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VIA FEDERAL EXPRESS

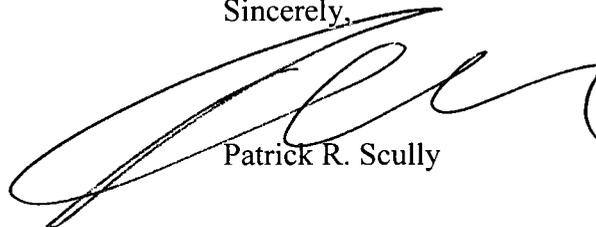
Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

**Re: SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338
Case No. 16-RC-10963**

Dear Mr. Heltzer:

In connection with the above-referenced matter, enclosed please find an original and eight (8) copies of SuperShuttle DFW, Inc.'s Brief on Review to Sustain Dismissal of Petition. Please file stamp a copy of the Brief and return to the undersigned in the self-addressed, stamped envelope provided herein. Thank you.

Sincerely,



Patrick R. Scully

PRS:mam

Enclosures

cc: SuperShuttle DFW, Inc.
Martha Kinard, Regional Director
NLRB Region 16
Daniel M. Combs
David Watsky, Esq.

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NLRB
ORDER SECTION

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

SUPERSHUTTLE DFW, INC.,
d.b.a. SUPERSHUTTLE DFW

Case No. 16-RC-10963

Employer,

and

AMALGAMATED TRANSIT UNION LOCAL 1338,

Petitioner.

**SUPERSHUTTLE DFW, INC.'S BRIEF ON REVIEW
TO SUSTAIN DISMISSAL OF PETITION**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RELEVANT PROCEDURAL AND FACTUAL HISTORY 3

III. ARGUMENT AND AUTHORITIES 4

 A. The Board Must Apply the Common-Law Agency Test in Determining Independent Contractor Status. 4

 1. The Board’s Limited Statutory Mandate Precludes the Board From Redefining or Modifying the Definition of “Employee” Under the Act. 4

 2. The Common Law of Agency Reflects Congressional Will and Governs Independent Contractor Status. 5

 3. Congress and the Supreme Court Have Rejected a Result-Driven Independent Contractor Test. 7

 4. The Board May Not Incorporate Policy Considerations in the Common-Law Agency Independent Contractor Test. 9

 B. The Common-Law Test, as Applied by the Regional Director, Demonstrates the Independence and Entrepreneurial Freedom of Franchisees Doing Business With SuperShuttle DFW. 11

 1. Controls Stemming From Government Regulations Are Not Demonstrative of Employee Status. 12

 2. Lack of SuperShuttle DFW’s Control Over the Manner and Means of Doing Business Corresponds to Franchisees’ Entrepreneurial Freedoms. 14

 3. Franchisees Proprietary Interests in the Instrumentalities of Work Demonstrate Their Independent Contractor Status. 16

 4. The Parties Explicitly Agree to an Independent Contractor Relationship. 17

 C. The Board Should Codify as Board Law the Iteration of the Common-Law Test Set forth in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). 19

IV. CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

<u>AAA Cab Servs, Inc. and Independent Taxi Drivers Union</u> , 341 NLRB 462 (2004)	12, 13, 14
<u>Air Transit, Inc. v. NLRB</u> , 679 F.2d 1095 (4th Cir. 1982)	12
<u>Argix Direct</u> , 343 NLRB at 1020	17
<u>Arizona Republic</u> , 349 NLRB 1040 (2007)	10, 11, 17, 21
<u>Chisom v. Roemer</u> , 501 U.S. 380 (1991)	6
<u>Community for Creative Non-Violence v. Reid</u> , 490 U.S. 730 (1989)	6
<u>Dial-A-Mattress Operating Corporation</u> , 326 NLRB 884 (1998)	2, 6, 8, 11, 21
<u>Don Bass Trucking, Inc.</u> , 275 NLRB 1172 (1985)	12
<u>FedEx Home Delivery v. NLRB</u> , 563 F.3d 492 (D.C. Cir. 2009)	2, 4, 5, 18, 19, 21
<u>Nationwide Mutual Insurance Co. v. Darden</u> , 503 U.S. 318 (1992)	6, 7, 8, 9
<u>NLRB v. Hearst Publications, Inc.</u> , 322 U.S. 111 (1944)	5, 7, 8, 9
<u>NLRB v. United Insurance Co. of America</u> , 390 U.S. 254 (1968)	5
<u>North American Van Lines, Inc. v. NLRB</u> , 896 F.2d 596 (D.C. Cir. 1989)	4, 19, 20, 21
<u>Roadway Package System, Inc.</u> , 326 NLRB 842 (1998)	2, 8
<u>St. Joseph News Press</u> , 345 NLRB 474 (2005)	5, 7, 8, 9, 21
<u>United States v. Silk</u> , 331 U.S. 704 (1947)	5, 7, 8, 9
<u>United States v. W.M. Webb</u> , 397 U.S. 179	5, 7, 8, 9, 10
<u>Yellow Cab, Inc.</u> , 179 NLRB 850 (1969)	4

Regulations

National Labor Relations Board Rules and Regulations, Section 102.67(c)	1
National Labor Relations Board Rules and Regulations, Section 102.67(f)	1

Statutes

29 U.S.C. § 2(3)	4
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I. INTRODUCTION

Respondent, SuperShuttle DFW, Inc., d.b.a. SuperShuttle DFW (“SuperShuttle DFW” or “Respondent”) hereby submits this Brief on Review in support of the Regional Director’s well-reasoned and correct Decision and Order dismissing the Petition (“Decision,” issued 8/16/10, attached as **Exhibit A**), pursuant to Section 102.67(f) of the National Labor Relations Board’s (“Board”) Rules and Regulations (“RR”).

The Order granting review indicated that review was granted because this matter “raises substantial issues warranting review.” (Order dated 11/1/10.) Such a basis for review is not set forth in the Rules, see RR § 102.67(c), but to the extent the Board reviews the factual or legal propriety of the Regional Director’s Decision, SuperShuttle DFW attaches hereto its Brief to the Regional Director (“Respondent’s Post-Hearing Brief,” **Exhibit B**), and Statement in Opposition to Request for Review (“Response to Request for Review,” **Exhibit C**), and incorporates these documents herein by reference. Respondent’s Post-Hearing Brief and Response to Request for Review, along with the Decision, dispense with any contention that the factual record or the pertinent authority warrant reconsideration of the Decision. Even under the most stringent standard for independent contractor status, dismissal of the Petition was the only appropriate outcome in the instant case.

To the extent the Board granted Review based on Petitioner’s contention, “There are Compelling Reasons for Reconsideration of Region 16’s Decision Based on Important Board Policy” (Petitioner’s Request for Review (“Pet. Request”) at 24), Respondent addresses such contention in the following Brief on Review. As set forth below, Petitioner’s argument that SuperShuttle DFW’s franchise model somehow conflicts with NLRB’s “policy of protecting

individuals” is a paternalistic attempt to deny parties’ freedom of contract based on the extent of Petitioner’s organizing. Petitioner’s argument lacks authority and is contrary to long-standing Board and Supreme Court precedent concerning independent contractor status and individual freedom of contract.

Moreover, the Regional Director’s Decision demonstrates the wisdom of the Board’s adoption of the common law test for independent contractor status described in Dial-A-Mattress Operating Corporation, 326 NLRB 884, 890–91 (1998), Roadway Package System, Inc., 326 NLRB 842, 850 (1998), and their progeny. The Board has held that Congress mandated use of the common law test in determining independent contractor status and no authority or compelling reason exists to depart from the standard. To the contrary, Congress has clearly stated its intent that the Supreme Court adhere to the common-law test absent legislation to the contrary. Rather than reverse the law, as Petitioner suggests, the Board should seize this opportunity to codify as Board law the well-reasoned decision of the District of Columbia Court of Appeals in FedEx Home Delivery v. NLRB, 563 F.3d 492, 498–99 (D.C. Cir. 2009), finding that entrepreneurial freedom is the “animating principle” of the common law test.

The relevant authority compels the Board to reject the Union’s apparent attempt to parlay the politicized nature of this Agency into an *ultra vires* expansion of the Board’s jurisdiction. Such a ruling would overturn over 20 years of settled Board authority and contradict equally long-standing judicial interpretation of the independent contractor exclusion from Section 2(3) of the Act.

II. RELEVANT PROCEDURAL AND FACTUAL HISTORY

The Regional Director's August 16, 2010 Decision dismissed Petitioner's July 15, 2010, Petition with Region 16 ("Petition"). (Case No. 16-RC-10963.)¹ Petitioner sought certification as the representative of all of SuperShuttle DFW's drivers/franchisees, including so-called "relief drivers" who, like the franchisees, are shared-van operators, but are hired by and report directly (and only) to franchisees.

On July 28 and 29, 2010, this matter came before Hearing Officer Darci B. Slager ("Hearing Officer Slager") of the NLRB, Region 16, at the Federal Office Building, 819 Taylor Street, Room 8A24, Fort Worth, Texas 76102. In the Hearing the parties presented evidence on the following issues: (1) the independent contractor status of SuperShuttle DFW's franchisees and their exclusion from the definition of "employees" under Section 2(3) of the Act, and (2) the supervisory status of SuperShuttle DFW franchisees.² The pertinent facts elicited at the Hearing are set forth in detail in SuperShuttle DFW's Post-Hearing Brief. (Exhibit B at 4–23.) As set forth in SuperShuttle DFW's Response to Request for Review, the material facts in this case are undisputed and were conceded by all of Petitioner's witnesses. (Exhibit C at 2–16.)

On November 1, 2010, the Board granted Petitioner's Request for Review. As set forth below, no grounds exist to set aside the Regional Director's Decision or well-settled Board authority in this area.

¹ The Petition in Case No. 16-RC-10963 was identical to a Petition the Union filed on July 8, 2010, and subsequently withdrew. (Petition, Case No. 16-RC-10960.)

² The Regional Director did not reach the issue of supervisor status because she determined the franchisees are independent contractors and thus excluded under the Act.

III. ARGUMENT AND AUTHORITIES

A. The Board Must Apply the Common-Law Agency Test in Determining Independent Contractor Status.

Petitioner implicitly asks the Board to set aside the common-law agency test for determining independent contractor status in order to advance certain goals of the Act. (Pet. Request for Review at 24.) Petitioner speculates that independent contractor models such as the SuperShuttle DFW franchise model in the instant case are designed to “put[] hurdles in front of individuals who have no negotiating power whatsoever with a company like SuperShuttle [sic].”³ (Id.) Petitioner’s assertions that the SuperShuttle DFW franchise model is somehow *motivated* by a desire to quash collective bargaining, and that franchisees “have no bargaining power whatsoever” not only are speculative but are contrary to record evidence before the Regional Director. Notwithstanding that this claim lacks any factual support, as set forth below, the Board simply has no authority to jettison or alter the common-law agency test in favor of Petitioner’s result-driven approach.

1. The Board’s Limited Statutory Mandate Precludes the Board From Redefining or Modifying the Definition of “Employee” Under the Act.

The Board has a limited statutory mandate over “employers” and “employees,” and has no authority over independent contractors as a result of Congress’s explicit exclusion of independent contractors from the definition of “employees” under Section 2(3) of the Act. 29 U.S.C. § 152(3) (providing that the term “employee” shall not include “any individual having the status of independent contractors”). “[T]he line between worker and independent contractor

³ Petitioner’s entire premise is speculative and in fact incorrect. For example, “SuperShuttle” is not an entity, but is a trade name for the shuttle service that independent contractor, mostly franchisee drivers provide to passengers between their homes, offices, and hotels to the airport, in their distinctive blue and yellow vans.

is jurisdictional—the Board has no authority over independent contractors.” FedEx Home Delivery, 493 F.3d at 496 (quoting North American Van Lines, Inc. v. NLRB, 869 F.2d 596, 599 (D.C. Cir. 1989)); see also Yellow Cab, Inc., 179 NLRB 850, 851 (1969) (finding that a determination of employee status under Section 2(3) established the Board’s jurisdiction over a petition for certification).

The limited statutory mandate set forth by Congress in Section 2(3) of the Act may not be taken lightly. Thus, the Board has no more right to expand its authority and jurisdiction over independent contractors as “employees” under Section 2(3) than it does to expand its authority and jurisdiction over the United States, the Federal Reserve Bank, or any State, among others, as “employers” under Section 2(2).

2. The Common Law of Agency Reflects Congressional Will and Governs Independent Contractor Status.

The Board and the United States Supreme Court both apply the common law of agency to determine employee and independent contractor status, because the common law of agency “reflects clear congressional will.” FedEx Home Delivery, 563 F.3d at 495–96; see also St. Joseph News Press, 345 NLRB 474, 478 (2005). This “congressional will” was articulated over 60 years ago and remains a well-grounded direction to the Supreme Court and the Board.⁴

The Supreme Court stated in NLRB v. United Insurance Co. of America, 390 U.S. 254, 256 (1968), that

⁴ As set forth in greater detail below, in 1948, Congress denounced the Supreme Court’s independent contractor test as set forth in NLRB v. Hearst Publications, Inc., 322 U.S. 111, 120–21 (1944), and United States v. Silk, 331 U.S. 704, 713 (1947). United States v. W.M. Webb, 397 U.S. 179, 186 (discussing congressional reaction to Hearst and Silk). Petitioner does not refer to Hearst and Silk in the Request for Review, but as a practical matter the Request for Review is simply a request to reinstate the long-ago rejected standards of these cases.

[t]he obvious purpose of [the exclusion of independent contractors] was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. . . . Thus there is no doubt that we should apply the common-law agency test . . . in distinguishing an employee from an independent contractor.

Id.; see also St. Joseph News, 345 NLRB at 477 (quoting NLRB v. United Insurance, 390 U.S. at 256). It is now a “‘well established’ principle” that “when Congress has used the term ‘employee’ without defining it, [the Supreme Court] has concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine.” Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 322–23 (1992).

The Board in Dial-A-Mattress explained that “Supreme Court precedent ‘teaches us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*’” St. Joseph News-Press, 345 NLRB at 478 (emphasis in original) (quoting Roadway Package, 326 NLRB at 849). The Board accordingly has a responsibility to consistently apply the common-law test to independent contractor issues. Justice Scalia has explained that the “highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people’s will.” Chisom v. Roemer, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting). The Board unquestionably is bound to this responsibility insofar as the Board directly interprets the Act that confers authority on it. The Congress that excluded “independent contractors” from the definition of “employee” in Section 2(3) of the Act directed the Board to construe the term consistent with congressional intent and the rulings of the Supreme Court. Taking a different approach here would have the effect of “depriv[ing] legislators of the assurance that ordinary terms, used in ordinary context, will be given a predictable meaning.” Id.

3. Congress and the Supreme Court Have Rejected a Result-Driven Independent Contractor Test.

As stated above, the Board lacks authority to reject the common law agency test as the standard to define employee status. Roadway Package, 326 NLRB at 849. The Board also lacks authority to incorporate new, result-driven considerations into the common law test. See St. Joseph News, 345 NLRB at 482; Nationwide Mutual, 503 U.S. at 325–26 (discussing abandonment of previous independent contractor status tests). Contrary to Petitioner’s implicit request, the Board may not rework the independent contractor test to advance Petitioner’s interpretation of NLRB policies or goals, and may not consider alleged “economic dependence” or perceived disparity in bargaining power when applying the common-law test. (See Pet. Request for Review at 24 (asserting need for a “policy of protecting employees” who wish to bargain with “powerful companies”).) Congress and the Supreme Court have rejected such standards because they are incongruous with the common-law test and congressional intent.

Petitioner asks the Board to determine independent contractor status by looking primarily to the ends to be achieved by the Act and asking whether “individuals wish to collectively bargain.” (Pet. Request for Review at 13.) Petitioner’s proposed alternative approach is not new or novel, but is the very mischief that Congress soundly rejected more than 60 years ago. See United States v. W.M. Webb, 397 U.S. 179, 186 (discussing congressional reaction to Hearst and Silk).

The Supreme Court in NLRB v. Hearst Publications, Inc., 322 U.S. 111, 120–24 (1944), and United States v. Silk, 331 U.S. 704, 705 (1947), attempted to turn away from the common-law agency standard in favor of a test that effectuated “the declared polic[ies] and purposes” of the NLRA and Social Security Act, respectfully. Hearst, 322 U.S. at 132. Under the Hearst and

Silk tests, the term “employee” was not a term of art that had a particular meaning determinable by the Restatement of Agency § 220. Hearst, 322 U.S. at 124. Rather, the term was to “be construed ‘in the light of the mischief to be corrected and the end to be attained.’” Id.; Silk, 331 U.S. at 705.⁵ The Supreme Court reasoned that such a result-driven approach would prevent “large segments of workers” from being excluded from the coverage of the Act based on technical distinctions and differences. Hearst, 322 U.S. at 125.

Congress explicitly rejected the Supreme Court’s results-oriented test, and it cannot be revisited in this context. Nationwide Mutual, 503 U.S. at 324–25 (1992) (discussing Congress’ abandonment of the Hearst and Silk test). In 1948, Congress passed a resolution (over the veto of President Truman) “reassert[ing] congressional intent regarding the application of the [Social Security Act].” W.M. Webb, 397 U.S. at 186–87 (discussing Congressional reaction to Hearst and Silk). Since that time, the Supreme Court has confirmed that Congress clearly intended to “reestablish the usual common-law rules [defining employee status], realistically applied” with no broader policy considerations. Id. at 186; see also Nationwide Mutual, 503 U.S. at 324–25. The Board also confirmed that its application of the common-law agency standard as set forth in Roadway Package System, Dial-A-Mattress, and their progeny is consistent with this expressed Congressional intent. St. Joseph News, 345 NLRB at 481–82 (“the Court has made clear that it has totally discredited that aspect of Hearst that permitted policy considerations to lead the Board to construe independent contractor status ‘in light of the mischief to be corrected and the end to be attained’” (quoting Nationwide Mutual, 503 U.S. at 325–26)).

⁵ The stated purposes of the NLRB were “[bringing] industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established.” Silk, 331 U.S. at 705.

In light of Congress' (and the Supreme Court's) rejection of a result-driven test, Petitioner's request that the Board "reconsider[]" the Regional Director's decision based on Board policy must be rejected. (Pet. Request for Review at 24.) Petitioner's proposal that the Board weigh independent contractor determinations with a goal of furthering Board policies is a transparent attempt to reinstate the rejected Hearst standard. (See Pet. Request for Review at 24); Nationwide Mutual, 503 U.S. at 325–26 (confirming the Supreme Court's "abandonment of Silk's emphasis on construing [the term 'employee'] in the light of the mischief to be corrected and the end to be attained"). As set forth in St. Joseph News, the Board has no authority to unilaterally abandon the common-law test or add such alleged policy considerations to the common-law test. St. Joseph News, 345 NLRB at 483; see also Roadway Package, 326 NLRB at 849.

A result-oriented test also is practically unworkable because it is "infected with circularity." Nationwide Mutual, 503 U.S. at 326 (rejecting a similar results-oriented test in the context of ERISA). That is, a test asking whether the Act seeks to "protect employees who wish to collectively bargain" still requires a determination of who is an "employee" under the Act, and thus "begs the question." Id.

4. The Board May Not Incorporate Policy Considerations in the Common-Law Agency Independent Contractor Test.

The Board also may not incorporate alleged policy considerations such as "economic dependence" or disparate bargaining power into the common-law agency test. Not only is it inappropriate "for [the Board] to implement . . . an alteration of the legal landscape without Congressional directions," St. Joseph News, 345 NLRB at 482, but Congress has specifically declared that policy considerations such as "economic reality" or "dependence" are incongruous

with the common-law agency test. W.M. Webb, 397 U.S. at 185–86. Further, considerations of economic reality, dependence, or alleged unequal bargaining power (1) are inappropriately paternalistic, (2) would serve to improperly invalidate lawful contracts entered into between competent parties, and (3) would effectively negate several common-law agency test factors.

In Congress’ 1948 resolution, discussed above, Congress rejected an “economic reality” or “dependen[ce]” approach to determining employer-employee because such a test would “not serve to make the necessary distinctions.” W.M. Webb, 397 U.S. at 186–87 (quoting Senate Finance Committee report). Congress found such a test to be unworkable, as demonstrated by Congress’ rhetorical question, “Who, in this whole world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person.” W.M. Webb, 397 U.S. at 186–87 (quoting Senate Finance Committee report). Instead, the common-law principles must remain unfettered by such inappropriate considerations.

Considerations of economic dependence or alleged unequal bargaining power also are inappropriately paternalistic, as demonstrated by such policies’ tendency to abrogate certain factors in the common law test. Arizona Republic, 349 NLRB 1040, 1042 (2007) (setting forth common law factors, including “whether or not the parties believe they are creating the relation of master and servant”). Under the common-law test, for instance, the Board must consider, “whether or not the parties believe they are creating the relation of master and servant.” Id. By applying some variant of an “economic dependence” factor, the Board would improperly insert itself as an arbitrator of whether a purported employee had the *capacity* to believe he or she is creating an independent contractor relationship. In so doing, the Board would eviscerate the right of an adult citizen to enter into bargains when that citizen is deemed—by the Board—to be

too unsophisticated to decide for him or herself whether to enter into an independent contractor relationship. As demonstrated below in Section III.B., franchisees doing business with SuperShuttle DFW are not children, but are business-oriented entrepreneurs. Franchisees (and all individuals seeking to work as independent contractors) do not need the Board to determine whether they are capable of entering into contracts.

Similarly, an economic dependence factor would abrogate additional common-law factors that are related to any contract entered into between parties. Alleged unequal bargaining power or economic dependence of franchisees under the SuperShuttle DFW franchise model would have the effect of nullifying *all* terms of the parties' contract. Accordingly, the Board would not give weight to a finite length of a contract relationship, whether the independent contractor provides the instrumentalities and tools of work, or an independent contractor's opportunity for risks and loss when such terms are set forth in a contract between an independent contractor and purported employer. See Arizona Republic, 349 NLRB at 1042 (setting forth factors). The effect of an economic dependence or unequal bargaining power factor has no place in the common-law test because it unavoidably usurps the factors set forth in the Restatement (Second) of Agency § 220.

B. The Common-Law Test, as Applied by the Regional Director, Demonstrates the Independence and Entrepreneurial Freedom of Franchisees Doing Business With SuperShuttle DFW.

Although the Board lacks authority to change the common-law standard, the Regional Director's Decision demonstrates the wisdom of the Board's adoption of the common law test for independent contractor status. The common-law test allows for flexible analysis of the franchise business in which the putative employees are engaged.

As mandated by Dial-A-Mattress, the Regional Director’s Decision weighed all common-law agency test factors. (Decision at 13.) Four of the factors—lack of control, supply of instrumentalities and tools of work, entrepreneurial freedom, and intent—were perhaps most compelling in the determination that franchisees are independent contractors. The Regional Director’s Decision also illustrates that the lack of employer control in the franchises’ business corresponds to the abundant entrepreneurial opportunities and risks enjoyed by franchisees.

1. Controls Stemming From Government Regulations Are Not Demonstrative of Employee Status.

Control over franchisees in the instant case came exclusively from extensive government regulations over the shared-ride transportation industry. (See Decision at 15–16.) A significant axiom in independent contractor decisions under Section 2(3) of the Act is that rules and requirements imposed on drivers because of regulations promulgated by government bodies and public authorities do not constitute control by a company, and accordingly cannot constitute a factor favoring a finding of employee status. Don Bass Trucking, Inc., 275 NLRB 1172, 1174 (1985) (“Government regulations constitute supervision not by the employer but by the state” (internal quotation omitted)); Air Transit, Inc. v. NLRB, 679 F.2d 1095, 1100 (4th Cir. 1982) (stating that “requiring drivers to obey the law is no more control . . . than would be a routine insistence upon lawfulness of the conduct of those persons with whom one does business”).

The Board and federal courts have applied this rule of law in every industry in which an employee/independent contractor determination has been requested, including cases involving drivers. See AAA Cab Servs, Inc. and Independent Taxi Drivers Union, 341 NLRB 462, 465 (2004) (“[G]overnmentally imposed rules such as those associated with the posting of fares do not evince the level of control by an employer to preclude independent contractor status.”)

Pursuant to this rule, in Air Transit, Inc., 271 NLRB 1108, 1111 (1984), the Board held that where all factors allegedly demonstrating control over the manner and means of drivers' performance of their duties stemmed from requirements imposed by an FAA contract with Air Transit, no evidence of employer control existed. That precedent undoubtedly governs this case, as demonstrated in the Regional Director's Decision.

The regulatory control over franchisees in the instant case is in fact more extensive than set forth in the Decision. The Regional Director properly found that requirements concerning the make, model, age, and appearance of vans did not demonstrate control over the manner and means of conducting business because they were mandated by DFW Airport. (Decision at 16.) Other alleged aspects of control also were regulatory in nature. For instance, the requirements that franchisees wear a uniform, keep records, and submit vehicles for inspection all are mandated by the DFW Airport Authority. (E. Ex. 1 at 6–7 § 1.1.32 (regulatory requirement of uniforms); Ex. 2 at 5–6 § 2.D; E. Ex. 1 at 24–26 (vehicle inspection requirements); E. Ex. 1 at 50–51 (regulation requiring maintenance of driver daily manifest). Such requirements are not evidence of control over the manner and means of doing business because the controls would apply to franchisees regardless of their relationship with SuperShuttle DFW. See AAA Cab Servs., 341 NLRB at 465.

Petitioner's implicit request to construe regulations as "control" to facilitate an unwarranted expansion of jurisdiction would invalidate not only freedom of contract but also the regulatory authority of states and their subdivisions. In this case, such a reversal would void these regulations by suggesting they are a manifestation of control.

2. Lack of SuperShuttle DFW's Control Over the Manner and Means of Doing Business Corresponds to Franchisees' Entrepreneurial Freedoms.

Setting aside regulatory requirements and limitations, franchisees have complete control over the details of their business. Their complete control over bids and fares they may select, hours they may work, and type of work to perform not only demonstrates lack of employer control over the manner and means of doing business, but also unfettered entrepreneurial freedom.

The Regional Director found that franchisees' complete freedom over scheduling and selecting fares "strongly" weighed in favor of independent contractor status. (Decision at 16.)

Based on testimony elicited by all franchisees, the Regional Director found as follows:

[D]rivers are free from control by the Employer in most significant respects in the day-to-day operation of their vans. Drivers are free to work if and when they want, and have total autonomy in this respect. Drivers do not need to even commit to a schedule of their own creating. Drivers simply indicate if they are available and decide whether or not to accept trips. . . . It is well settled that a driver's discretion in deciding if and when to work and which trips to accept weighs in favor of a lack of control. AAA Cab Services, 341 NLRB at 465.

(Decision at 14.) The control that *franchisees* have over their day-to-day work is unavoidably tied to (if not identical to) the entrepreneurial freedom they enjoy. The Regional Director's finding that franchisees "make calculated choices between which trips to choose" (Decision at 21), is abundantly supported by the record. For example, in the Hearing, franchisee Gideon Okwena demonstrated that his day-to-day operating decisions are business-oriented choices made with a goal of increasing his revenue. Mr. Okwena testified that he considers several

factors in accepting or declining a bid, including the fare and any offsetting gas costs.⁶ (Tr. 122:17–24.) These are “commonsense” business decisions made by Mr. Okwena. (Id. 122:17–19.)

Say, for example, I see 150 [dollars], but it’s someone in Plano or McKinney, and there is \$40 [two] miles from my house or from my location at that point. I’d rather go for two miles for \$40 than jumping from 150 [dollars] . . . in Plano, which [would] consume my time and gas. So I always choose what is good for me.

(Id. 122:19–24.) Mr. Okwena testified that he does not have a schedule with SuperShuttle DFW, but sets the times he will drive his van. (Tr. 116:16–19.) Mr. Okwena testified that the hours he works is “up to [him]. [He] can work two hours” or he “can work ten hours if [he] want[s] to.” (Id. 116:20–22.) In fact, Mr. Okwena can choose not to work on any particular day. (Id. 116:23–117:2.) Mr. Okwena testified that no one tells him when to take a break or whether he *should* take a break, but noted that his “stomach tells [him] when to take a break.” (Tr. 117: 5–8.) The Regional Director found particularly compelling Mr. Okwena’s testimony that to make up for slower times, he “work[s] like a wounded elephant” when customers are plentiful and could refrain from work during slow periods. (Decision at 7.)

While franchisees have complete freedom over the type and amount of work they perform (and thus have great opportunity for gain), they remain contractually obligated to pay a set fee to SuperShuttle DFW each week. (Decision at 20.) The obligation creates an opportunity for loss, as a franchisee must submit a set fee to SuperShuttle DFW regardless of the amount worked. (Id.) The Regional Director stated that

⁶ As set forth in detail below, franchisees pay for all expenses associated with operating their businesses, including paying gas for their vans. (Tr. 122:25–123:1.)

this relationship is quite different from the ordinary employment relationship, as a driver who cannot work or whose vehicle cannot function may still accrue these costs. . . . When factoring in gas, car payments, maintenance, licensing fees, tolls and other costs, . . . the operation of a franchise provides a risk of loss.

(Id.)

Moreover, franchisees' complete freedom to hire relief drivers, who are paid out of a franchisees' own earnings and are undisputedly controlled solely by franchisees, also gives franchisees "potential to generate more gross revenue while spending less time driving when a relief driver is hired." (Id.) In sum, franchisees' complete control over their business is intertwined with entrepreneurial freedom and demonstrates that they are properly independent contractors.

3. Franchisees Proprietary Interests in the Instrumentalities of Work Demonstrate Their Independent Contractor Status.

The Regional Director also properly determined that franchisees' responsibility for obtaining the instrumentalities of their work evidenced independent contractor status. (Decision at 17–18.)⁷

⁷ The text of the Restatement (Second) of Agency § 220 and its comments demonstrate the importance of the instrumentality factor. Indeed, an illustration in the Restatement is strikingly analogous to the franchise model in the instant case:

[Principal] employs a salesman who agrees to give full time to the work but furnishes his own car, is paid by commission and can call on those whom he pleases. It is inferred that the salesman is *not* [the Principal's] servant.

Restatement (Second) of Agency § 220 illustration to cmt. k.

Franchisees have a total proprietary interest in their vans. (Id. at 17–18.) They contractually agree to “purchase or lease a van” that conforms to regulatory specifications. (E. Ex. 2 at 4 § 2.A.) Sixty-four percent of franchisees own their vans and the remaining lease-to-own. (Tr. 66:19–23.) The investment in a passenger van is significant; the average cost of the passenger vans is approximately \$30,000. (Tr. 67:24–25.) That franchisees also pay a substantial amount for the actual franchise *and* for all expenses incidental to their business operations is also significant evidence of independent contractor status. (Decision at 18.) The record undisputedly demonstrates that franchisees alone pay for all gas, van maintenance, and airport or traffic tickets. (Tr. 66:24–67:2, 121:8–9, 122:25–123:1, 128:19–130:4.) Franchisees pay for driver permits and van permits required to operated shared-ride services, and pay toll fees and airport access fees associated with their business. (Tr. 67:1–15, 149:2–4, 268:12–17); Argix Direct, 343 NLRB 1017, 1020 (2004) (finding that the independent contractors provided the instrumentalities of their work despite the fact that the company paid the drivers’ tolls and parking tickets). In sum, franchisees’ substantial investment in franchises and shared-ride vans is among the more striking manifestations of their independent contractor status. A decision individuals who have made such an investment in their business to be “employees” under the Act would overturn settled Board precedent and negate their entrepreneurial freedom. See id.; Arizona Republic, 349 NLRB at 1044.

4. The Parties Explicitly Agree to an Independent Contractor Relationship.

The Regional Director also considered the fact that the parties agreed to enter into an independent contractor relationship (Decision at 19), and that SuperShuttle DFW does not provide any withholding and does not provide franchisees “with any type of benefits, which also

favors independent contractor status.” (Id.); Arizona Republic, 349 NLRB at 1042 (finding that the parties’ intent weighed in favor of independent contractor status where the parties’ contract “clearly state[d] that they were forming an independent contractor agreement”).

Additionally, the fact that, at the time of the Hearing, five of the franchisees contracted with SuperShuttle DFW as incorporated entities “clearly evidenced a belief [by the franchisees] that they are not in an employer-employee relationship.” (Id.) The Regional Director put it mildly by stating, “corporate status is unusual in the employment relationship and tends to be associated with a finding of independent contractor status.” (Id.) In fact, the Act confers no authority to order a corporation of any kind licensed under the laws of the State of Texas (or any state) to vote in an election or to effectively void such a legal entity through the Representation petition process.

Franchisees’ independent contractor relationship with SuperShuttle DFW is not a mere formality and is not reflected in writing only. Franchisees testified that they report themselves as “self-employed” to the IRS for purpose of paying their own taxes. (Tr. 213:18–24, 262:16–25; see also 144:13–17.) All franchisees who testified referred to themselves as franchisee independent business owners—not employees. (See Tr. 115:6–12, 302:5–9.) The fact that franchisees’ intent is so clear is not surprising, as they have invested tens of thousands of dollars into their businesses after performing due diligence on owning a franchise as an independent contractor. Franchisees are well aware of their relationship, as confirmed by their testimony that they are not employees but are independent, self-employed businesspeople. These factors were properly accorded appropriate weight in the instant case.

The Regional Director’s application of the common-law test in the instant case revealed that the petitioned-for franchisees heavily invest in their businesses, consider themselves to be independent contractors, have complete control over the amount and type of work they do, and have opportunities for both entrepreneurial gain and loss under the franchise model. The Decision demonstrates the wisdom of the common-law test which should not be set aside.

C. The Board Should Codify as Board Law the Iteration of the Common-Law Test Set forth in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

Respondent urges the Board to seize this opportunity to codify as Board law the well-reasoned decision FedEx Home Delivery, 563 F.3d at 496–97. In FedEx Home Delivery, the court found that in *close* cases—that is, in cases in which “some factors cut one way and some the other”—the emphasis should be shifted from “the unwieldy control factor” to “a more accurate proxy: whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss.” *Id.* at 497. Under the FedEx Home Delivery test,

while all of the considerations at common law remain in play, an important *animating principle* by which to evaluate those factors in cases where some factors cut one way and some the other *is whether the position presents the opportunities and risks inherent in entrepreneurialism.*

Id. (emphasis added) . This is not a close case, as franchisees are clearly independent contractors. However, shifting the emphasis toward entrepreneurial opportunity is legally sound and practical, as it reflects the harmonized approach the Board should adopt for this and future independent contractor decisions.

The D.C. Circuit in FedEx Home Delivery confirmed the applicability of the common-law agency test in determining independent contractor status and further acknowledged that

neither it nor the Board had authority to change the common-law standard. Id. at 496. The court, however, confronted the “long-recognized rub” with the non-exhaustive factors in the common-law test—namely, that the test “is not especially amenable to any sort of bright-line rule.” Id. at 496, 496 n.1.

[The] potential uncertainty is particularly problematic because the line between worker and independent contractor is jurisdictional—the Board has no authority over independent contractors. . . . Consequently, it is “one of this court’s principal functions” to “ensur[e] that the Board exercises power only within the channels intended by Congress,” especially as determining status from undisputed facts “involves no special administrative expertise that a court does not possess.”

Id. at 496 (quoting North American Van Lines, Inc. v. N.L.R.B., 896 F.2d 596, 599 (D.C. Cir. 1989)).

The D.C. Circuit also focused on another problem with the common-law test—that the “control” factor, which historically has been among the most important factors in determining independent contractor status, is an imperfect measure of an individual’s employment status. Id. at 496. Both Board and federal decisions made clear that “control” for purposes of determining independent contractor status only means certain types of control. Id. at 497. Put differently, “some controls [are] more equal than others.” Id.⁸ Thus, the following types of control, among

⁸ The authors of the Restatement acknowledged the limitations of the “control” factor. Comment d to Restatement (Second) of Agency § 220(1) states, “Although control or right to control the physical conduct of the person giving service is important and in many situations is determinative, the control or right to control needed to establish the relation of master and servant may be very attenuated.” Id. Comment e to the Restatement (Second) of Agency § 220 further advises that

[t]he important distinction is between service in which the actor’s physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use

others, had been deemed by the Board and federal courts as fully compatible with independent contractor status: (1) “efforts to monitor, evaluate, and improve a worker’s performance”; (2) “restrictions resulting from government regulation”; and (3) “[e]vidence of unequal bargaining power.” Id. at 496–97.

In close cases, the D.C. Circuit reasoned, courts (and the Board) had in fact looked to entrepreneurial freedom, which is closely related to but not the same as “control.” Id. In such cases, “an important animating principle by which to evaluate those factors” in such cases was “whether the position presents the opportunities and risks inherent in entrepreneurialism.” Id. at 497. The “subtle refinement” of shifting emphasis from control to entrepreneurialism reflected the comments of the Restatement (Second) of Agency § 220, id. at 497, the qualitative nature of the common law test,⁹ id. at 497 n.3, and Board decisions such as Arizona Republic, Dial-A-Mattress, and St. Joseph News Press.

care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.

(Id. cmt. e; see also id. cmt. g (stating that for purposes of statutory interpretation, “the word ‘employee’ has largely displaced ‘servant,’” and that the term “[employee] is synonymous with servant”).

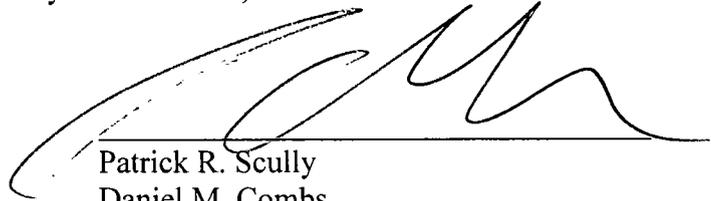
⁹ Comment d to Restatement (Second) of Agency § 220(1) cmt. d states that a full-time cook is regarded as a servant—and not an independent contractor—although it is understood that the employer will exercise no control over the cooking. FedEx home Delivery, 563 F.3d at 497 (citing Restatement (Second) of Agency § 220(1) cmt. d) (internal quotations omitted). The “important animating principle” in determining the employment status for the cook is not control because the master does *not* control the manner and means of the cooking. Instead, the cook in the Restatement comment is an employee because he lacks entrepreneurial opportunity. Id.

Emphasizing entrepreneurial opportunity and risks is practically sound in addition to being a reflection of Board precedent and the Restatement. Although the Regional Director did not adopt the FedEx test in the Decision, the test applies and leads to the same conclusion because it merely clarifies the Board's traditional analysis. As demonstrated above by the broad range of franchisees' entrepreneurial opportunities and risks under the SuperShuttle DFW franchise model (which are also evidence of a lack of control), the FedEx iteration of the common-law test is an analytically and practically superior method, which the Board should adopt.

IV. CONCLUSION

For all of the reasons set forth above and in Respondent's attached Post-Hearing Brief, Response to Request for Review, and the Regional Director's Decision, the dismissal of the Petition based on franchisees' status as independent contractors must be sustained.

Respectfully submitted this 12th day of November, 2010.



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

SUPERSHUTTLE DFW, INC.,
d.b.a. SUPERSHUTTLE DFW

Case 16-RC-10960

and

AMALGAMATED TRANSIT UNION LOCAL 1338

BRIEF OF SUPERSHUTTLE DFW, INC.

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT OF THE CASE	3
III. FACTS	4
A. Franchisees' Business Relationship with SuperShuttle DFW	4
1. Franchisees Enter Into Arms-Length Agreements to Use SuperShuttle DFW's Proprietary Systems and Intellectual Property.....	4
2. Franchisees Explicitly Engage in an Independent Contractor Relationship With SuperShuttle DFW	5
B. Business Operations of Franchisees	7
1. Franchisees Self-Schedule in Every Respect.....	7
2. Franchisees Have Full Discretion to Choose or Decline Business.....	9
3. Franchisees Generate Their Own Income and Do Not Share Revenues With SuperShuttle DFW.....	12
4. Franchisees Provide the Costly Instrumentalities of Their Business.....	13
5. Franchisees May Use Relief Drivers to Increase Franchise Revenue.	14
C. Regulation of Industry.....	15
1. Pervasive Regulations Govern Innumerable Aspects of Franchisees Business.	16
2. All Airport Regulations Are Passed Through to Franchisees in Their Unit Franchise Agreements.....	21
D. Business Operations of SuperShuttle DFW.....	22
IV. APPLICABLE LAW	23
A. Application of the Board's Common Law Test Demonstrates that Franchisees Are Independent Contractors.....	25
1. Board Precedent Requires a Weighing of Common Law Factors.....	25
2. Regulations By Public Authorities Do Not Evidence Employer Control.....	26
3. Franchisees Own The Instrumentalities of Their Businesses.....	27
4. Franchisees Generate Their Own Revenue.....	30
5. Franchisees Enjoy Unfettered Entrepreneurial Freedom.....	32
6. Franchisees Intend to Create an Independent Contractor Relationship.....	34
7. Franchisees Contract With SuperShuttle DFW for a Limited Period.....	35
8. SuperShuttle DFW Does Not Control the Details of Franchisees' Work.....	35
9. Franchisees Are Engaged in a Distinct Business From SuperShuttle DFW.....	40
B. Franchisees Are Independent Contractors Under the D.C. Circuit's Entrepreneurial Opportunity Test	41
1. The D.C. Circuit's Test Is Consistent With Board Precedent.	41
2. <i>FedEx</i> Compels a Finding of Independent Contractor Status.....	43
C. Franchisees Are Statutory Supervisors.....	44
V. CONCLUSION	46

TABLE OF AUTHORITIES

Cases

<u>AAA Cab</u> , 341 NLRB at 465.....	passim
<u>Ace Cab Company</u> , 273 NLRB 1492 (1985).....	passim
<u>Air Transit, Inc. v. NLRB</u> , 679 F.2d 1095 (4th Cir. 1982).....	26
<u>Air Transit, Inc.</u> , 271 NLRB 1108 (1984).....	passim
<u>Argix Direct, Inc.</u> , 343 NLRB 1017 (2004).....	passim
<u>Arizona Republic</u> , 349 NLRB 1040 (2007).....	passim
<u>City Cab Co. of Orlando</u> , 285 NLRB 1181 (1987).....	24, 39
<u>Corporate Express Delivery Sys. v. NLRB</u> , 292 F.3d 777 (D.C. Cir. 2002).....	41
<u>Dial-A-Mattress Operating Corporation</u> , 326 NLRB 884 (1998).....	passim
<u>Don Bass Trucking, Inc.</u> , 275 NLRB 1172 (1985).....	26, 36
<u>Elite Limousines</u> , 324 NLRB 991 (1997).....	39, 40
<u>FedEx Home Delivery v. NLRB</u> , 563 F.3d 492 (D.C. Cir. 2009).....	passim
<u>Metropolitan Taxicab Board of Trade, Inc.</u> , 342 NLRB 1300 (2004).....	38
<u>North American Van Lines, Inc. v. NLRB</u> , 896 F.2d 596 (D.C. Cir. 1989).....	42
<u>Oakwood Healthcare, Inc.</u> , 348 NLRB 686 (2006).....	44, 45, 46
<u>Overnight Transportation Co.</u> , 343 NLRB 1431 (2004) (Decision of ALJ).....	44
<u>Roadway Package System</u> , 326 NLRB 842 (1998).....	25, 26
<u>St. Joseph News Press</u> , 345 NLRB 474 (2005).....	passim
<u>Stamford Taxi, Inc.</u> , 332 NLRB 1372 (2000).....	45

Statutes

29 U.S.C. § 152(3).....	28
Tex. Transp. Code Ann. § 545.425 (2010).....	18, 42

I. INTRODUCTION

Petitioner, Amalgamated Transit Union Local 1338 (“ATU” or the “Union”), has improperly filed a Petition under Section 9 of the National Labor Relations Act (“NLRA” or the “Act”), to be certified as the bargaining representative of a group of independent contractor, franchisee drivers doing business with SUPERSHUTTLE DFW, INC., d.b.a. SuperShuttle DFW (“SuperShuttle DFW” or “Respondent”).¹ There is no question concerning representation in the instant matter because the franchisees are not employees under Section 2(3) of the NLRA.

The record evidence demonstrates that the franchisee drivers in the Dallas-Fort Worth market are independent contractors, and thus excluded from the definition of “employees” under Section 2(3).² All aspects of the franchisees’ business compel a finding that they are independent contractors. All franchisee witnesses testified at the Hearing that they self-schedule in every meaningful respect. Franchisees determine themselves how many hours they choose to work. They also devise and police their own schedules for picking up hotel circuit passengers. It is undisputed that franchisees can “pass” or “play” on any work (bid) offered without any repercussions to them. In determining the size of their businesses, the franchisees are completely free to select which passengers and trips they accept, taking into account, among other things, gas mileage, distance, and, most importantly, revenue opportunity.

¹ The proper Respondent in Case No. 16-RC-109763 is SUPERSHUTTLE DFW, INC., d.b.a. SuperShuttle DFW. SuperShuttle DFW, a Texas Corporation, is the SuperShuttle Licensee that operates in the Dallas-Fort Worth airport market and contracts with the franchisees in the instant case. SuperShuttle DFW is referred to in this Post-Hearing Brief both as “SuperShuttle DFW” and “Respondent.”

² Notwithstanding their status as independent contractors, franchisees currently meet the statutory definition of a supervisor under Section 2(11) of the Act. All franchisees have the authority to retain “relief” or “associate” drivers who are hired, fired, assigned, responsibly directed, paid, and controlled by franchisees.

All franchisees own (whether through straight-ownership or a lease arrangement) the vans which are the primary instrumentality of their business, at a cost of approximately \$30,000. The franchisees may drive as many, or as little, hours as they choose, and have the freedom to hire relief drivers to drive their van and generate revenue for their franchise 24 hours-a-day (or any lesser period of time). The franchisees are not paid wages by SuperShuttle DFW and are not guaranteed any income, but instead pay SuperShuttle DFW a weekly flat fee in exchange for use of SuperShuttle DFW's dispatching and proprietary systems and trademark and trade dress. Franchisees in fact receive greatly disparate earnings based on the hours they choose to drive and the number and types of fares they choose to accept. Franchisees testified that they report themselves as "self-employed" to the IRS for purpose of paying their own taxes.³ Importantly, it is undisputed that SuperShuttle DFW has no shared interest in the revenue earned by franchisees because of the flat-fee model in the Dallas-Fort Worth market.

ATU presented no evidence of control over franchisee drivers in the Dallas-Fort Worth market. The purported examples of "control" that the Union attempted to show in the hearing are regulations promulgated by Dallas-Fort Worth International Airport Board, the City of Dallas, the City of Fort Worth, the state of Texas, or the United States Department of Transportation.⁴ The Union's franchisee witnesses openly acknowledged the highly-regulated

³ Thus, franchisees who testified at the hearing have sworn to the IRS that they are not employees.

⁴ At best, the Union has pointed to one minor aspect of alleged control that is not purely regulatory in nature—a request by SuperShuttle DFW that franchisees limit use of cell phones. (Tr. 91:1–9; U. Ex. 1.) The policy, however, *is* regulatory and serves as a public safety stopgap in the Dallas-Fort Worth area. (U. Ex. 1 (stating that franchisees and relief drivers are subject to local and state laws).) The Texas legislature has imposed a partial ban on cell phone use while driving. Tex. Transp. Code Ann. § 545.425 (2010) (prohibiting use of hand-held cell phones in a school crossing zone, and prohibiting operator of a passenger bus from using a hand-held device while a minor passenger is on board). Moreover, SuperShuttle DFW's cell phone policy is not punitive.

nature of the their business, the wide freedoms available to them in running their business, and the fact that all franchisees are independent businesspeople.

Whether considering the common-law agency test applied in Dial-A-Mattress Operating Corporation, 326 NLRB 884, 891 (1998), or the entrepreneurial opportunity test of FedEx Home Delivery v. NLRB, 563 F.3d 492, 503–04 (D.C. Cir. 2009), the record is clear that the petitioned-for franchisees who work with SuperShuttle DFW are independent contractors. No arguable basis exists to declare these independent businesspeople “employees” under Section 2(3).

II. STATEMENT OF THE CASE

On July 8, 2010, ATU filed a Petition with Region 16 of the NLRB. (Petition, Case No. 16-RC-10960.) The Union withdrew Case No. 16-RC-10960 and on July 15, 2010, refiled the identical Petition with Region 16. (Petition, Case No. 16-RC-10963.)

ATU seeks certification as the representative of all of SuperShuttle DFW’s drivers/franchisees. (Id. at 1.) At the hearing, ATU asserted that it also seeks certification as the representative of each of SuperShuttle DFW’s franchisee’s relief drivers. On July 28 and 29, 2010, this matter came before Hearing Officer Darci B. Slager (“Hearing Officer Slager”) of the NLRB, Region 16, at the Federal Office Building, 819 Taylor Street, Room 8A24, Fort Worth, Texas 76102. In the Hearing, the parties presented evidence on the following issues: (1) the independent contractor status of SuperShuttle DFW’s franchisees and their exclusion from the definition of “employees” under Section 2(3) of the Act,⁵ and (2) the supervisory status of SuperShuttle DFW franchisees.⁶

⁵ As SuperShuttle DFW noted on the record, five of the petitioned-for franchisees are corporations, and thus, not employees under the Act. (See E. Ex. 4; Tr. 48:13–49:5, 49:12–50:4.)

⁶ SuperShuttle DFW is an “Employer” under the Act because it has employees separate and apart from the franchisees who are the target of ATU’s Representation Petition in Case No. 16-RC-10963.

SuperShuttle DFW is subject to the Board's jurisdiction. During the Hearing, the parties stipulated that SuperShuttle DFW was in the franchising business (B. Ex. 2),⁷ which the undisputed record evidence supports. The parties also stipulated that Petitioner, ATU, is a labor organization. (Id.)

Hearing Officer Slager granted the parties until the close of business on August 5, 2010, for the submission of post-hearing briefs in the matter. On July 29, 2010, Regional Director Martha Kinard granted the Union's request for an extension of time in which to file post-hearing briefs to the close of business on August 11, 2010.

III. FACTS⁸

A. Franchisees' Business Relationship with SuperShuttle DFW.

1. Franchisees Enter Into Arms-Length Agreements to Use SuperShuttle DFW's Proprietary Systems and Intellectual Property.

It is undisputed that SuperShuttle DFW is not engaged in the transportation business, but is engaged in the business of franchising and providing services to its franchisees. (Tr. 19:16–18, 155:13–21; B. Ex. 2.) The franchisees' business relationship with SuperShuttle DFW is set forth in the Unit Franchise Agreement (“UFA”). (E. Ex. 2; Tr. 36:20–24.) The UFA memorializes the business quid pro quo between the parties: in exchange for a franchisee's payment to SuperShuttle DFW of an initial franchisee fee and a flat weekly system fee, the franchisee obtains a one-year, non-exclusive right to provide shared-ride services in the Dallas-Fort Worth area using SuperShuttle DFW's proprietary reservation and automatic dispatching

⁷ As explained, *infra*, the Union does not contest that SuperShuttle DFW and the franchisees are engaged in totally separate and distinct businesses.

⁸ Citations in this Brief will be as follows: “Tr. ____:____” to indicate the Hearing transcript's page and line numbers, respectively; “E. Ex.” to indicate an Exhibit of Respondent, SuperShuttle DFW; “P. Ex.” to indicate an Exhibit of the Petitioner; and “B. Ex.” to indicate an Exhibit of the Board.

systems and intellectual property, including but not limited to the “SuperShuttle” trademark and the yellow and blue color scheme. (Id. at 1 § A, 3 § 1; Tr. 159:9–23.) Both parties must adhere to the terms of the UFA as part of the quid pro quo. (See id. § 3 § 1.) As in any business contract, the UFA is capable of being breached. (Id. at 20–23 § 11.) The UFA sets forth which breaches may be cured and which subject the agreement to immediate termination. (Id. at 20 § 11.) Controversies between the parties are subject to an arbitration provision, which may be invoked by either party. (Id. at 31.)

As stated above, the UFA is in effect for a one-year period only. (Id. at 3 § 1.A; Tr. 40:13–15.) The UFA explicitly provides that neither party has the right to renew the UFA. (Id. at 4; Tr. 40:23–25, 110:19–25.) Franchisees and SuperShuttle DFW may choose to enter into a new franchise agreement, and the parties repeat the franchising and contracting process each time the current UFA expires. (Tr. 193:2–3.)

2. Franchisees Explicitly Engage in an Independent Contractor Relationship With SuperShuttle DFW.

Franchisees’ contractual relationship with SuperShuttle DFW demonstrates the franchisees’ clear understanding that they are engaging as independent contractors. (E. Ex. 2, at 1 § C.) In their agreement with SuperShuttle DFW, franchisees agree clearly, consistently, and repeatedly that they are independent business owners and are independent contractors with SuperShuttle DFW. (E. Ex. 2 at 1 § C.) The UFA states as follows:

Franchisee is operating a business independent of and distinct from those of SuperShuttle and City Licensee [SuperShuttle DFW]. While Franchisee will receive instructions and direction from [SuperShuttle DFW] during the performance of its duties under the Franchise Agreement, those instructions and directions relate to government-imposed requirements or the result of its work, not to the details of how the work is performed. Any instructions regarding the details of performance are those inherent in a franchise system relating to the presentation of product to the public or are dictated by the Regulating Authorities.

FRANCHISEE IS NOT AN EMPLOYEE OF EITHER
SUPERSHUTTLE OR CITY LICENSEE.

(Id.)⁹ In the UFA, the franchisees and SuperShuttle DFW also explicitly agree that “nothing in the UFA shall “be deemed or construed to create the relationship of principal and agent, . . . or employment, . . . and the Franchisee shall not hold itself out as an agent . . . or employee of [SuperShuttle DFW] or any affiliate of [SuperShuttle DFW].” (Id. at 34 § O(1).) The franchisees additionally agree that “[p]ersons who do not wish to be franchisees and independent business people, but who prefer a more traditional employment relationship, should not become SuperShuttle franchisees.” (Id. at 2 ¶ H.)

The parties to the contract further agree as follows:

It is acknowledged that the Franchisee is the independent owner of its business, shall be in full control thereof, and shall conduct such business in accordance with its own judgment and discretion, subject only to the provisions of this Agreement. Franchisee shall conspicuously identify itself as the independent owner of its business and as a franchisee of [SuperShuttle DFW]. . . .

**IT IS ACKNOWLEDGED THAT THE FRANCHISEE IS
THE INDEPENDENT OWNER OF ITS BUSINESS AND
THAT THE FRANCHISEE AND ITS DRIVERS ARE NOT
ENTITLED TO WORKERS' COMPENSATION BENEFITS
AND THAT THE FRANCHISEE IS OBLIGATED TO PAY
FEDERAL AND STATE INCOME TAX ON ANY MONIES
EARNED PURSUANT TO THIS AGREEMENT.**

⁹The UFA that was introduced at the Hearing is the executed UFA of SuperShuttle DFW franchisee Gideon Okwena, who also testified at the Hearing. (E. Ex. 1 at 1; Tr. 115:13–15.) It is undisputed that Mr. Okwena’s UFA is substantially identical to the now-effective UFAs between all franchisees and SuperShuttle DFW.

(Id. at 34 § O(2), (3) (emphasis and all-capital formatting in original.)¹⁰ As noted above, each and every franchisee testified that they are not employees, but are independent, self-employed businesspeople. (See Tr. 116:7–13, 192:17–193:1, 219:2–6, 302:8–9.)

SuperShuttle DFW recommends that its franchisees form a business entity such as a corporation, LLC, or partnership. (E. Ex. 2 at 2 § D.) Presently, five franchisees working with SuperShuttle DFW—Kwapgram Inc., Nahome LLC, Omidee LLC, O Sattiy LLC, and Surafel LLC—are incorporated business entities. (Franchisee List, E. Ex. 4; Tr. 48:13–50:4.) It is undisputed that franchisees may form any type of corporation in their discretion. (Tr. 49:25–50:2.)

B. Business Operations of Franchisees.

The franchisee witnesses who testified at the Hearing provide compelling evidence that confirms their independence in operating their franchises in the Dallas Fort-Worth area on a day-to-day basis. Both the Respondent's and the Union's witnesses testified as to their self-scheduling, unhindered discretion to accept or decline business, ownership of the costly instrumentalities of their businesses, payment of every material expense associated with the business, ability to hire and control employees to assist in running their businesses, and general freedom to engage in their *own* business.

1. Franchisees Self-Schedule in Every Respect.

As part of the business agreement with SuperShuttle DFW, franchisees purchase either an a.m. or p.m. franchise. (E. Ex. 1 at 3 § 1.A; Tr. 80:5–11.) However, all witnesses confirmed that

¹⁰In contrast, and as explained below, relief drivers hired by franchisees *may* be employees of the franchisees. (E. Ex. 1 at 11 § E.) Pursuant to the UFA, a franchisee who hires a relief driver employee agrees to comply with all government laws and regulations concerning such an employee, including provision of workers' compensation insurance requirements and withholding and payment of taxes. (Id.)

franchisees in the Dallas-Fort Worth area may work at any time of the day, regardless of whether they purchased an a.m. or p.m. franchise. (See Tr. 80:12–14, 223:14–18.)

Franchisee Gideon Okwena summarized the complete control franchisees have over the days and hours they work. Mr. Okwena testified that he does not have a schedule with SuperShuttle DFW, but sets the times he will drive his van. (Tr. 116:16–19.) Mr. Okwena testified that the hours he works is “up to [him]. [He] can work two hours” or he “can work ten hours if [he] want[s] to.” (Id. 116:20–22.) In fact, Mr. Okwena can choose not to work on any particular day. (Id. 116:23–117:2.) Mr. Okwena testified that no one tells him when to take a break or whether he *should* take a break, but noted that his “stomach tells [him] when to take a break.” (Tr. 117:5–8.)

Mr. Okwena could not provide a definitive answer as to how many hours he works on a “typical” day, because (1) he does not work a “typical” day, and (2) he does not “count hours at work” (in part because he is not paid by the hour). (Tr. 145:11–146:13.) For example, Mr. Okwena testified that in the week before the Hearing, he worked three days, for approximately five hours per day, because his wife requested that he spend time with her that week. (Id. 145:11–19.) However, he testified that he normally chooses to operate his business for a greater part of the week. (Id. 146:2–5.)

Union witness Herb Corpany also confirmed that franchisees self-schedule. (Id. 223:19–24, 247:11–16.) Mr. Corpany was an employee driver for SuperShuttle DFW before SuperShuttle DFW converted to a franchise model in approximately 2005. (Id. 157:158:4, 218:20–219:1.) Mr. Corpany testified that as a franchisee, unlike as an employee driver, he does not punch in and punch out, and that he can work at any time during the day. (Id. 247:8–19.) (In

contrast, when Mr. Corpany was an employee driver for SuperShuttle DFW, he *was* scheduled and could not work at times in which he was not scheduled. (Id. 247:20–23.)

Finally, franchisees may choose to participate in the “hotel circuit”—a collection of Dallas-Fort Worth area hotels that have a passenger pick-up time schedule—by providing shared-ride services at numerous hotels. (Tr. 64:3–65:14.) It is within the franchisees’s complete discretion whether to participate in the hotel circuit.¹¹ (Id. 64:15–17.) It is undisputed that franchisees alone prepare and oversee scheduling of the hotel circuit for Dallas-Fort Worth area hotels. (Id. 64:12–23, 124:15–125:4.) It is undisputed that SuperShuttle DFW’s employees such as General Manager Mr. Harcrow have no involvement in developing the hotel circuit schedule or ensuring that franchisees comply with their hotel circuit schedule. (Id. 64:20–65:25.)

2. Franchisees Have Full Discretion to Choose or Decline Business.

(a) *Franchisees Choose Their Business.*

Franchisees run their businesses through the discretionary process of bidding on, declining, or passing on trips made available on SuperShuttle DFW’s automated dispatch system. (Tr. 54:5–55:3.) Access to SuperShuttle DFW’s automated dispatch system is part of franchisees’ quid pro quo with SuperShuttle DFW.¹² (E. Ex. 1 at 1 § A, 6 § 2.F.) The potential trips are displayed on a Nextel device that is roughly the size and shape of a cell phone. (Tr.

¹¹ Mr. Okwena testified that the hotel circuit makes up a major part of his franchise business. (Id. 124:8–11.)

¹² The Union apparently intends to argue that the communication of potential fares through Nextel, but not a regular cell phone, is evidence of control. (Tr. 137:6–138:7.) Such an argument is illogical for at least two separate reasons. First, franchisees contract for the ability to use SuperShuttle DFW’s automated dispatch system and Nextel because of its value—that is, because of SuperShuttle’s investment and development in its automated dispatching system, automated fares may be communicated through a compact Nextel device. Such fares, of course, cannot be streamed through a regular cell phone. Second, SuperShuttle DFW does not *make* franchisees bid on fares and has no financial interest in them doing so. Franchisees pay SuperShuttle DFW a flat weekly fee, and SuperShuttle has no financial interest in the income earned by franchisees through the bidding process.

54:5–55:3, 121:15–19.) When a trip is announced to a franchisee who has made himself or herself available for bids, the franchisee has the sole discretion to accept or decline the trip. (Id. 57:12–22; 121:25–122:22.) In deciding whether to “pass or play” on the bid (which is General Manager Mr. Harcrow’s terminology for accepting or not accepting a bid (Tr. 54:14–34)), a franchisee may consider information displayed on the Nextel such as mileage, location, and the fare. (Id. 54:14–24.) The franchisees testified that they consider such information in determining whether to accept or decline a bid. (Id. 122:17–24.) Mr. Harcrow, however, pointed out that there is not necessarily a consistent pattern in how franchisees bid on fares:

It’s [the franchisees’] choice one way or another. . . . These guys are businessmen or businesswomen [S]ome guys will take anything; some do what they want. It just depends.

(Id. 54:10–22.)

Franchisees communicate whether they accept or decline a trip by pressing the appropriate button on the Nextel. (Id. 58:16–24.) Franchisees also may do nothing, and the next available trip will display for bidding. (Id. 58:25–59:4.)

Mr. Okwena confirmed his discretion in accepting or declining business. (Tr. 121:10–24.) Mr. Okwena showed his hand-held, telephone-like Nextel device at the hearing, and testified that fares are offered on the Nextel listing such information as the location of the passenger, the distance of the trip, the time for pick-up, and the fare. (Id. 121:18–25, 122:12–16.) He testified that he “choose[s] what [he] want[s],” and may decline what he chooses. (Id. 121:20–122:1.) In Mr. Okwena’s words, “If I don’t want [a fare], I don’t want it.” (Id. at 122:1.) SuperShuttle DFW has no involvement in selecting franchisees’ business or the particular routes franchisees take after picking up a customer. (Tr. 68:8–13.) Franchisees make these decisions, and Mr. Okwena testified that he considers several factors in accepting or declining a bid,

including the fare and any offsetting gas costs.¹³ (Id. 122:17–24.) These are “commonsense” business decisions made by Mr. Okwena. (Id. 122:17–19.)

Say, for example, I see 150 [dollars], but it’s someone in Plano or McKinney, and there is \$40 [two] miles from my house or from my location at that point. I’d rather go for two miles for \$40 than jumping from 150 [dollars] . . . in Plano, which [would] consume my time and gas. So I always choose what is good for me.

(Id. 122:19–24.)

Again, there are no consequences to franchisees for declining a bid other than not receiving that fare. (Id. 123:25.) This is demonstrated by, among other things, the May 2010 bidding history of franchisee and Union witness Herb Corpany. (E. Ex. 5; Tr. 243:11–244:12, 245:2–3.)¹⁴ Mr. Corpany testified that he passed on numerous bids, as documented on the bidding history, and that his choices resulted in absolutely no consequences to him. (Tr. 244:11–244:12.)

(b) *Mr. Corpany's Testimony About "Forced" Bids Is Unreliable.*

The Union elicited testimony from Mr. Corpany that on one occasion approximately one-and-one-half years ago, the automatic dispatch system “forced” a trip into his Nextel, which effectively caused him to involuntarily accept a bid. (Tr. 238:24–239:17, 244:20–23.) According to Mr. Corpany, this forced bid has had a chilling effect on his bidding decisions and he “just [doesn’t] decline [bids] . . . for . . . the most part.” (Tr. 239:24–240:12.) Mr. Corpany’s testimony was belied by his admissions that his bidding history was accurate and that he repeatedly declined and passed on bids with absolutely no consequence to him. (Tr. 243:15–244:12; E. Ex. 5.)

¹³ As set forth in detail below, franchisees pay for all expenses associated with operating their businesses, including paying gas for their vans. (Tr. 122:25–123:1.)

The Union presented no evidence corroborating Mr. Corpany's claim to a "forced" trip. Even if Mr. Corpany's claim could be considered, it is admittedly one incident in the face of overwhelming evidence that franchisees are completely free to accept or decline work. (See Tr. 243:15–244:12; E. Ex. 5.)

3. Franchisees Generate Their Own Income and Do Not Share Revenues With SuperShuttle DFW.

Passengers pay franchisees to transport them to and from the airport or to other locations in the Dallas-Fort Worth area. (Tr. 117:18–22.) SuperShuttle DFW does not pay franchisees (Tr. 117:13–14); rather, as part of the parties' business agreement, franchisees pay SuperShuttle DFW an initial franchisee fee and a flat weekly system fee to provide transportation services using SuperShuttle DFW proprietary systems and intellectual property. (*Id.* at 1 § A, 3 § 1; Tr. 159:9–23.)

Because franchisees choose the days and hours they work (Tr. 116:16–117:2), and the business they take (*id.* 121:20–122:1), franchisees do not have a set wage. (*Id.* 117:11–14.) A franchisee's earnings may fluctuate from week to week or from season to season, depending on how the franchisee runs his or her business. (*Id.* 118:10–14.) However, regardless of how much they have earned, franchisees pay the same weekly flat System Fee to SuperShuttle DFW. (*Id.* 118:3–9.) SuperShuttle thus has no financial interest in the income earned by franchisees.

SuperShuttle DFW does not withhold taxes for franchisees. (Tr. 144:13–15, 189:7–12.) The franchisees testified that they file taxes for themselves and report themselves as "self-employed" (*id.* 144:13–17, 213:18–24, 262:16–25). Franchisees do not receive fringe benefits of

¹⁴ Mr. Corpany acknowledged the accuracy of E. Ex. 5. (Tr. 245:2–3.)

any kind from SuperShuttle DFW, including vacation time, holiday pay, workers' compensation insurance, or sick leave.¹⁵ (Id. 152:3–15, 268:5–14.)

4. Franchisees Provide the Costly Instrumentalities of Their Business.

(a) *Franchisees Have Complete Proprietary Interest in Their Vans.*

A franchisee's business requires a van, and in many respects *is* the van.¹⁶ Franchisees have a total proprietary interest in their vans. They contractually agree to “purchase or lease a van” that conforms to regulatory specifications.¹⁷ (E. Ex. 2 at 4 § 2.A.) Sixty-four percent of franchisees own their vans and the remaining lease-to-own.¹⁸ (Tr. 66:19–23.) The investment in a passenger van is significant; the average costs of the passenger vans is approximately \$30,000. (Tr. 67:24–25.)

Franchisees may acquire a van from any source. (Tr. 67:10–20.) Franchisees obtain vans from independent sources or from a leasing company, Blue Van Leasing. (Tr. 67:10–20.) Mr. Okwena, for instance, bought his van from a retired franchisee who, Mr. Okwena testified,

¹⁵ SuperShuttle DFW agrees to waive the franchisees' obligation to pay the System Fee for up to two weeks a year. (E. Ex. 2 at 15–16 § 17.A.) This waiver is a term of the UFA and is a business incentive to franchisees. (Id.; Tr. 152:3–15.)

¹⁶ Franchisees undisputedly would not be able to operate a franchise without a van. However, franchisees would not necessarily come to a consensus as to the nature of their respective businesses. For example, Mr. Okwena emphasized that his business was providing customer service. (Tr. 142:7–10.)

¹⁷ As detailed below, the Airport Regulations set forth numerous provisions concerning shared-ride vehicles, including: the age of vans, the distinct common color scheme and lettering of vans, the size and number of seats, requisite interior equipment, and the condition and cleanliness of all surfaces. (E. Ex. 1 at 58–59.)

¹⁸ SuperShuttle DFW anticipates that ATU may argue that a lease, as opposed to ownership, of a van, does not evince control of an instrumentality. The argument is unpersuasive and conflicts with Board precedent. Leasing is a form of ownership, see Tex. Transp. Code Ann. § 601.002(9) (defining “owner” to include a lessee), and the Board has held that “paying lease or rental fees over a period of time results in a substantial investment on the part of a lessee.” AAA Cab, 341 NLRB at 465. Further, “[c]ontrol over the drivers is not demonstrated by the fact that the Employer sets standardized lease terms in its leasing agreements.” Id.

gave him (Mr. Okwena) a “good deal.” (Tr. 120:11–14.) Union witness Mr. Corpany also owns his van, and acquired it through a lease-to-own program. (219:12–15.)

More than once, Mr. Okwena emphasized of the van, “It’s mine.” (Id. 120:17–22.) Thus, franchisees determine where and how to park their vans, and choose to park them at home. (See Tr. 120:15–16.) Franchisees may use their vans for personal (or business) purposes, and have driven the van for such purposes as buying groceries and driving their families. (Id. 120:19–121:9.)

(b) *Franchisees Pay for Expenses of Their Business Operations.*

Franchisees pay for all expenses incidental to their business operations. (See Tr. 66:24–67:6.) Franchisees alone pay for all gas, van maintenance, and airport or traffic tickets. (Tr. 66:24–67:2, 121:8–9, 122:25–123:1, 128:19–130:4.) Franchisees pay for driver permits and van permits required to operated shared-ride services, and pay toll fees and airport access fees associated with their business. (Tr. 67:1–15, 149:2–4, 268:12–17.) Franchisees are responsible for obtaining and maintaining their own uniforms. (Id. 262:6–10.) In exchange for the System Fee, SuperShuttle DFW provides the Nextel device that displays the automatic dispatching information. (Tr. 61:22–62:6.)

5. Franchisees May Use Relief Drivers to Increase Franchise Revenue.

Franchisees have the entrepreneurial freedom to hire and use relief drivers to assist in operating their businesses. (E. Ex. 2 at 10 § 4.C; Tr. 50:14–16.) The franchisees agree with SuperShuttle DFW that

Franchisee may utilize an Operator to substitute for Franchisee in operating the Vehicle; provided, however, that Franchisee provides written notice to [SuperShuttle DFW], in a form acceptable to [SuperShuttle DFW] of Franchisee’s intent to utilize an Operator, in addition to Franchisee. Such Operator must be an employee, agent, a shareholder, partner or member of Franchisee and must complete the initial training program to [SuperShuttle DFW’s]

satisfaction and must otherwise meet [SuperShuttle DFW's] criteria for operators.

(E. Ex. 2 at 10 § 4.C.) Franchisees who choose to hire a relief driver agree, among other things, to keep the relief driver in compliance

with all applicable rules and regulations of all airport(s) in the Territory, all speed and traffic laws and, if applicable, all government regulations relating to . . . worker's compensation insurance, unemployment insurance and withholding and payment of federal and state income taxes and social security taxes.

(Id. at 11 § 4.E.) Franchisees have complete authority to hire, fire, discipline, promote, schedule, or terminate their relief drivers. (See Tr. 206:19–207:5.)

Franchisees in the Dallas-Fort Worth market have hired and do hire relief drivers to assist the franchisees' businesses. (Tr. 51:9–19, 193:4–18.) SuperShuttle DFW has no involvement in the details of relief drivers' work, including when they work or how much they are paid. (Id. 51:20–25.) Franchisee John Butler testified that he recently hired a relief driver, Stewart Weldon, to operate Mr. Butler's van at night when Mr. Butler was not driving.¹⁹ (Tr. 192:17–21, 193:4–18, 196:11–197:12.) Mr. Butler used this arrangement in order to make his van available approximately 24 hours a day, which of course increased his revenue stream. (Id. 196:23–197:1.) Mr. Butler chose the method of paying his relief driver, Mr. Weldon, and paid Mr. Weldon approximately \$125 for every \$300 in revenue made by Mr. Weldon. (194:21–25.)

C. Regulation of Industry.

The franchisees' business—providing shared-ride transportation services in the Dallas-Fort Worth area—is heavily regulated. (See Tr. 29:11–14.) The sources of regulation are the Dallas/Fort Worth International Airport Board, a public authority, which promulgates rules and

¹⁹ The Union's relief driver witness, Ngouagnapi Tagnidoung, testified that he informally arranged his scheduling with the franchisee for whom he works. (Tr. 293:11–19.)

regulations to providers of shared-ride services via a shared-ride airport contract (the “Airport Regulations”) (E. Ex. 1; Tr. 20:11–18, 22:4–10), the Dallas City Code, the Fort Worth City Code and Charter, the Texas Transportation Code (see Tex. Transp. Code Ann. § 545.425 (2010)), and regulations of the United States Department of Transportation. (See E. Ex. 1 at 29 § 9.1 (requiring compliance with Federal, State, and Local laws); Tr. 33:23–34.)

1. Pervasive Regulations Govern Innumerable Aspects of Franchisees Business.

The Airport Regulations, which are 130 pages in length and cover an expansive breadth of topics,²⁰ set forth myriad limits on how independent contractor franchisees may operate their transportation businesses. (Tr. 22:3–7.) At the Hearing, the Union’s counsel argued that the Airport Regulations did not govern franchisees because the franchisees were not signatories to the Airport/SuperShuttle DFW Contract. (*See* Tr. 71:16–18.) The Union’s argument is misplaced. The Airport Contract with SuperShuttle DFW specifically provides that SuperShuttle DFW may contract shared-ride service to drivers on an independent basis, but requires that such drivers comply with the Airport Contract and that the contract (UFA) with a driver must be consistent with the Contract and approved by the Board. (E. Ex. 1 at 9 § 4.1.2.) Section 4.1.2 of the Airport Contract provides in part as follows:

Contractor [SuperShuttle DFW] may contract with a driver on an independent basis. . . . Contractor may not use a contract [with an independent contractor driver] that has been disapproved by the Vice President of Operations. The contract *shall*:

....

impose a condition that the driver shall comply with the [Airport Contract] and provide that failure to comply with the [Airport

²⁰ At the Hearing, Mr. Harcrow highlighted numerous examples of the Airport Regulations, but did not discuss many other Airport Regulations. (Tr. 35:12–14.) Several additional regulations are discussed herein. (Id. 35:12–14.)

Contract] may be considered by the Contractor to be a material breach of the contract.

(Id. (emphasis added).)

The very definition of “shared-ride services” detailed in the Airport Regulations demonstrates that the Airport Board contemplates that the contracting party, SuperShuttle DFW, may use an independent contractor model in its business. (E. Ex. 1 at 6–7 § 1.1.32; Tr. 23:12–20.) Shared-ride services is defined as:

[T]he business of offering transportation for hire by a van-type service on an on-demand or pre-arranged basis in which the entire service area is covered; . . . all drivers are dressed in a uniform or item of apparel that clearly distinguishes them as an employee, *independent contractor* or representative of the service for which they drive from all other transportation services; . . . a two-way communication system is maintained at all times.

(Id.) The Airport Regulations of shared-ride providers, including franchisees doing business with SuperShuttle DFW, include the following:

(a) *Insurance Regulations.* The Airport Regulations require SuperShuttle DFW to “procure and keep in full force automobile liability insurance that meets or exceeds” standards set forth in the Airport Regulations. (E. Ex. 1 at 33 § 14.1.) Pursuant to Airport Regulations, the insurance must cover all vehicles, “whether owned or not owned by [SuperShuttle DFW], operated under the [Airport Contract].” (Id. § 14.2.)

(b) *Regulations Ensuring Regulatory Compliance by Franchisees.* The Airport Regulations require SuperShuttle DFW to “establish policy and take action to discourage, prevent, or correct non-compliance with the terms and conditions of [the Airport Contract]” by customer service representatives and franchisee drivers authorized under the Airport Contract. (Id. § 4.1.14.) Pursuant to Airport Regulations, SuperShuttle DFW may “not allow a [franchisee] to operate a shared-ride vehicle . . . if [SuperShuttle DFW] knows or has

reasonable cause to suspect that the [franchisee] has failed to comply with the terms and conditions of the [Airport Contract] or other law applicable to the operation of a motor vehicle.” (Id.) The Airport Regulations also require franchisees to promptly and timely serve passengers whom the franchisees have agreed to serve. (Id. at 10 § 4.1.8.) The Airport Regulations set forth specific response times for picking up passengers. (Id.)²¹

(c) *Customer Complaint Regulations.* In regard to customer complaints, the Airport Regulations require SuperShuttle DFW to, among other things, investigate customer complaints and send to the Airport Board Vice President of Operations “copies of all correspondence related to customer complaints relative to shared-ride service under this contract.” (Id. at 12 § 4.1.15; Tr. 8–18.)²²

(d) *Vehicle Maintenance Regulations.* The Airport Regulations require SuperShuttle DFW to establish and maintain a vehicle maintenance program. (Id. at 12 § 4.1.16.) A copy of the maintenance program must be submitted to the Board VP. (Id.) The Airport Regulations separately permit the Board VP to monitor the condition of vehicles, compliance with terms and conditions of the contract, and service levels. (Id. at 13 § 4.1.17; Tr. 25:12–26:2.)

(e) *Background Check Regulation.* Pursuant to the Airport Regulations, only those with a valid permit issued by the Board VP may operate a shared-ride vehicle. (Id. at 16 §

²¹ Franchisees comply with these regulations by agreeing to service fares they have accepted to take. Franchisees pay an amount for not showing up to service passengers for a trip they have chosen to accept. (Tr. 102:3–10, 103:13–19.) This fee is paid to the franchisee who services the “refused business.” (Id. 102:3–10.)

²² The Airport Board’s Vice President of Operations (“Board VP”) is repeatedly referenced in the Airport Regulations. (See, e.g., E. Ex. 1 at § 4.1.17.) The Board VP, Kevin Smith, is an employee of the Airport Board and is the Board’s liaison for purposes of the Airport Board/SuperShuttle DFW contract and for compliance with Airport Regulations. (See E. Ex. 1 at 8 § 2.4, 9 § 4.)

4.3.1.1.) One condition precedent for a permit is submission to a criminal history background check, which must be performed by SuperShuttle DFW. (Id. at 17 § 4.3.2.1.)

(f) *Drug and Alcohol Screening Regulation.* The Airport Regulations also require SuperShuttle DFW to screen franchisees for the presence of drugs and alcohol before submitting a permit application. (Id. at 17 § 4.3.2.2; Tr. 26:18–27:9.) The Airport Regulations provide a written drug and alcohol testing procedure. (E. Ex. 1 at 17, 70.)

(g) *Regulation of Franchisee Character and Appearance.* The Airport Regulations provide that franchisees “shall be clean, neat in appearance, uniformly attired (with appropriate permit), and courteous at all times.” (Id. at 8 § 2.6; see also 13 §§ 4.1.19, 4.1.20.)

(h) *Regulation of Passenger Fares.* The Airport Regulations require franchisees to charge passenger fares consistent with those set forth in the fare book that SuperShuttle DFW submits to the Board VP. (Id. at 23 §§ 4.5.1, 4.5.4.) Every franchisee must carry a copy of the fare book in his or her van. (Id. at 23 § 4.5.3.) It is undisputed that these set fares cannot be altered without DFW Board approval. (See id. at 23 § 4.5.2.)

(i) *Vehicle Standard Regulations.* Pursuant to the Airport Regulations, the Board VP has set forth standards concerning safety and the condition, age, size, appearance, equipment, signs, and markings for shared-ride vans. (Id. at 24 § 4.6.2; id. at 58–65.) The Airport Regulations set forth the requirements, among others: the vans may not exceed a certain age (id. at 58); all vans must “have a common color scheme that is unique to [SuperShuttle DFW’s] fleet and distinctive from all other permitted transportation service at [the Airport] and is approved by [the Board VP]”; (id. at 59); all vans must have the company name and telephone “permanently affixed to both side panels of the vehicle” in specific-sized lettering (id.; Tr. 29:19–21); and vans must have specific interior equipment, such as an air conditioner, heater,

fire extinguisher, proof of insurance, a credit card machine, and at least 1/4 tank of gasoline. (E. Ex. 1 at 60.) The Airport Regulations also limit the number and size of dents a van may have, and describe the required condition and cleanliness of interior and exterior surfaces. (Id. at 61–62; Tr. 29:22–23.)

(j) *Vehicle Inspection Regulations.* Pursuant to Airport Regulations, franchisees must submit their van to inspection, must pass inspection, and must get an authorization decal. (Id. at 24–26 §§§ 4.6.5.–4.6.6, 4.6.14.) Franchisees also must make their vans available for inspection when ordered by the Board VP. (Id. at 24–25 §§§ 4.6.5.–4.6.6.) The Airport Regulations also do not permit SuperShuttle DFW from allowing a franchisee from operating a van if the franchisee is not in compliance with the Airport Regulations concerning, among other things, the condition and appearance of the vehicle. (Id. at 12 § 4.1.14 .)

(k) *Training Regulations.* The Airport Regulations set forth specific training requirements with which franchisees must comply (Id. at 21 § 4.3.14.1; id. at 48–49; Tr. 27:24–28:6), including vehicle requirements and permitting procedures, daily loading area and vehicle inspecting standards, customer service standards, lost article reporting procedure, completing a defensive driving course, and maintaining a driver daily manifest. (E. Ex. 1 at 48.) Pursuant to Airport Regulations, SuperShuttle DFW is responsible for training its franchisees. (Id.)

(l) *Regulatory Recordkeeping Requirements.* The Airport Regulations require that franchisees maintain a driver daily manifest. (See id. at 50–51.) Specifically, pursuant to the Airport Regulations, franchisees provide every customer a receipt, without the customer requesting a receipt, that contains the vehicle identification number, the name of the driver, the name and telephone number of SuperShuttle DFW, and the amount of the fare paid; and must “maintain a log of passengers transported and destination, including date, time,

destination, number in party[] and turn in copies of the logs” to SuperShuttle DFW. (*Id.* at 50.) These documents are subject to inspection and audits by the Airport Board. (*Id.* at 27–28 § 5; Tr. 31:19–24.)

2. All Airport Regulations Are Passed Through to Franchisees in Their Unit Franchise Agreements.

The Airport Regulations detailed above are passed through to franchisees via the various terms and conditions of the SuperShuttle DFW UFA. (*See, e.g.*, E. Ex. 2 at 5 § 2.D., 6 § E, 14 § 14.) *By way of example only*, as required by the Airport Regulations (E. Ex. 1 at 33 §§ 14.1, 14.2), franchisees agree to obtain insurance coverage. (E. Ex. 2 at 14–15 § 5.) Consistent with the Airport Regulations concerning vehicle inspections (E. Ex. 1 at 24–26), the franchisees acknowledge and agree that SuperShuttle DFW may inspect vans, and agree to maintain the physical and mechanical condition, and appearance of the van, and keep the van clean and free of dents and mechanical problems. (E. Ex. 2, at 5–6 § 2.D.) Pursuant to the Airport Regulations setting forth limits on age and size of vans, and standards on appearance, equipment, markings, and color scheme (E. Ex. 1 at 24, 58–65), franchisees agree to acquire a van meeting SuperShuttle DFW’s specifications as to make, model, color, size, age, and mechanical condition, and agree to use SuperShuttle DFW’s signage and uniforms. (§§ 2, 10.) Pursuant to Airport Regulations requiring maintenance of a driver daily manifest (*id.* at 50–51), franchisees maintain “trip sheets” that list franchisees’ passengers and trips. (Tr. 306:9–307:2.)

Ken Harcrow, SuperShuttle DFW’s General Manager and liaison with the Board VP (Tr. 19:10–15, 23:9–11), testified that SuperShuttle has submitted its UFA to the Airport Board, pursuant to its obligations under the Airport Contract. (Tr. 19:10–15, 23:21–24:3.) Mr. Harcrow testified that the Airport Board approved SuperShuttle DFW’s UFA with its franchisees. (Tr.

24:4–7.) In accordance with the Airport Contract, any changes to the UFA must be approved and adopted as part of the regulatory scheme. (E. Ex. 1 at 9 § 4.1.2.)

D. Business Operations of SuperShuttle DFW.

As set forth above, SuperShuttle DFW is engaged in a business completely separate from franchisees—namely, franchising the right to use SuperShuttle trademarks, supplying franchise owners with trip-generating systems, processing reservations, providing support services, and providing proprietary systems to franchisees. (Tr. 19:16–18, 155:13–21; B. Ex. 2.) Petitioner has stipulated to the nature of SuperShuttle DFW’s business, and the Union does not contest that SuperShuttle DFW and the franchisees are engaged in totally separate and distinct businesses. (B. Ex. 2; Tr. 156:4–13, 157:18–20.) Franchisees, not SuperShuttle DFW, provide transportation services to passengers. (Tr. 157:18–20.)

SuperShuttle DFW is a statutory employer because it employs individuals, such as General Manager Ken Harcrow (Tr. 19:10–15), and franchise manager Rex Gomillion, who, among other things, (1) facilitate franchisee and relief driver training to ensure compliance with Airport Regulations (see Tr. 136:12–20, 221:18–21),²³ and (2) oversee the franchise disclosure process at SuperShuttle DFW, to ensure prospective franchisees receive full disclosure of the risks associated with a franchise in accordance with FTC regulations. (Id. 35:25–36:6.) SuperShuttle DFW also employs dispatchers, department managers, customer service representatives working as airport curb coordinators, sales and marketing employees, and quality assurance employees. (Tr. 19:10–15, 111:13–23.) SuperShuttle DFW’s employees are not “operators” under the Airport Regulations, which is defined as “the driver, contractor, or owner

²³ As set forth above, the Airport Regulations set forth specific training requirements with which franchisees must comply. (E. Ex. 1 at 21 § 4.3.14.1; id. at 48–49; Tr. 27:24–28:6).

of a shared-ride vehicle. (E. Ex. 1 at 6 § 1.1.24; Tr. 19:10–15, 111:13–23.) No SuperShuttle DFW employee provides transportation services or supervises the franchisees. (Tr. 111:13–23, 113:11–13.)

IV. APPLICABLE LAW

The Board and the Supreme Court of the United States both apply the common law of agency to determine employee and independent contractor status, because the common law of agency “reflects clear congressional will.” FedEx Home Delivery v. NLRB, 563 F.3d 492, 495–96 (D.C. Cir. 2009); St. Joseph News Press, 345 NLRB 474, 478 (2005). The Board in St. Joseph News Press explained that “Supreme Court precedent ‘teaches us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*’” Id. (emphasis in original) (quoting Dial-A-Mattress Operating Corp., 326 NLRB 884, 894 (1998)).

In accordance with Board precedent, the Regional Director in this case is charged with applying a specific test reflecting clear congressional will: the Regional Director must make a fact-intensive, case-specific inquiry applying the record of the case to several non-exhaustive common law factors. See Argix Direct, Inc., 343 NLRB 1017, 1020 (2004); Arizona Republic, 349 NLRB 1040, 1042 (2007). The record before the Regional Director compels only one conclusion under the relevant Board precedent—the franchisees are independent contractors. In the instant case, a super majority of the franchisees own vans that, on average, cost \$30,000, while the remainder have complete proprietary interest in their vans through lease agreements. Franchisees are free to incorporate, and five of the petitioned-for franchisees are corporate entities. The franchisees self-schedule and exercise complete discretion over what business to take. All purported “controls” over the details of franchisees operations are regulatory in nature. It is undisputed that franchisees are not subject to any discipline. SuperShuttle DFW has no

interest in franchisees' earnings, as the franchisees pay a set, flat weekly fee. Franchisees' relationship with SuperShuttle DFW is for a one-year term, and both parties may choose to (or not to) enter into a subsequent contract. The franchisees also undisputedly engage in a business that is substantively different from SuperShuttle DFW.

No Board or court decision applying the common law agency test (or any test) permits a finding of employee status in the instant case. For instance, in AAA Cab Services, 341 NLRB at 463, 465 (2004), the Board applied the common law agency test to find that taxicab drivers using a company's automatic dispatch system were independent contractors. Id. The drivers in AAA Cab Services, like the franchisees in the instant case, entered into agreements with a company to gain access and use of dispatching service, id., undergo initial training, id., and provide transportation to customers to and from the airport and other locations. Id. The drivers were subject to heavy government regulation. Id. at 464. Like SuperShuttle DFW in the instant case, the taxi company in AAA Cab Services did not pay wages to the independent drivers and the drivers were responsible for withholding taxes. Id. Similarly, the drivers paid their own business-related expenses, such as gas. Id. In AAA Cab Services, the drivers used the contracted-for automatic dispatch services at their sole discretion, and could "reject a call by pressing a button on the display . . . for any reason without penalty." Id. Indeed, as in the instant case, when a call was "rejected, the computer repeat[ed] the process with other drivers until someone accept[ed] the call by pressing an accept button on the display." Id.²⁴ See also Ace Cab Company, 273 NLRB 1492, 1492–93 (1985) (finding drivers to be independent

²⁴ Drivers in AAA Cab Services who accepted a call but failed to service it were subject to a fine by the taxi company. AAA Cab Services, 341 NLRB at 463. The Board has held that a company requirement "that drivers service a dispatch once they accept it" does not preclude the finding of independent contractor status. Id. at 465 (citing City Cab Co. of Orlando, 285 NLRB 1181, 1194 (1987)). In the instant case, regulations require franchisees to service fares that have been accepted.

contractors where the drivers paid a monthly fee to use the company's trade dress and dispatching services, and the drivers were not compensated by the company, but instead determined their income by choosing their fares, and where the drivers were controlled only by insurance and city regulations); Air Transit, Inc., 271 NLRB 1108, 1111 (1984) ("Air Transit III") (finding drivers to be independent contractors when they owned their vehicles, kept what they earned but paid a fixed fee to the company, and generally conducted their business without company supervision).

No matter how stringent a test is applied in the instant matter, there is no lawful basis to conclude that the petitioned-for franchisees are anything but independent contractors. Both standing Board precedent and the D.C. Circuit's recent modification emphasizing entrepreneurial control require dismissal of the instant petition.

A. Application of the Board's Common Law Test Demonstrates that Franchisees Are Independent Contractors.

1. Board Precedent Requires a Weighing of Common Law Factors.

Franchisees are not "employees" pursuant to Section 2(3). Governing Board precedent—Roadway Package System, 326 NLRB 842, 850 (1998), and Dial-A-Mattress Operating Corp., 326 NLRB 884, 891 (1998), as well as their progeny, uniformly support the conclusion that the petitioned-for franchisees have the status of independent contractors and thus are excluded from the definition of "employee." 29 U.S.C. § 152(3). In Roadway Package and Dial-A-Mattress, the Board rejected the "right to control" test and applied the common-law agency test to determine whether the companies' delivery drivers were statutory employees or independent contractors. See also Argix Direct, 343 NLRB 1017, 1020 (2004) (applying common-law agency test). The test, which is set forth in the Restatement (Second) of Agency § 220(2), requires a fact-finder to consider the following factors:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is part of the regular part of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Arizona Republic, 349 NLRB 1040, 1042 (2007) (citing Roadway Package, 326 NLRB at 842).

The Restatement factors are not exclusive or exhaustive. Id. Additionally, no factor—including right of control—is to be considered as a predominant or decisive factor in the independent contractor determination; instead, the Board considers all factors. Roadway Package, 326 NLRB at 850.

2. Regulations By Public Authorities Do Not Evidence Employer Control.

A significant axiom in independent contractor decisions under Section 2(3) of the Act is that rules and requirements imposed on drivers because of regulations promulgated by government bodies and public authorities do not constitute control by a company, and accordingly cannot constitute a factor favoring a finding of employee status. Don Bass Trucking, Inc., 275 NLRB 1172, 1174 (1985) (“Government regulations constitute supervision not by the employer but by the state”); Air Transit, Inc. v. NLRB, 679 F.2d 1095, 1100 (4th Cir. 1982) (stating that “requiring drivers to obey the law is no more control . . . than would be a

routine insistence upon lawfulness of the conduct of those persons with whom one does business”).

The Board and federal courts have applied this rule of law in every industry in which an employee/independent contractor determination has been requested, including cases involving drivers. See AAA Cab Servs, Inc. and Independent Taxi Drivers Union, 341 NLRB 462, 465 (2004) (“[G]overnmentally imposed rules such as those associated with the posting of fares do not evince the level of control by an employer to preclude independent contractor status.”) Pursuant to this rule, in Air Transit, Inc., 271 NLRB 1108, 1111 (1984), the Board held that where all factors allegedly demonstrating control over the manner and means of drivers’ performance of their duties stemmed from requirements imposed by an FAA contract with Air Transit, no evidence of employer control existed. That precedent governs this case.

3. Franchisees Own The Instrumentalities of Their Businesses.

Franchisees’ complete proprietary ownership in the instrumentalities of their business operations, particularly in light of the substantial investment of their shared-ride vans, is among the more striking manifestations of their independent contractor status. Each franchisee owns the van (costing approximately \$30,000) used to run the business. (Tr. 66:19–23, 67:24–25; E. Ex. 2 at 4 § 2.) More than 60 percent have purchased their vans from various sources and the remainder lease through independent companies. (Tr. 66:19–23, 67:24–25, 120:11–14; E. Ex. 2 at 4 § 2.A.) The franchisees also are financially responsible all business-related expenses. (Tr. 66:24–67:2, 121:8–9, 122:25–123:1.) Franchisees’ ownership of instrumentalities in the instant case is even more compelling than in the decisions in which the Board has found individuals to be independent contractors.

Under the common law agency test, the Board determines “whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the

work.” Arizona Republic, 349 NLRB at 1042 (quoting Restatement (Second) of Agency § 220(2).) In Argix Direct, 343 NLRB at 1020, the Board applied the test to owner-operator truckdrivers. The Board in Argix Direct found that the drivers had a significant proprietary interest in the instruments of their work where the truck drivers personally owned or leased their trucks, but where the company supplied the drivers with items such as two-way radios and scanner guns, and the company paid the drivers’ tolls and parking tickets. Id. at 1020, 1022. Similarly, in Arizona Republic, the instrumentality factor favored independent contractor status where the carriers owned, controlled, and maintained the vehicle used to perform their duties under the contract, even though the newspaper occasionally provided supplies such as plastic bags and “Soft Books,” which were small computers that provided route information to carriers. Arizona Republic, 349 NLRB at 1044.

The decision AAA Cab Services, 341 NLRB at 463, discussed in detail, *supra*, is materially distinguishable from the instant case in one notable aspect—very few of the independent contractor drivers in AAA Cab Services owned a vehicle outright or had a lease-to-own agreement; rather, most had 12-hour, 24-hour, or weekly lease/operation agreements with the company. Id. at 464. Nevertheless, the Board found the drivers in AAA Cab Services to be independent contractors. Id. In the instant case, the franchisees’ complete ownership of the instrumentalities of their business presents a more compelling case for independent contractor status than in AAA Cab Services.

Further record evidence on this point compels a finding of independent contractor status. Franchisees’ complete proprietary interest in their vans is undisputed, as is the fact that approximately 64 percent own their vans outright. (Tr. 66:19–23, 67:24–25.) The franchisees’

vans are *their* property (id. 120:17–22), and they choose where to park their vans and use their vans for personal purposes. (See id. 120:19–121:9.)

Franchisees' purchase or leasing of vans is perhaps the most significant, but is by no means the only, investment they make in operating their business. Franchisees provide and pay for the tools of their trade such as gas, vehicle maintenance, tolls, airport fees, and airport or traffic tickets. (Id. 66:24–67:15, 121:8–9, 122:25–123:1, 128:19–130:4, 149:2–4, 268:12–17); cf. Argix Direct, 343 NLRB at 1020 (finding that the independent contractors provided the instrumentalities of their work despite the fact that the company paid the drivers' tolls and parking tickets). Franchisees pay for the driver permits and van permits required for operating a shared-ride shuttle. (Id. 67:1–15, 149:2–4, 268:12–17.) They also obtain and pay for their own uniforms. (Id. 262:6–10.)

The one instrumentality provided by SuperShuttle DFW—the Nextel device that displays the automatic dispatching information—is part of the franchisee/SuperShuttle quid pro quo and is provided in exchange for the System Fee. (Tr. 61:22–62:6); see Argix Direct, 343 NLRB at 1020 (finding that the owner-operator truckdrivers had a significant proprietary interest in the instrumentalities of their work even though the company supplied a two-way radio and scanner gun). Board precedent demonstrates that computerized communication devices are not instrumentalities that can determine the outcome of a independent contractor analysis. Argix Direct, 343 NLRB at 1020; Arizona Republic, 349 NLRB at 1044 (finding that the independent contractors owned, controlled, and maintained the instrumentalities of their business, even though the company provided small computers that provided route information). Thus, the franchisees' complete proprietary interest in the instrumentalities of their business, and their

payment of all expenses of their business, demonstrates their independent contractor status under Board precedent.

4. Franchisees Generate Their Own Revenue.

The facts in the instant case are not susceptible to the common law agency examination of “the method of payment, whether by the time or by the job.” Arizona Republic, 349 NLRB at 1042 (quoting Restatement (Second) of Agency § 220(2).) Where companies have paid drivers for their services, the Board has found the drivers to be independent contractors when they are not paid an hourly rate and do not receive a guaranteed income. Argix Direct, 343 NLRB at 1021 (finding that owner-operator drivers were independent contractors where they were “compensate[d] the owner-operators based on a sliding scale that depended upon the length of the route for the day,” and the owner-operators’ payments “[varied] greatly”).

SuperShuttle DFW does not compensate franchisees for their efforts at all. (Id. 117:11–14.) Instead, franchisees determine the amount of income they earn by virtue of the hours they choose to operate their business and fares they choose to take. (Id. 117:18–22); see Ace Cab Company, 273 NLRB at 1492–93 (analyzing earnings model for taxicab drivers). These facts lend themselves to the analysis of the Board’s taxicab and limousine decisions, which similarly compel a finding that the franchisees are independent contractors. See Ace Cab Company, 273 NLRB at 1493; Air Transit III, 271 NLRB at 1111.

In Ace Cab Company, the Board based its finding that drivers were independent contractors in large part on the drivers’ method of earning income. Ace Cab Company 273 NLRB at 1493. In Ace Cab Company,

[t]he company [paid] drivers no wages [and withheld] no taxes The drivers [provided] the Respondent with a monthly fee in exchange for the right to display the company emblem on their cabs and for permission to use the dispatch service. This [was] the only revenue the Respondent receive[d] from the drivers, who

[were] then free to carry as many or as few fares as they [were] able. In this way the drivers [were] responsible for generating their own income and the Respondent's profits [were] unaffected by the drivers' efforts. This type of arrangement [was] characteristic of an entrepreneurtial [sic] endeavor by the driver rather than an employment relationship.

Id. Similarly, in Air Transit III, 271 NLRB at 1111, the Board emphasized that the drivers kept the fares they earned and paid a fixed fee to the company, which demonstrated independent contractor status. See also AAA Cab, 341 NLRB at 464 (finding drivers to be independent contractors where the company did not pay wages).

Because franchisees determine their own income, they accordingly have no guaranteed income. (See Tr. 117:11–14, 263:13–19.) As in Ace Cab Company, 273 NLRB at 1493, SuperShuttle DFW “pays drivers no wages,” and the franchisees provide a weekly flat fee to use SuperShuttle DFW’s trade dress and trademark and access the automated dispatch system. Id. (describing monthly flat fee); (E. Ex. 1 at 1 § A, 3 § 1; Tr. 159:9–23). Also like Ace Cab Company, franchisees are “free to carry as many or as few fares as they are able.” Ace Cab Company, 273 NLRB at 1493; (see Tr. 145:11–10, 146:11–13). SuperShuttle DFW’s profits are not affected by franchisees’ efforts. Ace Cab, 273 NLRB at 1493.²⁵ Depending on how a franchisee operates his or her business, a franchise may *lose* money. (Tr. 263:13–19.)

Finally, the fact that SuperShuttle DFW does not withhold taxes for franchisees or pay fringe benefits of any kind to franchisees, including vacation time, holiday pay, workers’ compensation insurance, or sick leave, also evidences franchisees’ independent contractor status. (Tr. 144:13–15, 189:7–12, 152:3–15, 268:5–14); Argix Direct, 343 NLRB at 1021 (stating that

²⁵ For instance, Mr. Okwena, testified that regardless of whether he has a good week or bad week, or is in a strong or weak season, he pays SuperShuttle DFW the same fee. (Tr. 118:3–9.) Union witness Mr. Corpany testified that he could lose money on a given week if he did not bid that week. (Id. 263:13–19.)

“[t]he owner operators are responsible for paying their own expenses, as well as their own taxes. The Employer takes no deductions from the owner-operators for taxes, social security contributions, state disability, fringe benefits, health insurance benefits, or vacations”); see also AAA Cab, 341 NLRB at 465 (stating that the company does not deduct taxes).

Franchisees are not “paid”; they generate their own income from passengers. The franchisees’ financial arrangement clearly demonstrates that they are independent contractors.

5. Franchisees Enjoy Unfettered Entrepreneurial Freedom.

Entrepreneurial freedom is a significant consideration under the common law agency test, Dial-A-Mattress, 326 NLRB at 893, and is a fundamental characteristic of the business arrangement in the instant case.²⁶ See Ace Cab, 273 NLRB at 1493. The Board in Ace Cab described a nearly identical arrangement as an “entrepreneurial [sic] endeavor by the drivers rather than an employment relationship.” Id. As in Ace Cab, entrepreneurial opportunities pervade the petitioned-for franchisees’ business operations.

A franchisee’s business is an entrepreneurial endeavor because the franchisee generates his or her own income. (Tr. 117:11–14.) Franchisees have no guaranteed income (see id.), and place themselves at financial risk by engaging in their own business. Like any small business owner, a franchisee’s success (or failure) ultimately depends on whether the franchisee is enterprising or complacent. Franchisees’ business decisions such as whether to operate their business on a particular day (Tr. 145:11–19), whether to “pass or play” on a bid (id. 54:14–34), or whether to service the hotel circuit (id. 64:3–65:17), are theirs and theirs alone. Each of these

²⁶ Entrepreneurial freedom is a key factor under the D.C. Circuit’s FedEx test, as well. As discussed below, in FedEx Home Delivery v. NLRB, 563 F.3d 492, 496–97 (D.C. Cir. 2009), the D.C. Circuit applied the common law agency test with an emphasis on whether the individual has “significant entrepreneurial opportunity for gain or loss.”

business decisions are inherently entrepreneurial in nature and affect the revenue generated by a franchisee.

Mr. Okwena confirmed the entrepreneurial nature of his business in his testimony that he works the hours he wants to (Tr. 116:20–22), and that he makes cost-benefit analyses in bidding on fares by considering the fare and offsetting mileage and the time of the trip, among other things. (Id. 122:17–24.) It is undisputed that these choices are the franchisees' alone, and the franchisees have complete discretion to make themselves available for bids and to accept or reject work in the form of bids presented on the Nextel, without repercussions. (Id. 57:12–22, 121:25–122:1, 243:11–244:12, 245:2–3; E. Ex. 5.) Franchisee and Union witness Bahta Mengsteab explained that these types of decisions are made with the ultimate goal of maximizing revenue for his business; he decides whether to accept a bid only after considering the trip's revenue, distance, and the cost of gas. (Id. 301:13–302:12.)

Franchisees may also increase their revenue stream by hiring relief drivers. (E. Ex. 2 at 10 § 4.C; Tr. 51:9–19, 193:4–18.) Franchisee John Butler hired a relief driver and used the arrangement to make his van available approximately 24 hour a day, which of course increased his revenue stream.²⁷ (Tr. 196:23–197:1.) The Board has found this authority to hire employees to evidence entrepreneurial opportunity. Arizona Republic, 349 NLRB at 1044 (finding that carriers had entrepreneurial freedom because they could hire substitutes, could solicit customers, and could enter into contracts in a corporate name); see also Dial-A-Mattress, 326 NLRB at 892–93 (stating that “[a]nother indicator of independent contractor status is the owner-operators’

²⁷ SuperShuttle DFW has no involvement in the details of relief drivers' work, including when they work or how much they are paid. (Tr. 51:20–25.) Mr. Butler paid his relief driver in a manner that apparently was profitable to the franchise—he paid Mr. Weldon approximately \$125 for every \$300 in revenue made by Mr. Weldon. (194:21–25.)

extensive control over their drivers and helpers”). In assessing entrepreneurial opportunity, any “failure to take advantage of an opportunity is beside the point.” FedEx, 563 F.3d at 502; see also Arizona Republic, 349 NLRB at 1045 (“[T]he fact that many carriers choose not to take advantage of . . . opportunity to increase their income does not mean that they do not have the entrepreneurial *potential* to do so”).

Franchisees also may form their own corporate entities, in their discretion (Tr. 49:25–50:2), which is another indication of entrepreneurial freedom. Arizona Republic, 349 NLRB at 1044. It is undisputed that five franchisees presently working with SuperShuttle DFW are incorporated business entities. (Franchisee List, E. Ex. 4; Tr. 48:13–49:5, 49:12–50:4.) It also is undisputed that the franchisees file taxes for themselves and report themselves as “self-employed,” and take business-related deductions. (Tr. 144:13–17, 213:18–24, 262:16–25).

The petitioned-for franchisees’ business is fundamentally an entrepreneurial endeavor in which they bear the potential for loss of their investment. The entrepreneurial nature of their business compels a finding that franchisees are independent contractors.

6. Franchisees Intend to Create an Independent Contractor Relationship.

Intent to form an independent contractor relationship evidences that an independent contractor relationship exists. Arizona Republic, 349 NLRB at 1042 (finding that the parties’ intent weighed in favor of independent contractor status where the parties’ contract “clearly state[d] that they were forming an independent contractor agreement”). Such intent is demonstrated where it is expressed by contract. Id. ; St. Joseph News-Press, 345 NLRB at 479; see also Argix Direct, 343 NLRB at 1022 (noting that the driver/company contract stated that the owner-operators were independent contractors).

In the instant case, the parties repeatedly, consistently, and clearly set forth in their UFA that the franchisees are independent contractors. (E. Ex. 2 at 1 § C.) Proof of intent to form an

independent contractor relationship could not be stronger, as the parties expressly and repeatedly (2) disclaim that the franchisees are employees and (2) state that franchisees are not subject to employee programs or benefits. (*Id.*) The franchisees also agree to not to hold themselves out as employees of SuperShuttle DFW. (*Id.* at 34 § O(1).)

Franchisees' independent contractor relationship with SuperShuttle DFW is not a mere formality reflected only in writing. Franchisees are well aware of their relationship, as confirmed by their testimony that they are not employees but are independent, self-employed businesspeople. (See Tr. 116:7–13, 192:17–193:1, 219:2–6, 302:8–9.)

7. Franchisees Contract With SuperShuttle DFW for a Limited Period.

Franchisees' limited temporal relationship with SuperShuttle DFW further evidences their independent contractor status. See *Arizona Republic*, 349 NLRB at 1042 (setting forth common law factor, “the length of time for which the person is employed” (quoting Restatement (Second) of Agency § 220(2))). Franchisees' relationship with SuperShuttle DFW is governed by the UFA and, as set forth above, franchisees in the Dallas-Fort Worth area contract with SuperShuttle DFW for a one-year period. (E. Ex. 2 at 3 § 1.A; Tr. 40:13–15.) By the terms of the UFA, and in practice, neither party has the right to renew the UFA. (E. Ex. 2 at 4; Tr. 40:23–25, 110:19–25.) If a franchisees and SuperShuttle DFW both choose to enter into a new franchise agreement, they must repeat the franchising and contracting process. (Tr. 193:2–3.)²⁸

8. SuperShuttle DFW Does Not Control the Details of Franchisees' Work.

Franchisees exercise complete control over the operation of their business, and all rules under which franchisees operate are dictated by public authority and government regulations,

²⁸The year-long franchise agreement provides stronger evidence of an independent contractor status than was present cases where the Board has found individuals to be independent contractors. Thus, in *Argix*

which are not indicia of “control” by SuperShuttle DFW as a matter of law. See, e.g., Don Bass Trucking, 275 NLRB at 1174 (“Government regulations constitute supervision not by the employer but by the state”). The lack of control that SuperShuttle DFW may exercise over the details of the petitioned-for franchisees’ work compels a finding that the franchisees are independent contractors.

The decisions Ace Cab Company, 237 NLRB at 1492–93, AAA Cab Services, 341 NLRB at 463, and Air Transit III, 271 NLRB at 1111, are factually similar to the instant case and reflect the lack of supervision SuperShuttle DFW has over franchisees. Each of these cases involved individuals who contracted with a company to provide transportation services in exchange for use of the company’s trade dress and dispatching services. Ace Cab Company, 273 NLRB at 1492–93; AAA Cab Services, 341 NLRB at 463; Air Transit III, 271 NLRB at 1111.

In Ace Cab Company, 273 NLRB at 1493, “[m]ost of the rules under which the drivers operate[d] [were] dictated by either insurance or city requirements,” yet the company issued several rules to ensure customer satisfaction and orderly dispatching. Id.

Among the insurance-related rules [in Ace Cab Company] [were] accident reporting procedures, restrictions on usage of alcohol and drugs while on duty, remaining within the authorized mileage radius, requesting passengers to ride in the back seat of the vehicle, and compliance with safe driving procedures. The city-imposed regulations address[ed] the operating condition of the vehicles, drivers’ wearing apparel, procedures for obtaining . . . permits, overcharging of passengers, providing assistance to passengers, and prohibition of use of the vehicles for unauthorized purposes. Federal regulations govern[ed] drivers’ use of two-way radios. The remaining rules of conduct which the company devised relate[d] primarily to the orderly dispatching of jobs, i.e., trip stealing sanctions, obligations to service a fare once it [was]

Direct, the independent contractors had “a permanent working relationship with [the Company] that ordinarily continue[d] as long as performance [was] satisfactory.” Argix Direct, 343 NLRB at 1022.

accepted, and banning the transfer of one driver's charge tickets to another driver.

Id. The rules issued by the company in Ace Cab Company were not found to be significant.²⁹

Id.

As in the instant case, the Board also found that the company lacked any significant control over drivers' operations in AAA Cab Services, 341 NLRB at 465. In AAA Cab Services, drivers were free, among other things, "to decide what days and hours, if any, they work[ed]; the geographical area in which they work[ed]." Id. The drivers were free to accept or decline dispatches. Id. at 464. The Board in AAA Cab Services found that control over drivers was "not demonstrated by the fact that the Employer [set] standardized lease terms in its leasing agreements. Rather, this [was] indicative only of the parties' relative bargaining power and [was] irrelevant to the issue of control in determining the status of drivers regarding whether they [were] employees or independent contractors." Id. at 465. The Board in AAA Cab Services also found that "the fact that the Employer, in accordance with state law, establish[ed] . . . rates" and required the rates to be posted "[did] not establish that the Employer exercise[d] any significant control over the drivers." Id. As in Ace Cab Company, such governmentally imposed rules passed through to drivers "[did] not evince the level of control by an employer to preclude independent contractor status." Id. Finally, in Air Transit III, 271 NLRB at 1110-11, the Board found that the company did not control the means and manner of the drivers' performance where (1) the drivers paid the company fixed dues bearing no relationship to daily earnings, (2) "[n]early all the factors allegedly demonstrating control over the manner and means

²⁹ Notably, the Board decided AAA Cab Services under the more stringent "right to control" test. The analysis in AAA Cab Services is consistent with the analysis of Dial-A-Mattress, and remains a source for Board decisions in independent contractor cases. St. Joseph News Press, 345 NLRB at 478.

of [their] performance . . . stem[med] from requirements imposed by the FAA contract, Federal regulations, and the Transit commission,” and (3) the company imposed only “minor” controls such as a prohibition against leasing, a flat-fare charge to certain corporate customers, and an insurance requirement.” Id. at 1110–11.³⁰

The petitioned-for franchisees in the instant case, like the drivers in Ace Cab Company, 273 NLRB at 1492–93, AAA Cab Services, 341 NLRB at 463, and Air Transit III, 271 NLRB at 1111, control their own work. Franchisees self-schedule in every respect, including determining the hours they will operate their business on a particular day, or whether to work at all. (Tr. 116:23–117:2.) Franchisees may choose to participate in the hotel circuit, which undisputedly is scheduled and overseen by franchisees themselves. (Id. 64:12–23, 124:15–125:4.) Franchisees generate their own business and choose whether to accept or decline bids (with no repercussions to them) on the automated dispatch system. (Id. 57:12–22; 121:25–122:22.) It also is undisputed that SuperShuttle does not discipline franchisees. (Id. 108:13–15, 148:12–15.) Franchisees, however, are free to hire, control, and discipline relief drivers. (Id. 206:19–207:5.)

Franchisees are limited only by governing pervasive Airport Regulations and local, state, and federal rules and regulations. Regulatory requirements are not evidence of employer control. Air Transit, Inc., 271 NLRB at 1111 (holding that requirements imposed by an FAA contract with a company were not evidence of employer control); Metropolitan Taxicab Board of Trade, Inc., 342 NLRB 1300, 1310 (2004) (holding that the Taxi Commission regulations, not the company, controlled the drivers’ working behavior and potential economic return). The Airport

³⁰ The Board has found a lack of significant control over drivers in other industries. See Argix Direct, 343 NLRB at 1021 (finding that no significant control existed where drivers had discretion over their work schedules, were not guaranteed a minimum amount of work, could choose to accept work on only certain days, and could take a week or more off without penalty); Arizona Republic, 349 NLRB at 1043 (finding

Contract, which sets forth the Airport Regulations, explicitly provides that drivers who contract with SuperShuttle DFW shall comply with the Airport Contract, and requires approval of the UFA to ensure its terms are consistent with the Airport Contract and governing law. (E. Ex. 1 at 9 § 4.1.2) In the UFA, franchisees acknowledge the governing regulations and agree to comply. (E. Ex. 2 at 1, 2, 11.) Thus, franchisees are required to maintain specific levels of insurance (E. Ex. 2 at 14–15 § 5; E. Ex. 1 at 33 §§ 14.1, 14.2), have their vehicles inspected and maintained (E. Ex. 2 at 5–6 § 2.D; E. Ex. 1 at 24–26), maintain a daily manifest (E. Ex. 1 at 50–11; Tr. 306:9–307:2), wear uniforms (E. Ex. 1 at 6–7 § 1.1.32), and provide services only through a vehicle of specific color, markings, size, age, condition, and cleanliness (E. Ex. 2 at 5–6 § 2.D, E. Ex. 1 at 24–58–65). Franchisees also agree to service fares they have accepted to take, in order to comply with Airport Regulations requiring franchisees to promptly and timely serve passengers whom the franchisees have agreed to serve.³¹ (E. Ex. 1 at 10 § 4.1.8.)

The franchisees' complete control over the details of their businesses is wholly unlike decisions in which the Board has found employer control. In Elite Limousines, 324 NLRB 991, 1003 (1997), for example, the company “essentially micromanaged the drivers on issues that [did] not involve government regulations and . . . imposed a detailed and severe system of sanctions to enforce the rules it want[ed] the drivers to follow.” Id. The company in Elite Limousines collected hundreds of dollars in sanctions on its drivers for engaging in misconduct like driving while sick, speaking a foreign language, listening to “ethnic” radio stations, and not

that carriers were not supervised in large part because they were not subject to a formal discipline system).

³¹ The Board has also held that the requirement “that drivers service a dispatch once they accept it” does preclude the finding of independent contractor status. Ace Cab Company, 341 NLRB at 465 (citing City Cab Co. of Orlando, 285 NLRB 1181, 1194 (1987)). Such a rule “relate[s] primarily to the orderly dispatch of taxicabs and not are not significant factors regarding independent contractor status.” Id.

asking passengers what radio stations they preferred. Id. In the instant case, the Union has emphasized one minor aspect of alleged control—a request by SuperShuttle DFW that franchisees’ limit use of cell phones. (Tr. 91:1–9; U. Ex. 1.) The policy, however, is regulatory in nature, as the Texas legislature has imposed a partial ban on cell phone use while driving. Tex. Transp. Code Ann. § 545.425 (2010) (prohibiting use of hand-held cell phones in a school crossing zone, and prohibiting operator of a passenger bus from using a hand-held device while a minor passenger is on board). Moreover, SuperShuttle DFW’s cell phone policy is not punitive on franchisees. By no means does a single cell-phone policy serving to protect public safety constitute *significant* control over the drivers’ daily operations.

9. Franchisees Are Engaged in a Distinct Business From SuperShuttle DFW.

Franchisees are engaged in a distinct and separate business from SuperShuttle DFW. Franchisees are independent businesspeople who generate income by providing shared-ride transportation services. (E. Ex. 2 at 3 § 1.A.) Franchisees are “Drivers,” as that term is defined in the Airport Regulations—namely, “individual[s] granted permission by the Vice President of Operations to drive or operate a shared-ride vehicle.” (E. Ex. 1 at 1.1.16.) Franchisees therefore obtain permits and comply with the Airport Regulations concerning “Drivers” in providing shared-ride transportation services. (Id. at 17 § 4.3.2.)

In contrast, it is undisputed, and stipulated, that SuperShuttle DFW is not engaged in the transportation business, but instead is engaged in the business of franchising and providing services to its franchisees. (Tr. 19:16–18, 155:13–21, 220:3–15; B. Ex. 2.) Neither SuperShuttle DFW nor its employees are “Drivers” as that term is defined in the Airport Regulations. (Id. at 362:19–23.) The different types of services and business in which franchisees and SuperShuttle DFW, respectively, are engaged, evidences the independent contractor status of franchisees.

Arizona Republic, 349 NLRB at 1042 (setting forth standard). This factor, and all of the foregoing law and facts, heavily favor a finding that franchisees are independent contractors.³²

B. Franchisees Are Independent Contractors Under the D.C. Circuit’s Entrepreneurial Opportunity Test.

In a recent decision, the District of Columbia Circuit set forth a modified application of the common law agency test that emphasizes whether “putative independent contractors have significant entrepreneurial opportunity for gain or loss.” FedEx, 563 F.3d at 497 (quoting Corporate Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002)). As set forth above, the petitioned-for franchisees are independent contractors under the common law test, in part because of their unfettered entrepreneurial opportunities; *a fortiori*, these franchisees are independent contractors under FedEx.

1. The D.C. Circuit’s Test Is Consistent With Board Precedent.

In FedEx, the court acknowledged the common law agency test governs an employee/independent contractor determination pursuant to “clear congressional will.” FedEx, 493 F.3d at 496. The court, however, expressed a “long-recognized rub” with the common law test and its non-exhaustive factors—“it is not especially amenable to any sort of bright-line rule.” Id. at 496.

[The] potential uncertainty is particularly problematic because the line between worker and independent contractor is jurisdictional—the Board has no authority over independent contractors. . . . Consequently, it is “one of this court’s principal functions” to “ensur[e] that the Board exercises power only within the channels intended by Congress,” especially as determining status from

³² Petitioner’s attempt to rely on the Regional Director’s decision in 27-RC-8582 conflicts with the longstanding precedent that these matters must be decided on the facts and circumstances presented on the record. (See St. Joseph News, 345 NLRB at 478; Argix Direct, 343 NLRB at 1017, 1020.) The Denver matter involved a separate corporate entity with different management, different franchisees, and entirely dissimilar facts and circumstances. Any reliance on that decision here would be a substantial departure from Board precedent and the rule of law.

undisputed facts “involves no special administrative expertise that a court does not possess.”

Id. at 496 (quoting North American Van Lines, Inc. v. NLRB, 896 F.2d 596, 599 (D.C. Cir. 1989)). The court stated that the test’s uncertainty had not been resolved by the Board’s focus on employer control, in part because “control” does not mean “all kinds of controls, but only certain kinds,” and “some controls [are] more equal than others.” Id. at 497.

The court stated that emphasizing whether individuals have significant entrepreneurial opportunity for gain or loss not only makes the line-drawing “easier,” but also is a reflection of the comments of the Restatement (Second) of Agency § 220, id. at 497, the qualitative nature of the common law test, id. at 497 n.3, and Board decisions such as Arizona Republic, Dial-A-Mattress, and St. Joseph News Press. FedEx, 563 F.3d at 498. The FedEx court explained that “an important animating principle by which to evaluate [the common law] factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.” Id.

In FedEx, the court explained that the most relevant question is whether entrepreneurial potential *exists*, not whether putative independent contractors take advantage of such potential. Id. at 498, 503. The package delivery, independent contractor drivers in FedEx demonstrated many characteristics of entrepreneurial potential. Id. at 498–99. The contractors could use their vehicles for other commercial or personal purposes. Id. at 498–99. The contractors could independently incorporate, and at least two did so. Id. at 499. The contractors could hire their own employees, which was “no small thing in evaluating entrepreneurial opportunity.” Id. at 499. The contractors who hired their own employees were responsible for the employees wages, all expenses associated with the employees, and the employees’ benefits. Id. In FedEx, the contractors were obligated to provide service to the company five days a week. Id. at 499 n.5.

The contractors could, at their discretion, take a day, week, or month off, so long as they hired someone to be there. Id. at 499.

In FedEx, independent contractor status was not negated by the following requirements:

[the drivers must] wear a recognizable uniform and conform to grooming standards; vehicles of a particular color (white) and within a specific size range; and vehicles [must] display FedEx's logo in a way larger than that required by DOT regulations. The company insists drivers complete a driving course . . . and be insured, and it conducts two customer service rides per year to audit performance. FedEx provides incentive pay . . . and vehicle availability allotments, and requires contractors have a vehicle and driver available for deliveries Tuesday through Saturday. . . . Moreover, FedEx can reconfigure routes if a contractor cannot provide adequate service.

Id. at 500–01 (internal quotations omitted) . These elements “reflect[ed] differences in the type of service the contractors [provided] rather than differences in the employment relationship.” Id. at 501. The Court emphasized that the company’s business model came with “certain customer demands, including safety,” and that “a uniform requirement often at least in part ‘is intended to ensure customer security rather than to control the [driver].” Id. Once the driver wore a company logo, the company “[had] an interest in making sure her conduct reflects favorably on that logo.” Id. The Court also emphasized that “constraints imposed by customer demands and government regulations do not determine the employment relationship.” Id.

2. FedEx Compels a Finding of Independent Contractor Status.

As set forth above, the record in the instant case demonstrates that the petitioned-for franchisees engage in an entrepreneurial endeavor that compels a finding of independent contractor status under FedEx. The franchisees’ business, in which they generate their own income (Tr. 117:11–14), have no guaranteed income (id.), and self-schedule in every respect (id. 145:11–19), present them with the “opportunities and risks inherent in entrepreneurialism.” FedEx, 563 F.3d at 497. Not only do franchisees’ have the *potential* to increase their revenue by

accepting bids, choosing to drive for more days, choosing to operate in the hotel circuit, or operating their business for longer hours using relief drivers, the franchisees undisputedly take advantage of such opportunities. (See Tr. 57:12–22, 63:3–65:14, 121:25–122:1, 196:23–197:1, 243:11–244:12, 245:2–3; E. Ex. 5.) Franchisees are independent businesspeople, and can aptly be described as entrepreneurs. The record compels a finding that franchisees are independent contractors under FedEx.

C. Franchisees Are Statutory Supervisors.

Notwithstanding the fact that the petitioned-for franchisees are independent contractors, the record demonstrates that they also are supervisors under Section 2(11) of the Act. Franchisees are the sole supervisors over the relief drivers whom they hire, and all franchisees undisputedly retain supervisory authority. (E. Ex. 2 at 10 § 4.C.) The supervisory exclusion should apply to all franchisees. Alternatively, franchisees who presently retain or have retained a relief driver should be excluded.

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).

Exercise of any of the enumerated supervisory indicia results in exclusion from employee status in this industry. Accordingly, 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.

The petitioned-for franchisees undisputedly possess multiple enumerated indicia that establish statutory supervisory status. Franchisees in the Dallas-Fort Worth market have hired and do hire relief drivers to assist in their business. (Tr. 51:9–19, 193:4–18.) As set forth in the UFA, every franchisee has the authority to hire relief drivers (E. Ex. 2 at 10 § 4.C); indeed, franchisees may hire as many relief drivers as they choose to operate their business or increase revenue. Franchisees have the complete authority and sole discretion to suspend, discipline, reward, or terminate their relief drivers. (Tr. 52:1–21; 193:4–194:9.)

Mr. Butler confirmed his complete control over her former relief driver, Stewart Weldon. (Tr. 193:14–194:18.) Mr. Butler’s decision to hire Mr. Weldon was his alone. (Tr. 194:16–18.) Mr. Butler chose the method of paying Mr. Weldon, and paid Mr. Weldon approximately \$125 for every \$300 in revenue made by Mr. Weldon. (Id. 194:21–25.) Mr. Butler paid Mr. Weldon by check on his own account. (Id. 193:14–15.) Mr. Butler did not advise anyone as to the days or times when Mr. Weldon would be doing business for him (id. 193:19–22), and was responsible for ensuring Mr. Weldon was trained. (Id. 193:22–23.) It is undisputed that

franchisees remain responsible for compliance with UFA notwithstanding the use of a relief/associate driver. See Oakwood Healthcare, 348 NLRB at 689.

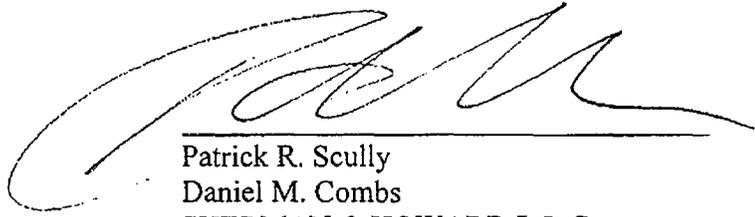
Not all franchisees choose to hire a relief driver, but it is undisputed that all franchisees have the *authority* to hire and use relief/associate drivers (Tr. 226:12–14), and to independently assert the supervisory indicia. All franchisees therefore are statutory supervisors under the Act. Oakwood Healthcare, 348 NLRB at 687 (citing Section 2(11)) .

Finally, the Act confers no authority to order a corporation of any kind licensed under the laws of the State of Texas to vote in an election or to effectively void such a legal entity through the Representation petition process. Five incorporated franchisees working with SuperShuttle DFW—Kwapgram Inc., Nahome LLC, Omidee LLC, O Sattiy LLC, and Surafel LLC—by law cannot meet the definition of “employer” under the Act.

V. CONCLUSION

Franchisees operating in the Dallas-Fort Worth area engage in an entrepreneurial endeavor in which they have a significant financial investment. Public regulations limit some aspects of the franchisees’ operations, but franchisees otherwise have the sole discretion to do business and generate income as they choose. The common law agency factors singularly weigh in favor of a conclusion that the petitioned-for franchisees are independent contractors. This conclusion is compelled both by Board precedent and the D.C. Circuit’s standard under FedEx. Accordingly, and for all the foregoing reasons, this Petition should be dismissed in its entirety.

Respectfully submitted this 10th day of August, 2010.



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CERTIFICATE OF MAILING

I hereby certify that on August 10, 2010, a true and correct copy of the foregoing **BRIEF OF SUPERSHUTTLE DFW, INC.** was served to the following:

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