



UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION LOCAL 2014, APPLICANT v UNITED CABS LIMITED OPERATING AS UNITED CABS AND BLUE LINE TAXI AND THE UNITED GROUP, RESPONDENT

LRB File No. 137-17; May 21, 2019

Chairperson, Susan C. Amrud, Q.C.; Board Members: Jim Holmes and Don Ewart

For the Applicant:

Heather M. Jensen

For the Respondent:

Larry F. Seiferling, Q.C.

Preliminary Issue – Not an abuse of process for Respondent to ask Board to consider whether certification is appropriate for bargaining unit last found appropriate 18 years ago.

Preliminary issue – No adverse inference found against Applicant for not calling witness that Respondent alleged had a different interest than witnesses called – No evidence of different interest – Applicant provided reasonable explanation for not calling witness – Witness not in Applicant's exclusive control.

Application for certification – Owners who own, lease or control one taxicab and drivers of taxicabs are employees of Respondent – Consideration of *York Condominium* and *Algonquin Tavern* criteria leads to finding of employment relationship.

Definition of employee in Part II of *The Saskatchewan Employment Act* is irrelevant to determination of whether people in proposed bargaining unit are employees under Part VI.

Owners who own, lease or control one taxicab are not managers or supervisory employees and can therefore be in bargaining unit with drivers.

Proposed bargaining unit of owners who own, lease or control one taxicab and drivers of taxicabs is appropriate for collective bargaining.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson:** On July 11, 2017, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International

Union Local 2014 ["Union"] filed an Application for Bargaining Rights for a bargaining unit described as follows:

All taxi drivers employed by United Cabs Limited and S-I Management Limited, operating as United Cabs and BlueLine Taxi and the United Group, except dispatchers, office personnel, garage staff, gas bar staff, employees of Atomic Motors, supervisors and management above the rank of supervisor, limousine drivers and further excluding those persons who own, lease or control two or more taxicabs.

[2] A Direction for Vote was issued on July 17, 2017, and the result of the vote was:

Number of eligible voters:	244
Number of ballots cast:	183
Number of employees not voting:	61
Votes for Union:	104
Votes against Union:	42
Spoiled ballots:	1
Disputed ballots removed from tabulation:	36

[3] On July 21, 2017, United Cabs Limited and United Cabs Limited o/a United Cabs and Blue Line Cabs filed a Reply in which it indicated that its proper name, for the purpose of this application, is United Cabs Limited operating as United Cabs and Blue Line Taxi and the United Group ["United Cabs"]. Its main positions were:

- It objected to S-I Management Limited being named as a respondent in the application;¹
- None of the people in the proposed bargaining unit are employees;
- Since there is no community of interest between the owner or lessee of one cab who drives and the driver of that cab, it would be inappropriate to place them in the same bargaining unit; and
- Collective bargaining is not feasible in this workplace.

[4] Both the Union and United Cabs filed Objections to Conduct of the Vote,² but both have been withdrawn.

¹ At the hearing the Union withdrew the application against S-I Management Limited and agreed to the proper name proposed by the respondent.

² LRB Files No. 153-17 and No. 155-17.

[5] The hearing of this application took place on November 20, 22, 23, 24 and 29, 2017, before then Vice-chairperson Graeme Mitchell and panelists Jim Holmes and Don Ewart. Vice-chairperson Mitchell was appointed as a Judge of the Court of Queen's Bench on September 21, 2018. The parties agreed that this matter could be concluded by Chairperson Amrud listening to the recording of the hearing and then issuing this decision in conjunction with the other members of the panel, following one more day of argument, which took place on April 11, 2019.

[6] The proposed bargaining unit includes two categories of taxicab drivers: those who do not own, lease or control a taxicab and those who own, lease or control one taxicab. For the purposes of these Reasons, the Board will refer to the first category as Drivers and the second category as Owners. Person who own, lease or control more than one taxicab will be referred to in these Reasons as multiple plate owners.

[7] The proposed bargaining unit (in its exclusion of taxicab drivers who own or control two or more taxicabs) is identical to bargaining units that were found by the Board to be bargaining units of employees appropriate for collective bargaining with this employer in 1996³ and again in 2001⁴. These two decisions will be referred to as the 1996 Decision and 2001 Decision, respectively.

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:*

(d) "**collective agreement**" means a written agreement between an employer and a union that:

(i) sets out the terms and conditions of employment; or

(ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees;

(h) "**employee**" means:

(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:

³ *Retail Wholesale Canada, a Division of the United Steelworkers of America v United Cabs Ltd.*, [1996] Sask LRBR 337; LRB File No. 115-95.

⁴ *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.

- (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;

(i) **“employer”** means:

- (i) an employer who customarily or actually employs three or more employees;
- (ii) an employer who employs fewer than three employees if at least one of the employees is a member of a union that includes among its membership employees of more than one employer; or
- (iii) with respect to any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may determine for the purposes of this Part;

(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;

Evidence:

[9] For the most part there is no dispute between the parties respecting the facts. The Board finds that the following facts were established by the evidence:

- The City of Saskatoon ["City"] issues three types of licences under *The Taxi Bylaw, 2014* ["bylaw"]: taxi broker's licence, taxi licence and taxi driver's licence.
- The City issues two main kinds of taxi licences⁵: a "regular" taxi licence that is transferable, and a seasonal taxi licence that is non-transferable.⁶
- United Cabs is a licensed taxi broker operating in Saskatoon.
- United Cabs provides a dispatch system for the taxicabs that drive under its name as well as office and accounting services and marketing.
- United Cabs supplies all equipment that Owners and Drivers need to use its dispatch system (tablet equipped with dispatch software, top sign, Global Positioning System ["GPS"], camera, debit/credit card machine).
- Rather than operate a taxicab, an Owner/multiple plate owner who owns a regular plate can choose to lease it to a person who supplies the vehicle that will operate as a taxicab.
- To make maximum use of their taxicabs, Owners generally rent their taxicabs to Drivers who will drive the taxicab when the Owner is not driving. These Drivers pay a weekly lease fee to the Owner.
- Drivers who drive for a multiple plate owner also pay a weekly lease fee to that person.

⁵ It also issues temporary and regular wheelchair accessible taxi licences.

⁶ In these Reasons, the Board will adopt the vernacular "regular plate" and "seasonal plate" in reference to these two kinds of licences.

- Owners/multiple plate owners and Drivers negotiate the amount the Driver pays as a weekly lease fee and the hours during which the Driver is able to drive. Drivers are not required to work during all of the hours that are assigned to them.
- Owners/multiple plate owners can only rent their taxicabs to Drivers who are approved by United Cabs.
- There was some reference in the hearing to Canada Revenue Agency's treatment of Owners and Drivers for income tax purposes. A letter from Canada Revenue Agency was entered as an Exhibit for identification only; testimony was never given to authenticate it. This means it is not evidence.⁷ However, witnesses for both parties agreed that United Cabs does not deduct or submit Employment Insurance premiums, Canada Pension Plan contributions or income tax for Owners or Drivers, and neither do Owners do this for Drivers.
- The Workers' Compensation Board has denied coverage to a Driver on the basis that taxi drivers do not have coverage.⁸
- United Cabs has a Manual setting out its policies and procedures with which Owners and Drivers must comply or risk discipline by United Cabs. Owners and Drivers have no input into these policies and procedures.
- United Cabs' website includes a page devoted to recruiting new Drivers including a page entitled "the united group Requirements for Employment as a Driver" and "United Cabs Application for Employment".⁹
- United Cabs provides training that new Drivers must take and a test they must pass before they are eligible to drive for United Cabs.
- Owners and Drivers cannot make private arrangements with customers or advertise their services.
- Owners and Drivers receive fares directly from passengers only if they pay with cash. Fewer than 10% of passengers pay their fare in cash. If a passenger pays with a credit card, debit card, charge slip or gift card, the money goes first to United Cabs, which then forwards the money to the Owner, after deducting its fees.
- When paying over this money, United Cabs provides a statement that sets out who was driving the taxicab when the fares were earned.

⁷ Sopinka, Lederman and Bryant: The Law of Evidence in Canada, 5th ed (LexisNexis Canada Inc., 2018), at paragraph 2.106.

⁸ Exhibit E-5.

⁹ Exhibit U-8.

- Taxi fares include goods and services tax (GST) and each Owner and Driver has a GST number, and remits that GST directly to Canada Revenue Agency.
- The Owner pays a weekly dispatch fee to United Cabs, which is deducted from the credit card/debit card/charge slip/gift card income before the balance is paid over. In addition, United Cabs retains a percentage fee on credit card, gift card and charge slip payments and a flat fee on debit card payments. Deductions can also be made for other amounts owed to United Cabs, such as liability insurance premiums.
- The bylaw sets out the fares that must be charged but allows a taxi broker to enter into a contract to charge a flat rate per trip instead.¹⁰
- United Cabs has arranged for taxi stands at some locations, including the airport. It also makes arrangements with some clients for charge accounts, with flat fees or reduced fees. It decides how to distribute these accounts among Owners and Drivers. These contracts account for up to 40% of its business.
- United Cabs has divided Saskatoon into zones, and Owners and Drivers can choose in which zone they will wait for fares. The dispatch system provides them with information respecting how many taxicabs are in each zone at any given time.
- Passenger complaints about a person driving a taxicab go to United Cabs; an Owner plays no role in resolving complaints about his or her Driver. United Cabs usually handles these complaints internally, with no input by the City bylaw officer.
- Owners have no role in United Cabs' decision-making respecting disciplining their Drivers, including a decision by United Cabs to de-authorize a Driver from accessing the dispatch system.
- The bylaw requires Owners to ensure that Drivers driving their taxicabs have a valid taxi driver's licence.
- The bylaw sets out three pages of obligations for taxi brokers, many of which require it to supervise Owners and Drivers.¹¹ United Cabs must ensure that Owners and Drivers comply with the bylaw or risk having its taxi broker's licence revoked.

¹⁰ Section 59.

¹¹ Section 30.

[10] Mike Pulak gave evidence on behalf of the Union. He described his experience as a Union representative assisting the employees at Comfort Cabs Ltd. in Saskatoon to undertake a successful organizing drive, obtain a certification order and negotiate a collective agreement in 2014.¹² The Union entered as Exhibits the Comfort Cabs Ltd. collective agreement effective September 2014 to 2017,¹³ as well as several collective agreements negotiated between unions and taxi companies across Canada that Mr. Pulak relied on as precedents in negotiating the collective agreement with Comfort Cabs Ltd.¹⁴

[11] The Union also called as witnesses a Driver, Muhammad Tariq, and a seasonal plate Owner, Muhammad Imtiaz. United Cabs called two witnesses: Carlo Triolo, who is employed by the United Group as General Manager of the six businesses under its umbrella, including United Cabs; and Scott Suppes, who has been President of United Cabs since 2000.

Argument on behalf of the Union:

[12] The Union argues that there are no issues to determine in this matter that have not already been determined by the Board. As noted above, two Decisions respecting this workplace have already been issued, finding Owners and Drivers to be employees of United Cabs and considering and approving the same bargaining unit. The essential characteristics of United Cabs' taxicab business are unchanged from 2001. No change in provincial legislation or the bylaw since those Decisions were issued would justify a different decision in this matter. The definition of employee in Part VI of the Act is unchanged from the definition of employee in *The Trade Union Act* that was considered by the Board in making the 1996 and 2001 Decisions. The introduction of the more detailed bylaw by the City in 2014 has not changed the operation of United Cabs' business, the relationship between United Cabs and Owners and Drivers or the flow of money among them. The bylaw prevents United Cabs from devolving its business into a non-employment situation. The bylaw requires United Cabs to exercise control over and supervise Owners and Drivers. Changes to the bylaw solidified and codified the dependence of Owners and Drivers on United Cabs. As in 1996 and 2001, Owners and Drivers continue to be subject to direction and discipline by United Cabs and continue to be dependent on United Cabs for their work. In addition,

¹² LRB File No. 327-13, Certification Order issued April 3, 2014.

¹³ Exhibit U-1.

¹⁴ Exhibits U-2 to U-6. United Cabs objected to these collective agreements being entered as evidence of the truth of their contents; during the hearing the Board ordered that they be admitted as evidence of Mr. Pulak's research.

certification orders for similar bargaining units are currently in place with respect to Comfort Cabs Ltd. in Saskatoon and Arch Transco Ltd. operating as Regina Cabs in Regina.¹⁵

[13] The Union urged the Board to grant its application on the basis that United Cabs' attempt to re-litigate these issues constitutes an abuse of process. It referred the Board to *Metz v SGEU*, 2007 CanLII 68747 (SK LRB), where the Board held that it has no jurisdiction to sit in appeal of its own decisions:

On the basis of the analysis in Canadian Linen, supra, it is clear that the Board has no jurisdiction to sit in appeal of its own decisions. An applicant is prevented from utilizing an application as an appeal mechanism through the Board's application of the doctrine of res judicata. It is through the Board's consideration of the principle of res judicata that the Board decides whether it has jurisdiction to embark on the determination of an application – if res judicata applies, the Board lacks jurisdiction to do so. Therefore, in this case, if the Applicant is asking us, in essence, to sit in appeal of any or all of the Board's decisions in LRB File No. 164-00, we have no jurisdiction to proceed with the hearing and determination of the applications before us. The doctrine of res judicata assists us to determine whether an application is in the nature of an appeal. This principle also underlies our consideration of whether the Board lacks jurisdiction because the applications are an abuse of process, a doctrine that is similar in its application to res judicata, which will be further discussed below.¹⁶

[14] With respect to the preliminary issue raised by United Cabs, that the Board should draw an adverse inference against the Union because it did not call a person who owns a regular plate as a witness, the Union states that the preconditions for drawing an adverse inference have not been met. Like United Cabs did, the Union referred the Board to *Murray v Saskatoon (City)*, 1951 CanLII 202 (SK CA) [*"Murray"*]. The Union states that such a witness is not in the Union's exclusive control. If United Cabs wanted the Board to hear evidence from a person who owns a regular plate, it could have called one as a witness. The Union pointed out that in 2001, United Cabs did just that. The Union indicated that it did not call an Owner of a regular plate because that evidence was not necessary to prove its case, it is not necessary to call an employee from every classification and its practice is to limit the number of employees called as witnesses, to protect their privacy and protect them from reprisal. While United Cabs argued that seasonal plate and regular plate Owners have different interests, it did not explain how; the Union says the amount paid for a plate is not relevant to the issue before the Board in this matter and there is no evidence before the Board that regular plate Owners who drive are in any way different than seasonal plate Owners who drive. United Cabs did not establish that a regular plate Owner would

¹⁵ LRB File No. 262-14.

¹⁶ At para 37.

have provided relevant or necessary evidence to the Board. All of the witnesses agreed that people who drive taxicabs, whether or not they are Owners, are all subject to the same rules and discipline by United Cabs.

[15] If the Board decides not to find that United Cabs' arguments are an abuse of process, the Union states that it has proven all necessary elements for the Board to issue the requested certification order.

[16] First, Owners and Drivers are employees of United Cabs. Both parties referred the Board to the *York Condominium*¹⁷ criteria and the *Algonquin Tavern*¹⁸ criteria as setting out factors that can be used in determining when an employment relationship exists. Both of these sets of criteria were relied on by the Ontario Labour Relations Board in determining that taxicab drivers were employees of the dispatch company in *Ontario Taxi Workers' Union v Hamilton Cab Co. o/a Hamilton Cab*, 2011 CanLII 7282 (ON LRB) [*"Hamilton Cab"*]. That decision cited the *York Condominium* criteria as follows, at paragraph 22:

Those criteria are:

- a. The party exercising direction and control over the employees performing the work.*
- b. The party bearing the burden of remuneration.*
- c. The party imposing discipline.*
- d. The party hiring the employees.*
- e. The party with the authority to dismiss the employees.*
- f. The party which is perceived to be the employer by the employees.*
- g. The existence of an intention to create the relationship of employer and employees.*

[17] The Union argues that applying the *York Condominium* criteria in this case leads to a decision that United Cabs is the employer of the Owners and Drivers.

[18] *The party exercising direction and control over the employees performing the work:* United Cabs is the party exercising direction and control over the Owners and Drivers when they are performing their work. For example, it controls everything even to the point of what shoes they wear, how long they must wait for a tardy passenger and that the cars they drive must have hub cabs. None of these requirements are in the bylaw; they are policies established and enforced by United Cabs. United Cabs does not set hours of work for Drivers, but neither do Owners. Drivers

¹⁷ *LIUNA, Local 183 v York Condominium Corp. No. 46*, 1977 CarswellOnt 938, [1977] OLRB Rep. 645.

¹⁸ *Canadian Labour Congress (Canadian Association of Burlesque Entertainers, Local Union No. 1689) v Algonquin Tavern*, 1981 CanLII 812 (ON LRB), [1981] OLRB Rep. Aug. 1057.

advise United Cabs when they are on duty and not on duty (by logging onto and off of the dispatch system), but they do not advise the Owner.

[19] *The party bearing the burden of remuneration:* While the Union acknowledges that this criterion is less clear, it does point out that United Cabs can significantly affect the Owners' and Drivers' remuneration. The Union disagrees with United Cabs' position that all monetary issues are negotiated between the Owner and Driver and that United Cabs' only role is to provide a dispatch system and conduit service for customer payments made by debit cards, credit cards, vouchers and gift cards. For example, all payments other than cash payments flow through United Cabs and United Cabs decides how much of a fee it will deduct from that money before passing it along to the Owners (United Cabs even takes a share of the tip if the fare is paid by credit card¹⁹). United Cabs can also unilaterally and arbitrarily de-authorize an Owner's or Driver's ability to log on to the dispatch system, making it impossible for them to earn any income. The amount the Driver pays the Owner is dependent on office fees United Cabs charges the Owner. United Cabs decides how long the Owner or Driver must wait for a fare or face economic consequences, by losing their place in the queue.

[20] *The party imposing discipline:* United Cabs is clearly the party imposing discipline. It can de-authorize an Owner's or Driver's ability to log on to the dispatch system. It can remove Drivers from its list of approved Drivers, entirely removing their ability to drive a taxicab for United Cabs. It makes all of these decisions without any input from or even notice to the Owner. It also usually makes these decisions without any input from or notice to the City bylaw officer.

[21] *The party hiring the employees:* This is a shared role between United Cabs and the Owners. The Union disagrees with the suggestion by United Cabs that it has no involvement with who an Owner uses as a Driver and the agreement they enter into. An Owner can only choose as a Driver a person that United Cabs has authorized to work for it. If United Cabs refuses to authorize a person to be a Driver, that person cannot work.

[22] *The party with the authority to dismiss the employees:* As set out above respecting the imposition of discipline, United Cabs is the party with the authority to dismiss Drivers. There is a shared responsibility with the Owner, in that an Owner may decide not to rent his or her taxicab to a particular Driver. However, that Driver can continue to drive other taxicabs associated with

¹⁹ Exhibit U-14.

United Cabs unless United Cabs decides otherwise. United Cabs can de-authorize a Driver, with no opportunity for input by an Owner into that decision. If an Owner and Driver part ways, the Driver is not terminated from United Cabs' business, and can drive for a different Owner or multiple plate owner. This is the same arrangement as existed when the 1996 and 2001 Decisions were issued.

[23] *The party which is perceived to be the employer by the employees:* The evidence indicates that United Cabs is perceived to be the employer by the Owners and Drivers.

[24] *The existence of an intention to create the relationship of employer and employees:* United Cabs has gone to great lengths to stress that it has no intention to create the relationship of employer and employees.

[25] *Hamilton Cab* also cited the *Algonquin Tavern* criteria, at paragraph 24:

Those factors are:

1. *The use of, or right to use substitutes.*
2. *Ownership of instruments, tools, equipment, appliances or the supply of materials.*
3. *Evidence of entrepreneurial activity.*
4. *The selling of one's services to the market generally.*
5. *Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.*
6. *Evidence of some variation in the fees charged for the services rendered.*
7. *Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.*
8. *The degree of specialization, skill, expertise or creativity involved.*
9. *Control of the manner and means of performing the work - especially if there is active interference with the activity.*
10. *The magnitude of the contract amount, terms, and manner of payment.*
11. *Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.*

[26] With respect to these criteria the Union made the following comments.

[27] With respect to the use of or right to use substitutes, United Cabs ultimately controls who can or cannot log into the dispatch system. An Owner cannot rent his or her taxicab to a Driver who is not approved by United Cabs.

[28] With respect to ownership of instruments, tools, equipment, appliances or the supply of materials, the key elements of the taxi business are the dispatch system and the marketing and reputation of United Cabs. The essential tools of the business are owned by United Cabs.

[29] Evidence of entrepreneurial activity indicates that Owners and Drivers are prohibited from entering into private arrangements with customers. The bylaw allows United Cabs to negotiate flat rates with customers. United Cabs controls all advertising; Owners and Drivers are not permitted to personally advertise their services. Owners and Drivers depend on a single source, United Cabs, for their income. The Union disagrees with United Cabs' argument that Owners and Drivers take on the entire risk of the business. They point out that United Cabs has unilateral control over marketing and contracts with customers. Owners and Drivers are entirely dependent for their income on United Cabs. Entrepreneurial activity lies entirely with United Cabs.

[30] The selling of one's services to the market generally by Owners and Drivers is not allowed. United Cabs prohibits them from providing their contact information to potential customers. They cannot independently advertise.

[31] Owners and Drivers cannot alter fare rates set by the City. United Cabs, however, can and does enter into contracts that vary the fares charged, and Owners and Drivers have no choice but to accept the negotiated amount.

[32] Owners and Drivers are not carrying on independent businesses. They are essential elements of United Cabs' business. United Cabs is the person who is in the business of providing taxi services to the public. United Cabs does not allow Owners or Drivers to operate an independent business. They cannot undertake individual marketing. Passengers are customers of United Cabs. The Owners and Drivers do not have an existence independent from United Cabs – when they drive they are contributing to the brand and reputation of United Cabs.

[33] With respect to the control of the manner and means of performing the work, the evidence shows that United Cabs exercises significant control over the manner of performing the work; it imposes standards, which it enforces by suspensions or terminations, including with respect to Owners' and Drivers' appearance, condition of taxicabs and manner of dealing with passengers. No standards are imposed by Owners on Drivers.

[34] With respect to the magnitude of the contract amount, terms, and manner of payment, United Cabs exercises full control. While it does not pay wages, the Owners and Drivers are economically dependent on United Cabs for their income.

[35] Owners and Drivers render services and work under conditions that are similar to persons who are clearly employees.

[36] The Union next turned to, and disagreed with, United Cabs' assertion that Owners meet the definition of manager or supervisory employee in section 6-1 of the Act. The primary function of an Owner is not to supervise a Driver; it is to drive a taxicab. United Cabs is the supervisor. For example, it (and not the Owner) has access to the in-vehicle camera and GPS to monitor the person driving the vehicle. It takes steps to discipline Drivers without input from the Owners, and usually without input from the City bylaw officer.

[37] It also disagreed with United Cabs' argument that the definition of employee in Part II of the Act is relevant to the Board's decision in this matter, relying on standard rules of statutory interpretation.

[38] With respect to the proposed bargaining unit, the Union states that it is an appropriate bargaining unit. It has been previously approved by this Board, in the 1996 and 2001 Decisions. It is standard practice for different classifications to be put together in one bargaining unit. Owners and Drivers share a community of interest with respect to their treatment by United Cabs. United Cabs acknowledges that all people driving taxicabs for it are subject to the same rules, whether they are Owners or Drivers. The issue before the Board, the Union argues, is not whether this is the most appropriate bargaining unit in this workplace, but whether this is an appropriate unit. The result of the vote indicates that the employees choose to bargain in the proposed unit. The Union referred to the following comment on this issue in the 2001 Decision:

We agree with the Board's earlier determination of the appropriateness of the bargaining unit and do not conclude from the evidence on this case that the relationship between single franchise owner/lessees and drivers is so fraught with potential conflicts that they be placed in two separate bargaining units. The evidence demonstrated that United Cabs control the key features of the work lives of single franchise owner/lessee and rental drivers. They work under the same rules and are subject to the same forms of discipline. They benefit from the advertising and marketing efforts of United Cabs. They are also subject to the same financial arrangements respecting the payment of charge accounts and credit cards. Rental drivers are indirectly affected by the fees charged by United Cabs for dispatch and office fees and any changes in these fees could affect their rental

payments. Primary control over the three groups of drivers rests with United Cabs. The Board also noted that the parties are currently engaged in negotiations through the drivers' committee. Although there are areas of conflict between rental drivers and franchise owners/lessees, we do not find that these conflicts are so great as to render the inclusion of both groups in one bargaining unit inappropriate.²⁰

[39] Finally, the Union disagrees with United Cabs' argument that, in making its decision, the Board should look at what could be accomplished in collective bargaining. The Union states that this is not a consideration for the Board. The Board should not speculate about what a collective agreement might look like. Alternatively, it argues, the definition of collective bargaining in section 6-1 of the Act is very flexible, and the evidence shows that collective agreements are possible in the taxi industry and in this workplace. The issue is not whether a collective agreement between these parties would look the same as it would for bargaining units in other industries. The evidence establishes that United Cabs exercises significant control over the Owners' and Drivers' working conditions. Some of this control it is required to exercise, in compliance with the bylaw, but nothing in the bylaw has prevented collective bargaining between Comfort Cabs Ltd. and its union.

Argument on behalf of United Cabs:

[40] In response to the preliminary issue raised by the Union, that its application is an abuse of process, United Cabs argues that Board decisions are never final. The Board is not bound by the 1996 and 2001 Decisions. It cited a number of reasons why the Board should not follow them. This is the first time the Board has been asked to consider the issue of whether Owners and Drivers are employees. The Board did not consider the *York Condominium* factors in those cases. There are major differences between the law and facts now and the law and facts as they were in 1996 and 2001. Now that Saskatchewan has a codified employment Act, the Board has to consider the entire Act in making its determination. The relationship between these parties is totally codified in the new bylaw; the bylaw has taken over the entrepreneurial part of the industry. The decision of the Board in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v Comfort Cabs Ltd*, 2015 CanLII 19986 (SK LRB)²¹ [*“Comfort Cabs”*] drew a line between what is entrepreneurial and what is employment such that there is nothing left that could be considered employment. The 2001 certification

²⁰ At para 36.

²¹ Upheld on judicial review and appeal to the Court of Appeal: *United Steelworkers v Comfort Cabs Ltd.*, 2017 SKCA 45.

showed how difficult it is to bargain in this industry, so difficult that by 2010 the certified union had abandoned the bargaining unit.

[41] United Cabs also raises a preliminary issue, asking the Board to draw an adverse inference against the Union for failing to call as a witness the Owner of a regular plate, relying on *Murray*. United Cabs says in its Brief of Law that Owners of regular plates and seasonal plates have “very different interests” but provides no explanation of that comment. It also did not explain why, if it considers this evidence important for the Board to consider in making this decision, it chose not to call a regular plate Owner as a witness itself.

[42] In addressing the main issue in this matter, United Cabs argues that there is no employment relationship between it and Owners or Drivers: United Cabs does not control how much money an Owner or Driver earns and has no control over hours of work. These factors, it argues, are the fundamentals of an employment relationship. A Driver gets a Taxi Driver’s Licence from the City, United Cabs puts the Driver on its list, but that does not get the Driver any money; the Driver still has to find a job driving for an Owner or multiple plate owner. It suggests being put on the list is equivalent to a lawyer obtaining a law degree. It argues that it has no influence over the economic welfare of Drivers; they are totally dependent on Owners/multiple plate owners. Owners and Drivers are not employees within the meaning of the Act. It also referred to Exhibit E-5, a decision by the Workers’ Compensation Board that found Drivers not to be employees, and urged the Board to rely on that decision.

[43] United Cabs argues that even if Drivers are found to be employees, United Cabs is not their employer, the Owners/multiple plate owners are. Review of the *York Condominium* criteria leads to a decision that United Cabs does not exercise fundamental control over day-to-day labour relations at the workplace:

a. *The party exercising direction and control over the employees performing the work:* Owners/multiple plate owners exercise direction and control over Drivers when they are performing their work. The agreement between Owners/multiple plate owners and Drivers establishes when a Driver can work. All other conditions of employment are set in the bylaw or controlled by Drivers themselves.

b. *The party bearing the burden of remuneration:* United Cabs bears no burden of remuneration. There is no contract between Owners and Drivers and United Cabs. The agreement between Owners/multiple plate owners and Drivers establishes how much a Driver will earn. United Cabs pays no salary or benefits and makes no deductions from earnings. Owners and Drivers file income tax returns as independent contractors.

c. *The party imposing discipline:* Owners/multiple plate owners are the ones who impose discipline. If they are unhappy with a Driver, they can remove the Driver's ability to drive.

d. *The party hiring the employees:* The Owners/multiple plate owners hire the Drivers. After United Cabs puts a Driver on its list, the Driver still has no work. Only if a Driver is hired by an Owner/multiple plate owner can they work and earn income.

e. *The party with the authority to dismiss the employees:* The Owners/multiple plate owners have the authority to dismiss the Drivers. Owners/multiple plate owners can make a decision to no longer allow a Driver to drive their taxicab. United Cabs has no role in this decision.

f. *The party which is perceived to be the employer by the employees:* The Owners/multiple plate owners are perceived to be the employer by the Drivers. Drivers only earn income if an Owner or multiple plate owner hires them to drive.

g. *The existence of an intention to create the relationship of employer and employees:* United Cabs has no intention to create the relationship of employer and employee with Owners or Drivers. United Cabs' only role is to provide a dispatch system and accounting service to the independent contractors who work as Owners and Drivers.

[44] With respect to the *Algonquin Tavern* criteria, United Cabs provided the following comments.

[45] Drivers have agreements with Owners/multiple plate owners in relation to the hours the Driver can use the taxicab and how much they will pay for the use of the taxicab. The agreements

also have terms relating to the taxicab, for example, who pays for damage caused during the Driver's shift and who pays for gas.

[46] Owners and Drivers can turn down any ride dispatched to them. The amount they earn is correlated to how often they drive and how many passengers they drive. They choose the zone in which they will drive and wait for passengers.

[47] All monetary aspects are negotiated between the Owners/multiple plate owners and Drivers. United Cabs is only the dispatcher and a conduit service for customer payments made with debit cards, credit cards, gift cards and charge slips.

[48] Owners should be considered to be independent contractors as they have entrepreneurial jobs. They own their own vehicles and are responsible for the cost and maintenance. They buy or lease a taxi licence. They also have to hire Drivers to drive when they are not driving. They can dictate who they hire, how much they charge and when their Drivers get to drive. Owners earn income through the fees they charge to Drivers. United Cabs has no involvement with who they hire and the agreement they enter into with them. United Cabs simply adds the Driver's taxi driver's licence identification to its dispatch system – that does not get them work. The engaging of Drivers is left to Owners.

[49] United Cabs does not take on any risk, as its fees are standard. Owners and Drivers take on the entire risk of the business. If there are not enough passengers or they choose to work fewer hours or decline work, their profits decrease. If a Driver no longer wishes to drive for an Owner, he or she needs to find another Driver and may lose fees while the taxicab sits idle. Owners are entirely responsible for purchase and upkeep of the taxicab.

[50] United Cabs also asked the Board to rely on *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59, [2001] 2 SCR 983 and *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 to reach the conclusion that control and dependency are the defining characteristics of an employment relationship. United Cabs argues that it exercises no control over Drivers; Drivers' conditions of employment are controlled by Owners/multiple plate owners and the bylaw. It argues that all financial arrangements are negotiated between Owners/multiple plate owners and Drivers; it has no involvement in who Owners hire or the agreements entered into between

Owners/multiple plate owners and Drivers; the training it provides to Drivers is not mandatory; Drivers can obtain their own customers.²²

[51] United Cabs referred to several decisions as support for its position that the issue to be determined is who exercises fundamental control over labour relations at the workplace, in other words, effective control over the essential aspects of the employment relationship.²³ Since, in its view, the essential aspects of the employment relationship are hours of work and wages, this gives rise to a conclusion that it is not the employer of the Owners and Drivers.

[52] United Cabs then referred the Board to the definition of employee in Part II of the Act, which reads as follows:

Interpretation of Part

2-1 In this Part and in Part IV:

(f) “employee” includes:

(i) a person receiving or entitled to wages;

(ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;

(iii) a person being trained by an employer for the employer’s business;

(iv) a person on an employment leave from employment with an employer; and

(v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv);

but does not include a person engaged in a prescribed activity;

[53] United Cabs argues that if the Board finds that Owners and Drivers are employees under Part VI, then Part II, Employment Standards, sets out the minimum standards that must apply to them, for example, hours of work, overtime, layoffs, wages, vacation pay, work week, statutory holidays. If they are employees under Part VI, they must also be employees under Part II. Whether the Part II definition was in force under *The Labour Standards Act* when the 1996 and 2001 Decisions were made is not the issue. This argument was not considered in those cases. The fact that Part II and Part VI are now in the same Act means the Act must be read as a whole to determine what constitutes an employee under the Act. Since Owners and Drivers do not fit into the definition of employee in Part II of the Act, they cannot be considered as employees under Part VI. To find otherwise would mean that they are only employees if they are unionized, which would not be a reasonable interpretation.

²² As noted in paragraph 9, these last two assertions were not supported by the evidence.

²³ For example, *Beaver Foods Ltd. (Re)*, [2009] SLRBD No. 33, 172 CLRBR (2d) 133 at para 88; *Saskatchewan Joint Board, Retail, Wholesale v Westfair Foods Ltd.*, 2011 CanLII 75834 (SK LRB), 2011 CarswellSask 793 at para 100.

[54] Next United Cabs argues that the proposed bargaining unit is not appropriate. The powers of Owners make them managers or, alternatively, supervisory employees within the meaning of the Act. United Cabs argues that Owners fall within the exception for managers in the definition of employee in paragraph 6-1(1)(h)(i)(A) of the Act because their “primary responsibility is to exercise authority and perform functions that are of a managerial character”. That means they are not employees.

[55] Alternatively, it argues, if Owners are employees, they cannot be placed in the same bargaining unit as Drivers because Owners are supervisory employees within the meaning of clause 6-1(1)(o) of the Act. They are responsible for hiring and firing, assigning hours and deciding what Drivers are paid. The requirement in clause 6-1(1)(o) that supervision be their “primary function” means they always have this function and they are the only ones who make the decisions itemized in the subclauses. Finally, it argues, there is no community of interest between Owners and Drivers that would make it appropriate to include them in the same bargaining unit.

[56] United Cabs argues that a review of Part VI of the Act shows that the Legislature did not intend it to apply to this industry. For example, sections 6-47 and 6-49, which set out rules of arbitration, would not be applicable because the bylaw sets out appeal rights respecting decisions made under the bylaw that affect licence holders. Further, section 6-43 could not apply because it presupposes the payment of wages to employees.

[57] If Owners and Drivers are found to be their employees, United Cabs argues that certification would be purposeless as United Cabs has no control over conditions of employment that could be bargained. Now, with a more detailed bylaw, there is nothing to bargain, as United Cabs’ only role vis-à-vis Owners and Drivers is enforcing the bylaw. Its bargaining experience pursuant to the 2001 Decision shows this is not a feasible bargaining unit. United Cabs argues that *Comfort Cabs* has confirmed that the agreement between owners who lease out their plates and a lessee is entrepreneurial and not employment, and therefore there is nothing that can be bargained between United Cabs and Owners and Drivers.

[58] United Cabs refers to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Retail Wholesale and Department Store Union, Local 568 v Canadian Linen and Uniform Service Co.*, 2004 CanLII 65625 (SK LRB) and suggests that it sets out factors to be considered by the Board when determining what is an appropriate bargaining unit. However, that case sets

out factors to be considered in amalgamation applications, not certification applications, and is therefore not applicable here.

Analysis and Decision:

[59] The Board thanks the parties for the comprehensive oral and written arguments they provided, which the Board has reviewed and found helpful. Although not all of the numerous arguments and authorities raised have been addressed in these Reasons, all were considered in making this decision.

[60] With respect to the first preliminary issue, the Board does not agree with the Union that United Cabs' arguments are an abuse of process. The 2001 Decision was issued 18 years ago, the provincial legislation and bylaw have changed since then, and it is reasonable for United Cabs to ask the Board to consider whether these changes should lead to a different outcome in this matter.

[61] The second preliminary issue for the Board to determine is whether to draw an adverse inference against the Union because it did not call as a witness an Owner who owns a regular plate (as opposed to a seasonal plate). In *Murray*, the Court of Appeal stated:

The subject is dealt with at length by the learned author in Wigmore on Evidence, 3rd ed., vol. II., pp. 162 et seq. On p. 16 it is stated in part:

*“ * * * The failure to bring before the tribunal some circumstance, document, or witness, when either the part himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, in brought, would have exposed facts unfavourable to the party These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.”*

[62] Similarly, The Law of Evidence in Canada²⁴ states:

In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be

²⁴ Sopinka, Lederman and Bryant: The Law of Evidence in Canada, 5th ed (LexisNexis Canada Inc., 2018), at paragraphs 6.471 and 6.472.

assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[63] The Board finds that, in the circumstances of this matter, no adverse inference should be drawn. The Union provided a reasonable explanation for not calling the Owner of a regular plate. If United Cabs thought the Owner of a regular plate could have provided helpful evidence it could have called one as a witness, as it did in the hearing leading to the 2001 Decision. The Board was not persuaded that, in relation to the issues before the Board, the evidence of a regular plate Owner would have been significantly different than or superior to the evidence of the seasonal plate Owner who testified.

[64] Turning now to the main issue in this matter, the application for bargaining rights, the Board is required, by subsection 6-11(1) of the Act, to determine if the proposed unit of employees is appropriate for collective bargaining. This requires the Board to determine that the proposed unit is composed of employees, that their employer is United Cabs and that the proposed unit is appropriate for collective bargaining. As the Union pointed out, the Board has twice answered these questions in the affirmative with respect to the same proposed bargaining unit of employees of this employer.

[65] United Cabs argues that, in deciding these questions, the Board should not follow the 1996 and 2001 Decisions because they did not consider all of the issues it is raising in this matter. First, it says, the Board has never considered the issue of whether Owners and Drivers are employees. In fact, that was the main issue considered in the 1996 Decision. The Board stated as follows:

In deciding whether a person is an employee for a purpose which relates to the advancement of the policy objectives embodied in The Trade Union Act, the Board must attempt to distinguish between persons who are genuinely operating in an entrepreneurial fashion independent of an "employer," and those who, whatever the form their relationship with that putative employer takes, are really employees whose access to the option of bargaining collectively should be protected.²⁵

²⁵ At para 41.

[66] In that Decision the Board also relied on the following comment in *International Brotherhood of Electrical Workers, Local 2038 v Tesco Electric Ltd.*, [1990] Summer Sask. Labour Rep. 57; LRB File No. 267-89:

With respect to the final consideration: ... the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers. Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as “employer-employee”, when in substance, they might be just as controlled and dependent on the party using their services as an employee is in relation to his employer. If the substance of the relationship between the individual and company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an “employee” within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.²⁶ (emphasis in original)

[67] After reviewing all aspects of the relationship between United Cabs and the Owners and Drivers (most of which are the same today) the Board decided that even though some of the ordinary indicia of an employment relationship were absent, the Owners and Drivers were employees:

[95] In our opinion, the drivers are in a position of economic dependence on United Cabs Ltd which places them at the employee, rather than the independent contractor, end of the continuum. It is true that some of the ordinary indicia of the employment relationship are absent; United Cabs Ltd does not, for example, make deductions for income tax, unemployment insurance contributions or workers compensation premiums.

[96] It is also evident that the taxi industry has many unique features, and that there are limitations on the capacity of a taxi company to exercise direct control over the drivers which are created by the nature of the work and the characteristics of the people who do it. Nonetheless, we find that the economic dependence of the drivers on the taxi company, and the assertion by the taxi company of authority with respect to the standards of service and performance of the drivers, are basic features of the relationship between the company and the drivers. These features, in our opinion, signify that the relationship is one which can be the basis of collective bargaining.

[68] Next the Board turns to United Cabs’ argument that the Board should not follow the 1996 and 2001 Decisions because of changes in the bylaw and in the Act since they were issued.

²⁶ At para 43.

[69] The Union argues that because employees have the right, under the *Charter of Rights and Freedoms*, to join unions, the Board should start from the presumption that Owners and Drivers fall within the definition of employee. The Board would restate this slightly. The *Charter* right to freedom of association, and the right in section 6-4 of the Act for employees to organize in and form, join or assist unions and engage in collective bargaining through a union of their own choosing, mean that the Board should interpret and apply Part VI in accordance with *Charter* values and in a manner that facilitates and supports Owners' and Drivers' freedom of association. With that principle in mind, the Board considered all of the issues and arguments the parties raised.

[70] The Board agrees with the Union that the new bylaw does not diminish United Cabs' role with respect to Owners and Drivers. If anything, it increases United Cabs' supervision and control over them. As noted earlier, the bylaw sets out three pages of obligations for taxi brokers, including clause 30(b) which requires United Cabs to have a customer complaints process and eight clauses under the heading "Responsibility for Drivers" that make United Cabs responsible for ensuring, for example, that Owners and Drivers hold a valid taxi driver's licence, maintain a clean and properly groomed appearance, conduct themselves in a courteous, prudent and safe manner, are signed in to the dispatch system at all times when on duty and charge only the fares allowed by the bylaw.

[71] With respect to the Act, United Cabs makes several arguments. First, it argues that the Board can only find Owners and Drivers to be employees for the purposes of Part VI of the Act if they are also employees for the purposes of Part II of the Act. This argument reflects a fundamental misunderstanding of the architecture of legislation. The Act is divided into eleven Parts, for the convenience of the reader. Part I is entitled Preliminary Matters. It is made up of four sections that apply to the interpretation and application of the entire Act, including section 1-2, which sets out six definitions that apply "In this Act". These definitions do not include the terms "employee" or "employer". That is because the Legislature chose not to adopt one definition of those terms in the Act but to use various definitions for the purposes of the various Parts of the Act.

[72] Part II, Employment Standards, includes, in section 2-1, its own definitions of "employee" and "employer" that apply only to Part II and Part IV. If these definitions were meant to apply to Part VI, section 2-1 would have said so, and it clearly does not.

[73] Part III, Occupational Health and Safety, also includes its own definition of “employer” and a definition of “worker”, that apply only to that Part. Part VI includes its own definitions of “employee” and “employer”, in section 6-1, that apply only to that Part. Part VII, Essential Services, has definitions of “employee” and “public employer”, that apply only in Part VII, that rely to a certain extent, but in a modified form, on the definitions of “employee” and “employer” in Part VI. Part VIII, Labour-Management Actions (Temporary Measures During an Election), has its own definitions of “employee” and “employer” that apply only to that Part.

[74] United Cabs chose, without explanation, to rely only on the definitions of “employee” and “employer” in Part II in making this argument; this choice further reflects how untenable this argument is. There is nothing inappropriate or unusual about a statute using more than one definition of the same term for its different provisions.

[75] If the Legislature had intended the same definitions of “employee” and “employer” to apply throughout the Act, it would have said so. In fact, it said the opposite. In this matter, the Board’s responsibility is to determine whether Owners and Drivers are employees for the purpose of collective bargaining, not whether they are employees for the purpose of employment standards or occupational health and safety or essential services. United Cabs argues that it is for the Legislature, not the Board, to decide who is an employee. The Board agrees. The Legislature has directed that the definitions in section 6-1, and only the definitions in section 6-1, apply to the interpretation of “employee” and “employer” when those terms are used in Part VI of the Act.

[76] United Cabs’ next argument is that Owners are managers and therefore cannot be members of the Union. To be a manager, and not an employee, an Owner would have to satisfy either paragraph 6-1(1)(h)(i)(A) or (B) of the Act:

(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

[77] United Cabs argues that Owners are managers under paragraph (A) because their “primary responsibility” is to “exercise authority and perform functions that are of a managerial character” with respect to Drivers. In United Cabs’ view, “primary” means that no one else exercises this responsibility and Owners always have these functions. It cites no authority for this definition. The Shorter Oxford English Dictionary,²⁷ on the other hand, defines primary as “of the first importance; principal, chief”. The evidence made it clear that Owners do not have as their first, principal or chief responsibility exercising authority over Drivers or performing functions of a managerial character. Their primary responsibility is to drive a taxicab. Even if United Cabs’ definition was accepted, there is someone other than the Owners that exercises managerial responsibilities with respect to the Drivers, and that is United Cabs.

[78] Next United Cabs suggests that if Owners are not managers, they are supervisory employees and therefore cannot be placed in the same bargaining unit as Drivers. To meet the definition of supervisory employee in clause 6-1(1)(o) of the Act an Owner must be both “an employee whose primary function is to supervise employees” and an employee who exercises one or more of the duties listed in subclauses (i) to (iv) of clause (o). Again, Owners do not meet either of those criteria. 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.

[79] As noted above, in its 1996 Decision the Board considered in detail the issue of whether Owners and Drivers were employees. Its analysis was based on the following definition of employee in *The Trade Union Act*:

(f) “**employee**” means:

(i) a person in the employ of an employer except:

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

(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer;

(i.1) 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;

²⁷ Shorter Oxford English Dictionary on Historical Principles, Third Edition, Oxford University Press, reprinted 1985.

(iii) any person designated by the board as an employee for the purposes of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor; and includes a person on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere, and any person dismissed from his employment whose dismissal is the subject of any proceedings before the board;

The Board finds that there is no difference in substance between this definition and the definition of employee in section 6-1 of the Act that would lead the Board to decide in this matter that Owners and Drivers are not employees.

[80] Reviewing all of these provisions leads the Board to the conclusion that there is no change from *The Trade Union Act* to Part VI of the Act that requires the Board to come to a contrary decision in this matter than the Board made in the 1996 and 2001 Decisions.

[81] The Board, then, must base its analysis on the definition of employee in section 6-1 of the Act. Both parties agree that the *York Condominium* and *Algonquin Tavern* factors are relevant to the Board's interpretation of the definition of employee in clause 6-1(1)(h) and its determination of whether Owners and Drivers are employees. The case law that has reviewed these factors consistently states that there is a continuum of relationships between a person who is unquestionably an employee and a person who is unquestionably an independent contractor, and that no one factor is determinative.

[82] The review of the seven *York Condominium* factors set out below leads the Board to the conclusion that Owners and Drivers are closer to the employee end of the continuum than the independent contractor end.

[83] First, United Cabs is the party exercising direction and control over Owners and Drivers while they are performing their work. Drivers do not report to Owners respecting the performance of their work. By virtue of the bylaw and its Manual, United Cabs controls such things as what Owners and Drivers wear, how long they must wait for a tardy passenger and how the taxicab they are driving is equipped.

[84] United Cabs has total control over access to its dispatch system, GPS and cameras, and the evidence indicates that it can and does remove access to the dispatch system by Drivers without consultation with or even notice to Owners. It can and does remove access by Owners

and Drivers without actual evidence of wrongdoing, before it has undertaken an investigation. In addition, (other than the reference to a company newsletter) the following comment in the 1996 Decision is equally applicable today:

Because it is the corporate image of United Cabs Ltd. which is affected by the operations of taxicabs operating under the banners of United Cab and Blueline Taxi, it stands to reason that the company has a strong interest in maintaining standards with respect to such things as customer service, safety, the condition of vehicles and the appearance of drivers. We have concluded from the evidence that United Cabs Ltd. takes the preeminent role in ensuring that drivers adhere to these standards, through exhortations in the company newsletters, and through disciplinary measures such as those we have described.²⁸

[85] Just because United Cabs' exercise of direction and control over its employees is, in part, required by the bylaw does not change the fact that United Cabs directs and controls Owners and Drivers in the performance of their work. The fact that the industry is regulated does not affect the issue of whether Owners and Drivers are employees.

[86] Second, United Cabs has almost entire control over the remuneration earned by Owners and Drivers. United Cabs argues that, since it does not pay Owners or Drivers a wage or set their hours of work, it cannot be characterized under this factor as their employer. However, United Cabs has unfettered discretion to enter into agreements with customers that require Owners and Drivers to accept a flat rate charge per trip rather than the fare established by the bylaw. It also has unfettered discretion in determining which Owners and Drivers are entitled to access the regular work established through these contracts. It controls access to its dispatch system and has unfettered discretion to decide when and for how long it will deny Owners and Drivers access to the system. It decides how much of a fee it deducts from the over 90% of fares that flow through it from passengers to Owners and Drivers.

[87] United Cabs argues that it is not in control of how much money an Owner or Driver earns. The Board disagrees. While it does not have full control, no employer does. For example, if an employee chooses to work less than full time, the resultant decrease in income could be said to be entirely in the employee's control. That does not mean, though, that, as a result, the employer has no control – what is determinative is that, when the employees are at work, the employer has full control over their income through the application of its policies. That is the situation in this

²⁸ At para 87.

workplace. Owners and Drivers are entirely dependent on one source for their livelihood, United Cabs. This is unchanged since the 1996 Decision, where the Board held:

88 *It is our view, as well, that United Cabs Ltd. has a strong degree of influence on the economic welfare of the drivers. In this respect, we do not think the concept of economic control requires the payment of wages. In Blue Line Taxi Co. Limited, [1979] O.L.R.B. Rep. Nov. 1056, the Ontario Labour Relations Board commented on this point:*

8. It is argued that despite the flow of work opportunities being through the respondent that no compensation or reward flows directly from the respondent to the owner-drivers but rather that all revenues flow from third-party passengers and the owner-drivers are totally at risk for the collection of such; and that this factor distinguishes the instant case from previous cases considered by the Board where the responsibility of revenue collection from third parties was assumed by the respondent and payments flowed directly from the respondent to the owner-driver. In our view this single factor cannot be allowed to obscure the fact that the control of work opportunities by the respondent is of, and in itself, the sine qua non of the economic dependence which here exists, and the form of compensating for the service performed is determined by the type of market being served. This form of compensation, combined with the stand rental flowing back to the respondent, must be viewed in the total context of the taxi industry, and is not sufficient to make the driver more closely resemble an independent contractor than an employee.

89 *In Retail, Wholesale and Department Store Union v. Hamilton Yellow Cab Company Limited et al, O.L.R.B. File No. 1295-85-R, the Ontario Board pursued this point:*

We are inclined to accept these views. We do not think that in the context of the taxi industry the collection of fares (set by the City) by owner-operators or drivers is a critical element in their relationship with Yellow - particularly since Yellow retains virtually complete and unreviewable control over the flow of work opportunities and the deductions from the drivers' revenue in respect of stand or equipment rental. If Yellow were to increase these fees, as it could do unilaterally, the operators/drivers would have their income reduced proportionally, and, if dissatisfied, would have little option except to go to work for some other broker - a position analogous to that of a disgruntled employee.

90 *The pattern of relationships between United Cabs Ltd., on the one hand, and the franchise owners, lease operators and drivers indentified in the application, on the other, reveals that the putative employer exercise a high level of control over the economic rewards to these drivers. The evidence suggested that perhaps seventy-five per cent of the income which the drivers receive comes from trips which are allocated through the dispatch system operated by United Cabs Ltd. These trips are attracted by United Cab advertising, and by the public reputation of the taxi service offered by the company. The remainder of the trips from which drivers derive their income are almost all obtained as the result of efforts by United Cabs Ltd. to secure locations for taxi stands, and to negotiate flat rate fees and customer accounts.*

[88] Third, United Cabs is the party that imposes discipline. Owners have no role in discipline. If passengers have a complaint, they take it to United Cabs. United Cabs handles the complaint and decides whether to discipline an Owner or Driver and how much discipline to impose. If the person complained against is a Driver, United Cabs makes these decisions without input from or

even notice to the Owner. The passenger has no interaction with the Owner. United Cabs decides when and how much discipline to impose. Discipline in the form of removing access of an Owner or Driver to the dispatch system means no income for that person for the length of time chosen by United Cabs. Removing access for a taxicab means no income for the Owner or Driver of that vehicle.

[89] Fourth, United Cabs and Owners both play a role in the hiring of Drivers. United Cabs' website includes a page devoted to recruiting new Drivers including a page entitled "the united group Requirements for Employment as a Driver" and "United Cabs Application for Employment". United Cabs will only approve a Driver after it is satisfied that the Driver has taken the training it provides and passed its test. An Owner can only rent his or her taxicab to a Driver who is approved by United Cabs.

[90] Fifth, the authority to dismiss Drivers is shared between Owners and United Cabs. If an Owner and a Driver part ways, the Driver can drive for a different Owner/multiple plate owner. However, if United Cabs terminates the Driver, he or she is out of work.

[91] Sixth, the evidence of the Union's witnesses indicates that United Cabs is perceived to be the employer by Owners and Drivers.

[92] Seventh, as mentioned previously, United Cabs has gone to great lengths to try to prove that it has no intention to create an employer-employee relationship with Owners and Drivers. It argues that it has no relationship with Drivers. This is an odd argument, given that the evidence of all witnesses, Union and United Cab alike, clearly indicate that this is not the case. The same can be said of United Cabs' argument that it does not set rules for Drivers, instead it just enforces the bylaw: all witnesses agreed that United Cabs has its own rules, in addition to the bylaw, that it enforces against Owners and Drivers.

[93] A review of the *Algonquin Tavern* criteria reinforces the Board's view that Owners and Drivers are employees.

[94] With respect to the use of or right to use substitutes, United Cabs controls who can or cannot log into the dispatch system. Owners can only rent their taxicab to Drivers who are approved by United Cabs. As long as a Driver is approved by United Cabs, an Owner can choose the Driver he or she wishes to contract with. If Drivers are unable to work during the shifts

assigned to them, they have discretion to arrange for another United Cabs-approved Driver to take their place, without first obtaining the Owner's approval.

[95] With respect to ownership of instruments, tools, equipment, appliances or the supply of materials, the Owner provides the vehicle. All other equipment is owned by United Cabs: the dispatch system and tablet equipped with dispatch software that provides access to it, top sign, GPS, camera and debit/credit card machine. Without the ability to use the equipment owned by United Cabs, Owners and Drivers cannot work. The essential tools of the business are owned by United Cabs.

[96] Evidence of entrepreneurial activity indicates that United Cabs is the entrepreneur in this business. Owners and Drivers are not allowed to enter into private arrangements with customers. The bylaw allows United Cabs, but not Owners or Drivers, to negotiate flat rates with customers. United Cabs controls all advertising and marketing. Owners and Drivers are not permitted to personally advertise their services. Owners and Drivers depend on a single source, United Cabs, for their income.

[97] The selling of one's services to the market generally by Owners and Drivers is not allowed. United Cabs prohibits them from providing their personal contact information to passengers. They cannot independently advertise.

[98] With respect to economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes, Owners and Drivers can decide when they will work and in which zone they will work.

[99] With regard to variation in the fees charged, Owners and Drivers can accept less than the fare rates set by the bylaw. United Cabs can and does enter into contracts that vary the fees charged, and Owners and Drivers have no choice but to accept the negotiated amount if they want to drive those passengers. It was noted that these contracts account for up to 40% of United Cabs' business.

[100] The next criterion is whether Owners and Drivers are carrying on an independent business on their own behalf or whether they are essential elements integrated into the operating organization of United Cabs. In the Board's view, Owners and Drivers are not carrying on independent businesses. They are essential elements of United Cabs' business. United Cabs is

the person who is in the business of providing taxi services to the public. Passengers are customers of United Cabs.

[101] United Cabs exercises significant control over the manner and means of performing the work. It imposes standards, which it enforces by suspensions or terminations, including with respect to Owners' and Drivers' appearance and manner of dealing with passengers. Some of these standards are set out in the bylaw, but United Cabs also has a Manual of policies and procedures with which Owners and Drivers must comply. Owners exercise no control over the manner in which or means by which Drivers perform their work.

[102] With respect to the magnitude of the contract amount, terms, and manner of payment, United Cabs exercises full control. While it does not pay wages, Owners and Drivers are economically dependent on United Cabs for their income. Over 90% of their income is paid first to United Cabs, and United Cabs decides how much of that income it retains. It alone decides the terms and manner of payment of this money.

[103] Owners and Drivers render services and work under conditions that are similar to persons who are clearly employees.

[104] The *York Condominium* and *Algonquin Tavern* decisions, and subsequent decisions that have considered them, have emphasized that these factors will not always result in an unequivocal answer and each case must be considered on the basis of its own facts. After considering the facts in this matter, the Board has concluded that Owners and Drivers are employees.

[105] The next issue for the Board to determine is who is the employer of the Owners and Drivers. United Cabs argues that if Drivers are employees, Owners/multiple plate owners, not United Cabs, are their employers. The Board disagrees, based on the evidence set out above in the review of the *York Condominium* and *Algonquin Tavern* factors. That evidence established that it is United Cabs and not Owners who control the manner in which Drivers perform their work. It is United Cabs and not Owners who impose standards on Drivers. It is United Cabs and not Owners who have the most significant control over the amount Drivers can earn. The meaningful lines of accountability run between United Cabs and Drivers. The Board finds that, based on the degree of control exercised by United Cabs over Owners and Drivers, and the degree of economic dependence by Owners and Drivers on United Cabs, an employment relationship has been

established. United Cabs exercises fundamental and effective control over labour relations in this workplace. United Cabs is the employer of the Owners and Drivers.

[106] The next issue is whether the proposed bargaining unit is appropriate for collective bargaining.

[107] United Cabs argues no, on three grounds. First it says that there would be nothing to bargain over as it has no control over any meaningful terms of Owners' and Drivers' employment, as they are all set out in the bylaw. The evidence indicates that this is not the case; for example, United Cabs has control over its policy and procedures Manual, the way in which it metes out discipline and distribution of charge account passengers. Comfort Cabs Ltd. has entered into collective agreements with its union while subject to the bylaw. Mr. Pulak testified that the primary issues in relation to which the union has represented its members at Comfort Cabs Ltd. include fair dispatch (including distribution of longer, out of town trips), driver safety and discipline. The evidence and case law relied on by both parties shows that it is possible to bargain in this industry and in this workplace.

[108] United Cabs argues that *Comfort Cabs* stands for the proposition that there is nothing left for United Cabs to bargain with Owners and Drivers, therefore there would be no purpose in granting this application. In fact, the Board found just the opposite:

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.²⁹

[109] While a collective agreement in this industry may not look like a collective agreement in another industry, that is not a reason for the Board to refuse to grant this application. As the Union states, the Board has never refused to issue a certification order because an employer says there is nothing to bargain. That argument is more likely to lead to a conclusion that the workplace needs a union.

[110] United Cabs next argues that the proposed bargaining unit is inappropriate because a number of provisions in Part VI of the Act cannot apply to this workplace and this is evidence that

²⁹ At para 49.

the Legislature did not intend Part VI to apply to this industry. For example, section 6-43 cannot apply to this workplace because there are no wages from which to deduct union dues. However, a careful review of section 6-43 indicates that it is not intended to apply automatically. It only imposes an obligation on an employer, contravention of which is an unfair labour practice, on the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit. None of the other sections referred to by United Cabs persuaded the Board that this is a reasonable interpretation of Part VI of the Act. For example, the arbitration process mentioned in sections 6-47 and 6-49 of the Act applies to different issues than the issues governed by section 66 of the bylaw.

[111] Finally, United Cabs argues that there is no community of interest between Owners and Drivers and therefore it would be inappropriate to place them in the same bargaining unit. The Board also rejects this argument. United Cabs admitted in evidence that it treats the people driving taxicabs for it the same, and requires them to comply with the same rules, whether they are Owners or Drivers. The Board agrees with the characterization of the relationship between an Owner and a Driver as one in which the Owner rents his or her taxicab to a Driver to allow the Driver to work for United Cabs. In the 1996 Decision the Board found that the proposed bargaining unit (Owners and Drivers) was appropriate, relying on the following passage from *Joint Board, Retail, Wholesale and Department Store Union v Hamilton Yellow Cab Company Limited et al.*, [1987] 17 C.L.R.B.R. (N.S.) 129 (OLRB), at 152:

In the taxi business, the owner-operator does not engage a replacement driver to "profit from his labour" in any material sense, but rather to fill in for the times when he cannot work for Yellow, so that he can "make ends meet", and to preserve the continuity of his commitment to the Yellow organization. The owner-operator is an "employer" in form only, for the meaningful lines of accountability still run between Yellow and the working driver, who remains, on the job, subject to Yellow's rules, direction and control. The economic relationship between the owner-operator and driver is largely confined to agreeing on the split of the revenue derived from serving Yellow's customers and is either a flat fee or some percentage of the total. Like the owner-operator, the driver derives his income from the name, goodwill, and dispatch service of Yellow, and he is subject to the same rules of behaviour and disciplinary regimen. In this regard the terminology of "leasing a shift" is quite accurate. The driver is not so much being "employed" by the owner-operator, as being permitted, for a fee, to work for Yellow. Yellow can tolerate such substitution because anyone working in its system must conform to Yellow's detailed prescriptions about the way things must be done, and Yellow always retains the residual right to discipline or terminate any driver that does not meet those norms. In this regard Yellow is not unlike a

construction industry employer who will be content with whomever is referred from the union hiring hall so long as s/he confirms to the prescribed standards of performance.³⁰

[112] In the 2001 Decision, the Board agreed with the 1996 Decision that the proposed bargaining unit was an appropriate unit. The Board agrees with the following comment in the 2001 Decision:

We agree with the Board's earlier determination of the appropriateness of the bargaining unit and do not conclude from the evidence on this case that the relationship between single franchise owner/lessees and drivers is so fraught with potential conflicts that they be placed in two separate bargaining units. The evidence demonstrated that United Cabs control the key features of the work lives of single franchise owner/lessee and rental drivers. They work under the same rules and are subject to the same forms of discipline. They benefit from the advertising and marketing efforts of United Cabs. They are also subject to the same financial arrangements respecting the payment of charge accounts and credit cards. Rental drivers are indirectly affected by the fees charged by United Cabs for dispatch and office fees and any changes in these fees could affect their rental payments. Primary control over the three groups of drivers rests with United Cabs. The Board also noted that the parties are currently engaged in negotiations through the drivers' committee. Although there are areas of conflict between rental drivers and franchise owners/lessees, we do not find that these conflicts are so great as to render the inclusion of both groups in one bargaining unit inappropriate.³¹

While there may be other appropriate bargaining units in this workplace, the question is whether the proposed unit is an appropriate bargaining unit, and the Board finds that it is.

[113] The Board finds that nothing has changed in the Act, the bylaw or the workplace that would cause it to deviate from its findings in the 1996 and 2001 Decisions. United Cabs' witness, Scott Suppes, admitted that the flow of money and organizational features of United Cabs are unchanged since he joined the business in 2000. The implementation of a new, more detailed bylaw has not changed the operation of the business or the relationship among Owners, Drivers and United Cabs. The Board is satisfied that Owners and Drivers are employees, United Cabs is their employer, and the proposed bargaining unit is appropriate for collective bargaining.

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

³⁰ At para 98.

³¹ At para 36.

- (a) All taxi drivers employed by United Cabs Limited operating as United Cabs and Blue Line Taxi and the United Group, except dispatchers, office personnel, garage staff, gas bar staff, employees of Atomic Motors, supervisors and management above the rank of supervisor, limousine drivers and further excluding those persons who own, lease or control two or more taxicabs, 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 Local 2014, 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) United Cabs Limited operating as United Cabs and Blue Line Taxi and the United Group, the employer, bargain collectively with the union set out in paragraph (b), with respect to the bargaining unit set out in paragraph (a).

[115] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **21st** day of **May, 2019**.

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson