



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

Appellate and Supreme Court Litigation Branch
Washington, D.C. 20570

February 27, 2019

VIA CM/ECF

Mark J. Langer
Clerk of Court, U.S. Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *Pennsylvania Interscholastic Athletic
Association, Inc. v. NLRB*,
Nos. 18-1037 & 18-1043
Oral argument held November 16, 2018
(Judges Garland, Griffith, and Pillard)

Dear Mr. Langer:

The National Labor Relations Board submits the following response to Pennsylvania Interscholastic Athletic Association, Inc.'s January 25 letter pursuant to Fed. R. App. P. 28(j).

On January 25, the Board issued *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), which overruled part of the test for whether an individual is an independent contractor as set forth in *FedEx Home Delivery*, 361 NLRB 610 (2014) ("*FedEx I*"), *enforcement denied*, 849 F.3d 1123 (D.C. Cir. 2017). Specifically, the Board overruled its *FedEx II* decision's characterization of entrepreneurial opportunity as just "one aspect" of a new factor concerning whether a putative contractor is "rendering services as part of an independent business." *SuperShuttle*, slip op. at 1. The Board explained that *FedEx II* had departed from the common-law test governing independent-contractor status by impermissibly minimizing the importance of entrepreneurial opportunity, and that it had wrongly disagreed with this Court's opinion in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) ("*FedEx I*"). *SuperShuttle*, slip op. at 7-12.

SuperShuttle provides no basis for the Court to remand the present case. As explained in the Board's brief (NLRB Br. 34-38, 45-48), the disagreement between

the *FedEx II* Board and the *FedEx I* Court concerning entrepreneurial opportunity was not at issue here. PIAA expressly conceded as much below, noting that “[t]he dispute between the Board and the DC Circuit is primarily over the significance of whether the alleged contractor has ‘entrepreneurial opportunity’ . . . [but] [t]hat issue is not of controlling relevance in the instant matter.” (JA729 n.9; *see also* JA779 n.24.)

While the Board here cited its *FedEx II* decision as the then-leading case articulating the common-law test, its analysis was consistent with pre-*FedEx II* precedent, including *Lancaster Symphony Orchestra*, 357 NLRB 1761 (2011), *affirmed*, 822 F.3d 563 (D.C. Cir. 2016), and this Court’s *FedEx I* opinion. As explained in the Board’s brief (NLRB Br. 28-38), nearly all of the traditional common-law factors show that the lacrosse officials at issue are employees who are controlled by PIAA and who have minimal entrepreneurial opportunity.

Very truly yours,

s/David Habenstreit
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cc: all counsel (via CM/ECF)