Saskatchewan
Labour Relations Board

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKS INTERNATIONAL UNION (UNITED STEELWORKERS), Applicant v. COMFORT CABS LTD., PHYLLIS SCHLOSSER INVESTMENT LTD., J G TAXIS LTD., and FRIE TAXIS LTD., Respondents

LRB File Nos. 163-14 & 221-14; April 16, 2015.
Vice-Chairperson Steven D. Schiefner; Members: Duane Siemens and Ken Ahl

For the Applicant Union:	Mr. Peter J. Barnacle.
For Comfort Cabs Ltd:	Mr. Robert Frost-Hinz.
For Phyllis Schlosser Investment Ltd., J G Taxis Ltd., and Frie Taxis Ltd.:	Mr. Timothy Rickard.

Unfair Labour Practices – Duty to Bargain in Good Faith – Trade union representing taxi drivers alleges respondent employer refused to bargain collectively with respect to terms and conditions of taxi plate leases – Employer argues that taxi plate leases are not properly the subject of collective bargaining and involve agreements with third parties not the employer – Board concludes that terms and conditions of taxi plate leases are distinguishable from terms and conditions of employment relationship with employer – Board not satisfied that taxi lease agreements are properly the subject of collective bargaining on the basis that leasing a taxi plate is primarily an act of entrepreneurialism not employment – Board not satisfied that employer had authority or control over taxi plate leases or that Union has authority to bargain on behalf of taxi plate lessees in their dealings with franchise owners – Board not satisfied that employer failed or refused to bargain in good faith - Application dismissed.

Unfair Labour Practices – Direct Bargaining – Trade union representing taxi drivers alleges respondent employer breached statutory freeze and bargained directly with taxi drivers when it asked lease operators to sign written lease agreements - Employer argues that taxi plate leases are not properly the subject of collective bargaining and involve agreements with third parties not the employer – Board concludes that terms and conditions of taxi plate leases are distinguishable from terms and conditions of employment relationship with employer – Board not satisfied that taxi lease agreements are properly the subject of collective bargaining on the basis that leasing a taxi plate is primarily an act of entrepreneurialism not employment – Board not satisfied that employer breached statutory freeze when lease operators were asked to sign written lease agreements with franchise owners – Application dismissed.

Employer – Related Employer – Trade union certified to represent taxi drivers employed by taxi company – Trade union argues respondent franchise owners ought to be declared common employer with taxi company – Board reviews criteria for granting a common employer declaration under *Saskatchewan Employment Act* – Board not satisfied that a valid and sufficient labour relations purpose would be served by declaring respondent franchise owners and taxi company to be one employer for labour relations purposes - Board not satisfied that relationship between respondent franchise owners and taxi company was likely to erode the Union's collective bargaining rights – Board also concludes that Union's desire to declare only some franchise owners to be common employers would be ineffectual – Application dismissed.

***The Saskatchewan Employment Act*, s. 6-20 & 6-62(1)(d) & (n).**

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** On August 1, 2014, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union (United Steelworkers) (the "Union") filed an application with the Saskatchewan Labour Relations Board (the "Board") alleging that Comfort Cabs Ltd. ("Comfort Cabs") had committed various violations of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*Act*") related to collective bargaining. This application was assigned LRB File No. 163-14. The common theme of these allegations was that Comfort Cabs had refused to bargain with the Union with regard to the terms and conditions of taxi plate leases. During collective bargaining Comfort Cabs, a certified employer, took the position that taxi plate leases were not properly the subject matter of collective bargaining and did so for a number of reasons, including the assertion that taxi plate leases were beyond its authority and control as they involve agreements with third-parties; namely, the taxi plate franchise owners.

[2] On October 1, 2014, the Union filed an application with the Board seeking a declaration that Comfort Cabs and three (3) named taxi plate franchise owners are one (1) common employer for purposes of collective bargaining. This application was assigned LRB File No. 221-14. Both Comfort Cabs and the respondent franchise owners resist the Union's application taking the position that they are not related or operated under common direction and control. In the alternative, they argue that, even if they are related, that no labour relations purpose would be served by declaring them to be common employers. Rather, they argue that a

common employer declaration would have the practical, if not legal, effect of expanding the Union's certification Order.

[3] The Union's applications were heard concurrently in Saskatoon on February 18, 2015 and March 11, 2015. In support of its applications, the Union called Mr. Mike Pulak, the Union's national staff representative. The Union also called Mr. Bawa Jewad and Mr. Gurpreet Singh. Both of these individuals were taxi drivers employed by Comfort Cabs and members of the Union's bargaining unit. In addition, both of these individuals were also lease operators and leased taxi plates from franchise owners. In the case of Mr. Jewad, he leased a taxi plate from Phyllis Schlosser Investments Ltd. In the case of Mr. Singh, he leased a taxi plate from J G Taxi Ltd.

[4] In response to the Union's applications, Comfort Cabs called Mr. Javed Mohammad Mian, the manager of Comfort Cabs. The respondent franchise owners declined to call any evidence.

[5] Having considered the evidence in these proceedings, we find that both of the Union's applications must be dismissed.

[6] With respect to LRB File No. 163-14, we find that Comfort Cabs was not under a duty to bargain collectively with the Union regarding the terms and conditions of taxi plate leases. As a consequence, Comfort Cabs did not violate *The Saskatchewan Employment Act* by refusing to bargain with the Union regarding these matters. In addition, we find that neither Comfort Cabs nor the respondent franchise owners violated the statutory freeze by providing written leases agreements to lease operators without first negotiating the terms of such agreement with the Union. Firstly, in our opinion, leasing a taxi plate is not a state of employment; rather, it is an act of entrepreneurialism. While taxi drivers may be dependent contractors in their dealings with taxi brokers (and thus they are treated as "*employees*" for purposes of *The Saskatchewan Employment Act*), in our opinion, lease operators are independent contractors in their dealings with franchise owners (and thus this particular relationship falls outside of the scope of the *Act*). Secondly, Comfort Cabs does not own or have control of the subject taxi plates. Rather, these taxi plates are owned and controlled by various third parties; namely, franchise owners. While Comfort Cabs is an agent for many franchise owners, it does not have sufficient control over the subject taxi plates to enable collective

bargaining. Simply put, notwithstanding the role Comfort Cabs plays in their management, taxi plates remain in the control of the franchise owners that own them. Thirdly, the Union was certified to represent taxi drivers in their employment relationship with Comfort Cabs; the Union was not certified to represent lease operators in their negotiations with franchise owners over the terms and conditions of taxi plate leases. To obtain such authority (assume such authority were possible), would require a certification application naming the affected franchise owners as respondents. In any event, none of the respondent franchise owners were named in the application that resulted in the Union's current certification Order and, as such, they are not bound by the Union's certification Order.

[7] With respect to LRB File No. 163-14, while the evidence in these proceedings tended to support the Union's position that Comfort Cabs and the respondent franchise owners are sufficiently related and operated under common control and direction, we were not satisfied that declaring Phyllis Schlosser Investments Ltd., J G Taxis Ltd., and Frie Taxis Ltd. to be common employers with Comfort Cabs would serve a valid and sufficient labour relations purpose. Simply put, there was no evidence of an actual or imminent erosion of the Union's bargaining rights. Rather, the purpose of the Union's common employer application was an attempt to bring the respondent franchise owners to the bargaining table so that the Union could negotiate with respect to the terms and conditions of taxi plate leases. However, even assuming that taxi plate leases are properly the subject of collective bargaining (an assumption with which the Board does not agree), bringing only three (3) franchise owners to the table would be ineffectual in permitting collective bargaining with respect to all taxi plate leases. Thus, even if the purpose of the common employer declaration is to remove an obstacle preventing meaning collective bargaining, the Union's application would not achieve the desired objective. Absent a compelling reason for doing so, we decline to exercise our discretion to make a common employer declaration.

[8] These are our reasons for the determinations we have made in these proceedings.

Facts:

[9] Comfort Cabs is a taxi company (or "*taxi broker*" as it is known in the industry) operating in the City of Saskatoon. This company was formed in 2009 by four (4) franchise owners who were generally dissatisfied with the operation of the taxi company with whom they

were previously associated. At that time, these four (4) franchise owners owned approximately fifty-two (52) taxi plates. When these franchise owners decided to form Comfort Cabs, all of the lease operators (also known as "lessees") who leased taxi plates from them were given the option of moving to the new taxi company and driving under the banner of "Comfort Cabs". In the intervening years, ownership of Comfort Cabs has changed; most notably, two (2) of the original founders have departed; leaving control of Comfort Cabs in the hands of Mr. James Frie and Mr. Khodr Bardough. Collectively, these two (2) franchise owners own approximately twenty-seven (27) taxi plates. However, a number of new franchise owners have affiliated their taxi plates with Comfort Cabs. At the time of the hearing, approximately eighty (80) taxi plates owned by dozens of different franchise owners were affiliated with Comfort Cabs and the company was growing. It should be noted that none of these new franchise owners have any ownership interest in Comfort Cabs.

[10] This Board has previously described the taxi industry in general, together with operational structure employed by Comfort Cabs. We have also previously described the relationships between Comfort Cabs and affiliated taxi plate franchise owners, as well as the relationship between franchise owners and the taxi drivers who lease taxi plates (i.e.: lease operators). In the interests of transparency, we would like to repeat this background information because, as we noted in *United Steelworkers v. Comfort Cabs*, (2013) 235 C.L.R.B.R. (2d) 128, 2013 CanLII 62414 (SK LRB), LRB File No. 249-13, the taxi industry is an awkward fit within the traditional model of industrial relations envisioned by *The Saskatchewan Employment* Act:

> *[6] Comfort Cabs is a taxi service operating in the City of Saskatoon. All of the individuals named in the Union's application drove taxis for Comfort Cabs until recently.*
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> *[7] In most cities in Canada, the taxi industry is heavily regulated at the municipal level. In Saskatoon, for example, the city regulates the taxi industry through a number of means, including the distribution of taxi licenses (or "plates" as they are commonly referred) and through the regulation of such things as types of vehicles, defined areas of service, and the fares that can be charged to passengers. To operate a vehicle as a taxi cab in Saskatoon, the owner must have a valid taxi plate. Taxi plates are obtained from the City and their numbers are limited. An individual who has obtained a single taxi plate and who operates their own vehicle as a taxi using that plate is known as a "single car franchise owner". None of the subject taxi driver were single car franchise owners. Rather, they each leased their respective taxi plates from someone else who was not using it at the time.*
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> *[8] A little background on the taxi industry may be helpful. The scarcity of taxi plates has caused these licenses to have capital value. In Saskatoon, this value can easily exceed the cost of the vehicle upon which the licenses are*

placed. Many of the people who obtain taxi plates (common known as "franchise owners") will own multiple plates and may choose not to operate a vehicle for all of the plates they own. Some franchise owners choose not to operate a vehicle for any of the plates they own, treating the ownership of taxi plates as merely an investment opportunity. In either case, franchise owners lease their surplus plates to taxi drivers who have their own vehicle and desire to operate that vehicle as a taxi. Individuals who lease a taxi plate and own their own vehicle are referred to as "lease operators". Lease operators pay a monthly franchise fee to the franchise owner for the lease of the taxi plate. The cost of franchisee fees is paid out of the revenue generated through the operation of the vehicle (i.e.: the fares paid by passengers) while it is in service as a taxi.

[9] In the taxi industry, taxis tend to be operated on a twenty-four (24) hour basis and thus are driven by multiple taxi drivers. Both single car franchise owners and lease operators typically only operate their own vehicle for a portion of the time it is in service and arrange for other qualified taxi drivers (a "taxi driver") to operate their vehicle for remainder of time the vehicle is available. Taxi drivers pay a shift rental or other fee to the owner of the vehicle in compensation for the use of that vehicle. Shift rentals are paid by taxi drivers out of the fares they receive for passengers while operating the taxi.

[10] Finally, whoever is driving the taxi is responsible for the cost of the fuel consumed while operating that vehicle. These costs are paid by the single car franchise owners, lease operators and taxi drivers out of the fares they received while operating the taxi.

[11] Whether required by law or out of convenience or efficiency, taxis are generally operated as part of a larger taxi service or dispatcher, such as Comfort Cabs. Taxi services/dispatchers provide a number of services to franchise owners (companies/individuals who lease their taxi plates to others), single car franchise owners (individuals who operate a taxi using their own taxi plate), lease operators (individuals who operate a taxi using a plate leased from someone else) and taxi drivers (individuals who merely drive a taxi owned by someone else).

[12] Firstly, taxi companies often act as brokers for franchise owners by connecting them with lease operators who wish to lease their surplus or available taxi plates. Generally speaking, because of the scarcity of taxi plate, there tends to be a wait list for taxi drivers desiring to obtain a taxi plate. In other words, even if you have a vehicle (or are willing to buy a vehicle), a taxi driver may not be able to find an available taxi plate for a significant period of time. Taxi companies collect and remit franchise fees from lease operators on behalf of franchise owners.

[13] Secondly, taxi companies provide dispatch and other services on behalf of the operators that are associated with them and operate under their marketing banner, including single car franchise owners, lease operators and drivers; each of whom pay a monthly fee to the taxi company. To the various individuals that drive a taxi for them, taxi companies provide coordinated dispatch services, radio services, metering services, computer services, office and accounting services, and marketing. In addition, both single car franchise owners and lease operators enter into contractual arrangements with taxi companies related to certain characteristics of the vehicles used in association with a particular taxi company, including age of the vehicle and its colour and condition of operation.

> *[14] The income earned by single car franchise holders and lease operators is determined by the fares earned while operating their vehicle, plus the shift rentals paid by other drivers who operate their vehicle, minus the costs of repairs and upkeep of the vehicle, minus the franchise fees (in the case of lease operators) paid to the owner of the taxi plate, and minus the fees charged by the taxi company with whom they are associated. The income earned by taxi drivers is determined by the fares earned while driving taxi minus the shift rental for the vehicle they are driving, minus the cost of fuel, and minus the fees charged by the taxi company with whom they are associated. To say the least, there are a number of factors that must be considered when calculating the income earned by the various individuals who drive taxis for a living.*
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> *[15] Collective bargaining has a novel and arguably awkward application in the taxi industry. The individuals who drive taxis are not employees in the traditional sense. They are not paid by their employer, the taxi company; rather they are paid by the customers who utilize their services. Nonetheless, labour boards have accepted that certain individuals who drive taxi are dependent contractors and, thus, may be treated as "employees" for purposes of The Trade Union Act. In addition, labour boards have accepted that taxi companies can exercise a certain level of control over workplace rules and working conditions for taxi drivers (either inherently or as a result of delegated authority from affiliated franchise owners). Once organized, the members of the bargaining unit (typically single car franchise owners, lease operators and taxi drivers) then bargain with the taxi company to, inter alia, minimize the fees and other charges paid to the tax company and with respect to other terms of their engagement with the taxi company, such as dispatch rules, installation of new equipment, etc.*

[11] On April 3, 2014, the Union was certified by this Board as the bargaining agent for the following unit of employees:

> *All taxi drivers employed by Comfort Cabs Ltd., operating as Comfort Cabs, except those persons who own or control two (2) or more taxi cabs, dispatchers, office personnel, supervisors and management above the rank of supervisors.*

[12] The parties began collective bargaining toward their first collective agreement on July 17, 2014. While progress was made during collective bargaining on a number of matters, Comfort Cabs refused to bargain with the Union regarding the leasing of the taxi plates that operate under the Comfort Cabs' banner. The Union wished to negotiate with respect to such matters as allocation of or access to surplus taxi plates when they become available for lease, the term of taxi plate leases (including limitations on the conditions under which leases may be terminated by a franchise owner), and the lease fees paid to franchise owners. Comfort Cabs took the position in bargaining (as it did in these proceedings) that these are not matters over which it has any authority or control. Rather, Comfort Cabs takes the position that the terms and conditions associated with taxi plate leases must be negotiated between lease operators and franchise owners; not Comfort Cabs.

[13] On September 9, 2014, the parties agreed on a new collective agreement but agreed to disagree on whether or not terms and conditions of taxi plate leases are properly the subject matter of collective bargaining. The parties entered into a memorandum of understanding wherein they agreed to reopen their new collective agreement in the event this Board should conclude that Comfort Cabs erred in the position it took regarding taxi plate leases.

[14] By way of additional background, different taxi plate franchise owners have different relationships with Comfort Cabs. Some franchise owners own a single taxi plate and operate a taxi cab under that plate ("owner/operator"). At the time of the hearing, there were approximately ten (10) taxi drivers employed by Comfort Cabs that were owner/operators. Owner/operators are members of the bargaining unit. It should be noted that, owner/operators generally have little involvement with Comfort Cabs as a franchise owner, other than the agreement to operate under its banner. Obviously, owner/operators do not need the services of Comfort Cabs to collect lease fees, to prepare documentation, or to communicate with a lessee because they are both the owner of the taxi franchise and the person operating the vehicle upon which that plate is attached.

[15] On the other hand, some franchise owners who are affiliated with Comfort Cabs own or control more than one (1) taxi plate. Some of these franchise owners may drive taxi; some do not. Regardless of whether they drive taxi for Comfort Cabs, if they own or control two (2) or more taxi plates, they are excluded from the bargaining unit. This group of franchise owners (i.e. "multi-plate owners") can have differing relationships with Comfort Cabs. Some multi-plate owners merely agree to operate their plates under the Comfort Cabs banner but independently locate their own lease operators, negotiate the terms and conditions for their taxi plate leases, and collect their own lease fees entirely independent of Comfort Cabs. On the other hand, some multi-plate owners retain Comfort Cabs to manage their taxi plates for them. In which case, Comfort Cabs can be responsible for a broad range of services, including locating potential lessees, communicating with lease operators on behalf of franchise owners, collecting lease fees from lessees and remitting such fees to franchise owners, communicating with franchise owners about the conduct of lease operators, and reporting to other agencies, such as Canada Revenue Agency. Multi-plate franchise owners who retain Comfort Cabs for these services pay a monthly management fee to Comfort Cabs.

[16] All three (3) of the respondent franchise owners; namely, Phyllis Schlosser Investment Ltd., Frie Taxi Ltd. and JG Taxi Ltd., have retained and pay a management fee to Comfort Cabs for the management of their respective taxi plates.

[17] As previously indicated, some franchise owners also have an ownership interest in Comfort Cabs. For example, Mr. James Frie owns seventy-five percent (75%) of Comfort Cabs and he also owns approximately twenty-four (24) of the taxi plates that are operated in affiliation with Comfort Cabs, through his company, JG Taxis Ltd. Similarly, Mr. Khodr Bardouh owns twenty-five percent (25%) of Comfort Cabs and he also owns approximately three (3) taxi plates that are affiliated with Comfort Cabs. However, it should be noted that the vast majority of franchise owners do not have an ownership interest in Comfort Cabs.

[18] In rounding out the discussion of franchise owners, it should be noted that for some franchise owners a taxi plate is merely a form of investment, with the owner having little interest in the day-to-day activities of the taxi business. Such owners would understandably be very reliant on the management services provided by Comfort Cabs. On the other hand, plate owners are not required to stay with Comfort Cabs and, if they become dissatisfied with either the operations of Comfort Cabs or the management of the taxi plates, they are free to move to another dispatch company.

[19] Mr. Mian testified that, after this Board's decision of April 22, 2014 in *United Steelworkers v. Comfort Cabs Ltd., et.al.*, (2014) 246 C.L.R.B.R. (2d) 1, LRB File Nos. 240-13 to 248-13 & 328-13, he was informed by Mr. Frie that the respondent franchise owners wanted to enter into written lease agreements with their respective lease operators. Mr. Mian testified that he was not involved in the drafting of these documents but he was asked by Mr. Frie to meet with lessees and provide them with the draft lease documents that had been prepared for the respondent franchise owners. Mr. Mian agreed to do so and began meeting with those taxi drivers who were lease operators with Phyllis Schlosser Investment Ltd., Frie Taxi Ltd. or J G Taxi Ltd. in June/July of 2014.

[20] In total, there were approximately thirty-six (36) lessees who were asked to sign written lease agreements. Mr. Mian testified that the majority of these individuals readily signed the draft lease agreements and that he witnessed their signatures when they did so. Some, however, asked for time to review the documents, returned some time later, and then signed the

lease agreements. While many asked Mr. Mian questions about the lease documents, none negotiated any changes from the original documents that were provided by the respondent franchise owners. As a result, all of the written lease agreements that were signed by lease operators were essentially the same.

Relevant statutory provision:

[21] Relevant provisions of *The Saskatchewan Employment Act* include the following:

> ***Unfair labour practices – employers***
> *6-62(1) It shall be an unfair labour practice for an employer, or any other person acting on behalf of the employer, to do any of the following:*
>
> > *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are employees of the employer;*
> >
> > ...
> >
> > *(n) before a first collective agreement is entered into or after the expiry of the term of a collective agreement, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in a bargaining unit without engaging in collective bargaining respect the change with the union representing the employees in the bargaining unit;*
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> ***Board may declare related business to be one employer***
> *6-20(1) On the application of any union or employer affected, the board may, by order, declare more than one corporation, partnership, individual or association to be one employer for the purposes of this Part if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by one person through the different corporations, partnerships, individuals or associations.*
> *(2) Subsection (1) applies only to corporations, partnerships, individuals or associations that have common control or direction on or after October 28, 1994.*

Applicant Union's argument:

[22] The Union takes the position that taxi plate leases are an integral part of the employment relationship between taxi drivers and Comfort Cabs. The Union argues that, in the taxi industry, taxi plate leases play an important, if not, defining role in establishing working conditions for lease operators. In taking this position, the Union relies on the decision of the Ontario Labour Relations Board in *Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 v. Diamond Taxicab Association (Toronto) Limited, et. al.*, [1995] O.L.R.B.Rep. 753, (1995) 27 C.L.R.B.R. (2d) 1, 2012, wherein that board concluded that taxi plate leases were properly the subject of collective bargaining because of the

influence these arrangements had on the working conditions for lease operators. The Union takes the position that, unless it is able to bargain with respect to the terms and conditions of taxi plate leases, its certification Order is hollow. The Union acknowledges that the taxi industry is an "*awkward*" fit within the traditional model of industrial relations. However, the Union takes the position that, now that taxi drivers have been acknowledged to be "*employees*" for purposes of collective bargaining, it makes no sense to exclude critical elements affecting the terms and conditions of their employment, such as taxi plate leases.

[23] The Union argues taxi plate leases are properly the subject of collective bargaining with Comfort Cabs and its refusal to bargain with respect to the terms and conditions of taxi plate leases was a breach of the duty to bargain in good faith. Furthermore, the Union argues that the actions of Comfort Cabs (and/or the respondent franchise owners) in providing written lease agreements directly to lessees without first negotiating these agreements with the Union was a breach of the statutory freeze and intended to undermine the status of the Union as the exclusive bargaining representative of taxi drivers in their dealings with their employer.

[24] Finally, the Union argues that, in light of the conduct of the respondent franchise owners, they ought to be made a party to the collective agreement because they were the ones that sought to circumvent the Union and attempting to negotiate directly with lessees regarding matters that should properly be the subject of collective bargaining. The Union notes that collectively these franchise owners own or control thirty-six (36) of the approximately eighty (80) taxi plates associated with Comfort Cabs.

[25] By way of remedy, the Union seeks a declaration that Comfort Cabs has violated *The Saskatchewan Employment Act*, together with an Order that Comfort Cabs return to the bargaining table prepared to negotiate the terms and conditions of taxi plate leases. The Union also seeks a declaration that the respondent franchise owners are common employers with Comfort Cabs and that they are bound by the Union's certification Order.

[26] Counsel on behalf of the Union filed a written brief which we have read and found to be helpful.

Argument on behalf of Comfort Cabs and the Respondent Franchise Owners:

[27] Comfort Cabs takes the position that it was under no obligation to bargain collectively with the Union regarding the terms and conditions of taxi plate leases. As a consequence, Comfort Cabs argues that it did not violate any duty imposed on it by *The Saskatchewan Employment Act.* To the contrary, Comfort Cabs notes that it explained its position to the Union at the outset of collective bargaining and agreed to re-open its collective agreement with the Union in the event of an adverse finding from this Board.

[28] Comfort Cabs argues that taxi plate leases involve arrangements between lease operators and franchise owners and that these are matters beyond the control and authority of Comfort Cabs. Simply put, Comfort Cabs takes the position that taxi plate leases are arms'-length, entrepreneurial arrangements between some of its taxi drivers and franchise owners. Comfort Cabs argues that these arrangements are external to its employment relationship with taxi drivers. Therefore, Comfort Cabs argues that the actions of providing written lease agreements to lease operators did not represent a violation of the statutory freeze set forth in *The Saskatchewan Employment Act.*

[29] Counsel on behalf of the respondent franchise owners adopted the arguments of Comfort Cabs. In addition, the franchise owners argued that no labour relations purpose could be served by this Board making a common employer declaration as they have taken no action to erode or undermine the Union's collective bargaining rights with Comfort Cabs. To the contrary, the franchise owners argue that declaring that they are subject to the Union's certification Order could have unintended consequences and would have the effect of dramatically expanding the scope of the Union's certification Order.

[30] Both Comfort Cabs and the respondent franchise owners asked that the Union's applications be dismissed. Council on behalf of Comfort Cabs filed a detailed brief of law, which we have read and found to be helpful.

Analysis – Taxi Plate Leases and Collective Bargaining:

[31] There is little doubt that the threshold question in these proceedings is whether or not Comfort Cabs was under a duty to bargain with the Union regarding taxi plate leases. There is no dispute that it refused to do so. However, to the employer's credit, it agreed to reopen its

collective agreement with the Union in the event it erred in the position it took at collective bargaining. Simply put, during collective bargaining, the parties agreed to disagree on the status of taxi plate leases in their collective bargaining relationship but that disagreement did not prevent the parties from arriving at a first collective agreement. Nonetheless, if taxi plate leases are properly the subject matter of collective bargaining between Comfort Cabs and the Union, then the Union's allegation regarding a failure to bargain is well founded.

[32] There is also no dispute that the respondent franchise owners asked Mr. Mian to present written taxi plate lease agreements directly to lease operators while Comfort Cabs was engaged in collective bargaining with the Union. If taxi plate leases are properly the subject of collective bargaining with Comfort Cabs, then the Union's allegations regarding a breach of the statutory freeze and direct bargaining are also well founded.

[33] However, for the reasons that follow and despite fulsome argument on behalf of the Union, we find that taxi plate leases are not properly the subject matter of collective bargaining with Comfort Cabs.

[34] In this Board's decision in *United Steelworkers v. Comfort Cabs Ltd., et.al.*, supra, we commented on the entrepreneurial aspects of leasing a taxi plate for a taxi driver;

> *[60] As we noted in our interim decision, the taxi industry is an imperfect fit within the normal model of industrial relations anticipated by The Trade Union Act. While driving a taxi under the banner of a taxi company bears many of the indicia of a traditional employment relationship for taxi drivers (as dependent contractors or otherwise), the lease of a taxi plate by a taxi driver from a franchise owner is an even more awkward fit. Leasing a taxi plate is largely an act of entrepreneurialism; it is not the same thing as a job promotion within a workplace. While lease operators have the potential to make more money than a taxi driver and have more control over their work environment, they also bear a non-trivial risk that they could lose money through those arrangements. Furthermore, while Comfort Cabs has (or at least had) a role in bringing lease operators and franchise owners together, a taxi plate lease is a contractual relationship between lease operators and franchise owners. While Comfort Cabs certainly played a role as agents for some franchise owners, the taxi plates that were leased by the subject drivers were never owned by Comfort Cabs. In our opinion, the relationship between lease operators and franchise owners is a matter not necessarily falling within the employment relationship between the subject drivers and Comfort Cabs. While the contractual relationship between lease operators and franchise owners is adjunct to the employment relationship between lease operators and taxi companies, one is not necessarily a corollary of the other.*

[35] In *United Steelworkers v. Comfort Cabs Ltd., et.al.,* supra, we left undecided the question of the status of taxi plate leases in collective bargaining with the Union. With these proceedings, we are called upon to answer that question. In doing so, we have organized our analysis around the following questions:

1. Are the terms and conditions of taxi plate leases distinguishable from the terms and conditions of the employment relationship between Comfort Cabs and its taxi drivers?

2. Are the lease arrangements between taxi plate lessees and the owners of taxi plate franchises properly the subject of collective bargaining? If yes, with whom would the Union negotiate these issues?

3. If taxi plate leases are properly the subject of collective bargaining, does the inclusion of leases within the purview of the Union's authority affect the appropriateness of the Union's bargaining unit?

Are the terms and conditions of taxi plate leases distinguishable from the terms and conditions of the employment relationship between Comfort Cabs and its taxi drivers?

[36] As noted, the Union takes the position that taxi plate leases are an integral part of the employment relationship between taxi drivers and Comfort Cabs. As noted, the Union argues that taxi plate leases play an important, if not defining, role in establishing working conditions for many taxi drivers. In this regard, the Union points to the number of matters in the Union's collective agreement with Comfort Cabs that are also contained in the draft lease agreements that were provided to lease operators by the respondent franchise owners. The overlap in subject matters include such things as, the cost of supplying, installing, removing, repairing and replacing equipment in taxis, insurance on vehicles used as taxis, and the safety roadworthiness, and cleanliness of vehicles used as taxis. The Union argues that Comfort Cabs exercises sufficient influence, if not *de facto* control, over taxi plate leases to enable meaningful collective bargaining to occur. Simply put, the Union argues that, without the authority to negotiate with respect to taxi plate leases, its ability to represent taxi drivers is frustrated.

[37] Although there is some obvious overlap, in our opinion, the terms and conditions of taxi plates are distinguishable from the terms and conditions of the employment relationship

between taxi drivers and Comfort Cabs. As this Board has previously noted, many taxi drivers desire to lease a taxi plate because doing so provides them with greater control over their working conditions, as well as a greater potential to generate income. Lease operators typically own the vehicle they drive and have greater control over the hours they work. Furthermore, there is a not-insignificant potential for a taxi driver to increase his/her income[1] if they can lease a taxi plate. On the other hand, you are not required to lease a taxi plate to be a taxi driver. In fact, many taxi drivers are not lease operators.

[38] Becoming a lease operator is not analogous to a promotion; it is something entirely different. It is an act of entrepreneurialism. Taxi drivers do have the potential to earn addition revenue through leasing a taxi plate but they generate additional revenue by renting their vehicle to other drivers. In doing so, lease operates are not paid for their labour; rather, they earn additional income through equipment rental. While in the taxi industry becoming a lease operator may have a number of employment-related benefits for a taxi driver, the primary value of a taxi lease is derived from the ability of the lease operator to rent his/her car to other drivers.

[39] In our opinion, leasing a taxi plate is an arrangement that is parallel to, but not inherently part of, the employment relationship between taxi drivers and their taxi broker. While Comfort Cabs undoubtedly plays a role in the management of many taxi plates, taxi plate leases are, by definition, agreements between lease operators and franchise owners; not Comfort Cabs. With all due respect, it is not axiomatic that taxi plate leases are automatically or necessarily part of the employment relationship between Comfort Cabs and its employees. To the contrary, the heart of the relationship between Comfort Cabs and taxi drivers is the dispatch services provided by Comfort Cabs, together with the rules and requirements for becoming a taxi driver with Comfort Cabs, the rights, obligations and privileges of taxi drivers while driving a taxi for Comfort Cabs, and the fees and other changes paid to lease operators (such as shift rentals) and to Comfort Cabs. As already noted, you are not required to lease a taxi plate to drive a taxi for Comfort Cabs and many of its drivers do not.

[40] In our opinion, the terms and conditions of taxi plate leases are distinguishable from the terms and conditions of the employment relationship between Comfort Cabs and its taxi drivers.

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[1] In fairness, it should also be noted that there is a potential for a taxi driver to lose money if they lease a taxi plate depending on a number of factors, including the lease fees they pay to the franchise owner, the shift rental they

Are the lease arrangements between taxi plate lessees and the owners of taxi plate franchises properly the subject of collective bargaining? If yes, with whom would the Union negotiate these issues?

[41] This Board has accepted that taxi drivers are dependent contractors and thus are "*employees*" for purposes of *The Saskatchewan Employment Act.* See: *Retail Wholesale Canada v. United Cabs Ltd., supra*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-96; and *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. United Cabs Limited, et.al.*, (2002) 73 C.L.R.B.R. (2d) 48, [2001] Sask. L.R.B.R. 108, LRB File No. 236-00. Therefore, taxi drivers have the right to form or join a trade union of their choosing for the purpose of bargaining collectively with their employer (i.e.: the taxi broker under whose banner they drive). The taxi drivers employed by Comfort Cabs have exercised this right and have indicated their desire to be represented by the Union in their dealings with Comfort Cabs. As a result, this Board has certified the Union as the exclusive bargaining agent on behalf of taxi drivers in their employment relationship with Comfort Cabs. However, this does not mean that Comfort Cabs is obligated to bargain collectively with the Union regarding everything that may have an impact on the lives and working conditions of taxi drivers employed by Comfort Cabs. Taxi plate leases are an example of a subject in relation to which Comfort Cabs is not required to bargain with the Union. In our opinion, taxi plate lease agreements are not properly the subject of collective bargaining with Comfort Cabs for a number of reasons.

[42] Firstly, we are not satisfied that the act of leasing a taxi plate is analogous to a state of employment. In our opinion, when a taxi driver lease a taxi plate from a franchise owner that person is an "*independent contractor*" in his/her dealings with that franchise owner. On the other hand, as this Board noted in *Saskatchewan Government and General Employees' Union v. Saskatoon Open Door Society*, [2001] Sask. Labour Rep. 210, LRB File No. 177-99, the determination as to whether someone is a dependent or independent contractor is seldom ever black and white. Rather, such determinations involve matters of degree. Such is the case with our analysis of taxi plate leases and the relationship between lease operators and franchise owners. While there are some aspects of this relationship (including the apparent lack of independent negotiating strength of lease operators) that support a dependent contract conclusion, on balance we are of the opinion that the substance of this relationship is far more entrepreneurial than employment-like.

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charge to other taxi drivers, and the cost, serviceability and amortization of his/her vehicle.

[43] This Board has adopted various tests, guides and criteria for aiding in the determination as to whether someone is a dependent or independent contractor, including an "*economic control*" analysis which was adopted by this Board in *Retail, Wholesale and Department Store Union, Locals 539 & 540 v. Federated Co-operatives Limited*, [1989] Fall Sask. Labour Rep. 60, LRB File No. 256-88; and the eleven (11) criteria developed by Ontario Labour Relations Board in *Algonquin Tavern v. Canada Labour Congress, et.al.*, [1981] 3 Can L.R.B.R. 337 that was adopted by this Board in *Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation*, [1997] Sask. L.R.B.R. 273, LRB File No. 012-97. See also: *United Food and Commercial Workers, Local 241-2 v. Beatrice Foods Ltd.*, [1994] 3rd Quarter Sask. Labour Rep. 302, LRB File No. 264-93; *Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd. & William Johnson, et.al.*, (1997) 34 C.L.R.B.R. (2d) 196, [1996] Sask. L.R.B.R. 337, LRB File No.115-95; *Grain Services Union v. AgPro Grain Inc.*, [1996] Sask. L.R.B.R. 639, LRB File No. 111-96; and *Teamsters Union, Local 395 v. Regina Leader Post Group Inc.*, (2008) C.L.R.B.R. (2d) 85, 2007 CanLII 68773 (SK LRB), [2007] Sask. L.R.B.R. 707, LRB File No. 118-05. While it is useful for analytical purposes to identify the general approaches which the Board has employed in the past, it must be remembered that each "*test*" is in reality merely a guideline. No approach will be controlling in a particular case; nor will a particular set of criteria necessarily result in an unequivocal answer.

[44] In applying either the economic control analysis or the eleven (11) criteria developed by the Ontario Board, it is not obvious that lease operators are "*dependent contractor*" in their dealings with franchise owners. Rather, in our opinion, leasing a taxi plate is primarily an act of entrepreneurism and risk-taking. Taxi plates are intangible assets created by the City of Saskatoon, owned by franchise owners and rented for profit to lease operators. Leasing a taxi plate involves the investment of money for profit; it does not involve a state of employment between franchise owners and lease operators. Lease operators are not employed by franchise owners and, other than their apparently lack of individual bargaining strength, it is difficult to conclude that lease operators are "*dependent contractors*". As this Board has noted, inequality in bargaining power alone cannot justify a finding that someone is a dependent contractor because many parties do not carry on business on an equal footing. See: *Retail, Wholesale Canada v. United Cabs Ltd., supra.*

[45] Simply put, leasing a taxi plate is a business decision. When a taxi driver decide to lease a taxi plate, they establish a contractual not employment relationship with franchise owners. In exploiting their lease rights, lease operators are, for the most part, economically independent of franchise owner. Lease operators choose the vehicle upon which their plate will be located and they maintain ownership of their vehicle. For the most part, lease operators have the unilateral right to decide whether or not to drive their vehicle or rent it to others. Although Comfort Cabs (and now the Union) have a role in setting shift rental rates, lease operators decide to whom they rent their vehicle. Some lease operators don't rent their vehicle to anyone, choosing instead to have the vehicle sit for a portion of the day. Unlike driving a taxi, the incremental revenue earned by a taxi driver who leases a taxi plate is not payment for his/her labour; it is equipment rental. Unlike driving a taxi, the incremental revenue generated by a lease operator is through the labour of others. During the term of a taxi plate lease, financial success or failure for a lease operator depends upon the decision making of the lease operator; not the franchise owner.

[46] While becoming a lease operator clearly has the potential of providing a number of employment-related benefits for a taxi driver employed by Comfort Cabs, so does the act of borrowing money for and buying a vehicle suitable for use as a taxi. Comfort Cabs in not required to negotiate collectively with the Union with regard to the cost of vehicles or the terms of financing because these are not acts of employment; they are acts of consumerism and investment. Similarly, becoming an owner/operator also has the potential for a number of employment-related benefits for a taxi driver. However, the terms and conditions of **buying** a taxi franchise are also not something that Comfort Cabs is required to bargain collectively with the Union. In our opinion, becoming either a lease operator or an owner/operator through leasing or buying a taxi plate is not an act of employment; it is primarily an act of entrepreneurism and therefore outside the scope of *The Saskatchewan Employment Act*.

[47] As we have noted, the taxi industry is an awkward fit within the normal model of industrial relations. Comfort Cabs has a relationship with its taxi drivers and, for purposes of *The Saskatchewan Employment Act*, this Board has been satisfied that taxi drivers are dependent contractors. Simply put, the Board has found that driving a taxi for a taxi broker sufficiently resembles an employment relationship to permit taxi drivers to be given the opportunity to bargain collectively with their employer should they desire to do so. However, it should be noted that the Board's recognition that taxi drivers are dependent contractors arose out of the dispatch

and other services provided by taxi brokers not because of the lease arrangements between lease operators and franchise owners. While this Board has concluded that taxi drivers are dependent contractors in their dealings with taxi brokers, this Board has not previously found that lease operators are dependent contractors in their dealings with franchise owners. In our opinion, it is an error to conflate these two (2) relationships and assume they are subject to the same treatment in the eyes of *The Saskatchewan Employment Act*. Furthermore, in our opinion, unlike the relationship between taxi drivers and taxi brokers, lease operators are **independent** contractors in their dealings with franchise owners.

[48] In coming to this conclusion, we are aware that the Ontario Labour Relations Board has found otherwise. See: *Diamond Taxicab Association (Toronto), supra*. With all due respect, we are not persuaded by the analysis of the Ontario Board on this particular issue or the application of that analysis to this jurisdiction. While there is often harmony in the findings of labour boards across Canada, not all labour boards agree on the proper resolution on some, often difficult, issues. This is one area where the findings of this Board and the findings of the Ontario Board appear to have diverged.

[49] Finally, we are not persuaded that the finding that taxi drivers are dependent contractors in the dealings with taxi brokers buts that lease operators are independent contractors in their dealings with franchise owners is anomalous. In our opinion, this finding merely reflects the inherent differences between these two (2) types of relationships; with the former being analogous to an employment relationship and the latter being far more entrepreneurial in nature. We are also not persuaded that this conclusion leaves the Union's certification Order hollow. As is apparent from the first collective agreement that was negotiated by the Union and Comfort Cabs, the scope of the relationship between taxi drivers and taxi brokers is fertile ground for collective bargaining even without including the terms and conditions of taxi plate leases.

[50] Secondly, even if we had been satisfied that leasing or buying a taxi plate were properly the subject of collective bargaining, we were not satisfied that these are subjects over which Comfort Cabs is required to bargain.

[51] In our opinion, the arrangements that lease operators have with franchise owners is parallel to their employment relationship with Comfort Cabs. While Comfort Cabs undoubtedly

has an important role in the relationship between franchise owners and lease operators, this role does not give Comfort Cabs legal ownership or control over these assets; nor does it make Comfort Cabs a party to these arrangements. Taxi plates continue to be owned by franchise owners[2] and the relationships between lease operators and franchise owners is outside of Comfort Cabs' authority to define.

[52] The fact that some franchise owners have an ownership interest in Comfort Cabs does not mean that Comfort Cabs has *de facto* (let alone legal) control over the taxi plates owned by those franchise owners. Similarly, the fact that Comfort Cabs provides management services to some franchise owners does not mean that their taxi plate leases somehow become part of the employment relationship between Comfort Cabs and its taxi drivers.

[53] While Comfort Cabs is required to recognize the Union as the exclusive bargaining agent on behalf of its taxi drivers, it is not required to bargain on behalf of franchise owners regarding the terms upon which they lease or sell their taxi plate franchises. Comfort Cabs in not required to bargain on their behalf for the same reason it is not required to bargain on behalf of car dealerships regarding the cost of vehicles or banks regarding access to and the cost of financing because these arrangements are external to Comfort Cabs employment relationship with its taxi drivers.

[54] Thirdly, even if we assume that leasing a taxi plate is properly the subject of collective bargaining (an assumption with which we disagree), we are not satisfied that franchise owners are bound by the Union's certification Order. The Union was certified to represent taxi drivers in their employment relationship with Comfort Cabs; the Union was not certified to represent lease operators in their leasing arrangements with franchise owners. The fact that some franchise owners have an ownership interest in Comfort Cabs does not mean that the Union's certification Order extends to the interest and activities of all of the franchise owners who are associated with Comfort Cabs. As we have noted, leasing a taxi plate involved an agreement between a lease operator and a franchise owner. Simply put, we are not satisfied that the Union's right to represent taxi drivers in their dealings with Comfort Cabs also binds franchise

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[2] It is noted that, at the time of the hearing, Comfort Cabs did control four (4) taxi plates. However, these taxi plates involved non-transferrable taxi franchises dedicated to accessibility vehicles. Although these taxi plates are similar to other taxi plate franchises in that they authorize the operation of a vehicle as a taxi in the City of Saskatoon, they are different in kind.

owners in their dealings with lease operators. In this regard, we note that none of the respondent franchise owners were named in the application that resulted in the Union's certification Order.

[55] For these reasons, we find that Comfort Cabs was not required to bargain collectively with the Union regarding the terms and conditions of taxi plate leases. In our opinion, the fact that the Union is not able to negotiate with respect to some facets of their members' participation in the taxi industry is the practical consequence of the awkward fit of that industry into the world of collective bargaining. It is not indicative of misconduct on the part of Comfort Cabs. As a consequence, we find that Comfort Cabs did not violate *The Saskatchewan Employment Act* in its conduct at the bargaining table. Furthermore, because of our conclusion that taxi plate leases do not form part of the employment relationship, we find that Comfort Cabs did not violate the statutory freeze when it provided (on behalf of the respondent franchise owners) draft lease agreements to lease operators without first negotiating the terms of these agreements with the Union.

If taxi plate leases are properly the subject of collective bargaining, does the inclusion of leases within the purview of the Union's authority affect the appropriateness of the Union's bargaining unit?

[56] As this Board has already noted, taxi plates are intangible assets that have a substantially capital value. The value of a taxi plate is largely a function of its scarcity, its transferability, and the stream of income that it can reasonably be expected to generate. The evidence established that approximately ten (10) members of the Union's bargaining unit were owner/operators of single taxi plates. If the Union seeks to represent lease operators in their dealings with franchise owners, the status of those taxi drivers who own taxi plates within the bargaining unit is an issue that may need to be re-examined by this Board. However, this is a determination that is better left for another day.

Analysis – Common or Related Employers

[57] In LRB File No. 221-14, the Union seeks a declaration from this Board that Comfort Cabs and the respondent franchise owners shall constitute one (1) employer for purposes of *The Saskatchewan Employment Act*. For the reasons that follow, we decline to make such a declaration.

[58] In most workplaces, the identity of the employer of a group of employees is readily apparent. However, such is not always the case and, in response to the complex and sometimes murky realities of corporate organization (particularly in the construction sector), most jurisdictions in Canada have enacted legislation to authorize labour boards to pierce the corporate veil[3], so to speak, and find that two (2) or more related businesses ought to be treated as one (1) common employer for purposes of labour relations. Saskatchewan has two (2) provisions dealing with these circumstances in *The Saskatchewan Employment Act*; firstly s. 6-20, dealing with common employers in general; and secondly, s. 6-79, dealing with common employers specifically in the construction industry. Prior to the enactment of *The Saskatchewan Employment Act*, this Board's authority to make common employer declarations was found in section 18 of *The Construction Industry Labour Relations Act, 1992*, S.S.1992, c.C-29.11 and section 37.3 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (applying to the construction and non-construction sectors, respectively). While none of these provisions are identical, they bear many similarities. As a result, this Board's past jurisprudence continues to be persuasive.

[59] Many companies are related to each other and/or operate under common control and direction. In some cases, these companies are divisions of a larger corporate enterprise. In some cases, they are separate companies with common or overlapping ownership and/or management teams. There are a variety of legitimate business reasons why companies operate in this fashion and it is, generally speaking, not unlawful to do so. However, if the purpose or effect of a relationship between corporate entities is to avoid or escape collective bargaining obligations (for example, by transferring work that would normally be completed by a unionized company to a related, non-union company), then this Board has authority to pierce the corporate veil and declare both employers to be one (1) for the purposes of collective bargaining. The effect of a common employer designation is to cause the employees of both the union and non-union entities to fall within the scope of the Union's certification Order. Obviously, this is a powerful tool granted by the Legislature for the purpose of achieving a particular remedial effect.

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[3] Most labour boards in Canada also have the authority to pierce the corporate veil, so to speak, and determine the identity of the "*true employer*" of a group of employees. Saskatchewan has such a provision in 6-1(1)(i)(ii) of *The Saskatchewan Employment Act*. See: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, [1996] Sask. L.R.B.R. 523, LRB File No. 083-96; *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd.*, [1999] Sask. L.R.B.R. 238, LRB File No. 363-97; *United Food and Commercial Workers, Local 1400 and the Canadian Salt Company Limited, Cardinal Construction Co. Ltd. and Production Services (1990) Ltd.*, [2011] 191 C.L.R.B.R. (2) 29, 2010 CanLII 65961 (SK LRB), LRB File No. 047-10; and *International Union of Painters & Allied Trades, Local 739 v. PAFHQ Construction GP LTD., Points Athabasca FHQ Contracting LP and Athabasca Labour Services Ltd.*, 2013 CanLII 83873 (SK LRB), (2014) 238 C.L.R.B.R. (2d) 57, LRB File Nos. 108-13 & 125-13. See also the criteria

[60] In numerous decisions, this Board has provided helpful guidance in dealing with applications seeking common employer declarations. These decisions include *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd.*, (2000) 54 C.L.R.B.R. (2d) 161, [1999] Sask. L.R.B.R. 238, LRB File No. 363-97; *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184 v. Cabtec Manufacturing Inc., et.al.*, 2008 CanLII 47035 (SK LRB), LRB File No. 153-07; Canadian Union of Public Employees, Local 4836 v. *Lutheran Sunset Home of Saskatoon, et. al.*, (2010) 172 C.L.R.B.R. (2d) 133, 2009 CanLII 54774 (SK LRB), LRB File No. 043-09; *v. United Steel Workers Union, Local 1-184 v. Edgewood Forest Products Inc. & C & C Wood Products Ltd.*, (2013) 225 C.L.R.B.R. (2d) 194, 2013 CanLII 15714 (SK LRB), LRB File No. 011-12; *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v. North American Construction Group Inc., et.al.*, (2014) 234 C.L.R.B.R. (2d) 168, 2013 CanLII 60719 (SK LRB), LRB File No. 051-13; and *International Brotherhood of Electrical Workers, Local 529 v. Merick Contractors Inc. et.al.*, LRB File No. 331-13.

[61] A review of this Board's jurisprudence reveals that there are four (4) prerequisites of a common employer declaration:

1. The application must involve more than one corporation, partnership, individual or association and at least one of those entities must be a certified employer. See: *Wayne Bus, supra*; and *International Brotherhood of Electrical Workers, Local 529 v. Western Electrical Management Ltd. & Merick Contractors Inc.*, 2013 CanLII 55453 (SK LRB), LRB File Nos. 096-13, 087-13, 109-13, 152-13, 180-13 & 181-13 ("*IBEW v. Merick Contractors #1*").

2. The subject entities must be "*sufficiently related*" to a unionized employer through their involvement in associated or related businesses, undertakings or other activities. See: *Wayne Bus, supra*; and *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd., et.al.*, [1998] Sask. LR.B.R. 719, LRB File No. 014-98.

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adopted by the Ontario Labour Relations Board *in Labourers' International Union of North America, Local 183 v. York Condominium Corporation, et. al.*, [1977] OLRB Rep. October 646.

3. The subject entities must be operated under "*common control and direction*". See: *Wayne Bus, supra*; and *Graham Construction and Engineering Ltd., supra.* See also the indices of common control and direction adopted by the Ontario Labour Relations Board in W*alters Lithography Company Limited* [1971] O.L.R.B. Rep. July 406.

4. The designation must serve a valid and sufficient labour relations purpose, interest or goal. See: *Wayne Bus, supra*. In other words, there must be a compelling labour relations reason for making the declaration and the benefits of doing so must outweigh the mischief such declaration is likely to cause. See: *Edgewood Forest Products Inc., supra; North American Construction Group Inc., supra;* and *International Brotherhood of Electrical Workers, Local 529 v. Merick Contractors Inc., Western Electrical Management Ltd. & Western Electrical Constructors Ltd.*, LRB File No. 331-15 (Decision dated February 5, 2015 – unreported) ("*IBEW v. Merick Contractors #2*").

[62] It is very important to be mindful that an applicant trade union must satisfy all of the above criteria. For example, even if we are satisfied that the subject companies are sufficiently related and operating under common control and direction, the question still remains as to whether or not the Board should exercise its discretion to make a common employer declaration. Such declarations are not automatic because, by definition, a common employer declaration involves an expansion of the applicant union's collective bargaining rights to one or more employers that were not previously named in its certification Order. Thus, applicants seeking a common employer declaration must not only satisfy the first three (3) prerequisites but they must also satisfy the Board that there is a compelling reason for granting the declaration. In *Wayne Bus, supra*, this requirement was described as follows:

> *However, once these requirements have been fulfilled the Board must determine whether to exercise its discretion to treat entities as one employer for purposes of the Act. This discretion will be exercised where there is a* ***valid*** *and* ***sufficient*** *labour relations value, interest or goal contemplated by the Act that will be served by making a single employer declaration. Absent such a purpose, the discretion to make the declaration will not be exercised. (****Emphasis added****)*

[63] In Saskatchewan, the primary reason for granting a common employer declaration is the avoidance or anticipated erosion of bargaining rights through transfer of work that would normally be performed by unionized employees to a related, non-union entity. See: *Wayne Bus, supra*. Other purposes have also been acknowledged by other Labour Boards, including the desire to remove obstacles to meaningful collective bargaining and to ensure that the "*true employer*" is at the bargaining table (i.e.: to ensure that the bargaining agent is negotiating with the entity possessing real economic control over terms and conditions of employment for employees rather than an employer in name only). See: *Penmarkay Foods Limited v. Retail Wholesale & Department Store Union, Local 414*, 1984 CanLII 1128 (ON LRB), [1984] OLRB Rep. Sept. 1214.

[64] Whatever the reason for seeking a common employer declaration, as noted by this Board in the *Wayne Bus* decision, that reason must be "*valid*". For example, an anticipated erosion of bargaining rights must be real or imminent. Speculation as to what possibly might occur is not sufficient. See: *IBEW v. Merick Contractors #2*. A helpful description of this limitation was provided by the Ontario Labour Relations Board in *Marble, Tile and Terrazzo, Local 31 v. Seamless Industrial Floor Coatings Ltd. and Proseal Concrete Floor Care Systems Inc.*[4], (2012) C.L.R.B.R. (2d) 310, 2012 CanLII 11123 (ON LRB), as follows:

> *14. In this case, the applicant is not seeking damages or a retrospective declaration, so the issue of prejudice from the delay does not arise. In these circumstances the union's delay in filing and processing this application does not provide a basis for the Board to refuse to issue the declaration sought by the union.*
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> *15. Rather, the refusal to grant the declaration in this application arises from the absence of any meaningful basis for the Board to conclude the applicant's bargaining rights have been or will be subject to erosion.* ***There is no evidence before the Board that erosion of the applicant's bargaining rights has occurred to date or is imminent. The union simply asserts that Proseal could, at some point in time in the future, engage in work that falls within the scope of its collective agreement. But the evidence is that Proseal has been in business since 1983 and it has never performed the type of work done by Seamless. To suggest that Proseal might expand or change the nature of its business in the future to include the performance of tile, terrazzo and ceramic work simply because Hall previously operated Seamless is mere speculation.*** *Furthermore, should that occur, it is open to the union to file a further application with the Board.* ***(Emphasis added)***

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[4] See also the decision of the Manitoba Labour Board in *United Food and Commercial Workers Union, Local 832 v. Sun Gro Horticulture Canada Ltd. & FPM Peat Moss Co.*, (2014) 249 C.L.R.B.R. (2d) 279, 2013 CanLII 93937 (MB LB), which was cited with approval by this Board in *Edgewood Forest Products Inc., supra*.

[65] The second requirement in the exercise of our discretion is that the reason for doing so must be "*sufficient*"; meaning that the benefits of making a common employer declaration must outweigh the mischief such declaration is likely to cause. In making a common employer declaration, labour boards must balance potentially competing interests. In the first instance, labour boards must be mindful of the need to protect and preserve the collective bargaining rights of organized employees by not permitting the erosion of their rights. On the other hand, labour boards must also be careful not to unilaterally impose collective bargaining upon a group of employees who may not wish to be represented by a trade union. This Board described this limitation on the exercise of its discretion in *North American Construction Group Inc.*[5], *supra*, as follows:

> *[65] While the purpose to be served by a common employer declaration is the protection and preservation of established collective bargaining rights, because of the potential for imposing collective bargaining upon a group of employees who may not wish to be represented, a trade union must move to enforce its rights with reasonable dispatch if it believes that an erosion of its bargaining rights is occurring because of the operations of a suspected common or related employer. Simply put, the longer the delay and the greater the number of employees that could potentially be unilaterally swept in, the more likely a common employer declaration will do more labour relations harm than good.*
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> . . .
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> *[67] Even if we were satisfied that the corporate reorganization within the North American Group of Companies had the [e]ffect of eroding the scope of the Union's certification Order (which we weren't), in our opinion, there has been too much delay on the part of the Union i[n] seeking a common employer declaration with respect to NA Services Inc. and there is a not-insignificant risk that a common employer designation would impose collective bargaining upon a group of new employees who may not wish to be represented by the Union. The Union has been aware that NA Services Inc. was operating in Saskatchewan on a non-union basis since 2009. The Union now seeks to assert bargaining rights in respect of a group of employees who has been unrepresented for a period of over three (3) years. In these circumstances, we are not satisfied that it would be a sound exercise of our discretion to treat NA Caisson Ltd. and NA Services Inc. as one (1) employer for the purposes of collective bargaining. If the Union wishes bargaining rights for the Employees of NA Services Inc., it must tender evidence of support from these affected employees with its amendment application (which it hasn't) or it must proceed by way of the normal certification procedures.*

[66] In our opinion, the Union's application to declare Phyllis Schlosser Investments Ltd., J G Taxis Ltd., and Frie Taxis Ltd. to be common employers with Comfort Cabs must fail

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[5] See also: *Farquhar Construction Limited v. United Brotherhood of Carpenters and Joiners of America, Local 2486*, [1979] 1 Can L.R.B.R. 72, [1978] O.L.R.B. Rep. Oct. 914, 1978 CanLII 595 (ON LRB).

because doing so would not serve a valid and sufficient labour relations purpose. Simply put, there was no evidence of an actual or imminent erosion of the Union's bargaining rights. For example, there was no evidence that the respondent franchise owners were attempting or contemplating the transfer of work (and drivers) from Comfort Cabs to another dispatch company or that their relationships with Comfort Cabs was otherwise likely to result in an erosion of the Union's collective bargaining rights.

[67] Rather, the purpose of the Union's common employer application was an attempt to bring the respondent franchise owners to the bargaining table so that the Union could negotiate with respect to the terms and conditions of taxi plate leases. However, there are a number of problems with the Union's desire to do so. Firstly, as we have already concluded, the leasing of a taxi plate is not an act of employment and thus not properly the subject of collective bargaining. Secondly, the Union is only seeking to bring three (3) franchise owners to the table. While the respondent franchise owners control a significant number of the total taxi plates that are associated with Comfort Cabs, they do not represent them all or even a majority of them. As a consequence, even if we granted the Union's request, the terms and conditions of the taxi plate leases negotiated by most franchise owners would still be beyond the Union's reach at the bargaining table. Even assuming that taxi plate leases are properly the subject of collective bargaining (an assumption with which we disagree), unless the Union is prepared to name all franchise owners as was done in the *Diamond Taxicab Association (Toronto)* case, a common employer declaration would be ineffectual. In our opinion, even if we granted the Union's request, it would not achieve the objective desired by the Union; namely, permitting the Union to bargain with respect to the taxi plate leases that are operated under the Comfort Cabs banner.

[68] The respondent franchise owners declined to call any evidence in these proceedings. As a result, we have limited evidence as to the potential mischief that could potentially arise from applying the Union's certification Order to their operations in terms of sweeping in previously unrepresented employees. The only observation we can make regarding potential mischief arising out of the Union's application is that the respondent franchise owners are currently not named in the Union's certification Order. Granting a common employer declaration would have the effect of causing their employees, assuming they have any, to fall within the scope of the Union's certification Order. On its face, this represents an expansion of the Union's certification Order.

[69] Because the Union's application failed on the fourth criteria, we have not analyzed the other three (3) preconditions in detail other than to say the following. There was no dispute that the Union has satisfied the first criteria. With respect to the second criteria, the evidence tended to support the conclusion that the activities of all franchise owners were related to the taxi business being conducted by Comfort Cabs. All franchise owners had taxi plates that were operated in association with Comfort Cabs and all of their lease operators were employed by Comfort Cabs as taxi drivers. With respect to the third criteria, while the evidence did not satisfy all of the five (5) factors set forth by the Ontario Labour Relations Board in *Walters Lithography Company Limited* [1971] O.L.R.B. Rep. July 406, there was some evidence in these proceedings to support the Union's position that Comfort Cabs and the respondent franchise owners operated under common control and direction. This evidence arose out of the close personal relationship between the respondent franchise owners and Mr. Frie and his ownership interest in Comfort Cabs. While Mr. Mian was clearly the guiding mind for the day to day operations of Comfort Cabs, his authority flowed from Mr. Frie both through his status as the major shareholder of Comfort Cabs and as the single largest franchise owner associated with Comfort Cabs.

[70] On the other hand, the evidence of common control and direction between Comfort Cabs and the remaining franchise owners (i.e.: those not named in the Union's application) was of a different nature and weight. Direct evidence included the management services provided by Comfort Cabs. However, this evidence provided a weak foundation for a common employer declaration because Comfort Cabs did not provide management services for all franchise owners. The balance of the evidence regarding common control and direction between Comfort Cabs and the remaining franchise owners arose out of the commercial interdependent between these parties. For example, Comfort Cabs cannot operate without the taxi plates owned by franchise owners and franchise owners rely on the dispatch services provided by Comfort Cabs to support the value of their taxi plates. While these relationships are clearly symbiotic, the fact that franchise owners can freely move from broker to broker tends to undermine a finding of common control and direction. In fact, all of the relationships involving franchise owners are rather fluid, with franchise owners have the unilateral right to leave Comfort Cabs if they so desire; with anyone having the right to buy a taxi plate and become a franchise owner if they so desire; and with taxi drivers having the potential to unilaterally removing themselves from the bargaining unit by buying or leasing more than one (1) taxi plate.

[71] However as indicated, having considered the evidence in these proceedings, we are not satisfied that a valid and sufficient labour relations purpose would be served by declaring Phyllis Schlosser Investments Ltd., J G Taxis Ltd., and Frie Taxis Ltd. to be common employers with Comfort Cabs. Even assuming that taxi plate leases are properly the subject of collective bargaining (an assumption with which the Board does not agree), bringing only three (3) franchise owners to the table would be ineffectual in permitting collective bargaining with respect to all taxi plate leases operating under the Comfort Cabs' banner. If the purpose of the common employer declaration is to remove an impediment to collective bargaining, the Union's application would not achieve the desired objective because the terms and conditions of the taxi plate leases owned by all the other franchise owners would continue to be beyond the Union's reach.

[72] Absent a compelling reason for making a common employer declaration, we decline to exercise our discretion.

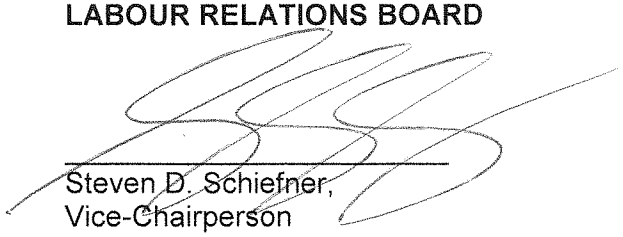
Conclusions:

[73] For the foregoing reasons, we find that the Union's applications must be dismissed.

[74] Board member Ken Ahl concurs with these Reasons for Decision. However, Board member Duane Siemens dissents in part.

DATED at Regina, Saskatchewan, this **16th** day of **April, 2015**.

LABOUR RELATIONS BOARD



Steven D. Schiefner,
Vice-Chairperson

Dissent:

[75] I have read the Reasons for Decision of the majority and I respectfully find that I must disagree; but only in part.

[76] In my opinion, taxi drivers are dependent contractors when they lease a taxi plate from a franchise owner. Simply put, I was not satisfied that the evidence supported the conclusion that lease operators are independent contractors. Rather, in my opinion, the arrangements associated with leasing a taxi plate are sufficiently similar to an employment arrangement; at least they are from the perspective of a taxi driver. I am also satisfied that the lease agreements that taxi drivers have with franchise owners form an integrated part of the employment relationship between taxi drivers and the dispatch company with which those plates are associated, in this case Comfort Cabs. In my opinion, the Union, as a certified bargaining agent, needs to have the authority to bargain on behalf of its members with respect to all of the essential elements of the employment relationship. In the taxi industry, taxi plate leases form an important part of the relationship between taxi drivers and dispatchers. Finally, in my opinion, the relationship that Comfort Cabs has with the franchise owners who have agreed to operate their taxi plates under its banner is sufficient to give Comfort Cabs the authority it needs to bargain with respect to the terms and conditions of taxi plate leases. If franchise owners are not comfortable with the terms and conditions negotiated by Comfort Cabs, they have the right to move their plates to another broker.

[77] On the other hand, I agree with the conclusion of my colleagues that Phyllis Schlosser Investments Ltd., J G Taxis Ltd. and Frie Taxis Ltd. are not common employers with Comfort Cabs.

[78] In my opinion, Comfort Cabs is required to bargain collectively with the Union with respect to the terms and conditions of taxi plate leases.

Duane Siemens,
Board Member