**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

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| TRANSPORTATION GENERAL, INC.,<br>t/a METRO TAXI,INC.<br><br>Employer [1]<br><br>and<br><br>INTERNATIONAL UNION, UNITED<br>AUTO WORKERS (UAW)<br><br>Petitioner | Case No. 34-RC-1816 |

## DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

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

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons.

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[1] The name of the Employer appears as amended at the hearing.

5. The Petitioner seeks to represent all full-time and regular part-time drivers employed by the Employer at its West Haven, Connecticut location. The Employer, contrary to the Petitioner, contends that the petitioned-for drivers, also known as owner-operators and lessee drivers, are independent contractors and not employees within the meaning of the Act. There is no history of collective bargaining regarding the drivers in the petitioned-for unit.

## I. FACTS

The Employer, a Connecticut corporation which has been in operation since September 1987, maintains an office and place of business in West Haven, Connecticut. It possesses a Public Certificate of Authority (herein "Certificate") issued by the State of Connecticut Department of Transportation (herein "DOT") which enables it to operate a taxicab service in Connecticut. At the time of the hearing, the Employer had 109 taxicabs in operation. Under the Certificate, the Employer is authorized by DOT to provide taxicab and related dispatching services within its franchised area which consists of six communities: East Haven, Hamden, New Haven, North Haven, West Haven and Woodbridge. According to DOT regulations, each trip operated under the Employer's Certificate must either originate or conclude within these six communities.

The Employer describes itself as an enterprise that leases operating rights for taxicabs and provides a dispatching service to drivers interested in driving taxicabs under its Certificate. Although not entirely clear, it appears that there are currently between 300 and 400 drivers who are presently operating taxicabs pursuant to the Employer's Certificate.

Primarily responsible for the Employer's overall operation is its President, William Scalzi. Reporting to Scalzi is a vice president, a secretary-treasurer, a comptroller, Operations Manager Fran Anderson, a shift manager, Recruiter Ted Miller, a maintenance supervisor, an administrative assistant, various mechanics, and the billing staff. Dispatchers report directly to Operations Manager Anderson. Anderson and the shift manager interact extensively with the taxicab drivers by, for example, distributing vehicles and car keys. Recruiter Miller places "help wanted" advertisements for drivers and describes the Employer's operations and various leasing options to prospective drivers.

### A. Ownership and Lease Arrangements

Under DOT requirements, individuals interested in driving a taxicab must first obtain a Public Service License (herein "PSL"). In order to obtain a PSL, an individual with a standard driver's license must submit a PSL application and fingerprint card to the State of Connecticut's Department of Motor Vehicles (herein "DMV"). After successfully completing physical and drug tests mandated by either the DMV or DOT, an individual is issued a temporary PSL. Eventually, either the DMV or the DOT issues a permanent PSL. There is no indication in the record that the Employer is involved in any of the above procedures. The record does indicate that the Employer requires driver applicants to furnish it with a copy of their driving record and either the temporary or permanent PSL. There is no evidence that the Employer requires drivers to have prior training or taxicab driving experience.

Upon complying with the above requirements, individuals interested in driving taxicabs under the Employer's Certificate meet with Miller to discuss the various leasing opportunities, described below. Prospective drivers can initially determine whether to become a "lessee driver," whereby they lease a taxicab from the Employer's fleet, or become an "owner-operator," whereby they use their own vehicle which they may purchase from the Employer. Prospective drivers maintain the sole discretion to determine whether to become a lessee driver or owner-operator.

#### 1. Owner-Operator Arrangements

There are two types of owner-operator arrangements: "owner-operator lease," and "owner-operator plus lease." Under both arrangements, drivers enter into a lease that provides that they are an "independent contractor." [2]

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[2] Paragraph 8 of the owner-operator agreements state, in relevant part, that "[t]his Agreement does not make Owner an agent, legal representative, joint venturer or partner of Transportation General for any purpose whatsoever, it being understood between the parties hereto that Owner is an independent contractor . . . ." Paragraph 8 further states that "[t]he parties to this Agreement acknowledge, understand and agree that this Agreement is not an employment contract. Owner acknowledges and agrees that he is not entitled to participate in any plans, distributions, federal or state unemployment benefits or other benefits extended by Transportation General to its employees. Owner understands and agrees that, as an independent contractor, he shall not be deemed to be an employee under the Workers' Compensation Act of the State of Connecticut."

#### a. Owner-Operator Lease

Under the "owner-operator lease" arrangement, the driver owns the vehicle and simply leases the operating rights to use the Employer's Certificate. The Employer charges drivers $465 on a weekly basis for leasing these rights. At the time of the hearing, there were approximately five drivers operating under this arrangement. The record reveals that under this type of arrangement, owner-operators can simultaneously operate more than one personally-owned vehicle. In this regard, the evidence reveals that one such owner-operator owned up to five vehicles and simultaneously operated each vehicle under the Employer's Certificate. He did so by hiring drivers for each vehicle. In the process of hiring these drivers, the owner-operator handled all aspects of hiring and compensating the drivers.

Whenever an owner-operator purchases and finances a vehicle from the Employer, the Employer retains the vehicle's title as collateral. If the owner-operators operate their own vehicle, they retain the title. However, pursuant to DOT regulations, all vehicles must be registered in the name of the Employer as the Certificate holder.

#### b. Owner-Operator Plus Lease

The "owner-operator plus lease" arrangement operates in the same manner as the "owner-operator lease" described above, except that under the former, the owner-operator hires other drivers, as sub-lessees, to operate the vehicle. The Employer charges the owner-operator $565 per week to operate a taxicab under this arrangement. At the time of the hearing, there were approximately six individuals operating under an "owner-operator plus lease" arrangement. These owner-operators, without input from the Employer, maintain the option of selecting the number and identity of any sub-lessees, and the amount to charge those sub-lessees. However, the record indicates that the Employer requires that all prospective sub-lessees possess the requisite PSL, and it can reject sub-lessees with whom it has had a previous "unpleasant" experience.

### 2. Lessee Arrangements

There are seven types of lessee driver arrangements: 1) "Single Weekly" lease; 2) "Single Weekly with New Car" lease; 3) "Split Weekly with Partner" lease; 4) "Split Weekly without Partner" lease; 5) "Daily" lease; 6) "Monthly" lease and 7) "Meter Only"

lease. Drivers maintain the exclusive option to select which arrangement to drive under. The lease agreement executed between the Employer and the lessee driver is uniform in text and does not identify or outline the details about any of the above seven driving arrangements. However, as with the owner-operator agreements, lessee drivers agree they are an independent contractor and seek "to lease as an independent contractor/business, a taxicab from Lessor."[3]

Under the lessee driver agreement, the Employer retains the title on the leased vehicles.[4] All weekly leases are based on six days use. In this regard, whenever a vehicle operated under a weekly lease is in disrepair, the Employer will either provide a "loaner" vehicle at no additional charge or it will credit the lessee's account if the vehicle remains inoperable for more than 24 hours during the weekly lease period.

**a. <u>"Single Weekly" Lease</u>**

Under this arrangement, drivers lease the vehicle from the Employer on a seven-day, 24-hour basis. The Employer charges drivers $660 on a weekly basis for this lease. At the time of the hearing, there were approximately 35 drivers operating under a single weekly lease.

**b. <u>"Single Weekly with New Car" Lease</u>**

Under this arrangement, drivers also lease the vehicle on a seven-day, 24-hour basis. However, under this lease, drivers operate a new vehicle. At the time of the hearing, the new vehicles were model year 2000 vehicles. The Employer charges

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[3] Paragraph 10 of the lessee driver agreements further state, in relevant part:

> By this Agreement, the Lessor and Lessee acknowledge and agree that there does not exist between them the relationship of employer-employee, principal-agent, or master-servant, either express or implied, but that the relationship between the parties hereto is strictly Lessor-Lessee, the Lessee being an independent contractor/business, free from interference or control on the part of the Lessor in the operation of said taxicab, subject only to adherence to applicable laws, statutes, regulations and ordinances of the United States, the State of Connecticut, and any city or municipality or transit district in which the Lessee operates the taxicab. Lessee acknowledges, without limitation, that he/she is exclusively responsible for the payment of his/her own federal and state taxes, as well as Social Security and disability taxes, and that no such deductions will be made by Lessor. Lessee also acknowledges that Lessor is not obligated to provide, and Lessee will not receive, unemployment compensation or worker's compensation benefits.

[4] The Employer receives its vehicles from Nutmeg Leasing, a separate corporate entity owned by Scalzi.

drivers $690 on a weekly basis for this lease. As noted below, the Employer requires that the new vehicles be inspected on a weekly basis at the Employer's garage. At the time of the hearing, there were approximately 23 drivers operating under a "single weekly with new car" lease.

**c. "Split Weekly with Partner" Lease**

Under this arrangement, two drivers agree amongst themselves to lease one vehicle on a seven-day, 24-hour basis. The Employer charges each driver $495 on a weekly basis for this lease. Each driver then has rights to operate the taxicab during a daily twelve-hour period determined by the drivers. Drivers select their partner without input from the Employer. They also decide amongst themselves, without input from the Employer, where and when to exchange the vehicle. The record does not specify how many drivers operate under this type of lease.

**d. "Split Weekly without Partner" Lease**

Under this arrangement, a driver leases the vehicle for a twelve-hour period each day. Although the drivers are not obligated to generate fares during their designated twelve-hour period, they are required to return the vehicle to the Employer at the end of the twelve-hour period. In this regard, a driver testified that, at his discretion, he picks up his vehicle anywhere between 3:00 a.m. and 5:00 a.m., and then returns it to the Employer's facility twelve hours after the initial retrieval time. The record does not specify how many drivers operate under this type of lease.

**e. "Monthly" Lease**

This arrangement operates in the same manner as a single weekly lease except that the driver prepays for an entire month. At the time of the hearing, there was only one driver operating under such a lease. The record does not indicate the amount charged by the Employer for this type of lease, although it reflects that the driver pays a discounted rate as compared to the sum of four weekly rates. The record also indicates that this arrangement came into existence upon the request of the present, and sole, monthly lease driver who wished to lease the vehicle for a longer period than one week.

**f. "Daily" Lease**

Under this arrangement, a driver leases the vehicle for a daily twelve-hour period. The twelve-hour lease periods, which are designated by the Employer, run

either from 3:00 a.m. to 3:00 p.m. or from 3:00 p.m. to 3:00 a.m. At the time of the hearing, approximately 25 of the Employer's vehicles were being operated by approximately 261 lessee drivers under a "daily lease" arrangement. Under this leasing arrangement, the Employer charges drivers $99 for each twelve-hour shift. Daily drivers are also charged a late fee of $25.00 for each hour (or part of an hour) that the vehicle is returned beyond the designated shift period. All daily leases are based on ten hours use. In this regard, whenever a vehicle operated under a daily lease becomes inoperable for more than two hours during the daily lease period, the Employer either provides a "loaner" vehicle at no additional charge, or credits the driver's account on a pro rata basis.

**g. "Meter Only" Lease**

Under this arrangement, which costs $450 per week, drivers elect not to use the Employer's computerized dispatch system, described below, and are thus limited to obtaining passengers either from taxi stands, "flagged" fares, "personals," or dispatch calls originating with a different taxi company. As of the close of the hearing, there were only two or three drivers operating a vehicle under this type of lease. According to Scalzi, the Employer created this arrangement in response to requests made by several drivers who indicated that they were interested in paying a lower lease rate in exchange for not using the computerized dispatch system and simply relying on their personal customers.

**B. Lease Terms**

Under each of the above-described arrangements, except the "meter only" lease, the lease payment amounts include a dispatch fee for which a driver has the right to utilize the Employer's computerized dispatch system.

Upon determining which particular contractual arrangement to enter into, drivers are generally provided the opportunity to read and review the particular lease document.[5] Nevertheless, it appears from the record that drivers renew their

[5] Although the majority of drivers testified to this effect, one driver testified that he had entered about ten different leasing arrangements and had not been allowed to review any of these agreements prior to execution. The record does not reveal why this particular driver was treated differently or whether the driver simply did not perfect the opportunity to review the agreements prior to execution. In this regard, Scalzi testified, without rebuttal, that lease copies are provided to any driver upon request.

agreements without always re-executing them on each occasion. Additionally, at their discretion, on each Tuesday, drivers have the opportunity to switch from the type of leasing arrangement that they have into any one of the other arrangements described above. The record reveals that drivers periodically take advantage of this opportunity in order to accommodate their schedules. Upon completion of their respective leasing period, drivers can, and do, opt to cease driving a taxicab under the Employer's Certificate for an indefinite period of time and then return to drive whenever their schedules permit. The record clearly indicates that drivers cease and re-establish their affiliation with the Employer at their convenience and without restriction. Under either the owner-operator or lessee driver agreement, the Employer and the driver each retain the right to terminate a lease within 48 hours for any reason. The Employer also maintains the discretion to unilaterally change lease terms. With the exception of lease rates and late fees, as described below, there is no evidence regarding whether the terms of the lease arrangements are subject to negotiation. Neither the owner-operator nor the lessee driver agreement specifies the amount of the dispatch fee and neither agreement specifies the amount to be charged for the lease payment and any liability insurance secured by the Employer on behalf of the driver.[6]

The owner-operator agreement provides that lease rates shall be subject to re-negotiation on the first day of November of every calendar year, and that such increases may not exceed the increase in that year's consumer price index. The owner-operator agreement also provides that lease rates "will automatically increase by a percentage equal to any percentage increase in the taxicab rates prescribed by the DOT" and the increase will become effective upon the date that the DOT rates becomes effective. Despite this contractual language, Scalzi testified that the Employer does not always adhere to these provisions. The record references only two occasions when the Employer unilaterally raised lease rates, once in 1997 and once in 2000. The record is silent regarding what prompted the Employer to increase lease rates in 1997. Thus, the record does not indicate whether the DOT raised meter rates in 1997. Regarding the 2000 lease rates, the record discloses that in mid-February 2000, the Employer raised

[6] As discussed below, the Employer presents each driver with a detailed breakdown of fees associated with leasing the vehicle at the beginning of each lease period.

the weekly lease rates on "single-weekly" drivers by $20 in anticipation of the DOT approving higher meter rates. On March 5, 2000, these higher meter rates, approved by the DOT, went into effect. About two weeks later, the Employer raised lease rates across-the-board by $60. The Employer claimed that the higher rates were necessary to finance the computerized dispatch system and a new sofa it had purchased for the drivers' lounge. The record does not indicate whether either the February or March lease rate increases were equal to the percentage of the meter rate increase by the DOT. On March 21, 2000, about 30 or 40 drivers protested the higher meter rates to and informed the Employer that the new lease rates were unaffordable, particularly during a time of upwardly spiraling gasoline prices. Although Scalzi informed these drivers that they could afford to pay higher lease rates, the Employer reduced the lease rates by about $30 across-the-board. The Employer has also on occasion reduced the amount that new drivers have to pay on their weekly lease whenever a new driver indicated that he or she could not initially afford to pay the prevailing weekly lease rates.

### C. Compensation and Benefits

Under any of the above arrangements, the Employer does not pay any form of compensation to drivers for operating the taxicabs.[7] Rather, drivers keep all fares including tips. In order to achieve a profit, therefore, a driver must generate revenues that exceed the lease payment, and vehicle maintenance and repair costs.

The Employer does not provide drivers with an employee handbook. Drivers do not receive paid sick, personal, or vacation days. The Employer does not provide health or disability insurance, workers' compensation benefits, or unemployment compensation coverage to any of its drivers. It does not issue W-2 or 1099 tax forms to any of its drivers, and it does not make social security or payroll deductions or report their earnings on its state or federal income returns. Consequently, drivers refer to themselves as "self-employed" on their personal tax returns.

### D. Training

Once a driver enters into one of the above driving arrangements, he or she is "trained" on vehicle and taxicab operations. There is conflicting testimony regarding

[7] As discussed below, the Employer does pay a modest stipend to select drivers who serve as a "road supervisor" or "accident investigator."

whether this training is mandatory. According to Scalzi, training is optional at the discretion of the drivers, for which the Employer charges a flat fee of $50 to any driver who requests to be trained. On the other hand, at least three drivers testified that training was mandatory. According to the Employer, any training a driver may undergo represents the Employer's efforts to comply with DOT regulations. In this regard, Section 16-319-9 of the DOT's regulations provides that: "Each Certificate holder shall ascertain that each operator employed in the operation of taxicabs is fit and proper to operate a taxicab, and is fully instructed regarding motor vehicle laws of this state and the regulations of this commission." The DOT regulations do not describe with specificity the manner in which a Certificate holder must act in order to be in compliance with the law.

Training lasts between three and eight hours and consists of watching a twenty-minute movie and instruction by an experienced driver regarding a variety of items including, inter alia, how to properly drive taxicabs, taxicab safety features, and how to greet passengers and maximize customer satisfaction, such as placing a newspaper in the vehicle for passenger use. The trainee is then assigned to an experienced driver, usually a "road supervisor," who demonstrates how to use the various pieces of equipment in the taxicab, including the computerized dispatch system. The trainee is also advised as to all taxicab operations including the Employer's maintenance procedures, and how to read street maps and complete any required paperwork, such as "trip sheets." The trainee then spends about three hours on the road with the experienced driver. During this time, the trainee is driven to taxi stands within the Employer's franchise area as well as to locations within the greater New Haven, Connecticut area that are difficult to find.

**E. <u>Post-Training Procedures</u>**

In addition to signing the lease, drivers also complete a "Computer Data Form." This form requests that drivers provide certain information, such as their name, address, telephone numbers (including home, cellular or beeper numbers), an emergency contact person, and the driver's license number and expiration date. This form also requests that drivers identify those passenger attributes which the driver may find undesirable, such as passengers who smoke, carry pets, or pay with credit cards. This

information, referred to by the parties as a “driver attribute“ sheet, forms the basis for determining which types of passengers will be referred to the driver by the Employer’s computerized dispatch system. The drivers may modify these “driver attribute” sheets at their discretion.

The Employer also provides new drivers with a multi-paged packet of information entitled “Welcome to Metro Taxi.” This information includes, inter alia, driving tips for drivers, sample greetings for passengers, and several company policies and procedures regarding accidents. The packet also explains trip sheets and the Employer’s franchised territory, as well as the differences between “meter rates,“ “out of town trips,” “charge accounts,” and credit card trips. The packet further provides meter instructions, a sample trip sheet, directions and maps of locations, and rate sheets.

**F. Compliance with DOT Requirements**

The DOT regulates the operation of the taxicab industry, and any related dispatching service, within the State of Connecticut. The DOT is responsible for licensing taxicab companies by issuing Certificates, setting intrastate transportation rates, and overseeing the operation of taxicab companies. The DOT determines to whom it will issue a Certificate. Certificate holders are subject to, and bound by, specific regulations promulgated by the DOT governing the taxicab industry in Connecticut. To ensure compliance with these regulations, the DOT has the authority to fine a Certificate holder, or suspend or revoke a Certificate holder’s operating authority. As noted above, the DOT charges the Certificate holder with the responsibility to instruct drivers about DOT regulations.

**G. Fare Rates**

Drivers charge different rates to passengers depending upon the origination and destination point of the trip. Drivers transport passengers on an intrastate or interstate basis. There are three categories into which intrastate transportation may fall: 1) metered rates within a ten-mile radius; 2) flat rates beyond ten miles to locations within Connecticut; and 3) “special rates” that are flat rates to specific destinations within Connecticut. Each category maintains a corresponding rate as described below. As

noted above, the DOT is responsible for setting all intrastate rates, including the above three categories.

**1. Metered Rates**

The meter rate is based on mileage and is applied to all transportation assignments that are performed under ten miles and either originate or conclude within the Employer's franchised area, or on any assignment that exceeds ten miles but occurs entirely within the Employer's franchised area. Only a Certificate holder may petition the DOT to establish or change metered rates. A petition for increase in metered rates by any Certificate holder is subject to a public hearing, the dates of which are published in a newspaper thirty days prior to the hearing. Although drivers may attend these hearings and comment on the proposed rates, there is no evidence that the Employer has requested driver participation or that any driver has ever attended such a hearing. Following the hearing, the DOT determines whether to grant a Certificate holder's metered rate request. Once DOT sets the metered rate, drivers are required to comply with those rates and do not have the discretion to negotiate a variance from such rates with passengers. Every taxi company servicing the affected franchised area is required to charge the rates promulgated by the DOT. The Employer distributes to its drivers a DOT metered rate schedule that must be affixed to the interior of their taxicabs at all times.

**2. Flat Rates**

The flat rate, which is also based on mileage, is applied to all intrastate transportation assignments that exceed ten miles and either originate or conclude within the franchised territory, but either originate or conclude elsewhere within Connecticut. The flat rate is generally a higher per mile charge than the metered rate because it allows for a driver's return time to the franchise area. As with metered rates, only a Certificate holder may petition the DOT for the establishment of, or seek changes in, flat rates. Unlike metered rates, a petition for flat rates is not subject to a public hearing. The DOT maintains the sole discretion whether to grant a Certificate holder's flat rate requests. According to Scalzi, the DOT has never rejected a flat rate request from the Employer. Here too, once DOT sets the flat rate, drivers are required to comply with them and do not have the discretion to negotiate a variance from such rates with

passengers. The record does not clearly demonstrate whether other taxi companies servicing the affected franchised area are required to charge the flat rates petitioned for by a Certificate holder. As with metered rates, the Employer distributes to its drivers a flat rate schedule which must be affixed to the interior of their taxicabs at all times.

**3. "Special" Flat Rates**

"Special" flat rates are usually discounted rates from what would typically be charged under the customary flat rate schedule. There are two types of "special" flat rates. The first consists of transportation between the franchise area and a popular location outside the franchise area, such as Bradley Airport in Windsor Locks, Connecticut or Foxwoods Casino in Ledyard, Connecticut. As with metered and flat rates, only a Certificate holder may petition the DOT for the establishment of, or seek changes in, these "special" flat rates. Similar to flat rates, a petition for "special" flat rates is not subject to a public hearing. The DOT maintains the sole discretion whether to grant a Certificate holder's "special" flat rate requests. There is no evidence that the DOT has ever rejected a "special" flat rate request from the Employer. Once the DOT agrees to a "special" flat rate request, drivers are required to comply therewith and do not have the discretion to negotiate a variance in such rates with passengers. Although not entirely clear, it does not appear that other taxi companies servicing the affected franchised area are required to charge the same "special" flat rates petitioned for by the Employer.

The second type of "special" flat rate involves negotiated rates between the Employer and either state or federally funded school systems. In this regard, the State of Connecticut passed legislation whereby, as of July 1999, taxicab companies were permitted to negotiate special flat rates directly with these types of school systems in order to transport schoolchildren. Pursuant to this legislation, the Employer has agreed to a special flat rate with duly designated school systems in the greater New Haven, Connecticut area. The drivers are obligated to adhere to this special flat rate if they decide to accept such assignments. The DOT does not have authority over these types of special flat rates.

With regard to all of the above-described rates, there is conflicting testimony regarding the drivers' participation in establishing the rates. In this regard, Scalzi

generally described how the Employer has historically consulted with drivers regarding any rate increase proposals. Specifically, Scalzi testified that the Employer has always sought driver "feedback" regarding the amounts to be requested. In this regard, Scalzi described one occasion in which, following consultations with various drivers, the Employer requested a flat rate increase from $1.60 per mile to $2.00 per mile. According to Scalzi, following the DOT's approval of this rate increase, drivers informed the Employer that they wanted to return to a lower flat rate of $1.80 per mile because they were losing customers. As a result, the Employer successfully petitioned the DOT for the lower rate. Scalzi further testified that the "special" flat rates to specific popular destinations were submitted to the DOT following driver input on those rates. With regard to the negotiated school rates, Scalzi also testified that the Employer approached the drivers and solicited from them a flat rate that they would agree to charge area school systems for transporting schoolchildren. In contrast to Scalzi's testimony, three drivers, each with at least eight years tenure with the Employer, all testified that the Employer has never approached them regarding rate increases prior to submitting a petition to the DOT or regarding the negotiation of school rates.

**4. <u>Interstate Transportation</u>**

In addition to intrastate transportation, drivers perform interstate trips. Unlike intrastate trips, the DOT does not have jurisdiction on interstate trips, and therefore does not establish rates for such trips. Consequently, the Employer establishes rates for the most popular out-of-state destinations, including the three airports located in the New York City Metropolitan area. The Employer prints and distributes these rates to the drivers who must post the interstate schedule in their vehicles. The Employer also quotes these rates to patrons who call seeking such out-of-state destinations. Although there is no evidence of any participation by the drivers in setting these interstate rates, it is clear that the drivers are free to disregard the quoted out-of-state rates, and can negotiate a variance in such rates with passengers. In this regard, according to Scalzi, the great majority of drivers discount the Employer's listed rate, while at least one driver has charged in excess of the listed interstate rates.

### H. Vehicle

Section 16-319-6 of the DOT's regulations provides that "[a] certificate holder shall do business under only one name." In this regard, all vehicles, regardless of leasing arrangement, must be uniformly orange and white in color and must display the "Metro Taxi" logo, along with the Employer's telephone number on both exterior doors.

Under the owner-operator leasing agreement, the Employer maintains the right to sell advertising on or in the vehicles, and all revenue from such advertising belongs to the Employer. However, there is no evidence that the Employer has ever sold or affixed advertising in either the exterior or interior of any vehicle. Moreover, under the lessee driver agreements, lessee drivers are also allowed to affix advertisements to the interior and exterior of the taxi. Here too, there is no evidence that any driver has actually done so. Under the lessee agreement, lessee drivers are also free to decorate the vehicle's interior, or equip the vehicle with furnishings of their choosing, subject only to the lessee agreement restriction that "Lessee shall not decorate the interior or exterior of the taxicab in an obscene or offensive manner." In this regard, the record reveals that lessee drivers reserve the same vehicle in advance in order to allow drivers to enjoy the improvements, such as compact disc players, made by them to a particular vehicle.

### I. Schedule

The Employer does not establish schedules for any of its drivers. Rather, each driver, subject to any arrangements with a partner, can establish whatever on-duty schedule he or she desires. In this regard, drivers may work as many or as few days each week as they wish. The record reveals that some drivers work only the morning and afternoon rush hours in order to maximize profits. The lone restriction on work hours is that drivers cannot operate their respective vehicles in excess of twelve consecutive hours. This restriction is mandated by regulations set by the DMV, not by the Employer. Drivers are not required to first report to the Employer before going on-duty, and while on duty, they are not required to report their whereabouts to the Employer. Drivers are also free to take breaks for as long as they desire without notifying the Employer.

### J. Passenger Selection

Drivers are free to obtain passengers through one or more of five means: 1) the Employer's computerized dispatch system; 2) flagged fares; 3) waiting at various taxi stands located throughout the greater New Haven area; 4) "personal" customers; and 5) dispatches from other cab companies. The Employer does not dictate which of these means may be employed by a driver in order to obtain passengers. Rather, at their discretion, drivers may use all, some or only one of these means to secure passengers. As previously discussed, under any of these means, drivers are required to charge the DOT approved intrastate rates but may negotiate with passengers regarding interstate rates.

#### 1. The Employer's Computerized Dispatch System

Since about 1998, the Employer has maintained a computerized dispatch service, known as Digital Dispatch Service (herein "DDS") to handle the approximately 2,500 daily calls it receives from prospective patrons. The DDS divides the Employer's franchise area and surrounding communities into approximately sixty-three geographic zones.[8] Each of these zones is assigned a three-digit code. Each vehicle in operation under the Employer's Certificate is equipped with an on-board computer that is connected to the main DDS terminal. Drivers have the option of obtaining passengers through the DDS. The Employer does not require or encourage drivers to use the DDS in order to obtain fares. If a driver elects to use the DDS in order to obtain passengers,

[8] There is conflicting testimony regarding whether the Employer unilaterally established the location and number of zones or whether drivers assisted in the establishment of these zones. In this regard, Scalzi testified that the Employer relied upon drivers' input in creating at least some of these zones. In contrast, one driver with approximately eight years driving tenure testified that the Employer had never communicated with him regarding how many zones should be established.

the Employer does not set a minimum or maximum number of completed dispatched fares, nor does it charge drivers a per dispatch fee for obtaining passengers through this system.

Drivers who opt to obtain dispatched fares through the DDS first enter a code in their taxi's computer terminal which activates the system, and alerts the DDS that the driver is interested in obtaining dispatched calls. Once "online," drivers can scroll through the various zones in order to identify the available assignments, i.e. passenger requests, in each zone. An interested driver then "books" into a particular zone by entering into the terminal the three digit number corresponding to that zone. In so doing, the driver informs the computer that he or she is interested in obtaining any fares in that zone. A driver can also inform the computer that he or she is solely interested in obtaining fares at a taxi stand located within a particular zone by entering a separate three-digit code. The Employer does not have any involvement regarding the zone or stand chosen by the driver. Based upon the order in which drivers have "booked" into any particular zone (or stand within a zone), the computer sequentially notifies drivers, in order of "booking," about assignments in that zone or at that stand.

A driver's passenger preferences as listed in the previously discussed "attribute sheet," are programmed into the DDS. In this manner, the DDS only notifies the next driver in the queue who is willing to carry a passenger with those attributes.

When an assignment materializes within a zone, the DDS notifies the next driver in the queue about the pending assignment in the following manner. Initially, DDS only notifies the driver that an assignment exists in the zone into which the driver has "booked." The computer does not notify the driver as to the specific location of the assignment within the zone or the destination requested by the patron. According to Scalzi, the Employer does not divulge more information to the driver about the pending assignment at this time in order to comply with the "Order of Service" regulation established by the DOT. Under this regulation, the DOT mandates that "[t]he operator of a taxicab shall accommodate patrons in the order of their application for service." Scalzi testified that the Employer believes this DOT requirement is designed to prevent drivers from discriminating against patrons based on their nationality, the amount of the fare involved, or other factors. Further, according to Scalzi, the Employer construes this

regulation to signify that once a driver accepts a dispatched call, the driver is committed to transporting the passenger.

Upon becoming notified through the DDS about a pending assignment, the driver has about thirty seconds in which to accept the assignment. Drivers can freely refuse to respond and can, at this point, freely reject the assignment. If the driver fails to timely respond, the computer then offers the assignment to the next queued driver in that particular zone. Once a driver accepts an assignment, the DDS informs the driver about the specific time and location of the pick-up, how many passengers are involved, the gender of the passenger, the desired destination and other information related to the assignment. The successful bidder then proceeds to pick up the passenger and complete the assignment. Once the assignment is performed, the driver enters "unload" on his or her computer and he or she returns to the system to await the next call from whichever zone they desire to obtain passengers. Drivers no longer interested in obtaining fares from a particular zone can then "book" out of that zone at their discretion by pushing a button on the inboard computer. Drivers are then free to "book" into a different zone or perform non-dispatched assignments if they so desire.

Another type of assignment dispatched through the DDS is a corporate account. In this regard, several businesses in the Greater New Haven area have an account established with the Employer whereby the account holders pay the Employer directly for the transportation costs of certain passengers. Under these accounts, drivers do not charge the passenger. Rather, the Employer automatically bills the corporate account holder and then credits the driver's next lease payment by the corresponding amount of the fare. Drivers are initially notified through the DDS whether the pending assignment is a corporate charge account. The drivers generally receive the full amount of the fare that is commensurate with the regular fare schedule. In the event that a passenger "no-shows" after a driver has accepted a corporate account dispatch, the Employer will credit the driver's lease by the amount of the anticipated fare and bill the fare to the corporate account holder.

According to Scalzi, due to the DOT's "Order of Service" regulation, the Employer permits drivers to first accept and then reject a dispatched call without consequence, known as a "void out," under a variety of circumstances: 1) whenever the driver realizes

that he or she has had a previous unpleasant experience with the particular patron or believes that the particular patron poses a safety risk based on prior dealings; 2) when a driver learns that the patron seeks a long-distance trip which will interfere with the driver's previously scheduled appointment with other patrons; 3) when the driver discovers that the assignment is a "special" flat rate negotiated between the Employer and eligible school systems; 4) when the patron subsequently cancels the trip or has taken another cab; 5) when the patron seeks to have more than four passengers simultaneously transported;[9] 6) when the driver is informed that the fare will be paid by a corporate account holder or the patron seeks to pay with a credit card;[10] and 7) when the patron fails to initially appear at the designated pick-up location.[11]

In any circumstance in which a driver opts to "void out" an accepted dispatch call, the driver notifies the dispatcher by entering an appropriate code into his or her terminal. The dispatcher then communicates with the driver via "voice" dispatch during which the driver explains the basis for the request to "void out" the accepted dispatch. If a dispatcher disagrees with the driver's request, the dispatcher inputs "no trip denied" into the DDS at which point the driver cannot receive another assignment through the DDS until he or she completes the original assignment.[12] Despite the dispatcher's apparent control in this process, one of Petitioner's witnesses conceded that he has "voided out" calls on "dozens" of occasions.

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[9] As discussed below, DOT regulations do not permit drivers to simultaneously transport more than four passengers.

[10] There is conflicting testimony regarding a driver's attempt to void out a trip because he or she does not wish to accept a credit card paying passenger. In this regard, one driver testified that once a driver refuses to accept a passenger on this basis, the Employer no longer refers credit card assignments to the driver at issue for up to a week. In contrast, Scalzi testified that drivers can void out a specific assignment on that basis and the DDS will, without interruption, continue to dispatch credit card paying customers to the driver at issue. Not all drivers are aware that they can "void out" an accepted dispatch call based upon the fact that a patron intends to pay with a credit card. In this regard, one driver testified that he "was always told that we have to accept the charges."

[11] When a patron fails to appear as scheduled, the driver must notify the dispatcher about the patron's absence, and wait a minimum of five minutes for the patron to appear, during which time the dispatcher will attempt to contact the customer. If the customer indicates that he or she remains interested in the taxi, the dispatcher will require the driver to remain waiting up to twenty minutes until the customer emerges. If the dispatcher is unable to contact the customer, the driver is allowed to "void out" the trip.

[12] According to Scalzi, in addition to "void out" attempts, drivers no longer interested in completing an accepted dispatch can bypass the system by simply turning their meters on and off without ever picking up the patron. As a result of this practice, Scalzi testified that the Employer receives 500 to 600 daily "callbacks," pursuant to which patrons complain that drivers have not shown up.

The DDS also incorporates the use of what is known as a "feeder zone." A "feeder zone" is a geographic zone outside of, but adjacent to, one of the Employer's six franchised territories. Drivers may "book" into a feeder zone in the hope of obtaining a patron from a popular location within that zone interested in transportation to a location within the Employer's franchised territory. Drivers may also simultaneously book into the zone within the franchise territory adjacent to the feeder zone. If a driver accepts a dispatch call from the adjacent franchised territory, the DDS will not allow the driver to accept any calls from the "feeder zone" until the first assignment is completed.

**2. <u>Taxi Stands</u>**

The record reveals that about ten taxi stands exist throughout the greater New Haven area, including stands situated at local hotels, bus stations, train stations, and airports. Taxi stands also exist at two large supermarkets and Yale University. At their discretion, drivers may solicit passengers from all, some or none of these taxi stands. Other than safety-related issues, as discussed below, the Employer does not monitor or control any decisions by drivers relating to taxi stand business. However, in accordance with the above-described DOT rule regarding order of service, if a driver is waiting at a taxi stand and accepts a dispatch call through the DDS, the driver may no longer accept passengers at the taxi stand until the accepted dispatch call is completed or the driver appropriately "voids out" the accepted dispatch call.

**3. <u>"Flag Down" Fares</u>**

The third source of driver revenue may come from "flag downs," i.e., passengers who hail a passing cab for transportation. At their discretion, drivers may pick-up and transport this type of passenger. Other than safety-related issues, the Employer does not monitor or control any decisions by drivers relating to "flag downs." As with taxi stand pick-ups, pursuant to DOT's order of service rules, if a driver is proceeding to pick up a passenger accepted through the DDS, a driver may not pick up a "flag down" fare.

**4. <u>"Personals</u>"**

The fourth category are patrons with whom the drivers have established an exclusive and regular business relationship. In this regard, drivers have the discretion to solicit passengers for exclusive driving arrangements. If the patron is interested in having an exclusive driver, the parties then establish prospective transportation

arrangements. To cultivate such relationships, referred to in the record as "personals," drivers develop and distribute personalized business cards often bearing the driver's home or cellular telephone number. The Employer does not prohibit, require nor monitor the use of business cards by its drivers, the cost of which is borne by the drivers.

Drivers often contact "personals" directly at their home or office through cellular phones, and "personals" also may directly contact their respective driver. The Employer does not become involved in any material aspect of "personals," including the decision by a driver when to solicit such business, the parameters of such an arrangement, or a driver's decision to purchase, carry and use a cellular phone toward the completion of such business. The Employer does not restrict the number of "personals" that a driver may have nor does it impose a minimum. It does not derive any financial remuneration from such arrangements and there is no evidence that it discourages drivers from entering into such arrangements. Drivers are not required to divulge any information regarding "personals" to the Employer. The Employer's only involvement with regard to "personals" occurs when such passengers call the Employer's facility and request their particular driver. In those circumstances, as a courtesy, the Employer notifies the driver that their customer is looking for them.

Contrary to the aforementioned DOT prohibitions, some drivers negotiate their own intrastate rates with their "personals." For example, one driver testified that he negotiates special rates for his "personal" customers depending upon waiting time and the number of stops involved. The record also discloses that, on occasion, drivers "steal" personal customers from another driver. The Employer does not compensate the affected driver or become involved in any manner in such circumstances.

With the exception of patrons secured pursuant to a corporate account, under any of the above four means of obtaining fares, the drivers bear the risk and are not compensated by the Employer if the patron fails or refuses to pay the fare.

**5. <u>Dispatches From Other Taxi Companies</u>**

The fifth opportunity to obtain fares comes from the drivers' right to accept dispatches from other taxi companies servicing the greater New Haven area without prohibition from the Employer.

### K. Insurance

Under the terms of either the owner-operator or lessee agreements, drivers are obligated to obtain liability insurance acceptable to the Employer. The Employer determines the minimum limits of such coverage. While drivers may obtain such insurance through the Employer, they are not required to do so.[13] As of the close of the hearing, all drivers had obtained liability insurance through the Employer and there is no evidence that any driver has ever obtained liability insurance other than through the Employer.[14] It does not appear that drivers obtain other forms of vehicle insurance from the Employer, such as collision or comprehensive coverage, or that such insurance is required by the Employer.

According to the owner-operator agreement, liability insurance purchased from the Employer only covers an owner-operator's vehicle when such vehicle "is being used as a taxicab for the business of transporting passengers under Metro Taxi's certificate" and does not cover the vehicle when "it is being used for any other purpose, including, but not limited to," the owner-operator's personal use. Notwithstanding this restriction, the record clearly demonstrates that owner-operators and lessee drivers use their vehicles for personal use without restriction. Moreover, the liability insurance purchased through the Employer does, in fact, cover these vehicles when in use for personal reasons.

### L. Personal Use

The record indicates that some drivers do not operate or own other vehicles and that they therefore use the leased or owned taxi for personal needs. As noted above, drivers may use the leased or owned vehicle for any personal reason they desire and are not required to report any personal use of the vehicle to the Employer. Indeed, some drivers use their leased vehicles to conduct other entrepreneurial business

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[13] Under the lessee agreement, a lessee driver interested in obtaining liability insurance coverage elsewhere must demonstrate to the Employer that he or she has been covered by another policy for at least two months before taking possession of a leased vehicle.

[14] It appears that individual drivers are unable to secure insurance rates as favorable as those obtained by the Employer, which has a fleet rate.

dealings unrelated to taxi service. The Employer does not preclude drivers from driving leased vehicles to out-of-state locations for personal reasons. Further, the Employer does not preclude or restrict drivers from transporting personal passengers, including friends and family members, except when a paying patron is in the vehicle. This latter restriction is in conformance with DOT regulations. Finally, the record demonstrates that, except for daily drivers who do not have the opportunity to do so, drivers regularly park their vehicles at home when not in use and do not return the vehicle to the Employer's garage.

**M. Vehicle Expenses and Maintenance**

All drivers are responsible for their respective gasoline expenditures, parking tickets, and moving motor vehicle violations. With regard to other expenditures, owner-operators are responsible for all maintenance, towing and mechanical expenses, and for paying all expenditures incurred in connection with obtaining the title and registration of the vehicle as well as any related taxes. Owner-operators are also responsible for any loss resulting from theft of the vehicle or equipment therein. Owner-operators are required to have their vehicle inspected by the Employer on a monthly basis. During this inspection, the Employer inspects the safety aspects of the vehicle, such as whether the lights are functioning.

With regard to vehicles driven by lessee drivers, the Employer pays for all registration costs as well as any costs related to mechanical repairs sustained by these vehicles in the ordinary course of business. As previously indicated, the Employer provides a loaner vehicle to lessee drivers if a vehicle remains out of service for a prolonged period due to these mechanical problems. According to Scalzi, the cost of repairs and the use of loaner vehicles are built into the higher lease rate charged to lessee drivers.

Based on its interpretation of DOT regulations,[15] the Employer requires that

[15] In relevant part, Section 16-319-3 of the DOT's taxicab regulations provides that: "Taxicabs operated pursuant to commission authority shall have four doors, and shall be suitable for providing safe and comfortable transportation of passengers in accordance with the accepted practices of taxicab service within Connecticut." Section 16-319-10 of the same set of regulations provides: "Each certificate holder shall maintain each taxicab operated under his authority in proper repair and in safe, clean and sanitary condition. Each certificate holder shall maintain a system of frequent and regular inspection and shall also maintain a record for at least one year of the conditions found in the inspection of taxicabs."

lessee drivers with new cars bring their vehicles to the Employer's garage each Monday so that the Employer's mechanics can perform a five-minute vehicle safety inspection. During this inspection, the mechanics check the vehicles for exterior damage, check the mileage and ensure that the vehicles are being maintained in a clean and safe condition. Upon a completing an inspection, a mechanic provides a receipt to the driver which must be submitted to the Employer's cashier at the time of lease payment in order to renew the lease. The Employer also requires all lessee drivers to check the vehicles' fluid levels on a daily basis prior to operating the vehicles for passenger service. Lessee drivers must contact the dispatcher immediately if one of several contingencies related to engine performance occurs, such as fluid leakage or engine "knocks". There is no evidence that the Employer disciplines drivers for failing to comply with any of the above vehicle inspection requirements.

All lessee drivers are responsible for all expenditures, including towing and bodywork, arising from the negligent operation of the vehicle. All lessee drivers are responsible for any losses resulting from theft while the vehicle was in the drivers' possession. Lessee drivers post a damage bond in the amount of $1,000 at the time they first enter into a lease in the event they negligently cause damage to a vehicle or suffer a loss from theft. Drivers who do not initially have the $1,000 may pay the bond in weekly $25 increments. The Employer does not reimburse any of the lessee drivers for revenue lost because their vehicle is out of service due to repairs.

Pursuant to the aforementioned DOT regulations which require that vehicles are to be "neat and clean," the Employer directs "daily" lessee drivers to wash their vehicles, at the Employer's expense, on a regular basis. It also requires all other lessee drivers to wash their vehicles, at the Employer's expense, whenever the vehicles require cleaning.

Pursuant to its above-described DOT obligations relating to vehicle inspection, the Employer requires that all lessee drivers bring their vehicles to the Employer's garage every 4,000 miles in order for its garage personnel to perform what is known as preventive maintenance service (PMS). During this inspection, the garage personnel check the brakes, change the oil, and test other mechanical and safety-related items. At each 4,000-mile interval, the Employer notifies drivers through the onboard computer

that their respective PMS appointment is scheduled for the following day. If the scheduled appointment is inconvenient for the driver, the Employer will generally re-schedule it for the following day. If this date is also inconvenient for the driver, the Employer will attempt to accommodate the driver further.

**N. Accident Investigators/Road Supervisors**

The Employer periodically employs up to two drivers per shift in a capacity interchangeably referred to as either "accident investigator" or "road supervisor." The record is silent regarding the selection or number of accident investigators/ road supervisors. It appears, however, that drivers are not required to serve as accident investigators/road supervisors and that only a handful of drivers perform such a function. The Employer generally pays selected drivers $35 per accident to serve in this capacity. The sum is credited to the driver's lease payment or paid in cash depending on the driver's preference.

As previously discussed, accident investigators/road supervisors participate in training new drivers. They also participate in the investigation of an accident involving any of the Employer's leased vehicles. In this regard, in the event one of the leased vehicles is involved in an accident, the Employer dispatches an accident investigator/road supervisor to the accident scene.[16] The accident investigator/road supervisor is responsible for identifying any eyewitnesses to the accident, photographing the accident scene and surrounding streets, assessing driver liability, and determining whether the vehicle needs to be towed. Following an accident, the involved lessee driver proceeds to the Employer's facility where the driver, with the assistance of the accident investigator/road supervisor, completes the necessary

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[16] All drivers must report to the dispatcher all accidents involving the vehicle. In this regard, the Employer's "Accident and Safety" policy distributed to drivers in the "Welcome" packet directs drivers to take the following steps following an accident:

> Report all accidents and incidents (to the dispatcher) when they happen. Tell dispatcher what type of accident and if you have passengers. Get the marker number of the other car. Get the name of the Insurance Company and its address from the other car owner. Make sure you get the right location of the occurrence, write down the nearest street or the nearest juncture of streets. Get the name and addresses of the car's driver, the passengers and any witnesses. Do not move your cab until the police or a company supervisor tells you to do so. Do not lose your temper. Say as little as possible. Never admit that you are at fault. Do not make a statement to anyone except company supervisors or the police.

insurance reports. The accident investigator/road supervisor is responsible for ensuring that all incident and insurance reports are properly completed.

When serving as an accident investigator/road supervisor, a driver is also responsible for observing the manner in which drivers are operating their respective vehicles. If he or she observes any of the Employer's taxis being driven in an unsafe manner, he or she either speaks directly with the driver about this conduct or reports the conduct to the Employer's dispatcher for further action. In an extreme case, the accident investigator/road supervisor may directly contact Operations Manager Anderson to report a driver's unsafe driving actions. The record does not reveal what action the Employer may undertake in these situations.

If the Employer determines that a lessee driver was at-fault in an accident, the driver is responsible for any damage to the vehicle resulting from the accident. The Employer may allow a driver to continue driving following an at-fault accident. In determining fault, the Employer relies on the police report and accident scene photographs as well as statements provided by the driver and accident investigator/road supervisor. The record shows that on some occasions, the Employer has permitted drivers to resume driving on the same day, while in other cases, drivers have not been permitted to resume driving for several weeks. It is unclear from the record whether the Employer's actions following an accident are based upon a need to complete the accident investigation or based upon other reasons. Generally, drivers are not paid for any "down time" during this investigation. However, the Employer may credit a driver's lease payment for the time that the vehicle was not in use.

Following an investigation, the Employer may terminate the lease on the involved driver based on its conclusion that he or she is unfit. Such determinations are dictated by the totality of the circumstances, including the manner in which the vehicle was operated, a driver's overall driving history, and the driver's length of service.

**O. <u>Discipline</u>**

The Employer does not maintain a formal disciplinary system. Generally, adverse action, to the extent that it is imposed, consists of terminating a lease or "de-authorization" of the use of the computerized dispatch system.

### 1. Lease Termination

As noted above, the Employer maintains the right to terminate a lease for any reason after 48 hours notice. The Employer has terminated very few leases since its inception. Although the record does not reflect the specific reasons for such terminations, Scalzi testified that some of the reasons for which the Employer may terminate a lease are: 1) nonpayment; 2) unsafe driving jeopardizing the Employer's Certificate; 3) drug or alcohol abuse; 4) overcharging passengers; 5) transporting personal and unauthorized passengers at the same time as patrons; and 6) using the vehicle for illegal activities. In addition, the Employer's "Welcome" packet informs drivers that contracts may be terminated under the following conditions: 1) any moving violations or accident within the first 14 days after executing an initial contract; 2) any at-fault accident within 90 days following the execution of the initial contract; 3) a "not-at-fault" accident that was avoidable; 4) two violations or accidents within any 180 day period; 5) any failure to report an accident or incident; and 6) transporting more than four passengers in violation of state insurance laws and DOT regulations. Finally, the owner-operator agreement states, in relevant part, that the "dispatch system will be affected negatively if a participating owner, who accepts a dispatch, later fails to satisfy his dispatch obligations. Owner understands that such a failure can subject Owner to termination."

### 2. "De-Authorization"

Under certain circumstances, the Employer may "de-authorize" a driver's computer terminal. Whenever this occurs, a driver is unable to secure further assignments through the DDS but can continue to transport patrons obtained from the three other primary means, i.e., taxi stands, flagged fares, and "personals". De-authorization may occur if a driver refuses to respond to the Employer's efforts to contact the driver following a patron's complaint or following a determination by the Employer that the driver was acting in a manner that jeopardized its Certificate. Acts that the Employer believes would jeopardize its Certificate include committing a violation of DOT regulations, driving in a manner that poses a safety risk to the public,

overcharging patrons, and deliberately transporting patrons along the wrong route. De-authorization may also occur if a driver fails to make a lease payment by Friday of the week that it was due. In these latter instances, however, the Employer will "re-authorize" the terminal once the driver has fully satisfied his or her account. The record also reveals that dispatchers may "de-authorize" a driver's terminal if the driver refuses to complete an accepted dispatch call after the dispatcher has rejected the driver's reasons for "voiding out" the assignment. Finally, there was testimony that the Employer may de-authorize any driver for failing to timely return a taxicab to its facility for a scheduled maintenance inspection.

**P. <u>Policies and Procedures</u>**

The Employer does not conduct driver meetings, and does not require drivers to wear a uniform. Although it requires that drivers be "neat and clean," it does not restrict with specificity the type of clothes any of the drivers may wear.

Pursuant to DOT regulations, the Employer requires that drivers complete a daily trip sheet that details certain information regarding each patron serviced.[17] The DOT has a standard form for collecting such information, a copy of which the Employer distributes to each driver. The Employer does not audit these trip sheets for accuracy, and does not require that drivers maintain or submit any records other than trip sheets.

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[17] The DOT mandates that:

> [A]ll Certificate holders are required to maintain permanent written records of every taxicab trip they perform and that such 'trip sheets' shall include the following information: 1) the complete name of the driver and their public service license number; 2) the taxicab registration plate number; 3) the starting and ending time and date of each trip sheet/shift; 4) the total starting and ending vehicle odometer reading for each trip sheet/shift; 5) the address of trip origin and trip destination including street name and number for each trip; 6) the pick up time and drop off time for each trip; and 7) the number of passengers transported.

Under DOT regulations, Certificate holders are responsible for ensuring that drivers maintain these records. According to the DOT, failure to meet this regulation may result in the revocation of the Certificate.

As previously noted, pursuant to DOT regulations, the Employer does not permit non-patrons in the vehicle while transporting passengers, and only permits drivers to simultaneously transport four passengers.[18]

According to one of the Employer's "Welcome" packets, drivers are expected to load passengers at curbside, not in the middle of the street. In this regard, in relevant part, the owner-operator agreement provides that the "Owner agrees to load and unload passenger baggage promptly, carefully and courteously, at curbside at the beginning and end of each trip. This service shall be provided by Owner without cost to his passengers, except as provided by DOT regulations." The record does not reflect whether these directives regarding luggage handling are pursuant to DOT requirements. The record does reflect that the DOT considers loading and unloading of baggage to be a traditional and expected part of taxicab service. In its "Welcome" packet, the Employer describes greetings and other acts of politeness that drivers should adopt in order to enhance customer satisfaction. However, the record clearly establishes that the Employer does not direct drivers to greet patrons in a specific manner, and that drivers greet and interact with patrons in whichever manner they deem appropriate, subject to DOT restrictions.

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[18] The Petitioner claimed in its post-hearing brief that neither of these issues were regulated by the DOT and that the Employer was exercising control beyond what is required by the DOT. Contrary to the Petitioner's contention, the record contains a letter dated May 5, 2000 from Robert Cumpstone, the DOT official responsible for overseeing the taxi industry in Connecticut. In relevant part, Cumpstone's letter states:

> [A] non-paying passenger is not a patron. You further ask are there any regulations that could be interpreted to prohibit non-paying passengers when a taxicab is in service? The answer is yes. R.C.S.A. 16-319-3 allows the Department to approve the number and the type of vehicles for use in taxicab service. Every vehicle is rated for a passenger seating capacity. Most sedans are suitable for four passenger/patrons. When on duty, these four places for patrons are to be available for use. Having any of these positions already occupied by parcels, or non-fare persons, makes this vehicle unavailable for the usage it was licensed to provide.

Under the owner-operator agreement, owners agree to notify the Employer of any traffic tickets, traffic violation convictions, suspension or revocation of the owner's license or any other change in the owner's driving record within ten days of said occurrence. Further, under the owner-operator agreement, owners agree "to transport all passengers in a prompt and orderly manner, provided that Owner, in his sole discretion, shall determine the hours he shall work and the routes over which he shall transport such passenger, except that the Owner agrees to use the shortest available route to the passenger's destination, or as directed by the passenger."

**Q. Driver Billing and Redemption of Charges**

The Employer requires drivers to timely redeem any credit card or corporate account charges. Drivers who fail to submit such charges in a timely manner risk forfeiture of the redemption. In this regard, drivers are expected to redeem any such charges by Monday at 3:00 p.m. However, the Employer periodically allows those drivers who were unable to appear on Monday to redeem charges on Tuesday. The record also discloses that the Employer has posted a notice informing drivers that they are to redeem any credit card charges within seven days of service. However, Scalzi testified that drivers actually have 30 days, pursuant to credit card rules, in which to submit ordinary credit card charges to the Employer for redemption.[19]

All drivers are required to pre-pay for their respective leases. The Employer presents all drivers with their itemized bills which include and display the amount charged for dispatch fees, lease charges, insurance payments, and any applicable late fees or collision damage repayment obligations. The bills are reduced by any charges that were redeemed on Monday. The Employer also maintains the option of crediting or waiving lease fees, if, for example, a driver timely notifies it that he or she is unavailable

[19] The Employer assesses a 5% fee on credit card charges that it processes on behalf of the drivers. According to Scalzi, this fee reflects the corresponding fees that the Employer pays to the credit card companies.

due to illness during the lease period. Drivers can pay by cash, money order or bank check but generally not by personal checks. Several drivers have incorporated their business and make their lease payments through business checking accounts. Although drivers are subject to a $15 fine for each day that the payment is late, the record demonstrates that the Employer regularly waives this fee following negotiations with the involved driver. As noted above, if payment on the lease is not made when it is due, the Employer retains the right to "de-authorize" the driver's terminal until payment is made.

## II. Applicable Law

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The Supreme Court has held that in determining an individual's status as an employee or independent contractor, the Board shall apply the common law test of agency. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989), the Supreme Court specifically referred to the definition of a "servant" in Section 220 of the Restatement of Agency as embodying the common law distinction between an employee and an independent contractor. In this regard, Section 220 provides:

> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
> (d) The skill required in the particular occupation.
> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
> (f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.
(h) Whether or not the work is part of the regular business of the employer.
(i) Whether or not the parties believe they are creating the relation of master and servant.
(j) Whether the principal is or is not in the business.

In determining whether individuals are employees or independent contractors, the Board has recently reaffirmed the application of the common law test of agency. *Roadway Package System, Inc.*, 326 NLRB No. 72 (1998); *Dial-A-Mattress Operating Corp.*, 326 NLRB No. 75 (1998). In so doing, the Board abandoned the principle that the "right to control" factor was entitled to any special weight and held that "the list of factors differentiating 'employee' from 'independent contractor' status under the common-law agency test is nonexhaustive, with no one factor being decisive." *Dial-A-Mattress*, slip op. at 8; see also, *Roadway*, slip op. at 7-9.

Applying the common-law agency test to the facts of this case, I find that the factors weigh more strongly in favor of independent contractor status for all of the Employer's drivers. In reaching this conclusion, I note particularly that all drivers have substantial opportunities to make an "entrepreneurial profit beyond a return on their labor and their capital investment," *Dial-A-Mattress*, slip op. at 8, and that the Employer exerts an insignificant degree of control over the "means and manner" of the drivers' performance as reflected, in part, by the absence of any meaningful disciplinary actions against drivers. I also find, for the reasons noted below, that the remaining factors present in the common law agency test do not, on balance, support employee status.

In *Roadway* and *Dial-A-Mattress*, the Board examined the absence or presence of "entrepreneurial opportunities" as a significant factor to be considered in determining employee status. Thus, in finding the truck drivers in *Dial-A-Mattress* to be independent contractors, the Board weighed the entrepreneurial factor and concluded that "Dial has structured its relationship with the owner-operators to allow them (with very little control) to make an entrepreneurial profit beyond a return on their labor and their capital investment." *Dial-A-Mattress*, slip op. at 8. After citing the relevant facts, the Board returned to this factor and found that "[i]n short, their separateness from Dial is manifested in many ways, including significant entrepreneurial opportunity for gain or

loss." Ibid. In contrast, the Board relied on the absence of entrepreneurial opportunity to find the truck drivers in *Roadway* to be employees, noting that the agreements between Roadway and its drivers "imposed substantial limitations and conditions . . . such that neither [agreement] retains any significant entrepreneurial characteristics." *Roadway*, slip op. at 12. Here too, the Board noted that "[o]ther indicators of entrepreneurship, such as performing outside work, business incorporation, use of additional drivers or helpers, or incentive-based income, continue to be absent." Ibid.

In the instant case, all of the drivers operate independent businesses and pay a fixed rental fee to the Employer bearing no relationship to daily, weekly or monthly earnings. The drivers keep what they earn and have the opportunity to set the hours of operation for their individual enterprises. Additionally, drivers have the discretion to seek and obtain passengers from a variety of venues (e.g., taxi stands, personally cultivated passengers, the Employer's computerized dispatch service, flag-downs, dispatches from other taxicab companies, or any combination thereof) without input from the Employer. Under similar circumstances, the Board has relied upon such evidence in finding that such drivers are not employees within the meaning of the Act. See, e.g., *Checker Cab Co.*, 273 NLRB1492, 1492-93 (1985); *City Cab of Orlando*, 285 NLRB 1191 (1987); *Air Transit*, 271 NLRB 1108, 1110-1111 (1984).

Significantly, unlike *Roadway*, the drivers in the instant case maintain other entrepreneurial indicators reflective of independent contractor status. In this regard, the record reflects that all drivers can use their vehicles in furtherance of other employment, including the performance of transportation services for other taxi companies in the greater New Haven area. Additionally, all drivers have the unrestricted right to cultivate "personals" and in the process, each driver must decide whether or how much to expend on business cards, cell phones, or other supplies and equipment in furtherance of their independent enterprise. Indeed, the "meter only" lease drivers apparently derive the majority of their income directly as a result of their individual client solicitation abilities.

Moreover, all drivers remain free at any time to select an ownership or leasing arrangement that may entail hiring driver-employees, sub-lessees or selecting a leasing partner. In this regard, as previously noted, all drivers have the right to enter into an

"owner-operator" agreement that permits the owner-operator to lease multiple vehicles and hire employees to drive the taxis. Thus, similar to the "business expansion" opportunities afforded to *Dial-A-Mattress* owner-operators, all of the Employer's drivers have the opportunity to expand their business limited only by their entrepreneurial abilities. In addition, all drivers have the right to enter into an "owner-operator plus" arrangement whereby the owner-operator maintains the option of selecting the number and identity of any sub-lessees, and the amount to charge those sub-lessees. Finally, all drivers have the opportunity to select the "split weekly with partner lease" arrangement whereby the driver selects a leasing partner, and the drivers then arrange amongst themselves the details regarding the usage of the taxi. In so doing, these drivers face possible negative consequences if their partner renders the vehicle inoperable.

Under any of the above arrangements, the Employer only maintains the limited discretion to exclude an individual who is not properly licensed or with whom it had a prior "unpleasant" experience. Significantly, drivers are not locked into their chosen leasing arrangement. Rather, at their option, drivers can switch between any of the various leasing arrangements at any time without any restrictions. Thus, as in *Dial-A-Mattress*, slip op. at 10, all drivers either already act in a distinctly entrepreneurial manner or have the opportunity to do so.

In considering whether an individual is an independent contractor, the Board has noted that whether a lessee has a "substantial investment" in the instumentalities of his or her work is an important factor. *City Cab of Orlando*, supra at 1194; see also, *Precision Bulk Transport*, 279 NLRB 437, 438 (1986). In the instant case, lease fees range from $99 ("daily" lease) to $690 ("single weekly with new car lease"). As a result, depending on the arrangement chosen, on an annualized basis, drivers are investing between $22,500 and $34,500. Thus, irrespective of which arrangement is chosen, by virtue of these lease payments alone, all drivers assume considerable entrepreneurial risk in operating their independent taxi enterprises. See e.g., *City Cab Co. of Orlando*, supra at 1994. Similarly, by purchasing their vehicle, owner-operators have an additional proprietary interest in their business.

In order to achieve a profit, drivers' revenues must exceed the chosen lease costs or investment payments, as well as insurance and other operational costs. With regard to operating expenses, all drivers are responsible for their respective gasoline expenditures, parking tickets, and moving motor vehicle violations. Additionally, owner-operators are responsible for all maintenance, towing costs and repairs to their vehicles whereas lessee drivers are responsible for expenditures, including towing, resulting from their negligent use of the vehicle.

All drivers also assume other financial risks such as non-payment from passengers or expending time and fuel to pick up a passenger who is not present when the driver arrives. Further, because drivers can set their schedules, they have the opportunity to maximize profits by working during the busiest hours.

It is clear from the foregoing that the record convincingly establishes that all of the Employer's drivers have considerable opportunities to make decisions that involve risks taken by an independent business person which directly affects their income. *Metro Cars*, 309 NLRB 513, 515 (1992); *Standard Oil Co.*, 230 NLRB 967, 968 (1977). Further, as more fully discussed below, the record is also devoid of any evidence demonstrating that the Employer imposes any requirement that materially restricts or limits drivers' entrepreneurial opportunities.

As noted above, although not controlling, another fundamental element of the common law agency test is the extent of control the master may exercise over the details of the purported servant's work. Historically, prior to *Roadway* and *Dial-A-Mattress*, the Board had focused primarily on this factor in determining employee status. See, e.g., *News Syndicate Co*., 164 NLRB 422, 423-24 (1967). In light of *Roadway* and *Dial-A-Mattress*, it is clear that "control" is no longer entitled to any special weight. However, it remains one of the factors to be considered.

In the instant case, the drivers generally conduct their business without significant company supervision. The Employer also does not generally control the "means and manner" of the drivers' performance. In this regard, I find that "accident investigators/road supervisors" are primarily responsible for training and assisting drivers and the Employer in post-accident matters and for ensuring that drivers operate their vehicles in a safe manner, rather than dictating the manner in which drivers are to

operate their enterprises. In this regard, there is no evidence that an "accident investigator/road supervisor" has ever imposed or recommended any adverse action regarding a driver.

Moreover, under almost all of the various owner-operator or lessee arrangements, drivers set their schedule without input from the Employer. Even under the "daily lease" and "split weekly without partner lease," where the company sets a twelve-hour leasing period, drivers have flexibility in determining their schedule. The drivers also maintain the option of switching from one owner-operator or lessee arrangement to another without restriction. Further, drivers are not required to report to the Employer at the beginning of their shift or to report their whereabouts to the Employer while on-duty, and they can take unlimited breaks without notice to the Employer. By virtue of their unfettered right to select or reject passengers from an array of options, drivers also maintain control of passenger selection. Even though drivers are limited in their ability to reject a DDS assignment once it has been accepted, the Employer permits drivers to "void out" such assignments for various enumerated reasons to the point that the exceptions nearly swallow the rule. Furthermore, it appears that the Employer's rules regarding "void outs" are reasonably designed to comply with its statutory obligations under the DOT's "Order of Service" regulation. As discussed more fully below, the Board has held that "requirements imposed by governmental regulations do not constitute control by an employer but is control by the governing body." *City Cab of Orlando*, supra at 1193; *Air Transit*, supra at 1110-1111; *Roadway*, slip op. at 14; *Don Bass Trucking, Inc.*, 275 NLRB 1172 (1985).

As previously noted, the Employer does not pay any compensation to drivers. Rather, drivers pay the Employer to operate under its Certificate. Consequently, the Employer lacks the incentive to "control" the material aspects of its relationship with drivers. In this regard, the Employer does not monitor the efforts undertaken by any of its drivers or the revenues generated by the drivers. While drivers must submit DOT-required trip sheets detailing the particulars of passenger trips, there is no evidence that the Employer reviews these forms or uses them to measure driver performance. Rather, it appears that the Employer merely stores these trip sheets in order to comply with DOT mandates. Consistent with the fact that the Employer does not compensate

drivers, the Employer also does not issue W-2 statements or IRS 1099 forms to drivers, nor does it make any federal or state income tax deductions for the drivers. Additionally, none of the drivers are required to wear uniforms or adhere to a dress code other than to be "neat and clean." Drivers are free to decorate the exterior and interior of their vehicles. Drivers are not required to exclusively purchase any items, including liability insurance or taxi supplies, from the Employer.

The Petitioner claims that employee status is revealed by the Employer's exercise of substantial control over the details of the drivers' work by establishing a set of work rules and disciplinary policies. Contrary to Petitioner's assertions, I find that the record reveals that the Employer has very few work rules. Further, nearly all the facts claimed by Petitioner allegedly demonstrating control over the means and manner of the drivers' performance in the instant case stem from requirements imposed by the DOT. In this regard, the Petitioner points to the fact that the Employer 1) does not allow a trade name other than "Metro Taxi" on the exterior of the vehicles; 2) trains and informs drivers with respect to motor vehicle safety issues and accepted taxicab practices; 3) regularly inspects vehicles for safety purposes; 4) requires drivers to complete accepted dispatch calls; 5) prohibits its drivers from having non-patrons ride in their taxicabs; and 6) requires that drivers regularly and accurately submit DOT-mandated trip sheets. As discussed above, all of these "rules" are either required by the DOT of any Certificate holder or are a reasonable measure designed to comply with a DOT regulation. As previously noted, current Board precedent establishes that government-imposed regulations do not show company control and, therefore, cannot constitute a factor favoring a finding of employee status. See, e.g. *Air Transit*, supra at 1110-1111*; Don Bass Trucking, Inc*., supra; *Roadway*, slip op. at 14. In this regard, the Board has noted that "the greater the control exerted by the governmental entity, the less opportunity for control by the putative employer." *Checker Cab Co.*, supra at 1492. Consistent with its reasoning that an employer cannot evade the law, the Board has held that an employer who complies with the law is not controlling the employees, rather the law is. *Air Transit*, supra at 1110, citing *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978). Accordingly, I find that those efforts reasonably

undertaken by the Employer to comply with DOT requirements do not support a finding of employee status.

Contrary to the Petitioner's contention, the record also reveals that the Employer does not have a formal disciplinary policy. As noted above, adverse actions consist either of terminating a lease or "de-authorizing" a driver's dispatch terminal. The record contains no specific examples of a driver having a lease terminated. Indeed, it appears that very few leases have ever been terminated. Although the record reveals that the Employer may terminate a lease or "de-authorize" a terminal for a variety of reasons, a careful examination of these reasons reveals that the Employer may terminate a driver only when the driver fails to adhere to certain DOT regulations, fails to comply with lease payment obligations, or engages in some act that evidences unsafe driving and therefore jeopardizes the public's safety and/or the Employer's Certificate. The first issue, compliance with DOT regulations, does not reflect on employee status. The second issue, non-payment, is a contractual matter, and the third issue involves safeguarding the public. Neither of the latter two issues is indicative of control that influences a determination of employee status. *City Cab of Orlando*, supra at 1194; *Don Bass Trucking*, supra at 1173 and 1175 (truck drivers found to be independent contractors despite evidence that they could be discharged for "using drugs," or "failing to comply with lease agreements"). See also, *Seafarers*, supra at 901-902.

With regard to "de-authorization," the record clearly shows that the Employer primarily relies on this procedure whenever a driver fails to pay his or her lease in a timely manner or fails to follow the DOT's "Order of Service" regulation. For the reasons discussed above, neither instance reflects control exerted by an employer over an employee.[20]

The Petitioner also claims that the drivers are employees because the Employer unilaterally sets lease terms. Although it appears that the Employer maintains the discretion to unilaterally change lease terms, the record reflects that drivers

[20] The record does reveal one instance in which a driver's terminal was de-authorized for one hour after arguing with a dispatcher. However, it appears that the dispatcher acted without authority in "de-authorizing" that terminal. In any event, I do not find that one isolated and very limited act of "discipline" occurring over a span of 13 years amounts to the type of discipline generally found to support a finding that drivers are statutory employees.

continuously negotiate with, and obtain concessions from, the Employer on those issues that arguably have the greatest impact on them; namely, the length of the lease, lease rates and late fees. In this regard, the record demonstrates that the Employer has created and tailored several leasing arrangements, such as the "monthly" lease and "meter only" lease, in response to driver demands. The Employer has also negotiated with new drivers regarding the amount of their lease payments. The Employer has also negotiated the amount of credit a driver will receive toward his or her lease payment following an accident or based upon a driver's sudden unavailability or illness. Finally, the record is replete with examples of the Employer negotiating and/or waiving late fees whenever that issue is raised by a driver. In *Dial-A-Mattress*, slip op. at 10, the Board found independent contractor status, in part, because those individuals had the opportunity to negotiate deals with the company. The fact that the relationship between the Employer and its drivers is marked by continuous negotiation further supports the conclusion that the drivers here are independent contractors. See *Dial-A-Mattress*, slip op. at 14 (drivers found to be independent contractors, in part, because they "enjoy[ed] certain freedoms…consistent with the operation of an independent business," including the freedom to negotiate for different terms).

The only controls not imposed by, or related to, DOT regulations appear to be: 1) the Employer's rule requiring drivers to wait for a period of five to twenty minutes whenever a patron fails to initially appear at the designated pick-up location; 2) the Employer's directives regarding post-accident procedures; and 3) the Employer's rule requiring drivers to load passengers at curbside only and not in the middle of the street. While these rules reflect control, in light of the record as a whole, I find them to be minor incidents insufficient to support a finding that drivers are statutory employees.

The Petitioner also claims that the Employer controls the details of its drivers' work by setting the rates that drivers can charge their customers. While such a factor points toward employee status, it is clear that such rates are established by the DOT and that the Employer's statutory right to petition the DOT for the establishment of metered and flat fares is derived from its exclusive position as Certificate holder. In this regard, drivers have the opportunity, at least in connection to applications for changes to the meter rate, to appear before the DOT's public hearing on the matter, and argue

for a rate that is contrary to the Employer's request. Furthermore, as noted above, unlike DOT–regulated fares, drivers remain free to negotiate out-of-state fares with passengers.

Finally, the Petitioner claims that drivers are employees because they must periodically perform assignments for Elm City Livery, a company separately owned by Scalzi. The record reflects that Elm City Livery maintains its own corps of drivers and does not regularly rely on the Employer drivers to perform its assignments. Further, at their discretion, the Employer's drivers can accept any spillover assignments that Elm City Livery is incapable of performing. Contrary to Petitioner's assertions, I do not find anything related to the relationship between the Employer and Elm City Livery that supports a finding of employee status for the Employer's drivers. In this regard, the Employer's drivers' ability to earn additional income, at their discretion, from Elm City Livery assignments does not necessarily convert them into statutory employees. Rather, it reflects yet another example of the Employer's drivers having discretion to accept dispatches from other taxi companies.

The record reflects that drivers who operate taxicabs under the Employer's Certificate are not subject to any of the terms and conditions typically found in an employer-employee relationship. For example, there are no employment applications, employee handbooks, or driver meetings, and the Employer does not provide benefits, unemployment coverage or workers' compensation coverage to its drivers. Moreover, the Employer does not restrict a driver's use of the vehicle for personal business or pleasure. With regard to the latter issue, the Board has noted that the greater the personal control by the lessee, the more likely it is that the relationship is that of an independent contractor. *City Cab of Orlando*, supra at 1194.

Under the common law agency test, another factor to be considered is whether or not the parties believe they are creating the relation of master and servant. In this regard, as previously noted, each of the agreements entered into by drivers express an intent on the part of the contracting parties to create an independent contractor relationship. Generally, the Board does not regard as determinative the fact that the written agreement defines the relationship as one of "independent contractor." *National Freight*, *Inc.*, 153 NLRB 1536 (1965); *Big East Conference*, 282 NLRB 335, 345 (1986).

However, in the instant case, several drivers testified that they viewed themselves as independent contractors and that they acted accordingly. For example, one driver testified that despite his lease obligations, he ceased pursuing fares whenever he "felt lazy" because he viewed himself to be "a self-employed taxi driver" who could "come and go" as he pleased. Another driver generated personalized invoices for at least one of his "personals" in furtherance of his independent enterprise. This driver testified that he viewed himself as "self-employed" because he made his own decisions concerning his business, and because the Employer informed him that he was an "independent contractor" who could take any action he desired in furtherance of his independent business. Accordingly, on balance, this factor does not support employee status in this case. See *Dial-A-Mattress*, slip op. at 9.

Consistent with a conclusion that the drivers are independent contractors, the drivers, not the Employer, provide themselves with most, if not all, of the necessary equipment and supplies, such as cell phones and business cards, required to further their business. In view of the fact that drivers can key into any one of the Employer's 63 zones, or can choose to exclusively obtain passengers from a variety of methods, it is clear that the drivers determine their work location. I also note that drivers have created business identities separate and distinct from that of the Employer. In this regard, some drivers have formed their own incorporated businesses, distributed unique business cards to passengers bearing their corporate identities, and cultivated private clientele. See, *Air Transit*, supra at 1109 (independent contractors were free to make their own arrangements with clients); *City Cab of Orlando*, supra at 1206 (taxi drivers who developed business relationships with their own regular clients found to be independent contractors).

Finally, in 1998, the Connecticut Supreme Court examined whether the Employer's owner-operators were employees or independent contractors under state law in a case arising from a denial of worker's compensation to a driver killed while on duty. Using the "right-to-control" test, the Court held that the drivers were independent contractors. *Hanson v. Transportation General, Inc.*, 245 Conn. 613, 716 A.2d 857 (Conn. 1998). Although not controlling, I find this ruling is to be accorded due

consideration in deciding the status of the Employer's drivers. See, e.g., *Lorenz Schneider Co.*, 209 NLRB 190, fn. 5 (1974), enfd. denied, 517 F.2d 445 (2d Cir. 1975).

Accordingly, based upon the above and the record as a whole, I find that none of the drivers that the Petitioner seeks to represent are employees within the meaning of the Act. Rather, I find these individuals to be independent contractors.

## ORDER

**IT IS HEREBY ORDERED** that the petition filed in this matter be, and it hereby is, dismissed.

## Right to Request Review

Upon the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by August 29, 2000.

Dated at Hartford, Connecticut this 15th day of August, 2000.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
Region 34
National Labor Relations Board

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