

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

WASHINGTON SHUTTLE, INC.
D/B/A SUPERSHUTTLE WASHINGTON, D.C.

Case 05-RC-112829

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.

On December 11, 2013, Petitioner, United Food and Commercial Workers, Local 1994, MCGEO (“Union” or “Petitioner”) filed a procedurally inadequate Request for Review (“Request”) which cannot be granted. The Request 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”). Specifically, Petitioner does not identify any departure from Board precedent, 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 and Order (“Decision”).

Instead of identifying a “compelling reason” for the Board’s review, Petitioner attempts to obtain review and reversal of the Decision by making several misrepresentations. Petitioner misrepresents the basis for the Regional Director’s Decision and then suggests that if the Board reviews the entire record in this case, it would conclude that the petitioned-for drivers are employees of SuperShuttle Washington, D.C. (“SuperShuttle”). Petitioner contends the “record is sufficient and includes Petitioners’ argument that these drivers are employees within the meaning of the Act.” (Request at 3.) Contrary to the Petitioner’s baseless arguments, the Regional Director found that the record established that the franchisees are supervisors. (Decision at 2.) Moreover, Petitioners’ arguments on the record are not evidence.

Petitioner also misrepresents that the Regional Director in the instant case made his finding based “upon his finding in an earlier filed case seeking the exact same unite[sic].”¹

¹ Petitioner filed a prior petition in October 2010 in Case No. 05-RC-16601 seeking to represent the Baltimore shuttle drivers. A hearing in that case was held in October 2010 and November 2010 and, subsequently, the Acting

(Request at 2.) No petition seeking the exact unit has been previously filed and the Regional Director has not made a prior ruling. Petitioner's failure to even distinguish between two entirely separate petitions and operations further demonstrates the insufficiency of its Request.

Petitioner also incorrectly states that the Regional Director found that "not a single shuttle driver could be included in a unit." (Request at 2.) To the contrary, the Regional Director found that franchisees were supervisors under Section 2(11) of the National Labor Relations Act ("Act") and, thus, are not entitled to the Act's protection. (Decision at 2.) However, the Regional Director made no findings concerning relief drivers because "Petitioner did not express a desire to proceed to an election in a unit limited to relief drivers" (Decision at 12.) As set forth below, the Decision is well supported by the record and Board precedent.

II. PROCEDURAL BACKGROUND AND SUMMARY OF THE REGIONAL DIRECTOR'S DECISION.

On September 9, 2013,² Petitioner filed a petition to be certified as the bargaining representative for a group of individuals, including franchisee drivers and relief drivers, who provide shared-ride shuttle services at Ronald Reagan Washington National Airport and

Regional Director for Region 5 issued a Decision and Order finding that the franchisees were supervisors under Section 2(11) of the Act. Petitioner filed a second petition in Case No. 05-RC-112774 seeking again to represent the Baltimore franchisees and the hearing was held one day before the hearing in the instant case. The Regional Director issued his decision on November 25, 2013. Petitioner filed a Request for Review on December 9, 2013. It appears that Petitioner copied the Request for Review in the Baltimore case and submitted a virtually identical Request for Review in both cases despite the differences that exist in each case.

² Petitioner had originally filed a petition in Case No. 05-RC-111971 seeking to represent full-time shuttle drivers only. Petitioner withdrew that petition on September 5, 2013, and filed the petition in this case on September 9, 2013. (Board Exhibit No. 1(a).) The new petition includes relief drivers.

Washington Dulles International Airport and who provide such services for SuperShuttle's customers pursuant to franchise agreements with SuperShuttle. (Board Exhibit No. 1(a).)³

The Petition in the instant matter came before Hearing Officer David Colangelo on September 17 and 18, 2013. The Regional Director issued his Decision in this matter on November 25, 2013, and he summarized his Decision as follows:

Even if I assume franchisees are not independent contractors and are Section 2(3) employees of SuperShuttle, franchisees 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 a majority of individuals in the petitioned-for unit are supervisors, and Petitioner failed to indicate it would proceed to an election in a unit limited to relief drivers, I shall dismiss the petition.

(Decision at 2.) With regard to the supervisory status of the franchisees, the Regional Director further elaborated upon his factual findings:

I further find it significant that individual franchisees make different decisions regarding how to hire and employ relief drivers. Some franchisees employ one relief driver per van in order to maximize revenue; other franchisees use multiple relief drivers per van in order to maximize the van usage. Still other franchisees opt not to assume the responsibility and potential costs of another driver and avoid using relief drivers. Franchisees use their independent judgment in deciding whether to hire relief drivers . . . Franchisees may recruit relief drivers through friends, families, and other sources, and are in no way required or compelled to search for relief drivers through SuperShuttle.

Should a franchisee hire a relief driver, it is up to the franchisee to decide how much the relief driver will be paid, the

³ Citations in this Brief will be as follows: "Tr. ___:___" to indicate the hearing transcript's page and line numbers; "SS DC Ex. ___" to indicate an exhibit of SuperShuttle; "Board Ex. No. ___" to indicate an exhibit of the Region.

manner of payment, and whether the relief driver will be responsible for any of the costs associated with the franchise. . . .

Franchisees also determine if and when their relief driver(s) will work, and therefore control the manner of employment, further exercising indirect control over relief drivers' earnings. . . . 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. . . .

In sum, I find that the evidence presented is sufficient to find that, even assuming that the petitioned-for franchisees are not independent contractors, SuperShuttle nevertheless met its burden and established that franchisees are supervisors as defined in Section 2(11) of the Act. Because a majority of individuals in the petitioned-for unit are franchisees, whom I find to be statutory supervisors, and, as indicated above, Petitioner did not express a desire to proceed to an election in a unit limited to relief driver, I dismiss the petition.

(Decision at 10-12.) The Regional Director's factual findings and Decision are entirely consistent with, and supported by, the record and established Board precedent.

III. 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). Such grounds are:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) 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.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

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). Furthermore, 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). 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.” Petitioner’s Request simply invites the Board to review the record and “the arguments previously made,” in search of some unspecified basis for review and reversal. Petitioner’s Request is, therefore, utterly deficient and, for this reason alone, it cannot be granted. Indeed, to even entertain such a defective and superficial Request for Review would set a dangerous precedent.

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

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

Petitioner's Request sets forth no legal argument whatsoever, and Petitioner failed to address the fact that 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, the evidence overwhelmingly shows that franchisees independently, and without input from SuperShuttle, exercise supervisory indicia. 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. (Decision 14–15.) On this record, all franchisees are statutory supervisors under the Act.

Petitioner’s Request does not specifically challenge any of these findings or conclusions and Petitioner has not alleged that any prejudicial error occurred at the hearing or in connection with the hearing. Rather, Petitioner asserts that franchisees cannot be supervisors because in order to be supervisors “they would have [to] be employees as opposed to independent contractors because they would have to have an employer.” (Request at 1.) Petitioner provides no legal citation or legal explanation as to why a supervisor must be employed by an employer. It is beyond cavil that an independent contractor can be an employer and supervise its own employees. This is the circumstance in the instant case - the franchisees are independent contractors who employ their own relief drivers. The Regional Director merely decided that it was unnecessary to resolve the issue of independent contractor status. (Decision at 2.) The Regional Director concluded that franchisees’ independent contractor status was irrelevant to the Regional Director’s determination to dismiss the Petition, and Petitioner provides no basis to review, much less reverse, that well-reasoned decision.

B. The Regional Director's Factual Findings Establish Supervisory Status.

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.⁴ (Tr. 73:1-74:1.) Franchisees independently hire and use relief drivers to assist in their businesses, and every franchisee has the authority to hire relief drivers. (Tr. 73:11-74:1; Tr. 234:22-235:1; Tr. 300:24-301:1; SS DC Ex. 8.) 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. (Tr. 73:24-74:1; Tr. 177:25-178:1.) There is no restriction on the extent to which franchisees may use relief drivers. (Tr. 74:2-7.) As established at the hearing, Mr. Alvin Bailey testified that his corporation, A Chipmunk LLC, owned four vehicles including three SuperShuttle vans. All three of the vans were in operation on the days of the hearing even though Mr. Bailey was present at the hearing. (Tr. 187:3-18.) Similarly, franchisee Mr. Mohamed Sal Bah owned five franchisees and employs four relief drivers: his brother, a fishing buddy, a former trainer, and the trainer's son. (Tr. 208:22-209:16; SS DC Ex. 8.)

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. (Tr. 74:16-21; Tr. 278:21-25; Tr. 409:25-410:3.) Furthermore, whether a franchisee directs his or her relief

⁴ Petitioner erroneously contends that the franchisees cannot be supervisors because there are “far more supervisors than there are employees.” (at 2.) However, Petitioner disregards the Regional Director's findings that franchisees may hire as many relief drivers as they choose. Indeed, many of the franchisees hired more than one relief driver. For example, Mohamed R. Bah hired twelve relief drivers, Mohamed Sal. Bah hired four relief drivers, Alvin Bailey hired three relief drivers, and Hughes Ngaleau hired four relief drivers. (SS DC Ex. 8.)

driver to drive at all times, or only during certain times, the relief driver's schedule is arranged without the involvement from SuperShuttle. (Tr. 190:1-9; Tr. 278:21-25; Tr. 288:5-6; Tr. 408:8-11.) Each franchisee is free to tailor the schedule of relief drivers to meet his or her personal and/or business needs and goals. (Tr. 408:8-11.) Similarly, whatever conditions are imposed on relief drivers is solely a matter between the franchisee and his or her relief driver(s). (Tr. 190:1-9; Tr. 288:5-6.)

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. (Tr. 189:25-190:1-3; Tr. 207:7-15; Tr. 279:1-3; Tr. 299:14-17.) In some cases, relief drivers receive weekly checks after the franchisees receive their reconciliations. (Tr. 206:17-22.) In other cases, relief drivers are assessed a drivers fee and whatever money is left over after the fees, the relief drivers keep. (Tr. 298:5-13.) 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. (Tr. 189:25-190:1-3; Tr. 207:7-15; Tr. 279:1-3; Tr. 299:14-17.)

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. (Tr. 210:9-18.) It is undisputed that SuperShuttle has no involvement in any of these decisions. (Tr. 211:1-13.) Notably, while no franchisee at the hearing testified about terminating a relief driver, it is undisputed that they all have the right to do so. (Tr. 210:5-20; Tr. 320:6-9.)

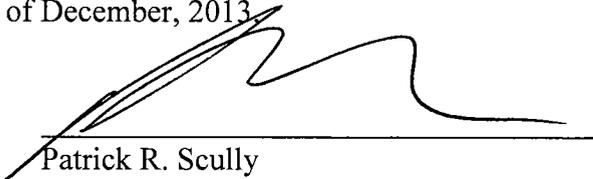
4. *Franchisees Responsibly Direct Relief Drivers.*

As found by the Regional Director, franchisees remain responsible for compliance of their franchises with the franchise agreement, no matter what occurs with respect to a relief driver. (Tr. 75:2-10; Tr. 289:23-290:1-3; Tr. 299:5-16; Tr. 418:5-19: SS DC Ex. 4 at 8§3.A(2), 11 §C.) Franchisees, therefore, are responsible for supervising and directing relief drivers whom they hire and are responsible for ensuring that relief drivers comply with the franchise agreement and all applicable laws and regulations. (Tr. 75:2-10; SS DC Ex. 4 at 8§3.A(2), 11 §C.) For example, franchisees Mr. Sami Abubakar testified that he incurred about \$600 in fees after his relief driver was in an accident (Tr. 418:5-19), and another franchisee, Mr. Mohamed Bah suffered an \$8,000 loss because of his relief driver's conduct. (Tr. 317:19-23.)

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. The record and the Regional Director's decision establishes that franchisees hire, direct, assign, reward and discipline relief drivers – all at their own discretion. Accordingly, the Request for Review should be denied and the Regional Director's Decision upheld.

Respectfully submitted this 17th day of December, 2013



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CERTIFICATE OF MAILING

I hereby certify that on December 17, 2013, a true and correct copy of the foregoing **STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW** was served to the following:

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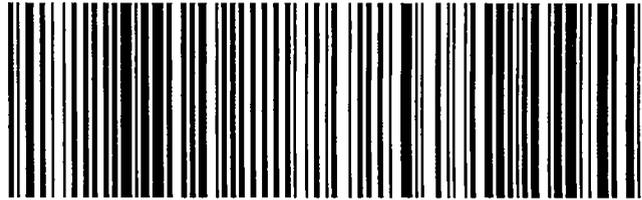
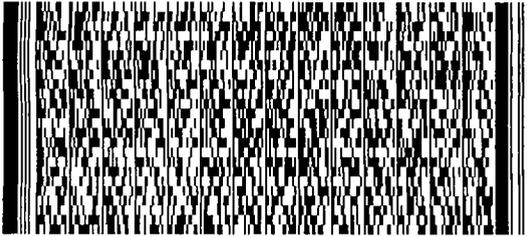
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