

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

ARISE VIRTUAL SOLUTIONS, INC.

and

Case 12-CA-144223

MATTHEW RICE, an Individual

**GENERAL COUNSEL’S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

Pursuant to Section 102.46 of the Board’s Rules and Regulations, Counsel for the General Counsel (herein called the “General Counsel”), hereby submits the following Brief in Support of Cross-Exceptions to the Administrative Law Judge’s Decision in the above captioned case.

I. Statement of the Case

The hearing in this case was held before the Honorable Charles J. Muhl, Administrative Law Judge (herein called the “ALJ”) on May 2 and 3, 2016. On August 12, 2016, the ALJ issued his Decision, properly finding that customer service professionals (CSPs), including Matthew Rice, are statutory employees and that Respondent violated Section 8(a)(1) of the Act as alleged in the Complaint issued by the Regional Director on April 27, 2015. (ALJD, pg. 1, 19:6-10, 20:19-20).¹ In reaching this conclusion, the ALJ properly rejected Respondent’s argument that CSPs are independent contractors and properly found that the CSPs are employees of Respondent within the meaning of the Act. The ALJ properly considered the independent contractor issue raised by Respondent pursuant to traditional common law factors and the

¹ The ALJ’s Decision will be identified by “ALJD”, page, and line. Transcript pages will be identified by the page, line, and name of witness, where necessary for clarification. “GCX” refers to General Counsel’s exhibits, and “RX” refers to Respondent’s exhibits.

Board's independent business factor analysis set forth in *FedEx Home Delivery*, 361 NLRB No. 55 (2014). (ALJD 1, 2:1-4). The ALJ also concluded that Respondent violated Section 8(a)(1) of the Act by maintaining a class action waiver provision in its "Acknowledgment and Waiver Agreement" (the Agreement); requiring employees to sign the Agreement as a condition of employment; and enforcing the Agreement by requiring Matthew Rice to withdraw his opt-in consent to join a class action complaint in the matter of *Heather Steele et al. v. Arise Virtual Solutions, Inc.*, Case No. 13-62823-WJZ in U.S. District Court for the Southern District of Florida, alleging violations of the Fair Labor Standards Act (FLSA). (ALJD 1, 20:33-37).

On September 23, 2016, Respondent filed Respondent Arise Virtual Solution Inc.'s Exceptions and Respondent Arise Virtual Solutions Inc.'s Brief in Support of its Exceptions to Decision of Administrative Law Judge. In addition to cross-exceptions, the General Counsel is also filing an answering brief to Respondent's exceptions and brief in support.

General Counsel's cross-exceptions are limited to the ALJ's findings that certain factors relevant to the analysis of the independent contractor issue are neutral or favor a finding of independent contractor status.

II. Argument

A. The ALJ erred by failing to conclude that the factor of whether CSPs are engaged in a distinct occupation or business weighs in favor of employee status.

The ALJ erred by finding that the factor of whether or not CSPs are engaged in a distinct occupation or business is a neutral factor and by failing to find that this factor weighs in favor of finding that CSPs are employees. CSPs are not engaged in a distinct occupation or business from Respondent. (ALJD 14:5-19). The ALJ correctly concluded that without Respondent, CSPs could not perform their customer service work because Respondent supplies

CSPs with the necessary infrastructure to provide customer service. (ALJD 14:10-11). As in *FedEx*, CSPs lack the infrastructure necessary to perform their work. 361 NLRB No. 55, slip op. at 15; see also *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); and *Gateway Chevrolet Sales*, 156 NLRB 856, 866 (1966) (the complete integration of salesmen into the employer's regular business is "characteristic of an employer, employee relationship"). The ALJ also found that Respondent derives about 85 percent of its revenue from the work performed by CSPs. (ALJD 14:12-13). See *Sisters Camelot*, 336 NLRB No. 13, slip op. at 4 (2015) (fact that employer would be unable to fund its operations without canvassers weighed in favor of employee status). In addition, the ALJ found that although Respondent does not preclude CSPs from working for other employers, the hours of work and sporadic nature of CSP work makes it difficult for CSPs to obtain other employment. Moreover, the ability to work for more than one employer does not make an individual an independent contractor, citing *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (2015). (ALJD 14:13-17). CSPs and Respondent are engaged in the same business, and CSP work is an essential part of Respondent's business. The only evidence relied upon by the ALJ that supports his finding that this factor is neutral is that CSPs identify themselves as working for Respondent's clients rather than Respondent when performing customer service work. (ALJD 14:5-8). However, it is the nature of Respondent's business for employees employed by a call center that when they are communicating with customers of Respondent's clients, they may not identify themselves as working for the call center (i.e. for Respondent), but rather, they are required to represent themselves as working for the client of Respondent whose customer is seeking service. Thus, this fact does not support a finding that CSPs are employed by the clients of Respondent, as the ALJ found. The testimony also shows that Matthew Rice, a CSP, considered himself an employee of Respondent. (ALJD

17: 29-32; Tr. 182:23-25, M. Rice). Taken as a whole, the facts support a finding that CSPs are not engaged in a distinct occupation or business, and the ALJ erred by failing to find that this factor weighs in favor of their employee status.

B. The ALJ erred by finding that the factor of whether or not the employer or the individual supplies instrumentalities, tools and place of work favors independent contractor status.

The ALJ erred by failing to find that the factor of whether or not the employer or the individual supplies the instrumentalities, tools and place of work favors employee status or, in the alternative, is a neutral factor. (ALJD 15:27-42). As the ALJ found, Respondent provides CSPs with the infrastructure necessary to connect with Respondent's clients to perform CSP work. (ALJD 15:27-28). Respondent's platform costs Respondent approximately \$500,000 to \$1,000,000 per year to maintain. (*Id.*). Respondent also provides CSPs with instructions on setting up their work stations, and in line with its clients' needs, sets forth the computer specifications necessary to perform CSP work. (GCX 14-17, 24). The ALJ placed some emphasis on the fact that Respondent deducts a fee for use of Respondent's platform from the payment Respondent makes to Independent Businesses (IBs), thereby removing a "potential wage payment to a CSP" and that the CSP is paying the platform access fee, citing *City Cab Co. of Orlando*, 285 NLRB 1191-1194 (1887). (ALJD 15:30-35). However, CSPs do not pay Respondent for the platform access fee. Rather, it is the IB that pays this fee to Respondent.

While CSPs do work from their homes and purchase a USB headset for training, and a phone with a headset for customer service work, CSPs' investment is far less than Respondent's. (ALJD 15:37-40; Tr. 166:5-12, M. Rice). Thus, CSP Matthew Rice testified that he spent approximately \$200 for equipment during the time he worked for Respondent. (Tr. 166:18-25, M. Rice). Training costs are at most \$100 for the CSP 101 course that Respondent requires CSPs to

complete, and about \$100 for each certification course. (Tr. 42:1-8, Padron; GCX 26 (a), 26(b)). In contrast, as noted above, Respondent's platform costs approximately \$500,000 to \$1,000,000 per year to maintain. (Tr. 20:15-18, Padron).

Although CSPs provide the place of work (most of them work from home) and a relatively small percentage of the tools and instrumentalities for work, Respondent's investment in what is required to do customer service work is far greater than CSPs' investment. (Tr. 252:11-21, Padron). In *FedEx*, the Board gave neutral weight to this factor even though the drivers supplied their own vehicles and bore all expenses in operating their vehicles, including costs of repair, maintenance, fuel, oil, taxes, tires, insurance, and license fees, 362 NLRB No. 55, slip op. at 4, 15-16. In comparison, the FedEx drivers provided a significantly higher percentage of the overall tools and instrumentalities of their work than Respondent's CSPs provide regarding the CSPs' work. Accordingly, the ALJ erred by finding that this factor weighs in favor of independent contractor status and by failing to find that this factor weighs in favor of employee status, or, in the alternative, is a neutral factor.

C. The ALJ erred by finding that the method of payment factor weighs in favor of independent contractor status rather than in favor of employee status. (ALJD 16:12-35).

The ALJ erred by failing to find that the method of payment factor weighs in favor of employee status. (ALJD 16:12-35). Although it is true that under Respondent's structure, IBOs pay CSPs for their work, Respondent exercises significant control over CSPs' rate of pay. The Statement of Work (SOW), pursuant to which CSPs are permitted to work for one of Respondent's clients (such as Barnes & Noble, Disney and Sears), is drafted by Respondent and specifically sets forth the service revenue paid to Independent Business Operators (IBOs). As a practical matter, this method of payment restricts the amount that an IBO is able to pay CSPs.

Thus CSP Matthew Rice was paid \$8 to \$9 per hour, which is the same as the average pay rate set forth in Respondent's posted job opportunity for Barnes & Noble work through Respondent. (Tr. 181:15-16, M. Rice; GCX 26(b)).² Matthew Rice testified that he did not believe the wage rate was negotiable. (Tr. 181:17-20, M. Rice). *FedEx*, slip op. at 16-17 (the fact that employer established non-negotiable wage rates weighs in favor of employee status); See also *Lancaster Symphony*, 357 NLRB at 1764. In addition, Respondent's web page notes that under the star program, Respondent rewards higher achieving CSPs by paying IBs more per call depending on the star rating achieved by the CSP. (GCX 45, GCX 46, pg. 50). While it is true that CCS paid Matthew Rice for his work and issued him 1099s, Patricia Rice testified that she never deducted the fees charged by Respondent from her son's paycheck or any other family member's paychecks. (Tr. 184:15-23, M. Rice; Tr. 148:148:12-17, 150:22-25, 151:1, 153:19-21; P. Rice). Although Respondent does not technically establish the CSPs' pay rate, Respondent essentially establishes a minimum wage rate for CSPs and controls any additional wages CSPs can receive through its incentive program.

Moreover, Respondent's structure "greatly minimizes the possibility of genuine financial risk or gain." *FedEx*, slip op. at 16. CSPs are bound by the limits of the actual service intervals they are able to obtain through Starmatic, and there is little to no ability to increase wage rates except in the limited circumstances where Respondent provides an incentive to an IBO. In addition, CSPs are not allowed to contact Respondent's clients nor do they control the rates Respondent charges its clients for customer service. Finally, CSPs lack the infrastructure necessary to provide customer service on their own. Accordingly, for the CSPs, as stated in *FedEx*, "[u]nlike the genuinely independent businessman, ... earnings do not depend largely on

² The SOW for Matthew Rice's Barnes & Noble phone work shows that the service revenue was \$1.45 per call multiplied by the total number of calls during an invoice period or alternatively, about \$8.00 per hour. (GCX 3, page 15).

their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits”, quoting *Roadway Package System (Roadway III)*, 326 NLRB 842, 852 (1998); *FedEx*, slip op. at 16. While Respondent does not provide CSPs with any fringe benefits or withhold taxes from their pay, this is outweighed by Respondent’s exercise of strict control over CSPs’ wages, earnings and potential for gain or loss. See *Sisters Camelot*, 336 NLRB No. 13, slip op. at 4 (2015) (Board found that employer’s tight control over canvassers’ compensation weighed in favor of employee status); See also *FedEx* (controlling the rate of pay outweighs the fact employer did not provide fringe benefits or withhold taxes). Accordingly, the ALJ erred by finding that the method of payment factor weighs in favor of independent contractor status rather than in favor of employee status, or, in the alternative, that the method of payment factor is neutral.

D. The ALJ erred by failing to find that the factor of whether the parties believe they are creating an independent contractor relationship is a neutral factor rather than a factor weighing in favor of employee status.

The ALJ erred by finding that the factor of whether or not the parties believe they are creating an independent contractor relationship is a neutral factor rather than a factor weighing in favor of employee status. (ALJD 17:34). The ALJ correctly noted that “[t]he Respondent has taken multiple steps to frame CSPs as independent contractors.” (ALJD 17:21). The ALJ also stated in his decision that “[t]he Respondent’s business structure is an elaborate construct designed to portray the relationship between the two as that of an independent contractor.” (ALJD 19:6-7). Although Respondent requires IBOs to sign Master Service Agreements (MSAs) agreeing that they are independent contractors, Respondent drafts the MSAs and CSPs do not have an opportunity to bargain over the terms of this agreement. (ALJD 17:21-27). Moreover, as the ALJ found, written agreements are not dispositive of independent contractor

status. (ALJD 17:26-27). As noted above, the ALJ also correctly found that Matthew Rice considered Respondent to be his employer and did not consider CCS or his mother, Patricia Rice, to be his employer. (ALJD 17:29-20; Tr. 182:23-25, M. Rice). Moreover, Matthew Rice and other CSPs have asserted claims in federal court against Respondent under the Fair Labor Standards Act, and arbitrators considering those claims have rejected Respondent's position that CSPs are independent contractors. (ALJD 17:30-32; GCX 78-79). Patricia Rice shepherded Matthew Rice during the time that Matthew Rice worked for Respondent, and testified that she was only a go-between, between Respondent and the CSPs. (Tr. 183:1-5, M. Rice; 155:4-8, P. Rice). Respondent supervised, trained, disciplined and terminated CSPs who worked under the SOWs with CCS, Patricia Rice's IB. (Tr. 154:7-25, 155:1-3, P. Rice). Although Patricia Rice operated her business and did some advertising, she testified that she was not running a successful or big business. (Tr. 127:4-9; 135:11-13, 139:18-23, P. Rice; RX 11, 16-17). Accordingly, the vast majority of facts support a finding that the parties, and especially the CSPs, do not believe they are creating an independent contractor relationship, and the ALJ erred by failing to find that this factor weighs in favor of employee status.

Dated at Miami, Florida, this 20st day of October, 2016.

Respectfully submitted,

/s/Susy Kucera
Counsel for the General Counsel
National Labor Relations Board
Region 12-Miami Resident Office
51 S.W. 1st Avenue, Suite 1320
Miami, FL 33130
Susy.Kucera@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that the General Counsel's Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision was electronically filed with the Office of the Executive Secretary of the National Labor Relations Board and served by electronic mail this 20th day of October 2016 on the following persons:

Peter W. Zinober, Esq.
Greenberg Traurig, P.A.
Bank of America plaza
101 E. Kennedy Blvd., Suite 1900
Tampa, FL 33602
zinoberp@gtlaw.com

Adam P. KohSweeney, Esq.
O' Melveny & Myers, LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
akohsweeney@omm.com

Shannon Liss-Riordan, Esq.
Jill Kahn, Esq.
Lichten & Liss-Riordan, P.C. 729
Boylston Street, Suite 2000
Boston, MA 02116
sliss@llrlaw.com
jkahn@llrlaw.com

/s/Susy Kucera
Counsel for the General Counsel
National Labor Relations Board
Region 12- Miami Resident Office
51 S.W. 1st Avenue, Suite 1320
Miami, FL 33130
Susy.Kucera@nlr.gov