

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

RICHMOND CABS LTD. AND CORAL CABS LTD.

(the "Employer" or "Richmond Cabs" or "the Company")

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL 2952

(the "Union")

PANEL: Hans Brown, Vice-Chair

COUNSEL: Kitty J. Heller, for Richmond Cabs  
Laura Parkinson, for the Union

CASE NO: 16028

DATES OF HEARING: August 23, 24, 25, 26, 27, September 7, 8, 9, 10, 13, 14,  
1993

DATE OF DECISION: March 2, 1994

## **DECISION OF THE BOARD**

### **I. NATURE OF THE APPLICATION**

The Union applies under Section 28 of the Code for a unit of "taxi drivers (owner operators/lease drivers)" employed by Richmond Cabs Ltd. and Coral Cabs Ltd. The Union also applies for a declaration under Section 38 that these two companies are a common employer.

The Board ordered a representation vote of owner operators and lease drivers. The ballots were individually sealed pending the disposition of disputed issues.

Prior to the hearing, the Employer agreed that Richmond Cabs and Coral Cabs are a common employer and that the lease or fleet drivers referred to in the application are dependent contractors. The issue before the Panel is to determine whether the owner operators under the Richmond taxi banner are also dependent contractors. No issue has been raised as to the appropriateness of their inclusion in the bargaining if such a determination is made.

### **II. BACKGROUND**

Richmond Taxi Co. Ltd. operates a taxi business under the name "Richmond Cabs" through its subsidiaries, Richmond Cabs Ltd. and Coral Cabs Ltd. The company was originally incorporated in 1964 and assumed its current name on February 19, 1993. The directors of the three companies are Gordon MacLean and Sandra Boucher, who respectively serve as their president and secretary.

The Employer's seven clerical and five dispatch employees are organized and are covered by two separate collective agreements. The taxi drivers under its banner are unorganized and, with the exception of approximately 23 drivers of taxicab owners, are all included in this application. The Employer concedes that approximately 165 lease drivers (also called "fleet drivers" or "town drivers") are dependent contractors. The Union has excluded three of the 18 taxicab owners from its application on the ground they do not qualify for both the "owner" and

"operator" component of the application. The status of the remaining 15 owner operators is in dispute.

Richmond Cabs is a fully licensed taxi fleet in the Lower Mainland of British Columbia. It advertises itself as "73 cabs serving Richmond and the Vancouver International Airport". The business currently consists of the following assets:

- 73 taxi plates and licenses, held in its name, from the provincial Motor Carrier Commission entitling the Company to operate 73 taxicabs to pick up fares in the City of Richmond and anywhere else in British Columbia providing their destination is in Richmond, with the exception of the Vancouver International Airport.
- 73 Class "A" City of Richmond plates and licenses, held in its name, entitling the Company to operate 73 taxicabs to pick up fares throughout Richmond without restriction. Richmond Cabs holds *all* of the Class "A" licenses issued by the City of Richmond.
- 73 airport plates and licenses, held in its name, entitling the Company to operate 73 taxicabs at the Vancouver International Airport subject to the terms and conditions of the Authorization Agreement between the Vancouver International Airport Authority and Richmond Cabs. The Airport Authority has issued a total of 386 licenses to nine taxi companies.
- Rights to operate its 73 licensed taxicabs from nine taxi stands in Richmond.
- A computer system owned jointly with Royal City Taxi Ltd.
- Real estate, offices and a shop at 8200 Capstan Way in Richmond.
- Fifty-three taxicabs which it owns and which it leases on a daily and weekly basis to "town" drivers who primarily operate through the Employer's dispatch system in Richmond and in other Lower Mainland zones except the airport zone.

- A contractual relationship with a further 20 taxicabs which are registered in its name; which are beneficially owned by 18 individuals; and which operate primarily at the airport under a combination of 20 airport licenses, 20 Richmond Class "A" licenses and 20 provincial Motor Carrier Commission licenses, all of which are also registered in the Company's name.
- Credit card contracts with Visa and Master Card.
- Over 200 customers holding Company charge accounts.
- Expertise in operating a major taxi fleet.
- Goodwill resulting from the quality of its service and its advertising.

Richmond Cabs has built a customer base from its unrestricted pick up rights in Richmond, organized through its dispatch system and taxi stands, and from its right to a share of the customers served by the airport taxi line. There are no independent taxi operators licensed to work at the airport.

Richmond Cabs has acquired all 73 general taxi licenses issued by the City of Richmond. There are no independent taxi operators licensed by the City. The Employer has unilaterally reduced the size of its fleet in Richmond from 73 to 53, assigning 20 sets of its licenses to operate at the Vancouver International Airport. Similarly, the Employer has acquired 73 of 386 licenses issued by the Airport Authority but, in the main, employs only 20 for airport taxi purposes. It maintains the discretion, however, and has exercised this discretion, to assign the fleet cars it owns to the airport taxi line (on one occasion it leased fleet cars at a special rate solely for airport work) and to include the airport cars of owner operators in its dispatching outside the airport zone (this occurred between March 1989 and March 1993).

As a result, the Employer both segments and integrates the customer base it has organized. Currently, owner operators earn 95-98% of their income from the airport taxi line and 2-5% through the dispatch system. These proportions are reversed for the Employer's fleet

drivers. Owner operators receive up to 25% of their income from the Company's charge accounts, mostly airport customer fares charged through Visa and Master Card on the Company's imprinter.

(i) Sale of Shares

Prior to 1987 Richmond Cabs held all the required licenses to conduct a taxi business in the City of Richmond and at the airport. It also fully owned all the taxis operating under its banner. These taxis were leased to fleet drivers operating under its dispatch system.

In September 1987 Richmond Cabs brought owner operators under its banner by selling 40 non-voting, non-participating, redeemable common shares to 12 individuals. These shares are in addition to the 200 voting, participatory, common shares held by Richmond Taxi Co. Ltd., owned by MacLean and Boucher. The holders of the non-voting redeemable common shares are not entitled to participate in the profits or assets of Richmond Cabs, except that they are entitled to repayment of the original amount paid for the shares in 1987 on liquidation of the Company.

The effect of this sale was to grant the 12 purchasers exclusive use of licenses held by Richmond Cabs to operate 20 taxi cabs under the Employer's banner at the airport. A further effect was to create new categories of persons under the Employer's banner. In addition to fleet drivers who lease cars from the Employer, there are now also owners who drive taxicabs, owners who do not drive, and drivers for owners.

Two shares represent beneficial ownership of licenses required to operate one taxi cab at the airport. One share represents a half interest in the required licenses. Initially, two shares and a vehicle sold for \$36,000. Two shares without a taxi sold for \$28,500. Subsequently, the price of two shares and a taxi rose to a high of \$97,500 in 1991 and are currently selling for \$92,400. The price of a single share and a half taxi rose to a high of \$49,700 in 1992. Eighteen individuals (including only two of the original purchasers) now own the 40 shares. Richmond Cabs does not participate in the profits or losses that result from the sale of these shares. Nor, after the initial sale, has it been involved in finding the purchasers of shares.

Shares may not be sold, however, without the written consent of Richmond Cabs. Such

consent will not be "arbitrarily or unreasonably withheld". In this regard, it is not unreasonable for the Employer "to require evidence of the respectability and financial responsibility" of the proposed purchaser. In addition, the proposed purchaser is required to sign a waiver allowing ICBC to release records of insurance claims to the Employer for its examination. Finally, the Employer's approval of a sale is conditional upon the purchaser agreeing to be bound by the terms and conditions of the Shareholder Dispatch Agreement between the Employer and the vendor.

The Company has refused its consent to a sale of shares on at least one occasion. In such circumstances, where the Company does not consent to a sale of shares, it has an option to purchase them itself "at a price equal to the then fair market value", to be determined by arbitration under the *Commercial Arbitration Act* if necessary.

(ii) Shareholder Dispatch Agreement Between Shareholders and Richmond Cabs

The Shareholder Dispatch Agreements are key to the relationship between Richmond Cabs and owner operators under its banner. Under the Dispatch Agreement a shareholder agrees to pay monthly fees to Richmond Cabs. These include a Monthly Dispatching and Administration Services Fee (originally \$450 per month and currently \$649.16 per month) reviewed annually on the basis of a formula linked to the monthly dispatch fees of three other taxi companies operating at the airport. They also include the cost of all licenses, permits, sales taxes and insurance premiums; the cost of fuel; and any costs of maintaining and repairing the vehicles, radios, meters, and mobile data terminals.

In return, Richmond Cabs agrees the shareholder will have exclusive use of his/her vehicle or replacement "for the sole purpose of carrying on the business of...[Richmond Cabs] at the Vancouver International Airport"; the exclusive use of licences necessary to carry on business as an airport taxi; the use of the toplight, meter, radio, and mobile data terminal; and the limited use of the dispatching services of the Company (except when the Company chooses otherwise). The dispatch service provided extends to:

...the main terminal of the Vancouver International Airport and those businesses and hangars within 300 metres of Grant McConachie Way on Sea Island, [including the Helijet Pad but]

excluding [the South Terminal and] the Delta River Inn, at any time such service is required, and in areas other than the Vancouver International Airport at such times as may arise when taxi service demand exceeds fleet capability, at the Company's absolute discretion....

The Company and the Shareholder agree that the Motor Vehicle is not entitled to any dispatch privileges or stand rights enjoyed by the Company's taxis, with the exception of those [just outlined]...but is entitled to use the license rights to service the Vancouver International Airport only.

Richmond Cabs provides shareholders with imprinters in its name and processes their Visa, Master Card and corporate charge slips. It also processes their accident reports.

Shareholders can supply their own vehicles as taxis, and replace them, providing they are mechanically and cosmetically suitable to the Company. Shareholders retain beneficial ownership of their taxis (and any replacements) they have purchased, but agree to register them with the provincial Superintendent of Motor Vehicles in the name of Richmond Cabs Ltd. "for the purpose of fleet insurance coverage" and as required by the Authorization Agreement between Richmond Cabs and the Airport Authority.

While the Shareholder Dispatch Agreement entitles the shareholder to "quiet enjoyment" of the taxi, it sets the following restrictions on its use:

- The Shareholder shall not use or permit the use of the Motor Vehicle or any replacement...for any purpose other than as a taxi in the operation of the Company's business or for any purpose that will injure the reputation of the Company;

- The Shareholder shall not do [anything]...which may cause any of the taxi licenses held by the Company to be in jeopardy of suspension or cancellation by any government agency or licensing body, or render void or voidable any policy of insurance on the Motor Vehicle or any replacement...

- The Shareholder shall keep the Motor Vehicle or any replacement...free and clear of any and all encumbrances with the exception of...encumbrances that the Company agrees...to in writing;
  
- The Shareholder shall maintain the Motor Vehicle, the meter, the radio, toplight, mobile data terminal and propane tank or any replacement...in a standard of maintenance and repair...similar to the minimum standard prevailing with the motor vehicles in the Company's taxi fleet....
  
- The Shareholder shall keep the Motor Vehicle in a clean condition both on the outside body and in the inside....
  
- The Shareholder will deliver the Motor Vehicle to the premises of the Company, or any other reasonable location of the Company's choice, for the purpose of mechanical inspection, provided that the Company give the Shareholder one week's verbal notice of such a summons and further that this inspection shall be required a maximum of once per month;

The Dispatch Agreement provides the Employer with the broad authority to enforce both its terms and conditions and the Company's rules and procedures:

- The Shareholder will obey all the rules of conduct with regard to taxi operations that may exist in the Company's taxi fleet, and upon serious contravention of said regulations, the Company may suspend use of the taxi license for periods of not more than one week at any one time;
  
- The Shareholder acknowledges that the Company has the right to make such reasonable rules and regulations as may from time to time be required for the safety, care, cleanliness and uniformity of the operation of its business...and agrees that for persistent infraction of such rules and regulations...the Company may impose such penalty...as it may deem meet....
  
- The Shareholder will comply at all times with all applicable laws,

bylaws and regulations of any competent authority in the ownership and operation of the Motor Vehicle....

- ...if the Shareholder neglects to make...repairs [required by the Company] the Company may at its option refuse to dispatch the Motor Vehicle until it meets with the standard of maintenance, condition and repair required by the Licensing Inspector for the City of Richmond;

- The Shareholder will not employ, or lease the Motor Vehicle to any person not approved by the Company, such approval not to be unreasonably withheld. Further, the Shareholder will not employ or lease the Motor Vehicle to any person that the Company considers to be a "fleet driver", without the consent of the Company;

- The Shareholder covenants and agrees with the Company that he will not, either directly or indirectly...carry on or be engaged or concerned or interested in or assist any corporation, firm or person, to carry on or be engaged or concerned or interested in any business involving the carriage of passengers, or the carriage of goods, including...any taxi or courier business within the Greater Vancouver Regional District...during the time he is a shareholder of the Company and for a period of one (1) year after he ceases to be a shareholder in the Company, without the consent in writing of the Company.

The Agreement further provides the Company with a procedure to deal with defaults in any payment or "in the performance of any other covenant" by a shareholder. Where such defaults extend beyond 30 days after written notice from the Company, the Agreement, "at the option of the [Company] shall cease and...the [Shareholder] shall return the radio, meter, mobile data terminal...and the taxi to the [Company]". The Company will then register the taxi or replacement in the name of the shareholder when he/she is no longer in default of any payments.

(iii) Airport Authorization Agreement

The Vancouver International Airport Authority regulates the airport taxi business. The

Authorization Agreement between Richmond Cabs and the Airport Authority sets out the fees which the Company must pay to the Authority (\$710 for six months for each vehicle, plus a variety of smaller fees). It also sets out extensive and detailed rules covering driver conduct, vehicle standards, taxi line procedures, suspension and termination procedures, and other matters. Under the Agreement, Richmond Cabs is accountable for all drivers operating under its banner. Compliance with the rules and directives from the Airport Authority is its responsibility.

The Agreement sets the metered rate charged airport passengers as the rate established by the City of Vancouver. It sets the level of insurance Richmond Cabs, as the authorization holder, must hold for each of its taxis licensed to operate at the Airport. All drivers must comply with the taxi call up procedures; comply with the directions of the Taxi Starter; not "in any circumstances bypass the Taxi Holding Area"; not solicit fares at the airport; take the first passenger in the queue unless the passenger has requested a specific taxi or company; not refuse short hauls; issue receipts when requested; not refuse service to handicapped persons, with or without a guide dog; charge only the metered rate; not charge flat rates; and accept Visa and Master Card as a means of payment.

(iv) Rules and Discipline

Many of the rules governing the owner operators, along with the Employer's general authority to make and enforce rules, are set out in the Shareholder Dispatch Agreement. The Employer's responsibility for enforcing the extensive set of rules and procedures governing the taxi business at the airport is set out in its agreement with the Airport Authority and extends to all drivers under its banner, including owner operators. Its basic rule book is the *Richmond Cabs Driver Information Package* which sets out detailed procedures covering all aspects of the Employer's taxi operations, incorporates all of the rules and procedures set out in the airport Authorization Agreement, and is given to all drivers.

The detailed procedures set out in the *Driver Information Package* deal with the dispatch system, the computer system, charges, flat rates, accidents reports, and other matters that are of concern to all drivers within the system. They apply equally to owner operators. The Employer's rules are enforced at its discretion, generally by means of temporary "Code 6" suspensions of dispatch rights. On three occasions, the Employer has suspended the plates and

licenses of owner operators. In two of these instances the suspensions were at the sole initiative of the Employer. In the third instance, while the Airport Authority asked for the suspension of the individual's Airport Driver's Permit, the Employer, on its own initiative, suspended all of his plates and licenses, thereby depriving him of the use of his taxi both at, and away from, the Airport.

Airport rules are enforced by the Employer as directed by the Airport Authority. The Airport puts its complaints, customer complaints, and disciplinary directives to the Employer, not to the drivers. The Employer deals directly with the drivers on these matters -- and not with the owners in the case of complaints against, or discipline of, the drivers for owners. Richmond Cabs' drivers -- be they owner operators, drivers of owner operators, or fleet drivers -- must take their complaints about the airport taxi line to the Employer, and not raise them directly with the commissionaires at the Airport.

Owner operators who are temporarily suspended from working at the Airport continue their relationship with Richmond Cabs and continue paying their dispatch fees. Owner operators whose airport taxi licenses or driver's permits are suspended for more than a week continue operating under the Employer's full dispatch system at 200% dispatch fees. In the event the Airport Authority cancels an individual license or permit, the Dispatch Agreement is terminated.

The Employer has the right to terminate its Shareholder Dispatch Agreement with owner operators, by notice, where they are either in default of payments or where they default in the performance "of any other covenant" in the agreement. This power has not been exercised to date.

(v) Disputes Between Owner Operators and the Company

Before 1989 Richmond Cabs operated a voice dispatch system by radio. In March 1989 the Company, in conjunction with Royal City Taxi Ltd., introduced a computerized dispatch system and installed computer terminals in all vehicles, including owner operated taxis, under its banner. The Company threatened suspension of their taxi licenses and plates if owner operators failed to bring their taxis into its lot for the installation. All reported as instructed. The Company further informed the owner operators that a monthly computer charge of \$60 was being

introduced to help pay for the system. In subsequent negotiations the owner operators agreed to the additional \$60 monthly fee and the Company agreed to grant them additional dispatch rights in the Lower Mainland, but not in Richmond. This additional source of fares for owner operators resulted in the portion of their income from dispatches rising to around 20%.

In late 1992 the Company advised the owner operators that, on the basis of the formula in the Shareholder Dispatch Agreement, it was setting the monthly dispatch fee at \$675 effective January 1, 1993. This was subsequently changed to \$649.16 plus GST. A Committee Representing Richmond Airport Cabs (Owner Operators) challenged this figure. Its calculations, based on its understanding of the formula, produced a monthly fee of \$582.50. The Company's response to this fee dispute was to drop the monthly \$60 computer charge and to cancel the owner operators' dispatch rights outside of the airport zone effective March 1, 1993.

As a result of this change in dispatch rights, the portion of owner operators' income from dispatches has dropped to 2-5%. The owner operators have responded by refusing to directly pay their dispatch fees except to have their charges, primarily Visa and Master Card, applied to their accounts. Kuldip Brar, a member of the Committee Representing Richmond Airport Cabs and a Union organizer, recognizes that the Company has the option of serving notice on operators whose accounts are in default for 30 days and redeeming their shares. The dispute is now at a stalemate. Discussions between the parties ceased when the Union's certification application came before the Board.

In response to these fee disputes, the owner operators have taken legal action against the Company before the Securities Commission and in the courts. In 1989 they made application to the B.C. Securities Commission seeking an order declaring the Company to be a reporting issuer within the meaning of the *Securities Act* and, as such, requiring it to file with the Securities Commission audited statements for each fiscal year and unaudited financial statements for each fiscal quarter; publicly disclose and file returns on all material changes in its affairs; file insider reports on insider trading in shares of Richmond Cabs; and give notice of and hold formal annual meetings, and provide the required information and proxy materials.

The Commission denied the application and the shareholders are seeking leave to appeal the decision to the B.C. Court of Appeal. Latterly, as a result of the most recent fee dispute, the

owner operators have commenced an action against the Company in the B.C. Supreme Court, seeking, among other things, a share of Richmond Cabs' profits and assets.

### III. POSITION OF THE EMPLOYER

The Employer says the owner operators are independent contractors and are therefore excluded from the unit for which the Union has applied.

It argues this is a case of first impression in that the relationship between these owner operators and Richmond Cabs is based on a shareholder arrangement that is unique. They are independent contractors because the shares they have purchased, initially from Richmond Cabs and subsequently on the open market, give them an exclusive, perpetual right to carry on a taxi business at the Vancouver International Airport. They are in business for themselves. While the Airport Authority exercises some control over that business, Richmond Cabs exercises very little.

The Employer's analysis of the relationship between Richmond Cabs and the owner operators focuses on the following factors: the proportion of income owner operators derive from dispatched fares and company charges; the control and direction of their work and work performance; their risk of losses and chance of profits; their legal actions against the Employer in their capacity as shareholders; and conduct vis a vis the Airport Authority which suggests they believe the Authority to be their employer.

(i) Economic Dependence: Dispatch Fares and Company Charges

The Employer stresses that owner operators earn only 2-5% of their income through its dispatch system. 95-98% comes through the airport taxi line -- a taxi stand over which it has no direction or control.

This, it says, is in sharp contrast to the situation described in *Diamond Taxicab Association (Toronto) Limited*, [1992] OLRB Rep. November 1143. *Diamond Taxicab* indicates that in all of the previous Ontario taxi cases, with the exception of *Niagara Veteran Taxi*, [1981] OLRB Rep. February 198, the drivers, including dependent contractor owner operators, derived

between 95% to 100% of their income from fares obtained through the company upon which they were found dependent. The dependent contractors working under the banner of Yellow Cabs in Hamilton obtained 80% of their business through Yellow's dispatch system. The dependent contractors operating under the Diamond banner in Metropolitan Toronto obtained only 30% of their business through the company's dispatch system (the other 70% come through flags or street pick ups). On the other hand, *Diamond Taxicab* found it significant that in the Toronto case a substantial portion of these fares (50% of the flag fares and 70% of the dispatch fares) were obtained through company charge accounts and chits.

*Diamond Taxicab* found Diamond drivers to be dependent contractors close to the line dividing dependent from independent contractors. The Employer argues the situation at Richmond Cabs is in sharp contrast. Here the owner operators must fall on the independent contractor side of the line. Only 2-5% of their income comes through Richmond Cabs' dispatch system. Only a maximum 25% of their income, and probably far less, comes from Richmond Cabs' charges. Their economic dependence on Richmond Cabs is not established.

(ii) Control and Direction of Work

The Employer cites *Diamond Taxicab, supra*, for the proposition that the entity from which dependent contractors derive a substantial part of their income must also exercise "*detailed control* over the performance of their work by means of an elaborate system of written or unwritten rules and disciplinary responses" (p. 71), the chief one being suspension from the company's dispatch system. It argues that Richmond Cabs does not, and cannot, exercise "detailed" control over the owner operators under its banner.

The Employer says its power to discipline is limited. It can only suspend the licenses required by owner operators to operate their taxicabs in two circumstances: when the Airport Authority orders the suspension and when an owner operator defaults payment under the Shareholder Dispatch Agreement. Under these limited circumstances, only three operators have ever been suspended. None have been suspended since March of 1989; and none are likely to be suspended in the future unless there is a "big time material breach" under the Shareholder Dispatch Agreement.

The Employer agrees it has temporarily suspended the dispatch rights of owner operators. As this has no effect on their airport pick up rights, however, such "Code 6" suspensions impact on only 2-5% of their income. The result, argues the Employer, is that it is "basically powerless to enforce rules which are unpopular with them" and that decisions to temporarily suspend airport pick up rights, which affects 95-98% of their income, are made *exclusively* by the Airport Authority. Richmond Cabs functions only as a *liaison* between owner operators and the Airport Authority: on receiving a request from the Authority for explanation of a passenger complaint it has received, Richmond Cabs obtains and forwards the driver's explanation.

The Employer says the Airport Authority directs and controls the airport taxi line and therefore controls 95-98% of the work of the owner operators. It points to the extensive taxi call up procedures, driver conduct rules, vehicle standard requirements, and discipline and termination provisions established by the Authority and set out in the Authorization Agreement. It is the Authority that sets the meter rates charged by drivers. It requires Visa and Master Charge be accepted in payment of fares. It prohibits the solicitation of fares at the airport. The Employer says the Authority can and does enforce these rules. It points to the minutes of the airport Taxi Drivers' Committee (established by the Authority to deal directly with driver's problems) and a petition from airport drivers to the Authority outlining taxi line problems at the airport as indicating the airport drivers themselves recognize it is the Authority which primarily controls their work, sets the rules and imposes the discipline.

(iii) Risk of Losses, Chance of Profits

The Employer says that owning shares and operating their airport taxi is a business venture for the vast majority of owner operators. They earn profits as a result of their ingenuity and entrepreneurial initiative, the leasing out of their taxicabs, and the sale of their shares.

The ingenuity and entrepreneurial initiative of owner operators was illustrated by their having Richmond Cabs confirm the flat rate they negotiated with Princess Cruises; by their submission on wheelchair accessible taxicabs to the Motor Carrier Commission; by their occasional undercutting of Richmond Cabs' daily lease price to its fleet drivers in order to secure their own drivers; by their efforts to arrange trips on their own; by their direct dealings with the Authority on fare cutting by limousine drivers; and by their decisions to lease out their cabs.

The Employer says that almost all of the owner operators lease out their taxicabs to earn additional income. It says four of the owners do not drive their cabs at all. They work full time elsewhere and lease out their cabs full time. Nine of the 20 cabs in issue are leased to others and are *not* driven primarily by their owners. All or most of the income arising from the shares in these nine taxis comes from third party lessees. While the remaining 11 cabs are currently driven primarily by their owners, most are leased out regularly to cover night and weekend shifts, vacations and other unplanned absences.

The Employer notes the estimate of one union witness that 23 drivers are currently driving on a lease basis for the 18 owners. It says the owners have, and take advantage of, a clear capacity to vary their income by employing others. This, in addition to the profits (or losses) the shareholders make when they sell their shares, establishes them as independent contractors who earn profits and risk losses through the management of their assets.

(iv) Legal Action against Richmond Cabs

The Employer says the actions taken by the owner operators, *in their capacities as shareholders*, before the Securities Commission and in the courts points to the *bona fides* of their independent shareholder relationship with Richmond Cabs and demonstrates their independent contractor rather than employee status.

(v) Prior Submissions on the Airport Authority

The Employer points to submissions made by the Union in its earlier application to the Canada Labour Relations Board for a unit of "all employees driving taxi cabs from the Vancouver International Airport on a regular basis". Such a unit would have involved the owner operators and lease drivers of all nine taxi companies operating at the airport. The Employer agrees with the Union's argument in those submissions that the Airport Authority was the employer of, *inter alia*, the Richmond Cabs' owner operators because it "controls the remuneration" and administers "extensive rules" governing their conduct, including "termination of the Airport Drivers' Card thereby effectively dismissing the driver".

The Employer also cited a letter written to the Airport Authority by Union organizer Kuldip Brar, in which he expresses his hope that disciplinary penalties against him by the Airport Authority "are not in response to my involvement in the Taxi Drivers' Committee of the United Steelworkers organizing campaign, an involvement you are well aware of". The logical inference from this statement, says the Employer, is that Brar shared the Union's belief that the "employer" of the owner operators was the Airport Authority and not the individual cab companies, since the campaign he was referring to was vis-a-vis the Airport Authority.

#### IV. POSITION OF THE UNION

The Union says the owner operators are dependent contractors, completely dependent on Richmond Cabs for access to their work opportunities and their income. They are thoroughly integrated into operation of Richmond Cabs which exercises ultimate control over their day-to-day activities and the continuity of their employment as taxicab operators.

(i) Economic Dependence: Company Licenses

The Union locates the economic dependency of the owner operators in the airport licenses and plates held by the Employer. Without the use of these licences, they would not be able to operate a taxi at the Airport. There are no independents at the Airport. To have access to the airport taxi line, which accounts for the bulk of their work and income, owner operators must drive under the banner of one of the nine taxi companies licensed by the Airport Authority.

The Union says this dependence on Richmond Cabs is enhanced by the fact that the additional income owner operators derive through the Employer's dispatch system is at Richmond Cabs' absolute discretion. While dispatched fares presently account for only 2-5% of their income, prior to March 1993 they accounted for some 20% because of the additional dispatch rights outside of Richmond and the airport zone. Company charges (which account for up to 25% of their income) contribute further to the dependence of the owner operators upon Richmond Cabs, as did the Company's past assistance in financing share acquisitions and insurance coverage, and its present policy of requiring owner operators to obtain its consent when they seek financing by encumbering their taxis.

Dependence also results from owner operators committing their capital to the Company by transferring legal title to their vehicles to Richmond Cabs and registering them in its name. The Union says the overall result of the terms and conditions set out in the Shareholder Dispatch Agreements is to establish a financially secure, long term relationship between the owner operators and the Company. The term of the agreement is perpetual unless the shares are sold or assigned, the agreement is terminated by the Company for default, or the agreement is frustrated by loss of license, in which case it must be renegotiated.

(ii) Control and Direction of Work

The Union argues that Richmond Cabs shares the day-to-day control and direction of the work of its drivers -- owner operators, drivers for owner operators and fleet drivers -- with the Airport Authority. The ultimate control, however, rests with Richmond Cabs. It cites *Aspen Planers Ltd.*, BCLRB No. 250/83, at pp. 15-16, for the proposition that contractors can be found to be economically dependent upon one entity even though that entity shares control with another, providing it exercises ultimate control.

The Union points to the Authorization Agreement between Richmond Cabs and the Airport Authority as vesting this ultimate authority with the Employer. While disciplinary decisions are made by the Authority, it is Richmond Cabs which assesses and implements them. In this capacity, the Employer's role extends well beyond the "liaison" function suggested by the Employer. The Employer also acts as an advocate for drivers under its banner who are the subject of the Authority's complaints, and it has the power to supplement the discipline imposed by the Airport Authority. In the case of Kuldip Brar, the Employer's own assessment of his infraction of airport rules caused it to impose discipline which significantly exceeded the penalty recommended by the Authority.

The Union says that Richmond Cabs' rules parallel and supplement those of the Authority. The Union agrees that these rules have not been enforced in some cases. It argues this results from the Employer exercising its discretion not to enforce its rules, rather than from any lack of authority under the Shareholder Dispatch Agreement to do so. The rules are in place, new ones can be formulated, and the Employer has the right to enforce them.

The Union says the Employer's control over the sale of shares exists and has been used, pointing to MacLean's evidence that on at least one occasion the Employer has refused permission for a transfer of shares. Further, the Union says Richmond Cabs' owner operators do not have the prerogative to work wherever they choose. It points to the restrictive covenant in the Shareholder Dispatch Agreement which prevents them from having any involvement in another cab, limousine or courier company without the written consent of the Employer. This potential control remains not only for the period in which they drive under the Employer's banner, but extends up to a year after the relationship has ended.

All these examples, along with the Employer's broad power to terminate its agreement with the owner operators for default of payment or for default of "any covenant" in the agreement, go to establishing Richmond Cabs' ultimate control and direction over the work at issue. The result of these extensive controls is that the owner operators are dependent contractors more analogous to employees than to independent contractors.

(iii) Chance of Profit

The Union says the owner operators have little opportunity for entrepreneurial initiative and very little latitude for limiting their expenses. Municipalities and the Airport Authority set the meter rates which all taxi drivers must charge. The Airport Authority sets the level of insurance required by each taxi. Richmond Cabs sets the monthly fees owner operators must pay to operate their cabs at the airport. These are set by formula. In addition, the owner operators have only a marginal ability to vary their revenues. They cannot solicit fares at the airport. They cannot turn down short, uneconomic fares from the airport taxi line.

The Union says there is only limited use of replacement drivers by owner operators; and where it occurs, it is confined to a weekend shift, to some vacations, and to occasional unplanned and temporary circumstances such as experienced by Baljit Gill. The Union argues that Prem Gill, who drives Cab 10 in conjunction with his father, is analogous to a part time employee in his dependency on the Employer. Of the owner operators it seeks to represent, the Union says only Sachi Ananda, Ranjit Ahulwalia and Indermohan Sohi lease out other cabs in which they have a share, in addition to regularly driving their own. Harbhajan Sandhu leases out the cab in

which he has a half share and drives for the Company as a fleet driver. The Union says that in none of these circumstances do the owner operators profit from the labour of others. Their use of other drivers springs from financial necessity and is subject to the direction and control of Richmond Cabs.

With respect to the sale of shares, the Union points to an analogous situation in Metropolitan Toronto described in *Diamond Taxicabs, supra*, at pp. 9-10. It cites that case for the proposition that the market value of cab licenses and fluctuations in their price does not preclude a finding of dependent contractor status.

(iv) Union Submissions to Canada Labour Relations Board

The Union says its submissions to the Canada Board involved an application covering all airport drivers for nine different companies with a wide variety of differing arrangements covering their drivers. They must be considered in that global context. Further, the Union points to the decision of the Canada Board in *Vancouver International Airport Authority et al.*, CLR B Letter Decision No. 1143, March 25, 1993, which, on dismissing the Union's application, made the following comments:

...the relationship between the cab drivers working out of the airport and the airport authority must be put in perspective. It is not denied that the Authority's requirements may influence the income of taxi drivers who operate out of the airport. Yet that is not sufficient to create economic dependence for the purpose of the acquisition of bargaining rights. It is our finding that overall, the economic situation of the drivers, is for labour relations purposes, determined by the terms of their relationships with the cab companies, not by their relationship with the airport authority. It may be that the Authority influences their conditions of work in a significant way, since it has a definite say on what takes place on its premises. Yet even that depends to some extent on the terms of the relationship between the drivers and the cab companies. A close review of those drivers' complaints or demands shows that one of the main bones of contention is the dispatch fees they claim they should not have to pay to the taxi companies. What better illustration could we find of their economic relationship with these companies? (p. 2-4)

## V. LEGAL FRAMEWORK

The issue before me is to interpret the dependent contractor provisions of the Code in the context of the taxi industry and of the relationship between Richmond Cabs and the owner operators driving under its banner at the Vancouver International Airport.

### (a) British Columbia Jurisprudence

Under the Code, dependent contractors are included in the definition of "employee". A "dependent contractor" is defined in Section 1(1) as:

...a person, whether or not employed by a contract of employment or furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

The policy basis for the Code's dependent contractor provisions is to achieve more equal bargaining power between the dependent contractor and the employer. When the Board makes a determination that a group of persons at the periphery of the employment relationship (but more analogous to employees than to independent contractors) are dependent contractors, it is for the specific labour relations purpose of allowing them to take advantage of the collective bargaining rights created by the Code: *Fownes Construction Co. Ltd.*, BCLRB No. 82/74, [1974] 1 Can LRBR 452, at p. 458. At issue here is whether the owner operators included in the Union's application for certification at Richmond Cabs satisfy the definition of dependent contractor, and whether they are therefore entitled to the benefits of collective bargaining under the Code.

The dependent contractor falls in the shaded middle area of an economic spectrum, at one end of which lies the individual employee and at the other end the true entrepreneur. The distinction between employment and self-employment is genuinely fluid and difficult to draw at

the margins. In the case before me the question is whether these owner operators are more analogous to employees in their economic dependence upon, and in their obligation to perform duties for, Richmond Cabs; or are they contractors more analogous to true entrepreneurs in the independence and detached basis of their taxi operation? The test is a comparative one: on which side of this economic spectrum do they fall?

This determination requires reference to a broad range of labour relations considerations. The terms and conditions of written contracts are important, but they are not necessary. Rather, the Board will evaluate the entire business relationship between the parties from a practical and functional perspective with a view to the definition of dependent contractor: *West Fraser Mills Ltd.*, BCLRB No. B97/93, at p. 17. In *West Fraser* the Board reviewed the decisions of the former Board and Council (most of which deal with trucking) and identified the following factors which have been considered in making dependent contractor determinations:

1. the way the industry operates;
2. the type of work and its sources;
3. the nature of the applicant's [contractor's] operations;
4. the organization of the employer's operations and the degree to which the contractors are a continuing part of it (does the employer generally expect the contractors to work on a daily basis and are the contractors generally available for work during working hours; is a long term, stable relationship between the parties evident?);
5. any contractual arrangements between the parties and others;
6. the type and extent of control and direction exercised by the employer with respect to such matters as hiring, firing, discipline, work assignment, hours of work, and so forth;
7. the nature and manner of compensation and how it is determined;
8. the percentage of income which the contractor derives from the employer (generally the lion's share of the contractor's income must be derived from the relationship with the employer);
9. the opportunity for the contractor to make a profit through the exercise of independent entrepreneurial judgment;
10. the contractor's opportunity for economic mobility and whether the contractor advertises or solicits customers elsewhere. (pp. 18-19)

The application of these criteria to the taxi industry in British Columbia has been limited. The Board has found commissioned taxi drivers to be employees of their respective taxi companies in *Kelowna Cabs (1981) Ltd.*, BCLRB No. 230/85, and in *Bluebird Cabs Ltd.*, BCLRB No. B86/93. To date, however, the Board has not dealt with or certified dependent contractors in the taxi industry.

(b) Ontario Jurisprudence

In contrast, the Ontario Board has had considerable experience applying a "dependent contractor" definition, identical to that under the British Columbia Code, in the Ontario taxi industry. The Ontario Board has found taxi drivers, including owner operators, to be dependent contractors in the following cases: *Blue Line Taxi Co. Ltd.*, [1979] OLRB Rep. March 398; *Niagara Veteran Taxi*, [1981] OLRB Rep. February 198; *Windsor Airline Limousine Services*, [1981] OLRB Rep. March 398; *Hamilton Yellow Cab Co. Ltd. et al.* (1988), 17 CLRBR (NS) 129; *Airline Limousine et al.* (1988), 88 CLLC 14,199; and *Diamond Taxicab Association (Toronto) Limited*, [1992] OLRB Rep. November 1143.

In determining whether taxi drivers are dependent upon and under an obligation to perform work and services for an employer, the Ontario Board has looked at a series of factors, weighing those which point in one direction or the other and assessing them in the light of labour relations considerations: *Airport Limousine*, at p. 14,215.

All of the Ontario cases deal with owner operators of a single car. Owners of more than one car have been found by the Ontario Board to be independent contractors because they employ others on a regular, ongoing basis. The Ontario Board has ruled that a dependent contractor determination in these circumstances would create a conflict of interest by placing into a bargaining unit contractors who are both employees and employers: *Canada Crushed Stone*, [1977] OLRB Rep. December 806.

Factors which suggest independent contractor status, but which have been found not to be determinative, include (i) ownership of licenses, (ii) ownership of vehicles, (iii) the potential for capital gains on assets, (iv) the absence of direct wages and deductions, and (v) the hiring of

replacement drivers. These are discussed briefly below:

(i) Ownership of Licenses: While ownership of licenses by taxi operators does not, by statutory provision, preclude a finding of dependent contractor status (*Diamond Taxicab*), lack of ownership of licenses is linked to dependent contractor status. In *Airline Limousine*, for example, the licenses and plates to operate limousines at the Toronto International Airport were issued to five companies by Transport Canada and were contracted out to individuals who entered into standard form service contracts with the companies. The Ontario Board noted that "by controlling the plates the companies effectively control their limousine fleets" (p. 14,201).

(ii) Ownership of Vehicles: While ownership of vehicles by taxi operators does not, by statutory provision, preclude a finding of dependent contractor status (*Diamond Taxicab*; *Blue Line Taxi*), lack of ownership is linked to dependent contractor status. In *Airline Limousine*, the limousine companies operating at the Toronto International Airport required all vehicles operating under their licenses to be registered in their name. The Ontario Board commented on this requirement:

...what independent contractor or entrepreneur is required, in order to work, to transfer title to an essential "tool" of his trade (here the vehicle) to the purchaser of his services, and why should he feel compelled to do so unless his activities are totally subservient to and integrated into the organization of the purchaser? (p. 14,217)

(iii) Potential for Capital Gains on Assets: Licenses to operate taxis, and contracts to use licenses held by others, have a capital value and are sold on the open market by their owners. This does not preclude a finding of dependent contractor status: *Diamond Taxicab*, at p. 9; *Airline Limousine*, at p. 14,201.

(iv) No Wages or Deductions: None of the taxi drivers, including the owner operators, earn wages from the company under whose banner they drive. All derive their income from passenger fares. None of the taxi companies make UIC, CPP or income tax deductions or payments for their drivers. These factors do not preclude a finding of dependent contractor status in the taxi industry: *Niagara Veteran Taxi*, at pp 202-203; *Diamond Taxicab*, at p. 24; *Hamilton Yellow*, at p. 137.

(v) Replacement Drivers: It is common for owner operators in the taxi industry to employ replacement drivers to fill in for the times they cannot work: *Hamilton Yellow Cab*, at p. 152; to make best use of their equipment, to make ends meet, and to earn a reasonable living: *Windsor Airline Limousine*, at pp. 401 and 404; to share the costs or lighten their work load: *Airline Limousine*, at p. 14218; to serve as an occasional helper: *Blue Line Taxi*, at p. 1067. The taxi company may have a veto over any driver under its banner, but it is usually not involved in the arrangements between owners and their drivers. The replacements are subject to the same rules and control by the taxi company as the owner operator: *Hamilton Yellow Cab*, at p. 152. In these circumstances, an owner operator is deemed to be an "employer" in form only.

On the other hand, the Ontario Board has found the following factors to be significant to findings of dependent contractor status in the taxi industry: (i) source of income, (ii) control of work, (iii) payment of regular fees, and (iv) little scope for entrepreneurial initiative. A brief discussion follows:

(i) Sources of Income: All of the cases focus on where drivers regularly derive a substantial portion of their income as a key indicator of dependency. Most of the cases focus on fares obtained through the company's dispatch system as the source of most of the drivers' income. *Diamond Taxicab* also pointed to the corporate accounts of taxi companies as a significant and reliable revenue base for their drivers. *Blue Line Taxi* and *Airline Limousine* focused on the companies' airport rights as controlling the work flow upon which their drivers are dependent for their income.

(ii) Control of Work: This factor was argued extensively before me and is given considerable attention and weight in all of the Ontario cases. All found dependency to be linked to an employer's ability to exercise control and direction over the work of drivers, including the owner operators.

The extent of control and direction varies from case to case. In some taxi companies, such as the largest ones in Metropolitan Toronto with 605 and 275 cabs respectively, the employer's control has been described as "detailed" and based on an "elaborate system of written and unwritten rules and disciplinary responses": *Diamond Taxicab*, at p. 71. In other taxi

companies, such as two smaller ones in Metropolitan Toronto with 186 and 123 cars respectively, the arrangements are less formal: *Diamond Taxicab*, at p. 53.

Control over the work of drivers is shared with public bodies which regulate the industry: *Niagara Veteran Taxi*, at p. 205. Government authorities issue licenses, set meter rates, regulate driver conduct, establish vehicle standards, and inspect taxis. A taxi company is only one party in the taxi industry's "web of control": *Diamond Taxicab*, at p. 72. In Metropolitan Toronto, some suspensions of taxi drivers "from the dispatch system are imposed at the request...of the Metro Toronto Licensing Commission": *Diamond Taxicab*, at p. 43.

Rules are not hard and fast and there is considerable discretion exercised in their application: *Diamond Taxicab*, at p. 39. There are practical limits to the extent to which rules can be proclaimed and enforced; rules on dress and the use of cellular phones, for example, have been unenforceable: *Diamond Taxicab*, at p. 51. The drivers in all of the cases reviewed here are free to determine their own hours of work, days of work and vacations. Discipline for rule infractions is administered at the discretion of the taxi company and usually takes the form of temporary suspensions from the dispatch system. Terminations are rare.

Contractors in the taxi industry are clearly subject to a range of controls from a number of sources. The test of dependency is not whether an employer exercises a high level of control or a low level of control over a contractor. The test of dependency, particularly in an industry characterized by a web of shared controls, is whether the employer exercises "ultimate" control over the work and continued employment of the contractor.

I adopt this test from *Aspen Planers Ltd.*, BCLRB No. 250/83. In that case, the Board found that Aspen and its logging contractors shared responsibility for the assignment of work to log haulers. Supervision, direction and control of daily activities was also shared, as was discipline and dismissal of the log haulers. However, Aspen exercised the "ultimate" control over their day-to-day activities and over the continuity of their employment.

(iii) Payment of Regular Fees: All the taxi drivers, including owner operators, pay regular fees to the taxi company under whose banner they drive. Their willingness to pay such fees underscores their dependency upon the company: *Diamond Taxicab*, at p. 73. In return for

the fees, owner operators receive an assortment of rights and privileges which give them access to work and income opportunities and serve to integrate them into the company's operation. These can include use of the company logo and colours, use of licenses held by the company, benefit of the company's advertising and goodwill, dispatch rights, stand rights, access to company charge account customers, charge collection services, taxi equipment rentals, discount gasoline, and so on.

(iv) Few Independents, Limited Scope for Entrepreneurial Initiative: There are few independent taxi operators in urban markets. This further underscores the dependence of owner operators on their taxi companies: *Hamilton Yellow*, at p. 139; *Diamond Taxicab*, at p. 73. Furthermore, the cases show "very little evidence of entrepreneurial activity such as self-promotion, advertising, the aggressive solicitation of business from other competitors, product differentiation, price competition or the organization of one's business to take advantage of limited liability or the tax laws": *Airline Limousine*, at p. 14216.

There was some evidence of "minor entrepreneurial activity" by drivers in Metropolitan Toronto "through highflagging, acceptance of credit cards, acceptance of other brokers' corporate chits, and use of cellular phones which enable customers to contact drivers directly without having to go through the dispatch system": *Diamond Taxicab*, at p. 71. However, they were still found to be dependent contractors.

(c) Dependent Contractors as "Employers"

Before setting out the factors to be applied in determining the status of the owner operators driving under the Richmond Cab's banner, a significant policy difference between the British Columbia and Ontario Boards must first be examined.

The policy of the Ontario Board to preclude owners of more than one vehicle from dependent contractor status has not been adopted by the British Columbia Board. This has been set out in *West Fraser Mill Ltd.*, BCLRB No. B442/93 (Reconsideration of BCLRB No B97/93):

...[We] are not willing to adopt the principle in Ontario that a person cannot be an employer and a dependent contractor (unless it is merely with a helper) at one and the same time. We think that

too narrowly restricts the inherently somewhat contradictory nature of a dependent contractor relationship, which is neither clearly an employer-employee relationship, nor an independent contractor-customer relationship. It could also defeat the purpose of the legislation...to allow for the certification of persons who are in a position of dependence upon another entity that more closely resembles that of an employee than that of an independent contractor. (pp. 18-19)

The *West Fraser Mills* reconsideration panel cited the following comments from *Fownes Construction, supra*:

What is to be done with owner-operators who own more than one truck and thus employ other drivers to operate them? A person who owns quite a few trucks, whose main concern is renting the trucks with a driver, and who does not regularly drive a truck himself would not come within the scope of the "dependent contractor" provision because he does not "perform work or services" in a manner analogous to an employee. Another person with several trucks may drive one of these trucks regularly, but because of the total character of his business, should not be considered to be "dependent". However, we do not believe that an individual who owns perhaps two trucks and thus employs a driver to operate one of them, is necessarily removed from the category of "dependent contractor". There is nothing illogical about finding that an individual is, at one and the same time, both an employer and a dependent contractor. That always turns on a judgment about the facts of the particular case. (p. 19)

The reconsideration panel went on to find in that case that a log hauler who owned three trucks with three employees, and who acted as a spare driver for the three trucks, was an independent contractor. The original panel also dealt with an owner of two trucks who regularly drove one truck himself, employed a driver for the other, and derived all of his income from West Fraser. It found him to be a dependent contractor. This determination was not raised on reconsideration and stands.

(d) Summary of Applicable Factors

In light of the above analysis, I find that an owner operator's economic dependence and obligation to perform services in the taxi industry will be determined by examining the following factors, the presence of which will indicate dependency:

1. Source of Income

Do the contractors derive a substantial portion of their income on a regular basis from sources within the control of the company? This may be from a combination of fares dispatched by the company under whose banner they drive, flagged fares paid through the company's corporate accounts, or fares obtained through the company's contracted taxi stand rights.

2. Control of Work

Does the company under whose banner the contractors drive exercise ultimate control over their work and over the continuation of their employment?

3. Integrated into the Employer's Business

Are the contractors an ongoing part of the operating organization of the company, dependent upon it, and under an obligation to perform work or services for it?

4. Payment of Regular Fees

Do the contractors pay regular daily, weekly or monthly fees to the company for dispatch services, taxi stand rights, or other services?

5. Entrepreneurial Initiative

Is there significant scope for entrepreneurial activity on the part of the contractors? This factor is less significant in the taxi industry than in other industries. There are few independent taxi operators and there is little scope for entrepreneurial initiative. Further, the chance for capital gains or losses on the

sale of assets does not preclude a finding of dependent contractor status.

6. Employment of Others

Does the contractor own a single vehicle and employ replacement drivers? This will not preclude a finding of dependent contractor status. Does the contractor own more than one vehicle and employ additional drivers on a regular and ongoing basis? This will not preclude a finding of dependent contractor status depending on the circumstances of the owner's business and providing the owner also drives regularly in a manner analogous to an employee.

VI. DECISION

I will now apply the above factors to the owner operators driving under the banner of Richmond Cabs to determine whether they are dependent contractors within the meaning of the Code.

(i) Source of Income

I find the owner operators before me are economically dependent upon Richmond Cabs for almost all of their taxi income. I accept that the bulk of their income is derived from fares obtained through the airport taxi line, and that almost all of their income is derived from a combination of these fares plus fares dispatched through the Employer's dispatch system. While the proportions may vary from time to time at the Employer's discretion, as occurred between 1989 and 1993 when additional dispatch rights were granted to the owner operators, their dependence upon the Employer for their work and income has been constant.

Richmond Cabs' drivers -- owner operators, drivers of owner operators and fleet drivers - do not have access to the airport taxi line in their own right because they do not hold the required licenses in their own right. Their access to the line is solely a function of their association with the Employer which, along with eight other companies, has contracted for a share of the taxi line, the largest taxi stand in the province. I conclude that Richmond Cabs'

airport drivers are serving the Employer's share of airport customers, not their own.

I do not agree that the Employer sold its rights to conduct business at the Airport when it sold shares providing beneficial use of the licenses required to operate there. Nor do I accept its franchise analogy whereby its sale of shares to owner operators represented a sale of franchises to operate 20 independent businesses at the Airport under its name. Rather, I find that this particular sale of shares is analogous to the subcontracting of airport plates described in *Airline Limousine, supra*. The drivers have use of licenses and plates. They do not have control of them.

The airport licenses and plates are controlled by the Airport Authority and the Employer, either of which can take them away from the owner operators. The remaining plates are controlled by the Employer, which retains the ultimate right to terminate the agreement for default and to recover licenses and plates through its option to purchase the shares on termination of the agreement.

(ii) Control of Work

I disagree with the Employer that it exercises very little control over the airport drivers. The Employer's *Driver Information Package* is detailed and comprehensive. It applies to all drivers, including owner operators and their drivers, in the Richmond Cabs' system. It provides the basis for the Employer's day-to-day direction, by computer and radio, with respect to dispatches, charges, accident reports, and other required information and instructions. I accept that the Employer uses its discretion under the Shareholder Dispatch Agreement to enforce its rules and procedures; but I also conclude from the evidence on license suspensions, airport driver permit suspensions, and "Code 6" dispatch suspensions that the Employer has the power to discipline owner operators and their drivers and has done so -- at times at the request of the Airport Authority and at times on its own initiative.

I agree that the Airport Authority also exercises direction and control over the work of owner operators. The coordination and supervision of the airport taxi line by the airport commissionaires is a significant feature of their daily work. However, the Airport Authority is not the employer. Its control is shared with Richmond Cabs, which has the responsibility of

ensuring that all the drivers operating taxis licensed under its Authorization Agreement with the Airport Authority comply with the detailed terms and conditions set out in that Agreement. The Authorization Agreement gives the Employer this responsibility of enforcement and the Shareholder Dispatch Agreement gives it the power of enforcement over the owner operators and their drivers. I am satisfied this power is real and is exercised by the Employer.

I agree with the Union that the Employer's role with respect to disciplinary decisions by the Airport Authority goes beyond mere "liaison" between owner operators and the Authority. I accept that Richmond Cabs' very experienced General Manager also acts as an advocate for owner operators and their drivers in his dealings with the Airport Authority. I further conclude that, in addition to a genuine desire to assist owner operators and their drivers who are the subject of airport discipline, the Employer recognizes it has its own airport interests and licenses to defend and, from time to time, imposes discipline upon owner operators for this purpose.

This is illustrated in the suspension of all of Kuldip Brar's vehicle licenses. MacLean testified that the Employer supplemented the Airport's recommended discipline to defend its interests in its licenses. He stated, "the Airport was going to cancel the license forever. We took all his licenses away to keep him off the road. We exercised control to protect *our licenses*. They may have pulled *our [airport] license*" (emphasis added).

The Employer has ultimate control over the owner operators because its relationship with them continues after the Airport Authority suspends the licenses and/or driver permits required to operate at the Airport. In these circumstances owner operators continue paying their dispatch fees to the Employer. After being suspended from working at the Airport for a week, they are entitled to full dispatch rights from the Employer at double dispatch fees. If their licenses or permits are cancelled by the Airport, the relationship is terminated -- not as a result of action by the Airport Authority, however, but by agreement as set out in the Shareholder Dispatch Agreement. For these reasons I find that the continuity of their employment servicing Richmond Cabs' customers rests with the Employer and not with the Airport Authority.

Furthermore, I find that the Employer possesses a broad power, beyond that just mentioned, to terminate the Shareholder Dispatch Agreement on default of payments or covenants by the owner operator. It is not surprising that this power has not been used; and I

accept Gordon MacLean's view that it could only be exercised for a "big time material breach" of the agreement without there being "a lot of trouble". Nevertheless, and no matter how benignly exercised, the power is real, is perceived to be real, and came close to being used in the case of Vic Chander, who met his defaulted payments the day after his plates were pulled.

(iii) Integrated into the Employer's Business

This is an integrated business -- and it is Richmond Cabs' business. The agreement between the owners and the Employer is explicit: the owner's rights under the Shareholder Dispatch Agreement are "for the sole purpose of carrying on the business of the Company at the Vancouver International Airport". The owners are confined to working in one sector of the Employer's overall taxi business, even though the licenses of which they have beneficial use have much broader application. The Employer has discretion, however, to expand the dispatch capacity of its fleet by drawing owner operators into the dispatch system when required. This discretion has been exercised at New Year and during snow storms. It is available to the Employer, as provided in the Shareholder Dispatch Agreement, whenever "taxi service demand exceeds fleet capability".

The agreement between the Airport Authority and Richmond Cabs is also explicit as to whose business the airport taxi line is. The Airport Authority has contracted with Richmond Cabs and it deals with Richmond Cabs. Correspondence between the two clearly demonstrates that the Authority sees all Richmond Cabs' drivers, including owner operators and their drivers, as agents of the Employer. It conducts itself accordingly in enforcing its contract with the Employer.

The owner operators are integrated into the Employer's business in a myriad of ways. Richmond Cabs advertises its fleet of "73 cabs serving Richmond and the Vancouver International Airport". All 73 cabs -- driven by owner operators, their drivers, and fleet drivers - - present a common corporate presence to the public. They operate under the same banner and logo; use the same receipts and the same computerized dispatch system; and accept the same charge accounts, vouchers, gift certificates and chits. All 73 vehicles are registered in the Employer's name. They are all insured in the Employer's name under its fleet insurance policy which it keeps in force. All the licenses under which they operate are held in the Employer's

name. The Company's *Driver Information Package* places them all on the same footing with respect to the rules and procedures of the Employer.

The owner operators have tied their fortunes to Richmond Cabs. They can't take their licenses to another taxi company because they don't own them. (Even if they could, this would merely shift their dependency from one company to another and would be analogous to an employee leaving the employ of one company and becoming an employee of another: *Diamond Taxicab*, at p. 72.) The owner operators can not work for another taxi company for a year after terminating their relationship with Richmond Cabs. Transferring legal title to their vehicles to Richmond Cabs has the effect for Richmond Cabs of securing the financial obligations of the owners operators to the Employer. If owner operators default on any financial obligation to Richmond Cabs, upon termination they must pay off these debts before title is transferred back to them.

I am satisfied that the owner operators are integrated into, dependent upon, and obligated to perform work and services for Richmond Cabs. They do not compete with Richmond Cabs as independent operators. They do not compete with each other as independent businesses. Neither the company's dispatch rules nor the airport's taxi line procedures permit it. Nor does the Employer's segmentation of its market allow it. The owner operators do not have a separate existence in the taxi business apart from the Employer's business.

(iv) Payment of Regular Fees

All of the Richmond Cabs drivers -- owner operators, their drivers, and fleet drivers -- pay such regular fees. Owner operators pay monthly dispatch fees to the Employer. Fleet drivers pay daily and weekly lease fees to the Employer. Drivers for owners pay lease fees to the owners. This underscores their dependency upon the Employer.

(v) Entrepreneurial Initiative

There are no independent taxi operators at the Vancouver International Airport. Nor is there scope for anything more than minor entrepreneurial initiatives. While the owner operators -- indeed all taxi drivers -- can receive fares over their cellular phones, this is limited. They

cannot turn down short, uneconomic fares from the airport taxi line. Nor can they turn down such fares from the dispatch system without paying the penalty of going to the end of the queue. They cannot refuse to accept the Company's charge account or credit card customers, or to accept payment by Company vouchers, gift certificates or coupons, despite their preference for immediate cash rather than delayed payment. They must accept the flat rates set by the Company. The Company determines which credit cards will be accepted and has refused to accept American Express despite requests from the owner operator to do so. Even when airport drivers themselves took the initiative in negotiating a flat rate with Princess Cruises, the Employer made the final decision to implement the rate.

(vi) Employment of Others

With certain exceptions, which I will deal with below, all of the owner operators included in this application employ only replacement drivers as discussed above.

Considering all the above factors in combination, I conclude that these owner operators are dependent contractors within the meaning of the Code.

Sachi Ananda, Indermohan Sohi, and Ranjit Ahulwalia own more than one vehicle. Ananda owns two vehicles, one of which he drives himself. The second is leased to a friend on a regular basis. Sohi owns one vehicle, which he drives, and has a half interest in a second cab which is driven by a lease driver. Ahulwalia owns one vehicle, which he drives, and has a half interest in two additional vehicles which are driven by lease drivers.

I conclude from the evidence that these three individuals each own four shares entitling them to operate the equivalent of two taxi cabs at the airport under the Richmond Cabs banner. In light of the policy set out in *West Fraser Mills (Reconsideration)*, *supra*, such ownership does not preclude a finding of dependent contractor status. On the basis of all of the above factors in combination, I find they are also dependent contractors within the meaning of the Code.

Prem Gill is a part time owner operator and shares driving his cab with his father on a regular basis. Gill also works as a dispatcher for Langley Cabs. While Gill is the only part time owner operator at Richmond Cabs, part time driving is not unusual among the Employer's fleet

drivers. In neither case does this preclude a finding of dependent contractor status. An individual may be economically dependent on several sources of income without being in business as an independent contractor: *Flyer Force, A Division of Southam Inc.*, IRC No. C113/89. I find Prem Gill to be a dependent contractor within the meaning of the Code.

Harbhajan Sandhu is a fleet driver who also holds a half interest in a cab which is driven by a lease driver. Sandhu is a dependent contractor by virtue of being a fleet driver.

Nikoo Shayan, Rajinder Dhaliwal and Gurpreet Randhawa do not drive their vehicles, do not come within the scope of the dependent contractor provisions of the Code, and are not included in the Union's application.

No issue has been raised as to the appropriateness of combining dependent contractor owner operators with dependent contractor fleet drivers in the same unit as proposed by the Union.

## VII. SUMMARY

In summary, all of the owner operators set out in the Union's application (Nikoo Shayan, Rajinder Dhaliwal and Gurpreet Randhawa are not included in the application) are dependent contractors within the meaning of the Code and are appropriately included in the bargaining unit for which the Union has applied.

As a result of this ruling, I order that the ballots cast in the representation vote be counted.

LABOUR RELATIONS BOARD

HANS BROWN  
VICE-CHAIR