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

SUPERSHUTTLE DFW, INC.,	§	
	§	
Employer,	§	
	§	
and	§	Case No. 16-RC-10963
	§	
AMALGAMATED TRANSIT UNION LOCAL NO. 1338	§	
	§	
	§	
Petitioner.	§	

UNION'S BRIEF IN SUPPORT OF REVERSAL OF REGIONAL DIRECTOR DECISION

David K. Watsky
GILLESPIE, ROZEN & WATSKY, P.C.
3402 Oak Grove Avenue, Suite 200
Dallas, Texas 75204
Phone: (214) 720-2009
Facsimile: (214) 720-2291

ATTORNEY FOR AMALGAMATED TRANSIT UNION LOCAL 1338

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I. INTRODUCTION

AMALGAMATED TRANSIT UNION, LOCAL 1338 ("ATU" or "Petitioner") respectfully requests that the National Labor Relations Board vacate the August 16, 2010 Decision and Order ("Decision") by Region 16 in Case Number 16-RC-10963, and direct an election in this case.

ATU sought to represent the drivers of SuperShuttle at DFW Airport. As SuperShuttle claimed that its drivers were independent contractors and not employees, a hearing was held before a hearing officer of the National Labor Relations Board. On August 16, 2010, Region 16 issued its Decision, holding that the SuperShuttle drivers are independent contractors and not employees under the Act. Based upon the evidence produced at the hearing and the applicable Board precedent regarding independent contractors, Region 16 erred in holding that the SuperShuttle drivers are independent contractors under Section 2(3) of the Act. Under either the common law agency test historically followed by the Board, or the entrepreneurial opportunity test advocated by the D.C. Circuit in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), the Drivers here are employees under the Act. Respondent exerts substantial control over Drivers – and significantly restricts their entrepreneurial opportunities – by, *inter alia*, subjecting them to exacting standards, narrowly controlling the way they perform their work each day, requiring them to wear uniforms and to drive vans meeting specific restrictions, implementing a fine system in which Drivers are disciplined for declining certain pick-ups, and restricting them from transferring their "franchises" to others.

II. STATEMENT OF FACTS

A. Petitioner ATU.

The parties stipulated that ATU is a labor organization under the Act. (Tr. 6; Bd. Ex. 2). On July 15, 2010, Petitioner filed the Petition in this case, seeking to represent all SuperShuttle drivers (Franchisees) and relief drivers at its DFW Airport location. (Tr. 13; Bd. Ex. 1).

B. Respondent SuperShuttle.

Respondent SuperShuttle DFW, Inc. ("Respondent") is a wholly-owned subsidiary of SuperShuttle International, Inc. ("SuperShuttle International"). (Tr. 154).[1] SuperShuttle International is primarily a holding company for its wholly owned subsidiaries, including Respondent. (*Id.*) SuperShuttle Franchise Corporation, a subsidiary of SuperShuttle International, is in the business of franchising this SuperShuttle system out nationwide, including to SuperShuttle DFW. (Tr. 154-56).

The Drivers were directly employed by Respondent until the summer of 2005, but SuperShuttle transitioned from an employee business model to a franchise model at DFW Airport at that time. (Tr. 157-58). Respondent has provided shuttle services in its current franchise model since that time. (*Id.*)

Respondent contracts with drivers – which it calls "Franchisees" – to provide transportation services to and from DFW International Airport ("DFW"). Respondent "franchises" to drivers the right to use the SuperShuttle trademark and "proprietary systems". (Tr. 156, 159-60). The "proprietary systems" include SuperShuttle International's dispatch and reservation systems. (Tr. *Id.*).

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[1] Citations in the Brief shall be made as follows: Citations to the Transcript as "Tr. [page no.]"; citations to the Board Exhibits as "Bd. Ex. [exhibit no.]; citations to Petitioner Exhibits as "Pet. Ex. [exhibit no.]"; and citations to Respondent Exhibits as "Resp. Ex. [exhibit no.]".

C. Respondent's Local Management Structure.

Ken Harcrow is Respondent's General Manager, and he oversees "franchise operations", including the Drivers at issue here. (Tr. 19). Rex Gomillion serves as Respondent's Franchise Manager. (Tr. 100). Harcrow, as General Manager, supervises everyone under the SuperShuttle system, including dispatch, quality assurance, department management, airport curb coordinators, hotel curb coordinators, sales and marketing, quality assurance, training and safety, and accounting. (Tr. 111-12).

D. Unit Franchise Agreements.

Once a prospective driver is identified and expresses interest in driving for Respondent, a "Franchise Disclosure Document" is prepared and given to the Driver. (Tr. 162-64; Resp. Ex. 7). This document lists "SuperShuttle Franchise Corporation" as the "Franchisor" and Respondent as the "Sub Franchisor". (Resp. Ex. 7). According to the Disclosure Document, Drivers are permitted to "operate one 'SuperShuttle System' van during certain specified hours to provide shared ride shuttle services . . . ." (Resp. Ex. 7 at p.1). There is no evidence that any driver has ever operated more than the one van listed in the Disclosure Document. The Franchise Disclosure Document is presented as a "take it or leave it" proposition and offers no opportunity for the driver to negotiate different terms. (Tr. 205-06).

Once a Driver decides that he wants to drive for Respondent, he or she is then required to sign a Unit Franchise Agreement ("UFA") which sets out the terms and conditions of employment. (Tr. 37, 109; Resp. Ex. 2). The Agreement is a standardized contract used by Respondent for all Drivers. Again, the UFA is offered on a "take it or leave it" basis. There is no evidence that prospective drivers are permitted to negotiate over any of the terms in the UFA and each UFA is identical. (Tr. 205-06). The UFA is filled with references that the Driver agrees that

he is an independent contractor and not an employee, but the actual practice demonstrates that Drivers are actually treated as employees.

E. Franchise Renewals.

Each UFA has a set term of one year. UFAs are apparently routinely renewed after a one year period. (Resp. Ex. 2). Harcrow stated as much when he said that he had never denied a renewal of a UFA. (Tr. 111).

F. Vehicles.

Drivers are required to provide their own vehicles, although Respondent specifically provides that they can lease their vans. (Resp. Ex. 2, p.4) ("Franchisee shall purchase <u>or lease</u> a van meeting the System's specifications . . . ") (emphasis added)). Driver Bahta Mengsteab's Weekly Vehicle Summary shows that his van lease costs $178.08 per week, which comes out of his weekly settlement check from Respondent. (Tr. 195-96; Un. Ex. 2). Many Drivers lease their vehicles from Respondent.

Respondent requires that specific vehicles be used, and that they meet very narrow specifications. Under Article 2 of the UFA, vans must meet "the System's specifications, including but not limited to make, model, color, size, age and mechanical condition". (Resp. Ex. 2).

Each Franchisee is further required to follow procedures outlined in the "Unit Franchise Operations Manual" ("Operations Manual").[2] (Tr. 231-32; Resp. Ex. 2). Respondent also requires that it be permitted to inspect all vehicles. (Resp. Ex. 2, p. 6). Thus, Drivers can buy

[2] Section 3B of the UFA states that Respondent "will lend to Franchisee during the Term a manual containing mandatory specifications, standards, operating procedures and rules for the SuperShuttle System prescribed from time to time and containing information relative to other obligations of Franchisee hereunder (the '**Manual**')." (Resp. Ex. 2 at p. 8 (emphasis in original)). The one-sided nature of the Operations Manual is made clear by the fact that Drivers must "acknowledge[ ] and agree [ ] that Manual may be modified from time to time ..." and that the Driver "covenants to accept, implement and adopt any such modifications at Franchisee's own cost." (*Id.*)

their own vans, but Respondent may change the rules on them at any time and can require Drivers to replace their vans. SuperShuttle also requires each driver to submit his van to an in-house sixty day inspection, which is outside of the DFW Airport required six month inspection. (Tr. 231-33). This inspection is done at the SuperShuttle location either by a mechanic on-site and/or John Stringer, a SuperShuttle manager, if the mechanic is not available. (Tr. 231-33).

SuperShuttle requires all drivers to take its insurance plan, currently at the cost of $135 per week. (Resp. Ex. 11 at p. 14; Tr. 344-45). According to the UFA,

> Franchisee agrees that [Respondent][3] shall obtain insurance coverage in amounts that [Respondent] determines . . . and Franchisee shall reimburse [Respondent] for its costs in doing so. Franchisee acknowledges that [Respondent] shall determine the carrier (which may be an affiliate of [Respondent]), the risks and coverages for which insurance shall be obtained and the amounts of coverage.

(Resp. Ex. 2 at p.14).

Under Section 2.C. of the UFA, "Franchisee further agrees to place or display on the Vehicle and other equipment all such signs, emblems, lettering, and logos as are required by [Respondent], and only such items." Under that same section, "[Respondent] shall install in Franchisee's Vehicle certain specialized data transmission equipment that is necessary in order for Franchisee to receive information and communications from [Respondent] concerning customers." (Resp. Ex. 11 at p. 5). In fact, all Drivers are required to use Nextel phones with GPS capability. (Tr. 63, 139).

G. Uniforms and Appearance.

Drivers must follow strict standards regarding uniforms and appearance. They must wear specific combinations of clothes and colors at all times. (Tr. 233).

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[3] The UFA defines Respondent as "City Licensee." For purposes of clarity, the bracketed term "[Respondent]" shall be used throughout this Brief when quoting the UFA.

H. Other Rules.

Drivers are required to agree to and sign a "Cellular Device Usage Policy." (Tr. 91; Pet. Ex. 1). Respondent failed to produce any evidence that such policy is required under law. Drivers who violate the policy are specifically threatened with "default under the franchise agreement." (Pet. Ex. 1).

I. Training.

Respondent conducts mandatory orientation and training on Respondent's proprietary systems, and conducts mandatory on-the-job training on various internal operating procedures, all conducted by SuperShuttle management. (Tr. 199-200, 220-22, 274-75).

J. Assignments.

If the Driver is assigned a trip that he or she bid on, the Driver picks up each of the passengers, takes them to DFW, and then logs onto the Nextel phone to see if there are any good jobs to bid on. (Tr. 233-36). If no trips are immediately available, the Driver will go to the DFW holding lot to wait his or her turn to drive incoming passengers from DFW. (Tr. 236). Once in the holding lot, the Driver must accept any trip the Dispatcher tells him or her to take from DFW or face a $50 fine. (Tr. 236-37).

Drivers who do not work their assigned routes and times are also subject to a fine. This happened to Bahta Mengsteab when he did not show up for a Fort Worth circuit route. (Tr. 297-99). SuperShuttle cleverly put this fine on Mengsteab's Weekly Vehicle Summary report as a "Standard Service Fee." However it is worded by SuperShuttle, the fact remains that this is a fine for not picking up someone on the Fort Worth circuit.

It is indeed ironic that Mengsteab got fined for something that occurred on the Fort Worth circuit, as Respondent's witnesses and legal counsel made much of the alleged "fact" that

this Fort Worth circuit is allegedly run independently of Respondent by the Drivers on the circuit. The fine that Mengsteab suffered as a result of this incident in the Fort Worth circuit clearly shows that Respondent's witnesses' credibility leaves much to be desired.

Although Drivers are permitted to bid on jobs, Drivers actually have very little autonomy on many trips. Each driver will attempt to bid on the trips that will make them the most money. Once the most lucrative trips are taken, Drivers are left with less-desirable trips. Moreover, if no one bids on a route, Respondent will "auto-assign" the route to any driver who does not have a passenger if it is within an hour of the scheduled pick-up. (Tr. 300-01). Indeed, Mengsteab testified that if you decline this type of an assignment, Respondent fines you $50.00. (Tr. 301).

K. Discipline.

Drivers are subject to an extraordinary amount of discipline by Respondent. In addition to the fines that Respondent unilaterally gives the drivers, under Section 4(E)(5) of the Franchise Agreement, Respondent allows itself to use a progressive disciplinary system with "points" to correct various, unspecified alleged transgressions.[4]

Under Article 11A, Respondent may unilaterally terminate a Franchisee Agreement for any of twenty-five alleged violations of the UFA. (Resp. Ex. 2 at pp. 20-22; Tr. 180). Under Article 11 B, Respondent may also threaten Drivers with termination of their Franchise Agreements "for noncompliance with any requirement in this Agreement or the Manual ...." (*Id.* at 23).

L. Weekly Settlements.

At the end of each week, Drivers must submit to Respondent a packet of materials verifying each and every trip they took and each and every passenger they carried for the

[4] "Franchisee agrees that [Respondent] may institute a system whereby points are awarded to Franchisee each time Franchisee fails to comply with such rules, regulations, rates and tariffs and accumulation of points may result in fines and termination of Franchisee." (Resp. Ex. 2, at p. 11).

previous seven days. (Tr. 224-25). Money earned other than cash is actually paid directly to Respondent, in the form of credit card payments, direct bill payments, prepaid credit cards, etc. (Tr. 225). The Driver is then issued a Weekly Vehicle Summary report that lists all income generated and all monies owed to Respondent. (Pet. Ex. 2). Respondent deducts from Drivers' checks such things as insurance costs, commissions, the cost of the Driver's franchise, and the cost of lease payments. (*Id.*).

M. Entrepreneurial Opportunities.

Drivers are also unable to work for certain other businesses. Under the UFA, Drivers are warned that they cannot enter "into an employment relationship, or other association or affiliation with a business that is competitive with that conducted by [SuperShuttle] ...." (Resp. Ex. 2 at p. 22). The Drivers who testified had not used their vans for any other businesses, whether competitive with SuperShuttle or not.

The UFA allows for "Charter Operations," although there was no credible evidence of even a single Charter trip. The UFA reads, in pertinent part:

> Franchisee must fulfill its contractual obligations to [Respondent], however, Franchisee also may conduct charter operations at its discretion. Pursuant to Public Utilities Commission, Franchisee is required to maintain records of all charter operations. "Charter Operations" means incidental scheduled transportation between locations other than airports and exclusive nonshared transportation within the Territory. Charter Operations do not involve use of the Trip Generating System, as defined below. Charter Operations are subject to the following: (a) compliance with the tariff filed by [Respondent] and approved by the applicable Regulating Authorities from time to time (the "Tariff"); (b) delivery of at least two (2) hours advance notice to [Respondent]; (c) a two (2) hour charter minimum; (d) payment of all fees under Section 7 of this Agreement with respect to revenues from such operations; and (e) upon request by [Respondent], delivery to [Respondent] of all trip sheets. Franchisee is free to conduct Charter Operations during hours other than the Scheduled Hours.
> (Resp. Ex. 2, pp. 4-5).

Thus, a Driver could only run a charter so long as he or she gives two hours' notice to Respondent, drives for at least two hours as part of the "charter", and does not drive to or from the airport.

Respondent offers discounts, coupons or group rate discounts to try to bring in more business and the Drivers must accept these payments from these deals. (Tr. 127, 224, 277).

Respondent must approve any other person that the Driver wants to use as a Relief Driver. In fact, a Driver's UFA can be terminated if her or she "utilizes drivers who have not met the requirements of Operators described above which include the successful completion of the [Respondent's] training program. . . ." (Resp. Ex. 2 at p. 22). Respondent requires that Relief Drivers take drug tests. (Tr. 275-76). Respondent requires that Relief Drivers meet with Respondent, submit to a drug test, go through a background check, take a Defensive Driving Class, and even go through a "MAPSCO" class. (Tr. 275-76). Respondent further requires that Relief Drivers submit an application. (*Id.*). There is no evidence that the Driver with whom the Relief Driver allegedly contracts acquires any of this information.

Although John Butler testified that he, in the past, used a Relief Driver, the only evidence that was submitted during the entire two-day hearing that anyone currently uses a Relief Driver was the testimony of Ngouagnapi Tagnidoung. Tagnidoung's testimony clearly shows that the only Relief Driver in the entire system is more of a "Co-Driver" than a "Relief Driver." Tagnidoung testified that he and the other Franchisee Driver take turns with the van on alternating 24 hour periods of time, and split all the costs and expenses (with the exception of tickets) of the van, while keeping the receipts that they make while driving the van. (Tr. 276-77).

N. Transferring a Unit Franchise Agreement.

As a practical matter, it would be virtually impossible for a Driver to transfer his UFA to someone else. Section 13.B. of the UFA states, in pertinent part:

> Except as set forth in this Section 13B and subject to all of its terms and conditions, Franchisee shall not transfer (as defined below) this Agreement or any interest therein. Any attempt at such a transfer shall constitute a material breach of this Agreement and shall convey no right or interest in this Agreement.
>
> ***
>
> (2) *** [Respondent] shall not unreasonably withhold consent to any transfer as long as the proposed transferee meets the requirements of franchisees, set forth herein and in the Manual and as required by Regulating Authorities. It will not be unreasonable for [Respondent] to withhold its consent to the transfer if any of the following conditions are not met:
>
> (a) At the time of the proposed transfer, all outstanding obligations of Franchisee to [Respondent] must have been satisfied; and
>
> (b) It will be demonstrated to the reasonable satisfaction of [Respondent] that the proposed transferee is of good moral character, and possesses the business experience and capability, credit standing, driving record, health and financial resources necessary to successfully operate Franchisee's business in accordance with the terms of this Agreement; and
>
> (c) Franchisee and its principals must execute a general release of the [Respondent], SuperShuttle, their respective affiliates and associates and their respective current and former officers, shareholders, directors, agents and employees in a form satisfactory to [Respondent]; and
>
> ***
>
> (h) The Franchisee or the transferee must reimburse [Respondent] for its costs in providing training to the transferee and for its other expenses in evaluating and processing the transfer, including without limitation, legal and administrative fees; and
>
> (i) Prior to the closing of the transfer, the franchisee must pay a transfer fee of the lesser of Five [sic] Dollars ($500.00) or equal to ten percent (10%) of the sale price, whether cash, services or other consideration, to [Respondent]. If any such consideration is not in cash, the cash value of such consideration shall be determined by [Respondent], in its reasonable discretion.
>
> (3) Franchisee may not transfer unless it first gives written notice to [Respondent] (the "Notice") at least thirty (30) days prior to any such sale. The Notice shall name the

> proposed transferee and specify the purchase price and payment terms of the offer. If [Respondent] notifies Franchisee in writing within thirty (30) days following receipt of the Notice that it desires to accept the transfer for itself or its nominee, Franchisee shall transfer, and [Respondent] or its nominee shall accept the transfer at the price and on the terms contained in the Notice; provided, however, that if the purchase price specified in the Notice includes consideration other than cash and notes, [Respondent] or its nominee may substitute for such other compensation cash in an amount equal to the fair market value thereof. The closing of such transfer shall be held within sixty (60) days following receipt by Franchisee of [Respondent]'s notice.

Thus, in order to transfer his UFA, the Driver must give thirty days notice, pay a transfer fee of $500 to Respondent, pay all of Respondent's costs, including legal fees, for signing up the new driver, and, perhaps, worst of all, the Respondent may reject the transfer if the Driver has not "fulfilled all obligations" to Respondent.

III. ARGUMENT

The Board may grant review of a regional director's decision, in part, based on the following three grounds, each of which is applicable in this Request for Review:

> 1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) departure from, officially reported Board precedent;
>
> 2. That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;
>
> * * *
>
> 3. That there are compelling reasons for reconsideration of an important Board rule or policy.

NLRB Rules & Regulations § 102.67(c).

ATU requests review in this case on two bases. First, Region 16 erred in holding that the SuperShuttle drivers are independent contractors rather than employees, departing from Board precedent and relying on factually erroneous interpretations of the record. Second, there are compelling reasons for reconsideration of an important Board policy of protecting individuals

who wish to collectively bargain with businesses which attempt to bypass the NLRA laws by setting up independent contractor franchise agreements.

A. Respondent Failed to Meet its Burden to Prove that the Drivers are Employees and Not Independent Contractors.

1. The Common Law Agency Test.

Section 2(3) of the National Labor Relations Act provides that the term "employee" shall not include "an individual having the status of an independent contractor." The burden of establishing independent contractor status is upon the party asserting it. *BKN, Inc.*, 333 NLRB 143, 144 (2001); *Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004).

In determining whether an individual is an employee or an independent contractor, the Board applies the common law agency test set forth in Restatement (Second) of Agency, Section 220 (1958). *Argix*, 343 NLRB at 1020 n.13. These factors are:

(1) The control that the employing entity exercises over the details of the work;

(2) Whether the individual is engaged in a distinct occupation or work;

(3) The kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision;

(4) The skill required in the particular occupation;

(5) Whether the employer or the individual supplies the instrumentalities, tools and the place of work for the person doing the work;

(6) The length of time the individual is employed;

(7) The method of payment, whether by the time or by the job;

(8) Whether the work in question is part of the employer's regular business;

(9) Whether the parties believe they are creating an employment relationship; and

(10) Whether the principal is in the business.

Reinstatement (Second) of Agency, Sec. 220.

The Board has cautioned that this list is neither exhaustive nor exclusive and that it considers "all the incidents of the individual's relationship to the employing entity." *Slay Transportation Co.*, 331 NLRB 1292, 1293 (2000), quoting *Roadway Package System, Inc.*, 326 NLRB 842, 850 (1998). The determination of whether an individual is an independent contractor is quite fact intensive. *NLRB v. United Insurance Co.,* 390 U.S. 254, 258 (1968).

2. Under the Common Law Agency Test, the Drivers are Employees.

a. Respondent Exercises Substantial Control Over the Details of Driver Performance.

Respondent exercises substantial control over the Drivers' daily performance. First, Respondent offers Drivers what is essentially a take it or leave it proposition. There are no negotiations over any of the terms of the UFA. In fact, they are identical for all Drivers. The evidence demonstrates that no Driver has ever negotiated for a different compensation rate, alterations to the strict rules regarding the make, model, color, size, age and mechanical condition of the vehicles used or any other substantial part of the UFA. The fact that "the agreement containing the terms and conditions under which [Drivers] operate is promulgated unilaterally by the Employer" is a factor "favoring finding the [Drivers] to be statutory employees:" *Argix Direct, Inc.*, 343 NLRB at 1022 (2004).

The fact that Drivers must display Respondent's logo on their vehicles also supports employee status. See e.g., *Slay Transportation Co.,* 331 NLRB at 1294 (owner-operators required to display employer's logo on vehicles supports finding of statutory employee status).

Drivers must replace their vehicles – a significant monetary investment – at the time unilaterally set by Respondent. Drivers are threatened that failure to do so will automatically result in termination of their UFA. Respondent can unilaterally change the type of van that

Drivers are allowed to drive, regardless of the investment a Driver has already made. Drivers must present their vans for inspection.

As in *Roadway Package System, Inc.*, 326 NLRB 842, Drivers must follow strict rules regarding uniforms and appearance, at the risk of significant default under the UFA. Drivers are subject to various rules that are clearly unrelated to any governmental regulation. They must obey a Cellular Device Usage Policy, but all the while bid for and accept potential trips over the Nextel phones they are required to use.

Drivers are forced to go through Respondent-required training, including training on daily trip sheets, how to process credit cards, other types of payment, how trips are assigned on Nextel, procedures on how to board those trips into the Nextel, how to then de-board them at the airport when they drop the passengers off, undergo a MAPSCO test, safety training, and how to fill out trip sheets. (Tr. 220-22, 274-76).

Even more importantly, there was compelling evidence that Respondent rules with a hard hand in having drivers take on passenger pick-ups. Drivers testified that they are fined by Respondent if they decline certain assignments. This fine mechanism was clearly described by Petitioner's witnesses. (Tr. 235-38, 265-66; 298-301).

Respondent most closely resembles a traditional employer in the way it disciplines Drivers. It specifically provides itself with the mechanism for a points-based system of progressive discipline in the UFA. It uses language in the Weekly Vehicle Summary reports indicative of a disciplinary system, such as "Refusal FW Circuit." Respondent also threatens to and actually does fine drivers for declining certain assignments. Finally, Respondent reserves the right to terminate UFAs for twenty-five separate alleged transgressions.

Despite this overwhelming evidence clearly showing that SuperShuttle exercises control of the details of Driver performance, Region 16 concluded that "the factors of control favor that the drivers are independent contractors," and that "the factors strongly favoring control include scheduling and selecting fares." Decision, Page 16. Quite clearly, Region 16 ignored the compelling evidence showing SuperShuttle's substantial control over the Drivers. This is especially shown in the Decision's discussion of the $50.00 fines that SuperShuttle punishes Drivers with if they have the "audacity" to turn down a fare. In its Decision, Region 16 made a severe factual error in its analysis of ATU's evidence that SuperShuttle can force a Driver to take a trip and that when the Driver declines the trip, it can fine the Driver $50.00. Decision, pp. 14-15. Specifically, without any evidence whatsoever, Region 16 concluded that "[t]his incident is the exception as it was the only example provided on the record." *Id.*

For Region 16 to conclude that this type of incident was the "exception" completely misses several points. First, it ignores the testimony adduced at the hearing that Drivers routinely go to the DFW holding lot, and that once in the holding lot, the Driver must accept any trip the Dispatcher tells him or her to take from DFW or face a $50.00 fine. See p. 7, *supra.* Second, the Decision also ignored the undisputed fact that SuperShuttle will "auto-assign" a route if no one bids on it if it is within an hour of the scheduled pick-up. Of course, in keeping with the punitive nature of the SuperShuttle/Driver relationship, if the Driver declines this type of an assignment, SuperShuttle fines the Driver $50.00. See p. 8, *supra.*

Not only is the Decision factually incorrect when it states that "[t]his incident is the exception as it was the only example provided on the record," but it totally gets it wrong even assuming that that one incident was the only example provided on the record. Specifically, the point of that particular testimony was that once a Driver gets fined for declining a trip, it forces a

Driver to start taking undesirable trips because of the threat of more fines. The Decision completely ignores this compelling evidence that the threats of fines forces drivers to take trips that they would ordinarily decline. (Tr. 235-38, 265-66, 298-301).

The Decision's severe error concerning this aspect of control over the Drivers, combined with all of the other compelling evidence adduced at the hearing, requires that the Board vacate the Decision, and direct an election in this case.

b. Drivers Perform a Function that is Regular and Essential Part of Respondent's Principal Business.

As in *Roadway Package System, Inc.*, 326 NLRB 842, Respondent's Drivers perform a function that is regular and essential part of Respondent's normal operations – shuttling passengers to and from DFW Airport. Drivers must conduct business in the name of Respondent, wear its uniform and badge,[5] drive in vans marked as Super Shuttle's and prominently displaying Respondent's name, logo and colors. Drivers are prohibited from entering into agreements with any competing businesses or engaging in any competitive work whatsoever. Even if a driver was to somehow schedule his or her won "charter" trip, the Driver must pay Respondent as if he or she got the work through Respondent. There is no evidence that any Driver has ever used his or her vehicle for even a noncompeting purpose. As the Board found in *Roadway.* "[t]his lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice by . . . drivers and more a matter of the obstacles created by their relationship with [Respondent}." 326 NLRB at 851. Because Respondent's requirements effectively prevent Drivers from realistically pursuing other commercial activities with their

[5] Requiring workers to wear a uniform is evidence of an employer-employee relationship. *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (noting requirement to wear company uniforms significant).

vehicles, their right to engage in such outside activities amount to "entrepreneurial opportunities that they cannot realistically take." *Id.* at 851 and n.36.

Moreover, Respondent exclusively solicits passengers and is solely responsible for arranging Driver pickups. Complaints go directly to Respondent and then Respondent unilaterally determines whether the Driver is at fault and whether he or she should be disciplined or even have their UFA terminated. Such control of customer solicitation and service shows that the Respondent is principally engaged in, and responsible for, the shuttle business and for protecting its reputation within that industry.

The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service. See *S.G. Borello and Sons, Inc. v. Department of Indus.*, 48 Cal. 3d 341, 357 (1989); *Estrada v. FedEx Ground Package Systems, Inc.*, 154 Cal.App.4th 1, 9 (2007) (despite *FedEx's* elaborate program designed to distance itself from control over the details of its drivers' performance of its core delivery services, the *FedEx* court correctly found the drivers to be employees because they were wholly integrated in *FedEx*'s core operation.); *Weary v. Cochran*, 377 F.3d 522 (6th Cir. 2004) (an individual is likely an employee when his work is regular part of hiring party's business).

c. Drivers Do Not Need Any Significant Skill or Experience to Perform Respondent's Shuttle Function.

Drivers do not need any significant prior training or experience to provide shuttle services. Courts have held that driving a truck without a special license requires no particular skill or specialty. The less skilled position, the more likely he is an employee. See *Estrada* at 12. (drivers who need no experience to get the job in the first place and whose only required skill is the ability to drive.); *JKH Enterprises, Inc. v. Department of Industrial Relations*, 142

Cal. App. 4th 1046, 1064, 48 Cal. Rptr. 3d 563, 579 (2006) (the functions performed by the drivers-pickup and delivery of papers are packages and driving in between – do not require high degree of skill); *Messenger Courier Association of Americas v. California Unemployment Insurance Appeals Board*, 175 Cal. App. 4th 1074, 1083, 96 Cal. Rptr. 3d 797, 801 (2009) (the following facts showed employee status: "uncomplicated nature of the work (driving), the integral nature of the function performed compared to the business of the employer, and the fact that the same work had previously been performed by the same persons when they were designated as employees rather than independent contractors.)

d. The Instrumentalities, Tools and Place of Work.

Drivers do own or lease their vehicles and are responsible for maintenance, repair and fuel costs. But Respondent provides them with the other necessities to perform shuttle driving services. Drivers get uniforms and badges from Respondent and Respondent installs and replaces its logos and markings on the vans. Drivers must purchase Nextel phones from Respondent with the required GPS feature. There is no evidence that any Driver has ever acquired any of these items anywhere but from Respondent. Respondent requires that Drivers obtain insurance through it or its chosen entity and unilaterally determines the amount of insurance and the risks that must be covered. Respondent can unilaterally increase the price of such insurance. Respondent also helps Drivers obtain vehicles for leasing.

e. The Non-Negotiable Compensation Package.

The Respondent unilaterally establishes compensation rates for all Drivers and the cost of beginning a "Franchise". There is no evidence that any Driver has ever been permitted to pay a lesser rate for their weekly payoff or their UFA. A strong indication that a worker is an

employee is the "lack of the ability of the worker to negotiate the terms of the employment relationship when governed by a 'take it or leave it' contract." See *S.G. Borello and Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d, 341, 358-59 (1989); see also *Cristler v. Express Messenger Systems, Inc.*, 2008 WL 4991828 (Cal. App. 2008).

Respondent further dictates what a Driver can make by offering various deals and packages to potential customers, but does not permit Drivers to change prices in any way in an effort to get more business.

f. Other Factors.

Drivers are not allowed to operate more than one van. Thus, unlike other recent Board cases, the Drivers at issue here do not employ others to help them with multiple routes. Moreover, it is virtually impossible for Drivers to sell their "franchises" to others. In order to transfer his or her UFA, a Driver must give thirty days notice, pay a transfer fee of $500, pay all of Respondent's costs, including legal fees, for signing up the new driver, and perhaps worst of all, the Respondent may reject the transfer if the Driver has not "fulfilled all obligations" to Respondent.

Region 16 pointed out in its Decision that the Drivers and SuperShuttle agreed in the UFA that they intended to create an independent contractor relationship. But this factor has been present in numerous other cases in which the Board has found drivers to be employees and, thus, is clearly not a determinative factor. *See, e.g., Time Auto Transportation*, 338 NLRB 626 (2003); *Corporate Express Delivery Systems*, 322 NLRB 1522, 1524 (2000), enf'd 292 F.3d 777 (D.C. Cir. 2002); *Slay Transportation Co.*,331 NLRB at 1293; *Roadway Package System, Inc.*, 326 NLRB at 848; *Elite Limousine Plus*, 324 NLRB 992, 994 (1997).

3. Prior Board Cases Support the Finding of Employee Status Here.

Applying the common-law agency test to the facts of this case, it is apparent that the factors weigh more strongly in favor of employee status. As shown above, the facts here are extremely similar to the facts presented in *Roadway Package System, Inc.*, 326 NLRB 842. Moreover, the facts are easily distinguished from the facts in *Dial-a-Mattress*, 326 NLRB 884 (1998) and *Argix Direct, Inc.* 343 NLRB 1017.

In *Dial-a-Mattress,* the owner operators at issue employed helpers and some owner-operators had as many as six or ten vehicles for which they hired drivers and additional helpers. 326 NLRB 884. But the Drivers at issue here are only allowed to have one van and none of them regularly hire any "employees." The evidence shows that there is currently only one Relief Driver, and he is more like a Co-Driver. And even then, Respondent retains heavy control over the Relief Drivers by drug testing them, training them, and requiring that it must approve them.

The Relief Driver issue here is more like that encountered by the Board in *Ingramo Enterprise Inc.* 351 NLRB 1337 (2007). There, the Respondent used drivers to pick up blood samples from veterinarians and veterinary hospitals. Some of the drivers occasionally had others drive their routes so that they could take a vacation. *Id.* at 334. The Board found that such infrequent use of a substitute did not turn the employees into independent contractors. *Id.*

Dial-a-Mattress also presents myriad other distinguishable facts. There, the owner-operators could use their vehicles to make deliveries for other companies, 326 NLRB at 885, while here the Drivers cannot. In *Dial-a-Mattress*, the owner operators could decline jobs dispatched by the employer, while here drivers are subject to discipline for not making assigned pickups. In *Dial-a-Mattress,* the owner operators could decline jobs dispatched by the employer, while here Drivers are subject to discipline for not making assigned pickups. In *Dial-a-Mattress*,

the owner-operators could do additional work for customers for separate payment, while here Drivers cannot do so. In *Dial-a-Mattress*, the owner-operators could use any type, model, make, color, size or condition of truck they wanted and the vehicles were not subject to inspection, while here Respondent specifically dictates everything about the van and requires inspections. In *Dial-a-Mattress*, an owner-operator who did not show up on a particular pick-up was simply replaced with another owner-operator, while Respondent fines Drivers for any incidents of not showing up. In *Dial-a-Mattress*, some of the owner-operators negotiated better fees, while that is not permitted by Respondent. All in all, the owner operators in *Dial-a-Mattress* were afforded "significant entrepreneurial opportunity for gain or loss", 326 NLRB at 891, which simply does not exist for Respondent's Drivers.

Similarly, the facts in *Agrix Direct, Inc.*, 343 NLRB 1017, are readily distinguishable from the case here. In *Agrix*, the employer put no restrictions on the contractors' use of vehicles for other purposes, the contractors were able to choose to not take routes on some days and, in fact, some worked only one day a week for the employer so that they could work elsewhere. None of those factors exist here. In *Argix,* five of the contractors owned twenty of the sixty-three vehicles and hired drivers to operate them, in contrast to this case where no Driver has or is permitted to have more than one van. In *Argix*, the vehicles could be of any make, model or color and the owner-operators could place their own names on their trucks, while here the vehicle must meet exacting specifications and must have the Super Shuttle colors and logo. in *Argix*, owner-operators were free to choose not to work on any day without penalty and could provide services to other carriers. In fact, the service agreement there specifically reserved owner-operators the right to provide services for other carriers. *Id.* at 1020. Here, Drivers are

threatened with termination for working for any competing business. Clearly, the seminal Board cases that found drivers to be independent contractors are distinguishable from the facts here.

4. The Recent D.C. Circuit Decision in *FedEx Home Delivery v. NLRB* Supports the Finding of Employee Status Here.

In *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009), two of three judges of the D.C. Circuit purported to amend the common law test of agency by "shift[ing] emphasis away from the unwieldy control inquiry in favor of a more accurate proxy: whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss." The Board has not yet considered the court's purported shift in emphasis. But even if the Board adopted the entrepreneurial opportunity test, it would find the Drivers here to be employees.

The court was clearly impressed that drivers in *FedEx Home Delivery* were permitted to use their vehicles "for other commercial or personal purposes." *Id.* But the evidence here is clear that Drivers simply cannot use their vans for any other commercial purpose.

Moreover, there is no evidence that any Driver ever has used his van for any other business purpose. The D.C. Circuit seemed impressed that drivers had entrepreneurial opportunities because at least one driver had negotiated for higher fees. *Id.* at 499. But not even one Driver has done so here.

The *FedEx Home Delivery* drivers were permitted to contract with the employer to serve multiple routes or hire their own employees for single routes. "This ability to hire others to do the Company's work is no small thing in evaluating 'entrepreneurial opportunity.'" *Id.* (internal quotations and citations omitted). But here it is undisputed that Drivers cannot drive more than one van.

Finally, the D.C. Circuit cited with approval the fact that "Contractors can assign at law their contractual rights to their routes, without FedEx's permission. The logical result is they can sell, trade, give, or even bequeath their routes, an unusual feature for an employer-employee relationship." *Id.* at 500. But Respondent's Drivers have no such rights. Instead, Drivers not only must get Respondent's permission, they must give thirty days notice, pay a transfer fee of $500 to Respondent, pay all of Respondent's costs, including legal fees, for signing up the new Driver, and, after all that, Respondent may reject the transfer if the Driver has not "fulfilled all obligations" to Respondent.

Under all of these facts, it is clear that Respondent's Drivers would be considered employees even if the D.C. Circuit's entrepreneurial opportunity test was adopted by the Board.

5. Region 16's Decision in this case directly contradicts Region 27's Decision in another SuperShuttle case.

Region 16's Decision also completely ignores Region 27's Decision and Order in SuperShuttle International Denver, Inc. and Communication Workers of America, Case No. 27-RC-8582 (Feb. 26, 2010). In that case, the Region 27 Decision first determined that the common-law agency test was the appropriate test to use for determining employee status. *Id.* at 31. In Region 27's analysis of the common law factors, Region 27 determined that (1) the Drivers' work was part of the regular business of the employer (*Id.* at 32-33), (2) the factor related to the method of payment indicates employee status, (*Id.* at 34-35), (3) the instrumentalities and tools used by the Drivers indicates employee status (*Id.* at 35-36), (4) Respondent exercises control over significant details of work performed by the Drivers, indicating employee status (*Id.* 36-37), and (5) SuperShuttle placed significant limitations on the entrepreneurial opportunities of the Drivers, indicating employee status as well (*Id* at 36-38).

While there may be minor differences in the way SuperShuttle Denver conducted its business versus SuperShuttle DFW, the vast majority of factors that the Regional Director in the Denver case relied upon are equally present here. As such, the Board should review Region 16's Decision in light of Region 27's completely contrary Decision in SuperShuttle Denver.

B. There are Compelling Reasons for Reconsideration of Region 16's Decision Based on Important Board Policy.

The National Labor Relations Act was passed to protect employees who wish to collectively bargain for better wages, working conditions, etc. with powerful companies. In the last decade, employers have been creating imaginative ways of putting road blocks in front of employees who wish to collectively bargain. This case is a prime example of one of those creative ways of putting hurdles in front of individuals who have no negotiating power whatsoever with a company like SuperShuttle. As explained in detail in the prior section, the Franchise Agreement model that SuperShuttle uses, along with the control that it has over Drivers, butts up against the NLRB policy of protecting individuals who wish to collectively bargain with companies for which they work. As such, there are compelling reasons for reconsideration of the important Board policy of protecting employees in situations like this.

IV. CONCLUSION

For all of the foregoing reasons, ATU respectfully requests that the Board vacate Region 16's Decision in this case and issue an order that the Drivers are employees and direct an election among all of Respondent's Drivers.

Dated: November 15, 2010

Respectfully submitted,

GILLESPIE, ROZEN & WATSKY, P.C.
3402 Oak Grove Avenue, Suite 200
Dallas, Texas 75204
Phone: (214) 720-2009
Facsimile: (214) 720-2291

By: /s/ David K. Watsky
David K. Watsky
State Bar No. 20932600

ATTORNEY FOR AMALGAMATED TRANSIT UNION LOCAL 1338

CERTIFICATE OF SERVICE

I hereby certify on this 15th day of November, 2010 that the Request for Review was served upon the company via electronic mail. I hereby certify that the Request for Review was served upon Region 16 via facsimile.

By: /s/ David K. Watsky
David K. Watsky