Taxi Lessees Are Not Employees under National Labor Relations Act: D.C. Circuit's New Concept of Employer Control - Seafarers Local 777 v. NLRB

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The National Labor Relations Act (the Act)\(^1\) protects only those involved in an employment relationship.\(^3\) Included in this relationship are "employees" of "employers", as those terms are defined by the statute\(^4\) and case law.\(^5\) The independent contractor\(^6\) is explicitly excluded\(^7\) from the definition of "employee." Consequently, persons having the status of independent contractor cannot meaningfully organize\(^8\) or collectively bargain\(^9\)

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2. Section 7 of the Act, 29 U.S.C. § 157 (1976), guarantees to employees the right to organize, collectively bargain with the employer, strike, and refrain from such activities. Under section 8(a) of the Act, 29 U.S.C. § 158(a) (1976), any employer interference with the employee's exercise of his § 7 rights is an unfair labor practice for which the employee can file a charge against the employer before the National Labor Relations Board.


"Employee" is not explicitly defined except that it includes anyone who has been fired as a consequence of a labor dispute or unfair labor practice. Specifically excluded are agricultural workers, domestic servants, persons employed by a parent or spouse, independent contractors, and supervisors. 29 U.S.C. § 152(2) (1976).

5. The cases define "employee" and "employer" according to the common law definition. See, e.g., NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968); NLRB v. Int'l Long-Shoreman's and Warehouseman's Union Local 10, 283 F.2d 558, 563 (9th Cir. 1960). Under the common law definition, an employment relationship exists when the employer exercises control over or has the right to control the manner and means of how the work is performed. RESTATEMENT (SECOND) OF AGENCY § 2 (1958).

6. An independent contractor is defined as a "person who contracts with another to do something for him but who is not controlled by the other with respect to the physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2 (1958).


with the employer. A device available to employers attempting to prevent the unionization of its workers is to assert an independent contractor status of those workers.\textsuperscript{10} If the employer shows that the only concern is with the result of the labor of the worker hired, and that the employer lacks the right to control the manner or means by which that result is achieved, the employer has established that the workers are independent contractors and cannot organize under the Act.\textsuperscript{11}

The taxi driver is particularly vulnerable to this common tactic of labor warfare, since the work requires that the individual be free to prospect for fares in the manner in which he or she chooses,\textsuperscript{12} and the employer is concerned mainly with his or her returning a certain profit to the company, rather than how that profit is obtained. The National Labor Relations Board (the Board),\textsuperscript{13} however, has traditionally considered the nature of the work

Gibbons, 172 F.2d 970 (8th Cir. 1949). \textit{See also} Note, \textit{Woodcutters: Employees or Independent Contractors}, 31 \textit{GUILD PANC.} 9 (1973). Such combinations for the purpose of collective bargaining by employees, however, are statutorily exempt from the antitrust laws. 15 U.S.C. \textsection 17 (1976). Labor collective bargaining is defined in \textsection 8(d) of National Labor Relations Act, 29 U.S.C. \textsection 158(d) (1976), as the "performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." \textit{See} J. \textsc{Jenkins}, \textit{LABOR LAW} \textsection 9.5 (1969). \textit{See also} R. \textsc{Gorman}, \textit{LABOR LAW} 399-401 (1976) [hereinafter referred to as \textsc{Gorman}].

10. There are three situations where the workers’ independent contractor status is generally raised: (1) When a union, attempting to organize the employer’s workers, petitions for a representation election \textit{see note 17 infra} under \textsection 9(c) of the Act, 29 U.S.C. \textsection 159(c) (1976), the petition will be dismissed if the employer can show that the workers are independent contractors. \textit{See}, \textit{e.g.}, Trade Wind Transportation Co., Ltd., 185 N.L.R.B. 373, 373 (1970); Vaughn, d/b/a Vaughn Bros., 94 N.L.R.B. 382, 383 (1951). (2) Employers charged with the commission of unfair labor practices \textit{see note 2 supra} often assert a defense that the victim of the alleged unfair labor practice is an independent contractor and consequently outside the protection of the Act. \textit{See}, \textit{e.g.}, Musicians, Local 360, 170 N.L.R.B. 271, 271 (1968); Crow Gravel Co., 168 N.L.R.B. 1040, 1040 (1967); Maxwell Co., 164 N.L.R.B. 713, 715 (1967), \textit{enf. den. on other grounds}, 414 F.2d 477 (6th Cir. 1969). (3) When a union pressures an employer to cease doing business with another party until that party joins the union, the union is in violation of \textsection 8(b)(4), 29 U.S.C. \textsection 158(b)(4), or \textsection 8(e) of the Act, 29 U.S.C. \textsection 158(e), if the party is an independent contractor rather than an employee hired by the employer. \textit{See}, \textit{e.g.}, Local 814, I.B.T (Santini Bros.), 223 N.L.R.B. 752 (1975), \textit{enforced}, 546, F.2d 989 (D.C. Cir. 1975).

11. \textit{E.g.}, Twin City Freight, Inc., 221 N.L.R.B. 1219, 1220 (1975). This is the common law test which the courts and the Board use to determine the status of a worker under the Act. \textit{See note 5 supra}.

12. Generally a cab company has little actual control over the physical movements of the driver while he is operating the cab. The only direct method of controlling the driver is by radio dispatch or by requiring the driver to periodically report to a check spot.

13. The Board is a 5-member commission charged with enforcement of the National Labor Relations Act, 29 U.S.C. \textsections 151-69 (1976). Its functions are to review hearings designed to determine if any employer or a union is guilty of unfair labor practices, \textit{see note 2 supra}, and to conduct representation elections. \textit{See} note 18 \textit{infra}. \textsc{Gorman}, \textit{supra} note 9, at 7.

The structure of the Board has changed somewhat since its inception in 1935. Under the Wagner Act, ch. 372, \textsection 3(a), 49 Stat. 449 (1935), the Board was to be composed of three members
in determining the extent of the employer's control over the driver. \(^{14}\) The District of Columbia Circuit Court of Appeals recently rejected this practice. In *Local 777, Democratic Union Organizing Committee v. NLRB* (*Seafarers, Local 777*),\(^ {15}\) a case arising out of the latest chapter in the noteworthy history of the Chicago taxicab industry,\(^ {16}\) the court found that the taxi drivers who lease cabs from companies are independent contractors rather than employees.\(^ {17}\)

This Note will trace the historical development of the employee-independent contractor distinction under the Act. It will compare the restrictive test for making this distinction with the more flexible test that the Board has applied in taxi leasing cases. This Note will then illustrate how the court in *Seafarers, Local 777* rejected the Board's approach and promulgated a restrictive test for determining the status of taxi lessees. Finally, it will examine whether the test adopted by the court will enhance the ability of employers in the taxi business, and in similar industries, to use leasing as a union-busting tactic.

appointed by the President and confirmed by the Senate. Its function was to "supervise the election process from the filing of a petition to the certification of the election results, as well as processing unfair labor practice charges through investigation, prosecution and adjudication." \(^ {14}\) GORMAN, *supra* note 9, at 7. The Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947), expanded the Board to five members and gave the President exclusive power of appointment. In addition, the Board was allowed to delegate its investigatory, prosecutory and adjudicatory functions to regional offices throughout the United States. The Board now sits mainly as a reviewing body for decisions from representation and unfair labor practice hearings, which are presided over by administrative law judges. \(^ {15}\) See note 33 infra. These decisions may be reviewed by the entire Board or by a three-member panel of Board members. \(^ {16}\) See § 3(b) of the Act, 29 U.S.C. § 153(b) (1976).


16. The Chicago taxicab industry has been marred throughout its history by violence, legal dispute, and political scandal. From the violent war over its control in the 1920's to a political scandal in the 1970's, in which Chicago Consumer Commissioner Jane Byrne implicated Chicago Mayor Michael Bilandic, the Chicago cab companies have been a center of controversy. For an investigation of the Chicago cab industry see McGrath, *Behind the Yellow Door*, Chicago Magazine, January, 1978, at 97. \(^ {17}\) See also Kitch, Isaacson & Kasper, *The Regulation of Taxicabs in Chicago*, 14 J.L. & ECON. 285, 316-43 (1971) [hereinafter cited as Kitch].

17. 99 L.R.R.M. at 2016. This was the major issue decided in the case, however, two other questions were at issue. The first was whether the company's unilateral imposition of a $10.00 fee for drivers taking cabs home overnight was an unfair labor practice. The second was whether the decision to lease cabs was a mandatory subject of bargaining. This Note will address these issues only where they are germane to the major issue of whether taxi lessees are independent contractors or employees under the Act.
Local 777 of the International Seafarers Union was certified in 1961 as bargaining representative for all taxi drivers of Yellow and Checker Cab Companies in Chicago. At the time of certification, all taxi drivers included in the bargaining unit were paid on a commission basis. Under this commission program, each driver returned a percentage of his total daily fares to the company, the driver's compensation consisting of the unreturned portion of the fares and any tips. The percentage of the driver's fares that the company was entitled to was determined by a rate schedule established in the collective bargaining agreements between the union and the company.

18. The Board will certify a union as the bargaining representative for a unit of employees when chosen by a majority of those employees in an election. When a petition requesting an election is filed, either by a union or by management pursuant to § 9(c) of the Act, 29 U.S.C. § 159(c) (1976), the Board, through a Regional Director, investigates to determine if the employees are sufficiently interested in having an election. Interest in an election is usually established by a showing that 30% of the workers involved want union representation, as reflected by authorization cards which are signed by the worker and indicate this desire. Once interest is established, the Board defines the appropriate unit of workers for the union to represent. The Board will then conduct the election. See Gorman, supra note 9, at 40-43. See generally Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 HARV. L. REV. 38 (1964).


20. Yellow Cab Company is a wholly owned subsidiary of Checker Cab Company. Together Yellow and Checker own all but 934 of the 4600 licenses to drive a cab issued by the City of Chicago. Kitch, supra note 16, at 286.

21. Included in the appropriate bargaining unit were all Checker and Yellow garage employees and chauffeurs (drivers). Only the chauffeurs were involved in the instant case. Yellow Cab Co., 229 N.L.R.B. 1329, 1341 (1977).

22. The percentage return to the company varied between 45% and 50% of the total fares collected; the exact amount depended on the seniority of the driver. Kitch, supra note 16, at 293.

23. In addition to establishing the rate schedule, the agreement dealt with other terms and conditions of employment, such as working hours, procedures and grounds for layoff or suspension, a pension plan, and vacations. The contract covered various aspects of the employment relationship. The companies established a lengthy job application procedure designed to assure the reliability and honesty of drivers by investigation of the background of the driver-applicant. Once hired, a driver was issued a rule book. The rule book governed the employment relationship and contained such requirements as regular attendance, promptness of drivers, and obedience to supervisors. In addition, the rule book imposed restrictions on the method in which the cab was operated. These restrictions included instructions not to use the cab to push other cars, not to eat during the rush hour, not to use personal radios in the cab, and not to smoke while carrying customers. It also required drivers to assist passengers with luggage, to call out the customer's destination, to remind passengers about seat belts, to remain until unescorted women or children are safely inside at night, and to keep a trip sheet. (A trip sheet is used by the driver to record every customer he or she carries in a given shift. It shows the distance traveled, the number of customers carried during a trip, and the fare collected. The purpose of the trip sheet is to determine how much the driver collects during the shift so that the company can exact its share.) Yellow Cab Co., 229 N.L.R.B. at 1341.
The commission basis was initially the only method of operation used by the companies. In 1974, claiming a substantial reduction in earnings and difficulty in getting full time drivers, the companies developed a plan to begin leasing taxicabs. Over the union's protest, the leasing program was implemented in 1975. Under this program, taxicabs were leased to drivers on a twelve or twenty-four hour basis. The driver paid a flat rental fee, keeping all fares and tips collected while using the cab. The rights and obligations of the lessee-driver and lessor-company were defined by a lease agreement which specifically provided that the lessee-driver was an independent contractor rather than an employee of the lessor. The lease agreement also contained provisions giving the cab company the right to renew or extend a lease at will, prohibiting subleasing by the lessee-driver, and requiring the driver's compliance with city regulations concerning the use and operation of taxicabs.

24. At the end of 1973, Yellow was operating at a loss while Checker was operating at a slight profit. Yellow Cab Co., 229 N.L.R.B. at 1343.

25. Id. A deficiency in full-time drivers has been a constant problem for the cab companies. Kitch, supra note 16, at 296.

26. Immediately prior to the implementation of the leasing program, then Union President Clark announced at a Chicago Federation of Labor meeting that the union was opposed to leasing, that the cab companies were engaging in union-busting activities, and that the drivers might strike in retaliation. The union again voiced its feelings at negotiations which were intended to deal with the leasing operation. See note 31 infra. At these negotiations, the union demanded to be recognized as the bargaining agent for the lessee drivers. Moreover, when a union attorney was asked if he had any proposals to discuss, his response was, "Yes, I have. Get out of the leasing business." Yellow Cab Co., 229 N.L.R.B. at 1344.

27. There were two types of twelve-hour leases: a day lease which ran from 6:00 A.M. to 6:00 P.M., and a night lease which ran from 6:00 P.M. to 6:00 A.M. Id. at 1346.

28. When the leasing program began, Yellow charged $22.00 for a day lease, $15.00 for a night lease, and $31.00 for a 24-hour lease. Id. By October of 1978, the fees had been hiked to $27.00 for a day lease, $23.00 for a night lease, and $36.00 for a 24-hour lease. Chicago Tribune, Oct. 25, 1978, at 3, col. 4.

29. One of the lease restrictions designed to prevent sub-leasing was that lessees could not drive more than 250-miles per shift. Yellow Cab Co., 229 N.L.R.B. at 1347.

30. Like most major cities, Chicago extensively regulates its taxicab industry. As the administrative law judge (see note 33 infra) noticed, "the rules and regulations promulgated by the Commissioner of Consumer Sales, Weights, and Measures, the official charged with taxicab regulation in Chicago) pursuant to the code impose intensive and detailed controls upon the taxicab business, including licensee and driver, which cover virtually every aspect of that business." Id. at 1340.

An owner of a cab must first get a license from the city to operate a cab in Chicago. CHICAGO, ILL., MUNICIPAL CODE, § 4 (1974). Once licensed, the owner and anyone the
In a series of negotiations between the union and the cab companies concerning the leasing program, the union demanded recognition as the bargaining representative for the lessee-drivers. When the companies refused, the union filed a charge with the Board contending that the companies were violating their statutory duty to bargain. In a hearing to determine the substance of the charge, the administrative law judge found no violation, relying on his finding that the lessee-drivers were independent contractors. Consequently, it was held that the company’s duty to bargain with the union did not extend to these drivers. The Board, however, re-

owner hires to drive the cab must comply with all city regulations dealing with the operation of cabs. For example, a driver must obtain a chauffeur’s license to drive a cab. This entails a complete physical examination and subjection to a police investigation of the character of the driver. Every driver must comply with the regulations governing rates of fare, use of the meter, and service to O’Hare Airport. Id. at § 8. He or she must be courteous to customers, present a neat appearance, and keep the cab clean. He or she cannot refuse service to customers. In addition, every driver must keep the cab in operation while in possession of the cab. Id. at § 9. Consequently, if a driver wanted to use the cab to “spend his days at the racetrack,” he would be in violation of the code. Yellow Cab Co. 229 N.L.R.B. at 1340.

A driver could be fined, have his chauffeur’s license revoked, or face criminal prosecution for violating a city regulation. The cab company, in addition, can be held liable for all driver infractions and could have its license to operate that cab revoked for driver violations. Id. See generally Kitch, supra note 16; Verkuil, The Economic Regulation of Taxicabs, 24 RUTGERS L. REV. 672 (1970) [hereinafter Verkuil].

31. Meetings between the union and the company were conducted on June 5 and 17, 1975. The meetings consisted mainly of questions, accusations, and denials. Little actual negotiating over the leasing program occurred. Despite the failure to meaningfully negotiate the implementation of the leasing program, the companies began leasing on July 1, 1975. Yellow Cab Co., 229 N.L.R.B. at 1344.

32. Under § 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1976), it is an unfair labor practice for an employer to refuse to bargain with a union designated as a representative of its employees. The union’s theory was that the company’s unilateral imposition of the leasing program without actually negotiating with the union at the June meetings constituted a refusal to bargain under § 8(a)(5).

33. [Hereinafter referred to as the ALJ]. The ALJ presides over the hearing at which it is initially determined whether a party is guilty of an unfair labor practice. After the hearing is completed, the ALJ decides the case, writes a recommended decision, and sends the opinion to the Board for review. See generally K. DAVIS, ADMINISTRATIVE LAW TEXT § 10.01 (3d ed. 1972). See also Segal, Administrative Law Judge, Thirty Years of Progress and the Road Ahead, 62 A.B.A.J. 1424 (1974).

34. Yellow Cab Co., 229 N.L.R.B. at 1352. While the ALJ found that the company did not have to recognize the union as bargaining representative of the lessee drivers, since those drivers were outside the scope of the Act, the company would still be under a duty to bargain over the implementation of the leasing program if it was a “mandatory subject of bargaining.” Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964). The leasing program would be a mandatory subject of bargaining if it might have an effect on the terms and conditions of the commission drivers’ employment. Id.

The ALJ found that it was not a mandatory subject of bargaining since the union failed to prove any adverse effect of the leasing program on commission drivers. The union, for example, failed to show that the leasing program resulted in work being taken from commission drivers and given to lessee drivers, or that the better cabs were given to the lessee drivers while commission drivers got inferior cabs. Yellow Cab Co. 229 N.L.R.B. at 1352.
fused to follow the administrative law judge's ruling and found the drivers to be employees.\textsuperscript{35}

On appeal, the District of Columbia Circuit Court, in a stinging rebuke of the Board for its inconsistency in determining the status of taxi lessees,\textsuperscript{36} refused to defer\textsuperscript{37} to the Board's decision. In finding that the taxi lessees

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35. Yellow Cab Co., 229 N.L.R.B. at 1333 (decided by Chairman Fanning and members Jenkins, Murphy, and Pennello. Pennello dissenting). The Board also found that even if the lessee drivers were independent contractors, the companies violated § 8(a)(5) of the Act. The Board, relying on Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), found that the decision to lease cabs was a mandatory subject of bargaining. The Board reasoned that because of the limited number of cab licenses issued to the companies, see note 20 supra, the leasing operation would decrease the size of the union drivers' bargaining unit, thus reducing the union's bargaining power. This, the Board observed, would have an adverse effect on the terms and conditions of the commission drivers' employment. 229 N.L.R.B. at 1333-34.

36. Referring to the Board's inconsistent decisions, the court concluded that "[t]his process of ad hoc and inconsistent judgments—in which the only determinative element seems to be the composition of the NLRB panel which happens to hear the case—has descended in the initial case almost to the point of absurdity." Seafarers, Local 777 v. NLRB, 99 L.R.R.M. at 2907.

37. Generally, courts will show deference to the Board's decisions because of the Board's expertise in the labor field. E.g., NLRB v. Circle Bindery, Inc., 536 F.2d 447, 452-53 (1st Cir. 1976); Frattaroli v. NLRB, 526 F.2d 1189, 1193 (1st Cir. 1975); Blue Cab Co. v. NLRB, 373 F.2d 661, 663 (D.C. Cir. 1967), cert. denied, 389 U.S. 837 (1967). In certain situations, however, courts have refused to defer to the Board's judgment. See, e.g., NLRB v. Brown, 380 U.S. 278 (1965); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The court in Seafarers, Local 777, in addition to pointing to the Board's inconsistent decisions, based its refusal to defer on the fact that the decision required the application of a common law test, at which the courts rather than the Board are expert. 99 L.R.R.M. at 2909. Although this is a correct expression of a general rule of administrative procedure, see K. Davis, Administrative Law Text § 30.01 (3d ed. 1972), it ignores the Supreme Court's contrary holding in NLRB v. United Insurance Co., 390 U.S. 254 (1968). That case involved a Board decision finding that debit agents who performed certain functions for an insurance company were, under the common law test, employees. The court enforced the Board's decision, holding that even though the decision involved the application of agency law, which is clearly out of the Board's area of administrative expertise, the decision should stand as long as it reflects a choice "between two fairly conflicting views." Id. at 260.

The Board's decision in Yellow Cab Co. (Seafarers, Local 777) clearly meets the criteria established by the Supreme Court in United Insurance. Both the ALJ and the Board considered strong evidence supporting either finding, clearly making the Board's decision a choice "between two fairly conflicting views." Id. Yet, the court in Seafarers, Local 777 refused to follow the dictates of United Insurance. Courts have, for the most part, followed United Insurance and accepted the Board's findings as to the status of a worker. E.g., Aetna Freight Lines, Inc. v. NLRB, 526 F.2d 930 (6th Cir. 1975); NLRB v. Sachs, 503 F.2d 1233 (7th Cir. 1974); NLRB v. Deaton, 502 F.2d 1221 (5th Cir. 1974); NLRB v. Cement Transp., Inc., 490 F.2d 1024 (6th Cir. 1973); NLRB v. Pony Trucking, Inc., 486 F.2d 1039 (6th Cir. 1973); Ace Doran Hauling and Rigging Co. v. NLRB, 462 F.2d 190 (6th Cir. 1972); NLRB v. Brush-Moore Newspapers, 413 F.2d 809 (6th Cir. 1970), cert. denied, 396 U.S. 1002 (1970). On the other hand, some courts, particularly the Ninth Circuit Court of Appeals, have flagrantly ignored the United Insurance holding and repeatedly reversed Board decisions concerning the status of workers. NLRB v. Merchants Home Delivery Service, 580 F.2d 966 (9th Cir. 1978); NLRB v. Transcontinental
were independent contractors, the court pointed to cases with identical facts in which the Board came to the opposite conclusion. 38 Although the court recognized that a somewhat irregular precedent might be expected because of the extreme importance of the factual setting of each case, the court observed that the Board had surpassed itself in "clouding what need not have been an unusually confusing development of the law." 39

**HISTORICAL DEVELOPMENT OF THE EMPLOYEE-INDEPENDENT CONTRACTOR DISTINCTION**

The Board’s inconsistent decisions reflect the uncertainty that has characterized the employee-independent contractor distinction from the inception of the Act. Originally, the Act applied only to employees but had no explicit language excluding independent contractors. 40 Although the Board and the courts operated under the assumption that the term “employee” excluded an independent contractor, 41 employee status was readily conferred. The Board defined an employee in light of the purposes of the Act and the economic realities of the particular situation. 42 The Act was designed to enhance the

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In Columbus Green Cabs I, reviewing an election hearing, the Board held that taxi lessees were independent contractors and therefore outside of the bargaining unit the union sought to represent. 214 N.L.R.B. 751, 752-53 (1974). In Columbus Green Cabs II, reviewing a hearing considering another election petition filed by the same union trying to represent the same drivers of the same cab company, the Board found that because of an expansive record showing changes in the relationship between the lessee drivers and the cab companies, the drivers were now employees. 237 N.L.R.B. No. 176, 99 L.R.R.M. 1181, 1184: [1978] 4 LAB. L. REP. (85 Lab. Cas.) ¶ 15,014 (1978).


41. E.g., Philadelphia Record Co., 69 N.L.R.B. 1232 (1946) (house-to-house newsboys held independent contractors could not be included in bargaining unit); Theurer Wagon Works, Inc., 18 N.L.R.B. 837, 869-70 (1939) (employer not guilty of unfair labor practice because worker, a pictorial and lettering worker in auto-body shop, was an independent contractor); Crosset Lumber Co., 8 N.L.R.B. 440, 475-76 (1938) (lumber haulers could not unionize because they were independent contractors).

42. E.g., Seattle Post-Intelligencer, 9 N.L.R.B. 1262 (1938). In holding that motor route drivers were employees of the newspaper company that hired them to deliver papers, the Board observed that
organizing and bargaining power of workers, in hopes that the creation of viable unions would result in labor disputes being settled by collective bargaining rather than by strikes and violence.\textsuperscript{43} Thus, under this economic reality test applied by the Board, whenever certain workers were in need of the protections of the Act to organize or participate in collective bargaining to achieve industrial peace, those workers would be designated as employees.\textsuperscript{44}

The economic reality test was adopted by the Supreme Court in \textit{NLRB v. Hearst Publications, Inc.}\textsuperscript{45} This case involved an attempt to organize newsboys\textsuperscript{46} who distributed the company’s newspapers. The Board applied the economic reality test and found the newsboys to be employees.\textsuperscript{47} The Ninth Circuit applied the common law test, focusing on whether the employer has the right to control the worker in the performance of his or her work, and found the newsboys to be independent contractors.\textsuperscript{48} The Supreme Court, however, agreed with the Board. The Court observed that the term “employee . . . must be understood with reference to the Act and the facts involved in the economic relationship.”\textsuperscript{49} The economic reality test was adopted and the employee-independent contractor distinction was declared a matter within the scope of the Board’s special expertise.\textsuperscript{50}

the statutory definition of the word employee [sic] is of wide scope . . . . The primary consideration is whether the effectuation of the declared policy and purpose of the Act comprehends securing to the individual the rights guaranteed and protection afforded by the Act. . . . Public interest in the administration of the Act permits an inquiry into the material facts and substance of the relationship. \textit{Id.} at 1274-75.


\textsuperscript{45} 322 U.S. 111 (1944).

\textsuperscript{46} As the Court noted, the term “newsboys” is somewhat deceptive. The term refers to the entire class of vendors engaged in the business of selling newspapers. The class was divided into two groups: “bootjackers,” and “fixed-spot” vendors. Bootjackers, mostly juveniles, worked on a temporary or casual basis, while fixed-spot vendors, predominantly adults who relied on their vending to support families, worked full-time. Since these vendors were more in need of responsible bargaining than the former, under the economic reality test, these vendors were more likely to be given employee status than the bootjackers. \textit{Id.} at 116.

\textsuperscript{47} \textit{Hearst Publications, Inc. v. NLRB}, 136 F.2d 608, 612-14 (9th Cir. 1943).


\textsuperscript{49} \textit{Id.} at 130. For matters that strictly involve labor relations and determinations designed to achieve the policies of the Act, the Board is considered expert. Consequently, reviewing courts are instructed to afford a certain amount of deference to Board decisions relating to such matters. \textit{Universal Camera Corp. v. NLRB}, 340 U.S. 474, 488 (1951). \textit{See Gorman, supra} note 9, at 13.
The Congressional reaction to Hearst was less than approving. With passage of the Taft-Hartley Amendments to the Act in 1947, Congress explicitly excluded the independent contractor from the Act’s coverage.⁵¹ The legislative history clearly shows that this explicit exclusion was meant to correct the Board’s previous actions together with the Supreme Court’s approval.⁵² Indeed, the Senate reports criticized the Board’s expansive definition of “employee” and indicated that the definition contemplated by Congress in passing the Act was based on the common law right of control test.⁵³

The Right of Control Test

The common law right of control test arose as a means of determining the status of a worker for purposes of respondeat superior⁵⁴ tort liability of employers. A worker would be designated an employee if the employer exercised a sufficient amount of control over the manner and means of the work, as opposed to merely dictating the result of the work, to justify that employer being held liable for an injury caused by the worker.⁵⁵

The test looks to various factual indicia of either the employer’s control or the worker’s independence.⁵⁶ Since many types of service relationships involve conflicting amounts of control and independence, the distinction be-

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⁵⁴ Under the principle of respondeat superior, an employer is vicariously liable for torts committed by his employees. However, the employer is not liable if the hired tortfeasor is an independent contractor rather than an employee. Although this is the general rule, the RESTATEMENT (SECOND) OF TORTS §§ 410-29 (1965) lists twenty-four exceptions. W. PROSSER, HANDBOOK ON THE LAW OF TORTS 468 (4th ed. 1971).
⁵⁶ The RESTATEMENT OF AGENCY lists ten factors generally relevant to the status of a worker:

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 time or by the job;
8) whether or not the work is a part of the regular business of the employer;
9) whether or not the parties believe they are creating the relation of master and servant; and
10) whether or not the principal is or is not in business.

between an employee and an independent contractor often seems arbitrary. An examination of the case law reveals that courts have often settled close cases on the basis of who was more capable of bearing the injured party's loss. If the wrongdoer was more capable, he or she would be deemed an independent contractor, but if the deeper pocket belonged to the party who hired the wrongdoer, an employment relationship would be found.\textsuperscript{57}

Since the purpose of the Act is obviously unrelated to tort liability, such loss bearing considerations are not examined by the Board in applying the right of control test. The legislative comments to the Taft-Hartley Amendments clarify that a worker's status under the Act is to be determined strictly by the right of control test, with no indication of how much or what type of control creates an employment relationship.\textsuperscript{58} With no apparent legislative purpose to aid the Board in applying this test, and a mandate from the courts to apply the test considering all of the circumstances, with no one factor dispositive,\textsuperscript{59} the Board has considered a myriad of factors in applying the test.\textsuperscript{60} The result, as reflected by the Board's decisions concerning the status of taxi drivers, is that vacillation and inconsistency have characterized the Board's decisions.

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58. See notes 51, 52, and accompanying text \textit{supra}.
59. In NLRB v. United Insurance Co., 390 U.S. 254 (1968), \textit{see} note 37 \textit{supra} the Supreme Court observed that

\[\text{[i]}\text{In such a situation as this, there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common law agency principles.}\]

\textit{Id.} at 258

60. The Board has looked to factors probative of the actual supervision by the employer over the worker, such as who supplies the instrumentalities through which the work is done, the intent of the parties, and actual restrictions imposed on the worker by the employer. \textit{E.g.}, Boston After Dark, Inc., 210 N.L.R.B. 38 (1974) (freelance writers' and cartoonists' option of contributing or not contributing material in any given week without prejudicing chances for contributing material at a later date is indicative of independent contractor status); Land-O-Lakes, Inc., 204 N.L.R.B. 519 (1973) (30-day termination of lease option is indicative of employee status); Aetna Freight Lines, Inc., 194 N.L.R.B. 740 (1971) (employer's right to terminate lease for infraction of lease provision is indicative of employee status); Peerless Publications, Inc., 190 N.L.R.B. 658 (1971) (although contract stated workers were employees, intent of parties is only one factor in determining status).

Additionally, the Board has looked for guidance to factors probative of the amount of entrepreneurial risk undertaken by the worker. These factors include capital invested, the method of compensation, and proprietary interest in the work. \textit{E.g.}, Farmers Ins. Co., 209 N.L.R.B. 1163 (1974) (insurance agents' opportunity for profits based on individual skill is indicative of independent contractor status); New York Univ., 205 N.L.R.B. 4 (1973) (full-time faculty's not being subject to entrepreneurial risks and profits is indicative of employee status); Lorenz Schneider Co., Inc., 203 N.L.R.B. 217 (1973) (manufacturer's control over prices at which driver could resell merchandise is indicative of employee status); A.S. Abell Co., Inc., 185 N.L.R.B. 144 (1970) (newspaper carrier boys are employees because of lack of proprietary interest in paper routes).
\end{flushleft}
Until 1974, the Board uniformly found taxi drivers to be employees regardless of the particular arrangement between the driver and the company. Taxi lessees, franchisees, commission drivers, and even owner-drivers who belonged to a self-regulatory trade association of other owners, were given employee status. In applying the right of control test, the Board considered

The relevancy of entrepreneurial characteristics on the status of the worker is often tied to language in the congressional history of the enactment of the independent contractor exclusion. Although Congress made it clear that the status of a worker should be determined strictly by measuring the employer's right to control that worker, see notes 51-53 supra, language in the history states that:

employees work for wages or salaries under direct supervision. Independent contractors undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages but upon the difference between what they pay for goods, materials, and labor, and what they receive for the end result, that is, upon profits.

LEGISLATIVE HISTORY OF THE LMRA, supra note 52, at 18. Consequently, while Congress calls for a strict adherence to the common law test, which relies chiefly on an examination of employer control to determine the status of a worker, an added factor is the entrepreneurial aspect of the work. A plausible explanation for the relevancy of entrepreneurial characteristics of the worker is that such factors "imply control." NLRB v. Cement Transport Co., 490 F.2d 1024 (6th Cir. 1973); Ace Doran Hauling and Rigging Co. v. NLRB, 462 F.2d 190 (6th Cir. 1973).

Whether a driver is a taxi lessee or franchisee has, under the right of control test, little relevancy to the status of the driver. In its simplest terms, "a franchise is a license from the owner of a trademark or tradename permitting another to sell a product or service under that name or mark." G. GLICKMAN, BUSINESS ORGANIZATIONS, FRANCHISING § 2.01 (1978). The relationship between the franchisee and the franchisor is governed by the franchise agreement. Like the lessee, the franchisee is an employee if the franchisor reserves the right to control the manner and means of the franchisee's performance. Id. § 2.03(4) at 28. See generally, McGuire, Labor Law Aspects of Franchising, 13 B.C. INDUS. & COM. L. REV. 215 (1971).

61. Whether a driver is a taxi lessee or franchisee has, under the right of control test, little relevancy to the status of the driver. In its simplest terms, "a franchise is a license from the owner of a trademark or tradename permitting another to sell a product or service under that name or mark." G. GLICKMAN, BUSINESS ORGANIZATIONS, FRANCHISING § 2.01 (1978). The relationship between the franchisee and the franchisor is governed by the franchise agreement. Like the lessee, the franchisee is an employee if the franchisor reserves the right to control the manner and means of the franchisee's performance. Id. § 2.03(4) at 28. See generally, McGuire, Labor Law Aspects of Franchising, 13 B.C. INDUS. & COM. L. REV. 215 (1971).

the relevant factors in light of the business realities of the given situation. Under this business realities approach, a cab company’s lack of supervision over the driver while operating the cab was not considered dispositive, since it was comparable to an employer’s lack of supervision over a truck driver’s choice of a route in delivering goods or a carpenter’s choice of using a plane, a chisel, or a saw to shave a piece of wood. These choices, considered inherent in the nature of the work, were characterized as routine, offering little indication of actual employer control over the driver.

Instead of determining the status of taxi lessees solely by the employer’s control over the operation of the cab, the Board looked at the overall relationship between the company and the driver. Any facts establishing the driver’s inability to exercise independent judgment were emphasized. Consequently, crucial factors have been the employer’s freedom to unilaterally set the terms of the lease, the employer’s ability to discharge or discipline drivers, and the employer’s ability to prohibit sub-leasing. Factors which point to the employer’s burden of entrepreneurial risk, such as the driver’s lack of investment in the cab, and the employer being the beneficiary of any goodwill arising out of the operation of the cab, have also been determinative. In effect, any facts pointing to employer control over

64. E.g., id. The Board’s injection of such qualifying factors into the right of control test has been criticized as a return to the economic reality test of *Hearst*. Adelstein and Edwards, *supra* note 44, at 196. The criticism is focused on the Board’s heavy reliance on the workers’ lack of entrepreneurial characteristics in order to find an employment relationship, see, e.g., *San Antonio Light Co.*, 167 N.L.R.B. 689 (1967); *El Mundo, Inc.*, 167 N.L.R.B. 760 (1967). This criticism, however, is not completely accurate. The Board’s examination of the overall relationship, rather than of actual employer supervision over the details of the work, can be seen as a flexible application of the right of control test. This approach, especially in industries where direct supervision over the work is minimal, may be a more accurate measure of the employer’s actual control over the worker. For example, the Board often looks to indirect control over the driver, such as the company’s ability to discharge or discipline the driver at will. The rationale is that while the company does not directly control the driver in his prospecting for fares, it retains indirect control based on the driver’s knowledge that he is ultimately answerable to the company for his performance.

In this sense, the Board is not returning to the economic reality test. The workers’ need for a bargaining representative to achieve the purposes of the Act never enters into the test. What can be validly criticized, however, is the Board’s “singlemindedness” in finding an employment relationship. Adelstein and Edwards, *supra* note 44, at 197. Too often the Board merely recites the facts, reiterates the right of control test, and concludes that in the overall relationship the workers are employees. Meaningful analysis, at least in the earlier cases, has been lacking. See, e.g., *Central Taxi Service*, 173 N.L.R.B. 826 (1968); *Miami Beach Yellow Cab Co.*, 173 N.L.R.B. 831 (1968).

65. See, e.g., Checker Cab Ass’n, 185 N.L.R.B. 182 (1970).
68. See note 60 *supra*. 
the driver in any aspect of the relationship were emphasized, while those facts showing the driver's freedom of choice in operating the cab were discounted.

In *Greater Houston Transportation Co.*, the Board began a retreat from this approach, though never overruling the earlier cases or explicitly undermining the "nature of the business" approach. In finding that taxi franchisees and owner-drivers were independent contractors, the Board rejected factors which previously were dispositive in establishing an employment relationship. This new approach, which placed more emphasis on the driver's independence while operating the cab, was continued in *Barwood, Inc.* and *Columbus Green Cabs I*. These cases involved taxi lessees who leased on short term agreements, drove cabs carrying the company insignia, and were prohibited from sub-leasing. The Board, over the protests of the dissenters who claimed that the majority was ignoring the business realities of the situation, found that these taxi lessees were independent contractors.


70. The Board merely mentioned the facts of the case and evaluated the amount of control exercised. No attempt was made to distinguish the prior inconsistent cases. *Id.*

The only explanation for the sudden shift in the Board's approach, offered by the court in *Seafarers, Local 777*, was the composition of the Board members deciding the case. *See note 36 supra*. When *Greater Houston* was decided, the Board consisted of Chairman Miller and members Kennedy, Penello, Fanning, and Jenkins. Miller and Kennedy have uniformly voted to find taxi lessees independent contractors. On the other hand, members Fanning and Jenkins have uniformly found such drivers employees. The swing vote was member Penello's, who was appointed to the Board by President Nixon in 1974.

71. The Board rejected such facts as the company's freedom to unilaterally set the terms of the franchise agreement, that the agreement required compliance with all government regulations, that the cabs had to be kept in good repair, that the franchisees had to refrain from behavior detrimental to the franchisor's public image, and that the company had the right to terminate the agreement at any time for an infraction of a provision of the agreement. *Greater Houston Transp. Co.*, 208 N.L.R.B. 1020, 1024 (1974).

72. 209 N.L.R.B. 19 (1974), deciding by a panel of members consisting of Fanning, Kennedy, and Penello; Fanning dissenting.

73. 214 N.L.R.B. 751 (1974), decided by a panel of members consisting of Fanning, Kennedy, and Penello; Fanning dissenting.

74. *Columbus Green Cabs I*, 214 N.L.R.B. 751, 753 (1974). The business realities that member Fanning referred to in his dissenting opinion all pointed to the cab company's indirect control over the lessee drivers. These indirect controls included: the company prohibited lessees from sub-leasing; the company required compliance with extensive city and state regulation; the company could refuse to renew a lease at will or terminate an existing lease for certain violations. Fanning also pointed to the fact that since the lessee-drivers drove uniform cabs all bearing the company's insignia, the public got the impression that all drivers were employed by the company. Consequently, any goodwill arising from the taxi operation is to the company's benefit. *Id.*

Yellow Cab Co. (Seafarers, Local 777)\textsuperscript{76} marks the Board's return to the original approach.\textsuperscript{77} The Board examined factors that clearly revealed the inherent nature of the taxi business. These factors included the company's right to extend a lease at its discretion or terminate a lease at any time for accidents or sub-leasing, and the pervasive city regulations which held the company accountable if the driver failed to comply.\textsuperscript{78} Emphasizing these factors and expressing a need to narrowly construe the earlier inconsistent cases, the Board held that the taxi lessees in question were employees. The D.C. Circuit, disturbed by the Board's vacillation, felt warranted in substituting its own analysis for that of the Board.\textsuperscript{79}

\textbf{THE COURT'S ANALYSIS}

The court's application of the right of control test in \textit{Seafarers, Local 777} indicated that it disagreed with the Board's practice of applying the test in light of the nature of the work. The court made two observations concerning the relevant controls involved in determining the status of taxi lessees which clearly reject the Board's approach.\textsuperscript{80}

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\item \textsuperscript{76} 229 N.L.R.B. 1329 (1977).
\item \textsuperscript{77} Again the only explanation for the Board's switch is the composition of the Board members deciding the case. See note 70 \textit{supra}. Yellow Cab Co., (\textit{Seafarers, Local 777}), was decided by members Fanning, Jenkins, Penello, and Murphy. Penello dissented. Yellow Cab Co., 229 N.L.R.B. at 1336. Member Murphy, appointed to the Board by President Ford on February 18, 1975, has in this and subsequent cases uniformly voted to find taxi lessees employees. City Cab Co. of Orlando, 242 N.L.R.B. No. 16, [1979] 2 \textit{LAB. REL. REP.} (101 L.R.R.M.) 1114; [1979] 5 \textit{LAB. L. REP.} ¶ 15,825 (1979). Columbus Green Cabs II, 237 N.L.R.B. No. 176, 99 L.R.R.M. 1181, [1978] 4 \textit{LAB. L. REP.} (85 Lab. Cas.) ¶ 15,014 (1978); City Cab Co., 232 N.L.R.B. 105 (1977).
\item \textsuperscript{78} The effect of the regulations was a major factor. See note 30 \textit{supra}. Other factors the Board noted include:
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\item the lessee drivers had no investment in the instrumentalities of their work;
\item the lessee cabs displayed the companies' insignia and all goodwill arising out of the operation of the cabs inured to the companies' benefit;
\item the work performed by the lessee drivers was an essential part of the companies' normal operation;
\item the terms of the lease were unilaterally set by the companies;
\item lessee drivers were subject to reference checks in the manner of regular employees at the time of application for a lease;
\item the companies imposed a 250-mile limitation on miles driven during the term of the lease;
\item the companies imposed dress restrictions on lessee drivers;
\item the companies at least arguably provided Workmen's Compensation insurance for the lessee drivers (In Morgan Cab Co. v. Indus. Comm'n, 60 Ill. 2d 92, 324 N.E.2d 425 (1975) and Penny Cab Co. v. Indus. Comm'n, 60 Ill. 2d 217, 326 N.E.2d 393 (1975), the Illinois Supreme Court held that, under the right of control test, the taxi lessees in question were employees for purposes of the Illinois Workmen's Compensation laws.)
\end{enumerate}
\item \textsuperscript{79} \textit{Seafarer's, Local 777}, 99 L.R.R.M. 2903, 84 Lab. Cas. ¶ 10,865 (D.C. 1978).
\item \textsuperscript{80} 99 L.R.R.M. at 2910-140.
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The first observation was that in a correct application of the right of control test, the relevant controls to consider are those exerted by the cab company over the lessee driver while the driver is operating the cab.\textsuperscript{81} The court followed \textit{Party Cab Co. v. United States},\textsuperscript{82} a Seventh Circuit decision in which the court applied the right of control test to determine that taxi lessees were independent contractors for purposes of the employment tax statutes.\textsuperscript{83} In following \textit{Party Cab Co.}, the court failed to consider that the unique nature of the business affords a taxi driver, under any arrangement, a certain amount of freedom to prospect for fares with only minimal employer interference.

Under the Board's approach, this freedom was considered "inherent in the nature of the work" rather than indicative of independent contractor status.\textsuperscript{84} The Board instead chose to consider facts establishing that the company exerted control over the driver in the overall relationship.\textsuperscript{85} Consequently, the Board was convinced that the lessee drivers were employees, pointing to such facts as the company's ability to unilaterally set the terms of the lease and to discharge or discipline the lessee drivers.\textsuperscript{86} The court, following \textit{Party Cab Co.}, dismissed these facts as only marginally relevant.\textsuperscript{87} The court instead focused on facts indicating the company's

\begin{footnotes}
\item[81] Id. at 2910.
\item[82] 172 F.2d 87 (7th Cir. 1949), cert. denied, 338 U.S. 818 (1949).
\item[83] The status of a worker under the Social Security Act, 42 U.S.C. §§ 301 et. seq. (1976), and the withholding provisions of the Internal Revenue Code, I.R.C. §§ 3401-3506, are often considered illuminating in determining the status of a worker under the National Labor Relations Act. See Oklahoma Trailor Convoy, Inc., 99 N.L.R.B. 1019 (1952); Inland Steel Co., 77 N.L.R.B. 1 (1948). The development of the distinction under the employment tax acts and the National Labor Relations Act is almost parallel. After passage of the Social Security Act in 1935, the courts began to apply an economic reality test which defined employee in relation to the purposes of the statute. See, e.g., Bartles v. Birmingham, 332 U.S. 126 (1947); United States v. Silk, 331 U.S. 704 (1947). The Congressional reaction was almost identical to the reaction to \textit{Hearst}. See notes 50-53 and accompanying text \textit{supra}. In passing the \textit{Gearhart Resolution}, H.R. J. RES. 296, Pub. L. No. 80-642, 80th Cong., 2nd Sess. (1948), Congress proclaimed that the correct test for distinguishing between an employee and an independent contractor under the employment tax acts is the right of control test. See generally \textit{Smith, Employee or Independent Contractor}, 33 N.Y.U. INST. FED. TAX 577 (1975).
\item[84] Yellow Cab Co., 229 N.L.R.B. at 1333.
\item[85] The Board reasoned that although the companies exert little control over the actual operation of the cab, they exert control over other aspects of the relationship between the company and the driver. These controls, while not constituting direct supervision over the driver while he operates the cab, indirectly influence the driver's behavior, since the driver is in danger of having his lease terminated for certain activities. Id. at 1332.
\item[86] Id.
\item[87] 99 L.R.R.M. at 2911.
\end{footnotes}
inability to control the “physical movements” of the driver while in possession of the cab. 88

The second observation made by the court in applying the right of control test was that company controls exercised pursuant to city regulations are irrelevant to the determination of whether the employer exerted sufficient control to create employee status. 89 The court defined an employee as one who surrenders control to the employer. The court, however, viewed the city-imposed controls as requiring the driver to surrender control to the city rather than to the cab company. 90

Under the Board’s approach, the fact that Chicago, like most major cities, 91 extensively regulates its taxicab industry was taken into account. The Board recognized that city regulations impose restrictions on the driver which, under normal conditions, would be imposed by the employer. 92 Consequently, no distinction was made between controls exercised by the company on its own initiative and those the company imposed pursuant to city regulations. The court, however, rejected this reasoning and concluded that “government regulations constitute supervision not by the employer but by the state.” 93

This distinction between city imposed controls and employer imposed controls is inconsistent with the court’s interpretation of the right of control test. By rejecting the Board’s interjection of business realities into the test and looking only to those employer controls exerted over the driver while in possession of the cab, the court was striving for a strict application of the common law test, which examines the employer’s control over the manner and means of the work. The court’s interpretation was that only control over the driver’s operation of the cab was relevant. The court strays, however, from this restrictive approach by considering the company’s reason for exercising control. For tort purposes, the original concern of the common law test, the employer’s control over the worker would determine liability re-

88. Id.
89. Id. at 2911-12.
90. Id. at 2912.
91. Verkuil, supra note 30, at 672.
92. Yellow Cab Co., 229 N.L.R.B. at 1331. The ALJ observed that “the regulations... cover numerous aspects of the drivers’ work which, in a different context, might normally be dealt with by the employer.” Id. at 1340.
93. 99 L.R.R.M. at 2912. The court cited Local 814, IBT (Santini Bros.), 223 N.L.R.B. 752 (1975), enforced, 546 F.2d 989 (D.C. Cir. 1975), as support for the proposition that company controls must substantially exceed those required by governmental regulation for an employment relationship to exist. In Santini Bros., the Board found that tractor owner-operators who hauled cargo for a New York moving and storage company were independent contractors. The Board distinguished Santini Bros. from an earlier case, Molloy Bros., 208 N.L.R.B. 276 (1974), in which owner-operators who hauled for another New York moving and storage company were held to be employees. One factor which the Board used to distinguish the two cases was that in Molloy Bros. the company controls substantially exceeded the government regulations, while in Santini Bros., they did not. See 41 N.L.R.B. Ann. Rep. 62-63 (1976).
Regardless of whether the employer exercised such control by his or her own initiative or pursuant to government regulations. 94

A major problem with the court’s application of the right of control test is that it greatly restricts the scope of relevant controls to be considered in making the employee-independent contractor distinction. The decision looks only to controls over the driver while he or she operates the cab, ignoring the fact that in the taxi industry such controls are minimal. Furthermore, the decision discounts controls which are dictated by government regulations without realizing that almost all control in the taxi industry emanates from this source. 95 By virtually dismissing all employer controls as irrelevant, the decision would seem to suggest that all taxi drivers, whether driving on a lease or a commission basis, are independent contractors.

The court avoided this conclusion by stating that the method of compensation, the only significant change resulting from the leasing program was the dispositive factor in determining the independent contractor status of the lessee drivers. 96 The company received a flat rental fee from the driver before the driver took possession of the cab. Thus, the company was fully compensated before the driver even took the cab out of the company garage. The court reasoned that this eliminated any financial incentive for the company to exercise control over the driver. The court found that this lack of financial incentive created a strong inference that the cab company did not exert control over the driver’s performance while operating the cab. 97

This reasoning creates a dual standard for application of the right of control test. In relation to commission drivers, the court would accept the Board’s approach. The controls exerted by the employer in the overall relationship would be considered relevant because of the employer’s financial incentive to exercise such controls. These same controls applied to lessee drivers, however, would be rejected in favor of those facts establishing the employer’s actual control over the lessee driver’s operation of the cab. 98


95. See Verkuil, supra note 30, at 672.
96. 99 L.R.R.M. at 2916.
97. Id. The court also observed that the company’s being compensated by a flat rental fee eliminated the need for lessee drivers to keep trip sheets. See note 23 supra. The court noted that trip sheets, reflecting the driver’s performance while operating the cab, was the primary means by which the company controlled the drivers. Consequently, the leasing program, eliminating trip sheets, resulted in a significant relinquishment of control over the drivers. The court discounted a regulation passed by the Chicago Consumer Commissioner after the initial hearing which required the cab companies to keep records of fares collected by each driver. The ALJ discounted this fact with skepticism, observing that “the union has some degree of clout at City Hall, and has not hesitated to use it.” Yellow Cab Co., 229 N.L.R.B. at 1347. The court less candidly discounted this fact by treating it as a city-imposed regulation rather than a company-imposed control. 99 L.R.R.M. at 2913.

98. This reasoning ignores the effect of goodwill as a financial incentive for control under the leasing program. The Board, in considering the nature of the business, has often pointed to the
In light of the court’s aspiration for a strict application of the right of control test, this distinction is at best artificial. An equal amount of control could be exerted over both lessee and commission drivers. Each type of driver is engaged in the same work. Yet, this dual standard for applying the right of control test treats the same controls differently based on how the driver chooses to be compensated for driving the cab.

**IMPACT OF THE DECISION**

At the time of the decision, 80% of all Yellow and Checker drivers in Chicago leased cabs. The court’s finding that the lessees are independent contractors precluded these drivers from union representation. With union members now affecting only 20% of the companies’ business, the decision significantly diminished, if not destroyed, the union’s bargaining power.

fact that lessee drivers operate cabs bearing the insignia and design of the company as indicative of employee status. Thus the company is the beneficiary of all goodwill arising out of the operation of the cab. The company’s need to maintain a positive public image in order to preserve the value of its business acts as a strong incentive for the assertion of control over its drivers.


100. See note 4 supra.


The Board held that the significant reduction in the union’s membership affected the union drivers’ “terms and conditions” of employment. Therefore, the leasing program was a mandatory subject of bargaining. See notes 34 and 35 supra. Consequently, the Board held that even if the lessee drivers were independent contractors, the companies violated § 8(a)(5) of the Act by unilaterally implementing the leasing program without first bargaining with the union. See note 34 supra.

The court refused to accept the Board’s holding. Pointing to language in the ALJ’s decision, indicating that the union demanded to be recognized as bargaining agent for the lessee drivers, the court held that it was the union who refused to bargain rather than the companies. 99 L.R.R.M. at 2420-32. This finding, of course, rendered irrelevant the issue of whether the decision to begin leasing cabs was a mandatory subject of bargaining.

Before reaching this conclusion, however, the court announced that if necessary it would hold that the leasing program was not a mandatory subject of bargaining. Id. The court distinguished Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, see note 34 supra, which the Board cited to support its finding. Yellow Cab Co., 229 N.L.R.B. at 1134. Fibreboard dealt with an employer that decided to subcontract its maintenance work to independent contractors rather than have its own employees perform that work. The Court held that the company violated § 8(a)(5) by refusing to bargain with the union representing the employer’s maintenance crew over the decision to subcontract. The court found that when an employer’s decision affects the terms and conditions of employment of the employees in question, as opposed to affecting the fundamental nature of the business, it is a mandatory subject of bargaining. 379 U.S. at 213. See Annot., 6 A.L.R.3d 1148 (1966).

The court in Seafarers, Local 777 distinguished Fibreboard as dealing with an employer who “essentially only replaced more expensive union labor with more economical outside workers.” 99 L.R.R.M. at 2919. The court distinguished the present case, finding that for “Yellow and Checker, on the other hand, the companies began leasing significantly to alter what had become a low profit operation.”Id.
The decision's effect may not be limited to Local 777 of the Seafarers Union. Leasing is an increasingly popular method of operation in the taxi industry.\textsuperscript{102} The wide-spread effect of the decision could be to transform leasing into an extremely effective and attractive union-busting device.\textsuperscript{103} Due to the court's rationale for finding taxi lessees independent contractors, this device is available to employers in any extensively regulated industry.\textsuperscript{104} The court discounted employer controls that were required by governmental regulations.\textsuperscript{105} In industries where employer controls are dictated by or coincide with extensive governmental regulation, an employer can implement a leasing program while losing little if any control over the workers. An employer's control over the workers will be attributed to the regulations; consequently, it will be insufficient to establish any employment relationship. The attractiveness of this scheme is evident. The employer frees himself or herself from having to deal with a union, giving the employer unilateral control over the relationship with the worker. Yet, the employer's intangible interest in the business is protected by the pervasive governmental regulations.\textsuperscript{106}

Among the regulated businesses which are particularly susceptible to this type of union-busting tactic is the trucking industry. Analogies between taxi leasing and truck leasing\textsuperscript{107} can be easily drawn. Both businesses by nature

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\item \textsuperscript{102} Brief of Amicus Curiae International Taxicab Association at 1, Local 777, DUOC, Seafarers v. NLRB, 99 L.R.R.M. 2903, 84 Lab. Cas. ¶ 10,865 (D.C. Cir. 1978).
\item \textsuperscript{103} Of course the Board is not compelled to follow precedent rendered by Circuit Courts of Appeal reviewing Board decisions. Consequently, the Board can refuse to follow the court's decision in \textit{Seafarers}, Local 777. Given the Board's expansive view of employees status of lessees, see note 77 \textit{supra}, the decision is not likely to be followed in the near future. \textit{See City Cab Co. of Orlando, 242 N.L.R.B. No. 16, [1979] 2 LAB. REL. REP. (101 L.R.R.M.) 1114, [1979] 5 LAB. L. REP. ¶ 15,825 (1979).} This, of course, would thwart the effect of such union-busting tactics. However, under \textsection 10(f) of the Act, 29 U.S.C. \textsection 160(f) (1976), a party can get judicial review of a Board decision in any circuit in which it does business, in the circuit where the unfair labor practice occurred, or in the District of Columbia Circuit. As a result, even if the Board finds workers an employer hires on a leasing basis to be employees, the employer can, based on \textit{Seafarers, Local 777}, get supportive judicial review from the District of Columbia Circuit Court of Appeals.
\item \textsuperscript{104} \textit{See, e.g.}, notes 107-09 \textit{infra}.
\item \textsuperscript{105} 99 L.R.R.M. at 2911-12. \textit{See} notes 88, and 89, and accompanying text \textit{supra}.
\item \textsuperscript{106} Because of the extensive city regulation, a cab company in Chicago has as much protection of its goodwill under a leasing program as it does under a commission program. For example, under Chicago regulations, a driver must present a neat appearance and keep his cab clean. He must report lost articles, operate the meter correctly and charge a certain fare. He or she cannot give misinformation to customers, take customers to wrong destinations, solicite, loiter, or gamble near the cab. The driver cannot refuse service to a customer, act rudely to passengers or drive carelessly. The driver is also required to keep the cab in operation while in possession. In essence, the regulations impose strict controls on the driver which insure, to an extent, that the goodwill of the company will be maintained. Yellow Cab co., 229 N.L.R.B. at 1340. \textit{See} note 30 \textit{supra}.
\item \textsuperscript{107} The most common type of leasing arrangement in the trucking industry involves owner-operators of trucks and for-hire or private carriers. A for-hire carrier is a trucking com-
\end{enumerate}
involve little employer control over the physical movements of the driver. Like the cab company, many trucking outfits have little opportunity to supervise the driver's actual performance of the work. A truck driver is generally given an assignment to pick-up or deliver cartage. The employer's supervision extends only to these results. Moreover, like the taxi industry,108 the trucking industry is extensively regulated.109 Consequently, whatever control the employer exerts over the driver is likely to coincide with regulations required by the government. Under the rationale of Seafarers, Local 777, such control will be irrelevant to the determination of the driver's status.

In addition to creating a union-busting tactic for employers who can feasibly institute leasing programs, the decision threatens to disrupt many firmly established driver unions.110 These unions, comprised of lessee drivers in the trucking and taxi industries, are jeopardized by the court's emphasis on the method of compensation as the dispositive factor in determining the independent contractor status of lessee drivers.111 Since the method of compensation used by the cab companies in Seafarers, Local 777, where a fixed rental fee is paid by the lessee driver, is characteristic of most leasing schemes,112 the court's decision can easily be interpreted as holding that lessee drivers in effect are independent contractors per se.

CONCLUSION

If the Supreme Court upholds Seafarers, Local 777,113 taxi leasing may become a standard method of destroying taxi driver unions throughout the

pany which provides transportation of freight owned by another party. A private carrier ships its own goods. Under the arrangement, the owner-operator will lease the truck to the carrier while agreeing to drive the truck himself. The arrangements usually cover one haul, known as a 'trip haul,” but often are for longer periods. C. TAFF, COMMERCIAL MOTOR TRANSPORTATION 315-37 (4th ed. 1969). It is estimated that at least 800,000 of all trucks used in hauling freight are leased. BREWE, LIABILITY INSURANCE COVERAGE OF LEASED TRUCKS, 8 TRANSP. L.J. 107, 108 (1976). In the Midwest, 59.3% of all trucks used by carriers are leased on some type of arrangement. AMERICAN TRUCKING ASSOCIATION, INC., AMERICAN TRUCKING TRENDS 31 (1976).

108. Taxi businesses are generally regulated by city and state law. See Verkuil, supra note 30, at 672.

109. The trucking industry is extensively regulated by the Interstate Commerce Commission and the Department of Transportation, as well as various state and local agencies. Generally, the ICC regulates such standards as rates, routes, types of service, and types of commodities transported. The Department of Transportation is charged with overseeing safety, equipment standards, and hours of service. AMERICAN TRUCKING ASSOCIATION, INC. AMERICAN TRUCKING TRENDS 36 (1976).


112. Id.

113. As of this writing, a petition for certiorari had not been filed.
country. By identifying the fixed rental method of compensation as the dispositive factor, the court in effect has held that taxi lessees are independent contractors per se, since this method of compensation is characteristic of most leasing schemes. By discounting employer controls that are dictated by the government, the decision threatens unions in other extensively regulated industries where leasing programs can easily be implemented. Consequently, by applying a restrictive version of the right of control test which discounts many employer controls, the court has developed an effective method for employers to retain significant control over workers while denying those workers protections granted under the Act.

*Seafarers, Local 777* can easily be criticized as promulgating an overly restrictive test for determining the status of a worker. The ultimate criticism, however, must be directed at the Board. The Board has made an already nebulous area more uncertain by wavering between a strict test, emphasizing the employer’s control over the physical conduct of the driver, and a flexible approach, considering employer control in the overall relationship. This vacillation has created confusion among both administrative law judges and employers as to whether there is a duty to bargain with a union claiming to represent workers the employer hires on a lease basis. Moreover, where the Board has consistently applied a business realities approach, it has often done so in a perfunctory and cursory manner. The result is that even the Board’s consistent decisions have little credibility among reviewing courts. What is needed is both a *consistent* and *accurate* application of the right of control test to define employee under the Act. Even the Board’s business realities approach, prudently applied, would suffice. However, if there is any progress to be made in arriving at a meaningful definition of employee under the Act, it must begin with the Board.

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114. See note 107 and accompanying text supra.
115. 99 L.R.R.M. at 2908. The court pointed out that Yellow and Checker, in designing their leasing operation, consulted with other cab companies whose lessee drivers had been held by the Board to be independent contractors.
116. See notes 62-68 and accompanying text supra.
117. For example, in SIDA of Hawaii, 191 N.L.R.B. 194 (1971), *enf. denied*, SIDA of Hawaii, Inc. v. NLRB, 512 F.2d 354 (9th Cir. 1975), the Board, finding that owner-drivers were employees of a self-regulatory incorporated association, merely mentioned the facts supporting both findings and concluded that under all the circumstances, the owner-drivers were employees. An in-depth business realities analysis should have carefully considered the drivers’ independence in light of such facts as the drivers having substantial investment in their cabs, the owner-drivers’ being free to lease or hire other drivers to drive their cabs, and the owner-drivers being free to work or not work when they pleased.
118. See, e.g., Brown v. NLRB, 462 F.2d 699, 702 (9th Cir. 1972); Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970).
119. See note 117 supra.