amend the complaint to allege the discriminatory refusal to reinstate all three of the named drivers.

Respondent's last witness was Bruno Necatera. He denied that Stamford Taxi drivers are not covered while driving off duty. While not recalling any discussions with drivers about not being covered off duty, Necatera was sure he wouldn't have told them they're not covered. He

recounted two separate claims which Respondent covered under its insurance policy involving accidents while drivers were off duty, in one instance, with the driver's wife and children in the car.

Necatera also claimed that he had gone to the Stamford train station to observe whether the number of available cabs are sufficient to handle the incoming traffic in order to aid Respondent's position that applications to DOT by its local competition, Stamford Yellow Cab and Eveready, for additional certificates of registration as taxicabs were not necessary and should be denied.

Necatera asserted that it was during the tenure of the Teamster's as the drivers' bargaining representative, until 1991, that Stamford Taxi restricted day-shift drivers from working past their shift after the Union grieved for night drivers losing fares. After 1991, Respondent permitted its drivers to drive when they want. Neither did Necatera ever tell drivers they had to work 6 days a week.

Necatera denied he physically, or verbally threatened any drivers with lease cancellation to force them to leave the Stamford train station during the January 12 snowstorm when the union affiliated drivers staged a work stoppage there and refused to move their vehicles which were blocking the area. Necatera denied he had any power to cancel leases. Necatera swore this was the only time between 1991 and 1996 he asked drivers to leave the station to handle dispatch calls.

Necatera corroborated the Union Agent Kushner's testimony that at the later meeting that day at the Government Center, after Boskello telephoned Respondent's attorney or Tibbetts, he returned and told Kushner the only way he would sign the paper (the recognition agreement) was if she agreed the drivers were lessee drivers and instead of driver discharge she agreed to use the words, lease termination. And Kushner said she would go along with that. In spite of this testimony, Necatera unaccountably asserted that when Boskello equated lessee drivers with independent contractors, Kushner agreed to that characterization as well, although the agreement does not so specify and, admittedly, Boskello did not ask for the insertion of those words.

With respect to Max Lucien, Necatera discovered Lucien's insurance scam on February 29, 1996, when certain repairs worth \$497.68 had to be performed on Lucien's vehicle pursuant to state inspection, after Stamford Taxi had already paid for them based upon an inflated estimate of damage arising from his accident which Lucien had obtained in late December 1995 from another car repair body shop. After Necatera told Boskello of the duplicate charges, Boskello said, "[L]et it go for now." (Tr. 1381.) In spite of this apparent condonation, Boskello referred to this conduct in explaining why he rejected Lucien's later application for reinstatement.

During his cross-examination Necatera claimed it was "impossible" that he would have had his wife serve as a witness to a discipline he issued to a driver, regarding the fact that they had to start their shift at a certain time. Necatera then confirmed that his wife had signed, as a witness, a statement signed by driver Joseph Spencer on February 22, 1995, in which Spencer, driver of car 55, declared that he "will start working at 4:00 p.m. everyday and will answer dispatched calls during my work period." (GC Exh. 32.)

Spencer had credibly testified earlier as a Government witness to the circumstances surrounding his receipt of this reprimand. Spencer had complained to Necatera that he allowed day-shift drivers who have their vehicles repaired at his service station to work longer hours beyond the end of their regular shift. This cut into the number of dispatch calls available to Spencer and limited his fares and his earnings. When Necatera questioned when he started work, Spencer replied he came in at 6 p.m. when the day guys are going home. Necatera then told him he had to start to report to work at 4 p.m. in the afternoon and he had his wife draft the letter and informed Spencer that he had to sign it or else he was not going to work there any longer. After Spencer signed it, Necatera told him he was free to go to work.

By swearing that he had no power to cancel leases, and that drivers were not restricted as to their work hours, Necatera's testimony has been impeached by indisputable documentary evidence to the contrary. As a consequence, I do not credit any of Necatera's testimony which conflicts with that of any of the drivers who testified during the General Counsel's presentation of his case or conflicts with Union Agent Kushner's testimony regarding the events of January 12, 1996.

ANALYSIS AND CONCLUSION

I consider first the underlying issue of the status of Respondent's drivers under the Act.

Section 2(3) of the Act excludes from the definition of employee “any individual having the status of an independent contractor.” In determining whether individuals are employees or independent contractors, the Board applies the common law of agency, specifically the “right-of-control” test set forth in *News Syndicate Co.*, 164 NLRB 422, 423–424 (1967).

Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

There are many factors considered significant under the “right-of-control” test: (1) whether individuals perform functions that are an essential part of the company’s normal operation or operate an independent business; (2) whether they have a permanent working relationship with the company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the company’s name with assistance and guidance from company personnel; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; (5) whether they account to the company for the funds they collect under a regular reporting procedure prescribed by the company; (6) whether particular skills are required for the operation subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and (8) whether they have the opportunity to make decisions which involve risks taken by the independent business person which may result in a profit or loss. *Metro Cars*, 309 NLRB 513, 515 (1992); *Standard Oil Co.*, 230 NLRB 967, 968 (1977); *NLRB v. Pepsi Cola Bottling Co.*, 455 F.2d 1134, 1141 (6th Cir. 1972). This analysis also includes an examination of the “entrepreneurial risk” undertaken by the party performing the service and the method of compensation and tax withholding. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968); *Diamond L. Transportation*, 310 NLRB 630, 632 (1993); *Metro Cars*, supra at 515, *Cardinal McCloskey Services*, 298 NLRB 434 (1990).

For a recent Board decision in which these factors were enunciated, and considered significant in determining whether an employment relationship exists under the right-to-control test, see *Prime Time Shuttle International*, 314 NLRB 838, 840 (1994), citing *Standard Oil Co.*, cited supra.

In a recent case, *Yellow Cab of Quincy*, 312 NLRB 142 (1993), the Board set forth the test for determining employee status of taxicab drivers: (1) whether the employer controls the driver’s means and manner of operation; and (2) whether there is any correlation between the employer’s income and the amount of fares collected by its drivers. *Yellow Cab of Quincy*, supra 144, citing *Checker Cab Co.*, 273 NLRB 1492 (1985), and *Air Transit*, 271 NLRB 1108 (1984).

The factors which I have previously reviewed, as applied to the drivers’ hire, vehicle selection, work shift assignment, dispatch call system requirements, fare schedules and fees; and work rules governing their conduct and operation of the taxicabs, substantially support the conclusion that the drivers are employees and not independent contractors. The record shows that the Respondent clearly controls the means and manner of the drivers’ operation of their taxicabs by assigning drivers to work shifts, by requiring the use of its dispatch services, by imposing a dress code and by disciplining drivers for not complying with Respondent’s numerous rules. Of equal or even greater significance, Respondent’s income is directly correlated to the amount of fares collected by the drivers. During the relevant period, prior to Respondent’s unilateral adoption of a flat fee arrangement with its drivers after May 20, 1996, Respondent maintained a commission-based system pursuant to which it received not only a set daily fee, but a unit fee for each local fare and a percentage of the drivers’ other fares. Even after May 20, the percentage payments continued to be made for trips outside the Stamford area, in other portions of Connecticut, and across state lines.

Applying the factors deemed significant under the right-to-control test, the drivers perform a function essential to Stamford Taxi’s basic business of providing taxicab service to the public. In performing that function, the drivers work a particular shift and do not work for themselves in their own business then or at any other time. Respondent does not permit the drivers to operate its registered vehicles, painted black and carrying its own logo, independently, or for

any other cab company. Since Respondent holds title to the vehicles, it thereby controls drivers use of the vehicle for other taxicab business.

The drivers’ relationship is permanent and continues as long as they perform consistent with Respondent’s rules and regulations, and even if they do not, rarely have their leases been terminated under Respondent’s disciplinary system.

It is clear that the drivers operate in Respondent’s name, in vehicles Respondent selects or approves, which bear only Respondent’s color and logo. Respondent requires the drivers to use its dispatch service. While driver Ayres used a business card to solicit business, I have found he was obliged to utilize Stamford Taxi’s dispatch service, and that he also was required to pay the Company the unit fee for each fare he solicited. Although Ayres’ business card was not produced, he acknowledged customers utilized his services either through dispatch or calling him directly. In either case, he was selling Stamford Taxi services, operating a vehicle which bore Stamford Taxi advertising by virtue of its uniform color and logo. As to the importance of company advertising of this nature in helping to establish an employer-employee relationship, see *Prime Time Shuttle International*, cited supra at 840.

By retaining title to the vehicles the drivers operate, Respondent effectively restricts their ownership rights in the cabs. By warning drivers that personal use of their vehicles on and off duty will not be covered for insurance purposes, Respondent further impedes and restricts driver use of their vehicles to business use only on behalf of Respondent.

While Respondent failed to have any business cards of drivers included in the record, the evidence shows that Respondent required these cards to list its dispatch telephone number. The only evidence supporting pager and cellular phone use by drivers was offered by Ayres whose testimony I have largely discredited and who had a special status and alignment with management different from that of the other drivers. In any event, the fact that drivers were free to solicit passengers in addition to complying with Respondent’s dispatch orders, and that Ayres did so, and even Lucien, among others, may have done so on limited occasions, is not determinative of a finding that the drivers are independent contractors. *Southern Cab Corp.*, 159 NLRB 248 fn. 4 (1966); *Veterans Cab Co. of Memphis, Inc.*, 159 NLRB 251 (1966).

While the drivers have an incentive to maximize their income much the same as an employee working on commission, and in spite of the fact that some of the drivers may have fully paid the lease and financing charges on their vehicles, to the extent that Respondent retains their registration and title so long as they continue to drive for Respondent, they do not fully own their vehicles and similarly, they have no proprietary interest in a business. See *Prime Time Shuttle International*, supra at 841.

I have previously described the facts regarding the preparation and execution of the lease agreement the drivers are required to sign. Respondent unilaterally drafts, promulgates and changes its terms. There is no negotiation with any driver, including Ayres. There is no reasonable time provided drivers for its review before being directed to sign. The two occasions on which Respondent changed the terms and required new lease executions, it did so for its benefit and without any input from the drivers. Drivers’ leases did not contain the fee amounts and they could not explain the various fees and charges they were required to remit. Respondent’s exercise of unilateral control over the lease agreement is a significant factor supporting employee status. *Prime Time Shuttle International*, supra; *Red Cab*, 173 NLRB 1262 (1968); *Transportation Promotions*, 173 NLRB 828 (1968); *Miami Beach Yellow Cab*, 173 NLRB 831 (1968), *Blue Cab Co.*, 156 NLRB 489, 498–499 (1966).

The Respondent’s system-in-place for driver accounting each day for local fares, and number and type of out of town calls on daily trip reports, coupled with the dispatcher’s logs, provides Respondent with the information necessary to determine the amounts of fees owed by drivers and whether a disparity exists for which the driver is responsible. Respondent’s system of accounting, beyond DOT requirements, to the extent drivers must remit daily moneys plus a computation of unit calls, the \$8 train fee and number and type of out of town and out of state calls, provides a further basis for concluding the drivers are employees. *Yellow Cab of Quincy*, 312 NLRB 142 fn. 7 (1993).

Another factor supportive of a finding that the drivers are statutory employees, is the absence of any special driver training or a requirement of knowledge of the Stamford area or city streets. The public service license required, in addition to the regular drivers license, involves only a physical examination and a background check.

Various requirements imposed by Respondent on its drivers, severely limit their entrepreneurial opportunities and are thus strongly indicative of employee status, *Yellow Cab of Quincy*, supra, at 144. Thus, the drivers are both required to pay an \$8 daily fee to cover the costs associated with customers picked up at the Stamford train station, and are prohibited from working all day out of that station. Drivers cannot extend or limit the hours of their work shift without permission from Respondent. When circumstances warrant, Respondent may permit drivers to stay beyond their shift, but this is a decision made by Respondent and not the driver. Drivers who select later starting times without permission, in order to enhance their earning potential for example, are disciplined for such business-oriented decision making. Neither are drivers free to work 7 days a week, or on a shift of their own choosing, or to select a day off other than the one selected for them by Respondent.

While the busiest hours for taxicab services in Stamford run from 6 to 10 a.m., 12 to 2 p.m., and 4 to 8 p.m. Respondent was unable to identify a single driver who worked those times. By retaining the title to all of the taxicabs, Respondent restricts the ability of drivers to work for themselves or another taxicab company. Thus, unlike true independent contractors, Respondent's drivers have a very limited opportunity to make decisions which entail the risk of profit or loss and they also have a very limited proprietary interest in the taxicab business.

The fact that the lease agreements defines the driver as an independent contractor with exclusive custody and control of the taxicab is undercut by the strong evidence of control exercised by Respondent over its drivers, and, consequently, may be accorded limited weight in determining the actual status of the drivers. *National Freight, Inc.*, 153 NLRB 1536 (1965). Even where additional factors supporting independent contractor status are present, such as the absence of payroll deductions, drivers paid their own social security and other taxes and were free during part of their shift to obtain their own passengers, such factors have been held by the Board not to be determinative. *Southern Cab Corp. and Veterans Cab Co. of Memphis, Inc.*, supra.

In an earlier section of this decision I have described in detail the degree to which Respondent maintains rules and enforces them with discipline, thereby significantly controlling the manner and means by which the drivers operate their vehicles. These rules and discipline continued in effect to the present and well after the Teamsters ceased being the drivers exclusive representatives and have not been dictated by a collective-bargaining relationship which terminated in 1991. Respondent's control has remained the same whether Respondent considered the drivers as employees up to 1991, or it considered them as independent contractors since 1991.

I have also shown how DOT rules and regulations do not mandate the discipline Respondent imposes, nor the decision to impose discipline, nor the degree of discipline selected. Accordingly, Respondent's argument that in enforcing its rules of conduct against drivers in operating the cabs and in their behavior toward dispatchers and others, it is merely complying with DOT regulations, lacks merit. For example, in testifying about its dress requirement, Tibbetts could not identify any DOT rule which imposed a state requirement of neat appearance or dress, in general, or in specific detail. None of Respondent's work rules and procedures mandating drivers work a particular shift or number of days of work per week, respond to dispatch calls, report their locations to dispatchers, limit their time at the train station, refrain from using the taxicabs after hours or during their shift for personal use, place customer luggage in the trunk, refrain from wearing sneakers, jeans, sandals, T-shirts, and shirts without collars, are required by DOT. In certain instances, Respondent has enforced a rule more restrictive than DOT's, for example, regarding restrictions on personal riders while a driver is on duty. Respondent has never informed its drivers they could "book off" during their shift to transport personal riders or perform personal errands.

Respondent has also enforced rules contrary to DOT requirements, for example, as to rates per mile charged on in-state travel, and its 5-day limit on repairs to vehicles which became evident on inspections. Surely, Respondent cannot rely on State action in imposing these fares and this rule on its drivers.

As noted earlier, the degree to which the income of the taxicab company is correlated with or is dependent on the work effort and fares collected by the drivers, is a key consideration in determining employee status of taxicab drivers. *Elite Limousine Plus*, 324 NLRB 992, 1002, and cases cited at fn. 67 (1997).

In *Yellow Cab of Quincy*, 312 NLRB 142, 144 (1993), the cab company, in effect, received a percentage of the drivers' fares, since the fares paid by customers to the drivers were based on mileage, and the rental fee paid by the drivers to the employer was also based mileage. The pure mileage based fee resulted in a direct correlation between the employer's income and the amount of fares collected by the drivers "thus substantially limiting the drivers' entrepreneurial opportunities and strongly indicating that the drivers are statutory employees." [Citations omitted.] Id. at 244. Furthermore, in *Yellow Cab of Quincy*, the Board recognized an employer incentive to have the cabs driven as many miles as possible. That incentive, coupled with the driver's substantial reliance on the employer's dispatching service, "gives the Employer both a motive for, and a method of, controlling the drivers' means and manner of operating the cabs."

Both of these factors, which the Board found heavily outweighed the few circumstances facially indicative of independent contractor status, led the Board to determine the drivers were employees. Those same factors are present in the instant case. Respondent's income is directly correlated to the fares collected by the drivers. The unit fee is earned by Respondent on each fare, and Respondent, as well, charges a percentage of every fare outside of the Stamford area. Respondent's revenues are thus strongly dependent on the earnings of the drivers. There is also a strong incentive for Respondent to maintain full driving shifts for the drivers during which they are obligated to respond to dispatch calls, thereby enabling Respondent to both audit and to maximize the fares collected by the drivers subject to the unit and percentage fees which it collects, as well as providing it with a measure of control over the driver's means and manner of operating the cabs.

By limiting time spent by the driver at the Stamford train station, where there are no unit charges and only a single \$8 daily charge due Respondent, and by requiring a minimum of 10 dispatch calls a day, Respondent maximizes its income and exercises control over driver opportunities to profit from the fares they obtain.

Aside from the opportunities for profit available at the train station (which Respondent's rules have effectively restricted), the drivers have little incentive to maximize trips on which they are obligated to pay a percentage of their fares. In contrast, under a flat fee arrangement, which Respondent unilaterally implemented after May 20, 1996, drivers do have an incentive to maximize their trips, since, once that is recouped income thereafter is largely profit.

In determining the status of a worker as employee or independent contractor, the common law agency test requires that, "all the incidents of the relationship must be assessed with no one factor being decisive," *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).

Though no one factor carries unparalleled weight, two recent Board decisions, issued subsequent to the date on which the parties filed their posttrial briefs, have emphasized decisive factors to be taken into account, and both support the conclusion I have reached that Respondent's drivers are employees under the Act.

In *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998), the Board concluded that the owner-operators who use their own equipment and the assistance of helper and/or driver to deliver Dial's products throughout the New York Metropolitan area, are independent contractors within the meaning of Section 2(3) of the Act. Unlike the owner-operators in *Dial-A-Mattress*, whose vehicles displayed the name and addresses of their particular company, and not of their employer, the drivers of Stamford Taxi are restricted to driving only black vehicles that bear the Stamford Taxi logo on the driver and passenger side door. No other advertisements are allowed. Though no specific uniform is required bearing Stamford's name, its drivers do not maintain the persona of self identity like the drivers of *Dial-A-Mattress* who supply their own company's work uniform solely promoting their individual companies. Thus, Stamford drivers do not maintain a separate identity indicative of independent contractor status.

The *Dial-A-Mattress* drivers, unlike the *Stamford Taxi* drivers, exercised substantial freedom and flexibility in selecting the work days they provided delivery service, in selecting their own vehicle and retaining exclusive ownership rights and their own independent financing, if necessary, and being free of any inspections of their vehicles, and in exercising complete freedom to hire their own employees and to have complete control and responsibility over them. Although able to sublease their vehicles, the *Stamford Taxi* drivers' subleases, their hours and conditions, are all subject to managerial approval. By having the power to limit the subleasee's working hours, thereby substantially controlling the subleasee's productivity, *Stamford Taxi*, and not its drivers, determine which subleases, if any, will be given the opportunity to be productive and profitable for the owner drivers.

Unlike *Stamford Taxi* drivers, *Dial-A-Mattress* owner-operators are paid a flat fee for each completed delivery, have significant freedom with respect to the hiring, firing, supervision and payment of their drivers and helpers, and are free to work for other companies and use their trucks for personal business. Furthermore, under the contracts they sign, neither the Dial owner-operators nor their employees are subject to the work rules applicable to Stamford employees.

The Board concluded in *Dial-A-Mattress* that by virtue of the manner by which it structured its relationship with the owner-operators to allow them (with very little external controls) to make an entrepreneurial profit beyond a return on their labor and their capital investment, among other factors, that the *Dial-A-Mattress* owner operation are independent contractors. As this decision has repeatedly noted, the Stamford Taxi drivers opportunities for an entrepreneurial profit are severely limited and controlled, and thus this factor, among many others discussed, clearly distinguish the *Dial-A-Mattress* owner-operators from the Stamford Taxi drivers.

In *Roadway Package System*, 326 NLRB 842 (1998), the Board relied on a series of decisive factors, derived from *United Insurance Co. of America*, cited supra, in determining that the drivers are employees. These factors, which I have previously itemized, include: (1) whether the workers operate their own business, (2) whether they perform functions which are an essential part of their Company's operations, (3) whether they need prior experience or re trained by the company, (4) whether they do business in the company's name with considerable assistance and guidance from the company, (5) whether the workers operate under an elaborate and regular reporting procedure, (6) whether they receive benefits from the company, and (7) whether they have a permanent working arrangement under which they can continue as long as their performance is satisfactory. 326 NLRB 849. In applying these factors to the instant case, based on the preceding analysis, it is clear that the drivers of Stamford Taxi should be classified as employees.

With the possible exception of item number 6, in that while *Roadway* drivers received group rates for insurance, compensation mechanisms and a "business support package," Stamford Taxi drivers receive little to no assistance from the Respondent, application of all of the other factors points clearly in the direction of employee status for them. As noted in *Standard Oil Co.*, 230 NLRB 967, 968 (1977), and equally applicable to Stamford Taxi drivers:

It is clear that, unlike the genuinely independent businessman, the driver's earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits.

Having concluded that Respondent's drivers are employees within the meaning of Section 2(3) of the Act, it is also apparent that the drivers, who share a community of interest, and with regard to whom, Respondent had, prior to 1991, recognized and bargained with the Teamsters on their behalf, *Washington Post Co.*, 254 NLRB 168 (1981), constitute a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act. Thus, all of the drivers work under common supervision, possess similar skills, perform the same function, and receive the same benefits.

Respondent never claimed that all of its drivers did not constitute an appropriate unit until it filed its answer in the instant proceeding. By entering the recognition agreement, Respondent agreed to the appropriateness of such a unit. I therefore conclude that a unit of Respondent's employees composed of lessee and sublessee drivers is an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the act.

The facts of record also warrant the conclusion, which Respondent also denies in its answer, that on January 12, 1996, the Union demonstrated its majority status in the unit through a card count conducted by an impartial third party, Provodator, which Respondent explicitly acknowledged in the recognition agreement.

Not only did Respondent acknowledge the validity of the card count conducted on January 12, to verify the establishment of its majority status in the appropriate unit, but Respondent has never contested its validity thereafter. In agreeing to permit majority status to be determined by means other than a Board election, Respondent is bound by the result of that election. *Snow & Sons*, 134 NLRB 709 (1961), enf. 308 F.2d 687 (9th Cir. 1962). See also *Linden Lumber*

Division, Sumner & Co. v. NLRB, 419 U.S. 301, 310, fn. 10 (1974). Once an employer has made a commitment to bargain upon some demonstrable showing of majority, the Respondent cannot unilaterally withdraw its recognition, and to do so is a violation of its bargaining duty under the Act. *Jerr-Dan Corp.*, 237 NLRB 302, 303 (1978); *Brown & Connolly, Inc.*, 237 NLRB 271 (1978).

Notwithstanding the foregoing, Respondent asserts that the agreement lacks mutuality because there was "no meeting of the minds" at the time it entered the agreement, or, alternatively, that the agreement should be rescinded because the Union misled the Respondent into believing that it concurred with Respondent's view that the drivers were independent contractors.

As to the first defense to the enforceability of the agreement, I reject Respondent's claim. Respondent, in its brief, cites the appropriate legal authority but reaches the wrong conclusion in applying the facts. As I have found in the fact section of this decision, the Union's agent, Kushner, on January 12, 1996, in testimony I have credited, never agreed to the drivers' status as independent contractors and made clear to Boskello the Union's position as to their employee status. In signing the agreement, Boskello was fully aware of the Union's positions with regard to the status of the "leasee drivers." I also found that Boskello both agreed to substitute "leasee drivers" for "employees" and did not insist on inclusion of the word "independent", much less the phrase "independent contractors" in the final agreement which he executed. In taking this position, Boskello recognized the Union's understanding of the employee status of the drivers, and while he differed with it, he was willing to allow the agreement to reflect the meaning ascribed to it by the Union.

As the Board decisions make clear, only where the facts show a mutual misunderstanding or mistake with respect to a basic term of an agreement, will the Board conclude that there was no meeting of the minds necessary to show that the parties entered a binding contract. *Butchers' Local 120, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO*, 154 NLRB 16, 26 (1965), *Oil, Chemical and Atomic Workers International Union and Its Local 7-507*, 212 NLRB 98, 107-108 (1974), *Cherry Valley Apartments*, 292 NLRB 38, 40 (1988), *Transit Service Corp.*, 312 NLRB 477, 482 (1993).

In reaching this conclusion, the administrative law judges in both *Butcher's Local 120 and Oil Chemical and Atomic Workers*, with Board approval, referenced and relied upon basic principles set forth in the Restatement Contracts. Thus, Restatement Contracts, (1932) contains the following comment (b) to Section 501 headed *When Mistake Prevents The Formation of Contracts*:

b. Misunderstanding exists where the words or other acts of the parties indicate assent, but one or both of the parties in fact intend something different from what the words or acts express. If the misunderstanding is due to the fault of one party and the other party understanding the transaction according to the natural meaning of the words or other acts, both parties are bound by that meaning. If the misunderstanding is due to ambiguity for which neither party is to blame, or for which the parties are equally to blame, and parties differ in their understanding, their apparent agreement creates no contract under the rule stated in § 71. [Emphasis added.]

This is the comment which Respondent quotes at page 77 of its brief. As applied to the facts of the instant proceeding, it is evident that the underlined portion most nearly fits the negotiations which led to execution of the recognition agreement. Any misunderstanding, if one existed, was on the part of Boskello only, and Kushner understood the phrase "leasee drivers" in their natural meaning, as referring to the leases which the drivers were obliged to execute, and which permitted the Union to continue to assert, correctly, that the drivers enjoyed status as employees. Only Respondent held the mistaken belief with respect to the status held by the drivers. Respondent has clung to this belief despite the fact that Kushner repeatedly informed Boskello that the Union considered the drivers to be employees under the Act. In continuing to assert that it maintained its position as to the independent contractor status of the drivers, without insisting on so characterizing them in the agreement, Respondent's position is disingenuous. Even if it truly believed the agreement characterized the drivers as non-employees, its mistaken belief cannot result in the rescission of the contract.

Another Section of the Restatement Contracts (1932), referenced by the Judge in *Butchers Union Local Union Local 120*, supra, has relevance here. A comment dealing with Section 71,

headed *Undisclosed Understanding of Offeror or Offeree, When Material*, provides, in pertinent part, as follows:

if the manifestations of the parties have more than one reasonable meaning, it must be determined which of the possible meanings is to be taken. If either party had reason to know that the other will give the manifestations only one of those meanings and in fact the manifestations are so understood, the party conscious of the ambiguity is bound in accordance with the understanding. . . .

I have found that Boskello was fully aware of the interpretation Kushner was placing on the phrase "lease drivers" which she had agreed to substitute for the word "employee" in the agreement. In accordance with the principle of contract law referred to in the comment, Boskello must be bound by his understanding of the Union's interpretation of the language inserted in the agreement. Board law holds that a meeting of the minds between parties is reached not by their subjective inclinations, but rather by their intent as objectively manifested in what they said to each other. *M.K. Ferguson Co.*, 296 NLRB 776 at fn. 2 (1988). Under that test, where only one party, here the Respondent, professes a mistaken belief about the status of the drivers, but nonetheless enters the agreement in which the drivers are described as lease drivers, it must be held to have assumed the risk for having held that mistaken belief. Accordingly, where, in fact, the drivers are employees, Respondent is bound by that result, regardless of its belief.

There is also no question that the Union did not waive its position regarding the employee status of the drivers, either on January 12, when the agreement was signed, or at any time thereafter. The facts, as I have found them, do not support such a conclusion. Neither did Kushner ever inform Boskello that the Union was agreeable to treating the drivers as independent contractors at the time Boskello signed the recognition agreement. In its brief at page 79, Respondent counsel relies heavily on what he describes as a "sworn affidavit" from a cab driver as supporting Respondent's version of the events with the UAW organizer. Respondent counsel's attempted reliance on this document as supporting proof of a Union agreement to the drivers' status as independent contractors is improper and is strongly rejected.

During the presentation of its case in chief Respondent offered in evidence, without objection from the General Counsel (Tr. 1210), a letter, with attachments, Respondent counsel had written to the Regional Director, providing information relative to the underlying charge, during the investigative phase of the case. At no time did counsel, on the record, reference attachment 1 to the letter, which the letter describes as "a sworn affidavit from a cab driver who was present at the initial meeting between the Union and Stamford Taxi." While the letter, as well as the attachments, constituted documents suitable for inclusion in the record as a position taken by Respondent during the investigation of the charge, under no account did Respondent counsel alert opposing counsel or the trier of the facts that he intended to rely on a hearsay document for the truth of the Respondent's claim that the Union acquiesced in its understanding that the recognition agreement covered independent contractors only. Respondent counsel had been made acutely aware 21 pages earlier in the transcript, of the refusal of the undersigned to permit a document offered for the truth of its assertions to be received in evidence without the presence of the writer of the document, Respondent's accountant, to be present to support its authenticity (Tr. 1189). Under these circumstances in particular, Respondent counsel's attempt now to rely on hearsay declarations of an individual without calling him as a witness subject to both examination and cross-examination to test his credibility on a central factual issue in this proceeding will not be permitted.

I have previously credited Cerritelli's account of the bargaining process, and I have found both Boskello and Katz to have been unreliable witnesses to that process, in particular, discrediting Katz as to his assertion that the parties reached an understanding as to the drivers' status at the last bargaining session. Neither Cerritelli's bargaining notes nor Katz's recollection of their interchanges support Respondent's position that the Union clearly and unmistakably relinquished its right to claim employee status for the drivers. Without such evidence, Respondent's argument of the existence of a waiver of rights must fail. *NLRB v. Katz*, 369 U.S. 736 (1962).

Both in Boskello's responses to Cerritelli during their May 16 telephone conversation, and in the 2-page notice it posted the following day, Respondent withdrew its recognition of the

Union as the exclusive collective-bargaining representative of the drivers. Respondent does not deny its withdrawal of recognition, but argues that since the drivers were independent contractors, and the agreement it executed was unenforceable because there was no meeting of the minds, or because the Union agreed with its position, it had no legal obligation to accord such recognition. Those positions have each been rejected in turn. But Respondent also argues that, even if the drivers were employees, they lost status as such when they engaged in unprotected conduct.

Respondent can cite no legal support for this proposition, and, indeed, there is none. Unprotected conduct does leave employees vulnerable to discharge or discipline for engaging in such conduct. Thus, the citations collected at page 85 of Respondent's brief are accurate, as far as they go. And, the record shows that the Board refused to issue complaint on the Union's charge that by discharging the employees who withhold daily fees in the week preceding the strike, the Respondent had discriminatorily terminated them. But the drivers whose leases were cancelled were only a portion of a larger unit when Respondent had agreed to recognize the Union on behalf of "all of its drivers." (GC Exh. 21). Thus, the Union continued to represent all of the drivers, beyond the 42, who did not withhold fees and did not go on strike commencing May 20. Furthermore, the Union continued to represent the 10 or 11 drivers whose leases were cancelled, but who ceased striking and whom Respondent took back on their individual applications, after May 20. Finally, as to both the drivers who returned to its employ, and, the 11 new drivers hired since May 20, the Board has refused to adopt, with Supreme Court approval, an anti-union presumption as to replacement workers' interest in continued union representation. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 792-794 (1990). As the Court noted, it was reasonable for the Board to conclude that the antiunion presumption could allow an employer to eliminate the Union merely by hiring a sufficient number of replacement employees, and thereby avoid good-faith bargaining over a strike settlement, and instead, use the strike as a means of removing the union altogether, id. at 794. Indeed, Respondent has seized not only on the drivers' withholding of fees, but also on its re-hiring of old drivers and of new ones, without any evidence of their support for the Union, to justify its withdrawal of recognition and refusal to bargain.

The Court also noted that the Board's refusal to adopt an antiunion presumption is also consistent with the Act's "overriding policy" of achieving "industrial peace," and that the Board "further[s] this policy by promot[ing] stability in collective-bargaining relationship, without impairing the free choice of employees," quoting and citing *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, at 38 (1987), in support.

The Respondent also argues at page 84 of its brief that it was under no obligation to bargain with the Union once the Union condoned and encouraged the drivers' unlawful and unprotected conduct. The Respondent is wrong. The Supreme Court has long recognized that while certain conduct engaged in by employees may not be a protected concerted activity, "[B]ut surely that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 494 (1960).

When Respondent bypassed the Union and dealt directly with its employees in the unit in its two-page notice, posted and distributed to the drivers on May 17, it violated its bargaining obligations under the Act. By offering its drivers the choice whether to continue under the former daily payment system, or accept a new, flat weekly payment system it described, Respondent bypassed and undermined the Union's negotiation efforts regarding the single most critical issue presented during negotiations. *Central Cartage, Inc.*, 236 NLRB 1232, 1258 (1978); *Greenery Extended Care Center in Cheshire*, 322 NLRB 932, 937 (1997).

When, later, in February, 1998, approximately 14 months after it had refused to honor the Union's unconditional offer to return to work, Respondent directly addressed by individual letter the drivers who remained on strike, and solicited them to enter into new leases provided they met some conditions such as repayment of all outstanding fees, Respondent again bypassed the Union and dealt directly with its past drivers in violation of its bargaining obligation. Contrary to Respondent's argument made at page 83 of its brief, the fact that these drivers were no longer employees, did not mean that they lost the protection of the Act. They were clearly being invited to apply for reinstatement as former lease drivers, and, as such, enjoyed the right to be considered for these positions, free of discriminatory considerations, and to be addressed through their bargaining representative.

By failing to recognize the Union as their exclusive bargaining representative, and by failing to offer to restore the terms and conditions of employment in existence prior to May 20, when it withdraw recognition and unilaterally offered and imposed new terms, Respondent compounded its violations committed under Section 8(a)(1) and (5) of the Act.

Since May 20 the Respondent violated its bargaining obligation under the Act, by unilaterally altering the terms and conditions of employment of the unit drivers. *Peerless Food Products*, 236 NLRB 161 (1978). After withdrawing recognition, and commencing on May 20, Respondent unilaterally offered new weekly lease terms to those drivers who remained, as well as those drivers who abandoned the strike and returned to its employ. The major change offered and accepted by these drivers concerned the method of their compensation and thus went to the heart of their relationship and of the negotiations between the Respondent and the Union, and thereby clearly met the Board test that a unilaterally imposed change be "a material, substantial and significant one." Id.

Further, on February 13, 1997, when Respondent posted another notice in its facility addressed to its drivers informing them that they could choose their own hours, use their vehicles for personal business during off hours, and reject a dispatch call, Respondent violated the Act again, by imposing, unilaterally, substantial new terms and conditions of employment. Contrary to Respondent's contention, these terms had not been in effect prior to its withdrawal of recognition, and thus constituted significant new terms which, it is clear, Respondent would be prepared to argue, established its driver as independent contractors. On neither of these occasions, subsequent to May 20, did Respondent provide prior notice to the Union to bargain prior to their implementation.

The February 13, 1997 letter constitutes another in a series of unilateral actions, in this case, changing the terms and conditions of employment of its drivers, which is closely related to its May 17, 1996 notice unilaterally offering new weekly pay leases to qualified drivers, and both of which grow out of Respondent's withdrawal of recognition and refusal to bargain with the Union. Accordingly, I conclude, contrary to Respondent's argument made at pages 95 to 98 of its brief that the test enunciated by the Board in *Redd-I, Inc.*, 290 NLRB 1115 (1988), for determining when an otherwise late filed charge will nonetheless be deemed timely under Section 10(b) of the Act, has been met. The same may also be said for the allegation added to the Complaint charging Respondent with bypassing the Union and dealing directly with its employees on February 13, 1998.

Respondent's defense that an impasse in bargaining existed at the time of implementation on and after May 20, also lacks merit, by virtue of the facts previously discussed, showing a Union late counter offer never considered by Respondent, the Union's willingness to reconsider its opposition to the Respondent's last best offer based upon an anticipated Union audit of its financial records, and the remaining issues such as dues checkoff at the time of the last bargaining meeting, on which the Union had not yet taken a final position and bargaining was still open and unresolved.

I consider now the allegation charging Respondent with discriminatorily failing and refusing to consider reinstatement of the drivers on whose behalf the Union made an unconditional offer to return to work.

The facts show that, aside from the 10 to 11 drivers who abandoned the strike and to whom Respondent offered new leases, none of the strikers who stayed the course have been considered for reinstatement. Respondent's attitude toward the Union and its adherents has been uniformly hostile. As early as May 10 Tibbetts and Boskello threatened to cancel the insurance on any vehicle and thereby consider as breached the leases of any drivers who continued to support the Union's offer with regard to the weekly fees. On November 27, in response to the Union's unconditional offer to return to work, Respondent's attorney Sapinski vigorously disputed the Union's status as representative of any of the drivers so long as the Union claimed they were employees and denied that the drivers whose leases had been cancelled had any further rights with the Company. Such a position conflicts strongly with any claim by Respondent that it was prepared to consider these drivers for reinstatement. As noted earlier, while employees may be discharged for unprotected conduct, the Union continues to retain the right to represent them in collective bargaining, and the discharged employees continue to retain all rights under the Act to be free from any subsequent discriminatory treatment, e.g. as in this case, as applicants for reinstatement to their prior positions of employment. The Respondent's November 27 letter, coupled with its reemployment of strikers who abandoned the Union,

evidenced disparate treatment sufficient to warrant a conclusion that by rejecting their offer, Respondent was motivated by their Section 7 conduct.

Respondent cannot rely on these Union affiliated drivers' failure to appear on December 5 in conformity with the Union's offer, since by rejecting them outright, and denying them any rights with the Company, Respondent presented the Union and its members with a fait accompli that they would not be rehired.

Since Respondent has hired at least seven new drivers between December 1996 and June 1997, it is established that positions for drivers have become available since the Union's unconditional offer was made, and it is clear that, in accordance with its November 27 response to that offer, no Union affiliated driver who remained on strike has been considered for these positions. One witness, Eugene Poteau, showed that, although he was in contact with Boskello, he was never asked to repay the small fees he withheld or to come in to apply for work.

Even Respondent's belated, February 12, 1998 letter to the strikers, cannot be considered a legitimate consideration of the terminated drivers for reinstatement, since it bypassed the Union and failed to recognize the Union as their representative, and further gave no assurance the strikers would be considered as employees and that it would negotiate with the Union on their behalf and remedy its other unfair labor practices. Even so, the letter does provide evidence that the fees the strikers had withheld would not be an impediment to their reinstatement, and thus their unprotected conduct would be forgiven and condoned. On the foregoing evidence I conclude that under *Wright Line*⁴ the General Counsel has shown that in denying the strikers consideration for reinstatement, Respondent was motivated by their Union activity, and, further, that Respondent has not shown that it would have denied such consideration absent the employees' protected activities.

As to the three named drivers, the evidence establishes that Respondent was aware of the Union affiliation and activity of each of them, in particular, their participation in the strike, and, as to two, Lucien and Solinaire, that they were leading Union advocates, through Lucien's service as Union steward and both of their service on the drivers' four man negotiating committee. The Respondent's hostility and animus to their union activity is evidenced by the May 10 threat to cancel insurance coverage of any driver supporting the Union's demands at the bargaining table. Both Lucien and Solinaire were at the bargaining table supporting the Union's demands. Further evidence of union animus appears from Respondent's precipitate withdrawal of recognition, and its immediate commission of the unfair labor practices of bypassing the Union and making unilateral changes in its fee schedules upon learning of the Union's strike vote.

Unlike the other strikers, the three named drivers each appeared at Respondent's facility and offered to return under the new lease terms and to pay the fee amounts previously withheld. Nonetheless, they were each denied any consideration whatsoever for reinstatement.

I conclude that the three drivers have made a prima facie showing that their union activity motivated Respondent's rejection of their applications for reinstatement. Respondent offered varying defenses to their reinstatement. As to Lucien, Boskello and Necatera recited his participation in an insurance scam as foreclosing any return to his position. But it is clear that Lucien's involvement in padding an accident estimate was condoned at the time when Boskello testified that "everybody deserves a second chance." Although the inflated claim was discovered on February 26, 1996, Lucien was not disciplined before the strike on May 20 and Boskello told Necatera to "let it go for now."

Having retained Lucien without any change in their relationship notwithstanding the grounds for discharge, Respondent has condoned his conduct and may not rely on it as a basis for its refusal to reinstate him. *Harry Hoffman & Son Printing*, 278 NLRB 671 (1986). Having no other legitimate justification for refusing his return to work, I also conclude that Respondent has failed to meet its *Wright Line* burden of showing it would have acted the same absent his protected concerted activity.

As to Augustine Solinaire, Respondent noted that he had hidden his vehicle and that it has been unable to reclaim it since the strike. Since Respondent was prepared to accept Union drivers who made it whole by repaying any fees withheld and Solinaire had admittedly offered

⁴ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

to do so, it is unclear that Solinaire's retention of his vehicle after Respondent rejected his offer to return can be used now as a ground to keep him off of Respondent's driver roster. There is also no evidence that Boskello or Necatera informed Solinaire that he was denied reinstatement for retaining his vehicle in his possession, particularly when other drivers engaged in the same conduct without any repercussions. I conclude that Respondent has failed to show Solinaire would have been denied reinstatement absent his union activity.

With respect to Andre Chery, Respondent pointed to a gambling problem. However, Boskello conceded he had only hearsay knowledge of the gambling habit, did not discipline him once it was discovered, did not discipline other drivers who also gambled with him and did not use their gambling as a ground to deny them reinstatement. In the case of Chery, I also conclude that Respondent has failed to show it would have refused to reinstate him about his union activity.

By offering all three of these drivers consideration for reinstatement by its letter of February 1998, Respondent expressly withdrew whatever reservations it may have had about their prior behavior.

CONCLUSIONS OF LAW

1. The Respondent, Stamford Taxi, Inc., and Tibbets Enterprises, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁵

2. The Union, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Stamford Taxi, Inc., and Tibbets Enterprises, Inc., constitute a single integrated business enterprise, and have been at all times material herein a single employer within the meaning of the Act.

4. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All drivers, lessees and sub-lessees, employed by Respondent; excluding all other employees, guards, and professional employees and supervisors as defined in the Act.

5. At all times material, since January 12, 1996, based on Section 9(a) of the Act, the Union has been and is now the exclusive collective-bargaining representative of the employees in the unit described in paragraph 4 above.

6. By withdrawing recognition from the Union as the collective-bargaining representative of the above-described unit; failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit; bypassing the Union and dealing directly with the employees in the unit by soliciting employees to enter into new lease payments agreements; unilaterally changing the terms and conditions of employment of its drivers, including the amount and payment terms of its lease rates, without prior notice to the Union and without affording the Union an opportunity to bargain with it with respect to this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive bargaining representative of its employees, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

7. By failing to consider for reinstatement to their former positions of employment, the driver employees who remained affiliated with the Union, upon the Union's unconditional offer made to Respondent on their behalf on or about November 27, 1996, and by failing and refusing to reinstate drivers Max Lucien, Andre Chery and Augustine Solinaire upon their individual applications for reinstatement, Respondent has been discriminating in regard to the hire and tenure and terms and conditions of employment of its employees, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

⁵ Having found that the drivers are employees within the meaning of the Act, I also conclude that the combined fares that they received during the year running from June 1, 1996 through May 31, 1997 may be deemed gross receipts to Stamford Taxi for providing taxicab service, thereby alternatively satisfying the Board's discretionary \$500,000 retail standard for asserting jurisdiction. See *Major Cab Co.*, 255 NLRB 1383, 1384 (1981).

8. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The recommended Order will provide that Respondent Stamford Taxi, Inc. and Tibbets Enterprises, Inc., as a single employer be required to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its unit employees. Inasmuch as counsel for the General Counsel has been unable to cite any cases in which the Board extended the certification year, where the recognition was voluntary and not based on a Board certification, I will not require, as he has requested, bargaining to extend beyond the usual reasonable period. See, e.g. *Mar-Jac Poultry Co.*, 136 NLRB 787 (1962); *Colfor, Inc.*, 282 NLRB 1173, 1174 (1987), *enfd.* 838 F.2d 164 (6th Cir. 1988); *Jasco Industries*, 328 NLRB 201 (1999), which cases all involve a certification, not present in the instant proceeding.

The Order will also require Respondent, including Tibbets, to offer immediate and full reinstatement to the drivers it discriminatorily refused to consider for reinstatement, as well the three named drivers, Max Lucien, Andre Chery and Augustine Solinaire, who it refused to reinstate upon their individual applications, to their former jobs, or in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any drivers hired since the date of the Union's November 27, 1996 unconditional offer, and the dates of the individual applications of drivers Lucien, Chery and Solinaire. The identity of each of the drivers upon whose behalf the Union made its unconditional offer shall be fixed during the compliance stage of this proceeding. Any drivers who, under this remedy, may not be entitled to immediate reinstatement, shall be placed on a hiring list based upon seniority, and shall be recalled before any new drivers are hired.

Respondent shall also be required to make whole the drivers described and named for any loss of earnings they may have suffered by reason of Respondent's unlawful conduct, by making payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent's unlawful action to the date of its offer of reinstatement, less net earnings during such period, with backpay to be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent should also be required to remove from its files any reference to the termination and refusal to reinstate, of any of the drivers discriminated against, and notify them of this fact, in writing.

I will also recommend, that if the Union so desires, Respondent shall revoke and cease giving effect to the changes in the unit employees' terms and conditions of employment which were implemented on or after May 20, 1996; and in the event of such revocation, make employees whole, with interest, for any losses they may have suffered as a result of such changes. *NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 308 (7th Cir. 1981); *Children's Hospital of San Francisco*, 312 NLRB 920, 931 (1993), *affd.* 87 F.3d 304, 311 (9th Cir. 1996).

The Union in its brief argues that I may appropriately order reinstated all of the drivers whose leases were terminated, as a remedy for the Section 8(a)(1) and (5) violation of the Act committed by Respondent. By forcing the drivers to bargain on an individual basis at the cost of their representation by the Union, the drivers were placed in an untenable situation which, Union counsel argues, may only be rectified by restoring the status quo ante, by putting the drivers all back at work before the bargaining obligation can become effective. The Union would apparently require an order of reinstatement effective from on or about May 17, 1996, when the Respondent withdrew recognition and first offered new lease terms, individually, to its drivers. I cannot grant this requested remedy.

First, in my judgment, it smacks much more of a claim of a substantive violation than a remedy. If Respondent had a bargaining obligation dating from May 17 or 20, 1996 that included bargaining about the decision to discharge the drivers and related matters, the Complaint would have included such an allegation, and it does not. The reason it does not is, as the Union recognizes, Respondent was free to discharge the drivers who withheld fees, and thereby engaged in an unprotected partial strike. Second, to require bargaining about whether the

drivers who withheld fees would be terminated and whether they should have been required to reimburse Respondent, would be inconsistent with the right Respondent enjoyed, to then discipline the drivers because they engaged in unprotected conduct. While I have previously recognized the status of the terminated drivers as employees under the Act and the status of the Union as their bargaining representative with respect, in particular, to their applications for reinstatement, these drivers ceased being employees of Respondent upon the cancellation of their leases, even though Respondent was prepared, thereafter, to reinstate certain terminated drivers, excluding the ones who remained Union affiliated. The discriminatory and disparate treatment of these drivers only arose once the Union offered their unconditional return on November 27, 1996, and the three named drivers applied individually for reinstatement.

Counsel for The General Counsel also seeks changes to the standard provision that requires a Respondent to preserve and make available, for the purpose of computing the amount of back pay due, payroll and other records. The changes would require a Respondent to provide greater assistance in making its payroll records available to the Region for backpay calculations, and also would require the Respondent to make available to the Region electronic copies of its payroll records where the records are already maintained in such form. Most recently, the Board, in *Bryant & Stratton Business Institute*, 327 NLRB 1135 fn. 3 (1999), reversed the administrative law judge's denial of such relief, and modified the recommended Order to provide for the production of electronic copies of the specified backpay records if they are stored in electronic form. The Board concluded that such records are encompassed within the Board's traditional remedial language and the Respondent therein had not established that it would be prejudiced by requiring their production. I will, accordingly, provide this remedy. Although the Board in *Bryant & Stratton* declined to order the Respondent to submit copies of the necessary backpay records at the Board's Regional Office because the litigation did not

satisfactorily present the question of the propriety of requiring such an order, I am persuaded that the record adequately supports such relief. Although the payroll records of Respondent are stored in either Stamford or Greenwich, Connecticut, Respondent brought the records it did produce into the Hartford, Connecticut Region 3 hearing room without undue hardship. I also agree with counsel for the General Counsel that the time and expense incurred by Respondent in providing this assistance would be minimal, and the cumulative saving of time and expense by the Regional Office would be considerable. It is also appropriate that the wrongdoer assume a greater burden of gathering and providing payroll records necessary to calculate the amount of backpay owed.

Finally, I will recommend that the Order require Respondent to mail copies of the Notice it will be required to post, to the last known address of all drivers then employed by it during the week of May 13, 1996, immediately preceding the strike which began on May 20, upon whose behalf the Union unconditionally requested on November 27, 1996, but who have not to the date of this Order been offered reinstatement. By this means, all drivers who are subject to the backpay provisions of the remedy and who have been exposed to the unfair labor practices and their effects, but who have not been reinstated, will receive actual notice of the violations found and of Respondent's obligations to comply. *Cf. Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997). I will also recommend that the notice be printed in the Haitian language as well as in English.

[Recommended Order omitted from publication.]