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National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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TO: Mori Rubin, Regional Director
Region 31

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: SuperShuttle Los Angeles, Inc.
Case 31-CA-092489

177-2414
177-2484-5000

This case was submitted for advice regarding whether the franchisees of SuperShuttle Los Angeles, Inc. are employees or independent contractors outside the Board's jurisdiction. We conclude that the franchisees are independent contractors because they have significant entrepreneurial opportunity, the company does not meaningfully control the manner and means of the franchisees' work, and the parties clearly intended to create an independent contractor relationship.¹

FACTS

SuperShuttle Los Angeles, Inc. ("Company" or "SuperShuttle") provides shared-ride transportation services to and from airports in the greater Los Angeles and Orange County areas. Prior to 2002, SuperShuttle operated on an employer-employee model and the drivers were represented by a Teamsters local union. In 2002, SuperShuttle began implementing a franchisee business model, through which drivers signed a Unit Franchise Agreement ("UFA") and agreed to become independent contractors. The Teamsters union ceased representing the drivers, and by 2004 all remaining drivers were franchisees operating under a UFA.² Currently, there are 193 franchisees associated with SuperShuttle.

The franchisees' UFAs contain mostly identical provisions but are not uniform. UFAs entitle franchisees to operate within the Los Angeles metropolitan area and

¹ We do not address SuperShuttle's alternate claim that the franchisees are supervisors within the meaning of Section 2(11) of the Act.

² Several drivers decided to end their relationship with SuperShuttle rather than sign a UFA.

Orange County during AM hours, PM hours, or 24 hours. All franchisees are required to pay a substantial up-front franchise fee. The franchise fees vary from individual to individual; for example, three franchisees with otherwise similar UFAs paid fees of \$35,000, \$42,000, and \$50,000, respectively, in 2004. The Company states that the franchise fee amounts are negotiable, although two franchisees state that they did not negotiate their fees.

The UFAs require franchisees to provide their own vans. The vans must meet the Company's specifications, including but not limited "to make, model, color, size, age and mechanical condition." There is a factual dispute about what this means in practice. One franchisee states that vans must be a certain model of Ford and no more than five years old, but does not know of any vehicle ever being rejected; another franchisee states that vans can be no more than six years old and must be certain makes and models, but that there is no formal approval process as all the drivers know what kind of vans they need to buy. The Company, by contrast, states that any van may be used, so long as it seats seven to ten people. All agree that the franchisees may obtain the vehicles anywhere they wish, including through the SuperShuttle-affiliated Blue Van Leasing. The Company does not provide storage facilities for the vehicles; rather, franchisees must garage their own vans.

Franchisees have three primary options for obtaining work assignments. When customers schedule rides in advance through SuperShuttle's reservation system, franchisees can "bid" on prospective trips that appear on their mobile data terminals ("MDTs"). Bidders receive such assignments on a first-come, first-served basis. There is no penalty for declining to accept an available assignment. In fact, franchisees work as much or as little as they want and can elect to not work at all on any given day. When transporting passengers, franchisees are free to choose whatever routes seem best. Although bidding on trips through the dispatch system is the most common way to be assigned work, franchisees also may obtain assignments other than from MDT bidding. One option is to wait in an airport holding lot, along with drivers affiliated with other companies, to be assigned trips for arriving passengers. If the trip is unappealing, the driver may turn it down. Another means of obtaining work outside the SuperShuttle reservation system is to engage in "charter operations," which involve passengers being transported from a non-airport location to another non-airport location. The UFA requires that such trips be at least two hours long and that franchisees notify the Company two hours in advance.

Franchisees are not guaranteed any minimal level of compensation. They must honor all coupons or promotions sponsored by SuperShuttle, and have no ability to independently set fares. Passengers who schedule rides in advance through SuperShuttle's reservation system often pay drivers in person with cash or a credit card, though passengers can also pre-pay via SuperShuttle's website. Once a week, franchisees "cash out" at SuperShuttle's facility in Torrance and turn over their driver manifests (which reflect all cash payments), as well as all other forms of customer

payment, such as credit card slips and airport vouchers. The non-cash forms of payment are credited to the franchisees' accounts, and various fees are then deducted by SuperShuttle, including a system fee for use of the dispatch system, insurance payments, airport fees, data plan fees for the MDTs, and SuperShuttle's 25% share of all revenue. If the franchisees are owed money after the fees have been deducted, a check is issued. Occasionally, franchisees will owe SuperShuttle money after the cash out process. SuperShuttle does not withhold any taxes from franchisees' reimbursement checks, and franchisees do not receive any fringe benefits such as health insurance or retirement plans.

There is a factual dispute about franchisees' ability to market themselves and solicit new customers. Two franchisee witnesses maintain that they are forbidden from handing out personalized business cards or marketing themselves in any way, and can only distribute generic SuperShuttle business cards. The Company, by contrast, states that franchisees may hand out their own business cards and could theoretically take out newspaper advertisements in order to solicit passengers. The UFA states only that any advertising by the franchisee must be first approved by SuperShuttle.

SuperShuttle enters into contracts with the City of Los Angeles that permits SuperShuttle to provide passenger transportation services at area airports. These contracts require, among other items, that vans be clean and free of damage, that they contain identical color schemes and display SuperShuttle's name on all sides of the vehicle, that drivers wear uniforms identifying themselves as working for SuperShuttle, that SuperShuttle maintain appropriate vehicle insurance and general liability insurance, and that SuperShuttle provide certain training to its drivers. Local government regulations, including regulations from the California Public Utilities Commission ("PUC") and individual airports, likewise require that each van display SuperShuttle's name on all sides of the vehicle, that the vans be in good mechanical condition, that SuperShuttle regularly inspect the vehicles, that drivers not be under the influence of drugs or alcohol while on duty, and that SuperShuttle provide drug tests for prospective drivers. Many of these requirements are reflected in the UFAs.

Franchisees may hire as many relief drivers as they wish, subject only to completing SuperShuttle's initial training program. In addition, some UFAs require advanced written notice to SuperShuttle of an intent to use a relief driver. Franchisees solely determine relief drivers' terms and conditions of employment. Although a franchisee states that he has heard that some relief drivers have been suspended in the past by SuperShuttle, there is no direct evidence of any such action. Approximately 40% of franchisees use relief drivers; several franchisees do not drive vans at all and use relief drivers to perform all of their driving work.

Franchisees may purchase as many UFAs and operate as many franchises as they wish, and are encouraged to form corporations for their enterprises. Of the 193 franchisees, 52 have formed business entities. Several franchisees operate multiple franchises using relief drivers. Franchisees may sell or transfer franchises, subject to approval from SuperShuttle, and a 10% commission on any sale. There is no evidence that SuperShuttle has ever blocked a sale or transfer of a UFA. SuperShuttle states that about 35-40 transfers have occurred in the last year alone.

SuperShuttle states that some franchisees who have formed their own business entities also use those entities to manage non-passenger related businesses, such as an auto repair business. Moreover, though the UFAs explicitly forbid franchisees from engaging in outside passenger transportation business that may conflict with their SuperShuttle franchises, SuperShuttle claims that one franchisee uses his business entity to operate other airport shuttle vehicles. That business does not conflict with SuperShuttle's business because it does not use "shared-ride" vehicles. Franchisees may also use their SuperShuttle vans for other purposes, such as transporting goods.

The UFAs allow SuperShuttle to assign points to franchisees each time the franchisee or its relief driver fail to comply with local government regulations, which could eventually result in fines or termination of the contract. Moreover, the UFA allows SuperShuttle to terminate the contract for "good cause" should any one of 24 different events occur, including deceiving SuperShuttle about revenue, falsifying records, or receiving (or a relief driver receiving) an excess number of traffic citations. SuperShuttle may also send a "default letter" for various reasons, such as failure to pay a fee or noncompliance with a UFA. Unlike contract termination, a default letter gives the franchisee an opportunity to cure the default.

SuperShuttle occasionally utilizes a "mystery rider" program, by which SuperShuttle may place fake passengers in franchisees' vehicles to monitor customer service. Video cameras have also been installed in approximately half of the vehicles by a third-party insurance company. The Company states that the cameras are optional and entitle franchisees to a 5% discount on their insurance rates, while a franchisee witness states that the cameras became mandatory in January 2012. SuperShuttle maintains that the insurance company, rather than SuperShuttle, reviews the cameras and will occasionally notify SuperShuttle if it spots something concerning; SuperShuttle may then follow up with the franchisee.

The UFA also contains an indemnification clause, by which the franchisees are held liable for any third-party damages.

ACTION

We conclude that the franchisees are independent contractors within the meaning of Section 2(3) of the Act because they have significant entrepreneurial

opportunity, the Company does not exert meaningful control over the manner and means of the franchisees' work, and the parties clearly intended to create an independent contractor relationship.

Section 2(3) of the Act excludes "any individual having the status of an independent contractor" from coverage. The party asserting independent contractor status has the burden of proof.³ In *NLRB v. United Insurance Company of America*,⁴ the Supreme Court held that Congress mandated the use of the common-law agency test to determine independent contractor status under the NLRA.⁵ This analysis requires examination of every aspect of the employment relationship.⁶ The reviewing body must analyze the entire context, and no single factor is determinative.⁷ Indeed, "decisive" facts in one case may be entirely inadequate in another.⁸ Factors that the Board considers in determining whether an individual is an employee or independent contractor include whether significant entrepreneurial opportunities are available to the individual;⁹ whether the putative employer exercises significant control over the manner and means of the individual's work;¹⁰ and the intent of the parties upon entering into the working relationship.¹¹

³ *Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004), (citing *BKN Inc.*, 333 NLRB 143, 144 (2001)).

⁴ 390 U.S. 254 (1968).

⁵ *Id.* at 256.

⁶ *Roadway Package System, Inc.*, 326 NLRB 842, 850 (1998) (citing *United Insurance*, 390 U.S. at 258).

⁷ *United Insurance*, 390 U.S. at 258.

⁸ *Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982).

⁹ See *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998) (citing ability "to make an entrepreneurial profit beyond a return on [drivers'] labor and their capital investment" as indicating independent contractor status); *St. Joseph News-Press*, 345 NLRB 474, 479 (2005) (Board looks for conditions that permit individuals to take economic risk and reap corresponding opportunity to profit "from working smarter, not just harder" (internal citations and quotation marks omitted)).

¹⁰ See *Roadway Package System, Inc.*, 326 NLRB at 851 (relying on evidence that drivers "do business in the company's name with assistance and guidance...[and] under its substantial control" as indicating employee status); *Arizona Republic*, 349

The Franchisees Have Significant Entrepreneurial Opportunity

In determining entrepreneurial opportunity, the Board considers the extent to which a job provides workers an opportunity to impact their own compensation by taking economic risk and to reap profit by “working smarter, not just harder.”¹² In *St. Joseph News-Press*, for example, the Board found it critical that the drivers could hire full-time substitutes and exercised complete control over those substitutes’ terms and conditions of employment, that the carriers could hold contracts on multiple routes, and that the carriers could solicit new customers.¹³ In *Dial-A-Mattress*, the Board likewise stressed that the owner-operators hired their own employees and solely dictated those employees’ terms and conditions of employment; moreover, the Board emphasized that the owner-operators were not guaranteed a minimum compensation, could decline orders without penalty, and were not required to provide delivery services every single workday.¹⁴

Here, several factors demonstrate that the franchisees have significant entrepreneurial opportunity. Franchisees may hire full-time relief drivers and determine those drivers’ terms and conditions of employment, subject to minimal oversight from SuperShuttle. The franchisees may operate as many vans under as many different UFAs as they purchase, and many franchisees form separate business entities to manage their franchises and related business enterprises. Although two franchisees contend that they are forbidden from handing out personalized business cards or otherwise marketing themselves, the Company disputes this. Moreover, franchisees’ ability to offer “charter” services outside of the SuperShuttle dispatch system supports the Company’s assertion that franchisees are permitted to solicit new customers and even advertise their services. Additionally, the franchisees are not guaranteed minimum compensation, are not required to work every day, can decline offered trips without penalty, and can choose various methods of obtaining work, thus increasing their potential for either profit or loss. Indeed, one franchisee states that

NLRB 1040, 1044 (2007) (independent contractor status indicated where carriers not bound by employer’s work rules other than basic safety standards).

¹¹ *St. Joseph News-Press*, 345 NLRB at 479 (noting that the intent of the parties “weigh[ed] strongly in favor of finding independent contractor status,” as “[t]he parties believed they were creating an independent contractor relationship”).

¹² *Id.*

¹³ *Id.*

¹⁴ *Dial-A-Mattress Operating Corp.*, 326 NLRB at 891.

he uses his judgment to only accept trips that he deems will be profitable, and works fewer hours and earns more money (between \$300-\$400 per day) than he did before SuperShuttle shifted to the franchise model. Two other franchisees state that they earn only \$600 per *week*. The franchisees' potential for profit or loss is also reflected in the variability of the franchise fees, which SuperShuttle states were negotiable. For example, in 2004, three different franchisees paid \$35,000, \$42,000, and \$50,000, respectively, for 24-hour franchises. Taken together, the evidence demonstrates that the franchisees are able to significantly affect their income by "working smarter, not just harder."¹⁵

The Company Does Not Exert Meaningful Control Over the Manner and Means of the Franchisees' Work

The right of a putative employer to control the manner and means of its employees' work is an important factor in determining independent contractor status.¹⁶ Additionally, in considering whether putative employees operate under significant employer control, the Board does not consider company rules designed to comply with government regulations to be evidence of control.¹⁷ However, company

¹⁵ *St. Joseph News-Press*, 345 NLRB at 479. Compare *Carey Limousine LA, Inc. and Carey International, Inc. (Joint Employers and/or Single Employer)*, Case 31-CA-085481, Advice Memorandum dated February 28, 2013 (among other factors, purported entrepreneurial opportunity enjoyed by drivers illusory, as the company heavily regulated drivers' relief operators, stifled drivers' ability to solicit new customers, and interfered with drivers' ability to choose what work to take).

¹⁶ Compare *Roadway Package System, Inc.*, 326 NLRB at 843-848 (finding drivers to be employees where they were required to provide delivery services every scheduled workday, could not refuse to deliver or pick up packages without being subject to discipline, could not operate multiple trucks or hire their own relief drivers, and were required to wear uniforms displaying the Roadway logo) with *Dial-A-Mattress Operating Corp.*, 326 NLRB at 892-893 (finding drivers to be independent contractors where they were not required to provide delivery services each scheduled workday, could refuse load assignments, could change the order of deliveries, could use multiple vehicles, and could hire relief drivers and helpers).

¹⁷ *Don Bass Trucking*, 275 NLRB 1172, 1174 (1985) (holding that employer compliance with Illinois Commerce Commission regulations in managing its owner-operator drivers constitutes "supervision not by the employer but by the state") (internal citations omitted).

rules which go beyond applicable governmental regulations are an indicator of employee status.¹⁸

Here, the franchisees enjoy a significant degree of operational freedom. Subject only to the broad shift (AM, PM, or 24-hour) and geographical requirements in their UFAs, the franchisees may work whenever and wherever they choose, utilize whichever routes seem most efficient, and can decline any work they do not wish to take without fear of discipline. The franchisees can bid on jobs through their MDTs, wait in airport holding lots for prospective work, or arrange on their own to transport passengers through “charter” services. If the franchisees do not want to drive their vans, they may choose to hire relief drivers to do so for them, and control those relief drivers’ wages and other terms and conditions of employment.

Moreover, many of the requirements that franchisees are subject to are in fact imposed by state or local government. Thus, the California PUC and the City of Los Angeles—through both airport regulations and its contracts with SuperShuttle—variously require that vans be clean and in good mechanical condition; that SuperShuttle periodically inspect the vans; that SuperShuttle’s name and colors be displayed on the vans; and that drivers undergo drug tests, wear uniforms, and receive training regarding customer service standards and airport regulations. As a result, none of those factors weigh in favor of finding the franchisees to be statutory employees.

Although the franchisees are subject to significant discipline from SuperShuttle—ranging from fines to termination of the UFA—on balance, this is outweighed by the significant operational freedom enjoyed by the franchisees.

The Parties Intended to Create an Independent Contractor Relationship

The Board has found evidence of the parties’ intent to be pertinent in evaluating independent contractor status.¹⁹ Here, the evidence supports finding that both

¹⁸ *Metro Cab Co.*, 341 NLRB 722, 724 (2004), enforced 512 F.3d 1090 (9th Cir. 2008) (policies contained in the employer’s manual which went “beyond, and d[id] not involve, government regulations” supported finding employee status).

¹⁹ *St. Joseph News-Press*, 345 NLRB at 479 (finding that the parties’ intent weighed strongly in favor of finding independent contractor status, as the parties believed they were creating independent contractor relationships and the parties’ contracts themselves stated that the parties were forming independent contractor relationships); *Dial-A-Mattress Operating Corp.*, 326 NLRB at 891 (the contracts between the parties stated that the owner-operators were not to be considered employees and were instead independent contractors).

SuperShuttle and the drivers who executed UFAs intended to establish an independent contractor relationship. Prior to 2002, SuperShuttle operated on an employee-employer model, and the drivers were unionized. In 2002, however, SuperShuttle began implementing a franchisee model, and the union ceased representing the drivers. Those drivers who entered into UFA contracts with SuperShuttle were required to provide their own vans, and were required to pay a substantial franchise fee, generally between \$35,000 and \$50,000. Rather than enter into such an agreement, many drivers chose to stop driving for SuperShuttle. Additionally, the UFAs specifically state that drivers are “independent contractors” rather than employees. Indeed, the two franchisee witnesses proffered by the Charging Party state that they understood themselves to be independent contractors, and another franchisee states that he wanted to become a franchisee so he could control his own business, set his own hours, and work in the locations he desired.

Nature of Franchisees’ Work Does Not Outweigh Independent Contractor Factors

A factor that supports finding the franchisees to be statutory employees is their performance of a crucial and stable part of SuperShuttle’s operations. Thus, SuperShuttle is primarily in the business of providing airport transportation services, which requires drivers.²⁰ However, the numerous other factors discussed above more than outweigh this indicator of employee status.

Determinations of Employee Status in Other Forums Not Inconsistent

Our finding that the franchisees are independent contractors is not inconsistent with a recently-issued California Unemployment Insurance Appeals Board (CUIAB) decision, in which CUIAB found the franchisees to be employees rather than independent contractors.²¹ Although CUIAB purports to apply the common-law definition of agency, it analyzes the factors differently than the Board, inasmuch as it relies primarily on a “right to control” analysis and places significantly less weight on entrepreneurial opportunity. Moreover, the facts reviewed in the CUIAB decision—which cover the period of July 2006 through June 2009—appear to be different. CUIAB states that franchisees may not turn down work assignments without adverse consequences; but none of the franchisee witnesses in the instant case support that

²⁰ *United Insurance*, 390 U.S. at 259; *Roadway Package System, Inc.*, 326 NLRB at 851 (finding drivers performing “a regular and essential part of the company’s business operations” favored employee status).

²¹ *SuperShuttle International Inc.*, Case No. AO-279534 (California Unemployment Insurance Appeals Board December 12, 2012).

statement, and it is entirely possible that SuperShuttle's practice has changed in the intervening three years.

Likewise, our conclusion does not conflict with Region 27's Decision and Order finding SuperShuttle Denver franchisees to be statutory employees.²² Unlike the franchisees here, the Denver franchisees could only purchase one UFA and operate one vehicle, were assigned routes pursuant to biweekly schedules, and only one Denver franchisee had formed his own business entity.

Conclusion

On balance, we conclude that SuperShuttle has carried its burden of demonstrating that the franchisees are independent contractors outside of the Board's jurisdiction.

/s/
B.J.K.

²² *SuperShuttle International Denver, Inc.*, Case No. 27-RC-8582 (Regional Director's Decision and Order dated February 26, 2010).