

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SHUTTLE EXPRESS, INC.

Case 05-RC-112774

Employer,

and

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1994, MCGEO

Petitioner.

STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW

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I. SUMMARY OF OPPOSITION TO PETITIONER’S REQUEST FOR REVIEW.

Petitioner’s superficial and deficient Request for Review (“Request”) cannot be granted. It fails to enunciate any basis for review, as required by Rule 102.67(c) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), and it is almost entirely devoid of legal argument and factual substance. Indeed, in its two-page Request, Petitioner does not identify any Board precedent that requires reversal of the Regional Director’s Decision and Order (“Decision”), any factual finding by the Regional Director that is contrary to the record, any prejudicial error that occurred at the hearing or in connection with the hearing, or any other “compelling reason” to review the Regional Director’s Decision.

In fact, instead of identifying a “compelling reason” for the Board’s review, as required by Rule 102.67(c), Petitioner attempts to obtain review and reversal of the Decision by misrepresenting the basis for the Regional Director’s Decision. Specifically, Petitioner asserts that, if the Board combs through the entire record in this case, it must conclude that the petitioned-for drivers are employees of Shuttle Express, Inc. d/b/a SuperShuttle Baltimore (“SuperShuttle”). Petitioner, therefore, ignores the Regional Director’s holding – that, even if the franchisees are not independent contractors, they are supervisors under Section 2(11) of the National Labor Relations Act (“Act”) and, thus, beyond the jurisdiction of the Board. As set forth below, this finding is well supported by the record and Board precedent.

II. THE REQUEST MUST BE DENIED FOR FAILURE TO COMPLY WITH THE BOARD’S RULES.

Petitioner’s Request may be granted only upon one, or more, of the four enumerated grounds set forth in Rule 102.67(c): (1) “That a substantial question of law or policy is raised because of the absence of, or a departure from, officially reported Board precedent;” (2) “That

the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;" (3) "That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error;" and (4) "That there are compelling reasons for reconsideration of an important Board rule or policy." See Rule 102.67(c). With respect to the second ground for review, "and other grounds where appropriate," a request for review "must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument." See Rule 102.67(d). In fact, the Board's Rules and Regulations require that "[a]ny request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." Id.

Petitioner has not complied with any of the Board's requirements. It has not asserted that review is warranted based on any of the four grounds listed in Rule 102.67(c), and it has not provided "a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument," as required by Rule 102.67(d). Certainly, Petitioner's Request is not "a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." In fact, Petitioner's Request simply invites the Board to review the record and "the arguments previously made," in search of some basis for review and reversal. Petitioner's Request is, therefore, utterly deficient and, for this reason alone, it cannot be granted. To even entertain such a defective and superficial Request for Review would set a dangerous precedent.

Even if the Board were inclined to scour the record to determine whether any basis for review or reversal exists, there is no doubt that the Regional Director's Decision is consistent

with, and supported by, the evidence submitted at the hearing and well-established Board precedent.

III. THE REGIONAL DIRECTOR'S DECISION IS WELL SUPPORTED BY THE RECORD AND BOARD PRECEDENT.

A. Procedural Background and Summary of the Regional Director's Decision.

On September 6, 2013, Petitioner filed a petition to be certified as the bargaining representative for a group of individuals who provide shared-ride shuttle services at Baltimore Washington International Airport ("BWI"), and who provide such services for SuperShuttle's customers pursuant to franchise agreements with SuperShuttle. In its petition, Petitioner sought to include in the proposed bargaining unit all relief drivers that the petitioned-for franchisees choose to hire.

The franchisees were the subject of a prior petition filed in October 2010 in Case No. 05-RC-16601. A hearing in that case was held in October 2010 and November 2010 and, subsequently, the Acting Regional Director for Region No. 5 issued a Decision and Order ("2010 Decision") finding that the franchisees were supervisors under Section 2(11) of the Act. (Jt. Ex. 1(a); Jt. Ex. 4.)¹ Counsel for Petitioner filed a Request for Review in that case; however, the Request for Review and Petition were withdrawn before any action was taken by the Board. Tr. 11:14-19.

¹ Citations in this Brief will be as follows: "Tr. ___:___" to indicate the 2013 hearing transcript's page and line numbers; "Company Ex." to indicate an exhibit of SuperShuttle introduced at the 2013 hearing; "UFCW Ex." to indicate an exhibit of Petitioner introduced at the 2013 hearing; "Jt. Ex." to indicate a joint exhibit introduced at the 2013 hearing; "Bd. Ex." to indicate an exhibit of the Board introduced at the 2013 hearing; "Jt. Ex. 1(a) at ___: ___" to indicate the 2010 hearing transcript's page and line numbers; "SS Ex." to indicate a SuperShuttle exhibit introduced at the 2010 hearing; and "2010 Jt. Ex." to indicate a joint exhibit introduced at the 2010 hearing.

The Petition in the instant matter came before Hearing Officer David Colangelo on September 16, 2013. At the outset of the hearing, the parties jointly admitted into the record the 2010 Transcript (Jt. Ex. 1(a)), SuperShuttle's Post-Hearing Brief in the 2010 case (Jt. Ex. 2), a submission by Petitioner's counsel dated November 10, 2010 (Jt. Ex. 3), and the 2010 Decision (Jt. Ex. 4). See Tr. 9:20-12:3. The parties further stipulated that the record in the present case would be limited to the issue of changed circumstances and other supplemental evidence arising after hearing in Case No. 05-RC-16601. Id. at 11:1-13.²

The Regional Director issued his Decision in this matter on November 25, 2013, and he summarized his Decision as follows:

I find no reason to disturb the findings and conclusion that were reached in Case 05-CA-16601 [sic], and I am dismissing the instant petition. First, Petitioner has not demonstrated a material change in circumstance since the prior case was decided. Nevertheless, I also find that even if Petitioner had demonstrated changed circumstances, and I assume, as the prior decision did, that franchisees are not independent contractors, the franchises would nevertheless be beyond the jurisdiction of the Board as Section 2(11) supervisors. I find the franchisees possess the authority of supervisors under Section 2(11) to hire, assign, reward, and/or discharge relief drivers, using their independent judgment. Given that Petitioner seeks to represent a unit that includes franchisees, but Petitioner did not stipulate that it would proceed to election with any unit I found appropriate, I conclude that the petition should be dismissed.

Decision at 3. With regard to the supervisory status of the franchisees, the Regional Director further elaborated upon his factual findings:

² Thus, although Petitioner asserts in its Request that the Decision and Order in Case No. 05-RC-16601 is "moot" and irrelevant to this matter, there is no merit to the Petitioner's contention. Petitioner stipulated on the record that the Decision and Order in Case No. 05-RC-16601, and the record underlying the Decision and Order, *are* relevant to the Petition in this case. Furthermore, in this case, the Regional Director held that the Decision and Order in Case No. 05-RC-16601 did not limit or restrict his view of the evidence presented at the hearing in this case, which established that the franchisees are supervisors. See Decision at 9 ("In any event, with or without affording comity to the prior decision, I find, in accord with that decision [and based on the evidence submitted at the hearing], that franchisees are supervisors as defined in Section 2(11) of the Act.").

Now, as in 2010, franchisees are free to hire relief drivers provided they meet the same eligibility requirements to drive as are applicable to franchisees. Many franchisees use relief drivers to enable their franchise to operate 24 hours, to keep their franchise operating if they go on vacation, and/or if they own multiple franchises. Franchisees make the decision to hire relief drivers independently, without SuperShuttle's involvement. While SuperShuttle may provide candidate names to franchisee drivers who are interested, the decision of who to hire remains solely with the franchisee

Should a franchisee hire a relief driver, it is up to the franchisee to decide how much the relief driver will be paid and whether the relief driver will be responsible for any of the costs associated with the franchise. Sometimes the arrangement between the franchisee and his or her relief driver will be a subject of negotiation between them, while, in other situations the franchisee will make the decision. In either case, SuperShuttle is not involved. Franchisees may choose to split costs and revenues equally with relief drivers. Alternatively, they may allow a relief driver to operate a van exclusively and keep most of the revenues provided they pay all the costs. Franchisees and their relief drivers may also reach different manners of arrangement, such as having franchisees pay for their relief drivers' training, or loaning their relief drivers money for van repairs, or pay them in advance. Whatever the arrangements covering terms and wages of employment, however, SuperShuttle issues one check to the franchisee (or the appropriate incorporated entity). The franchisee remains solely responsible for making sure their franchise is in compliance with all applicable laws and regulations; should a relief driver commit a violation, responsibility for it still falls upon the franchisee.

Franchisees may also terminate a relief driver at any point, also without SuperShuttle's input. Whether franchisees give their respective relief drivers an opportunity to correct any deficiencies is entirely up to the franchisees. The record at the prior hearing [in 2010] provided examples of such terminations, which occurred without SuperShuttle's involvement SuperShuttle has no authority to terminate the relief driver and its actions are only against the franchisee, who is ultimately responsible for ensuring a franchise's compliance.

Decision at 14–15 (footnote omitted). See also Decision at 7 (noting that there is no limit on the number of relief drivers that a franchisee may utilize, as “each franchisee is permitted to utilize one or more . . . relief drivers”). The Regional Director's factual findings and Decision are entirely consistent with, and supported by, the record and established Board precedent.

A. The Regional Director's Decision Is Supported by Board Precedent.

1. *Franchisees Independently Hire Relief Drivers.*

As noted above, the Regional Director found that the franchisees independently hire relief drivers and, given the record in this case, this fact is effectively undisputed. Franchisees independently hire and use relief drivers to assist in their businesses, and every franchisee has the authority to hire relief drivers. (Jt. Ex. 1(a) at 391:14-392:5, 453:19-20, 475:6-7, 619:2-4; SS Ex. 4 at 10 § 4.C.) In fact, franchisees may independently hire – without input from SuperShuttle – as many relief drivers as they choose, and SuperShuttle has no input in the hiring process. (See Jt. Ex. 1(a) at 126:6-17, 391:14-392:5, 553:10-21; SS Ex. 6; Company Ex. 2.)

2. *Franchisees Independently Assign and Pay Relief Drivers.*

As found by the Regional Director and as evidenced in the record, franchisees decide when their relief drivers will work and how much their relief drivers will be paid. (Jt. Ex. 1(a) at 392:3-17, 513:19-514:4, 552:9-10.) Furthermore, whether a franchisee directs his or her relief driver to drive at all times, or only on certain days of the week, the relief driver's schedule is arranged without the involvement from SuperShuttle. (Jt. Ex. 1(a) at 932:25-933:7, 941:16-942:2.) Rather, each franchisee is free to tailor the schedule of relief drivers to meet his or her personal and/or business needs and goals. Similarly, whatever conditions are imposed on relief drivers is solely a matter between the franchisee and his or her relief driver(s). (Jt. Ex. 1(a) at 16:22-17:8.)

The record also clearly demonstrates that pay arrangements made by each franchisee vary widely and are accomplished solely as a matter between franchisees and their relief drivers. (Jt. Ex. 1(a) at 454:17-455:11, 513:19-514:4, 552:9-10.) In some cases, relief drivers pay the

franchisee a fee and receive the difference in the reconciliation. (See Jt. Ex. 1(a) at 538:19-21, 853:15-25.) In other cases, relief drivers receive a set percentage of the reimbursement, less the fees for which the franchisee remains responsible. (Jt. Ex. 1(a) at 454:17-455:4.) In all cases, the franchisee reconciles his or her account and independently compensates and/or rewards his or her relief drivers in his or her independent discretion, without SuperShuttle's involvement. (Jt. Ex. 1(a) at 455:5-11, 459:9-23, 552:11-14, 853:10-14.)

3. *Franchisees Independently Discipline And Fire Relief Drivers.*

The Regional Director also found that franchisees have the complete authority and sole discretion to suspend, discipline, or terminate their relief drivers, and this finding is fully supported by the evidence submitted at the hearing. (Jt. Ex. 1(a) at 52:1-21, 193:4-194:9, 552:1-23, 553:20-554:1, 567:10-568:5.) Indeed, it is undisputed that SuperShuttle has no involvement in any of these decisions and, in fact, franchisees have terminated relief drivers who failed to meet the franchisees' expectations. (Jt. Ex. 1(a) at 477:18-23, 554:2-4.)

4. *Franchisees Responsibly Direct Relief Drivers.*

As found by the Regional Director, and as Petitioner agreed at the hearing in this case, franchisees remain responsible for compliance of their franchises with the franchise agreement, no matter what occurs with respect to a relief driver. (See Jt. Ex. 1(a) at 721:8-17.) Franchisees, therefore, are responsible for supervising and directing relief drivers whom they hire and ensuring that relief drivers comply with the franchise agreement and all applicable laws and regulations. (Jt. Ex. 1(a) at 511:13-24.)

B. The Regional Director's Decision Is Supported by and Consistent with Board Precedent.

Petitioner's Request sets forth no legal argument whatsoever, and Petitioner fails to address the fact the Regional Director's Decision is well supported by Board precedent. Under Section 2(11) of the Act, a "supervisor" is

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment[.]

See also Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006) (discussing and applying Section 2(11)). Section 2(11) "is to be read in the disjunctive; possession of any one of the enumerated powers establishes supervisory status." Overnight Transportation Co., 343 NLRB 1431, 1455 (2004) (Decision of ALJ). Pursuant to Section 2(11), individuals are statutory supervisors

if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held "in the interest of the employer."

Oakwood Healthcare, 348 NLRB at 687 (internal quotations omitted). Thus, exercise of any of the enumerated supervisory indicia results in exclusion from employee status. For example, in Stamford Taxi, Inc., 332 NLRB 1372, 1382 (2000), the Board adopted the judge's findings that an assistant manager was a statutory supervisor when his duties included reviewing driver applications, interviewing prospective drivers, and deciding whether to hire the driver.

As set forth in the record and explained above, in the instant case, evidence that franchisees independently (*i.e.*, without input from SuperShuttle) exercise multiple supervisory indicia far exceeds the evidence the Board found compelling in Stamford Taxi. As noted above, the Regional Director properly relied on such evidence when rendering his Decision, as he found that franchisees have the independent authority to hire relief drivers, assign and reward (pay) relief drivers, and discharge relief drivers, and direct their work. See Decision 14–15. In fact, a clear majority of franchisees were independently directing and controlling relief drivers as of the date of the September 16, 2013 hearing. (See Company Ex. 2.) On this record, all franchisees are statutory supervisors under the Act. Oakwood Healthcare, 348 NLRB at 687.

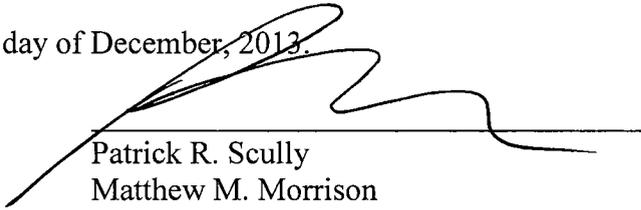
Petitioner’s Request does not specifically challenge any of these findings or conclusions, and neither has Petitioner alleged that any prejudicial error occurred at the hearing or in connection with the hearing. Accordingly, there is no basis to review, much less reverse, the Regional Director’s Decision.

CONCLUSION

Whatever argument Petitioner is attempting to articulate in the Request, there is no discernable basis for reviewing or reversing the Regional Director’s Decision, which is fully

supported by the record and Board precedent. Accordingly, the Request for Review should be denied and the Regional Director's Decision upheld.

Respectfully submitted this 13th day of December, 2013.



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CERTIFICATE OF MAILING

I hereby certify that on December 13, 2013, a true and correct copy of the foregoing **STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW** was served upon the following:

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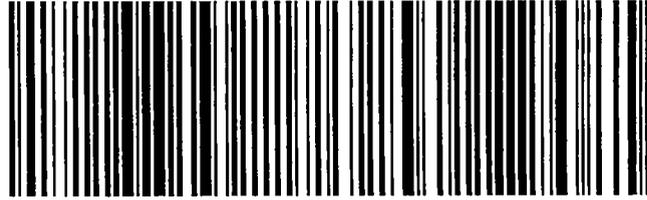
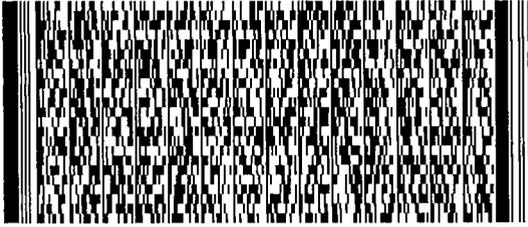
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