UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

AAA TRANSPORTATION/YELLOW CAB

Employer

and **Case 28-RC-106979**

TUCSON HACKS ASSOCIATION

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

On June 11, 2013, Tucson Hacks Association (the Petitioner) filed a petition seeking to represent all full-time and regular part-time taxicab drivers employed by AAA Transportation/ Yellow Cab (the Employer) at its facility in Tucson, Arizona. The Employer asserted that the petition should be dismissed because its taxicab drivers are independent contractors and, thus, are not employees within the meaning of Section 2(3) of the National Labor Relations Act (the Act).

A hearing was held before a Hearing Officer for the National Labor Relations Board (the Board), and, on July 18, 2013, I issued a Decision and Order dismissing the petition on the grounds that the Employer's taxicab drivers are independent contractors. The Petitioner requested review of my Decision and Order, and, on May 28, 2015, the Board remanded the proceeding to me for further appropriate action consistent with its decision in *Fedex Home Delivery, Inc.*, 361 NLRB No. 55, issued on September 30, 2014, in which it restated and refined its approach for assessing independent contractor status. I determined that it was appropriate to reopen the record to receive additional evidence, and accordingly, a Hearing Officer for the Board conducted further hearing and formally closed the hearing's record on September 24, 2015.

Based upon the evidence adduced at the original hearing and the further hearing on remand and based upon an application of the Board's restated and redefined approach for assessing independent contractor status to that evidence, I have concluded that the drivers in the petitioned-for unit are statutory employees and are not independent contractors. Accordingly, I shall direct an election in the petitioned-for unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. On the entire record in this proceeding, including post-hearing briefs submitted by both parties, I find:

1. **Hearing and Procedures:** The Hearing Officer's rulings made in the original hearing and the further hearing on remand are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The Employer, an Arizona corporation, maintains offices and places of business in Phoenix and Tucson, Arizona, where it is engaged in operation of a taxicab service for the general public. During the 12 months preceding the original hearing, the Employer purchased and received goods valued in excess of $50,000 from suppliers located outside of the State of Arizona and, during the same period, derived gross revenues in excess of $500,000 from its business operations. The Employer is engaged in commerce within the meaning of the Act, and therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Labor Organization Status and Claim of Representation:** The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and seeks to represent certain employees of the Employer.

4. **Statutory Question:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. Specifically, the Union seeks to represent the Employer's taxicab drivers, and although the Employer contends the taxicab drivers are independent contractors, such that no question concerning the representation of employees exists, I find, for the reasons set forth below, that the taxicab drivers are employees within the meaning of Section 2(3) of the Act and, thus, that a question concerning representation exists:

I. Facts

A. The Employer's Operations

The Employer is engaged in the operation of a taxicab service for the general public. It has a facility in Tucson, Arizona, where it maintains a fleet of approximately 110 vehicles that it leases to the taxicab drivers that the Petitioner seeks to represent. The Employer operates under the names AAA, Yellow Cab, and Courier.

At the time of the original hearing, the Employer had about 95 to 120 active drivers who had leased vehicles during the prior 3 months and who had not requested their names be removed from the Employer's active driver list. At the time of the further hearing on remand, the Employer had 177 active drivers. During the first 7 months of 2015, between 198 and 206 drivers leased a vehicle for at least one day. In addition, the Employer employs limousine and Town Car drivers, who provide sedan services through exclusive arrangements between the Employer and hotels, and MedEx drivers, who the Employer concedes are employees and who exclusively provide medical transport services. The Petitioner is not seeking to represent limousine and Town Car drivers or MedEx drivers.

Most of the vehicles in the Employer's fleet are Crown Victoria and Toyota Prius sedans. Other cars in the fleet include Chevrolet Impala and Toyota Camry sedans, Dodge Caravan vans with and without wheelchair and stretcher capacity, and larger vans.

Operations at the Employer's Tucson facility are overseen by an Operations Manager, a Fleet Manager, an Administrative Fleet Manager, and an Office Manager. Further, in addition to taxicab drivers, the Employer employs various individuals at the Tucson facility, including cashiers, dispatchers, mechanics, a sales and marketing employee, and a training coordinator.

The Employer also has a facility in Phoenix. Various managers, including the Employer's Director, Finance Manager, and Risk Manager, are based out of this facility. At the time of the 2013 hearing, the Employer's call center in Phoenix fielded calls for the Tucson facility, but the Employer recently reopened a call center in Tucson, which now handles cash and credit calls, but not voucher calls, for the Tucson drivers.

B. Drivers' Lease Options

To be eligible to lease one of the Employer's vehicles, an individual must be at least 25 years of age, must be able to pass a criminal background check, must be able to pass a drug and alcohol screen, and must pay for the Employer to obtain his or her driving record. Approved applicants sign a Master Lease Agreement, which is renewed every time a driver leases a vehicle or renews a lease.

The Master Lease Agreement states that the Employer will lease vehicles to drivers "for use by LESSEE to provide Taxicab Service." It further states that the Employer will make its dispatch system available to drivers but that drivers may also receive requests for service directly from customers. In addition, it provides that the Employer will maintain required permits and provide maintenance and repairs and a certain level of insurance and that drivers will pay for fuel, parking fees, tolls, fines, penalties, and other expenses incurred in the operation of their vehicles. It also provides that the Employer can install advertising on its vehicles and specifies that revenue generated by the advertisements is payable to the Employer.

The Master Lease Agreement specifies that drivers are "independent Lessees" and states that they are not entitled to receive benefits traditionally associated with an employee/employer relationship. It further states that on any given day drivers will determine if they will work, in what areas they will work, the days and hours of their work. It further specifies what routes they will run for transporting customers and what methods they will use to obtain customers. In addition the agreement states that, subject to the terms of the Master Lease Agreement, drivers are not precluded from engaging in forms of gainful employment or entrepreneurial endeavors while under contract. The Master Lease Agreement warns drivers that operation of the Employer's vehicles may not be profitable. It further permits the Employer and a driver to terminate a lease on 30 days' written notice without cause and states that the Employer may terminate without notice if a driver does not operate a vehicle for 30 days. It requires drivers to give 30 days' notice of any alleged breach.

However, the Master Lease Agreement also states that drivers cannot use trade names, logos, or service marks other than the Employer's, without approval of the Employer. It states that drivers will not act in any manner detrimental to the good will of the community toward the Employer, its trade names, logos, and service marks. It restricts drivers' disclosure

of confidential and proprietary information and permits the Employer's installation of audio and video recording and GPS equipment in vehicles. It permits the Employer to conduct drug testing of drivers. It requires drivers to pay a security deposit to pay for any damage to the Employer's vehicles, and it requires drivers to pay credit card processing fees, if they use the Employer's credit card processing system, as described in more detail below.

The Master Lease Agreement prohibits drivers from transferring or assigning their rights and obligations under the agreement, except with express written permission of the Employer. It also prohibits drivers from permitting anyone else to drive the vehicles they are leasing, except with advance written authorization to the Employer.

The Master Lease Agreement gives the Employer the right to cancel the agreement if drivers present a risk of harm to other drivers or vehicle operators. Further, it provides that the Employer can terminate the agreement "in the event a driver breaches any of the terms, obligation, or provisions of the Agreement, or ceases to operate the Vehicle under all the trade name(s) owned and/or managed by [the Employer]." The Master Lease Agreement also allows the Employer to temporarily revoke drivers' right to operate vehicles for a period of time pending investigation, if it believes the driver cannot, will not, or has not been performing pursuant to the terms of the agreement.

After entering into the Master Lease Agreement, drivers sign separate agreements leasing vehicles for 12 hours, 24 hours, or on a weekly basis. These separate agreements are considered to be and treated as modifications of the original Master Lease Agreement. The Employer currently offers the following types of leases:

- one driver weekly, pay daily leases at $105 per day for Prius sedans and $90 per day for Crown Victoria sedans;

- 12-hour day leases at $110 per day for Prius sedans and $90 per day for Crown Victoria sedans;

- 12-hour night leases at $75 per night for Prius sedans and $50 per night for Crown Victoria sedans;

- weekender leases at $150 for Friday at 5:00 p.m. through Monday at 8:00 a.m.;

- two driver weekly, pay daily split leases at $80 per driver per day for Prius sedans and $65 per driver per day for Crown Victoria sedans;

- two driver 24 hour split leases at $79.50 per driver per 24-hours for Crown Victoria sedans;

- 4-hour training leases at $37.50 per 4 hours;

- 24-hour rookie leases at $60.00 per 24-hours;

- new driver leases at $60 per day for the first week, $70 per day for the second week, and $80 per day for the third week;

- Prius sedan 24-hour transition leases at $130 per day;

- 12-hour voucher only leases at $60 per 12-hours;

- 24-hour transition leases at $100 per 24-hours;

- minivan combo leases at $122 per day;

- high top wheelchair van leases at $114 per day; and

- airport weekly pay in advance leases at $600 per week.

Each time they lease a vehicle, drivers may select their lease of choice. Each lease includes the vehicle, a metering device, and dispatch equipment. Drivers may also opt to include a child seat or a booster seat at no additional cost. The Employer reduced the cost of its leases in early 2015 because it was only leasing about 70 percent of its fleet. The Employer has since started leasing about 98 percent of its vehicles each day, with vehicles not being available at times during the early summer months immediately before the further hearing on remand.

Most drivers have weekly leases. A driver with a weekly lease can lease a vehicle by paying for the weekly lease in advance or paying one sixth of the weekly lease by the end of every 24-hour period. For all weekly leases, the seventh day of each week is free. The Employer may, at its discretion, allow a driver to terminate a weekly lease without penalty prior to its end date if the driver can show extenuating circumstances. Most drivers with open leases as of July 6, 2015, generally lease their vehicles consecutively, week after week, with very few breaks between their leases.

Whatever lease option a driver chooses, at the end of each lease period, a driver with a weekly lease must sign a new lease to keep operating the same vehicle. For a variety of reasons–comfort, reliability, familiarity, and vehicle availability among them–drivers prefer to keep the same vehicle if possible. If a weekly driver does not renew a lease by the time it expires, his or her vehicle goes back into the pool of vehicles that are available to all drivers, and the driver has to select a new vehicle–if one is available–when and if the driver signs a new lease.

Drivers who lease on a non-weekly basis do not have the option of retaining an assignment to that same vehicle if and when they rent again. The Employer linked specific vehicles to drivers in the past, even if these drivers drove on a non-weekly basis, but eliminated the assignment of vehicles sometime in 2007. If a driver needs to obtain a new vehicle, either because the driver let a weekly lease expire or because the driver leases on a non-weekly basis, the driver may have to wait for a matter of hours, or even days, for a vehicle to become available. Drivers have created a list called the “soup line” for those drivers waiting for vehicles, so that they do not have to physically wait at the Employer’s facility.

The Employer began a pilot program called the summer relief program in June 2015. This program allows drivers to arrange ad hoc subleases with other drivers, called "relief drivers," during the summer months. The undisputed reason for this arrangement is that Tucson's taxicab business slows down greatly during the summer months, and allowing drivers to arrange subleases increases the probability that they will make enough pay for their leases.

In order to participate in the program, both taxicab and relief drivers must have approval from the Fleet Manager, have a record of at least 30 incident-free leases, and have at least $150 in their security deposits. Both drivers log into the dispatch system using their own identification if they use the dispatch system, but only the primary driver is signatory to the lease. The primary driver can arrange the times and prices with the relief driver, and drivers must complete and submit to the Employer a sublease agreement before the relief driver's shift begins. The primary driver is only permitted to sublet his or her vehicle two times per week. The first day of subleasing costs the primary driver a $10 surcharge for a Crown Victoria sedan and a $15 surcharge for a Prius sedan, and the second day costs a $20 surcharge for a Crown Victoria sedan and a $30 surcharge for a Prius sedan. Drivers who fail to follow the additional guidelines associated with the program risk loss of their leasing privileges.

C. Security Deposits, Insurance, and Maintenance

In addition to paying their leases, drivers are required to maintain a security deposit. They must pay $5 per lease-day until they accumulate an overall $1,500 security deposit. The Employer does not pay drivers interest on their deposits. The Employer draws from the deposits to pay for the cost of damage arising from at-fault accidents or damage caused by failure to comply with vehicle maintenance obligations.

While security deposits are meant to cover the cost of vehicle damage, the Employer regularly (but at its discretion) allows drivers to draw from their security deposits in order to cover the cost of their leases when they end a day without enough money to pay for an existing lease or to renew a lease. This is because on some days drivers lose money after accounting for their lease and gas costs, or make so little in a day that they cannot pay their leases and their personal expenses. From January to July 2015, the aggregate of all security deposits made by all drivers was actually negative. During that period, approximately 70 drivers had negative security deposits, and at least 10 drivers had negative security deposit balances exceeding $1,000. The Employer sometimes, at its discretion, allows drivers to pay shortages over time, without using their security deposits.

The Employer insures each vehicle through an aggregated insurance contract that covers the Employer's fleet and all drivers. The Employer's insurance provides coverage for drivers whose leased vehicles are damaged, including those who are found to be at fault for a collision. Drivers must pay for the cost of damage to a vehicle in an accident up to the amount of the security deposit. The Employer does not provide uninsured/underinsured motorist coverage, so drivers must acquire such coverage independently if they wish to have it.

All vehicles are inspected and maintained by the Employer, but drivers are required to abide by a maintenance schedule set by the Employer. Ford Crown Victoria sedans require regular maintenance approximately every 3,000 miles, and Toyota Prius sedans require regular maintenance every 5,000 miles. If a driver does not follow the prescribed maintenance schedule, and the Employer determines that this failure caused a vehicle to become mechanically damaged, the cost of the damage will be deducted from the driver's security deposit. Nonetheless, should a vehicle become inoperable for any reason, or if a driver notes an issue with a vehicle, the driver may lease another vehicle, if one is available, and the Employer provides the driver with credit on the lease for the inoperable cab based on a prorated lease rate.

D. Credit Card Fees

The Employer requires drivers to accept credit cards, even from customers who do not indicate when they call that they intend to use credit cards. Drivers can ask customers to use cash if their credit cards are declined. The Employer's vehicles are equipped with credit card machines, which drivers may use. The Employer charges drivers at six percent fee for processing credit card transactions. The credit card machine provider, in turn, charges the Employer 4 to 4.75 percent for processing the transactions. For credit card transactions processed with the Employer's credit card machines, the Employer generally incurs the cost of any chargebacks, paying the driver in full for the transaction. The Employer will not pay drivers more than $200 cash per day for credit card transactions. Any amount beyond $200 is credited to drivers' accounts.

Drivers may also process credit card transactions independently of the Employer, using systems such as a PayPal credit swipe system connected to a phone or tablet. Drivers processing credit card transactions independently must bear the cost of any chargebacks. Although the processing fees for outside credit card processing systems are often less than the six percent processing fee charged by the Employer, most drivers use the Employer's credit card machines because of the convenience of using the machine and the absence of the financial risk of chargebacks. Thus, during the first seven months of 2015, only three percent of drivers accepted credit card dispatches that did not utilize the Employer's dispatch system.

E. Other Fees and Penalties

The Employer charges drivers various fees and penalties. Drivers are required to pay late fees of $25 if they do not timely pay for their leases. Further, a driver who receives a photo radar violation must take a defensive driving course of his or her choosing, which can consist of a defensive driving course the Employer provides at a cost of $50. Drivers can also be charged a $250 fine for failing to immediately report an accident or incident. Further, the Employer will charge a driver for the cost of towing a vehicle if the driver does not have a jack or spare tire. In the past, the Employer also charged drivers $50 for "rapid metering," which involves accepting a call and then turning off the meter to reset it so that another call can be received, without actually transporting the passenger, though it no longer charges drivers for doing so and instead will stop leasing vehicles to drivers who rapid meter. The Employer is charged $50 by the City of Tucson for rapid metering.

F. Dispatch System

Most drivers primarily rely on the Employer's dispatch system, called the "Mobile Knowledge System" (MKS) to obtain revenue. Each of the Employer's vehicles is equipped with a device called a "Mobile Data Terminal" (MDT), which drivers use to receive dispatches.

Drivers can receive cash calls, credit card calls, and voucher calls, the nature of which is described in more detail below, through their MDTs. Drivers can limit their "attributes" so that they will receive only certain types of calls (cash, credit, vouchers, Spanish speaking, infant child seat, toddler car seat, booster seat, and animals). Drivers call a manager, primarily the Fleet Manager, to change their attributes. Once they have selected their attributes, they only will receive calls that match their attributes, and they cannot accept calls that do not match their attributes. However, in some instances, when no drivers with their attributes set to receive voucher calls are available, dispatchers will ask other drivers if they are willing to service the calls, although they are not required to do so.

When a call is entered into the dispatch system, it is first offered to drivers with the applicable attributes in the same zone as the passenger. According to the Employer, the calls are offered to the driver closest to the passenger, although one driver at the further hearing disputed that. Drivers receive limited information on the MDT about the calls within their zones before they accept the calls. Although they receive the distance from the pick-up location, they are not provided with information about the length of the trip or whether the call is a cash, credit card, or voucher call. They only receive such information once they have accepted the call. In some instances, dispatchers have taken away lucrative voucher calls for long-distance medical transports from drivers after the drivers have accepted them.

If none of the drivers in the passenger's zone has the appropriate attributes for a call, or all drivers with the appropriate attributes reject the call or are occupied with other calls, the dispatch appears for "bid" on the MDTs of drivers with the appropriate attributes in all zones. For calls appearing for bid outside the passenger's zone, drivers are able to see if the call is a voucher or cash or credit card call before accepting.

The Employer provides limited information about calls before they are accepted to prevent drivers from skipping less favorable calls so that all customers are served. This practice prevents drivers from picking up a passenger before the driver who accepted the call is able to do so, a practice called "cherry picking."

Although there is no fee or penalty for failing to accept a call, once a driver accepts a call, the driver must transport the passenger. If a driver is mistakenly offered a call outside his or her attributes, however, the driver can contact dispatch to ask for the call to be reassigned. Drivers are not permitted to "rapid meter," which involves turning off the MDT after accepting the call, without picking up the passenger, in order to clear the call and be able to accept other calls. The driver will refuse to lease vehicles to drivers who "rapid meter" excessively and, as noted above, used to charge drivers $50 for engaging in this conduct. The Employer also charges back to the driver any dispatch the driver accepts without servicing.

Should drivers for any reason be unable to service a call after accepting it, they are encouraged to contact dispatch.

Drivers may use their MDTs during whichever hours they choose. While drivers may take breaks for meals or leisure whenever they choose, drivers who leave their vehicles to eat or rest will be disadvantaged by the MKS' algorithms because their GPS devices will not be updating as rapidly as those of drivers who are working and driving.

G. zTrip System

The increasing use of non-taxi ride-sharing services like Uber and Lyft has reduced the number of cash and credit card calls available to drivers through the Employer's dispatch system. To compete with these services, the Employer has contracted with an application developer to use an application called zTrip, which emulates Uber and Lyft. zTrip allows customers to directly contact vehicles closest to them without going through the Employer's dispatch service. To use the zTrip system, drivers must pay $250 to for a tablet with the zTrip application. They are not permitted to load any other applications on the tablet for business or personal use. Drivers must pass a zTrip certification course before they can use the system. As zTrip launched in July 2015, it is unclear how much business it will generate for drivers who opt to use it, and drivers who served as early adopters reported receiving only a handful of calls through the service.

H. Cab Stands

The Employer also has made agreements with a number of Tucson businesses to operate cab stands exclusively serviced by the Employer's drivers for the businesses' patrons. Businesses agree to establish the cab stands in exchange for the Employer's providing advertising or other consideration. The Employer has made similar arrangements in connection with special events.

I. Airport Slots

A limited number of drivers are permitted to service customers needing rides from Tucson International Airport. The Employer has been allotted 8 slots for its drivers at the airport. Drivers must sign a long waiting list to be assigned one of those slots, and, once assigned to the slots, drivers rarely leave their airport assignments. Airport drivers are subject to more extensive regulations than other drivers, including a dress code and pricing regulations. Those regulations are set by the City of Tucson. Unlike other drivers, airport drivers are allowed to sublet to relief drivers without making additional arrangements with the Employer, and they are also subject to fines of $275 for failure to accept credit card payments.

J. Investigators

Some of the Employer's drivers are classified as investigators. In addition to driving their leased vehicles, investigators are assigned to investigate incidents and accidents. They are paid $40 for each investigation, which can take anywhere from 15 minutes to over an hour. Investigators are permitted to stop acting as investigators at any time.

K. Independent Operation

In addition to utilizing the dispatch system to obtain business, drivers are encouraged to build personal clientele. Some drivers have customers that prefer their specific service. These customers may contact the driver directly, most often by calling the driver's cell phone. Further, a customer may contact the Employer to request a particular driver, in which case the Employer passes the message on to the driver at no cost.

To this end, drivers are permitted to generate business cards that use the Yellow Cab official logo, and in some cases Yellow Cab's marketing department will pay for and arrange the printing of those cards. However, the Employer requires drivers to submit the card for approval before they may use it.

While drivers are welcome to build a personal clientele and service foot traffic (referred to as "flags"), most do not generate very much business by those means and rely mostly on the Employer's dispatch system. The business drivers do generate by personal clientele is inconsistent, and those drivers with large personal client lists indicate that only a small fraction of those clients call on a daily or weekly basis. Moreover, some personal clients may use a driver as transportation to and from work every day for weeks or months, but once they obtain personal transportation they will entirely cease doing business with the driver.

One former driver explained at the further hearing that he had over 100 personal clients at the time his lease was terminated by the Employer. That driver also took dispatch calls and, as discussed below, established a dispatch service because he was unable to service all of his personal clients all the time. However, there is no evidence that any current drivers have more than 40 personal clients, and most drivers carry fewer than 10 personal clients.

Drivers explained that servicing personal clients and servicing flagged fares carry safety risks. Flagged fares do not have to identify themselves to the dispatch service. On one occasion, a driver was carjacked by a personal or flagged fare. Further, drivers explained that personal clients may call when they are unavailable, when they are sleeping late at night, or when they need to be taken home from a bar or event.

Although the Master Lease Agreement specifies that the Employer agrees to lease vehicles to drivers to provide taxicab services, drivers have engaged in personal use of their vehicles without penalty. Further, one driver used a vehicle to help a customer move and received additional payment from the customer for moving items from the customer's old residence to the vehicle and from the vehicle to the new residence. However, the record reflects that drivers rarely perform work other than providing taxicab services with their vehicles. Since the vehicles are painted like taxicabs and are equipped with machinery specifically for the purpose of providing taxicab services, the use of the vehicles is limited to some extent. Further, the drivers' inability to display trade names, logos, or service marks other than the Employer's, without authorization, presumably limits their ability to perform work for entities other than the Employer that require the display of a trade name, logo, or service mark.

L. Driver Attempt to Operate Separate Dispatch System

One driver who was authorized to lease vehicles from the Employer from March 1996 until July 2012, accumulated over 100 personal clients, as noted above. At times, he was unavailable to provide service to one of his personal clients because he was transporting a customer dispatched by the Employer. He, therefore, established a system for sending his personal clients to other drivers from various taxicab companies when he was unable to transport them. He called his service, "All Cabs Dispatch Service."

The driver created his own zone map and a roster of drivers who wished to use his service. When a personal client called, he sent a text message to all drivers on his roster in the personal client's zone. The driver sought to use his service to create an all-cash customer base. Eventually, the Employer investigated his service, and, in July 2012, the Employer terminated his lease and prohibited him from leasing from the Employer in the future. The Employer feared that the driver could use his service to farm out calls received through the Employer's dispatch system, which could take opportunities away from the Employer's drivers by taking away calls that would have been available to them and could harm the Employer's brand by causing different taxicab companies to pick up customers who had called the Employer. However, although the Employer believed the driver's service interfered, conflicted, and competed with its business, it presented no evidence that the driver had, in fact, farmed out any dispatched calls. .

M. Drivers' Sources of Revenue

Drivers receive revenue from cash calls, credit card calls, and voucher calls. Cash calls are calls for passengers who pay in cash, credit card calls are calls for passengers who pay with credit cards, and vouchers are calls for medical transport paid for by vouchers for which the Employer reimburses the drivers.

The Employer sets meter rates for cash and credit card calls, which are posted on the door of each vehicle. The Employer raises and lowers meter rates from time to time. The meter rate consists of a $2.75 flag drop, which is paid by the passenger for getting into the vehicle; a mileage rate of $2.20 per mile; and a waiting rate of $36.00 per hour, charged when the vehicles is moving less than 15 miles per hour. If passengers are unable to pay or refuse to pay after having received services, the driver is responsible for resolving the dispute, including by calling the police, if necessary.

The Employer previously offered a special airport rate of $15.00 for the first 10 miles and $1.50 for each additional mile, but it has eliminated that special rate after the original hearing in this matter. Prior to the original hearing, the Employer also offered $2.00 to $3.00 off the fare, and drivers had to absorb the cost of the discount. After the original hearing, the Employer began giving drivers credit on their leases for redeemed coupons.

Drivers can negotiate flat rates, discounted rates, and ad hoc cash or credit rates for cash or credit calls for personal clients, flagged fares, or dispatched passengers. However, for dispatched passengers, drivers must turn on their meters to signal that the passenger has been picked up and must leave their meters running until reaching the passenger's destination, to

avoid the appearance of "rapid metering" to get another call without picking up the passenger. As a result of the meter running the whole trip, and the customer being able to view the meter's display, drivers rarely charge dispatch customers more than the meter rate. Drivers do sometimes give customers a discount from the meter rate or give low cost or free rides to passengers unwilling or unable to pay at the end of the ride, but typically, drivers charge the meter rate to avoid a shortfall of revenue. Drivers are not required to provide the Employer with an accounting of their trips and revenue for cash and credit card calls, although the Employer knows which calls are dispatched to which drivers, can track drivers' locations using GPS equipment, and receives information about the credit card transactions it processes.

Voucher calls are provided pursuant to an arrangement between the Employer and its sister company, Medical Transportation Brokerage of Arizona (MTBA), which is owned by the same two individuals who own the Employer. MTBA contracts both with the Employer and with taxicab companies outside of the Tucson area to provide medical transport services. Although MTBA has contracted with small van services in Tucson to supplement its contract with the Employer, all or nearly all of MTBA's Tucson business, is currently contracted with the Employer.

MTBA has negotiated a number of contracts, chiefly with healthcare companies, whereby it agrees to provide transportation services for customers of the contract companies. The people utilizing transportation under these contracts are supplied with vouchers by the contract companies and use their vouchers to pay for rides provided by drivers.

When the vouchers are redeemed, the contract companies pay MTBA in accordance with their respective contractual arrangements. Two companies pay a monthly fee based on the population and demographics of the customers for whom MTBA has agreed to secure transportation, and two companies pay MTBA base rate and per mile rate, with one of those companies paying more than $1.60 per hour and the other paying less.

MTBA pays the Employer a $1.50 flag drop and $1.30 per mile for each call. The Employer, in turn, pays drivers $1.60 per mile, with no flag drop or waiting rate, even though drivers are required to make 15-minute stops at pharmacies for passengers on voucher calls, and cannot leave without permission of dispatch even if the stops exceed 15 minutes. For voucher calls, drivers are paid based on the shortest route from pick-up to drop-off, even if a faster route or a route that avoids a traffic jam is available. There is a $7.00 minimum fare for voucher calls of less than 5 miles. Although long-distance voucher calls can result in large fares, the Employer's MedEx drivers are generally assigned to long-distance calls.

Drivers are required to keep a trip log for voucher calls. The log tracks the mileage driven as compared to the mileage of the shortest route mileage. Drivers whose passengers have pharmacy stops must also fill out a pharmacy receipt slip showing that the medication was picked up. If a voucher passenger uses a paper voucher, the driver must retain a copy of the voucher with the passenger's signature for both pick-up and drop-off. The driver must produce the pharmacy receipts and paper vouchers in order to receive payment. They must also submit their vouchers to the Employer's cashier by 7:00 p.m. to receive credit for the vouchers the same day. In sum, voucher calls generally generate less revenue than cash or

credit card calls at the meter rate, and they result in greater administrative burdens for the drivers.

Although it appears that MTBA pays the Employer less per call than the Employer pays drivers for voucher calls, the contract companies have paid MTBA more during the period from January 1, 2015, through July 23, 2015, than the Employer has paid drivers at its Tucson facility for voucher calls. It is noted, however, that it is unclear whether all of the amounts received by MTBA were exclusively for voucher calls serviced by the Employer's drivers in Tucson. Further, although the Employer may not derive profit from MTBA from voucher calls, the voucher calls present drivers with additional business opportunities and, thus, an incentive to enter into leases, which also generate revenue for the Employer.

N. Drivers' Actual Earnings and Net Income

The Employer informs prospective drivers that they can reasonably expect to earn, after lease costs and gas costs, $40 per day on the low end and $140 per day on the high end. The Employer tries to price its leases so that drivers can make $20 per hour, but uses no data or formal analysis in that pricing.

With rare exceptions, drivers work between five and seven days per week for between 12 and 17 hours per day. This equates to a common workweek of between 60 and 119 hours. Some drivers lease sporadically or not at all during the summer months, as business becomes much slower in Tucson at that time, and it is not always possible for drivers to make a profit after gas and lease costs. Drivers with weekly leases often decide whether to drive the seventh day of the week (the "free day" of their leases) based on what after-expenses profit–if any–they made during the first six days of the week.

As noted above, drivers rely heavily on the Employer's dispatch system. A rough estimate, based on testimony given in the hearings, is that 90 to 95 percent of all calls come from the dispatch system. For some drivers, nearly 100 percent of calls come from the dispatch system, and all or nearly all drivers receive at least 80 percent of their calls from the dispatch system. The calls not received from the dispatch system consist of calls from personal clients and flagged fares.

During the first 7 months of 2015, of the calls received from the dispatch system, 55.7 percent were voucher calls, 34.4 percent were cash calls, and 9.9 percent were credit card calls. Some dispatches recorded as cash calls may actually consist of credit card calls for which drivers processed credit card transactions independently of the Employer's system. Thus, drivers also rely heavily on voucher calls. Only one percent of drivers refuse to take voucher calls and rely upon cash and credit card calls alone, and three percent of drivers take voucher calls alone. Voucher calls comprised more than half of all calls taken for 63 percent of all drivers. In contrast, cash calls comprised more than half of all calls for only 22 percent of all drivers. Credit card calls did not comprise the majority of any drivers' dispatches.

For the first 204 days of calendar year 2015, the average value of voucher calls was $15.65. For the same period, the average value of credit card swipes (including tips included on the credit card receipt) was $23.02. During those 204 days, drivers were paid a total of

$1.7 million for all vouchers and all credit card swipes processed through the Employer's credit card system, and a minimum of $50,000 cash and unrecorded fares (dispatched cash and credit card calls minus all recorded credit card swipes) were taken. Assuming that the average value of unrecorded fares was the same as the value of recorded credit swipes, drivers would have earned a total of about $1.2 million dollars in additional payments from the Employer's other dispatches (50,000 unrecorded fares times $23.02). Thus, a basic estimate of all fares received for all dispatched calls is about $2.9 million ($1.7 million recorded fares, plus $1.2 million unrecorded fares). Assuming drivers generated an additional 10 percent of revenue from personal calls and flagged fares, drivers would have earned a total of about $3.2 million. Cash tips not recorded in credit card swipes are an unknown variable.

Divided by 110 vehicles, this means that, excluding tips, drivers produced approximately $29,000 per vehicle, or $142 per day per vehicle, over the first 204 days of calendar year 2015. Assuming a lease rate of $100 per vehicle per day (a rate within the array of lease rates charged by the Employer), an average cab produced a net yearly income of about $8,600, or $42 per day, not accounting for gas and tips. Thus, it appears that the Employer's estimate that drivers make $40 to $140 per day, after costs, is well within the range of plausibility. A driver on the high end of daily earnings ($140) and the low end of daily hours worked (12 hours) would make less than $12 per hour, while a driver on the extreme low end of daily earnings and high end of daily hours worked (17 hours and $40) would make between $2 and $3 per hour. Drivers indicated that their average hourly earnings after expenses fell somewhere in the middle of these estimates.

Since the Employer treats the drivers as independent contractors for tax purposes, they must pay more Social Security taxes than they would have to pay if they were classified as employees. Further, as independent contractors, drivers are left to secure their own health insurance, at their own cost, through insurance exchanges provided pursuant to the Affordable Care Act.

O. Regulation of Driver Conduct

Prospective drivers are required to go through six hours or more of training and evaluation, during which a senior driver (often an investigator) will evaluate their fitness for driving and driving skills. The Employer requires that a lengthy and detailed series of documents be filled out by the trainer, noting all of a new driver's behaviors and driving skills, as well as obedience to the rules of the road. This evaluation determines, in part, if the Employer will lease a cab to the prospective driver.

The Employer also maintains some limited policies regulating driver conduct for drivers once they start leasing its vehicles. It expects drivers to maintain a professional appearance and have good personal hygiene. In addition, it prohibits them from having non-paying customers in their vehicles when transporting customers, from parking on the Employer's property, and from tipping cashiers. It also requires them to immediately report accidents or incidents, or face a $250 fine. It also prohibits rapid metering, as described above. The Employer also suggests that drivers work no more than 14 hours per day, though drivers admit to working 16 to 17 hours per day on a regular basis.

The Employer does not maintain a formal disciplinary system. However, the Employer's Fleet Manager investigates customer complaints and talks to drivers about the complaints if he believes the drivers acted inappropriately. Some drivers have been required to attend sensitivity or cultural awareness training as a result of complaints. A driver who receives multiple similar complaints from different customers or one who refuses to undergo required training may be prohibited from leasing with the Employer. Further, as noted above, drivers are required to attend defensive driving course, at a cost of $50 for the Employer's in-house course, if they incur photo radar violations.

The Employer also sometimes terminates drivers' contracts. Generally, the Employer will terminate drivers' contracts for acts of gross misconduct, excessive photo radar violations, or at-fault accidents. As noted above, the Employer terminated the contract of one driver for operating his own system for dispatching for his personal clients.

II. Analysis

Section 2(3) of the Act states that the term 'employee' "shall not include…any individual having the status of an independent contractor." The burden of proving that individuals are independent contracts lies with the party making that proposition. See, e.g., *BKN, Inc.*, 333 NLRB 143 (2000).

In *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968), the Supreme Court ruled that the Board is to use common law agency principles in distinguishing between employees and independent contractors. These agency principles are summed up in the Restatement (Second) of Agency § 220 (1958), which states that:

> "[i]n determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> [1] The extent of control which, by the agreement, the master may exercise over the details of the work[;] [2] Whether or not the one employed is engaged in a distinct occupation or business[;] [3] The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision[;] [4] The skill required in the particular occupation[;] [5] Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work[;] [6] The length of time for which the person is employed[;] [7] The method of payment, whether by the time or by the job[;] [8] Whether or not the work is part of the regular business of the employer[;] [9] Whether or not the parties believe they are creating the relation of master and servant[;] [10] Whether the principal is or is not in the business."

In *Fedex Home Delivery, Inc.*, supra, the Board clarified that it consistently considers one additional factor, whether the one employed has actual entrepreneurial opportunity for loss or gain, in assessing whether an individual is an independent contractor.

In considering this factor, the question is not whether employees have a merely theoretical opportunity for loss or gain, but whether that opportunity is real and feasible. Nor is it a test of outliers hinging on the business behavior of a minority of employees, as "[t]he fact that only a small percentage of workers in a proposed bargaining unit have pursued an [entrepreneurial] opportunity demonstrates that it is not, in fact, a significant aspect of their working relationship with the putative employer." *Id.* at slip op. at 15. Thus, "if the day-to-day work of most individuals in the unit does not have an entrepreneurial dimension, the mere fact that their contract with the employer would permit activity that might be deemed entrepreneurial is not sufficient to deny them classification as statutory employees." *Id.* (citations omitted)

However, the Board did not specify that the entrepreneurial opportunity factor was dispositive or that it outweighs the common law factors. Instead, these 11 non-exclusive factors form "the applicable inquiry[, which] is whether the putative independent contractor is rendering services as part of an independent business." *Sisters Camelot*, 363 NLRB No. 18, slip op. at 2, 6 (2015). In essence, what the Board specified through its refined independent contractor test is that empirical considerations should predominate over a surface reading of the bare terms of a contractual arrangement.

Prior to the issuance of the Board's decision in *Fedex Home Delivery, Inc.*, supra, in assessing whether taxicab drivers were employees or independent contractors, the Board relied primarily on two factors: the company's control over the manner and means by which drivers conducted their business and the correlation between the company's and the drivers' revenue. *Air Transit*, 271 NLRB 1108, 1110 (1984) (adopting the reasoning of *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 879 (D.C. Cir. 1978)). Thus, the Board inferred that taxicab drivers were independent contractors if they paid a fixed lease irrespective of their earnings and did not have to account to the company for their earnings. *City Cab Co. of Orlando*, 285 NLRB 1191, 1194 (1987). Since the issuance of its decision in *Fedex Home Delivery, Inc.*, supra, the Board has not specifically addressed how the principles of that decision should be applied to taxicab drivers. Accordingly, in making this decision, I have applied Board precedent involving taxicab drivers, but in accordance with the principles set forth in *Fedex Home Delivery, Inc.*, supra, I have carefully considered the economic realities of the relationship between the Employer and its taxicab drivers in applying that precedent.

For the reasons set forth below, based upon an application of the factors relevant to assessing whether individuals are employees or independent contractors, including entrepreneurial opportunity, I find that the Employer has not met its burden of establishing that the taxicab drivers are independent contractors.

A. Extent of Control

Although the Employer's drivers nominally pay a fixed lease fee irrespective of their earnings, the evidence establishes that, in reality, the Employer makes ad hoc, functional adjustments to drivers' leases by allowing drivers unable to pay their leases based on the amount they have earned in a day to draw from their security deposits, even beyond the amount of their balance, and to arrange to pay for shortfalls over time. Further, the Employer

admittedly adjusts its lease rates to try to maximize the number of vehicles it is leasing and to try to ensure that its drivers are earning at a certain rate. In addition, it sometimes adjusts its meter rates, the amount to be paid to drivers for voucher rates, and the types of leases available to account for the conditions of the market in which its drivers are operating. Further, since the Employer is paid by MTBA per mile for voucher calls (and MTBA is sometimes paid per mile for voucher calls), the Employer's revenue further correlates with the drivers' revenue (even though, the Employer apparently takes a net loss per voucher call). Moreover, the Employer charges drivers credit card fees that, to a limited extent, create a correlation between the drivers' revenue and some of the Employer's revenue. I note that, given the lease rates paid by drivers, it appears that drivers are not just paying for use of the Employer's vehicles, but are also paying for access to the Employer's brand equity, dispatch and metering system, and voucher calls. In view of these realities, I find that the inference of independent contractor status for drivers who pay a fixed lease rate regardless of earnings does not squarely apply here.

Similarly, although drivers nominally have control over the days and hours they work, economic realities dictate their schedules. In order to cover the cost of their leases and other expenses and generate some net income, drivers must work extremely long workweeks of 60 to 119 hours for average net pay that ranges from about $40 to $140 per day. Further, to avoid losing their vehicles and being relegated to the "soup line," drivers must to lease their vehicles on a weekly basis, week after week, with limited ability to sublet their vehicles to relief drivers. Since most weekly drivers pay daily, they must go to the Employer's facility daily to pay their leases. The days and hours worked by drivers who lease vehicles on a non-weekly basis are dictated by the availability of vehicles and by the types of leases the Employer makes available.

Moreover, while drivers are not required to report all of their earnings, they are required to create trip logs and pharmacy receipts for voucher calls, which appear to comprise a majority of their calls. See *Yellow Taxi Co. d/b/a Suburban Yellow Taxi Co.*, 262 NLRB 702 (1982) (supplementing *Suburban Yellow Taxi Co.*, 249 NLRB 265 (1980) (drivers were found to be employees, in part, because the company required trip sheets to an extent that exceeded government-imposed requirements). Further, the Employer's credit card processing system, which is used by most of the Employer's drivers, tracks drivers' earnings for calls paid by credit card. Its dispatch system also tracks drivers' locations and their metered trips.

Additionally, drivers are controlled by the Employer's MDT and MKS systems. Drivers can only directly receive calls if they are located within a zone on a map created by the Employer, have the appropriate attributes, and are within the closest proximity to the customer. When they receive direct calls, they are only informed about how far away the fare is from their immediate location. They are not given information about whether the call will be a short or long-distance trip or whether it will be a voucher, cash, or credit card call. It is essentially a game of roulette that ensures that less-attractive, short-distance voucher trips have equal footing with profitable, long-distance cash fares. This arrangement only benefits the Employer's sister-company, MTBA, and the Employer's brand equity. As with roulette, the drivers are playing a game over which they have no control. The Employer, like the proverbial house, controls and benefits from the game by controlling its parameters.

Although drivers are not required to rely on the Employer's dispatch system, few if any drivers have been able to establish the number of personal clients they would need to establish to generate net income after paying their lease rates and expenses. Further, when one driver tried to expand his and other drivers' ability to operate independently of the Employer's dispatch system through operation of his own dispatch system, his lease was terminated. In addition, the characteristics of the Employer's vehicles and the limitations on drivers' ability to display trade names, logos, or service marks other than the Employer's constrain the drivers' ability to use the vehicles for purposes other than providing taxicab services. Although drivers have used their vehicles for personal business without penalty, their ability to do so is constrained by their need to use their vehicles to generate income.

On balance, I find that, looking beyond the terms of the drivers' leases, the extent of control factor weighs in favor of employee status.

B. Distinct Occupation or Business

Drivers are not in a distinct occupation or business from the Employer. They drive vehicles with the Employer's logo on them, they are encouraged to produce business cards with the Employer's logo on them, they receive most of their calls through a the Employer's dispatch system, use meter rates and voucher rates set by the Employer, and rely upon the Employer's equipment and repair services. When one driver began operating his own dispatch service for personal clients, the Employer terminated his lease. More simply, the Employer operates a taxicab company, and not just a vehicle leasing service, and the drivers operate taxicabs in the name of the Employer's business. As a result, I find that this factor weighs in favor of employee status.

C. Direction by Employer

Drivers are not subject to continual in-vehicle personal supervision, and they are contractually permitted to set their hours, decide where they will work, and decide what routes to drive. Because "the nature of the work makes […] in-person supervision highly impractical," the lack of in-vehicle supervision has minimal dispositive value. *Sisters Camelot*, supra at slip op. at 3. Further, the Employer arguably directs the work of drivers by means other than in-vehicle personal supervision. As noted above, the MKS and MDT systems, upon which drivers are heavily reliant for income, control what calls drivers receive (and reduce drivers' control over which calls they will accept) by restricting available information and employing parameters that limit drivers' choice of customers. Thus, the system arguably amounts to being a system of assigning calls to drivers. Further, drivers must keep detailed records of voucher calls, which comprise a majority of dispatched calls. I, therefore, find that this factor weighs in favor of employee status.

D. Skill Required

Drivers are required only to meet certain minimal requirements in order to operate the Employer's vehicles, and they are trained for only a day before they start operating the Employer's vehicles. The skill factor therefore weighs in favor of employee status. *Fedex Home Delivery, Inc.*, supra at slip op. at 13. See also *Prime Time Shuttle*, 314 NLRB 837, 841 (1994).

E. Instrumentalities, Tools, and Place of Work

The drivers do not own their vehicles, and, instead, lease their vehicles, at most, on a weekly basis. They also do not own the MKS system, their MDT devices, or their meters. Drivers operate out of the Employer's facility, where they must go to lease their vehicles and to return their vehicles for maintenance or changes to advertisements displayed on or in the vehicles. In addition, the Employer dictates the very limited conditions under which drivers are permitted to sublet their vehicles. I, therefore, find that this factor weighs in favor of employee status.

F. Length of Employment

Although drivers can lease vehicles for as few as 12 hours (or even 4 hours while in training), most drivers lease their vehicles on a weekly basis, week after week, for various reasons, significantly including the prospect of losing their vehicles and having to wait on the "soup line" for other vehicles to become available. While some drivers have leased vehicles from the Employer for years or decades, the inactive driver list indicates that turnover is high. Because of the strong economic incentive for drivers to lease on a weekly basis, week after week, I find that this factor weighs in favor of employee status.

G. Method of Payment

Although drivers are paid by customers for cash and credit card calls and nominally can charge customers rates other than the meter rate set by the Employer, most cash and credit card calls are obtained from the Employer's dispatch system, and drivers rarely charge customers rates other than the meter rate. Doing so would typically require a discount, since most customers would reasonably expect that they will not be required to pay more than the rate posted on the door and the meter. There is little incentive for drivers to offer discounts, since customers mostly request service through the Employer's dispatch system, thus minimizing the incentive to develop individual good will with customers, and since drivers already tend to net little income after expenses. The Employer also controls whether it offers discounts to customers, and it determines the fee for processing credit card transactions for drivers who use the Employer's credit card processing system.

Although drivers are paid by customer for voucher calls, they obtain voucher calls, which comprise a majority of dispatched calls, from the Employer, and they are paid by the Employer for their voucher calls at a voucher rate set by the Employer. The payment methodology for these calls is highly constrained in that drivers are paid for the shortest route, regardless of the route actually taken, and the documentation required to be reimbursed for these calls is relatively extensive.

Moreover, the Employer attempts to normalize weekly net income earned by drivers by allowing them to draw from their security deposits or enter into payment plans to pay their leases on an ad hoc basis when they do not generate sufficient revenue to pay their leases. These practices increase to almost totality the economic dependency that the drivers have on the Employer. These practices further have the benefit to the Employer of ensuring that a driver's lack of steady reliable income interferes as little as possible with the Employer's

ability to retain that driver and sustain its business need to lease vehicles and provide taxicab service to its card, credit, and voucher dispatch clients.

Although the Employer does not provide fringe benefits or withhold taxes from drivers' pay, "these considerations [are] outweighed…by the fact that [the Employer] establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to the customers." *Fedex Home Delivery, Inc.*, supra at slip op. at 13, quoting *Roadway Package System*, 326 NLRB 842, 852 (1998).

On balance, I find that this factor weighs in favor of employee status.

H. Regular Business of the Employer

The Employer is engaged in the business of providing taxicab services. The Employer markets its taxicab services to the public and makes arrangements with businesses to establish cab stands and with MTBA to service voucher calls. It receives calls for service from the public and dispatches them to the drivers. Drivers, who actually provide the taxicab services "perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business." *Slay Transp. Co., Inc.*, 331 NLRB 1292, 1294 (2000). This factor, therefore, weighs heavily in favor of employee status.

I. Parties' Understanding of Relationship

The Employer's leases and orientation materials make it clear that the Employer considers its drivers to be independent contractors. Although leases are signed by the Employer's drivers, the terms are set unilaterally by the Employer and, therefore, may not reflect the drivers' understanding of the nature of the parties' relationship. Some drivers testified that they considered themselves to be independent contractors, and others stated that they considered themselves to be employees. Further, a number of drivers signed the showing or interest supporting of the instant petition, thus tending to indicate their understanding that they were employees. In view of this evidence, I find that this factor is inconclusive. See *Fedex Home Delivery, Inc.*, supra at slip op. at 14, citing *Lancaster Symphony Orchestra*, 357 NLRB No. 152, slip op. at 6 (2011).

J. Principal's Business

As discussed above, the Employer is in the business of providing taxicab services. It does not merely lease and maintain vehicles. It also dispatches calls for taxicab services to its drivers, markets taxicab services to the public, makes arrangements to provide medical voucher transports, makes cab stand arrangements, and secures slots for taxicabs at the airport. Although drivers theoretically can perform other business with their vehicles (like the one driver who used his vehicle to help a customer move), the drivers' use of their vehicles is constrained by the vehicles' characteristics and appearance, including limits on displaying trade names, logos, or service marks other than the Employer's. Further, drivers' use of their vehicles is constrained by the Employer's lease rates, which, as noted above, require them to provide taxicab services for 12 to 17 hours per day in order to generate more than token income. As a result, virtually all of the work performed by the drivers consists of providing taxicab services.

In sum, I find that both the Employer as the principal and the drivers are engaged in the same business—the business of providing taxicab services. I, therefore, find that this factor weighs in favor of employee status.

K. Entrepreneurial Opportunity

The drivers' entrepreneurial opportunities are significantly constrained. They cannot sell, transfer, or assign their leases to other drivers, and their ability to sublet their vehicles is very limited, as they have only recently been given the ability to sublet their vehicles to relief drivers two days per week, under limited circumstances, for a surcharge.

The Employer's arrangements with its drivers also effectively prevent the drivers from working for other employers. There is only very limited evidence of drivers using their vehicles for work other than providing taxicab services, and since drivers need to work 12 to 17 hours per day to be able to afford their leases, there would be little practical opportunity to use their vehicles for other purposes. Although the Employer offers 12- and 24-hour leases, which could allow drivers to work for other employers on their off days, there are disincentives for selecting these leases, in that drivers with such leases have to wait for vehicles to become available, and the lease rates are higher than weekly lease rates. In addition, as noted above, the restrictions on drivers' ability to display trade names, logos, or service marks other than the Employer's further limits drivers' ability to use their vehicles to perform services for any employers or entities that may require them to display other logos.

Further, in reality, drivers are heavily reliant on the Employer's dispatch system to generate sufficient revenue to pay for their leases. Although they can develop their personal client base, few have actually done so because doing so can interfere with drivers' schedules and ability to accept business through the Employer's dispatch system. There is only very limited evidence of drivers making efforts to market their own individual services independent of the Employer. In fact, as noted above, the one driver who was able to develop a large enough personal client base to start developing an independent business by dispatching some of his personal calls to other drivers had his lease terminated by the Employer.

Finally, drivers have no control over important business decisions, such as setting lease rates, meter rates, and voucher rates; determining the parameters of the MKS and MDT system; deciding how to market the Employer's services; setting up voucher call arrangements with MTBA; setting up cab stand arrangements with other business; and obtaining taxicab slots at the airport.

Taking into account all these facts, I find that taxicab drivers have a theoretical but not actual opportunity for entrepreneurial loss or gain. The Employer's drivers cannot function as independent business enterprises for both economic and structural reasons. I, therefore, conclude this factor weighs heavily in favor of employee status.

III. Conclusion Concerning Statutory Question

Based on the foregoing, I find that the taxicab drivers in the petitioned-for unit are employees within the meaning of Section 2(3) of the Act, and thus, that the petition raises a

question affecting commerce concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Unit Finding: For the reasons set forth below, the petitioned-for unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and it is appropriate to direct an election in that unit:

A. Community of Interest

Although the Employer has not specifically argued that the petitioned-for unit would not be appropriate in the event that I find the drivers to be employees within the meaning of Section 2(3) of the Act, it also did not stipulate to the appropriateness of the unit in that event. Therefore, I must address the issue here. As the relevant facts are described in detail above, I will begin by describing the Board's community of interest standard, and then will turn to an application of those standards to the facts of this case.

The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in *an* appropriate unit. *Overnite Transportation Co*., 322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the unit sought by a petitioner is readily identifiable and that employees in that unit share a community of interest, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that the unit employees could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. *Specialty Healthcare,* supra, slip op. at 7.

Thus, the first inquiry is whether the job classifications sought by a petitioner comprise a readily identifiable group and share a community of interest. In this regard, the Board has made clear that it will not approve fractured units, that is, combinations of employees that have no rational basis. *Odwalla, Inc.*, 357 NLRB No. 132 (2011), *Seaboard Marine*, 327 NLRB 556 (1999). An important consideration is determining whether a group is readily identifiable and shares a community of interest is whether the group is organized into a separate department or administrative grouping. Other relevant considerations include whether the employees in a petitioned-for unit have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; have interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002); see also *Specialty Healthcare*, supra, at 9. Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc*., 256 NLRB 1069, fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

With regard to the second inquiry, additional employees share an overwhelming community of interest with the petitioned-for employees only when there "is no legitimate

basis upon which to exclude (the) employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Specialty Healthcare*, supra, at 11-13, and fn. 28 (quoting *Blue Man Vegas, LLC. v. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). Moreover, the burden of demonstrating the existence of an overwhelming community of interest is on the party asserting it. *Northrop Grumman Shipbuilding, Inc*., 357 NLRB No. 163, slip. op. at 3, fn. 8 (2011).

I find that the taxicab drivers are a readily identifiable group and share a community of interest because they hold the same job classification; perform the same kind of work (operating taxicabs); have the same skills and training; have access to the same leases, vehicles, and dispatch system; are supervised by the same managers; and have the same terms and conditions of employment. There is no contention or evidence that the drivers share an overwhelming community of interest with employees in any other job classification such that the employees in the other classification must also be included in the unit. Indeed, other employees at the Tucson facility hold different job classifications; perform job functions other than operating taxicabs; in some cases, have different skills and training; have different supervisors and managers; and have different terms and conditions of employment. I therefore find that the petitioned-for unit is appropriate.

B. Eligibility Formula

The Petitioner, citing *Cab Operating Corp.*, 153 NLRB 878 (1964), argues that only drivers who leased vehicles from the Employer an average of two days or more per week during the quarter preceding the issuance of this Decision should be eligible to vote. The Employer did not advance any argument with respect to what eligibility formula, if any, should be applied in determining whether drivers are eligible to vote, in the event that I find the drivers to be employees within the meaning of Section 2(3) of the Act. Because the parties have not agreed upon an eligibility formula, I have addressed the issue below.

In devising eligibility formulas to fit the unique conditions of any particular industry, the Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), *enfd.*, 2 F.3d 35 (3d Cir. 1993); *DIC Entertainment, L.P.*, 328 NLRB 660 (1999), *enfd.*, 238 F.3d 434 (D.C. Cir. 2001).

As noted by the Petitioner, in *Cab Operating Corp.*, supra, the Board held that because of a significant rate of turnover among an employer's drivers, only those who worked at least 2 days per week had a "sufficiently substantial interest in general working conditions of all drivers to justify permitting them to vote in the election." *Id.* at 883-884. Here, as in *Cab Operating Corp.*, supra, although a significant number of drivers lease vehicles consecutively from week to week over long periods of time, a number of drivers on the Employer's list of inactive drivers leased vehicles from the Employer for a period of less than a month. Based on the rate of turnover among the Employer's drivers, I find that the application of the eligibility formula proposed by the Petitioner is appropriate.

C. Conclusion Concerning Unit

Based on the foregoing, I find that the following unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and it is appropriate to direct an election in that unit:

> All full-time and regular part-time taxicab drivers employed by the Employer at its facility in Tucson, Arizona, excluding all other employees, MedEx drivers, limousine and Town Car drivers, cashiers, dispatchers, mechanics, sales and marketing employees, training coordinators, confidential and office clerical employees, guards, managers, and supervisors as defined in the Act.
>
> To be eligible to vote, taxicab drivers must have leased vehicles from the Employer for at least 26 days during the 13 week period immediately preceding the issuance of this Decision.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election that will issue soon, subject to the Board's Rules and Regulations.[1] The employees who are eligible to vote are those in the unit who were on the active driver's list as of the date of this Decision and leased vehicles from the Employer for at least 26 days during the 13 week period immediately preceding the issuance of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and, if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced.

[1] Employers shall post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election. The notices shall remain posted until the end of the election. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays. A party shall be stopped from objecting to non-posting of notices if it is responsible for the non-posting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least five days prior to the commencement of the election that it has not received copies of the election notice. Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

TUCSON HACKS ASSOCIATION

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned two (2) copies of election eligibility lists containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the National Labor Relations Board Regional Office, 2600 N. Central Avenue, Suite 1400, Phoenix, Arizona, 85004, on or before **October 30, 2015**. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1015 Half Street SE, Washington, DC 20570-0001. This request must be received by the Board in Washington by November 6, 2015. The request may be filed electronically through the Agency's website, www.nlrb.gov, [2] but may not be filed by facsimile.

Dated at Phoenix, Arizona, this 23rd day of October, 2015.

/s/ Cornele A. Overstreet
Cornele A. Overstreet, Regional Director

[2] To file the request for review electronically, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. Guidance for electronic filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located on the Agency's website, www.nlrb.gov.