

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges**

XPO CARTAGE, INC.

and

**Cases 21-CA-150873
21-CA-164483
21-CA-175414
21-CA-192602**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

**To the Honorable Christine E. Dibble,
Administrative Law Judge**

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I. INTRODUCTION

In a September 12, 2018 Decision and Recommended Order (2018 Decision), Administrative Law Judge (ALJ) Christine Dibble determined that tractor-trailer drivers working at XPO Cartage Inc.'s (Respondent) facility in Commerce, California, (Commerce Facility) were employees protected under the National Labor Relations Act (the Act). ALJD: 24:8-9.¹ She further concluded that Respondent had committed various unfair labor practices as alleged by the Counsel for the General Counsel (CGC). Following the issuance of ALJ Dibble's decision, the Board announced its own decision in *SuperShuttle DFW*, 367 NLRB No. 75 (Jan. 25, 2019). There, the Board explicitly overruled its previous precedent, *FedEx Home Delivery*, 361 NLRB 610 (2014), and held that to properly consider whether a purported independent contractor is an employee, one must apply traditional common-law factors "through the prism of entrepreneurial opportunity" *SuperShuttle*, slip op. at 15.

This case now returns to ALJ Dibble on remand from the Board in order to determine the lawfulness of the Complaint allegations in light of *SuperShuttle*. All parties had an opportunity to introduce additional evidence in a hearing which took place from October 5, 2020 through October 8, 2020. As discussed in further detail below, that additional evidence is insufficient to disturb ALJ Dibble's finding that Respondent's drivers are employees protected under the Act. Indeed, the evidence only serves to strengthen that finding.

¹ ALJ Dibble's 2018 Decision will be referred to as "ALJD" followed by the appropriate page and line numbers. The transcript will be referred to as "Tr." followed by the appropriate page number. General Counsel's and Respondent's exhibits will be referred to as "GC X" and "R X" followed by the appropriate exhibit number.

II. ALJ DIBBLE'S 2018 DECISION

In her 2018 Decision, ALJ Dibble correctly applied the Board's then-controlling precedent, *FedEx Home Delivery*, to a voluminous record which included extensive testimony from Respondent's drivers, supervisors, managers, and corporate representatives, as well as numerous documentary exhibits. After applying the traditional common-law factors to determine whether Respondent's drivers are independent contractors or employees, ALJ Dibble found that the drivers are employees. Indeed, the vast majority of the drivers' working conditions weighed towards their status as employees. Respondent's "significant control over the driver's work;" the centrality of the drivers' work to Respondent's business; the long length of the drivers' working relationships with Respondent; the drivers' belief that they have an employer-employee relationship with Respondent; and the absence of any substantive distinction between Respondent's core businesses and the function of the drivers all weighed towards the conclusion that Respondent's drivers are employees. ALJD 14:17-24. Notably, ALJ Dibble also reviewed both testimonial and documentary evidence concerning the drivers' entrepreneurial opportunity with care and concluded that the drivers lack any significant entrepreneurial opportunity for gain or loss.

III. THE EVIDENCE PRESENTED ON REMAND

At the hearing following the Board's remand of this matter, CGC presented additional testimony and documentary evidence supporting ALJ Dibble's finding that Respondent's drivers are employees. Respondent's witnesses, most of whom did not previously appear in this matter, also corroborated evidence ALJ Dibble relied upon in making her findings in the 2018 Decision. For example, during the remand hearing, Respondent's Vice President of Transportation, Troy

Tibbets, who did not appear in the first hearing, testified that if drivers do not accept the pay rates Respondent offers to them in Schedule B of their Independent Contractor Operating Contracts (ICOCs), they cannot work for Respondent. Tr. 2224. This confirms ALJ Dibble’s finding, based on previously admitted evidence, that Respondent can unilaterally change the drivers’ pay rate. ALJD 19:26-27. Tibbets also testified that the compensation rates Respondent pays to its drivers and the compensation Respondent receives from its customers are independent variables. As a result, when Respondent changes its drivers’ pay rates, that does not necessarily impact any of the contracts Respondent has with its clients. Tr. 2223, 2225.

A. Respondent Provides Training to Drivers, Regularly Audits Drivers’ Performance, and Punishes Poor Performance

At the remand hearing, new evidence was introduced which revealed the extent of Respondent’s supervision of drivers’ work performance, and Respondent’s role in shielding its drivers from loss.

In her 2018 Decision, ALJ Dibble found that Respondent does not provide its drivers with job training or performance reviews. ALJD 14:13-15. However, testimony provided by Respondent’s Regional Safety Manager, Enrique Flores, at the remand hearing demonstrates that Respondent *does* provide such training. When a driver begins working for Respondent, Respondent trains them to properly fill out various documents they must use to complete their work, including delivery memos. If a driver fails to properly complete this paperwork, they are not paid for their work. Tr. 2391, GC 33(a).

Upon hiring a driver, Respondent also provides the driver with a “Compliance, Safety, Accountability” (CSA) booklet, outlining the drivers’ responsibilities pursuant to various safety rules, including limits on the number of hours they drive (also referred to as “hours of service”

limits) and successfully passing roadside inspections conducted by the California Highway Patrol. Tr. 2357, R 20. Each driver's performance is measured on a numerical scale, known as their "CSA score," assigned by the Federal Motor Carrier Safety Administration. Respondent is also assigned a CSA score, which is affected by the drivers' scores. Tr. 2353-2354, 2362. Regional Safety Manager Flores admitted that Respondent's customers consider its CSA scores in deciding whether to hire Respondent. Tr. 2355. Further, Flores admitted that there was at least one instance in the past where a potential customer decided not to hire Respondent because of its unsatisfactory safety score. Tr. 2355. If a driver repeatedly receives unsatisfactory CSA scores, Respondent terminates that driver's contract. Tr. 2361.

Drivers also face a variety of other consequences, short of termination, if their performance is deemed unsatisfactory. Flores, or another member of Respondent's Safety Department staff, first meets one-on-one with a poorly performing driver for a "counseling" session. After that counseling session, the Safety Department staff member and driver memorialize the meeting by signing the driver's "Driver Detail Report," which records the driver's score in various performance categories. Tr. 2360, GC 85. If a driver is cited for a violation during a roadside inspection, they are required to notify Respondent of that citation within 24 hours of the unsatisfactory inspection. Respondent then requires the driver to complete an online remedial training - which they access using a username and password Respondent issues to them - and requires the driver to provide Respondent with a written explanation of how they will avoid unsatisfactory roadside inspections in the future.² If the driver fails to complete the remedial training and/or fails to provide Respondent with that written

² The mandatory online remedial trainings are distinct from the online trainings Respondent requires the drivers to complete related to the transportation of hazardous materials referenced in the ICOCs (Tr. 1343-1344; R X 26; R X 27; R X 37; GC X 52; GC X 60) and the online mandatory training enumerated in Respondent's Safety Handbooks (GC X 71; GC X 72).

explanation within a certain period of time set by Respondent, Respondent takes them out of service. Tr. 2364-2365.

Beyond requiring the driver to complete the remedial training and written explanation, Respondent also fines the driver. Flores admitted that levying this fine is not a government requirement. Tr. 2373. Flores also testified that he or another Safety Department representative counsels drivers who fail to conduct proper pre-trip inspections and also directs those drivers to complete mandatory online remedial training. Tr. 2374. Flores or another Safety Department representative also counsels a driver when Respondent discovers any violations recorded in the driver's log, which are then included in a printed Violation Summary Letter. Tr. 2380-2381; 2384.

Flores also testified about an employment action called "disqualification," whereby a driver is barred from driving for Respondent, but may keep their truck under contract with Respondent and use a second-seat driver to operate their truck. Tr. 2412-2413. Flores stated that a driver can be disqualified forever and that individual might never qualify to drive for Respondent again. Tr. 2413. Flores also testified that Respondent may disqualify a driver for safety reasons in order to comply with federal regulation; however, he also admitted that Respondent may disqualify a driver for speeding, which is not a federal requirement. Tr. 2434.

B. Respondent Protects Its Drivers from Losses

Witnesses at the remand hearing also offered testimony regarding Respondent practices that shield its drivers from loss. Felipe Flores, a dispatcher who works at Respondent's Commerce Facility, testified that if a driver encounters an issue while transporting a load, Respondent sends another driver to relieve the driver, rather than requiring the driver to find assistance on their own. There are various issues a driver may encounter on the road that could

prevent them from completing their trip: they might have a traffic accident; or they may have exceeded the maximum number of driving hours allowed; or they may have discovered a limitation on their driver's license after a roadside inspection, etc. In any of these instances, Respondent's dispatchers will send another driver to assist the original driver. Dispatcher Flores added that soliciting this sort of assistance is not a challenge for Respondent because there is a "brotherhood" among the drivers. Tr. 2319.

IV. CONTROLLING PRECEDENT: FROM FEDEX TO SUPERSHUTTLE

A. FedEx: Entrepreneurial Opportunity as a Factor in the Common-Law Test

ALJ Dibble's 2018 Decision analyzed the facts of this case under the then-governing precedent, *FedEx Home Delivery*, 361 NLRB 610 (2014). There, the Board was guided by the common-law, non-exhaustive, multifactor test set forth in the Restatement (Second) of Agency §220 (1958) used to determine an individual's employment status. That section provides:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work.
- (b) whether or not the 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 a part of the regular business of the employer.
- (i) whether or not the parties believe they are creating the relation of master and servant.
- (j) whether the principal is or is not in the business.

As the Supreme Court has long recognized, this non-exhaustive, ten-factor test is not amenable to a bright-line rule, and, therefore, no shorthand formula can be applied to determine whether an individual is an employee or independent contractor. Rather, all the incidents of the relationship must be assessed and weighed with no one factor being decisive. *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968). It is a fact-intensive inquiry. Moreover, the legal distinction between “employees” and “independent contractors” is “permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute.” *North American Van Lines v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989).

In addition to the common-law factors enumerated in the Restatement, the Board in *FedEx Home Delivery*, *supra* at 621, announced that it was going to consider, as a separate factor, whether the putative independent contractor is *rendering service as an independent contractor*, that is: whether the individual has a significant actual, as opposed to merely theoretical, entrepreneurial opportunity for gain or loss. Related to this factor, the Board considered whether the individual has a realistic ability to work for other companies; a proprietary or ownership interest in the work; and an ability to control important business decisions such as scheduling, hiring, selection, and assignment of employees, purchase and use of equipment, and commitment of capital. In her 2018 Decision using the *FedEx* standard, ALJ Dibble found that Respondent’s drivers were employees under Section 2(3) of the Act. As discussed below, even under current controlling precedent, ALJ Dibble’s 2018 Decision should stand.

B. *SuperShuttle*: The Common Law Through a “Prism of Entrepreneurial Opportunity”

After ALJ Dibble made her ruling in this case, the Board established a new legal framework in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). While the Board retained the common-law, non-exhaustive, multifactor test set forth in the Restatement (Second) of Agency §220 (1958), enumerated above, the Board modified how fact-finders should evaluate the concept of entrepreneurial opportunity when examining an individual’s employment status.

Contrary to *FedEx*, the Board declared in *SuperShuttle* that “entrepreneurial opportunity represents merely ‘one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business.*” *SuperShuttle*, supra, slip op. at 1 (quoting *FedEx*, 361 NLRB at 620 (emphasis in *FedEx*)). Therefore, entrepreneurial opportunity should not constitute an entirely separate and independent common-law factor; rather, the common-law factors should be evaluated through “the prism of entrepreneurial opportunity.” *SuperShuttle*, slip op. at 15. The Board then provided the key to properly operate this prism: “. . . control and entrepreneurial opportunity are two sides of the same coin: the more of one, the less of the other. Indeed, entrepreneurial opportunity often flowers where the employer takes a “hands off” approach.” *Id.*, slip op. at 16.

In *SuperShuttle*, the Board considered “whether franchisees who operate shared-ride vans for SuperShuttle Dallas-Fort Worth [were] employees covered under Section 2(3) of the National Labor Relations Act or independent contractors and therefore excluded from coverage.” *Id.* slip op. at 1. When analyzing the working terms and conditions of the *SuperShuttle* franchisee-drivers, the Board found that, in order to work, the franchisees were required to have their own shuttle vans and pay the company an initial franchise fee and a decal fee. *Id.*, slip op. at 5, 6. After paying those fees, franchisees were then required to pay the company a continuous flat

weekly fee, for the right to use SuperShuttle's dispatch and reservation systems, which "[did] not change and [was] not related to the amount of business that a franchisee generate[d]."

SuperShuttle DFW, Inc., supra., slip op. at 5. Franchisees "work[ed] as much as they chose," they did not work a set work schedule or have a set number of hours or days a week they were required to work. *Ibid.* These franchisees then were able to keep the money they earned for finishing the assignments they choose to take on and were able to hire relief drivers to operate their vans. *Ibid.* Other requirements, such as appearance, seating, decals, and inspections, were imposed on franchisees by the state-run airport, not the company. *Id.*, slip op. at 5, 13. The Board found that the franchisees had "near-absolute autonomy in performing their daily work" in terms of any supervision by the company. *Id.*, slip op. at 19.

In *SuperShuttle*, the Board applied those facts to the common-law factors and then viewed them through the "prism of entrepreneurial opportunity" to determine that the franchisees' ownership of the principal instrumentality of their work, the method of their compensation, and their significant control over their own daily work schedules and working conditions indicated that the franchisees enjoyed significant entrepreneurial opportunity. *Id.*, slip op. at 1. These factors, combined with the "absence of supervision and the parties' understanding that the franchisees [were] independent contractors," led the Board to find that the facts weighed in favor of independent contractor status. *Ibid.* The Board stated that particular significance is given to how workers are compensated in the taxicab industry, noting that, "[w]hen an employer does not share in a driver's profits from fares, the employer lacks motivation to control or direct the manner and means of the driver's work." *Id.* slip op. at 19, citing *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300, 1309-1310 (2004).

SuperShuttle’s overall lack of control over the franchisees’ work was determinative in the Board’s decision to designate the franchisees as independent contractors.

C. *FedEx and SuperShuttle: Control Remains in the Spotlight*

When compared to *FedEx Home Delivery*, *SuperShuttle* only presents a subtle shift in focus.³ As the Board itself has declared in post-*SuperShuttle* cases, when considering employee status, it must consider “all the common-law factors in the total factual circumstances of a particular case and treat[] no one factor of the principle of entrepreneurial opportunity as decisive.” *Intermodal Bridge Transport*, 369 NLRB No. 37, slip. op at 2 (2020), citing *SuperShuttle*, supra, slip op. at 11. *SuperShuttle* does not require a finder of fact to completely recalibrate their conclusions under *FedEx*, nor does it require that new or novel factors be considered; it merely shifts the weight of one aspect of the analysis of the specific, factual circumstances.

Exactly what the Board finds significant when assessing an individual’s working terms and conditions can be found not in what changed between *FedEx* and *SuperShuttle*, but what remained: the traditional common-law factors. It is clear that the Board remains focused on an employer’s control over how individuals perform their work. The Board has affirmed that entrepreneurial opportunity and control are in diametric opposition to one another as they are “two sides of the same coin: the more of one, the less of the other.” *SuperShuttle*, supra, slip op. at 16. Therefore, focusing on the aspects of an employer’s control over its workforce is

³ Respondent may argue *SuperShuttle* requires the Board to more heavily rely on the notion of entrepreneurial opportunity when determining an individual’s employment status and, further, that this new focus on entrepreneurial opportunity warrants finding that Respondent’s drivers are independent contractors. However, granting more weight towards entrepreneurial opportunity would misconstrue *SuperShuttle* and the Board’s specific instruction that entrepreneurial opportunity is not to be considered an independent factor of analysis. As ALJ Dibble correctly observed during the remand hearing, “Entrepreneurial opportunity was always a factor to consider even prior to *SuperShuttle*.” Tr. 2179:23-24.

consistent with both the Board's intent behind *SuperShuttle* and with the common law test itself. As discussed below, when *SuperShuttle* is applied to the facts in this case, it does not change ALJ Dibble's finding that the level of Respondent's control over the drivers' working terms and conditions signify that the drivers are employees under the Act.

D. Since *SuperShuttle*, the Board Has Consistently Emphasized the Issue of Control

The Board's successive rulings applying *SuperShuttle* highlight the Board's focus on control. Since *SuperShuttle*, the Board has applied this case in three decisions. These cases involved individuals engaged in three very different industries: courier services, transportation logistics, and exotic dancing. In each case, the Board applied *SuperShuttle* to the facts presented and found that the purported independent contractors were, in reality, employees protected under the Act, due in large part to the amount of control exerted by each employer.

1. "Day-to-Day" Control in *Velox*

In *Velox Express, Inc.*, the Board's first decision in which it applied *SuperShuttle*, the Board found that the company's courier drivers were employees, given that the drivers had "very little control over their day-to-day work for Velox." 368 NLRB No. 61, slip op. at 4. Velox's drivers did not have discretion to determine their schedules or their routes, and, like the drivers in the instant case, the Velox drivers did not have a say regarding the customers they served, were required to service specific stops during pre-determined time periods, and did not have any proprietary interest in their routes. *Id.* slip op. at 3.

The Board also concluded that the Velox's method of compensation for its courier drivers, in which drivers were paid a flat rate unilaterally set by Velox, much like the drivers in the instant case, "[did] not afford them significant entrepreneurial opportunity." *Ibid.* Although

the Velox drivers owned their work vehicles, the Board found that fact was outweighed by the employer's control over the drivers' day-to-day work activities. These instances of control, which are comparable to the conditions imposed on the instant Respondent's drivers, included stringent job requirements, such as complying with Velox's detailed procedures on how to complete their work, responding to all of Velox's communications, and using fines as a form of discipline. *Velox*, supra, slip op. at 4. Velox's drivers, like Respondent's drivers, signed "open-ended" contracts, which automatically renewed without any action required on the part of the driver or Velox. *Ibid.* Finally, as ALJ Dibble determined with Respondent's drivers, the Board found that the *Velox* drivers were "fully integrated into Velox's normal operations and perform[ed] a function that [was] not merely a regular part of Velox's business but [was] 'the very core of its business.'" *Ibid.*, citing *Slay Transportation*, 331 NLRB 1292, 1294 (2000); ALJD 17:5-10.

2. "Extensive Control" in *Intermodal Bridge Transport*

While the *Velox* drivers and Respondent's drivers work under similar conditions, the drivers examined in *Intermodal Bridge Transport*, the second of the three cases in which the Board has applied *SuperShuttle*, are even more analogous to Respondent's drivers. In *Intermodal Bridge Transport*, the Board found that drivers working for that company, a logistics, drayage and container storage business servicing the ports of Los Angeles and Long Beach, California, were employees protected under the Act. 369 NLRB No. 37, slip op. at 1.

Like ALJ Dibble in her 2018 Decision, the administrative law judge in *Intermodal Bridge Transport* first applied the traditional common-law test when analyzing the facts of the case and then "considered whether the drivers were rendering services as part of an independent business," as directed under *FedEx*, to determine that the drivers were employees. 369 NLRB

No. 37, slip op. at 2. When presented with the case for review, the Board stated its intent to “determine the drivers' status under the traditional common-law test as applied in *SuperShuttle*.” *Intermodal Bridge Transport*, supra, slip op. at 3. The Board found that “[Intermodal Bridge Transport’s] extensive control over the drivers and their attendant lack of entrepreneurial opportunity clearly weigh in favor of employee status.” *Id.*, slip op. at 4.

The Board examined the drivers’ working terms and conditions, which are exceedingly similar to those experienced by Respondent’s drivers, and concluded that they were employees under Section 2(3) of the Act. Like the drivers in the instant case, the drivers in *Intermodal Bridge Transport* were able to choose which days to work and what time to start. Further, for the first assignment of their shift, drivers could choose between several possible assignments presented to them by company dispatchers *Id.*, slip op. at 2. As with Respondent’s dispatchers, the Board found that *Intermodal Bridge Transport*’s dispatchers “control[led] the flow of the drivers’ work for the remainder of the shift by providing drivers assignments and controlling their customers.” *Ibid.* The drivers in *Intermodal Bridge Transport*, like Respondent’s drivers, did not have propriety interest in routes that they could sell or transfer because they did not have their own routes. *Ibid.*

The drivers in *Intermodal Bridge Transport* were also compensated by their employer in the same fashion Respondent compensates its drivers - it paid its drivers in the form of a per-load rate, a fuel surcharge, and a clean-truck assistance payment each week. *Ibid.* Fuel costs and a non-negotiable lease rate were deducted from the drivers’ payments. *Ibid.* The drivers’ compensation rates in *Intermodal Bridge Transport*, like the compensation here, was set by the company and not negotiated with each driver. *Ibid.* After establishing these facts, the Board

found that the compensation structure in *Intermodal Bridge Transport* “[did] not afford [the drivers] entrepreneurial opportunity.” *Id.*, slip op. at 3.

Like ALJ Dibble’s findings concerning Respondent’s drivers, the Board found that the drivers in *Intermodal Bridge Transport* were not engaged in a distinct occupation or business as they were performing functions that were an essential part of the company’s normal operations. The Board also noted that “[Intermodal Bridge Transport’s] drivers themselves perform the work of hauling shipping containers to [Intermodal Bridge Transport’s] customers, as assigned by [Intermodal Bridge Transport] and not on routes in which they have a proprietary interest, with only limited ability to select or reject work...” *Intermodal Bridge Transport*, supra, slip op. at 4. Also echoing ALJ Dibble’s conclusions concerning Respondent, the Board found that *Intermodal Bridge Transport* essentially retained a permanent work force of drivers, as more than 80-percent of the drivers had worked there for several years. *Id.*, slip op. at 5. In light of all of the facts presented in *Intermodal Bridge Transport*, the Board concluded that the employer had “decisively failed to meet its burden of demonstrating that the drivers are independent contractors.” *Id.*, slip op. at 6.

3. “Significant Control” in *Nolan Enterprises, Inc.*

Most recently in *Nolan Enterprises, Inc.*, 370 NLRB No. 2 (2020), the Board affirmed an administrative law judge’s determination that exotic dancers working at a gentlemen’s club were employees, rather than independent contractors. The Board determined that Nolan Enterprises “exercise[d] significant control over the dancers’ day-to-day work (through extensive rules, expectations, supervision, fines, and penalties), their work environment, and the customer base,” which, “in turn, result[ed] in a significant degree of control over the dancers’ opportunities for economic gain.” 370 NLRB No. 2, slip op. at 1. While the Board acknowledged that the

dancers did have some degree of leeway to impact their income “through their own efforts and ingenuity,” this flexibility did not overcome all the ways in which Nolan Enterprises exerted its control over its dancers’ working terms and conditions. *Ibid.*

When examining the dancers’ compensation structure, the Board highlighted how Nolan Enterprises’ revenue stream differed from that in *SuperShuttle*. In *SuperShuttle*, the company’s revenues were not linked to the amount of fares earned by drivers: “the company received the same amount from drivers regardless of the fares the drivers earned.” *Nolan*, supra, slip op. at 1., citing *SuperShuttle*, 367 NLRB, slip op. at 3. In contrast, Nolan Enterprises made its revenue in a similar fashion as Respondent does in this case: its revenue is largely, if not entirely, dependent on their employees’ performance of work. The more Nolan Enterprises’ dancers earned in dance fees and drink commissions, the higher the employer’s profits. *Ibid.* In the instant case, the more assignments the drivers accept and complete, the more contracts Respondent can fulfill, and more profits Respondent can earn.

The Board affirmed the administrative law judge’s decision, in which he found that Nolan Enterprises was responsible for the hiring and employing of other staff, such as the bartenders, servers, DJs, and security, “all of whom the dancers rely upon to earn their income.” *Id.*, slip op. at 17. The dancers’ dependence on core staff hired by the employer echoes Respondent’s drivers and their reliance upon Respondent’s dispatchers to receive work. These factors, along with evidence of verbal warnings, suspensions, and fines imposed on the dancers by Nolan Enterprises, prompted the Board to reject its argument that the administrative law judge “failed to properly evaluate the common-law factors through the prism of entrepreneurial opportunity, as required under *SuperShuttle*.” *Id.* slip op. at 1, 2.

V. ALJ DIBBLE’S FINDING THAT RESPONDENT’S DRIVERS ARE EMPLOYEES WITHIN THE MEANING OF § 2(3) OF THE ACT IS CORRECT EVEN AFTER SUPERSHUTTLE.

A. Control in the Transportation Logistics Industry: *Intermodal Bridge Transport* as a Guide

After reviewing the Board’s post-*SuperShuttle* cases, it is clear the Board has already considered a scenario that closely resembles that which Respondent’s drivers face. Given the similarities to the instant case, the Board’s decision in *Intermodal Bridge Transport* is especially instructive and can be used as a model. *SuperShuttle* involved the shared-ride industry, which is “an extension of the taxicab industry. . . .” *SuperShuttle*, supra, slip op. at 20. No party is purporting that Respondent is in the shared-ride industry or the taxicab industry; in fact, Respondent admitted that it is in the “transportation logistics services” industry. GC X 1(ww). *Intermodal Bridge Transport* involved the “logistics, drayage, and container storage business,” the same industry as Respondent. 369 NLRB No. 37, slip op. at 1. Therefore, it is clear that, of the Board’s post-*SuperShuttle* cases, *Intermodal Bridge Transport* is the most analogous to the instant case and should guide the fact-finder in determining that Respondent’s drivers are employees.

B. Application of the Common-Law Factors, Post-*SuperShuttle*

- i. the extent of control which, by the agreement, the master may exercise over the details of the work.**

In her 2018 decision, ALJ Dibble found that this factor weighs in favor of employee status because Respondent “maintains significant control over the drivers’ work.” ALJD 14:17. This is unlike the franchisees in *SuperShuttle*, where the Board concluded that “*SuperShuttle* franchisees are free from control by *SuperShuttle* in most significant respects in the day-to-day performance of their work.” *SuperShuttle* at 17.

In the present case, ALJ Dibble found that Respondent has control over virtually all aspects of the company's interaction with the clients; the drivers' compensation for deliveries and other services; scheduling of the drivers' deliveries; the types of equipment drivers must use for deliveries; the type of insurance drivers must maintain pursuant to their contract with the Respondent; requirement that the trucks are branded in the Respondent's name when delivering for its clients; and the standardization of the contract between the drivers and the Respondent. ALJD 14:17-24.

ALJ Dibble found that the drivers have "virtually no contact with [Respondent's customers]..." and that their compensation rates, as set forth in Schedule B of Respondent's ICOC, are unilaterally determined by Respondent. ALJD 14:32-33. While ALJ Dibble previously determined that the drivers had some control over when they work and which loads to accept, Respondent has overall control over the loads assigned to the drivers as the pickup and delivery locations and specific appointment times are set by Respondent, not the drivers. ALJD 15:10-25.

It is clear from the record that these facts have not changed. At the remand hearing, Respondent did not present any evidence that refutes ALJ Dibble's findings of fact; instead, the evidence presented strengthens ALJ Dibble's conclusions. At the remand hearing, Vice President of Transportation Tibbets confirmed that Respondent unilaterally determines its drivers' compensation rates and the drivers must accept those rates if they wish to work for Respondent. Tr. 2224-2225. Tibbets also admitted that the amounts Respondent pays to its drivers are not directly related to the rate at which its customers compensate the company, furthering separating the drivers from Respondent's customer base. *Ibid.* Dispatcher Felipe Flores testified that if a driver is unable to complete an assignment, that driver calls Respondent's dispatchers and Respondent takes on the responsibility to find assistance for the driver. Tr. 2319. Contrary to the instant case, in *SuperShuttle*, the franchisee was responsible

for covering his scheduled shift if he was unable to drive it, and the company was not involved in finding a replacement in any way. *SuperShuttle*, 367 NLRB, slip op. at 7.

Because Respondent “maintains significant control over the drivers’ work,” the drivers have little opportunity for economic gain or risk of loss. The drivers in *Intermodal Bridge Transport*, like the drivers here, were able to choose the days they worked and the time they started working but were subject to the decisions of the dispatchers “in their sole discretion” after accepting their first load of the day. *Intermodal Bridge Transport*, 369 NLRB, slip op. at 3. After deciding which load to start with, “the dispatchers control[led] the flow of the drivers’ work for the remainder of the shift by providing the drivers assignments and controlling their contact with customers.” *Id.* at 3. The same conditions are present for the drivers in the instant case. Respondent has failed to introduce any evidence that challenges ALJ Dibble’s finding that Respondent exercises control over the vast majority of the drivers’ working terms and conditions. Therefore, Judge Dibble’s conclusions for this factor should remain unchanged.

ii. whether or not the one employed is engaged in a distinct occupation or business and whether or not the work is a part of the regular business of the employer.⁴

After thoroughly analyzing the facts presented at the previous hearing, ALJ Dibble correctly concluded that these factors weigh in favor of employee status because “[t]he Respondent could not perform its function without the drivers” and “without the work of the drivers, XPO could not exist.” ALJD 17:6-7. The Board came to the same conclusion

⁴ In her 2018 decision, ALJ Dibble combined two of the factors found in the common-law test. Given their similarities, she analyzed whether or not the one employed is engaged in a distinct occupation or business and whether or not the work is a part of the regular business of the employer concurrently.

concerning the drivers in *Intermodal Bridge Transport*, noting the Supreme Court’s analysis in *NLRB v. United Insurance*:

one of the *decisive factors* in finding [United Insurance’s] debit agents were employees was that “the agents [did] not operate their own independent businesses, but perform[ed] functions that [were] an essential part of the company’s normal operations. *Intermodal Bridge Transport*, 369 NLRB, slip op. at 5 [emphasis added][internal citation omitted].

Respondent has failed to present any new evidence challenging ALJ Dibble’s previous findings⁵ and, as such, ALJ Dibble’s conclusions should not be disturbed.

iii. 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.

In her 2018 Decision, ALJ Dibble found there was “no substantive evidence of an agreement between the Respondent and the drivers for close supervision” and that “[t]he record is also devoid of evidence that the drivers receive evaluations, audits, or training.” ALJD 17:30-31. At the remand hearing, CGC presented evidence proving the opposite is true. Respondent’s Regional Safety Manager, Enrique Flores, testified that Respondent holds one-on-one, mandatory “counseling” meetings with drivers to address a variety of performance issues. Flores testified that Respondent requires these “counselings,” for example, when drivers have unsatisfactory CSA scores; when drivers receive poor roadside inspections; when drivers fail to

⁵ Respondent has previously cited some of its drivers’ business incorporation as evidence that they operate as independent businesses. However, as Regional Safety Manager Flores revealed at the remand hearing, Respondent provided drivers with a financial incentive if they incorporated. Tr. 2423–2424, 2427. As such, some drivers’ decision to incorporate simply illustrates those drivers’ decision to take advantage of a benefit offered by Respondent.

conduct pre-trip inspections; when drivers violate hours of service limits; and when any violation is recorded in a Violation Summary Letter.

Respondent may contend that these counselings do not amount to discipline or supervision; however, this argument fails on multiple accounts. First, the record clearly shows that a driver's individual record and Respondent's overall CSA record are inextricably intertwined. The drivers' individual records can and do impact Respondent's safety record, which is a factor when potential clients consider doing business with Respondent. In fact, Regional Safety Manager Flores admitted that there was at least one instance in the past where a potential customer decided not to hire Respondent because of its safety score. Tr. 2355. The drivers' individual actions and their direct impact on Respondent's business establishes Respondent's motive to impose supervision and discipline over how the drivers perform their work. The record proves that Respondent has done this through these counselings, monetary fines, requiring drivers to complete mandatory trainings, placing drivers out-of-service, and even disqualifying drivers and/or canceling their contracts.

Second, it has been shown that Respondent uses these adverse employment actions to enforce policies and practices that are more stringent than government requirements. Regional Safety Manager Flores testified that the fines imposed on the drivers were not required by government regulation. Flores also admitted that a driver can be disqualified for speeding and government regulation does not require that punishment. Tr. 2434.

Third, despite what Respondent may contend, the counselings amount to discipline. The Board defines discipline broadly, consistently holding that actions taken by employers constitute discipline if the action "has the real potential to lead to an impact on employment." *Extendicare Homes, Inc. d/b/a Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1064 (2006) [quoting

Progressive Transport. Services, 340 NLRB 1044, 1048 (2003)]. The Board has found that if an employment action resembles discipline, it will be deemed as such unless the employer can demonstrate that the action cannot be used as the basis of future discipline. *Battle Creek Health System*, 341 NLRB 882, 898 (2004) (“In today’s work environment, the absence of formal sanction is not completely dispositive. As illustrated by the [employer] in this case, employers display a fondness for euphemisms designed to sugarcoat a sometimes bitter pill.”). Clearly, using the term “counseling” is Respondent’s attempt to obscure what this one-on-one meeting between a driver and a Safety Department representative really is: a documented, written warning that can ultimately lead to a driver’s disqualification or the termination of their contract.

On the witness stand, Flores claimed that “disqualification” and “termination” are distinct employment actions; however, he also admitted that a driver could be disqualified forever and would, therefore, not be able to drive for Respondent ever again. As Flores explained, although an individual driver might be disqualified, their truck could remain under contract with Respondent, meaning that the disqualified driver could hire a second-seat driver to drive his truck for Respondent. While Respondent may claim this creates an entrepreneurial opportunity for the disqualified driver, that driver’s profit would be reduced in proportion to the second seat driver’s earnings. Further, Respondent’s witnesses previously admitted that drivers can only hire second-seat drivers subject to the company’s approval. ALJD 23:20-21. As such, even a disqualified driver - who does not and cannot perform work for Respondent themselves – does not enjoy the level of independence a truly independent business would.⁶

⁶ Indeed, Respondent already has made such an argument, contending that its drivers are “solely in control” of their arrangement with second-seat drivers; however, ALJ Dibble found “the facts prove otherwise.” ALJD 23:15-16. Respondent’s contracts with its drivers require that Respondent approve second-seat drivers’ applications. Although Respondent claimed this requirement is in place solely to ensure that second-seat drivers meet state and federal

Finally, Respondent may claim that these counselings are not a common practice and have a de minimus impact on its drivers' work. This argument fails, as the Board ruled in *Intermodal Bridge Transport* that "even . . . occasional instances of discipline indicate significant control" by an employer. 369 NLRB, slip op. at 4, citing *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (2015). Therefore, this newly introduced, undisputed evidence regarding supervision and discipline supports a finding that Respondent's drivers are employees subject to supervision, performance audits, and discipline.

iv. the skill required in the particular occupation.

In her 2018 Decision, ALJ Dibble found this factor weighs in favor of independent contractor status because Respondent's drivers must possess a Class A commercial drivers' license and Respondent does not provide training to the drivers to qualify them for that license. ALJD 11:5-9; ALJD 18:8. In light of the Board's decisions issued since her decision, this factor should be found to weigh in favor of employee status.

In *Intermodal Bridge Transport*, the Board affirmed the administrative law judge's conclusion that the drivers in question were employees, despite the fact that the judge analyzed the facts of the case under *FedEx*. When examining the common-law factors, which remain the same under *SuperShuttle*, the Board found that,

[a]lthough driving a commercial truck requires specialized skills, the drivers' skills are inherent to the performance of the drivers' duties in furtherance of the employer's

requirements, ALJ Dibble astutely observed that testimony from one of Respondent's own witnesses revealed Respondent had rejected second-seat driver applications "for reasons totally unrelated to federal mandates." ALJD 23:20-21. ALJ Dibble concluded, "if the driver had true control over hiring the second seat driver . . . the driver should have been the ultimate decisionmaker." ALJD 23:23-26. This is unlike *SuperShuttle*, in which the franchisees were able to hire relief drivers without any discretionary involvement from SuperShuttle, outside of ensuring the relief drivers met objective eligibility standards. *SuperShuttle*, 367 NLRB, slip op. at 9.

business, consistent with the common-law definition of an employee. *Intermodal Bridge Transport*, 369 NLRB, slip op. at 5.

This factor weighs in favor of employee status because Respondent's drivers utilize their skills, i.e. their commercial drivers' licenses, "in furtherance of [Respondent's] business." As ALJ Dibble correctly found, Respondent would not be able to conduct its business without the drivers. While Respondent may not provide entry-level driving training to its drivers,⁷ the evidence presented during the remand hearing does prove that Respondent requires its drivers to undergo training to correct deficiencies in their driving record. As such, the Board's findings in *Intermodal Bridge Transport* demonstrate this factor clearly weighs in favor of concluding Respondent's drivers are employees.

v. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

Like her finding concerning the drivers' skill, ALJ Dibble's conclusion concerning this factor must be re-examined in light of the Board's post-*SuperShuttle* decisions. Although ALJ Dibble found that the drivers themselves supply the instrumentalities of their work, the Board has found that supplying the principal instrumentality of work does not alone determine whether this factor weighs in favor of independent contractor status. While the Board in *SuperShuttle* felt that purchasing or leasing a truck is a "significant initial investment in their business" and an indication of independent contractor status, *SuperShuttle*, 367 NLRB, slip op. at 1, the Board's subsequent ruling in *Velox* shows that the Board also considers *how* the instrumentality can be utilized by the worker. In *Velox*, the drivers at issue owned their own vehicles, which did

⁷ However, at the remand hearing, Regional Safety Manager Flores admitted that Respondent does provide initial training to drivers to qualify them for a hazardous materials endorsement. Tr. 2433.

provide them “with some entrepreneurial opportunity for economic gain because they [could] use their vehicles to perform other paid work;” however, the Board highlighted that “the drivers’ ability to use their vehicles to work for other employers does not so much reflect significant entrepreneurial opportunity as it does the part-time nature of their work for Velox.” 368 NLRB No. 61, slip op. at 4.

In the instant case, Respondent claims its drivers may operate their vehicles for other companies while under contract with Respondent. However, as ALJ Dibble found, these claims are illusory. To operate their truck for other motor carriers, drivers must acquire their own Department of Transportation federal identification number; California state identification number; and additional insurance coverage. ALJD 9:fn. 20. Even after complying with these requirements, drivers must seek Respondent’s authorization prior to working for any other motor carrier. If a driver fails to seek Respondent’s approval before working for another motor carrier, that driver is immediately fined \$1,000 in liquidated damages and Respondent may immediately terminate the driver’s contract. GC X 52, Schedule T. These strict limitations make it practically impossible for the drivers to use their trucks to work for another motor carrier while under contract with Respondent. Respondent’s own witnesses at the previous hearing in this case made clear that these limitations have an impact on drivers’ work opportunities: Safety Specialist Steve Casillas testified that, in his six years of working for Respondent, he only knew of one driver who worked for another motor carrier while also working for Respondent. Tr. 1397-1398; ALJD 5:2-3. In light of these facts, it is clear the drivers’ ownership interest in their trucks does not create any significant entrepreneurial opportunity and this factor weighs in favor of employee status.

vi. the length of time for which the person is employed.

ALJ Dibble correctly found this factor weighs in favor of employee status. As she stated in her 2018 Decision, “[d]espite the[ir] contract [with Respondent], the facts in evidence establish that, in practice, the drivers expected and were retained for an indefinite period and not on a job-to-job basis.” ALJD 19:10-11. At the previous hearing in this case, ten drivers testified about the length of their relationship with Respondent, most of whom had worked for Respondent for at least two years, some for much longer. ALJD 19:6-9. This mirrors the facts presented in *Intermodal Bridge Transport*, in which the Board found that the vast majority of that company’s drivers had worked for the company for several years, “suggesting that the drivers function as a permanent work force.” 369 NLRB No. 37, slip op. at 3-4. Respondent failed to present any new evidence concerning this factor at the remand hearing. As such, ALJ Dibble’s finding that this factor weighs in favor of employee status should stand.

vii. the method of payment, whether by the time or by the job.

ALJ Dibble also found that this factor weighs towards employee status. ALJD 19:42. Like *Intermodal Bridge Transport*, the present Respondent sets the pay rates for deliveries, the fuel surcharges, the accessorial-related fees, the hazardous material shipment premiums, the labor charges, the chains/tie downs fees, the wait time premiums, and a “host of other fees.” ALJD 19:22-25. Respondent also “decides unilaterally the formula for the mileage rate paid to drivers and Respondent can unilaterally change the drivers’ fees. . .” ALJD 19:26-27. As Vice President of Transportation Tibbets reiterated, if a driver does not accept the fee set by Respondent, that driver cannot work for Respondent. Tr. 2224.

Respondent’s method of compensating its drivers, like the compensation methods at issue in *Intermodal Bridge Transport* and in *Nolan Enterprises, Inc.* differs greatly from that in

SuperShuttle. In *SuperShuttle*, the Board found that the “‘lack of any relationship between the company’s compensation and the amount of fares collected’ supports a finding that franchisees are independent contractors.” 367 NLRB No. 75, slip op. at 19. In *Nolan Enterprises, Inc.*, however, the Board found that company’s revenue was directly tied to the dancer’s revenue, thus distinguishing it from *SuperShuttle*. 370 NLRB No. 2, slip op. at 1. Here, the drivers’ rate of compensation is not directly tied to Respondent’s revenue – which is unsurprising, given the lack of any significant contact or relationship between the drivers and Respondent’s customers. However, the record is clear that Respondent alone sets the drivers’ compensation rates, that the drivers are completely excluded from Respondent’s negotiations with its customers, and that Respondent’s revenues and its ability to retain its contracts with its customers are directly tied to the driver’s performance. In short, if the drivers fail to complete their assignments, Respondent will not be able to serve its customers. As the Board has stated, where a company’s revenues are directly tied to the performance of its workers, “[the] compensation system militates against independent contractor status.” *Ibid*.

Respondent’s dependence on the drivers’ performance is clearly stated in its contracts with its customers. Respondent’s contracts plainly state that Respondent’s performance is tied to the availability and performance of its drivers and there are financial consequences for Respondent if its drivers fail to perform. One such contract states that Respondent will be financially liable for any “cargo damage, loss, theft or delay from any cause” and that Respondent assumes all responsibility for its own “[e]mployees, agents, servants, subcontractors, leased or temporary employees, or independent contractors” GC X 64. In another contract, Respondent and its customer agreed that “[Respondent’s] ability to meet shipment demands regarding pickup/delivery schedules . . . [is] imperative in measuring [Respondent’s]

performance.” GC X 65. “Availability,” “pickup schedules,” “delivery schedules,” “distribution incidents,” and “inventory incidents” are listed in the categories used to measure Respondent’s performance. If Respondent uses employees and subcontractors, those workers “shall be at all times under [Respondent’s] exclusive direction and control.” Furthermore, that same contract states that “[Respondent] will have full liability for the freight and tracking/tracing of the shipment regardless of who physically has possession.” *Nolan Enterprises, Inc.*, 370 NLRB, supra, slip op. at 1. Respondent’s revenues, by the very nature of its contracts with its customers, are clearly and directly tied to its drivers’ work.

Further, Respondent’s method of compensating its drivers is very similar to the compensation structure at issue in *Intermodal Bridge Transport*. There, the Board reasoned, “[b]ecause the [company] controls the drivers’ compensation and expenses as well as their assignments, the drivers lack ‘the independence to engage in entrepreneurial opportunities.’” 369 NLRB No. 37, slip op. at 3, citing *Roadway Package System, Inc.*, 326 NLRB 842, 851 (1998). The fact that the company “established both the drivers’ rate of compensation and the costs of operation” outweighed the fact that the drivers were paid by the assignment and paid their own taxes, thus shifting this factor in favor of employee status. *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 5.

Respondent has failed to present any credible evidence relevant to this common-law factor.⁸ Given Respondent’s significant control over the drivers’ compensation, ALJ Dibble’s conclusion that this factor weighs in favor of employee status should remain undisturbed.

⁸ At the remand hearing, Respondent asserted that it is “part of the structure of the business to encourage the entrepreneurial nature of the owner-operator’s work and support that work.” Tr. 2335:12-14. The only evidence offered on this point was testimony from various managers and dispatchers about conversations they had with drivers about opportunities available to them. However, as ALJ Dibble noted at the hearing, if Respondent’s assertion was true, “then there should be some type of . . . company documentation because they have set up a

viii. whether or not the parties believe they are creating the relation of master and servant.

When scrutinizing this factor in her 2018 Decision, ALJ Dibble noted that “all of the drivers who appeared on behalf of the General Counsel testified that they believed the Respondent’s actions and the work they did for the Respondent created an employee-employer relationship.” ALJD 21:38-41. ALJ Dibble concluded this factor also weighs in favor of employee status. Since Respondent produced no evidence at the remand hearing disproving that conclusion, it should remain unchanged.

ix. whether the principal is or is not in the business.

ALJ Dibble found that, “despite the additional drayage related services the Respondent performed, there was no substantive distinction between its core business and the function of the drivers.” ALJD 22: 18-20. In *SuperShuttle*, the Board found that “driving is not considered a distinct occupation” and that the company was “clearly involved in the business of transporting customers, and its revenue [came] from providing that service,” concluding that this factor weighed in favor of employee status. 367 NLRB, slip op. at 20. The same principles apply to the drivers in this case. Respondent has not presented any further evidence concerning this factor and ALJ Dibble’s determination that this factor weighs in favor of employee status should remain in place.

VI. CONCLUSION

After considering all of the common-law factors in her 2018 Decision, ALJ Dibble correctly concluded that most of those factors weighed towards finding Respondent’s drivers are employees. Although she issued her Decision before the Board noted, in *SuperShuttle*, that “. . .

program...that is specifically focused on helping drivers develop entrepreneurial opportunities. . .this is a big company. So it would take more than. . .just a couple of dispatchers to prove that.” Tr. 2335:16-25.

control and entrepreneurial opportunity are two sides of the same coin: the more of one, the less of the other,” 367 NLRB, slip op. at 16, she presciently observed that, “[m]any of the factors considered in determining whether the employer or worker exercises control over their work also applies to entrepreneurial opportunity.” ALJD 22:36-37. After the conclusion of the remand hearing, it remains clear that Respondent “maintains significant control over the drivers’ work,” thus limiting their entrepreneurial opportunity while working for Respondent. ALJD 14:17. Respondent has failed produce any evidence sufficient to justify a different conclusion.

The common law factors, as expressed in *SuperShuttle* and its progeny, weigh in favor of finding Respondent’s drivers are employees. ALJ Dibble’s conclusion to that effect must remain intact.

Respectfully submitted,

/s/ Molly Kagel

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Dated at Los Angeles, California
This 7th day of December, 2020.

STATEMENT OF SERVICE

I hereby certify that a copy of **Brief of Counsel for the General Counsel** has been submitted by e-filing to the Division of Judges of the National Labor Relations Board on December 7, 2020, and that each party was served with a copy of the same document by e-mail.

I hereby certify that a copy of **Brief of Counsel for the General Counsel** was served by e-mail, on December 7, 2020, on the following parties:

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