UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), Applicant v RIIDE HOLDINGS INC., Respondent

LRB File No. 126-19; September 12, 2019

Chairperson, Susan C. Amrud, Q.C.; Board Members: Phil Polsom and Brenda Cuthbert

For the Applicant: Heather M. Jensen
For the Respondent: Larry F. Seiferling, Q.C.

Application for certification – Once the Union satisfied the Board that the proposed bargaining unit was an appropriate unit for collective bargaining, the Employer did not meet its evidentiary burden of demonstrating why Owners who own and control one taxicab should not be included in the bargaining unit.

Owners are not managers or supervisory employees and can therefore be included in bargaining unit with drivers.

Services Agreements signed by Owners were not determinative, as evidence indicated that their provisions were not reflective of the true role played by Owners in the workplace.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C, Chairperson: On May 28, 2019, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) ["Union"] filed an Application for Bargaining Rights with respect to all taxi drivers employed by Riide Holdings Inc. ["Employer"], except those persons who own and control two or more taxi cabs, dispatchers, office personnel, supervisors and management above the rank of supervisors[1]. A vote was held on June 7, 2019; two Objections to Conduct of the Vote were filed on June 12, 2019, one by the Employer[2] and one by the Union[3]. A first Application for

[1] LRB File No. 126-19.
[2] LRB File No. 137-19.
[3] LRB File No. 138-19.

an interim order was heard and dismissed on July 9, 2019[4]. The Objections to Conduct of the Vote were resolved between the parties, and withdrawn, and on July 19, 2019, the vote was counted. Of the 171 votes counted, 109 votes were for the Union and 62 were against the Union. A second Application for an interim order was heard on August 13, 2019, and on August 16, 2019, an order was granted as follows:

> a) *that all taxi drivers employed by Riide Holdings Inc., except those persons who own and control one or more taxi cabs, dispatchers, office personnel, supervisors and management above the rank of supervisors, is an appropriate unit of employees for the purpose of bargaining collectively;*
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> b) *that the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), a union within the meaning of The Saskatchewan Employment Act, represents a majority of employees in the bargaining unit set out in paragraph (a);*
>
> c) *that Riide Holdings Inc., the employer, bargain collectively with the union set out in paragraph (b), with respect to the bargaining unit set out in paragraph (a);*
>
> d) *that this Interim Order shall remain in effect until the Board makes a final determination in this matter.*[5]

[2] At the commencement of the hearing of this matter on August 21, 2019, the parties agreed that the only issue for the Board to determine was whether taxi drivers employed by the Employer who own and control one taxi cab ["Owners"] should be included in the bargaining unit.

[3] The starting point for this analysis is the decision of the Board granted in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 2014 v United Cabs Limited operating as United Cabs and Blue Line Taxi and The United Group*, 2019 CanLII 57383 (SK LRB) ["*United Cabs*"]. In that case, the Board granted a certification order for a bargaining unit that included the Owners in dispute in this case. Both parties focused their evidence and arguments on what, if anything, was different in the operations of the Employer that would differentiate it from *United Cabs*.

[4] As noted in *United Cabs*, the Board has also granted a certification order respecting another taxi broker operating in Saskatoon, Comfort Cabs Ltd.[6] That certification order

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[4] LRB File No. 151-19. The panel that heard this application initially indicated they would issue Reasons for their decision. However, given the ensuing events, no Reasons will be forthcoming.
[5] The second interim Application was heard by the same panel that heard this application. Board member Phil Polsom dissented from the decision and would have granted the Interim Order with respect to the full bargaining unit applied for by the Union.
[6] LRB File No. 327-13.

established a bargaining unit equivalent to the bargaining unit requested in this matter, including drivers who own or control one taxicab.

[5] The same people who own United Cabs and Comfort Cabs set up the Employer. The evidence indicated that United Cabs and Comfort Cabs transferred their dispatch operations to the Employer. Evidence was received of a situation where, even if a passenger called United Cabs or Comfort Cabs, the taxicab dispatched came from the Employer. The charge accounts with clients that were referred to in *United Cabs* as comprising up to 40% of United Cabs' business[7] have all been extended to the Employer and the Employer's taxicabs are given priority to that work. Therefore, by the date of the hearing, all of the Owners and drivers from Comfort Cabs and 90% of the Owners and drivers from United Cabs had converted to working for the Employer.

[6] When Owners transferred their taxi cabs to the Employer, they were required to sign a Services Agreement. Several versions of the Services Agreement were put into evidence[8]. It is primarily this document on which the Employer relies to make the argument that it is no longer appropriate for Owners to be part of the bargaining unit.

[7] Two Owners gave evidence, one on behalf of the Union and one on behalf of the Employer. Both were covered by the *United Cabs* certification order and both are now employed by the Employer. Sultan Chowdhury, who gave evidence on behalf of the Union, did not sign a Services Agreement. His evidence was that nothing has changed in his relationship with the broker or with the other person who drives his taxicab since he transferred to the Employer. Aurel Pintea, who testified on behalf of the Employer, signed a Services Agreement. He also testified that he has the same responsibilities now with respect to his driver as he had when his taxicab was associated with United Cabs.

Relevant Statutory Provisions:

[8] The following provisions of Part VI of *The Saskatchewan Employment Act* ["Act"] are relevant to this application:

> ***Interpretation of Part***
> *6-1(1) In this Part:*
>
> *. . .*
>
> *(h)* ***"employee"*** *means:*

[7] At para. 9.
[8] Exhibit U-7 and Exhibit C to the Partial Agreed Statement of Facts entered as Exhibit U-1.

(i) a person employed by an employer other than:

(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character; or

(B) a person whose primary duties include activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit the person would be included in as an employee but for this paragraph:

(I) labour relations;

(II) business strategic planning;

(III) policy advice;

(IV) budget implementation or planning;

(ii) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining; and

(iii) any person designated by the board as an employee for the purposes of this Part notwithstanding that, for the purpose of determining whether or not the person to whom he or she provides services is vicariously liable for his or her acts or omissions, he or she may be held to be an independent contractor;

and includes:

(iv) a person on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere; and

(v) a person dismissed from his or her employment whose dismissal is the subject of any proceedings before the board or subject to grievance or arbitration in accordance with Subdivision 3 of Division 9;

. . .

(o) ***"supervisory employee"*** *means an employee whose primary function is to supervise employees and who exercises one or more of the following duties:*

(i) independently assigning work to employees and monitoring the quality of work produced by employees;

(ii) assigning hours of work and overtime;

(iii) providing an assessment to be used for work appraisals or merit increases for employees;

(iv) recommending disciplining employees;

but does not include an employee who:

(v) is a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs;

(vi) acts as a supervisor on a temporary basis; or

(vii) is in a prescribed occupation;

Right to form and join a union and to be a member of a union

6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.

Acquisition of bargaining rights

6-9(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.

Determination of bargaining unit

6-11(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:

(a) if the unit of employees is appropriate for collective bargaining;

. . .

(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.
(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.

Certification order
6-13(1) If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:
(a) certifying the union as the bargaining agent for that unit;

Argument on behalf of the Union:

[9] The Union argues that the Employer bears the onus of satisfying the Board that Owners should not be included in the bargaining unit.

[10] The Union argues that a bargaining unit that includes Owners is an appropriate bargaining unit. It is a bargaining unit of drivers; it applies to Owners only in their status as drivers. The Owners are not managers or supervisory employees in this workplace, just as they were not at United Cabs. In the Union's view the Services Agreement is not determinative of this issue, just as a job title is not determinative. The Board should consider the reality of the relationship between the parties, rather than the statements the Employer requires Owners to sign, using its near-monopoly control over whether an Owner can operate a taxicab in Saskatoon.

[11] With respect to the issue of whether Owners are managers, the definition of employee in clause 6-1(1)(h) of the Act excludes a person employed by an employer whose primary responsibility is to exercise authority and perform functions of a managerial character. The primary responsibility of Owners at the Employer, as it was at United Cabs, is to drive a taxicab. The exclusion of people employed by the Employer from the definition of employee needs to be narrowly interpreted because employees who are found to be managers are denied the right to join a union or engage in collective bargaining through a union. In making this determination, the focus is on the degree of direction and control an Owner has over a driver. The Owners do not have the necessary effective authority for the Board to find that they have direction and control over the drivers.

[12] There is no evidence of the Owners exercising functions of a managerial character. When a person applies for employment as a taxi driver, the Employer interviews that applicant. Even if an Owner requests that a qualified driver be authorized to drive his or her taxi, the Employer can refuse that request. Evidence of such refusals was provided by the Union's witnesses and

confirmed by the Employer's witnesses. Owners cannot de-authorize a driver from the dispatch system; they can only make a request. The Employer sets the dress code for Owners and drivers. Owners and drivers do not work alongside each other; the evidence indicated that the Employer does spot checks to ensure drivers are complying with the rules. An Owner does not always see the other driver at shift change. The Employer has access to the camera and GPS system in the taxicab; the Owner does not. The Employer decides whether to de-authorize drivers from the dispatch system and, despite what the Services Agreement says, continues to exercise this authority without input from or even notice to the Owner. The real control over continued employment remains in the hands of the Employer.

[13] With respect to the definition of supervisory employees, clause 6-1(1)(o) of the Act requires not only that they be employees whose primary function is to supervise employees, it also requires that they exercise one or more of the following duties: independently assigning work to employees and monitoring the quality of work produced by employees; assigning hours of work and overtime; providing an assessment to be used for work appraisals or merit increases for employees; recommending disciplining employees. The Union argues that there is no evidence that Owners perform any of these tasks. Owners do not supervise employees as their primary function; their primary function is to drive a taxicab. The Employer, not the Owners, can check the camera footage from the taxicabs, has access to the in-car GPS system and receives complaints from the public about drivers' work performance. If anyone is in a position to supervise how drivers do their work, it is the Employer.

[14] The Owners do not independently assign work to drivers or monitor the quality of their work. This responsibility lies with the Employer through its control of the dispatch system and distribution of charge account trips and its responsibility under section 30(b) of *The Taxi Bylaw, 2014* to maintain a complaints process. Owners do not assign hours of work and overtime; the number of hours worked by a driver is within the driver's control. Owners do not provide an assessment to be used for work appraisals or merit increases for drivers. With respect to recommending discipline, as Mr. Pintea noted, Owners might have some input but, if they do, it would be ancillary to the work they perform driving a taxicab, thus keeping them outside the definition of supervisory employee by virtue of subclause 6-1(1)(o)(v).

[15] The provisions of *The Taxi Bylaw, 2014* respecting responsibilities of taxi brokers, owners and drivers have not changed since May 2019; they put the responsibility for drivers squarely on the Employer.

[16] The Board heard significant evidence respecting why United Cabs and Comfort Cabs transferred their businesses to the Employer. The motivation was to portray a new image to the public, to better compete with Uber and other transportation network companies. Even the Employer's witnesses agree that nothing about this new image affects the relationships between the Employer and the Owners or the Employer and the drivers. Therefore, there is no basis on which to change the composition of the bargaining unit.

[17] The bargaining units at United Cabs and Comfort Cabs include Owners. No evidence was submitted to the Board that indicated any problems arising from having them in the same bargaining unit with drivers. There is no reason here to depart from what has been recognized as an appropriate bargaining unit in the taxi industry. The Employer's position is inconsistent with its agreement to count the ballots cast by both drivers and Owners.

Argument on behalf of the Employer:

[18] As noted earlier, the Employer based its argument almost entirely on the Services Agreement that the Employer required the Owners to sign. There were no Services Agreements at United Cabs. The Employer argued that the Services Agreement provides that Owners have the discretion to hire, discipline, promote, demote, evaluate and direct their drivers. The Employer assigns duties to Owners as managers. The Owners are managers because they have the responsibility to enforce the Employer's rules.

[19] The Employer says that Owners will be involved in the administration of the collective agreement and grievances and in the formulation of proposals on behalf of the Employer on the terms of the collective agreement. Owners are on the Employer's side of the bargaining table. The duties of their position demand a level of loyalty to the Employer that places them directly at odds with the drivers.

[20] The Employer referred the Board to the 1980 decision in *Westfair Foods Limited v United Food and Commercial Workers International Union*[9] ["*Westfair Foods*"] for its argument that the Owners are persons employed by it whose primary responsibility is to exercise authority and perform functions that are of a managerial character:

> *One cause for concern was that some departments are small, with only 3 or 4 employees as compared to other departments which have had up to 45 employees. The question arises as to whether or not the department manager in the small department when*

[9] LRB File No. 085-80; The Saskatchewan Labour Report, February 1981, Volume 32 No. 2, p.66.

> *exercising authority and performing functions that are of a managerial character is performing his "primary responsibility" when the exercise of authority and performance of managerial functions is obviously a relatively small part of his time due to the small size of his department as compared to the larger departments. The Board concluded that all Department Managers did perform management functions to a degree that brought them within the exclusion defined by Section 2(f)(i) of The Act. The authority of each position in the overall organization of the employer is essentially the same.*

[21] In the Employer's opinion, "primary responsibility" means Owners always have that responsibility. This applies even if they never have to exercise it and even if they have only a few employees. It is who has the authority that matters. The Board needs to assess whether the Owners are on the side of the Employer or the side of the drivers. The Employer argued that it cannot check every taxicab every day and that is why Owners have this responsibility. The Owners' decisions can seriously affect the drivers' employment. It is the Owners who are going to administer the collective agreement. The Employer does not control what an Owner does with his or her taxicab; the Owner decides who his or her driver is. The Employer gets paid for dispatch; the driver's day-to-day activities are solely in the hands of the Owner. If the Employer receives a complaint about a driver, the Employer investigates it, but discusses it with the Owner before imposing discipline. For all of these reasons, the Employer argues, Owners should be recognized as being managers.

[22] In the alternative, if the Board finds that Owners are not managers, the Employer argues that Owners meet the definition of supervisory employee in clause 6-1(1)(o) of the Act. Owners perform all of the duties described in that definition. Whether a duty is a primary duty is not dependent on the amount of time spent performing that duty, but rather on the fact the supervisory employee always has that duty. Owners are at all times responsible for the duties of assigning and monitoring work, assigning hours of work, and disciplining drivers, even if they are performing those duties only as required to ensure the Employer's image is upheld.

[23] Owners and drivers cannot be in the same bargaining unit because they do not have the same interests. Owners have a vested interest in ensuring the Employer's brand is maintained, to make sure their business can survive in the face of transportation network companies like Uber.

Analysis and Decision:

[24] The Union raised the issue of which party bears the onus of proof in this application. The Board adopts the following explanation of this issue in *Workers United Canada Council v Amenity Health Care LP*[10] ["*Amenity Health*"]:

> *This Board concurs with the Board's analysis in Wheatland Regional Centre. It is important to clarify the difference between the burden of proof and the onus. It cannot be denied, as asserted by Amenity, that the Union bears the legal burden of proof to establish on a balance of probabilities the proposed unit is an appropriate one for collective bargaining purposes. However, if an employer contests the composition of a proposed unit on the basis for example, that some individuals function as managers or, as in this case, qualify as supervisory employees, then the evidential burden or onus, as opposed to the legal burden of proof, shifts to the employer to present evidence supporting its argument for exclusion. Notwithstanding this shift in the evidentiary onus, the over-arching burden of proof in a certification application remains upon the union.*

[25] Therefore, the Board must first consider whether the bargaining unit proposed by the Union is an appropriate one for collective bargaining purposes. Only if the Union satisfies the Board that it is, will the evidentiary burden then shift to the Employer to demonstrate why the Owners should not be included in the bargaining unit because they are either managers or supervisory employees.

[26] The Board begins this assessment with subsection 6-4(1) of the Act, which states the principle that employees "have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing". As the Board noted in *Amenity Health*, "[t]his statutory statement of public policy is reinforced by the constitutional guarantee of freedom of association found in section 2(d) of the *Canadian Charter of Rights and Freedoms*"[11].

[27] As the Union notes, the proposed bargaining unit is the standard bargaining unit used in the taxi industry in Saskatchewan. It has been found by the Board to be appropriate every time it has addressed the issue: in 1996[12], 2001[13], 2014[14], 2015[15] and May 2019[16]. Accordingly, the Board has no difficulty in determining that the Union has met its legal burden of proof by

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[10] 2018 CanLII 8572 (SK LRB) at para 59.
[11] At para 85.
[12] *Retail Wholesale Canada, a Division of the United Steelworkers of America v United Cabs Ltd.*, [1996] Sask LRBR 337; LRB File No. 115-95.
[13] *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v United Cabs Limited*, [2001] SLRBD No 18; LRB File No. 236-00.
[14] LRB File No. 327-13, respecting Comfort Cabs Ltd.
[15] LRB File No. 262-14 respecting Arch Transco Ltd. operating as Regina Cabs in Regina.
[16] *United Cabs*.

establishing on a balance of probabilities that the proposed unit is appropriate for collective bargaining purposes. The onus now shifts to the Employer to satisfy the Board that the Owners should be excluded from the bargaining unit because they are either managers or supervisory employees.

[28] Much was made by the Employer of the provision in the Services Agreement that requires Owners to acknowledge that they and their drivers are not employees of the Employer. While they may not be considered employees for some purposes (as was the case in *United Cabs*), the Employer acknowledged in this matter that Owners and drivers are employees of the Employer under Part VI of the Act. The Employer consented to the August 16, 2019 Interim Order naming the drivers as their employees; the only issue it continues to dispute in this matter is whether Owners occupy such a senior position in the employment of the Employer, and have authority to perform such duties, that require them to be excluded from the bargaining unit.

[29] The Board will first consider whether Owners should be excluded from the bargaining unit because their primary responsibility is to exercise authority and perform functions of a managerial character.

[30] The Employer referred the Board to *International Longshoremen's and Warehousemen's Union, Local 514 v Vancouver Wharves Limited*, 1974 CarswellNat 419, 74 CLLC 16,118 (CLRB) in support of its argument that Owners are managers:

> *177 The reasons seem to this Board to be apparent. The current structures of industrial or commercial enterprises are such that what used to be easy has become very difficult when attempting to distinguish who has authority, who is employer and who is employee. The authority or managerial functions are spread over an ever increasing band of persons and further it varies in degree according to each enterprise's policy and also it varies regarding the individuals. When one looks at some of the most characteristic and true attributes of management, such as hiring and firing, promoting and demoting, planning the work and appointing people to do it, personally bargaining collectively, executing the provisions of a collective agreement or setting down independently or as a team the general policies of an enterprise, it becomes evident that all of these or any one of them may be possessed by some in total, by others only partly and still by others, none at all and in all cases in varying degrees.*
>
> *178 Parliament, by the provisions of the Code, has willed that it be the duty of this Board to analyse each case and decide what is the separation line between those who are management and those who are not.*
>
> *179 There is no dispute, the Board believes, with the recognition that the Canadian Parliament, together with the Provincial Legislatures is committed to the fundamental policy that collective bargaining must be facilitated and enhanced for as many people as possible. Collective bargaining rights are not a privilege, not a concession, not a favour, they are a*

> *basic right which will not be withdrawn from any employee unless there are very serious reasons.*
>
> *180 One of these serious reasons is found in the position of this group of persons who, although dependent on an employer, are associated with said employer in the senior ranks and have been delegated substantial powers over the rest of the employees in seeing that the products or the services of the employer are made or done and that the collective agreement is followed rigorously. The employer requires and needs exclusive loyalty from these people: they could not participate in union activities, and their decisions can seriously if not fatally affect the position and remuneration or career paths of the employees: dismissals, promotions, demotions.*
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> *. . .*
>
> *194 What would be the other management functions which would disqualify an employee in a supervisory position?*
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> *195 It seems to the Board that the two functions most vital to the employees's status and career are dismissal and promotion or demotion. That is, the authority to make the original decision or the final one if they result from recommendations.*
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> *196 The performance of these functions is also that which is most likely to create conflicts of loyalties with membership in the bargaining unit.*
>
> *197 In order of lesser importance would then come the functions of disciplining employees and of hiring, that is interviewing, assessing and selecting new employees. Again here we are referring to the original or final decision taking process if there are recommending procedures. The exercise of independent judgment in discharging functions which require skill or professional expertise is foreign to our consideration of management functions.*
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> *198 Planning and decision-making in the area of job priorities, assignment (not division or allocation) of work to persons, the independent buying or requisitioning of material or tools are also of interest to the Board as a criterion.*

[31] A review of the criteria used by the Canada Labour Relations Board in the above-noted case leads the Board to the conclusion that Owners are not managers. Owners do not have the power of hiring and firing drivers. They do not decide job priorities or assign work to drivers. The Canada Labour Relations Board noted that dismissal and promotion or demotion are the two most important criteria and the ones most likely to create conflicts of loyalties. Promotion or demotion is not an applicable concept in this workplace; dismissal is clearly in the hands of the Employer, not the Owners.

[32] The Employer also suggested that *Westfair Foods* supported its argument. It is to be noted, however, that the Board found that the Department Managers in question in that case had the authority to hire new employees without reference to their superior; administered lesser forms of discipline such as reprimands on a regular basis; held any discretion available to the employer with respect to promotion or demotion; were instructed by the employer to deal with employees' questions regarding the collective agreement; had responsibility to regularly evaluate their

subordinates; determined hours of work; authorized overtime; approved absences; and exercised a substantial degree of independent discretion in the management of their departments. In other words, they performed management functions to a degree that brought them within the managerial exclusion. Such is not the case for Owners. While some of these factors are inapplicable to the taxi industry, those that apply (*e.g.*, hiring), lie squarely in the hands of the Employer. The Board would note at this point that the Employer's contention that the Services Agreement gives Owners discretion to hire, discipline, promote, demote, evaluate and direct their drivers is not borne out by the oral evidence or a review of any version of the Services Agreement entered into evidence.

[33] Next the Employer referred the Board to *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 880 v Ford Motor Company of Canada Limited*, 1993 CanLII 7810 (ON LRB). That case relied on the following summary of the approach of the Ontario Labour Relations Board to the issue of determining who is a manager:

> *7. We can summarize these general approaches then, as follows:*
>
> *(1) A party seeking to exclude an individual from the ambit of a remedial statute designed to extend benefits to employees, must be prepared to demonstrate that the disputed individual is not an employee.*
>
> *(2) A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect.*
> *. . .*
>
> *(4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the "traditional foreman" so that he is no longer the king-pin he once was. This process has several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with "real" managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status –especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.*
>
> *(5) The acceptance of the "effective recommendation test" mentioned above, means that it is not necessary to show that the disputed individual performs his role*

> *independently of higher levels of management. But it is necessary to show that his recommendations are really effective, so that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide concrete examples of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years, this evidence has either not been available at all, or when examined closely, amounts to no more than a "participatory decisionmaking style". Whatever value the latter may have in improving employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards.* [emphasis in original]

[34] In the Board's view, application of this summary of criteria leads, in this matter, to a decision that the Owners are not managers. The Employer has not provided the Board with the clear evidence that would be required to establish that the Owners should be denied the right to collectively bargain through a union of their choosing. Even relying on the Employer's evidence, the most that has been established is a participatory decision-making style that does not lead to a conclusion that managerial authority has percolated downwards to the Owners. The following statement is particularly relevant in this workplace:

> *Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status –especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.*

[35] The Employer relied on the evidence of Mr. Pintea as indicating that Owners share its view that they are managers. However, the Board heard evidence from one Owner who considered himself to be on the Employer's side of the bargaining table, and one who considered himself to be on the Union's side of the bargaining table. There was no evidence respecting how representative either is of the views of the Owners in general. The onus is on the Employer to satisfy the Board that Owners are managers and this evidence does not advance its case.

[36] The evidence indicates that the managerial authority needed to establish a person as a manager of the drivers is held by other senior managers of the Employer.

[37] In interpreting clause 6-1(1)(h) of the Act, the Board adopts the definition of "primary" that it adopted in *United Cabs*, which was also adopted in *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*, 2018 CanLII 38248 (SK LRB):

> *To fit within the managerial exception, the employee must have "primary" responsibility to exercise authority and perform functions that are of a managerial character. In this context, "primary" has its usual meaning of "earliest, original, of the first rank in a series, of the first importance, chief".*

[38] Even if the Employer's definition was accepted, Owners would not meet that definition. They do not perform management functions to a degree that would bring them within that exclusion. Carlo Triolo, general manager of the Employer, and his other senior managers, are the ones with primary responsibility to exercise authority and perform functions of a managerial character with respect to the drivers. As the Employer noted, it is who has the authority that matters and, in this case, it is not the Owners.

[39] The Union referred the Board to *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artist and Allied Crafts, Local 295 v Globe Theatre Society*, 2011 CanLII 75423 (SK LRB). In that case, in determining whether the positions in dispute should be excluded from the bargaining unit because they were managerial, the Board made the following comment:

> *Finally, and of particular significance, excluding the production heads would undoubtedly weaken and divide the bargaining unit and would see a wholly disproportionate number of excluded positions for a relatively small bargaining unit. In our opinion, excluding the production heads would be inconsistent with this Board's policy of granting managerial exceptions on "as narrow a basis as possible".*[17]

[40] The Employer's suggestion that the proportion of Owners to drivers in the proposed bargaining unit was 1:2 was not disputed by the Union. A workplace in which there is one or more managers for every two drivers would not respect the principle of granting managerial exceptions on as narrow a basis as possible.

[41] The Board agrees with the Canada Labour Relations Board[18] that collective bargaining must be facilitated and enhanced for as many people as possible. Collective bargaining rights are not a privilege, not a concession, not a favour, but a basic right that will not be withdrawn from any employee unless there are very serious reasons. The Board is not satisfied that the required "very serious reasons" have been proven by the Employer to exist in this matter. The exclusion of Owners from the bargaining unit would unnecessarily deprive them of their right to union representation.

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[17] At para 40.
[18] *International Longshoremen's and Warehousemen's Union, Local 514 v Vancouver Wharves Limited*, 1974 CarswellNat 419, 74 CLLC 16,118 (CLRB) at para 179.

[42] *United Cabs* held that Owners were not managers. The Employer has not provided any evidence or argument respecting the Employer's operations that would persuade the Board to find otherwise in this matter.

[43] The next decision for the Board is whether Owners are supervisory employees of the drivers, and therefore cannot be placed in the same bargaining unit with them. As in *United Cabs*, the Board finds that they do not meet the necessary criteria to be characterized as supervisory employees. To meet the definition of supervisory employee, clause 6-1(1)(o) of the Act requires the Employer to prove two things. First, it must prove that the Owners' primary function is to supervise employees. If it can satisfy that hurdle, it must also satisfy the Board that an Owner is an employee who exercises one or more of the duties enumerated in subclauses (o)(i) to (iv):

> *(i) independently assigning work to employees and monitoring the quality of work produced by employees;*
> *(ii) assigning hours of work and overtime;*
> *(iii) providing an assessment to be used for work appraisals or merit increases for employees;*
> *(iv) recommending disciplining employees.*

[44] Again, Owners do not meet either of those criteria. As noted above, their primary function is not to supervise employees. Neither do they: independently assign work to employees and monitor the quality of work produced by employees; assign hours of work and overtime; provide an assessment to be used for work appraisals or merit increases for employees; or recommend disciplining employees. As a result, there is no impediment to Owners and drivers being placed in the same bargaining unit.

[45] The Board agrees with the Union that the terms of the Services Agreement are not determinative, any more than a job title or job description would be for an employee in a more traditional workplace. The Board must make its assessment on the basis of the duties the Owners actually perform, and whether those duties create an insoluble conflict between the responsibility the Owners owe to the Employer, and the interests of Owners and drivers as members of a bargaining unit[19]. Although the Employer suggested in argument that Owners would play a role on its behalf in labour relations with the Union, no evidence was led to support that assertion.

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[19] *Prince Albert Firefighters Association, IAFF Local 510 v City of Prince Albert*, 2011 CanLII 78523 (SK LRB).

[46] The Services Agreement attached to the Partial Agreed Statement of Facts includes the following statement:

> *1.0 (c) "Contracted Driver" refers to any drivers under contract with the "Operator". When the term is used in the agreement, it is understood that at no time will the "Broker" have any control over who operates a taxicab for the Operator, the shifts they drive the taxicab, or the monies they will earn from such contract, other than approving a list of drivers that have met the minimum qualifications under the City Bylaw to operate a taxicab, from which list the Operator can choose a driver.*

The evidence showed that this was not followed in practice. The Employer has the final word in determining who can operate a taxicab for an Owner. As in *United Cabs*, it controls the amount of money drivers can earn.

[47] This version of the Services Agreement also includes the following provision:

> *6.1 The "Operator" makes the following covenants:*
>
> *. . .*
>
> *(f) The Operator acknowledges that they are responsible, if they wish to use a Contracted Driver, for all terms and conditions related to the use of that Contracted Driver. Provided, however, that the Driver must be approved Drivers who have complied with the requirements of the "Broker" and the Bylaws, relating to the terms and conditions necessary to be a Driver of a taxi under the law. The Operator acknowledges that all of the terms that apply to the Operator operating under the dispatch system of the Broker, with regard to dealings with customers and rules relating to appearance, dress code and standards for the equipment, will apply to all Contracted Drivers operating the taxicab covered by this agreement, and the operator will be responsible to ensure the Contracted Drivers comply with such rules.*
>
> *The Operator acknowledges that a failure to have the Contracted Driver follow all of the rules required by the dispatch company can lead to the cancellation of this agreement, unless the operator, after notification of a breach, rectifies the breach within three days of notification and ensures compliance with the rules required by the city of Saskatoon Bylaw and the dispatch business rules.*

[48] In other words, the Employer decides that a breach has occurred and directs the Owner to rectify it within three days[20], failing which the Employer can cancel the Services Agreement. Cancellation of the Agreement would require the Owner to pay the Employer an amount equal to all Weekly Brokerage/Dispatch/Accounting Expenses remaining in the Initial Term[21]. Some of the Agreements included the following provision: "If the breach is by a Contracted Driver, the cancellation of that drivers ability to operate the taxicab will be considered to be an appropriate remedy". The Board cannot draw a conclusion from any of these provisions that the authority over

[20] Some of the Services Agreements filed require rectification of the breach to occur within 24 hours.
[21] Paragraph 11.3. The terms of the Services Agreements ranged from 12 to 84 months.

discipline or dismissal lies in the hands of the Owners. The senior managers in the Employer's office have total authority and control.

[49] As in *United Cabs*, the Employer has not satisfied the Board that the Owners meet the definition of supervisory employee.

[50] Accordingly, with these Reasons, the Board will issue the following Order:

(a) All taxi drivers employed by Riide Holdings Inc., except those persons who own and control two or more taxicabs, dispatchers, office personnel, supervisors and management above the rank of supervisors, is an appropriate unit of employees for the purpose of bargaining collectively;

(b) United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), a union within the meaning of *The Saskatchewan Employment Act*, represents a majority of employees in the bargaining unit set out in paragraph (a);

(c) Riide Holdings Inc., the employer, bargain collectively with the union set out in paragraph (b), with respect to the bargaining unit set out in paragraph (a).

[51] The Board thanks the parties for the comprehensive oral and written arguments they provided, which the Board has reviewed and found helpful.

[52] Board member Brenda Cuthbert dissents from this decision.

DATED at Regina, Saskatchewan, this **12th** day of **September, 2019.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson