UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
VELOX EXPRESS, INC.	)	
	)	
Respondent,	)	
	)	Case 15-CA-184006
and	)	
	)	
JEANNIE EDGE,	)	
	)	
an Individual.	)	

RESPONSE TO BRIEF OF THE GENERAL COUNSEL TO THE NATIONAL LABOR RELATIONS BOARD AND MOTION TO STRIKE ON BEHALF OF RESPONDENT VELOX EXPRESS, INC.

Submitted by:

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I. INTRODUCTION

After advancing an argument for over a year that the misclassification of employees as independent contractors, standing alone, violates the National Labor Relations Act ("NLRA" or the "Act"), and after the Administrative Law Judge ("ALJ") adopted that argument and the General Counsel defended the ALJ's conclusion in its previous Response Brief in front of the National Labor Relations Board ("NLRB" or the "Board"), the General Counsel now admits that the ALJ's ruling was wrong. *See* Brief of the General Counsel at 1, filed April 25, 2018 ("GC Brief"). If anything, the unreasoned adoption by the ALJ of that clearly erroneous argument is indicative of the overall thought and analysis utilized by the ALJ in reaching all of the conclusions in his opinion.

However, in place of the bright-line, but admittedly wrong, rule for which the General Counsel previously advocated, the General Counsel now insists on an unworkable, circular rule that misclassification is a violation of the Act where an employer "actively used the misclassification of employees to interfere with their Section 7 rights." This proposed rule is nothing more than a meaningless attempt by the General Counsel to contort its legal argument in a manner that gives the ALJ some credence for his unsupported ruling that Respondent Velox Express, Inc. ("Velox") violated the Act by supposedly misclassifying the drivers as independent contractors.

Indeed, while the General Counsel recognizes that a multitude of reasons prohibit making misclassification alone a violation of the Act, the General Counsel's

proposed rule nonetheless flouts those same rationales. For instance, while the General Counsel touts free speech considerations and the need for businesses to be able to express their legal position on the topic of the classification of contractors/employees as reasons that misclassification alone should not violate the Act, the General Counsel still suggests that Velox violated the Act through "active[] use" of the misclassification when Velox continued to insist that drivers were independent contractors after a driver suggested that they were being treated as employees. The General Counsel does not explain why Velox's free speech rights disappeared at that point, nor why Velox could no longer state its position on that legal topic after that point without violating the Act. In any event, the General Counsel's proposed rule is thoughtless drivel designed only to give it a second, unwarranted bite at arguing the merits of other issues in the case, for which large, irrelevant portions of the General Counsel's Supplemental Brief must be struck.

II. AS GENERAL COUNSEL ADMITS, THE ALJ IMPROPERLY CONCLUDED THAT MISCLASSIFICATION IS A PER SE VIOLATION OF SECTION 8(A)(1)

As the General Counsel now admits, the ALJ ruled incorrectly that Velox's classification of the drivers as independent contractors was an unfair labor practice in violation of Section 8(a)(1). GC Brief at 5. Of course, for the reasons set forth in Velox's Brief in Support of its Exceptions and its Reply to the General Counsel's Response, Velox maintains that the drivers were properly classified as independent contractors. But even assuming for argument's sake to the contrary, the mere fact that Velox classified the drivers as independent contractors clearly was not an

unfair labor practice for numerous reasons including those that the General Counsel itself outlines in its Brief.

Those reasons include that Congress did not intend to "unduly restrict business formation" or penalize businesses simply for erring in the classification of workers (GC Brief at 6); that treating misclassification as violating the Act would run afoul of Section 8(c) of the Act by deeming opinions, and potentially honest mistakes, regarding employee classification as unlawful coercive speech (GC Brief at 6-7); that concluding that misclassification is a violation of the Act would be an improper shifting of the burden in unfair labor practice proceedings, because it is the General Counsel's burden, and not the respondent business's, to prove that an unfair labor practice occurred (GC Brief at 7); and that creating a new violation for misclassification of employees would overly complicate representation election proceedings where employee status is commonly litigated (GC Brief at 7-8).

Of course, despite acknowledging the multitude of problems with the misclassification ruling by the ALJ, the General Counsel wholly fails to acknowledge its own part in that ruling, namely that the ALJ was simply unthinkingly accepting the General Counsel's arguments when the ALJ issued his ruling, of which the misclassification-as-independent-violation-of-the-Act ruling was one. Not only must the ALJ's ruling on that issue be overturned pursuant to the General Counsel's own recognition of its error, but the ALJ's other unthinking adoptions of the General Counsel's arguments should be given the same skeptical eye.

III. THE GENERAL COUNSEL'S PROPOSED RULE IS UNWORKABLE

While the General Counsel openly admits that a multitude of reasons foreclose any ruling that misclassification of employees as independent contractors alone violates the Act, the General Counsel nevertheless proposes that some misclassifications should constitute violations of the Act. But the General Counsel's proposed rule on that issue is little more than circular argument that seems designed to, first and foremost, give the General Counsel another bite at the apple to argue the remainder of its case against Velox. Specifically, the General Counsel offers up what is ultimately a meaningless and unworkable rule: that misclassification of employees as independent contractors constitutes a violation of the Act where the misclassification is used to interfere with Section 7 rights. Indeed, as described by the General Counsel in the factual context of this case, the General Counsel's rule does little to avoid the numerous issues that it admits require rejection of the ALJ's ruling that misclassification alone is a violation of the Act.

For instance, the General Counsel notes that businesses face numerous complex issues in determining the status of workers and must "look to the interpretations of the courts and various enforcement agencies to determine the appropriate classification" for the standards for the contractor analysis. GC Brief at 6. The General Counsel also notes the free speech interests of businesses and the Act's protection of opinions being voiced by such businesses. GC Brief at 6-7.

Yet, the General Counsel also contends that, even though a business does not violate the Act by misclassifying the drivers as independent contractors in the first instance, once a worker disagrees with that classification, it would be a violation for the business to continue to adhere to the classification it made under that complex set of rules and laws. GC Brief at 12. How the complexity of the determination differs and what vitiates a business's free speech interests and the Act's protection of opinions just because a worker has voiced a differing opinion on the classification issue is a subject the General Counsel never addresses. Indeed, the General Counsel's rule would do nothing more than move the time at which the strict liability under the Act imposed by the ALJ attaches from the time of the initial classification decision to the time when any single employee ever broaches the subject of classification with the business. Such a proposed rule is clearly unworkable for all the same reasons that (as the General Counsel recognizes) the ruling of the ALJ is unworkable.

The General Counsel cites to several decisions for the proposition that an employer violates Section 8(a)(1) when its actions operate to chill or curtail future Section 7 activity of statutory employees. GC Brief 9-10. Yet each of the cited cases dealt with the discharge or termination of a statutory employee, not the maintenance of their statutory classification. The <u>discharge</u> of the employee is the act that served to chill or curtail future protected activity: *Phoenix Processor Ltd. P'ship*, 348 NLRB 28, 28 at n. 7 (2006) (respondent discharged employee for talking to other employees about wages and hours and "discharged him to prevent any

further such discussions among employee"); *Compuware Corp.*, 320 NLRB 101, 102 (1995) (Board adopting finding that employee was "terminated because of a perception that he might continue to [be engaged in protected concerted activity]"); *Koronis Parts, Inc.*, 324 NLRB 675, 701 (1997) (Board adopting finding that respondent refused to hire a temporary employee on a permanent basis because of her protected activity of displaying support of a potential union); *Metro. Orthopedic Assocs., P.C.*, 237 NLRB 427, (1978) (Board adopting finding that respondent improperly discharged employees for an erroneous belief that they had engaged in protected activity).

Simply put, these cases do not stand for any proposition that a business's protected opinion regarding the classification of workers has any independent bearing on whether the Act was violated. They instead stand for the undisputed proposition that the discharge of employees for engaging in otherwise protected activities is a violation of the Act because it creates a chilling effect on Section 7 activity, nothing more and nothing less. In contrast, the correct classification of the workers is merely a threshold jurisdictional issue, as it always has been.

Here, Velox intended for the drivers at issue to be independent contractors and continues to believe they were. There is nothing in the law that suggests that the opinion of one of Velox's drivers to the contrary created, or should create, a heightened standard for Velox to reclassify all of its drivers, upending its entire business model. And, as set forth in Velox's Brief in Support of the Exceptions and Reply Brief in Support of the Exceptions, Velox did not terminate Edge for any

protected activity, regardless of her classification, as Edge herself admitted under oath.

Moreover, there is no evidence in the record that the alleged misclassification of the drivers chilled any attempts to exercise Section 7 rights. Velox believed then, and still maintains, that the drivers were properly classified as independent contractors for all the reasons set forth in its Exceptions to the Board and the Brief in Support of the Exceptions. Edge's questioning of Velox's classification of drivers as independent contractors does not, and should not, subject Velox to additional liability for misclassification.

In short, the General Counsel is putting the cart before the horse by concluding that there is a Section 8(a)(1) violation when a worker disagrees with a business's opinion of the worker's status under the Act without a full adjudication of the merits of that claim. Such a conclusion will undoubtedly serve to chill business decisions in the use of independent contractors because of the increased risk involved with defending a claim of misclassification, and will undermine each of the other rationales that the General Counsel admits require rejection of the ALJ's ruling that misclassification alone violates the Act.

IV. GENERAL COUNSEL IMPERMISSIBLY RE-ARGUES ITS CASE AND THUS ARGUMENT NOT RELATING TO THE QUESTION PRESENTED BY THE NLRB SHOULD BE STRUCK FROM THE RECORD

Finally, to the extent that the General Counsel uses its Brief as an opportunity to reargue its case, those portions of the Brief should be struck from the record. Much like a Rule 12(f) motion to strike in federal court, the Board should

strike "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

The redundant arguments made by the General Counsel in its History of the Case serve no purpose whatsoever in its answer to the Board's limited question presented about whether misclassification should be a standalone violation of the Act. The repeated arguments simply serve to improperly bolster the General Counsel's Response to the Exceptions filed by Velox. Thus, the Board should strike the arguments to the extent that they go beyond the question presented by the Notice and Invitation to File Briefs.

V. CONCLUSION

The Board should conclude that mere misclassification of employees as independent contractors is not an unfair labor practice under the Act in any circumstance.

Dated: May 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2018, I caused a copy of the foregoing to be filed with the National Labor Relations Board and electronically served upon the parties of record.

/s/ Benjamin C. Fultz
Counsel for Respondent Velox Express, Inc.