Metropolitan Taxicab Board of Trade, Inc., and its Constituent Members *and* Local 74, Service Employees International Union, AFL–CIO. Case 2–CA–31330

September 28, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On November 15, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondents[1] filed an answering brief. The Respondents filed limited cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief. The International Alliance of Theatrical Stage Employees, AFL–CIO, the Screen Actors Guild, Inc., the Writers Guild of America, East, Inc., AFL–CIO, and the American Federation of Musicians of the United States and Canada, AFL–CIO, filed a joint amicus brief in support of the General Counsel's and the Charging Party's exceptions.[2]

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

The Board has considered the decision and the record in light of the exceptions, the cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent herewith, and to dismiss the complaint in its entirety.

The complaint alleged that the Respondents unlawfully withdrew recognition and refused to bargain with SEIU Local 74 as the collective-bargaining representative of their taxi drivers.[3] For the reasons set forth in the judge's decision, we agree with him that the Respondent fleet operators' lessee taxicab drivers are independent contractors and not statutory employees. Because the lessee taxicab drivers comprised the majority of the historical bargaining unit, the judge concluded that the bargaining unit was so changed (i.e., essentially destroyed), that the

[1] Respondent Metropolitan Taxicab Board of Trade (MTBOT) is a trade association whose members are operators of fleets of New York City-licensed medallion taxicabs. The member fleet operators that are parties to this action include J & I Maintenance Corp., Ann Service Corp., Glenties Leasing Corp., Ronart Leasing Corp., Irene Leasing, Inc., 55-Stan Operating Corp., Linden Maintenance Corp., and Team Systems Corp.

[2] On February 24, 2004, the Charging Party, through its attorney, submitted a letter that stated that it wished to withdraw its unfair labor practice charge and discontinue all related proceedings, including, but not limited to, its exceptions pending before the Board. The Respondents and the General Counsel did not oppose the Charging Party's request. The General Counsel, however, did not withdraw his own exceptions to the judge's decision.

Only the Board is vested with discretion to determine whether a proceeding, once instituted, may be abandoned. See *Robinson Freight Lines*, 117 NLRB 1483, 1485–1486 (1957), enfd. 251 F.2d 639 (6th Cir. 1958). This matter has been fully litigated, exceptions and briefs have been filed, and considerable time and resources have been invested by the Board in consideration thereof. The issue whether nearly 2000 New York City taxi drivers are Sec. 2(3) employees who can claim collective-bargaining rights under the Act is not moot simply because the Charging Party apparently no longer seeks to represent them. No comparable issue warranting final Board resolution existed in *Wilson Tree Co.*, 312 NLRB 883 (1993), cited by our concurring colleague. Accordingly, we decline to exercise our discretion to dismiss the charge and to discontinue all related proceedings as the Charging Party requested.

Member Schaumber respectfully disagrees with his concurring colleague that the principal of judicial restraint—upon which he relied in part in his dissenting opinion in *Double D Construction Group*, 339 NLRB No. 48 (2003)—weighs in favor of the Board granting the Union's request to withdraw its petition in lieu of issuing a decision on the merits. In *Double D Construction Group*, the panel majority remanded for the judge to explain why he discredited an employee witness who lied on an INS form. The remand was inconsistent with extant Board law, *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), relied on facts which were not in evidence, thus presenting only a hypothetical question, and was, in any event, unnecessary because the General Counsel failed to satisfy his burden of proof under *Wright Line* without regard to the discredited testimony.

Unlike *Double D Construction Group*, the instant case presents important considerations that militate in favor of final resolution of the issue raised. This is one of several cases considered together by the Board because each raised the issue of independent contractor versus employee status under Sec. 2(3) of the Act. The Board contemplated simultaneous issuances of the decisions for the benefit of the parties and the public. The Union sought to withdraw the charges that gave rise to this appeal, which had been pending before the Board for nearly 5 years, at a late stage in the Board's decisional process. Thus, in weighing the interests of the Board, the Charging Party Union, the Respondents, and the taxicab drivers in the bargaining unit, I believe the benefits arising from the resolution of the question presented—employee status under the Act of the former bargaining unit members—outweigh any minimal savings of additional Board resources. In my view, leaving the drivers in the dark with respect to their coverage under the Act would constitute circumstances in which "restraint is not prudent." *Double D Construction Group*, supra, slip op. at 1.

[3] The Respondents and SEIU Local 3036 had a collective-bargaining relationship for more than 25 years. The most recent collective-bargaining agreement had a term of April 1, 1987, until March 31, 1990, which was subsequently modified and extended until October 5, 1997. In June 1997, Local 3036 sought assistance from sister Local 74 in negotiating a successor contract. That same month, the sister locals notified the International Union of their desire to have Local 3036 merge into Local 74. Each local informed its members of the merger, and at separate meetings, their members, having had full opportunities for discussion, overwhelmingly approved the merger by voice votes. The International Union approved the merger on September 17, 1997. We do not pass on the question of whether the merger comported with our due process standards. See, e.g., *Sullivan Brothers Printers*, 317 NLRB 561 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996). For the reasons discussed in her concurring opinion, Member Liebman agrees that it is unnecessary to pass on this issue.

Respondents were no longer obligated to recognize and bargain with the Union. Therefore, he dismissed the complaint. While we agree with the judge that dismissal of the complaint is appropriate, we find it unnecessary to pass on his rationale for reaching that conclusion and instead rely on the reasons described below.

The complaint alleges that, for purposes of collective bargaining, the "following employees" constitute "a unit appropriate" within the meaning of Section 9(b) of the Act: "drivers and inside workers in the garages of the employer members of the Association." The complaint also alleges that the Respondents "withdrew its recognition of the Union as the exclusive collective-bargaining representative of the Unit," and have "failed and refused to recognize or bargain with the Union as the exclusive collective-bargaining representative of the employees of the Unit described above." Prior to the hearing, the parties stipulated that the inside workers are "employees" within the meaning of Section 2(3) of the Act and that they constitute an appropriate bargaining unit under the Act.

The record evidence here compels us to find that the Respondent fleet operators' lessee taxicab drivers are independent contractors who do not belong in the historical bargaining unit. Although the parties stipulated that the inside workers constitute an appropriate unit, the complaint, strictly construed, failed to allege that the Respondent fleet operators' inside workers constituted an appropriate unit within the meaning of Section 9(b), that the Union demanded recognition and bargaining in that unit, and that the Respondents violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union as the collective-bargaining representative of those unit employees. Given the limited scope of the present complaint, we find that dismissal of the complaint is warranted.[4] Cf. *Barwood, Inc*., 209 NLRB 19 (1974) (dismissing complaint allegation that employer failed to bargain over cab rental rates because the employer's cab drivers were independent contractors who should be excluded from the certified bargaining unit).

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 28, 2004

Peter C. Schaumber, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring in the result.

There is no good reason to decide this case. The Charging Party Union has sought to withdraw its unfair labor practice charge and to discontinue all related proceedings. In the interest of administrative economy, we should grant the Union's request and dismiss the complaint, on that basis alone. See, e.g., *Wilson Tree Co*., 312 NLRB 883 (1993).[1]

The majority, on the other hand, proceeds to issue a decision that reaches the merits. It is not clear that *any* party desires that result at this point.[2] In any case, "judicial restraint should guide the Board in its decision-making. With an enormous backlog lessening our effectiveness, the Board should not reach out to address issues unnecessary for it to decide."[3]

Citing no Board precedent for ignoring the wishes of the parties in cases in which the judge has recommended *dismissal* of a complaint, the majority maintains that, because this matter has been under consideration by the Board for several years, justice can be served only if the merits are addressed. But there are no individual rights that need to be remedied here. Moreover, any bargaining rights the Union might have had, it essentially relinquished once it filed the withdrawal request. As a result, reaching the merits of this case in no way effectuates the policies of the Act.

Indeed, it represents an unfortunate waste of the Board's resources. Independent-contractor cases like this one are fact-intensive, and the basic legal principles that govern them are well established. The Board's deci-

[4] Although Sec. 10(b) bars the Union from now filing an unfair labor practice charge alleging that the Respondents failed and refused to recognize and bargain with it as the exclusive collective-bargaining representative of the inside workers, the Union may file a properly-supported representation petition if it is interested in representing those employees, and the employees themselves may approach a union, including this one, about representing them.

[1] In *Wilson Tree*, supra, the charging party union requested to withdraw the Sec. 8(a)(5) portion of its charge because, due to the passage of time since the employer refused to bargain, the employees had become disillusioned with the union and the progress it had made in securing representation rights. Because no party was opposed, the Board majority granted the withdrawal request, dismissed the corresponding allegations of the complaint, and modified the recommended Order to reflect only the other allegations.

[2] Neither the General Counsel nor the Respondents have filed a written response to the Union's request. The Board should have solicited such responses by issuing an order to show cause why the Union's request should not be granted.

[3] *Double D Construction Group, Inc.*, 339 NLRB No. 48, slip op. at 8 (2003) (Member Schaumber, dissenting).

sion—an advisory opinion, for all practical purposes—thus can provide the public with only limited useful guidance.[4] We have better things to do.

Dated, Washington, D.C., September 28, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Ruth Weinreb Esq., for the General Counsel.
Merril A. Mironer Esq. and *David E. Ross*, for the Respondent.
Thomas P. Ryan Esq., for the Union

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me on June 3 and 4 and July 28, 1999. The charge was filed by Local 74, Service Employees International Union, AFL–CIO on March 17, 1998 and the complaint was issued on October 27, 1998. In substance, the complaint alleges that Local 74, is the proper collective-bargaining representative inasmuch as it is the successor to Local 3036, SEIU, AFL–CIO which merged into it. The complaint further alleges that subsequent to the merger, the Respondents withdrew recognition and have refused to bargain.[1]

The Respondents make the following arguments. First they argue that the merger was not carried out with the proper safeguards to ensure a fair election among the respective members and therefore that it was not effective for the purpose of imposing any duty to bargain with the successor union. Second, they argue that in any event, the collective-bargaining unit is inappropriate because most of the persons who the Union purports to represent are independent contractors and not employees.

On the entire record, including my observation of the demeanor of the witnesses and after reviewing the briefs filed by the parties, I hereby make the following[2]

FINDINGS OF FACT

I JURISDICTION

The parties agree and I find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the charging party, Local 74 is a labor organization within the meaning of Section 2(5) of the Act.

II THE ALLEGED UNFAIR LABOR PRACTICE A. THE RELATIONSHIP BETWEEN FLEET OWNERS AND TAXICAB DRIVERS

I remember a day, long ago, when I found myself was counting ballots in the large ballroom of the now defunct St. George Hotel in Brooklyn, after which the late and flamboyant Regional Director, Samuel Kaynard, announced that the taxi drivers in New York had voted for union representation. That was quite an event and this case is perhaps the sad conclusion of a Union's rise and fall.

The employers involved in this case are companies that own fleets of taxi cabs which are operated in the city of New York. The taxis are the familiar yellow painted vehicles operating in New York which are the only commercial vehicles permitted by law to pick up customers on the street. There are other companies which provide car or limousine services, but they are not involved in this case.

There are four types of players in this industry. There are people who hold medallions which are licenses issued by the City of New York to operate a taxicab on the city's streets. The number of licenses outstanding at any given time is limited to about 10,000 and generally speaking there is one medallion per cab. Thus, although it sometimes seems that there are a lot more, particularly in midtown Manhattan, the total number of yellow cabs in New York is about 10,000. People who own medallions may also be owners of cab companies. But in some instances, they are the widows and heirs of people who used to have them in the past. Medallions, because they are limited in number, are bought and sold on a market and their value may vary from year to year. At the time of the hearing, a medallion was worth about $300,000.[3]

There also are people who own taxi cabs. A cab may cost about $20,000. It may be owned by an individual who operates the cab himself, but more commonly, may be owned by a company that operates a fleet of cabs. The companies involved in the present case are fleets that consist of at least 50 cabs and which have a fixed location where they do business. The fleet owner or owners may have some or no medallions in their own names, but in order to operate the cabs, each cab has to covered by a medallion. If a fleet company does not have medallions for some or all of its cabs, it leases the requisite number of medallions from those people who hold them. There are, apparently, brokers who act as middlemen for these kinds of transactions.

[4] I express no view on the correctness of the Board's decision on the merits.

[1] The individual employers named as respondents in this case are Linden Management Corp., J and I Maintenance Corp, Ann Service Corp., Glenties Leasing Corp., Ronart Leasing Corp, Irene Leasing Inc., 55 Stan Operating Corp., and Team Systems. All of these are fleet owners.

[2] The Respondent's unopposed motion to correct the transcript dated September 10, 1999, is granted.

[3] Actually the cost of medallion, if issued by the city, is quite low. What keeps the price so high is that the city limits the number of medallions at a steady level and therefore does not issue them except on rare occasions. Thus, with the supply limited by the government, the cost of a medallion is much higher than its initial issuance price. Presumably, the city limits the number of medallions in order to limit the number of taxicabs on the streets. I would imagine that this is done for traffic control reasons, although a side effect of this practice is that the current medallion owners protect their value. Obviously, if there were no limit on the number of medallions there would be no premium to their price, but there might be a large increase in the number of taxicabs on the streets. I, of course have no expertise and no opinion as to what would happen if the city made more medallions available and therefore reduced their cost.

The fleet owners maintain facilities where they keep and maintain their cabs. They employ office clerical employees and also employ maintenance people who take care of repairs. The owner is responsible for all insurance, including liability insurance for the cabs. Additionally, the owners are required by law to provide Workers Compensation Insurance for all their employees, including the drivers. Therefore, whether or not drivers are held to be employees in the context of this case, they are treated as if they were employees for purposes of New York State's workers' compensation laws. However, for other purposes, such as taxes and unemployment compensation, the drivers are treated as independent contractors. The fleet owners neither make federal or state income tax deductions, nor deductions for social security purposes.

In addition to cab owners and medallions holders, there is the group of people who drive the cabs. (There are about 40,000 New York City cabdrivers.) This is a group of workers who are engaged in a relatively unskilled field of endeavor and who, if they don't own their own cabs, lease them from the cab owners. In order to become a taxidriver, a person needs to obtain a hack license from the City of New York, but this does not seem to be very difficult. (The city does require that prospective taxidrivers take an 80-hour course). There are a variety of leases ranging from one for a single 12-hour shift, to leases that run for several months. The cost of the lease depends on its length, (the most costly being the single-shift lease), and the days of the week that are covered by the lease. (Some days cost more than others because of the anticipated volume of business). The terms of the lease are regulated by the New York Taxicab Commission which sets maximum amounts for each type of available lease. Daily leases run from about $95 per day to $112 per day. The standard weekly lease for a cab with a medallion is somewhat less on a prorated daily basis. And based on some exhibits offered by the employers, the average hourly earnings of drivers, after accounting for the lease price, is, depending on the day of the week, between $8.25 to $10 per hour, (including tips calculated on the basis of 15%).[4] In some cases, a driver on a particularly good day might make around $15 per hour and on a particularly bad day may earn under $5 per hour. These figures do not include the cost of gasoline which is borne by the drivers; nor do they include the payments by drivers for license fees, fines, etc. Tolls are charged to customers.

Perhaps the biggest player in the industry is the government through the operation of the New York Taxi & Limousine Commission. For it is this body that sets the prices that are charged to customers, regulates the types of vehicles that can be used, mandates the inspection of these vehicles, and determines the maximum price that a cab owner can charge a cabdriver in the form of a lease.

Additionally, as noted above, because the City government limits the number of outstanding medallions, it is the cause for this licensing cost to far exceed the cost of vehicles. Thus, the cost of buying or renting medallions is no doubt, a major portion of the cost of doing business for a taxi owner, whether it be an individual or a fleet. In addition, the Taxi Commission receives complaints from customers regarding either the vehicles or their operation by drivers and has a formal hearing mechanism to hear, decide and if necessary, punish both owners and/or drivers for infractions of its many and varied rules. Thus, insofar as the economics of this industry is concerned, it is the city government which is the final arbiter of the income received by the fleet owners, by setting the maximum amounts they can charge for leases, and the income received by the cabdrivers, by setting the fees that they can charge to customers. Accordingly, the final determination of income for both groups is not set in the market place but rather is a consequence of decisions made, (no doubt after a certain amount of lobbying and petitioning), by public officials.[5]

For many years, Local 3036 has been the collective-bargaining representative of the drivers and inside workers employed by the Respondents' fleets through successive collective-bargaining agreements between that Union and the Metropolitan Taxicab Board of Trade, a multiemployer association. By 1997, the number of employees covered by a collective-bargaining agreement was about 3000 drivers and about 200 inside workers.

There is no dispute by the Respondents that before 1979 the drivers were employees of the fleets. The event that perhaps changed this situation was a change in the law by City of New York which, after lobbying from the fleet owners and opposition from the Union, permitted the owners to lease their cabs to the drivers. With the acquiescence of the Union, which permitted, in its collective-bargaining agreement, the new leasing arrangements, the pattern shifted, over time, from a system of commission sharing to a system of leasing. Under the former arrangement, the fares were shared between the driver and the owner and an elaborate system of accounting and control was maintained to ensure that the owners got their share of the fares. When the arrangement shifted to leasing, the owners got their money up front before the driver took the vehicle out of the garage. From a practical point of view, the owner couldn't care less how the driver used the vehicle during the leased period as long as the vehicle was returned, on time, in the same condition as it went out.[6]

At the commencement of the trial, the parties entered into evidence a stipulation regarding the relationship between the

[4] The figures here are based on a very small sample and cannot be viewed as dispositive. I should note that drivers are not covered by Fair Labor Standards laws and therefore do not receive any premium pay for working in excess of 40 hours per week. From the records, it seems that a typical driver's shift will consist of anywhere from 10 to 12 hours.

[5] To enforce the pricing rules, each cab is required to have the rates printed on the outside of the vehicle and each has a taximeter which registers the amount of the fare during the trip; this being determined mostly by mileage. Each driver is required by the Taxi Commission to maintain a trip card on which he or she is required to note the start and end time of every fare during the shift.

[6] The Respondents assert that the change from commission sharing to leasing came about largely because the drivers felt it served their self interest. While I am skeptical of the reasons asserted by the Respondent, there is no doubt that this was a voluntary change and after a few years, virtually all of the drivers changed over to the leasing arrangement.

fleet owners and the drivers. This stipulation describes the relationship in great detail and it reads as follows:

Stipulation

1. Respondents, J & I Maintenance Corp., Ann Service Corp., Glenties Leasing Corp., Ronart Leasing Corp., Irene Leasing, Inc., 55-Stan Operating Corp., Linden Maintenance Corp., and Team Systems Corp., are operators of fleets of New York City-licensed medallion taxicabs, and are in the business of leasing such medallions and taxicabs to licensed New York City taxi drivers. (The respondent fleets are hereafter referred to as the Fleets.) Respondent Metropolitan Taxicab Board of Trade, Inc. (MTBOT) is a not-for-profit corporation, and is a trade association whose members include the Fleets. MTBOT has served as the designated bargaining representative of the Fleets in connection with collective-bargaining negotiations with Taxi Drivers and Allied Workers Union, Local 3036, Service Employees International Union, AFL–CIO (Local 3036). MTBOT and the Fleets are the respondents in this matter.

2. Prior to 1979, New York City law precluded the leasing of medallion taxicabs. Accordingly, the Fleets, or their predecessors in interest, employed drivers to drive their taxicabs, and paid such drivers pursuant to commission arrangements involving the splitting of fares between the employer and its employee-drivers. Such employee-drivers received benefits pursuant to the collective-bargaining agreement between Local 3036 and the Fleets. Those benefits included paid vacations, health insurance, pension benefits, death benefits and eligibility for school scholarships. Such employee-drivers were also subject to discipline and discharge for misconduct, including misappropriation or theft of fares, violation of their employer's rules and regulations, lack of productivity and various other causes. In 1979, New York City amended its applicable law to permit the leasing of medallion taxicabs. Shortly thereafter, the Fleets, or their predecessors in interest, began to lease their taxicabs and medallions to taxi drivers, subject to the terms of the collective-bargaining agreement between the Fleets and Local 3036.

3. Before the Fleets commenced leasing, Local 3036 was the collective-bargaining representative of the taxi drivers who were employed by the Fleets or their predecessors in interest. After the Fleets commenced leasing, Local 3036 was the collective-bargaining representative of the taxi drivers who leased taxicabs from the Fleets. Since 1983, each collective-bargaining agreement between Local 3036 and the Fleets has stated, in the article entitled "Leasing of Taxicabs," that "A lease taxicab driver shall be an independent contractor and shall not have any of the rights, benefits or obligations of commission driver employees, except as specifically provided for in this Agreement."

4. Under the leasing system, drivers lease taxicabs (and the related medallions) from the Fleets pursuant to varying lease arrangements. As more fully set forth below, pursuant to a written lease agreement, the driver pays the Fleet a flat fee to lease a taxicab at a rate set by the Fleets, subject to the qualifications described in paragraphs 12 and 13 below. Having paid the lease fee, the driver keeps all fares (including night surcharges) and tips that he/she collects. The New York City Taxi & Limousine Commission (TLC) sets the rate of fare which is charged to taxicab passengers. The driver pays for the gasoline consumed during the lease period. Certain Fleets maintain on-site gas pumps for sale of gasoline to those drivers who choose to purchase gasoline at the Fleet's premises. A driver who leases a medallion and cab five shifts per week throughout a year pays approximately $20,000-$25,000 in lease fees and gasoline. Drivers lose income due to lost fares because of accidents and breakdowns, being stopped and ticketed by the police or TLC inspectors, or other interruptions such as those caused by inclement weather or severe traffic. Drivers also lose income due to robberies and nonpaying passengers. In addition, drivers must pay for tickets issued by the police, the TLC or NYC parking violations bureau, where such tickets are related to the driver's conduct. The above factors can cause a driver to earn less in fares for a particular shift than he pays to lease the cab.

5. Drivers receive no compensation of any kind from the Fleets, nor do they receive any fringe benefits (including overtime, vacation pay, medical, dental or life insurance, pension or retirement contributions). As the Fleets pay no wages to driver-lessees, they withhold no social security or other moneys from and issue no tax-related forms to, the drivers. The driver alone is responsible for his/her tax reporting. The U.S. Internal Revenue Service has issued individual determination letters to each of the Fleets or their predecessors in interest, acknowledging that the lessee-drivers are "independent contractors" for all purposes under the Internal Revenue Code. Likewise, the New York State Department of Labor, Division of Unemployment Insurance has repeatedly found that the lessee-drivers are not employees, but instead "independent contractors," who are not eligible for unemployment insurance coverage. New York State law was amended in 1986 to require that lessee-drivers be covered under the workers' compensation law and, accordingly, the Fleets provide such coverage at their cost. While the trip sheets which the TLC requires drivers to complete and the Fleets to maintain call for information on fares, the Fleets make no attempt to ascertain and do not know how much money their lessee-drivers receive in fares and tips, except as set forth in the next sentence. On approximately three occasions during the past 10 years, on request of counsel for the Fleets, several of the Fleets reviewed a limited sample of trip sheets to present statistical information to the TLC.

6. Each of the Fleets operates 7 days per week and 24 hours per day, based on two 12-hour daily shifts. The "day shift" typically begins between 4 and 5 a.m. and concludes 12 hours later when the "night shift" begins.

7. In order to become licensed, a driver must first obtain a New York City "hack" license. To obtain a hack license, a driver must at his/her own cost pay for application and licensing fees, an 80-hour TLC-mandated taxi driver's course and a 6-hour DMV-approved defensive driving course, and mandatory medical and drug-testing examinations. The driver is also responsible for the costs of periodic license renewals, refresher courses and drug tests mandated by the TLC. The Fleets and MTBOT have, from time to time, assisted drivers in completing TLC forms and referred them to notaries. To attract new drivers to drive for the Fleets, from October, 1997 to March, 1999, some of the Fleets offered new drivers lease credits equivalent

to the cost of tuition for the TLC-required course, which credits could be applied after a new driver leased for 20 shifts from the same Fleet.

8. Drivers are free to lease from any companies and individuals who are in the leasing business, including individual owners, lease managers, owner/drivers looking for a "second driver", fleets other than the Fleets, and those firms comprising the Fleets. Lease managers act as brokers with respect to taxicab medallions, contracting with medallion owners to pay to such owner a fixed sum each month for the use of the medallion and leasing the medallion to drivers, often together with a vehicle. However, lease managers do not operate taxicab garages and usually lease medallions exclusively on a longer-term basis, unlike the Fleets. The Fleets have "fleet" status under the rules of the TLC, which require that the fleet maintain a full-time garage, where vehicles can be serviced. A driver chooses which firm or individual medallion/cab owner or lease manager to lease from based on the driver's preference for the nature, type and lease prices/arrangements of a particular Fleet, firm, medallion/cab owner or lease manager, as well as its location and convenience for his/her particular lifestyle.

9. When a driver wishes to lease from a Fleet for the first time, a Fleet will typically ask the driver to fill out a lease application form which seeks basic information to identify the driver, his driver's and hack license information, and driving history. This information is then used by the Fleet to run a check with the DMV to verify that the driver is properly licensed and in good standing, and to determine whether the driver's driving record, particularly his/her history of accidents and moving violations, indicates that the driver presents an acceptable risk to that Fleet. The driver's safety record is of utmost importance to the Fleet because its primary objective is to maximize the number of its cabs that are leased during every shift, by keeping them operational and by avoiding costly accidents. The Fleets generally do not lease to new potential lessee-drivers with excessive moving violations or a history of accidents. For current lessee-drivers, Fleets will terminate the leasing privileges of those drivers who have an excessive number of accidents, or fail to pay lease or gasoline fees when due, or engage in threatening or abusive behavior. With respect to Respondent Glenties Leasing Corp., a lessee driver's leasing privileges may be suspended or terminated if the driver fails to lease on a shift when the driver has previously advised the Fleet that he would lease for such shift.

10. If a new lessee-driver has an acceptable driving history, the Fleet will typically give such driver a "road test" that lasts a few minutes to determine whether the driver is able to safely back up, drive and park the cab. Following a new lessee's successful road test, a driver new to the industry is then typically provided with a very short "orientation" to verify that he/she understands how the taximeter works, how to complete the "trip sheet" (as required by the TLC regulations) and how to check the cab to ensure it complies with all other TLC regulations which are the driver's responsibility, such as those set forth in paragraphs 16 and 17 below. Other than such "orientation," the Fleets provide no other training to lessee drivers. New drivers who have previous taxi industry driving experience do not receive any orientation or other training. Written orientation guidelines are issued to new drivers by many of the Fleets. Although the guidelines vary significantly, each emphasizes the importance of avoiding accidents and damage to the taxicab, and gathering accident information required by the Department of Motor Vehicles and needed for insurance purposes. Each set of orientation materials also emphasizes the need to comply with TLC rules. Some of the Fleet's guidelines include information concerning procedures for accidents and breakdowns, refueling of the cab at the conclusion of the shift, and information concerning the shift schedule.

11. Prior to leasing a cab from a Fleet, the driver must sign a written lease agreement with such Fleet which sets forth the contractual terms of the lease. Each Lease Agreement provides as follows:

> RELATIONSHIP BETWEEN PARTIES: It is understood and agreed that the relationship between the parties hereto shall be solely that of LESSOR and LESSEE, and that the LESSEE shall be an independent contractor and not an employee of the LESSOR, nor shall LESSEE be deemed an agent of the LESSOR. LESSEE shall at all times be free from the control or direction of LESSOR in the manner of operation of the automobile leased hereunder, and LESSOR shall have no right to, nor attempt to, exercise any supervision over LESSEE in the operation of said vehicle. LESSEE shall retain all fares collected from passengers.

12. After signing the lease agreement, the driver then typically meets with a Fleet dispatcher or representative to advise on what days and what shifts the driver wishes to lease. The driver's leasing arrangements with a fleet are subject to the Fleet's ability to supply a cab for the desired days/shifts. Drivers' leasing preferences vary greatly depending on whether they wish to lease full time or part time, with some drivers leasing only days or nights or weekdays or weekends, or even during school intercessions. For at least the past 4 to 5 years, there has been a growing shortage of lessee-drivers. As a result, lessee drivers have been requesting and often obtaining lower lease fees, a better choice of shifts, and new automobiles from the Fleets.

13. Among the Fleets, there are wide variations in the lease options and associated pricing they offer. Some operate almost exclusively on a "two-shift, 12-hour" basis. Others offer a wide variety of lease terms including varying hourly leases (on 9, 12, 18, 36, 48, and 72-hour bases, for example), weekly leases (5, 6, or 7 days for the day or night shift), 24-hour (2-shift) leases, weekend leases, monthly leases, or partial shift leases. Some Fleets also enter into leasing agreements with drivers who own or are financing the purchase of a cab, with the driver leasing only the medallion from the Fleet. These are known as driver-owned vehicles or "DOV's" in the industry. Many of the Fleets will negotiate their lease prices with drivers and will enter into special deals depending on supply and demand for drivers and cabs. Other Fleets have set lease prices that a driver can either accept or reject. Many drivers change the party from whom they lease to get better lease prices, different lease options or newer cars (which have fewer breakdowns). Over the course of an average year, there is approximately a 40-percent turnover among the drivers who lease from the Fleets. Among the reasons drivers cease leasing from

a Fleet are: leaving the industry, revocation of drivers' licenses, taking an extended break from leasing, or choosing to lease from a different fleet or taxicab operator.

14. Over the 14 12-hour shifts during a week, the Thursday, Friday and Saturday night shifts are considered the "prime" shifts during the fall, winter and spring because taxis are typically in high demand on those nights (and tipping is frequently more generous at those times). In the summer, Wednesday and Thursday nights are considered "prime shifts". As a result of this difference between shifts, there is a high demand among drivers to lease during prime shifts and Fleets frequently cannot fill the demand for cabs during those shifts. Correspondingly, as there are fewer passengers during the day shifts on Saturday and Sunday, lease demand is much lower during those shifts. Because the Fleets seek to maximize the number of cabs they lease during every shift, many will structure their leases to provide for a lessee-driver to drive during a relatively less profitable shift in order for the driver to be guaranteed the opportunity to lease during more profitable shifts. The Fleets do not require lessee drivers to accept such arrangements. If the Fleet and a lessee-driver do agree to such an arrangement, and if the lessee-driver thereafter fails to lease in accordance with such arrangement, the Fleet may choose not to continue the arrangement. The Fleets do not require lessee drivers to lease on weekends, unless they have committed to do so pursuant to an agreed arrangement as described above.

15. The dispatcher, an agent of the Fleets, assigns cabs to the drivers. A driver advises the dispatcher of the shift he/she wants to drive. If a driver requests a shift that is already filled, then the dispatcher will offer another shift to that driver, if a cab is available for such other shift. If the driver does not want to drive that alternative shift, then he/she can decline to lease a cab from such Fleet and go elsewhere for that shift. The driver can also choose not to drive at all for that shift. Drivers can also lease a cab by coming to the garage before the shift begins. If there is a cab available, the dispatcher will assign one to such driver.

16. Prior to October 5, 1997, pursuant to the collective-bargaining agreement between the Fleets and Local 3036, drivers were required to purchase from a union vending machine a lease permit, which cost $3, in order to lease a taxicab. The lease permit was presented to the Fleet's dispatcher and subsequently collected by the Union, which also collected the payments from the vending machine. Such moneys constituted union dues.

17. The Fleets do not supply their drivers with anything except the cab they have leased, equipped with a taximeter and receipt paper, and the TLC-mandated trip sheet. The Fleets advise, and periodically remind, drivers of many of the "Driver's Rules" to assure compliance with all TLC rules. Such TLC Driver's Rules bar a driver from, among other things: subleasing a taxi, driving more than 12 consecutive hours, smoking in the cab, charging more than approved rates, refusing to take any orderly passenger to a destination within New York City, Nassau or Westchester, or requesting a tip. Such Driver's Rules also mandate, among other things, that the driver: be "clean and neat in dress and person" (specifying prohibited dress such as shorts, bathing suits, or "underwear"), insure that brakes, tires, lights, signals and seatbelts are in good working order, properly maintain the "trip sheet", properly display and (after sunset) illuminate his hack license, the "rate card" and the taximeter, insure that the interior and exterior of the cab is clean, have a NYC map in the cab, and dispense receipts to passengers.

18. When a driver leases a taxicab, the driver undertakes certain steps to assure compliance with TLC rules. These include checking: (a) that the correct trip sheet, which is required by the TLC, has been given to the driver by the Fleet; (b) damages to the vehicle to avoid liability for previous accidents; and (c) cleanliness of the cab and that off duty and brake lights are working, as required by the TLC. If the driver advises the Fleet that the cab is not in compliance with TLC requirements, and the Fleet agrees, the Fleet will either remedy the problem or provide an alternate car if one is available. Fleets provide free car washes for the cabs which are being leased to drivers, since TLC rules require the owner to maintain a clean cab. Trip sheets, as required by the TLC, are filled out by the driver, recording the location a passenger is picked up, the passenger's destination, and the amount of fare. Pursuant to TLC rules, drivers return completed trip sheets to the Fleets, which are required to retain them for three years. In accordance with TLC rules, the dispatcher records the shift and the cab leased by the driver and the Fleets retain these records.

19. The lease agreement used by each of the Fleets, except for Glenties, provides that the Fleet can charge a late fee to a driver who returns the cab to the Fleet's garage after the conclusion of the leased shift and, for some Fleets, after the expiration of a grace period. Only some of the Fleets actually charge a late fee.

20. Once the driver drives the leased cab out of the garage, the driver alone chooses where he wants to pick up his first fare, where he chooses to "cruise" for fares when riding empty, when to take breaks to eat or rest, and whether to wait for fares in hotel or airport taxi lines. There are no mileage limitations or penalties imposed on driver-lessees for excess mileage. The Fleets do not operate two-way radios to communicate with drivers and do not dispatch any calls or fares to drivers. Once the driver drives the leased cab out of the garage, the Fleet has no contact with him till the cab is returned to the garage; and the driver is not required to and does not report his location to the Fleet at any time during a shift with these exceptions: if a cab breaks down, is in an accident, or in the case of some of the Fleets, if the driver wishes to take a fare beyond the New York City metropolitan area. In the case of a breakdown or an accident, the Fleets require that the driver promptly report same to the Fleet both for insurance purposes and to expedite repairs. Some Fleets will provide an alternate car in the event of a disabling breakdown or accident, subject to the availability of an alternate cab, and certain Fleets provide lease fee credits for such accidents or breakdowns, where the driver is not at fault.

21. Fleets service and repair at their cost the taxicabs they own and lease. When an accident or breakdown is the fault of a lessee-driver, the Fleet may require the driver to pay all or part of the cost of the repair. Fleets are responsible for summonses issued with respect to equipment violations. Drivers are expected to deliver such summonses to the Fleets. The

Fleets are responsible for complying with TLC rules pertaining to operation of the taximeter. The Fleets also insure the taxicabs they own and lease, and register them with the State Department of Motor Vehicles, and follow TLC rules for readying them for operation as a taxicab (which is referred to in the industry as "hacking up").

22. Drivers who lease taxicabs from the Fleets are not incorporated. Although TLC rules, and accordingly, the Fleets' lease agreements, prohibit drivers from subletting taxicabs which they lease, many drivers who lease taxicabs for extended periods, such as weekly leases or DOV leases, work with one or more other drivers so as to maximize for them the profitability of their lease arrangement, sharing the costs and revenues in proportions determined by such drivers. With respect to such additional drivers, the Fleets screen them in the same manner as described in the first two sentences of paragraph 9 above.

23. Approximately half the Fleets own and operate tow trucks, which are driven by inside workers and which respond to accidents or breakdowns involving the taxicabs of the Fleet, performing minor repairs at the site of the breakdown or accident, or towing the taxicab back to the Fleet's garage. The Fleets which do not own and operate tow trucks contract with a towing service, which tows the Fleet's disabled cabs back to the Fleet's garage. Lessee-drivers do not pay for the towing of a disabled cab.

24. None of the taxicabs operated by the Fleets have any identifying logo, or other marking indicating the identity of the Fleet which operates the taxicab.

25. The "inside workers" (mechanics, "body" workers, gas dispensers and others) are employees of the Fleets, servicing the taxicabs, dispensing gasoline and performing various other jobs. The Fleets' inside workers are "employees" within the meaning of Section 2(3) of the NLRA. The Fleets' "inside workers" constitute an appropriate bargaining unit under the Act. If it is ultimately determined that lessee-drivers are statutory employees, rather than independent contractors under the Act, the lessee-drivers and the inside workers would constitute an appropriate bargaining unit under the Act.

26. Respondent alleges that the event which purported to combine Local 3036 and Local 74 was not a valid merger. Hereinafter, such combination is referred to as the "Merger." Prior to the Merger, Local 3036 was a labor organization within the meaning of Section 2(5) of the Act.

27. Prior to the Merger, Local 3036 was the collective-bargaining representative of the inside workers employed by the Fleets as well as the collective-bargaining representative of the drivers who leased taxicabs from the Fleets. Prior to the Merger, the Fleets or their predecessor companies and Local 3036 had a collective-bargaining relationship for more than 25 years.

28. On or about September 18, 1997, MTBOT, on behalf of the Fleets, declined recognition of Local 74 as the representative of the drivers who leased taxicabs from the Fleets and the Fleets' inside workers.

29. The most recent collective-bargaining agreement between Local 3036 and MTBOT, on behalf of the Fleets, that covered inside workers and lessee-drivers, had a term from April 1, 1987 until March 31, 1990 and was extended, from time to time, and modified by the agreement of the parties, finally expiring on October 5, 1997.

B. The Unions Merge and the Employers Refuse to Bargain

For many years, Local 3036 was the collective-bargaining representative for the drivers and inside workers who were employed by the Respondent fleets. As of August 1997, the unit consisted of about 3000 drivers and about 200 inside workers. The most recent contract executed between Local 3036 and the Metropolitan Taxicab Board of Trade (MTBOT) was set to expire on October 5, 1997. Prior to expiration, representatives of the Union and MTBOT commenced, in 1996, negotiations for a successor contract. The main negotiator for the Union was Larry Goldberg who was Local 3036's secretary/treasurer.

In June 1997, Larry Goldberg at a meeting with Jack Ryan, President of sister Local 74, SEIU, AFL–CIO, asked for assistance in negotiating the taxicab contract. Ryan agreed. At the same time, Goldberg and Ryan talked about the possibility of merging the two locals and thereafter raised that possibility with Mike Fishman, who is the assistant to the president of the International Union. As a consequence, representatives of the two locals and the International Union agreed that a merger should take place on an expedited basis pursuant to which Local 3036 would disappear and its members would become members of Local 74. It was further agreed that upon completion of the merger, Local 74 would establish a taxi division and that Local 74 would hire Goldberg and several other of Local 3036's employees including Mike Rosenthal, and Ben Goldberg, respectively Local 3036' recording secretary and president.

On June 6, 1997, Ryan and Larry Goldberg signed a letter sent to Andrew Stern, the International Union's president indicating their desire to accomplish a merger. In essence, they agreed to have a merger.

On June 19, 1997, Ryan and Goldberg signed a document stating:

> Local 3036 SEIU hereby agrees to merge into SEIU Local 74 subject to the following terms and conditions:
>
> 1. All current members of Local 3036 shall become members of Local 74 upon the effective date of the merger, without payment of any additional initiation fees. Local 3036 members will enjoy the same rights and benefits as Local 74 members, and shall be subject to Local 74's Constitution and By-laws. The time during which Local 3036 members have been members in good standing of Local 3036 shall count as membership time in Local 74.
>
> 2. Local 74 shall assume all of the collective-bargaining responsibilities and representational rights with Local 3036 as well as the governance and administration of its respective funds.
>
> 3. The dues rates paid by Local 3036 members shall remain the same, after this merger, until such time as Local 74 may lawfully change them.
>
> 4. All current staff of Local 3036 and its funds shall be considered for employment with Local 74, to the extent that openings exist and the staff member is qualified. All decisions regarding the hiring of the staff of Local 3036

and its funds shall be made at the discretion of the President of Local 74.

In mid-June 1997, Goldberg introduced Ryan to the representatives of the Respondents and informed them of their desire to merge Local 3036 into Local 74.

In late June 1997. Goldberg and Ryan met with the executive board of Local 3036 to explain the reasons for the proposed merger. It was explained to them that Local 74 intended to create a taxi division which would negotiate and vote on its own contracts. The Board voted in favor of a merger. A similar meeting was held by Ryan with the executive Board of Local 74 which also approved the merger.

During July 1997, Goldberg met and spoke to Local 3036 members about the merger. On July 1, 1997, Local 3036 mailed postcards to its members advising them as follows:

ATTENTION LOCAL 3036 SEIU UNION MEMBERS
The executive Board of Local 3036 SEIU
recommended the merger of Local 3036 into Local 74 SEIU
and have called a
SPECIAL UNION MEETING
for the purpose of approving this merger.
The meeting will be held on Tuesday, July 29th 1997
at 1:00 p.m.
At SEIU Local 74, located at 24-09 38th Avenue
Long Island City, NY (corner of 24th street)

Additionally, Local 3036 representatives visited garages, distributed and posted flyers and made an effort to reach its active and retired members about the July 29 merger meeting. (The flyers said essentially the same thing as the postcards and notified members of the July 29 meeting.)

On July 29, the meeting was held but was not well attended. (In fact many of the attendees were retired members). No attendance records were kept or maintained and apart from knowing people by sight, no effort was made to insure that those in attendance were members. According to Goldberg, there were about 200 people present at this meeting including retirees who no longer worked for the respondents. The persons present were told of the reasons for the merger and approved the merger by a voice vote. Although the testimony was that the vote was overwhelmingly in favor of the merger, there was no mechanism to record the ayes and nays.

From the Respondents' point of view, most significant are the facts that (a) the vote was not conducted by secret ballot and (b) the vote was taken before there was any discussion at the July 29 meeting about the proposition. Thus, the Respondents argue that the merger vote did not meet the minimum standards of "due process" enunciated by the Supreme Court in *NLRB v. Financial Inst. Employees*, 475 U.S. 192 (1986), because of the failure to allow meaningful discussion before the vote and because the vote itself was not held by secret ballot. The General Counsel contends that notwithstanding these two factors the merger vote met an adequate "due process standard" and therefore constituted a valid action which the employers could not legally challenge. The Union's position is somewhat broader in that it asserts that inasmuch as the present situation involves two locals of the same International Union, the due process standards applied by the Board and the Courts should not be applicable or appropriate. The Union contends that where the merger involves two locals of the same International, this is strictly an internal union matter, not subject to scrutiny by the Board or the employer.

On the same afternoon, (July 29), a similar membership meeting was held by Local 74 which had notified its members in similar fashion as Local 3036. According to Ryan there were about 400 of his members at this meeting who also approved the merger by voice vote.

In August 1997, Union Representatives Ryan, Goldberg and Rosenthal met with MTBOT's chief negotiator Ron Stoppelmann, and its attorney Merril Mironer. Also present were Tom Ryan, counsel to Local 74 and Local 74's funds administrator, Hugh Ford. According to Ryan, Mironer stated that at "that time" they would be recognizing Local 74. Ryan told Mironer that Local 74 intended to have former Local 3036 representatives, Larry Goldberg and Rosenthal, continue as Local 74 business agents who would be involved in contract negotiations and grievance handling.

On September 17, 1997, Andrew Stern, the International President sent a letter to Ryan and Goldberg approving the merger, effective August 15, 1997.

At a meeting held on September 18, 1997, Mironer advised Ryan and Goldberg that MTBOT declined to recognize and bargain with Local 74.

Subsequent to the merger, Local 74 hired Larry Goldberg as a business agent and his father, Ben Goldberg, as a consultant. Rosenthal was hired on a per diem basis for about a month but was unable to continue his services inasmuch as no money was coming in from the taxi drivers division after negotiations ceased. Local 74 took over the premises previously occupied by Local 3036 and moneys in Local 3036's benefit funds were transferred to Local 74 benefit funds.

III. ANALYSIS

There are two issues to be decided here, both of which have to be decided in favor of the Union and the General Counsel in order for them to prevail.

The first issue is whether there was an effective merger between two local unions of the same International which, after implementation, gave the second, Local 74, Service Employees International Union, AFL–CIO, the legal right to compel the Respondents to bargain with it as the successor to Local 3036, SEIU, AFL–CIO.

The second issue is more basic and deals with the question of whether the taxi drivers who have been covered by a collective-bargaining relationship between Local 3036 and the Respondent fleets have, since about 1979, continued to be employees or have become, for want of a better term independent contractors. Since the drivers comprise the vast bulk of the collective-bargaining unit, if it is determined that they are not employees as defined in the Act, then the employers would not be required to bargain with any union on their behalf. And as the pre-existing bargaining unit which did contain some nondriving employees it would have been so changed, (essentially destroyed), that the employers would have been within the law to refuse to bargain either with the original union, Local 3036 or its alleged successor, Local 74.

Because it is my opinion that the drivers no longer were employees at the time of the withdrawal of recognition, I need not answer the first question dealing with the validity of the union merger.[7]

To call the fleet taxi drivers independent businessmen is, in my opinion to use a category which has little or no application to these people. They do not own the cabs they drive and more importantly they do not own the licenses to operate the cabs. In this sense they have no proprietary interest in the means by which they perform their services. For the most part they lease cabs on 12-hour shifts and by managing to stay out on the road for perhaps 11-½ hours at a time, they may earn, with tips, an average of about $9 or $10 an hour with no overtime pay. They receive no health insurance, no life insurance, nor any other benefits for their labor. And the only way that they can realistically maximize their earnings is to stay on the road for as long as possible during a shift, be lucky in the tips they garner, and perhaps use some discretion in limiting the amount of income they report for taxes.

The drivers have no control over the prices they charge to customers or in the choice of customers. Nor for that matter, do they have any significant control over the prices of the lease for the use of a vehicle. As to these significant economic functions, the drivers have no control over their income or costs as these are set by the Taxi Commission after hearings and lobbying by those for whom it may concern.[8] (I suppose that a driver has some limited control over costs relating to the operation of the vehicle in that he can search out a lower priced gasoline station and drive within the law so as to avoid fines.)

On the other hand, the relationship between the fleet owners and the drivers is virtually devoid of control of the latter by the former. The fleets own vehicles and they lease them to the drivers, with a medallion, (which in many cases may be owned by somebody else). Assuming that a driver has a hack license and is therefore legally licensed by the city to drive a taxi, the fleet is not at all interested in how the driver uses the vehicle during the term of the lease except to the extent that the driver delivers it back in the same condition, and on time for the next lessee. This is because the fleet owner gets all of his money from the driver and does not get a percentage of the fares, all of which are retained by the driver. Indeed, once a driver gets on the road, there is virtually no communication between the company and the driver unless the cab breaks down and the driver calls in to get a repair or tow.

The drivers are nevertheless subject to stringent controls regarding their behavior on the road and with respect to the public they serve. But these are controls that are *not* imposed on them by the fleets; they are imposed by the Taxi Commission through a system of citations, fines, and ultimately license suspensions. If there is a single entity controlling the economic return and the working behavior of drivers, it is the city and not the fleets.

In *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), the Supreme Court stated that in determining whether people were employees or independent contractors, the Board should apply the common-law agency test under which "all the incidents of the relationship must be assessed and weighed with no one factor being decisive. In that case where the Court upheld the Board' determination of employees status for debit agents the Court stated:

> [T]he agents do not operate their own independent business, but perform functions that are an essential part of the company's normal operation; they need not have any prior training or experience , but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agents Commission plan" that contains the terms and conditions under which they operate is promulgate and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they many continue as long as their performance is satisfactory.

In a recent case, *Roadway Package System, Inc*., 326 NLRB 842 (1998), a majority of the Board held that certain truck drivers were employees and not independent contractors and noted inter alia that the right of control test while still a factor should not be considered the "predominant" factor in determining employee status.[9] The Board found that the individuals in question performed functions that were an essential part of the company's operations; that the drivers did not operate independent businesses; that they did not have any prior training or experience, receiving all of their training from the employer; that they did not engage in outside business; that they had no substantial propriety interest beyond the investment in a truck which was usually leased with substantial involvement of the

[7] The basic rule as enunciated in *Sullivan Bros. Printers*, 317 NLRB 561, 562 (1995), is that an employer has a obligation to bargain with a successor union where an affiliation vote is conducted with adequate due process safeguards and where the organizational changes are not so dramatic that the post affiliation entity lacks substantial continuity with the pre-affiliation union. In the present case, there clearly was continuity between the preexisting bargaining agent and the successor union, as there was continuity of representatives who were going to be involved in the bargaining for and administration of a fleet taxi collective-bargaining agreement. There is, however, a real question as to whether an affiliation of this type requires a secret ballot election and an opportunity for the members to discuss and evaluate a merger before voting. Compare *Sullivan Bros*. supra at fn. 5 with *May Dept. Stores Co., v NLRB*, 897 F.2d 221, 226 (7th Cir. 1990), and *Paragon Paint & Varnish Corp*., 323 NLRB 882 (1997), where the Board accepted the Court's decision at 90 F.3d, 591 (D.C. Cir. 1996), as the law of the case.

[8] The stipulation noted and there was some testimony that to an extent, the degree to which was not demonstrated in the record, drivers may be able to obtain lower cost leases from fleets on some occasions. To the extent that drivers may have leverage, this would probably be due to either a general lowering of the unemployment rate in the city.

[9] Then-Chairman Gould in a concurring opinion, expressed the view that where an enterprise becomes the mechanism for carrying out governmental controls over drivers, this should be a probative factor in favor of finding that the drivers are employees.

employer; that they worked as an integral part of the employer's business under its substantial control; and that they had no significant entrepreneurial opportunity for gain or loss. The facts showed among other things that the drivers wore uniforms approved by the employer, that they operated uniformly marked vehicles that were custom designed by the employer, and that the vehicles clearly displayed the employer's name, logo, and colors. The decision in *Roadway*, while perhaps downplaying the right of control test, clearly did not eliminate it as a significant factor in determining employee status.

On the same day that the Board issued its decision in *Roadway*, it also issued a decision in *Dial-A-Mattress Operating Corp*., 326 NLRB 884 (1998), in which a majority found that the drivers were independent contractors and not employees. In that case, as opposed to *Roadway*, the owner operators employed at least one other worker whom they hired and directed; many had more than one truck and were incorporated businesses; and they could refuse to do deliveries and were not guaranteed a minimum amount of revenue. Additionally, the drivers owned their own trucks and the company involved had no role in the selection, acquisition, ownership, financing, inspection, or maintenance of the vehicles.

The Board and the Courts have had occasion to deal with a number of taxicab cases at different geographic locations in the country. The decisions in these cases have gone either way depending upon facts peculiar to each case and to a degree, depending on the views of the deciders in applying a legal standard to a particular fact pattern. In the past, it seems to me that the most decisive facts related to (a) whether the lessor (company) shares directly or indirectly in the revenues collected by the drivers and (b) whether the company controls the drivers' means and manner of operating the vehicles once they leave the company's garage. *NLRB v. O'Hare-Midway Limousine Serv. Inc*., 924 F.2d 692, 695 (7th Cir., 1991); *Yellow Taxi Co., of Minneapolis v. NLRB*, 721 F.2d 366, (D.C. Cir. 1983); *Local 777 (Seafarers), v. NLRB*, 603 F.2d 862, 880 (D.C. Cir. 1978), rehearing denied 603 F.2d 682 (D.C. Cir. 1979); *Elite Limousine Plus*, 324 NLRB 992 (1997); *Yellow Cab of Quincy*, 312 NLRB 142, 144 (1993) ; *Metro Cars*, 309 NLRB 513, 516 (1992); and *City Cab of Orlando*, 285 NLRB 1191 (1987).

In *Local 777 (Seafarers), v. NLRB*, the Court held that the drivers became independent contractors when the taxicab company switched from a commission system of leasing to a leasing system similar to the one in the present case. The Court stated inter alia,

> When a driver pays a fixed rental, regardless of his earnings on a particular day, and when he retains all the fares he collects without having to account to the company in any way, there is a strong inference that the cab company involved does not exert control over "the means and manner" of his performance. This conclusion is justified because under such circumstances, the company simply would have no financial incentive to exert control over the drivers, other than such as is necessary to immunize the proprietor of a cost from liability which arises from its operation by virtue of the lessor's ownership. However the driver conducts his occupation, the company has received its financial reward…. Not only do cab companies have no financial incentive to impose controls on their lessee-drivers, but also it would be anomalous for them to try to do so. This is true because one the motivations behind the institution of leasing was an attempt to be less involved in the routine difficulties of directing the daily operations of their cabs. Moreover to the extent that the companies' assertion of control would likely be resented by potential drivers, to the extend that the company sought to assert such controls beyond those required to guard against liability, it would be acting against its own best interest. In sum, once financial accountability is no longer important, [the cab companies] have little business justification for seeking to continue to hold their drivers accountable in other matters.

The same result was reached in *City Cab Co. of Orlando* supra, where the Board affirmed the decision of the administrative law judge who concluded, inter alia, that drivers who leased their cabs at a fixed rate independent of the fares received were independent contractors and not employees.

Contrast the situations described above with cases where the cab owner and the drivers share the fares received from the customers and where, of necessity, the owner must put in place a system of controls to ensure that he or she receives the set percentage of the fares. For example, in *Yellow Cab of Quincy*, supra at 144, the cab owner received a percentage of the fares since the rental fee paid by the drivers were based on mileage which was also the mechanism for determining the fares. The Board noted that due to this de facto fare sharing arrangement, the owner had an incentive to have the cabs driven as many miles as possible and coupled with the drivers' substantial reliance of the employer's dispatching service for obtaining fares, this gave the company a motive for and a method of controlling the drivers' means and manner of operating the vehicles. See also *NLRB v. O'Hare Limousine Service*, supra, *Elite Limousine Plus*, supra, and *Metro Cars*, where either a court of appeals or the Board found that the drivers were employees where there was a fare sharing arrangement, even if that arrangement was in the guise of a lease, or if the company, despite a lease arrangement, nevertheless exercised substantial control over the drivers.

It is probably true, as suggested by the General Counsel, that the Board's decisions in *Roadway Package System*, and *Dial-A-Mattress Operating Corp.*, supra, may have shifted the legal standard a bit more in favor of finding employee status. But it is my opinion that under the prior decisions involving taxicabs and taking into account the standards in *Roadway* and *Dial-A-Matress*, the drivers in this case would still not be considered employees as defined in the Act. As discussed above, the facts show too much independence of the drivers from the fleet owners. And whether or not one would characterize these people as independent business persons, I can't escape the conclusion that they are not employees of the fleets.

CONCLUSION OF LAW

The Employer has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 15, 1999

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.