CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

SUPERSHUTTLE INTERNATIONAL INC
c/o MARRON & ASSOCIATES LAWYERS
Petitioner

Precedent Tax
Decision No. P-T-502

EMPLOYMENT DEVELOPMENT DEPARTMENT
Respondent

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

KATHLEEN HOWARD

ALBERTO TORRICO

ROBERT DRESSER

ROY ASHBURN

Pursuant to section 409 of the California Unemployment Insurance Code, AO-279534(T) is hereby designated as Precedent Decision No. P-T-502.

Adopted as Precedent: February 13, 2013

Case No.: AO-279534, AO-279535, AO-279536, AO-279537
Petitioners: SUPERSHUTTLE INTERNATIONAL, INC.
SUPERSHUTTLE LOS ANGELES, INC.
SUPERSHUTTLE OF SAN FRANCISCO, INC.
SACRAMENTO TRANSPORTATION SERVICES, INC.

In Case No. AO-279534 (FO Case No. 3214568), Petitioners SuperShuttle International, Inc.[1] (hereafter "SuperShuttle") and SFO Airporter, Inc.[2] appealed from the decision of the administrative law judge that denied the Petitioners' petition for reassessment of an assessment issued under section 1127 of the Unemployment Insurance Code (hereafter "code") covering the period of January 1, 2007 through June 30, 2009, for a total of 10 calendar quarters. The Employment Development Department (the Department or EDD) computed and assessed the amounts of employer and worker contributions payable by Petitioners based on the estimated wages paid for employment by Petitioners' operations in Los Angeles, San Francisco and Sacramento.

In Case No. AO-279535 (FO Case No. 3214569), Petitioner SuperShuttle Los Angeles, Inc. (hereafter "SuperShuttle Los Angeles") appealed from the decision of the administrative law judge that denied the Petitioner's petition for reassessment of an assessment issued under code section 1127 covering the period of July 1, 2006 through December 31, 2006, for a total of two calendar quarters. The Department computed and assessed the amounts of employer and worker contributions payable by Petitioner based on the estimated wages paid for employment by Petitioner's operation in Los Angeles.

In Case No. AO-279536 (FO Case No. 3214570), Petitioner SuperShuttle of San Francisco, Inc. (hereafter "SuperShuttle San Francisco") appealed from the decision of the administrative law judge that denied Petitioner's petition for reassessment of an assessment issued under code section 1127 covering the period of July 1, 2006 through December 31, 2006, for a total of two calendar quarters. The Department computed and assessed the amounts of employer and worker contributions payable by Petitioner based on the estimated wages paid for employment by Petitioner's operation in San Francisco.

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[1] Veolia Transportation acquired SuperShuttle in or about 2006.

[2] SuperShuttle Franchise Corporation, a Delaware corporation, entered into "License Agreement" with Petitioners SFO Airporter, Inc., SuperShuttle Los Angeles, Inc., SuperShuttle of San Francisco, Inc., and Sacramento Transportation Services, Inc., respectively. Each Petitioner was referred to as "City Licensee" in the "License Agreement;" and was a wholly-owned subsidiary of SuperShuttle International, Inc. City Licensee was granted the right to use a unique system of transportation services which SuperShuttle had developed, including without limitation, a demand responsive and/or scheduled airport shuttle serving under appropriate governmental authority providing transportation to passengers traveling to and from specific metropolitan airports and destinations within the general markets surrounding those airports.

In Case No. AO-279537 (FO Case No. 3214571), Petitioner Sacramento Transportation Services, Inc. (hereafter "Sacramento Transportation Services") appealed from the decision of the administrative law judge that denied Petitioner's petition for reassessment of an assessment issued under code section 1127 covering the period of July 1, 2006 through December 31, 2006, for a total of two calendar quarters. The Department computed and assessed the amounts of employer and worker contributions payable by Petitioner based on the estimated wages paid for employment by Petitioner's operation in Sacramento. No penalty of 10 percent of the amount of contributions was added to any of the assessments under code section 1127.

The Board heard oral argument on October 9, 2012. SuperShuttle Drivers; and National Employment Law Project submitted amicus curiae briefs to the Board.

Henceforth, all the above-named Petitioners are referred collectively as "Petitioners" or "City Licensees," unless indicated otherwise.

ISSUE STATEMENT

The issues in these cases are whether or not the franchisee airport shuttle drivers (hereafter "the franchisees," or "the franchisee drivers," "the shuttle drivers" or "the drivers," including their singular forms) are employees of Petitioners during the periods of the assessments. If so, whether or not the petitioners are liable for unemployment, employment training, and disability contributions, personal income tax withholdings, and interest.

FINDINGS OF FACT

Petitioners are passenger stage corporations (hereafter "PSC" or "PSCs") subject to regulation by the California Public Utilities Commission (hereafter "CPUC") pursuant to sections 211(c), 216(a), and 226(a) of the Public Utilities Code. A PSC "includes every corporation or person engaged as a common carrier, for compensation, in the ownership, control, operation, or management of any passenger stage over the public highway in this state between fixed termini or over a regular route." (Public Utilities Code § 226(a).) Petitioners hold certificates of public convenience and necessity ("PSC certificates" or "CPCN") from CPUC to operate as PSCs pursuant to section 1031 of the Public Utilities Code. A PSC is not authorized to engage in taxicab transportation service licensed and regulated by a city/county.

The California Public Utilities General Order 158-A governs PSC operations. Section 5.03 of this General Order pertains to "Driver Status." It states, "Every driver of a vehicle shall be the [PSC] certificate holder or under the complete supervision, direction and control of the operating carrier and shall be:

A. An employee of the [PSC] certificate holder; or,
B. An employee of a sub-carrier; or,

C. An independent owner-driver who holds charter-party carrier [TCP] authority and is operating as a sub-carrier.

Under CPUC General Order 158-A, “carrier” refers to a PSC carrier unless specific reference includes charter-party carriers (TCPs). "Vehicle" refers to a motor vehicle operating passenger stage service. (CPUC Gen. Order 158-A, §§ 2.02 and 2.03.) A TCP can sign up charters or specific contracts to transport passengers from one place to another; and operate as an on demand carrier only under the authority of a PSC.

1. *SuperShuttle converted the employment status of airport shuttle van drivers from employees to franchisees to save costs.*

SuperShuttle was operating with employee drivers in all of their operations until late 1993 when SuperShuttle was suffering severe financial trouble. Subsequently, SuperShuttle engaged in effects bargaining of their decision to change the employment status of their drivers with all the labor unions concerned, and negotiated the financial terms of the unit franchise agreements that would be offered to drivers.

2. *Petitioners had the right to operate and provide shared ride airport shuttle van transportation service; notwithstanding its claim that it was in the business of offering and granting franchises for the right to utilize SuperShuttle’s trademark and trip-generating service.*

During the periods of assessments, Petitioners were authorized and licensed to transport passengers and provide other transportation services; had the right to operate shared ride shuttle services; and operated as shared ride ground transportation providers. Petitioners entered into unit franchise agreements with drivers, referred therein as “franchisees,” to operate “demand responsive and/or scheduled airport shuttle services,” transporting passengers to and from hotel, convention center, passenger’s home or office, and the metropolitan airports with which Petitioners had entered into service agreements. Petitioners offered and granted to franchisees, through unit franchise agreements, the right to utilize the SuperShuttle System (hereafter “System”) and its trademarks. The “System” provided to the franchisees “trip generating service,” and access into an airport with which Petitioners had contracted to be the premiere transportation provider on a semi-exclusive basis.

3. *Petitioners used SuperShuttle’s mandatory national central reservations, route design, dispatch and cashiering systems to receive reservations and non-cash payments from customers; and then dispatch the routes to franchisee drivers for bidding and transportation of the customers.*

    a. *SuperShuttle controlled the dispatch systems.*

SuperShuttle developed a “proprietary” technology to automate the Dispatch System (SDS), consisting of the dispatch and reservation systems; communications technology; and analytical and reporting tools. “Bidding” software was used to “manage” and "create" bids. A hand-held Nextel device, the so-called Nextel phone, transmitted and displayed bids from the SuperShuttle dispatch system to the franchisees.

The automated SDS used an algorithm and routing software to apply various variables - flight time, lead time for pickup, pickup time, and distance involved in picking up the different trips - to determine which trips should be grouped for the creation of "the most efficient routes." A "trip" originated from the same location and could consist of any number of passengers up to the van capacity. According to SuperShuttle policy, three should be the maximum number of trips in each route, but the dispatcher had the discretion to increase it.

The dispatch system was not totally automated. There were two groups of dispatchers, one handling the reservations in the field and the other at the airport holding lots. Dispatchers' jobs were to insure proper operation of the automated dispatch system and the bidding process. Dispatchers could use a “bid monitor” to view driver availability and pending rides, strategically group passengers into the most optimal routes, and monitor the execution of each trip. A dispatcher could combine two routes, one more lucrative than the other, to allow a driver who had placed a bid on the less lucrative route to "piggyback" on a better route.

b. *Franchisees bid for routes through SuperShuttle’s dispatch system.*

Franchisees were obligated to provide Petitioners with an availability schedule in advance, and to accept assigned trips while their vans were logged into the dispatch system. There were predominantly three types of bidding: the "clear van bidding;" the "available bidding;" and the "holding lot bidding."

"Clear van bidding" was a means by which a driver would initiate the bidding process by text-messaging the centralized dispatch system to state his/her availability. The dispatch system would search any routes within a pre-determined radius within that vehicle's GPS location and a given period of time, such as a 20-mile radius within any two-hour period; and transmit a summary of multiple routes to the driver's Nextel phone screen display, consisting of information on the zone, number of passengers and stops.

Drivers could let the routes "time out" after about 60 to 75 seconds; or hit the "pass" button; or select a route and hit the "bid" button. After a driver hit the "bid" button, the server would "assign" the route to that driver if that route and the vehicle driven by the bidding driver were still available, and display more details of the route, including the address, pick up location, city, state, zip, fare, tip, payment method, and number of passengers. The driver could accept the bid or exercise an "option" to reject it; or occasionally, contact the dispatcher to request

a "piggyback." The dispatcher would "un-assign" a rejected route, i.e., remove the route from that driver and make it available for bidding by other drivers. The manager could question why a franchisee had rejected a bid, and remind the franchisee that the purpose of the unit franchise agreement was to provide customer service, rather than to merely earn higher revenue.

"Available bidding" involved routes that were not accepted during the bidding process, or were outside the radius of the “clear van” window. The dispatcher would send a message to all vehicles in the available queue stating, "Bid started. You're number [queue position] of [number of available drivers]." The vehicle that had been available for the longest period of time would have the first choice. It was not uncommon for Petitioners to use taxis, or ExecuCars that were operated by a different entity of the Petitioners, to pick up passengers whose reservations were not selected or when the shuttle vehicle was going to be late.

"Holding lot bidding" would be available only to vehicles in the airport van holding lots in the order of their holding queue positions. Before proceeding into the airport’s central terminal area, all airport concessionaire drivers had to wait at the van holding lot that Petitioners managed, until an airport manager at the curbside pickup location notified the holding area that a van would be needed. A franchisee that refused to take a passenger at the curb when needed could face adverse consequences from Petitioners, that included being forced to leave the airport for two hours, or work only in the field for the rest of the day.

“Auto dispatching” involved direct communication between the dispatcher and the driver when increase of “van coverage” was necessary.

Prospective passengers had multiple reservation options. They could book reservations through the SuperShuttle centralized reservation telephone line, the SuperShuttle Web site, an airport SuperShuttle agent, or a hotel. Passengers could pay in cash or with a credit card, in advance or on-board the shuttle vans.

The Nextel system recorded information on the activities of each vehicle: the shift beginning and ending time; vehicle availability; the quantity of bids that were passed up; whether the Nextel phone was turned off or timed out; the pickup time, location and destination; the distance between the first pickup and the vehicle's then current location; the number of passengers and stops; whether the bid was accepted or acknowledged and denied; and where the passenger had boarded and disembarked. Franchisees could view a summary of the financial information related to their franchises on their Nextel phones, such as their receivables and revenue for the week, payments, fares, and prepaid credit cards.

4. *SuperShuttle unilaterally determined the franchisees’ obligations in excess of what the regulating authorities imposed, and what would be necessary for the protection of the SuperShuttle brand standard.*

The unit franchise agreement of Petitioner SuperShuttle Los Angeles stated, "The System standards set forth in the unit franchise agreement and in the operations manual are, in part, imposed by regulating authorities. *Additional obligations were determined by SuperShuttle, to be necessary for the overall quality and growth of the SuperShuttle brand.* The brand is composed of the SuperShuttle companies and all the individual franchisees who operate in the SuperShuttle System, and who collectively and voluntarily accept the SuperShuttle standards[.]" The SuperShuttle Operations Manual stated, "The SuperShuttle System procedures and standards established in the Unit Franchise Agreement and this Manual are the backbone of its franchise business. When you became a franchisee, *you agreed to abide by the SuperShuttle service standards and procedures*." [emphasis added]

The unit franchise agreement further stated that a franchisee was operating a business independent of and distinct from those of SuperShuttle and Petitioner. It was stated verbatim, "FRANCHISEE IS NOT AN EMPLOYEE OF EITHER SUPERSHUTTLE OR CITY LICENSEE," and "SuperShuttle does not seek to control the details of how Franchisee conducts its business[, it] seeks only two compatible objectives: that customers are served promptly, courteously, and safely; and, that the SuperShuttle brand image is upheld[.]" [*sic*]

a. *SuperShuttle unilaterally established the franchisees' scheduled hours and territory.*

Petitioners granted to the franchisees, through the unit franchise agreement, the right to operate a "SuperShuttle System" van during certain specified hours determined by Petitioners (called "scheduled hours"); to provide shared ride shuttle services, and certain other services within a certain geographic area (called "the territory"); and to participate in Petitioners' dispatch system.

Franchisees might elect a 24-hour franchise, beginning each day at 12 noon and continuing until 12 noon of the next day. Franchisees might also elect either the 14-hour "AM Franchise" beginning from 1:00 a.m. to 4:00 p.m. on the same day, or the "PM Franchise" beginning from 11:00 a.m. to 2:00 a.m. on the next day. Upon one week's prior written notice to Petitioner, Franchisee might elect to change from one type of "scheduled hours" to another (e.g., from a 24-Hour Franchise to a PM Franchise). Franchisee's right to make any such change was limited to four (4) times per calendar year. Under the franchise agreement, franchisees could conduct "occasional charter operations[3] originating in the "territory" without using Petitioners' dispatch system. Petitioners' evidence showed that one driver had conducted "occasinal charter operations."

[3] "Charter operations" meant incidental scheduled transportation between locations other than the airport.

b. *SuperShuttle unilaterally established the types and amounts of fees to be charged to franchisees.*

(i) *Franchise fee.* Franchisees had to pay Petitioners an initial franchise fee, or a portion thereof for a 14-hour franchise. Such fee would be deemed fully earned by Petitioners upon execution of the unit franchise agreements and would not be refunded, in whole or in part, at any time. The amount of the franchisee fee was initially twenty-one thousand dollars ($21,000) in 2004, and was increased to fifty thousand dollars ($50,000) as of January 27, 2005. Most drivers financed the entire franchise fee by making payments to SuperShuttle for the first seven years of the ten-year franchise period.

(ii) *License fees.* Franchisees had to pay to Petitioners 25% of all gross revenues received by the franchisees on account of operating the SuperShuttle System vehicles during the preceding week.

(iii) *System fee.* Franchisees had to pay Petitioners a weekly system fee in the sum of $375 for the 24-hour Franchise and $250 for AM Franchise or PM Franchise. The system fee accrued throughout the term of the unit franchise agreement and continued to accrue; and would be due and payable whether or not the franchisee's vehicle was operational.

(iv) *Airport and incidental expenses.* Franchisees had to reimburse Petitioners for all airport expenses, including the airport loop fees, airport concession and inspections fees assessed to Petitioners for the operation of franchisees' vehicles in the airports. Airport loop fees were charged to Petitioners based on the number of times each specific shuttle van, identified by a transponder on the van, had entered the airport.

Franchisees also had to reimburse Petitioners for any and all costs Petitioners incurred on behalf of the franchisees such as vehicle insurance costs; vehicle leasing fees if the franchisees leased their vehicles from Petitioners; alternative fuel costs; pager costs; toll fees; vehicle maintenance and/or inspection fees; Nextel phone charges or similar phone system charges; any fines assessed against Petitioners due to the franchisees' acts or failure to act; any parking tickets; costs in resolving the customer complaints about franchisees or franchisees' services; and for all other articles that Petitioners might order on the franchisees' behalf, such as uniforms.

(v) *Deposit for the communication and specialized equipment.* Franchisees had to sign the communication and specialized equipment agreement, and pay a $1,500.00 deposit to Petitioners for the installation of the SuperShuttle specialized communication transmission equipment for Petitioners' dispatch system in their vans, and other equipment, such as a headsign and credit card

processing equipment. Petitioners “loaned” the equipment to the drivers for their use while they were franchisees.

(vi) *Decal fee.* The franchisees had to pay Petitioners a $250 fee for the application of vehicle decals to the franchisees' vehicles, and removal at the termination of their unit franchise agreements.

(vii) *$50 handling charge.* A $50.00 per occurrence handling charge could be assessed the driver's account if a driver or the backup/relief driver did not log into the dispatch system within 30 minutes of the driver's scheduled availability. In addition, if a driver rejected a dispatched trip without having given an appropriate, advanced 2-hour notice that his or her vehicle would be out of service, Petitioners would find an alternate means of transportation, such as taxi service, for the passenger whom the driver had refused to serve. Petitioners, at times, assessed a $50.00 per occurrence handling charge to the driver's account.

c. *SuperShuttle unilaterally established the formula for calculating the total gross revenue for each van.*

The “Commission’s authority over shuttle carriers includes the power to fix rates. (Cal. Const. art. XII, § 4 & 5.) The rates must be just and reasonable. (Cal. Pub. Util. Code § 451.) The Commission’s rate regulation of these carriers is quite flexible, permitting ‘zones of rate freedom’ (Cal. Pub. Util. § 454.2) as well as the ability to raise or lower rates (Cal. Pub. Util. Code § 491.1). (PUC *Amicus* Br. filed by CPUC with the Court in *Kairy v. SuperShuttle International* (9th Cir. 2011) 660 F.3d 1146, at 7, fn.1.)

The unit franchise agreement obligated the drivers to charge the fares set by Petitioners pursuant to their agreements with the various airports. A driver was not free to change a fare. At times, SuperShuttle would provide discounted rates for special groups or occasions, including discount vouchers and coupons that the drivers were obligated to accept.

Petitioners required the drivers to keep a daily "trip sheet" on which the drivers recorded a list of each fare; pick up and drop off time and location; number of fares; amount of prepaid fares; method of payment, credit card or cash, and where the payment was rendered. The driver would submit to Petitioners any vouchers and credit card slips he or she had received during the week. The credit card payments were payable to and processed by Petitioners or SuperShuttle. The driver kept all cash received from the customers.

Petitioners could track the amounts of revenue to each shuttle van, and on a weekly basis, would calculate the total gross revenue for each van based on the trip sheet submitted by the driver. Gross revenues included all fares, revenue from charter operations, amounts received on account of all vouchers and all

other revenue franchisees received on account of operation of their vans pursuant to the unit franchise agreements.

Petitioners would deduct from the gross revenue all the fees and incidental expenses, including but not limited to the franchise, license, and system fees, and airport expenses. Shuttle drivers would receive a payment from Petitioners for the net difference; or remit payment to Petitioners if the gross receipts were insufficient to cover the fees and expenses.

The franchisees' income was therefore dependent on the quantity of fares they carried. If they had sub-drivers operating their vans, they were obligated to pay the same fees to Petitioners for each van. There was no requirement that a driver be on duty on any particular day. Drivers could take vacation whenever they wished. Unless Petitioners agreed ahead of time, the franchisees continued to make their payments to Petitioners for their franchise, van lease and system fee for access to the dispatch system even when they were not working.

d. *SuperShuttle unilaterally established how nonpayment or late payment would be handled.*

The franchisees were obligated to pay all the fees on a weekly basis, to cash out every Monday or Tuesday and to maintain a zero balance on their accounts. When the franchisees fell behind in the payments, the franchise manager would attempt to diagnose the cause for the cash shortage. They would be allowed to continue working, however they would be closely monitored.

e. *SuperShuttle unilaterally established the terms of van ownership and cost of vehicle maintenance.*

Drivers could either lease their vehicles from Petitioners, or purchase them from other drivers or independent car dealers. The vans had to meet the System's specifications, including the make, model, color (blue), size (nine to 15-passenger), age and mechanical condition. Franchisees had to grant Petitioners a security interest in their vans.[4] The drivers could use their vans for personal use during off hours. They could provide private charter service to and from locations not including airports, provided that they notified Petitioners and the CPUC, pay a license fee to SuperShuttle, and use the SuperShuttle set hourly rate of $55.

f. *SuperShuttle unilaterally established "good causes" for terminating a unit franchise agreement.*

[4] Sections 6.1 and 6.3 of the Communication and Specialized Equipment Agreement between Petitioners and the drivers provided that in order "to secure the due, punctual and unconditional performance by Franchisee of its obligations under this Agreement, including without limitation its obligation to return Equipment and Specialized Equipment to City Licensee upon termination of this Agreement", "Franchisee hereby grants to City Licensee a security interest in and to the 'Collateral'" which "means all of Franchisee's right, title and interest in the Vehicle."

Petitioners could “immediately terminate” a unit franchise agreement on delivery of a notice of termination to the franchisee, with no opportunity to cure. Twenty-five events, including but not limited to insolvency; failure on three or more separate occasions to make timely payment of fees; receipt of excessive number of complaints, citations, notices from airport representatives, customers, or federal, state or local regulatory agencies; were “deemed to be an incurable breach” and “good cause” for terminating the agreement.

In addition, the agreement would be terminated after the franchisee had received a notice with “opportunity to cure,” but failed to cure noncompliance with any requirement in the unit franchise agreement or the Manual or prescribed by the City Licensee, within three days after notice; or failed to pay any amounts due the City Licensee within three days after receipt of a written notice of default.

“Good cause” to terminate the unit franchise agreement “shall also include City Licensee’s determination[,] *in its sole discretion*, that termination of the Agreement is *in the best interest of the SuperShuttle system*.” [emphasis added]

The franchisee could terminate the unit franchise agreement at anytime by negotiating with Petitioners; or selling his or her franchise to a new franchisee, with Petitioners’ approval. The franchise owner-seller would determine the franchise sale price. Upon termination of the unit franchise agreement, the driver would no longer be liable for any further franchise payments if he or she had signed a waiver when the unit franchise agreement was initially executed. However, the driver would not be reimbursed for any paid franchise fee. At the end of each franchise term, the franchisee had the option to renew the right to operate a SuperShuttle vehicle for two additional terms of five years each.

5. *Drivers’ perception of the nature of their work and employment status.*

The unit franchise agreements identified the drivers as independent contractors, and many of the drivers understood that to be their correct status. Petitioners strongly recommended that the driver form a business entity to act as the franchisee, and obtain an identification number from the Internal Revenue Service. The business entity may be a corporation, a limited liability company (LLC) or a general or limited partnership in the franchisee's sole discretion.

The franchise agreement allowed franchisee drivers to hire sub-drivers to drive their vans, but only upon Petitioners’ approval of the drivers. All sub-drivers had to follow the same rules and regulations as the franchisees themselves. Most franchisee drivers drove their own vans. Less than half of the franchisees hired sub-drivers, and a few had multiple vans and multiple drivers.

The nature of the drivers’ work remained the same. Several franchisee drivers considered themselves as performing “essentially the same type” of work,

transporting passengers to and from the airport that they did as an employee. Petitioners were the drivers' sole source of airport shuttle customers.

Franchisee-driver Zaydoff understood that he was "working for" Petitioner SuperShuttle Los Angeles under a contract wherein Petitioner would collect and give "all quotes for pickups" to the drivers who, in return, would "handle the customers" and paid Petitioner 25% of their gross revenue. If Petitioners did not have any customers, the drivers would not have any customers. Franchisee-driver Donaldson considered himself "operating under SuperShuttle" because their logo on the van made it "pretty obvious" that he was working for them. He thought that it would be "counterproductive" to obtain private charters even though he had the authority to do so since he was paying Petitioner a fee to dispatch business to him. Franchisee-driver Chipman never carried passengers not referred to him by Supershuttle. He thought that he worked for Petitioners only and would be terminated if he were to transport other passengers not dispatched by Petitioner. Franchisee-driver Larry White felt obligated to protect Petitioner's contract with the Sacramento International Airport in order to maintain his livelihood.

Petitioners exerted control over the van interior by prohibiting drivers from keeping personal items therein, even though airport authorities required only clean interiors free from "dust," "debris," "any substance in the seating area which could cause harm, damage, or injury to any passenger or their clothing," and "any papers or objects on dash." Petitioners would conduct quality control of the drivers by utilizing their past customers reservation database to take random telephone surveys of the quality of the franchisees' services, and by making guest surveys and comment cards available to their customers.

6. *The local, state and federal government agencies; airport authorities; and other regulatory bodies (collectively, "the regulating authorities") regulate the airport ground transportation business.*

    a. *The Federal Trade Commission governs, and the California Department of Corporations oversees franchising.*

The Federal Trade Commission governs franchising, and the Department of Corporations oversees the franchising activity in the State of California. A franchise currently offered in the United States must have a franchise disclosure document (FDD), which was referred to as the unit franchise offering circular (hereafter "UFOC") during the relevant audit period in the instant cases. The franchisor had to give the prospective franchisee at least 10 days to examine the UFOC, and a five-day cooling down period between deciding to purchase the franchise and signing the franchise document; to allow the prospective franchisee an opportunity to have a professional of their choosing, an accountant, an attorney, or an impartial third party, review the documents.

b. *Petitioners must satisfy the following requirements under Public Utilities Code section 1032, and CPUC General Order 158-A.*

(i) *Equipment list and preventive vehicle maintenance program.* CPUC requires Petitioners to maintain on file with CPUC an equipment list of all vehicles (owned or leased by the drivers) in use under each PSC certificate. (Public Utilities Code § 1032(b)(1)(C); and CPUC Gen. Order 158-A, section 4.01.) CPUC requires Petitioners to have a preventive maintenance program that conforms to safety regulations of the Department of the California Highway Patrol, as described in Title 13 of the California Code of Regulations. (Public Utilities Code § 1032(b)(1)(C); and CPUC Gen. Order 158-A, section 4.02.) Petitioners are authorized to inspect the vehicle from time to time and keep a maintenance record on all the vehicles. The airport inspection of the vehicles, consisting of documentation and visual inspection, is minimal in scope.

(ii) *Drivers' driving record.* CPUC authorizes Petitioners to regularly check the driving records of all persons, whether employees or subcarriers, operating vehicles used in transportation for compensation requiring a class B driver's license under the certificate. (Public Utilities Code § 1032(b)(1)(D); and CPUC General Order 158-A, section 5.02.) Every driver of a vehicle has to be licensed under the California Vehicle Code and has to comply with Motor Carrier Safety provisions identified by the CPUC. The drivers have to participate in the Department of Motor Vehicles "pull notice program" under Vehicle Code Section 1808.1, by submitting their driving records to the CPUC for regular review.

(iii) *Display and removal of carrier's name, and vehicle number.* The SuperShuttle name and the assigned identifying vehicle number must be painted or displayed or otherwise permanently attached to the rear and each side of the exterior of each vehicle. The carrier's name and vehicle numbers shall be sufficiently large and color contrasted as to be readable, during daylight hours, at a distance of 50 feet. All certificate numbers and identification symbols must be removed when a vehicle is sold or transferred. (CPUC Gen. Order 158-A, sections 4.03 and 4.08.) Petitioners charged the drivers a $250 decal fee for this function.

(iv) *Record-keeping.* Each Petitioner is required to maintain in its office a set of records on the services it performed, including tariffs (charges to passengers for transportation services); timetables; the number of passengers transported by each driver; copies of all lease and sub-carrier agreements; maintenance and safety records; driver records; and consumer complaint records. The CPUC staff has the right to enter Petitioners' premises to inspect Petitioners' books and records and to inspect each and any vehicle used to drive for Petitioners. (CPUC Gen. Order 158-A, sections 6.01-6.02.)

(v) *Response to complaints.* Petitioners are required to respond within 15 days to any written complaint concerning transportation service provided or arranged by Petitioners. (CPUC Gen. Order 158-A, section 7.01.)

(vi) *Tariffs and timetables.* Petitioners are required to file their tariffs and service timetables. That information is to be considered public record, for use of the general public, and has to be published in a manner that is readable and easily understood. (CPUC Gen. Order 158-A, sections 8.01 and 8.02.)

(vii) *Posting of pertinent information.* Petitioners have to post information concerning the tariffs, timetables and complaint procedures that customers can use, in each vehicle used to provide service to the airport and in each location where airport tickets are sold. (CPUC Gen. Order 158-A, section 8.04.)

(viii) *Holding CPUC authority as charter party carriers (TCP).* Petitioners are the "carriers," and the franchisee drivers the "sub-carriers." Petitioners enter into unit franchise agreements with the sub-carriers. The sub carriers, also the franchisees, provide the vehicles and the drivers, and are required to hold CPUC authority as charter party carriers (TCP). The unit franchise agreement between the franchisees and Petitioners has to be evidenced by a written document, and shall contain the carriers' names, the charter party carrier numbers, and the services to be provided. (CPUC Gen. Order 158-A, section 3.03.)

The driver has to comply with all CPUC rules and regulations. The driver is also subject to regulation by the California Motor Vehicle Department and the Department of Airports based on agreements Petitioners have entered with various metropolitan airports. The U.S. Department of Transportation also restricts the number of hours per day drivers can drive and determines the required amount of rest periods.

(ix) *Vehicle maintenance.* Petitioners agree to maintain their vehicles used in transportation for compensation in safe operating condition and in compliance with applicable laws and regulations relative to motor vehicle safety. Petitioners require the franchise drivers to maintain the mechanical condition and the appearance of their vehicles in accordance with the SuperShuttle preventative schedule. (Public Utilities Code § 1032(b)(1)(F).)

(x) *Use of alcoholic beverage and drugs are forbidden.* Petitioners are prohibited from allowing drivers to consume or be under the influence of a drug or alcoholic beverage while on duty. (CPUC Gen. Order 158-A, section 5.04.) Petitioners have a safety education and training program in effect for all franchisees or subcarriers operating vehicles used in transportation for compensation. (Public Utilities Code § 1032(b)(1)(E).) A franchisee has to take one to four days of training consisting of certain safety requirements, map reading and training on how to use the Nextel phone system.

7. *Petitioners' concession agreements with airport authority require them to comply with safety or traffic rules and regulations.*

"No carrier shall conduct any operations on the property of or into any airport unless such operations are authorized by both this Commission and the airport authority involved." (CPUC General Order 158-A, Section 3.01.)

"The City Licensee provides shared-ride van shuttle services under concession agreements with airport authorities…. [that] specify the services to be provided and dictate the operating requirements contained in this Unit Franchise Agreement, including without limitation van specifications, driver uniforms and driver conduct." (SuperShuttle Los Angeles Unit Franchise Agreement.)

Each vehicle operated at the airport had to be clean inside and out, free of exterior body damage, mechanically safe, and in excellent working order. All the vehicles had to possess identical color schemes and markings so as to be readily identifiable as belonging to Petitioner. All vehicles had to display Petitioner's name or its "d.b.a.," and vehicle identification number on the front, rear, and sides of each vehicle in a readily identifiable type, style and size.

The Public Utilities Code required uniforms as a means to identify the service provider to the public as being associated with a specific charter party carrier, but there were no provisions in the CPUC regulations or airport rules defining dress code features, such as color, type of hat, sweater, jacket, vest or visor that the drivers should wear. The Los Angeles Airport Authority, for instance, required each driver, while on airport, to wear "neat and clean" uniform which clearly identified the wearer "as an employee" of SuperShuttle Los Angeles, and wear a valid photographic identification badge issued by SuperShuttle Los Angeles of a design approved by the Executive Director of the Airport Authority.

Petitioners mandated the drivers to wear specific colors and hats to create a distinctive visual impression identifiable with SuperShuttle. They could not simply wear a plain jacket over a shirt with a valid photographic identification badge identifying them as a SuperShuttle representative. There was no outward appearance to the public that these drivers were independent business owners.

If drivers were seen without the proper uniform, Petitioner SuperShuttle Los Angeles could lock the driver's computer and the curb coordinator at the Los Angeles airport would send the driver away from the line in the holding lot. A driver for Petitioner SuperShuttle Los Angeles was "fired" for wearing a red-colored jacket when working at the LAX.

REASONS FOR DECISION

We concur with the result of the administrative law judge's decision based on the following rationale.

"The objects and purposes of the Unemployment Insurance Act are not limited to the raising of revenue. It is a remedial statute and the provisions as to benefits must be liberally construed for the purpose of accomplishing its objects. (*Empire Star Mines Company, Ltd*. v. *California Employment Commission* (1946) 28 Cal.2d 33, 38.) The legislatively declared public policy of the state requires the extension of unemployment insurance benefits to persons "unemployed through no fault of their own." (Unemp. Ins. Code, § 100.)

In determining whether a person rendering service to another is an "employee" or an excluded "independent contractor," the "control-of-work-details test … must be applied with deference to the purposes of the protective legislation." (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, at p. 353. See *Laeng* v. *Workmen's Comp. Appeals Bd*. (1972) 6 Cal.3d 771, 777–778.)

California decisions applying statutes for the protection of employees "uniformly declare that '[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . .' [Citations, including unemployment insurance benefits cases that draw direct analogy to workers' compensation law.]" (*S. G. Borello v. Department of Industrial Relations, supra,* 48 Cal. 3d at p. 358. See also, *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd* (1991) 235 Cal. App. 3d 1363, at p. 1371; and Precedent Decision P-T-495, affirmed by *Messenger Courier Association of the Americas et al v. Unemp. Ins. Appeals Board,* (2009) 175 Cal. App. 4th 1074.)

In *S. G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d 341, the California Supreme Court has upheld a determination of employee status by the Department of Industrial Relations' Division of Labor Standards Enforcement ("DLSE") following the state agency's evidentiary hearing. The Court ruled that "the determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences, and the Division's decision must be upheld if substantially supported." (*Id*., at p. 349.) Deference to the DLSE's determination of employment status is implied. Accordingly, for the purpose of administering the unemployment insurance benefits program, this Board has the power to make a factual determination of employee or independent-contractor status of franchisee driver that is dependent upon the resolution of disputed evidence or inferences, and to draw direct analogy to workers' compensation law and Labor Code statutes enforced by DIR.

Contributions are due the Department from employers with respect to wages paid in employment for unemployment insurance (Unemp. Ins. Code, § 976), disability insurance (Unemp. Ins. Code, § 984), employment training (Unemp. Ins. Code, § 976.6), and personal income taxes (Unemp. Ins. Code, § 13020). California

unemployment insurance taxes accrue only on amounts paid as remuneration for services rendered by employees.

If the Department is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. (Unemp. Ins. Code, § 1127.)

I. *Petitioners have the burden of proof by a preponderance of the evidence.*

"By statute, any person rendering 'service' to another is presumed to be an employee except as excluded from that status by law. (Lab. Code, § 3357.)" (*Yellow Cab Cooperative, Inc., v. Workers' Comp. Appeals Board* (1991) 226 Cal.App.3d 1288, 1293; see *Laeng* v. *Workmen's Comp. Appeals Bd*. (1972) 6 Cal.3d 771, 777–778.)

"[T]he fact that one is performing work and labor for another is *prima facie* evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary. [Citation]" (*Robinson v. George* (1940) 16 Cal. 2d 238, 242; *see also Cristler v. Express Messenger Sys., Inc*., (2009) 171 Cal. App. 4th 72, 83.[5]) "Once the employee establishes a prima facie case, the burden shifts to the employer, which may prove, if it can, that the presumed employee was an independent contractor." (*Narayan v. EGL, Inc.* (9th Cir. 2010) 616 F.3d 895, 900.) "It is best understood as creating a presumption that a service provider is presumed to be an employee unless the principal affirmatively proves otherwise." (*Yellow Cab Cooperative, Inc., v. Workers' Comp. Appeals Board, supra,* 226 Cal.App.3d at p. 1295.)

The courts have long held that the burden of proof generally is on the party attacking the employment relationship. Petitioner therefore has the burden of proof in the instant tax matter. (*Isenberg v. California Employment Stabilization Commission* (1947) 30 Cal.2d 34, 38, relying on *Robinson* v. *George*, 16 Cal.2d 238, 244; *Aladdin Oil Company v. Perluss* (1964) 230 Cal.App.2d 603, 610 [in actions for refunds of taxes, the burden of proof is upon the taxpayer-plaintiff]; *Smith v. Unemployment Ins. Appeals Board* (1976) 62 Cal.App.3d 206, 213 [the burden is upon the party seeking to recover an unemployment tax assessment to prove that it was illegally assessed]; and *Santa Cruz Transportation Inc. v. Unemployment Ins. Appeals Bd, supra,* 235 Cal.App.3d at 1367.)

[5] After reviewing the court decision in *Cristler v. Express Messenger Systems, Inc.,* (2009) 171 Cal. App. 4th 72, 81, we have decided that their class definition of drivers is based on facts that are distinguishable from those in the instant case, and is thus not controlling here.

The California Unemployment Insurance Appeals Board (hereafter "Board") has held that petitioner generally bears the burden of proof in a tax case and it is by a preponderance of the evidence. (P-T-493; Evidence Code § 115.)

II. *Analysis of the employment relationship between Petitioners and the franchisee-drivers.*

The relationships of employer and employee and of principal and independent contractor have long been recognized to be mutually exclusive. They cannot exist simultaneously with respect to the same transaction. The proof of the one status automatically precludes the existence of the other. Accordingly, the services of an independent contractor are not "employment" within the meaning of Unemployment Insurance Code, section 601, and the remuneration paid for such services is not taxable. (Precedent Decision P-T-2.)

"Employment" means service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express, or implied. (Unemp. Ins. Code, § 601.) "Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemp. Ins. Code, § 621(b).)

A. *The label of "franchisee" is not dispositive of Petitioners' relationship with the drivers.*

The essence of the common law test of employment is the "control of details," whether the principal has the right to control the manner and means by which the worker accomplishes the result desired. (*Empire Star Mines Company, Ltd. v. California Employment Commission, supra,* 28 Cal.2d at pp.43-44.)

Here, Petitioners, SuperShuttle International, Inc. and its wholly-owned subsidiaries are PSCs authorized and licensed by CPUC to provide shared ride shuttle services. They conduct their business as shared ride ground transportation providers in San Francisco, Los Angeles and Sacramento. Their stated mission is to operate and provide "a demand responsive and/or scheduled airport shuttle" service.

Petitioners used employees in all of their operations until 1993 when they decided to convert the employee model to the independent contractor - franchisee model in order to avert financial trouble and save costs.[6] Petitioners argue that franchisee-drivers are operating a business independent of and distinct from those of SuperShuttle and the Petitioners according to the unit

[6] Yellow Cab Cooperative, Inc. made a similar business decision. "Prior to 1976, the drivers of Yellow cabs were unionized employees. In 1976 the company went into bankruptcy. In 1979 it adopted a system under which drivers leased cabs and were no longer deemed employees of the company." (*Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Board* (1991) 226 Cal.App.3d 1288, 1291.)

franchise agreement of Petitioner SuperShuttle Los Angeles which states verbatim, "FRANCHISEE IS NOT AN EMPLOYEE OF EITHER SUPERSHUTTLE OR CITY LICENSEE".

Contrarily, the evidentiary record has established that the drivers continue to perform the identical work they had carried out when they were previously known as employees, even after the conversion of their employment status from "employee" to "franchisee." Drivers continue to transport passengers who have made reservations directly with SuperShuttle, to and from designated airports.

Even though Petitioners reclassified the drivers from "employees" to "franchisees," "[t]he parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship." (*Estrada v. FedEX Ground Package System, Inc.* (2007) 154 Cal. App. 4th 1, 11.) "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. [Citations.]" (*S. G. Borello v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 349.) "The agreement characterizing the relationship as one of 'client -- independent contractor' will be ignored if the parties, by their actual conduct, act like "employer -- employee." (*Toyota Motor Sales U.S.A., Inc.* (1990) 220 Cal. App. 3d**.** 864**,** at 877 (*Toyota*); *Empire Star Mines Co. v. Cal. Emp. Com., supra*, 28 Cal.2d at p. 45; *Tieberg* v. *Unemployment Ins. App. Bd.* (1970) 2 Cal.3d at p. 952.) Thus, we do not find the label of "franchisee" to be dispositive of the relationship between Petitioners and the drivers.

B. *The franchise agreement contains many indicia of control.*

Like the lease between Yellow Cab and the taxi driver in *Santa Cruz Transportation*, the unit franchise agreement in the instant case contains "many indicia of control" that give the franchisor-petitioners the right of substantial control over the franchisee-shuttle drivers. (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal.App.3d at p. 1372.)

The unit franchise agreement and the operations manual set forth the SuperShuttle System standards that all individual franchisees have to accept. The SuperShuttle standards consist not only of requirements imposed by regulating authorities such as the CPUC and airport authorities; but also set forth additional obligations determined unilaterally by SuperShuttle to be necessary for the overall quality and growth of the SuperShuttle brand.

California courts have recognized that a franchisor's interest in the reputation of its entire marketing system may allow it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchise into an agent. (*Kaplan v. Coldwell Banker* (1997) 57 Cal.App.4th 958, 961, citing *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th, at p. 1292.) However, an agency relationship may exist if the franchisor retains to itself control exceeding that necessary to protect its legitimate interests.

(*Id.* at p. 1295-1296 ["The above franchise agreements gave the franchisor control beyond that necessary to protect and maintain its interest in its trademark, trade name and goodwill."].)

1. *The franchise agreement requires the franchisee to accept all assignments, within certain specified hours and a certain geographic area determined by Petitioners.*

Petitioners' objectives of serving customers "promptly, courteously, and safely;" and upholding the SuperShuttle brand image can be achieved only by exerting substantial control over the driver through the dispatch and bidding "systems." Thus, Petitioners' contentions that franchisees "decided whether to transport in-coming or out-going passengers, provided private charter services for passengers with no connection to SuperShuttle, negotiated inducements with SuperShuttle" do not support a conclusion that the drivers are other than employees.

Unlike the leaseholders in *Empire Star*, whom the court found were not employees because they determined for themselves what work they would do, where and when they would mine, and how it should be done, drivers in the instant cases are not "free" to determine the nature, terms and conditions of their jobs. (*Empire Star Mines Company, Ltd*. *v. California Employment Commission*, *supra*, 28 Cal.2d at pp. 44–45, 49.) Petitioners have substantial control over the entire "systems," from reservations, route design, bidding, dispatch, to the final delivery of passengers to their destinations. Petitioners have complete control over the centralized reservations systems, a highly technical computerized algorithm program, that serve as the backbone of their business of providing "demand responsive and/or scheduled airport shuttle" service to their customers."

Contrary to Petitioners' contention that the "franchisees enjoyed significant freedoms and, as business owners, were responsible for independently making significant business decisions" such as setting "their own hours of work," "whether to work a particular day"; the evidence shows that the drivers' control over their hours and days of operation is restricted to the Petitioners' designated duration of the 24-hour, AM or PM franchise, and to the drivers' economic need to work. Franchisees must provide shared ride airport shuttle transportation service, within "scheduled hours" and designated "territory," to customers who have made reservations directly with SuperShuttle. Drivers are obligated under the unit franchise agreement to provide Petitioners with a schedule of availability in advance. There is an adverse consequesnce if they do not accept trips assigned to them while they are logged into the dispatch system.

Petitioners' control over the beginning and ending times of each of the AM and PM Franchises is akin to that of Yellow Cab Cooperative, Inc. "[U]nder the lease Yellow Cab designates the time period when a daily shift begins and ends. (Cf.

[*Yellow Cab Cooperative, Inc., supra,* 226 Cal.App.3d] at pp. 1298-1299. 'Yellow controlled drivers' hours by assigning shifts. Yellow imposed this control so that it could lease each cab to more than one driver in one day. This practice resembled a paradigmatic employment relationship and significantly restricted applicant's independence.') (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal.App.3d at p. 1372.)

Petitioners exercise a broad control over the operation of the enterprise under a provision requiring the franchise holders to conduct their daily job activities within a designated territory; and to maintain and manage their work hours according to pre-determined "AM or PM Franchise" schedules, in accordance with the general policies of the franchisor. (*Nichols v. Arthur Murray, Inc.* (1967) 248 Cal.App.2d, 610, at pp. 615-616[7].)

As stated in *Toyota*, "a certain amount of freedom of action that is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it. [Citation]" (*Toyota Motor Sales U.S.A., Inc. v. The Superior Court of Los Angeles County, supra,* 220 Cal. App. 3d, at p. 875.) "Such factors generally have been considered to be simply a freedom inherent in the nature of the work and not determinative of the employment relation." (*Id.,* at p. 876.)

The franchisee's freedom may appear to exceed that of a typical employee, but it is largely illusory. Petitioners do not require drivers to be on duty on any particular day, and permit them to take vacation whenever they wish. Unless Petitioners agree ahead of time, however, the franchisees must continue to make their payments to Petitioners for their franchise, van lease and system fee for access to the dispatch system even when they are not working. To earn a livelihood, franchisee drivers have to work productively, and that means logging on the Nextel bidding system, bidding for routes and transporting passengers. (*Yellow Cab Cooperative, Inc., v. Workers' Comp. Appeals Board, supra,* 226 Cal.App.3d at p. 1295.)

The bidding system provides little room for autonomy for the drivers. Detailed information of the trip, including the address, pick up location, city, state, zip, fare, tip, payment method, and number of passengers is not displayed on the Nextel device until after the drivers hit the "bid" button. A franchisee that rejects

[7] In *Nichols v. Arthur Murray, Inc., supra, 248 Cal.App.2d 610*, the court affirmed a judgment against the franchisor on an actual agency basis. The franchise agreement conferred upon the franchisor the right to control the employment of all employees of the franchise holder; to fix the minimum tuition rates to be charged, to designate the location of the studio, its layout and decoration; to control all advertising by the franchise holder; and to exercise a broad control over the operation of the enterprise under a provision requiring the franchise holder to conduct, maintain and manage the studio in accordance with the general policies of the franchisor, and "directing that failure to maintain such policies shall be sufficient cause for immediate cancellation of the agreement." (*Id*. at p. 615.)

a route after hitting the “bid” button may receive a verbal reprimand or even suffer an adverse financial consequence.

Dispatchers use a “bid monitor” that is part of the “systems” to view driver availability and pending rides, strategically group passengers on the most optimal routes, monitor the execution of each trip, and assign trips directly. A dispatcher can manipulate the assignment process by designing specially packaged bids, or assigning a more lucrative "piggyback" route to a particular driver, thus blocking certain trips from the bidding process. Conversely, the drivers’ earning capacity is partially dependent on the dispatchers’ cooperation and willingness to assemble “piggyback” packages that can compensate for the adverse economic consequence of unprofitable routes.

The dispatcher arranges for a taxi or alternative service to pick up passengers if the shuttle vans are late. The dispatchers’ tracking of assigned routes and direct involvement in making alternative transportation of passengers weakens Petitioners’ contention that “transportation of passengers is the business of the franchisees.” Petitioners are doing more than “maintaining and increasing the value of the franchises through their marketing plan.” They are actively controlling the business of operating and providing “a demand responsive and/or scheduled airport shuttle” service to their customers.

The *Borello* statutory test of "control" may be satisfied even where "complete control" or "control over details" is lacking -- at least where the principal retains pervasive control over “all meaningful aspects of the operation,” the worker's duties are an integral part of the operation, the nature of the work makes detailed control unnecessary, and adherence to statutory purpose favors a finding of coverage. (*S. G. Borello v. Department of Industrial Relations, supra,* at pp. 355-358.) As will be discussed in further details below, the franchisee drivers’ duties are an integral part of the SuperShuttle “System,” and Petitioners’ substantial control over the operation as a whole and pervasive control over “all meaningful aspects of the operation,” have made detailed control unnecessary.

Petitioners further contend on appeal to this Board that “[t]he responsibility of a franchisee in providing passenger transportation is typical of the responsibilities of any independent contractor. While they are required to provide an end result that meets the quality standards of the franchisor, how they do so is up to them.” This contention is without merit. Petitioners can use the Nextel system to track the drivers’ day-to-day work details, and conduct quality control of drivers by inviting past customers to participate in random telephone surveys of the franchisees’ service quality, or to complete and submit comment cards.

The drivers have limited opportunity to pursue entrepreneurism by enhancing the profitability of their own franchises. While drivers can view a summary of the financial information related to their franchises on their Nextel phones; the Nextel

system is not an interactive tool with which the drivers can use to manage their day-to-day work activities, or analyze the profitability of their routes.

Petitioner's exertion of all the necessary control over the operation as a whole is analogous to that of JKH in *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) *142* Cal. App. 4th 1046. The *JKH Enterprises* court stated, "By obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all *necessary* control over the operation as a whole. Under *Borello*, and similar to its facts, these circumstances are enough to find an employment relationship for purposes of the Workers' Compensation Act, even in the absence of JKH exercising control over the details of the work and with JKH being more concerned with the results of the work rather than the means of its accomplishment." (*Id*. at p. 1064.) A business entity may not avoid its statutory obligations by carving up its business process into minute steps, then asserting that it lacks "control" over the exact means by which one such step is performed by the responsible drivers. (*S. G. Borello v. Department of Industrial Relations, supra,* 48 Cal. 3d at p. 357.)

2. *The franchise agreement gives Petitioners the right to terminate the agreement based on "good cause," and to determine in their sole discretion that termination is in the best interest of the SuperShuttle "System."*

Petitioners have unilaterally defined "good cause" for terminating a unit franchise agreement. "Good cause" to terminate the agreement "shall also include City Licensee's determination[,] *in its sole discretion*, that termination of the Agreement is *in the best interest of the SuperShuttle system*." [emphasis added] This contract provision gives Petitioners the right to terminate the franchise agreement "virtually at will." (*Porter* v. *Arthur Murray, Inc*. (1967) 249 Cal.App.2d, at p. 421; *Empire Star Mines Company, Ltd*. *v. California Employment Commission*, *supra,* 28 Cal.2d, at pp.43-44 ["Strong evidence in support of an employment relationship is the right to discharge at will, without cause."]; see *Cislaw v. Southland Corp., supra,* 4 Cal.App.4th at pp. 1289-1290.)

Conclusive proof of an employer-employee relationship is provided by Petitioners' right to terminate a franchise agreement if they determine, in their "sole discretion," that termination "is in the best interest of the SuperShuttle system." "Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so." (*Empire Star Mines Company, Ltd*. *v. California Employment Commission, supra,* 220 Cal. App. 3d, at 875; *Toyota Motor Sales U.S.A., Inc. v. The Superior Court of Los Angeles County, supra,* 220 Cal.App. 3d at p. 875.)

In addition, Petitioners can "immediately terminate" a unit franchise agreement on delivery of a notice of termination to the driver and with no opportunity to cure. Twenty-five events, including but not limited to, insolvency, failure on three or more separate occasions to make timely payment of fees, receipt of excessive number of complaints, citations, notices from airport representatives, customers, or federal, state or local regulatory agencies, are "deemed to be an incurable breach" and "good cause" for terminating the agreement.

In *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d, 541, the court found that the franchise agreement provided a plethora of controls and supervisory privileges on behalf of the franchisor, based on the franchisor's right to cancel the franchise relationship at any time by reason of [the franchisee's] insolvency, failure to maintain sufficient gross sales, or failure to comply with any contractual obligation, including [the franchisee's] duty to comply with all building codes and to obtain necessary building permits." (*Id.* at p. 550) In sustaining the punitive damage award against the franchisor, the court held that the franchisee "may be equated in all respects with an *employee***,** officer or manager." (*Ibid*.) [emphasis added]

Petitioners' right to terminate a franchise agreement based on excessive number of complaints from customers is akin to "the lease [that] cites failure to maintain good public relations as a specific reason for termination. This is an unquestionable control upon Gallegos's behavior as a taxicab driver." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal.App.3d at p. 1372.) It strongly suggests that the franchise agreement has provided a plethora of controls and supervisory privileges on behalf of Petitioners. (*Kuchta v. Allied Builders Corp., supra,* 21 Cal.App.3d, at p. 550 ["The most significant control an *employer* has over the acts of an official is the right to terminate his employment for misconduct. Allied had even this control over the franchisee."].)

The court in *Nichols* stated that the subject franchise agreement between the franchisor and the franchise holder, in substance, conferred upon the franchisor the right "to exercise a broad control over the operation of the enterprise under a provision …directing that failure to maintain [the franchisor's] policies shall be sufficient cause for immediate cancellation of the agreement." (*Nichols v. Arthur Murray, Inc., supra,* 248 Cal.App.2d, at pp. 615-616.)

3. *The franchise agreement requires the drivers to maintain and submit trip sheets.*

CPUC requires each petitioner to maintain in its office a set of records on the services it performed which included tariffs, timetables, and the number of passengers transported by each of its drivers; copies of all lease and sub-carrier

agreements; maintenance and safety records; driver records; and consumer complaint records. (CPUC Gen. Order 158-A, sections 6.01 and 6.02.)

The evidence here shows that petitioners require the franchisee-drivers to "maintain and accurately report" to Petitioners "all information" beyond what is required under CPUC General Order 158-A, sections 6.01 and 6.02 that Petitioners "may from time to time require." Petitioners also require all drivers to "maintain and submit" a daily "trip sheet" on which they record a list of each fare; pick up and drop off time and location; number of fares; amount of prepaid fares; method of payment, credit card or cash, and where the payment is rendered.

The franchisee-drivers' obligation to keep a "trip sheet" in the instant case is similar to that in *Nichols*, wherein the franchise holder was required to maintain records, and submit copies thereof weekly to the franchisor, setting forth the names and addresses of pupils enrolled during the week, the amounts paid by all pupils, number of lessons taken by each pupil, and the names of all pupils taking lessons. The court in *Nichols* affirmed the trial court's judgment against the franchisor on an actual agency basis. (See *Nichols v. Arthur Murray, Inc., supra,* 248 Cal.App.2d, at pp. 615-616.) In *Santa Cruz Transportation*, the Court stated, "'[T]he presence of a trip sheet requirement militates strongly in favor of employer control." [Citation]'" (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal.App.3d at p. 1372.)

4. *The franchise agreement requires the drivers to pay all fees with respect to gross revenues, in addition to the franchise fee.*

The franchisee is required to pay a franchise fee under section 31005 of the Corporations Code. In the instant case, Petitioners unilaterally set the amount of the franchisee fee at twenty-one thousand dollars ($21,000) in 2004, and within a year, increased it to fifty thousand dollars ($50,000) in 2005. Petitioners are deemed to have fully earned the franchise fee upon execution of the unit franchise agreements and would not have to refund it, in whole or in part, to the franchisees at any time.

Petitioners' contention that the "franchisees invested their money and their entrepreneurial skills in acquiring and building their franchise businesses" is illusory. A franchisee could sell his or her franchise to a new franchisee upon Petitioners' approval, at a sale price to be determined by the seller. However, there is barely any evidence showing that any franchisees have actually recovered their original investments or profited from the sale of their franchises. Upon termination of the unit franchise agreement, the driver would no longer be liable for any further franchise payments only if he or she had signed a waiver at the time when the unit franchise agreement was executed.

In addition, Petitioners require the franchisees to share the overhead expenses associated with maintaining the equipment, dispatching, cashiering, and other

business-related expenses. Franchisees have to reimburse Petitioners for any and all costs Petitioners incurred on behalf of the franchisees such as vehicle insurance costs; vehicle leasing fees if the franchisees lease their vehicles from Petitioners; alternative fuel costs; pager costs; toll fees; vehicle maintenance and/or inspection fees; Nextel phone charges or similar phone system charges; any fines assessed against Petitioners due to the franchisees' acts or failure to act; any parking tickets; costs in resolving the customer complaints about franchisees or franchisees' services; and for all other articles that Petitioners may order on the franchisees' behalf, such as uniforms. In addition, franchisees are responsible for payment of the license fees and system fee; reimbursement to Petitioners for all airport and incidental expenses; payment of a $1,500.00 deposit for the communication and specialized equipment, a $250 decal fee, and a $50.00 per occurrence handling charge for failure to pick up a passenger.

The purposes of these fees and incidental expenses, other than that of the franchise fee, are unrelated to the protection of Petitioners' trade name, good will and business image. The fee and incidental expense provisions in the unit franchise agreement vest in Petitioners "the right to control a substantial part of the obligations incurred in the operation of the business through its right to require and assert the nature, extent and amount of most of the contemplated expenses incident to the operation." (*Nichols v. Arthur Murray, Inc., supra,* 248 Cal.App.2d, at p. 617.)

The *Toyota* court stated that the franchisee driver's payment of his own payroll and income taxes and expenses related to his own worker's compensation insurance, are "merely the legal consequences of an independent contractor status not a means of proving it. An employer cannot change the status of an employee to one of independent contractor by illegally requiring him to assume burdens which the law imposes directly on the employer." (*Toyota Motor Sales U.S.A., Inc. v. The Superior Court of Los Angeles County, supra,* 220 Cal.App. 3d at p. 877.) Similarly, the fact that the Petitioners have imposed overhead expenses on their employees as if they were independent contractors does not make them independent contractors.

5. *The franchise agreement obligates the drivers to charge the fares set by Petitioners pursuant to Petitioners' agreements with the various airports.*

The unit franchise agreement obligates the drivers to accept assignments to transport passengers and to charge the fares set by Petitioners pursuant to Petitioners' agreements with the various airports. The CPUC's authority over shuttle carriers includes the power to fix rates. (Cal. Const. art. XII, § 4 & 5). The rates must be just and reasonable. (Cal. Pub. Util. Code § 45 1). The CPUC's rate regulation of these carriers is quite flexible, permitting "zones of rate

freedom," (Cal. pub. Util. Code § 454.2), as well as the ability to raise or lower rates. (Cal. Pub. Util. Code § 491.1).[8]

The fact that the rates are subject to the approval of various regulating agencies does not, by itself, shows an absence of control by Petitioners over the drivers. "That the City of Santa Cruz set taxicab fare rates has no tendency in reason to prove Yellow Cab's lack of control over Gallegos." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal.App.3d at p. 1375.)

In *Nichols*, the court affirmed a judgment against the franchisor on an actual agency basis, in part because the franchise agreement conferred upon the franchisor the right to fix the minimum tuition rates, and to require the franchise holder to honor unused lessons purchased by a pupil from another franchise holder. (*Nichols v. Arthur Murray, Inc., supra,* 248 Cal.App.2d, at pp. 615-616.)

In the instant case, a driver is not free to change a fare. Moreover, SuperShuttle would occasionally provide discounted rates for special groups or occasions, including discount vouchers and coupons that drivers have to agree to accept. On the rare occasions when the drivers conduct "occasional charter operations," they have to use the SuperShuttle set hourly rate of $55. Such evidence shows the existence of an agency relationship between Petitioners and the drivers.

6. *The franchise agreement permits the hiring of sub-drivers upon Petitioners' approval of the sub-drivers.*

Drivers are allowed to hire sub-drivers to operate their vans; but only upon Petitioners' approval of the drivers. (See, *Nichols v. Arthur Murray, Inc., supra, 248 Cal.App.2d, at pp. 615*-616, wherein the court found the franchise holder to be agents of the principal Arthur Murray, Inc. partially based on the principal's right to control the employment of all employees.)

Petitioner SuperShuttle Los Angeles instructed at least one driver to terminate his partnership with another driver because the other driver wore a red-colored jacket when working at the LAX. The court in *Empire Star*, in determining the independent contractor status of leaseholders, found that no leaseholder was ever requested to discharge anyone. (*Empire Star Mines Company, Ltd*. v. *California Employment Commission, supra*, 28 Cal.2d at pp. 44–45, 49.)

[8] The CPUC "may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified[.]" (Cal. Const. art. XII, § 4.)
"Notwithstanding Section 491, the commission may authorize a passenger stage corporation, upon one day's notice, to reduce its rates and charges to not less than those of a competing passenger transportation service operating over substantially the same route pursuant to federal operating authority. The commission may attach any conditions it finds reasonable or necessary." (Pub. Util. Code, § 491.1.)

7. *The franchise agreement requires franchisees to purchase or lease a van meeting the System's specifications, including but not limited to make, model, color, size, age and mechanical condition.*

Petitioners' contention on appeal that drivers have "complete discretion over whether to buy new, used or lease vans, or invest in alternative fuel vehicles" is insufficient to show that the drivers are independent of Petitioners' control.

In *Nichols*, the court affirmed a judgment against the franchisor on an actual agency basis in part because the franchisor designated the location of the studio, its layout and decoration. (*Nichols v. Arthur Murray, Inc., supra,* 248 Cal.App.2d, at pp. 615-616.)

Here, drivers' vehicles are analogous to "the studio" in *Nichols.* Drivers have to grant Petitioners a security interest in the vans they use to transport SuperShuttle passengers; and modify their vehicles in accordance with the specifications set forth in the operations manual. The vans have to meet the System's specifications, including but not limited to make, model, color (blue), size (nine to 15-passenger), age and mechanical condition. Drivers have to distinctively paint and mark their vans with the SuperShuttle logo and colors. Thus, SuperShuttle and Petitioners have demonstrated their control over the franchisee drivers. (*Yellow Cab Cooperative, Inc., v. Workers' Comp. Appeals Board, supra,* 226 Cal.App.3d at p. 1294.)

8. *Under the franchise agreement, franchisees shall not engage in any advertising or promotional activities.*

In the instant case, SuperShuttle and Petitioners control all advertising upon the rationale that a franchise entitles the driver to a nonexclusive right to the SuperShuttle trademark, marketing plan and advertising. The franchisee-drivers are not allowed to advertise their services to the public, and the business cards they hand out to the customers are printed and distributed by SuperShuttle with contact information only for SuperShuttle and not for their own franchises.[9]

In *Nichols,* by analogy, the court determined that Arthur Murray, Inc. was the principal of an agent, as opposed to an independent contractor, when it controlled all advertising of the franchise holder's services. (*Nichols v. Arthur Murray, Inc., supra,* 248 Cal.App.2d, at pp. 615-616.)

9. *Under a franchise agreement, the drivers are not allowed to keep personal items within their own shuttle vans.*

[9] At hearing, Petitioners produced the business card of only one franchisee, Robert Ash, who owned two franchises, two vans, and had a separate charter operation. He had a driver for the second van and a third backup driver. He had obtained contract work outside of the SuperShuttle system under the name of his limited liability company, Rob's Ultimate Transportation.

Drivers are not allowed to keep personal items within their own shuttle vans. The First Amendment to Airport on Demand Van Service Agreement, executed on April 19, 2005 between Sacramento County Airport System and SuperShuttle, contains this provision on "cleanliness." Every ground transportation vehicle shall be required to have clean interiors free from "dust," "debris," "any substance in *the seating area which could cause harm, damage, or injury to any passenger or their clothing*," and "*any papers or objects on dash*." [emphasis added]

The above-stated prohibition restricts dust and debris in the interiors, harmful substance in the seating area, and papers or objects on the dash, but Petitioners' blanket restrictions extend to personal items in the entire van interior. Petitioners' control in this regard extends beyond what the airport authorities require and beyond what is necessary to protect the value of their goodwill and trademarks.

C. *Examination of secondary factors supports an employee status determination.*

The *Empire Star* court did not solely consider "control" in evaluating the employment relationship. The court noted other factors that should be taken into consideration. Pertinent to the facts in the cases at hand are these factors: (1) whether or not the drivers are engaged in a distinct occupation or business; (2) whether the operation of an airport shuttle van for the transportation of passengers is the kind of occupation or work usually done under the direction of the principal or by a specialist without supervision; (3) the skill required in the operation of a nine- to 15-passenger van; (4) whether Petitioners or the drivers supply the instrumentalities, tools, and the place of work for the drivers doing the driving; (5) the length of time for which the services are to be performed; (6) the method of payment, whether by the time or by the fare; (7) whether or not transportation of passengers to and from airports is a part of Petitioner's regular business; and (8) whether or not the drivers and Petitioners believe they are creating the relationship of employer-employee.

1. *The drivers are not engaged in any distinct occupations or businesses.*

Petitioners strongly recommend to the franchisee-drivers to form a business entity and to obtain an identification number from the Internal Revenue Service. However, the preponderance of the evidence has established that few franchisee drivers engage in separate and distinct occupations of their own. (*Grant v. Woods* (1977) 71 Cal. App. 3d at p. 653; *Air Couriers International v. Employment Development Department* (2007) 150 Cal.App.4th 923**,** at p. 939, "Drivers were not being engaged in a separate profession or operating an independent business and infrequently declined job assignments.")

They incur no opportunity for "profit" or "loss." Like employees, they are simply paid by the quantity of fares they transport. They rely solely on Petitioners' dispatch of customers for their subsistence and livelihood. (*S. G. Borello v. Department of Industrial Relations, supra*, 48 Cal.3d at pp. 351-358.)

Many franchisees hire sub-drivers upon Petitioners' approval of the drivers, or form a partnership with another driver. All sub-drivers have to follow the same rules and regulations as the franchisees themselves. Both drivers and sub-drivers perform the same work. With the exception of only a few franchisees that have multiple vans and multiple drivers, almost all drivers who hire sub-drivers are not in the business of operating their own airport shuttle transportation services and hiring employees for that purpose.

Franchisees may conduct "occasional charter operations," which are incidental scheduled transportation between locations other than the airport, without using Petitioners' dispatch system, provided that they notify Petitioners and the CPUC, pay a license fee to SuperShuttle, and use the SuperShuttle set hourly rate of $55. However, the evidence shows that few franchisees actually conduct private charter operations, or own and operate their own distinct business.

The Public Utilities Code requires uniforms as a means of identifying to the public the service provider's association with a specific charter party carrier, but the CPUC regulations or airport rules contain no definition for a dress code, such as color, type of hat, sweater, jacket, vest or visor that the drivers should wear.

The SuperShuttle dress code requires the drivers to wear black pants, black shorts, black shoes, black socks, and a blue or white shirt with a black tie, in order to create a distinctive visual impression identifiable with SuperShuttle. There is no outward appearance to the public that these drivers are proprietors of their own business enterprises. Petitioners have the prerogative to lock a driver's computer if that driver does not comply with the SuperShuttle dress code, and to "fire" a driver for wearing a red-colored jacket when working at the LAX. A dress code requirement is an indicium of control by Petitioners over the franchisee-drivers, as well as a strong indication that the franchisee-drivers are not engaged in a distinct occupation or business. (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal. App. 3d at p. 1372.)

2. *The operation of an airport shuttle van for the transportation of passengers is usually not done under the direction of the principal or by a specialist without supervision.*

Driving an airport shuttle van does not involve the kind of expertise which requires entrustment to an independent professional. The skill required on the job is such that it can be done by employees rather than specially skilled independent drivers. (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal.App.3d, at p. 1373.)

The *Air Couriers* court noted that simplicity of the work (taking packages from point A to point B), and regularity of daily routes in drivers' schedules, even though the driver had the discretion on when to take breaks or vacation, made detailed supervision, or control, unnecessary. Drivers were given delivery deadlines and had to notify the dispatchers when the delivery was complete. (*Air Couriers International v. Employment Development Department, supra,* 150 Cal.App.4th at pp. 947-948.)

3. *There is no affirmative evidence that specially skilled independent drivers are required to accomplish the desired result.*

We do not find sufficient evidence to support Petitioners' contention that the "drivers must exercise considerable skill - not only in negotiating the airports and city traffic, but also in doing so in compliance with the myriad legal requirements, and regulations which impact their chosen profession."

All drivers, whether employees or subcarriers, operating vehicles used in transportation for compensation are required to possess a class B driver's license under the PSC certificate. (Public Utilities Code § 1032(b)(1)(D), and CPUC General Order 158-A, section 5.02) Every vehicle driver who is licensed under the California Vehicle Code and willing to comply with Motor Carrier Safety provisions identified by the CPUC, is qualified to be a franchisee driver for Petitioners.

An analogy can be drawn between the skill level of an airport shuttle van driver and that of a taxicab or a courier driver. As stated in *Santa Cruz Transportation*, "there was no evidence that taxicab driving is an unskilled occupation. This finding is not affirmative evidence that taxicab driving is a skilled occupation, which might justify an inference of independent contractor status." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal.App.3d at p. 1377.) The work of a courier driver "did not require a high degree of skill and it was an integral part of the employer's business. The employer was thus determined to be exercising all *necessary* control over the operation as a whole." "The minimal degree of control that the employer exercised over the details of the work was not considered dispositive[.]" (*JKH Enterprises, Inc. v. Department Of Industrial Relations, supra,* 142 Cal. App. 4th at p. 1064.)

4. *Drivers provide the vans, but Petitioners supply the centralized reservation system and the customers; and control the geographical area of routes.*

Franchisees are not required to possess any special vehicles. They are required to possess vans that meet the System's specifications, including but not limited to make, model, color (blue), size (nine to 15-passenger), age and mechanical condition. Franchisees are required to modify the vehicles in accordance with the specifications set forth in the operation manual. Drivers can either lease their

vehicles from Petitioners, or purchase them from other drivers or independent car dealers, but they have to grant Petitioners a security interest in their vans. (*Air Couriers International v. Employment Development Department, supra,* 150 Cal.App.4th at pp. 947-948.)

As stated herein previously, Petitioners provide and have complete control over the centralized reservations system, a highly technical computerized algorithm program that is the backbone of their dispatch system and business of providing "demand responsive and/or scheduled airport shuttle" service to their customers. Petitioners "loaned" to the drivers the SuperShuttle specialized communication transmission equipments, and other equipment, such as a headsign and credit card processing equipment upon the drivers' payment of a $1,500 deposit.

5. *Drivers are mandated to enter into 10-year franchise agreement.*

Most franchisees purchased a 10-year franchise that is renewable for two terms of five years each, thus, the drivers are tenured for lengthy periods of time. (*Grant v. Woods*, *supra*, 71 Cal. App. 3d at p. 653.) In *Air Couriers*, the court concluded that the drivers were properly classified as employees for the purposes of the Unemployment Insurance Act, since most drivers had lengthy tenures in performing an integral and entirely essential aspect of the employer's business. (*Air Couriers International v. Employment Development Department, supra,* 150 Cal.App.4th at p. 939.)

6. *Petitioners unilaterally establish the formula for calculating the drivers' gross revenue, and the method of payments to the drivers.*

Petitioners require the drivers to record on a daily "trip sheet." The drivers must submit to Petitioners any vouchers and credit card slips they have received during the week. The credit card payments are payable to and processed by Petitioners or SuperShuttle. The driver keeps all cash received from the customers. On a weekly basis, Petitioners calculate the total gross revenue for each van based on the trip sheet submitted by the driver for that van. Petitioners then deduct from the gross revenue all the fees and expenses, including but not limited to the franchise, license, and system fees, and airport expenses.

The franchisees' income is dependent on the quantity of fares they transport. If they have sub-drivers operating their vans, they are obligated to pay the same fees to Petitioners for each van, but may pay their sub-drivers less than the weekly net proceeds generated by operation of that van. Drivers do not have to be on duty on any particular day, but unless Petitioners agree ahead of time, the franchisees continue to make their payments to petitioners for their franchise, license and system fees; van lease if applicable; and for access to the dispatch system even when they are not working.

In *Santa Cruz*, the court determined that the fixed lease payment to Yellow Cab did not amount to an entrepreneurial risk and make the taxi driver more like independent businessperson than was the case in *Borello*. "The court there found little entrepreneurial character in the work because the workers were paid according to the size and grade of their crop, they did not set the price, and the risk that the crop might be unharvestable was no different from the risk they would run if they were employees." "In the first two respects the cabdrivers' work here is closely analogous: drivers did not set their own rates but were paid according to the number and distance of fares they carried. The only risk they ran beyond that in *Borello* was that in the worst case they might lose money on a given shift." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal.App.3d, at p.1375.) "[T]here is no basis for characterizing this risk as 'entrepreneurial.' There is no evidence that earnings varied with the drivers' skills, entrepreneurial or otherwise. The evidence on this point does not tip the balance far enough to warrant a result different from that in *Borello*." (*Ibid*.)

The evidence in the instant case has established that the franchisee-drivers do not set the rates of the fares, but are paid according to the quantity of fares less the sum of all the fees fixed by Petitioners. In accordance with the rationale in *Santa Cruz*, the franchisee-drivers are not exposed to any entrepreneurial risk since their earnings do not vary with their skills.

7. *The drivers perform an integral and entirely essential aspect of Petitioners' "demand responsive and/or scheduled airport shuttle services."*

The franchisee-drivers perform an integral and entirely essential aspect of the Petitioners' business. As stated in the SuperShuttle Unit Franchise Operation Manual, *"franchisees and employees … are critical in delivering* high quality *service*." [emphasis added] The drivers' work, though "on demand" by nature, is long-term in the business of airport shuttle transportation. This permanent integration of the drivers into the heart of Petitioners' business is a strong indicator that the drivers function as employees under the Unemployment Insurance Act. (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 150 Cal.App.4th at p. 939.)

As the court stated in *Arzate et al v. Bridge Terminal Transport* (2011) 192 Cal. App. 4th 419, 427, "while defendant asserts that its business is to "mak[e] arrangements between customers and the owner-operators of trucks for the movement of containers" and that plaintiffs "did not perform work that was part of [defendant's] regular business," that claim is belied by defendant's own documentation, which states, correctly, that defendant is a "common carrier by motor vehicle, engaged in the business of transportation of property … ." Thus, the work plaintiffs do "is a part of the regular business of the principal", a factor

suggesting employee status. (*S. G. Borello v. Department of Industrial Relations, supra,* 48 Cal. 3d 341, 351.)

"The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service." (*S. G. Borello v. Department of Industrial Relations, supra*, 48 Cal.3d at p.357.)

Contrary to Petitioners' description, the essence of their enterprise is not merely granting to the franchisees the right to use the "reservation system" and be "part of SuperShuttle's comprehensive marketing plan," as "required under franchise law." They cultivate the passenger market by soliciting passengers, processing requests for service through a centralized reservation and dispatching system, requiring shuttle vans be distinctively painted and marked with their brand colors of blue and yellow and SuperShuttle logo, and concerning themselves with various matters unrelated to the franchisor-franchisee relationship.

Petitioners' stated mission is not merely to sell a reservation system or a marketing plan to franchisees, but to operate an airport transportation business by using franchisee drivers to accomplish their mission. The drivers, as active instruments of the SuperShuttle enterprise, provide an essential and indispensable service to Petitioners. Petitioners cannot survive without the drivers. (*S. G. Borello v. Department of Industrial Relations*, *supra*, 71 Cal. App. 3d at p. 653; *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra,* 235 Cal.App.3d, at p. 1376.)

8. *Petitioners believe that they have created a franchisor-franchisee relationship that classifies the drivers as "independent contractors," but the drivers believe the nature of their work as "employees" has not changed since their status was converted to "franchisees."*

The unit franchise agreements identify the drivers as independent contractors, and many of the drivers believe that to be their correct status. However, the drivers' testimony at hearing has established that the nature of their work as "employees" has not changed since their status was converted to "franchisees." Franchisee-drivers perform essentially the identical work they had carried out when they were previously known as employees, even after the conversion of their employment status from "employee" to "franchisee." Drivers continue to transport passengers who have made reservations directly with SuperShuttle, to and from designated airports.

III. *Conclusion*

The fact that the franchisee airport shuttle van drivers are performing work and labor for Petitioners is *prima facie* evidence of employment, and the drivers are

presumed to be employees unless Petitioners affirmatively prove otherwise. After evaluating the franchise agreement and the relationship between Petitioners and the franchisee drivers, we conclude that Petitioners have not sustained their burden of proof in establishing that the franchisee shuttle van drivers are independent contractors. Thus, we find that the franchisee airport shuttle van drivers are employees under common law and California law.[10] The

[10] Petitioners placed erroneous reliance on a panel decision of this Board that had no precedential value, "M & M Luxury Shuttle Inc.," No. AO-160078(T), issued on June 17, 2008, affirming OA Decision No. 2056607 that was mailed by the San Francisco Office of Appeals on January 11, 2008. The rules regarding precedent decisions of this agency are contained in Unemployment Insurance Code section 409, and California Code of Regulations, Title 22, section 5109. We take official notice under California Code of Regulations, title 22, section 5009(a) that Case No. AO-160078(T) was not designated a precedent decision by the Appeals Board and was not published as such. It is not listed in the index of said decisions. Neither this Board nor any other entity is bound by the holding of Case No. AO-160078(T). (P-T-495, at p. 7, fn.5.)

Petitioners cited two federal district court decisions in their Appellants' Brief. The first case was *Juarez v. Jani-King of California, Inc.* in which the Court granted Jani-King's motion for summary judgment with respect to the plaintiff's labor claims. (Case No. 09-03495 SC, United States District Court for The Northern District Of California, 2012 U.S. Dist. LEXIS 7406, 2012 WL 177564, January 23, 2012). Subsequently, the United States District Court for The Northern District Of California, entered an "order granting plaintiffs' motion for certification pursuant to 28 U.S.C. § 1292(b) and staying further proceedings pending appeal." The court reasoned, "A district court may certify for appellate review any order that, in the court's opinion, "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] [where] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b)." (Case No. 09-03495 SC, 2012 U.S. Dist. LEXIS 19766, February 16, 2012.) Under these circumstances, it would not prudent for this Board to refer to the court decision entered on January 23, 2012, and reported in U.S. Dist. LEXIS 7406, 2012 WL 177564.

The second case is *Ruiz v. Affinity Logistics Corporation* (Case No. 05CV2125 JLS (KSC), United States District Court For The Southern District Of California, 2012 U.S. Dist. LEXIS 121477, 2012 WL 3672561, August 27, 2012.) Affinity, a Georgia corporation, provided regulated, for-hire home delivery and transportation logistics support services to various home furnishing retailers, including Sears. The facts in *Ruiz* are distinguishable from those in the instant cases. For instance, before starting his work for Affinity, Ruiz formed his own business, R&S Logistics ("R&S"), by obtaining a Federal Employer Identification Number and establishing a separate business banking account for R&S. (*Id.* at *5) Ruiz had total control over his start and end time. (*Id.* at *14.) Affinity's control over work details and requirements were attributable to a need to comply with federal regulation or with [their clients'] requirements. (*Id.* at *16.) The drivers "selected or were assigned their routes based on scores they received from customer surveys conducted by Affinity's clients. (*Id.* at *21.) There was a "mutual termination provision" in the contract between Affinity and Ruiz which could be terminated "without cause upon sixty-days written notice." (*Id.* at *27.) Ruiz and other drivers were required to possess substantial skill in proper delivery and appliance-installation, "especially considering the dangers involved in installing appliances hooked to gas lines, or the potential water damage that may arise." (*Id.* at *30-31.) The drivers "were, on occasion, able to negotiate a higher payment for an individual delivery which proved to be particularly difficult." (*Id.* at *38.) Ruiz and other drivers "were required to and did form their own businesses before contracting with Affinity." (*Id.* at *42.)

We do not find *Ruiz* to be persuasive authority, due to the numerous factual differences between that case and our cases. In addition, "[T]he rule [of stare decisis] under discussion has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting

employment status determination herein covers every driver, including sub-driver, who performs airport shuttle transportation service for Petitioners, regardless of whether or not the driver has hired sub-driver(s) or is in a partnership with another driver or other drivers, or has conducted occasional private charter operations.

DECISION

The decisions of the administrative law judge are affirmed based on the rationale stated herein. The petitions for reassessment are denied.

decisions." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) This Board has chosen not to refer to the Ruiz decision for the reasons stated herein.