UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 848 and LOCAL 542
Petitioners,

- and -

STG CARTAGE, LLC DBA XPO LOGISTICS,
Respondent.

Case No. 21-RC-289115

STG CARTAGE, LLC DBA XPO LOGISTICS' REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Section 102.67(c) of the National Labor Relations Board’s Rules and Regulations, STG Cartage, LLC dba XPO Logistics (“STG”) requests review of the Decision and Direction of Election (“Decision”) issued by the Regional Director for Region 21 on June 13, 2022 in the above-captioned matter.”

The Regional Director erred in concluding that STG’s Owner-Operators and second-seat drivers are not independent contractors and, thus, employees covered by the Act, and that second-seat drivers are employees of STG. The Regional Director also erred in finding appropriate a multi-facility unit of two locations in Commerce and San Diego, California.

First, whatever the standard for determining whether individuals are independent contractors (SuperShuttle versus FedEx Home Delivery), the record is replete with evidence that Owner-Operators and second-seat drivers were properly classified as independent contractors. In finding to the contrary, the Regional Director ignored the law and clear evidence supporting STG’s assertion. Indeed, there is no dispute that Owner-Operators are entrepreneurial businesses and individuals over whom STG exercises little control, with second-seat drivers one step removed from any purported employment relationship with STG because the Owner-Operators, not STG, maintain either an employment or an independent contractor relationship with them.

STG’s business is logistics and coordinating intermodal transportation—not performing short haul truck deliveries; the latter business is the domain of Owner-Operators and second-seat drivers. Owner-Operators and second-seat drivers pick up chassis and container combinations at the port or a warehouse and deliver them to rail terminals (i.e., intermodal) for nationwide

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1 References to the transcript shall appear as ([Witness]: _); Board Exhibits as (Bd. Exh. _); STG Exhibits as (STG Exh. _, which were designated XPO below); Union Exhibits as (Pet. Exh.) and the Decision as (DDE _).
transport at a lower-cost, but slower alternative, to over-the-road trucking. They also perform the same operation in reverse. The customer cost of the “bookend” trucking portion of the delivery of a container and its chassis, performed by Owner-Operators and second-seat drivers, is only a small fraction of the total cost and the overall planning involved in moving a container over thousands of miles by various modes of transport. Fees that STG’s clients pay are not negotiated out of STG’s Commerce or San Diego facilities. Rather, STG’s customers pay prices set by STG’s parent company for intermodal transport across the country. As such, Owner-Operators and second-seat drivers are in a completely different business than STG.

The Regional Director ignored evidence that Owner-Operators and second-seat drivers have significant economic opportunity for gain or loss. As more fully discussed below, technology introduced in 2018 amplified Owner-Operators’ and second-seat drivers’ freedom and flexibility, and STG has further limited its interactions with them. The wide-ranging differences in revenues the drivers generate flow exclusively from business decisions made at the full discretion of Owner-Operators (ranging from almost $700,000 on the high end and $100,000 on the low end). While STG offers Owner-Operators and second-seat drivers the ability to choose from a broad selection of loads and fees, Owner-Operators elect which to take and reject, whether to use second-seat drivers, whether to buy or lease a tractor, and whether to haul for other entities unrelated to STG, among many other decisions critical to their business success.

In sum, the record demonstrates numerous factors reflecting entrepreneurial opportunity that exists for Owner-Operators and second-seat drivers and STG’s lack of control over them:

- Owner-Operators’ enjoy total autonomy to decide whether, when, where, and how long to work and their total discretion to accept or reject loads;
- Owner-Operators have significant opportunities to increase their income reflected in the wide range of compensation;
• Owner-Operators’ exercise their ability to hire second-seat drivers to work in addition to
themselves or in their stead, as Owner-Operators do not have to drive at all and some
have chosen to take advantage of this to manage their fleet;

• Owner-Operators make the significant initial investment to acquire a tractor;

• Owner-Operators’ are responsible for the operational decisions relating to the tractor and
the services provided—they decide which trucks to purchase or lease, where and who
maintains them, and the routes they (or their drivers) take to their destinations when they
agree to accept a load from STG;

• Owner-Operators’ have the ability to choose to simultaneously contract with another
motor carrier to provide services, or, by obtaining their own authority, directly contract to
haul for their own customers;

• Owner-Operators do not have to wear uniforms or even physically appear at STG’s
terminals to accept loads;

• Owner-Operators assume the risk of loss when entering into a relationship with STG;

• Owner-Operators negotiate their compensation;

• Owner-Operators’ contract with STG acknowledging their independent contractor status;

• STG does not withhold taxes and does not provide them with fringe benefits;

• Owner-Operators indemnify STG for various losses or damages that may arise during the
performance of their services; and

• STG compensates Owner-Operators by assignment.

The record evidence does not support the Decision on employee status. In fact, the
Regional Director’s clear error on the contractor versus employee analysis taints almost each
factor in the analysis, as discussed below. The Regional Director’s conclusion that Owner-
Operators and second-seat drivers are “employees” rather than independent contractors thus fails
on the facts and the law, and the Board should dismiss the petition.

Next, the Regional Director’s conclusion that the petitioned-for multi-facility unit
consisting of drivers in Commerce and San Diego is an appropriate unit, which rests on the
faulty conclusion that the drivers are STG’s employees in the first instance (they are not), was
factually erroneous and inconsistent with existing Board law—the locations are functionally
separate to such a degree that combining both sites does not make for an appropriate unit. The
locations: are more than 130 miles apart; function with separate staffs and management; utilize
separate dispatch systems to offer loads; offer separate and distinct compensation for the work
performed by both Owner-Operators and second-seat drivers; and engage in negligible
coordination, cross-utilization, or overlap of personnel, equipment, of facilities. Importantly, the
drivers at both facilities move loads for a different customer base, a key distinction that also
drives differences in working conditions, opportunities and compensation. What little evidence
of operational overlap exists is but a small fraction of the overall operations of both sites. The
Regional Director erred in finding otherwise.

For these reasons, and as will be discussed more fully below, the NLRB should grant
review, vacate the Decision, and dismiss the petition.

II. THE REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION

On January 19, 2022, the Union filed a petition seeking an election in a multi-facility
unit. (DDE at 1-2.) A hearing was held on February 10 through 28, 2022. On June 13, 2022, the
Regional Director concluded the following constituted a unit appropriate for collective
bargaining purposes within Section 9(a) of the National Labor Relations Act (“Act”):

    All full-time and regular part-time drivers employed by STG Cartage,
    LLC dba STG Logistics, at its Commerce location at 5800 Sheila Street,
    Commerce, California 90040 and its San Diego location at 10250
    Airway Road, San Diego, California 92154. (Id. at 53-54.)

III. THE BASIS ON WHICH REVIEW IS SOUGHT

The following compelling reasons require the Board to grant this Request for Review:

- The Decision’s conclusion that Owner-Operators/second-seat drivers are not independent
  contractors and, thus, are statutory employees raises a substantial issue of law or policy
  because it departs from officially reported Board precedent. (DDE at 33-46.)
• The Decision on substantial factual issues relating to the determination that Owner-Operators and second-seat drivers are not independent contractors is clearly erroneous on the record and such error prejudicially affects the rights of STG. (DDE at 33-46.)

• The Decision’s conclusion that the petitioned-for multi-facility unit consisting of drivers in Commerce and San Diego raises a substantial issue of law or policy because it departs from officially reported Board precedent. (DDE at 46-53.)

• The Decision on substantial factual issues relating to the determination that the petitioned-for multi-facility unit consisting of drivers in Commerce and San Diego is clearly erroneous on the record and such error prejudicially affects the rights of STG. (DDE at 46-53.)

IV. STATEMENT OF FACTS

A. STG’s Intermodal Operations

As a logistics company, STG provides coordination services to complete intermodal deliveries of commercial freight throughout the contiguous United States, primarily in large gateway markets, and gateway markets for containerized sealed freight movements.\(^3\) Intermodal is the transportation of goods using two or more modes of transportation—here railroads and trucks. STG partners with railroad vendors to complete the long-haul portion of a move, while it partners with Owner-Operators to complete the short-haul portions that bookend the railroad portion of the move.\(^4\) In the intermodal business, Owner-Operators provide only a limited portion of the overall transportation services needed to move the freight owned by STG’s customers. Because Owner-Operators are providing services that constitute a small piece of a much larger move, the nature of their business prevents them from negotiating with STG’s customers. It is not possible for Owner-Operators to negotiate directly with the cargo owners in the intermodal business because they do not have the contracts with railroad providers that STG does, nor do they have the capability to provide the trucking services on the other end of the

\(^3\) Tibbetts: 31:2-32:21; STG Exhs. 1, 2.
intermodal move, which could be thousands of miles from where the Owner-Operator is based. Thus, Owner-Operators are bidding for a small piece of a bigger move that is paid separately from what the customer pays STG.⁵

Similarly, because STG’s functions are limited, it does not provide any equipment used in the movement of its customers’ goods. Owner Operators own or lease their own tractors.⁶ STG does not rent the port terminals or own the steamships, the rail cars or yards, the tractors, the chassis attached to the tractors, or the containers being hauled.⁷ Owner-Operators and second-seat drivers play a limited role in the intermodal process: moving a chassis and container combination, neither of which is owned by STG.⁸ The chassis and container are thus not an instrumentality of the work being provided by STG; instead, movement of the chassis and the container with the Owner-Operator’s tractor is the contracted-for work being performed by the Owner-Operators and second-seat drivers. That STG daily offers trips to contractors to move or reposition empty containers from one location to another is further evidence of this fact.

B. STG’s Operations Are Regulated By Federal And State Laws

STG is a federally licensed motor carrier regulated by the Federal Motor Carrier Safety Act ("FMCSA") that arranges transportation to meet customer needs through contracts with commercial truck Owner-Operators to transport freight between rail yards or marine terminals and customers. Applicable federal law requires STG to ensure that individuals moving freight

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⁵ Tibbetts: 43:9-46:1; Tibbetts 59:2-60:13; STG Exh. 3.
⁸ Tibbetts: 43:19-44:5; (The containers are owned by XPO’s Customers or third-parties, and the same is true of the chassis and railcars that are utilized during an intermodal move); Limuaco: 648:13 - 649:1, 717:11-16 (The railroads own the chassis, not XPO); Limuaco: 649:2-9 (XPO Cartage does not own the containers).
under its motor carrier authority meet the qualifications for drivers set forth in the Federal Motor Carrier Safety Administration’s Regulations and its minimal insurance and safety standards.⁹

Fundamentally, safety is a shared responsibility among STG and Owner-Operators and second-seat drivers.¹⁰ No driver—including a second-seat driver—can drive a commercial motor vehicle unless they complete and furnish to the federally regulated motor carrier, here STG, an application meeting certain content requirements. See 49 C.F.R. § 391.21. All STG does is the legally required ministerial act of ensuring that second-seat drivers complete these forms consistent with federal and local regulations.

Federal regulations also require STG to examine the character and driving history of a driver, and STG’s refusal to allow an Owner-Operator to utilize a driver for STG’s customers is consistent with that mandate. 49 C.F.R. § 391.21 is located under Subpart C titled “Background and Character,” and various federal regulations define Subpart C as “relating to disclosure of, investigation into, and inquiries about the background, character, and driving record of drivers.” See 49 C.F.R. §§ 391.67(b); 391.68(b) (emphasis added). Thus, the regulations presume that a motor carrier will be able to decide whether a particular driver may perform services for the motor carrier, regardless of whether a driver is an employee or independent contractor.

C. Owner-Operators’ Success Depends On Their Entrepreneurial Ability

1. Owner-Operator Agreements Evidence Entrepreneurial Opportunity

In order to haul commercial freight for STG, Owner-Operators enter into an Independent Contractor Operating Contract (“ICOC”) with STG.¹¹ The ICOC states in no uncertain terms that

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⁹ Freeman: 1546:12-1547:4; see also 49 C.F.R. § 376.12(c)(4) (“Nothing in [the provisions of the lease agreement required by the regulations] is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee.”); 49 C.F.R. § 390.5 (defining “employee” to include “an independent contractor while in the course of operating a commercial motor vehicle.”).


¹¹ See STG Exh. 13.
Owner-Operators are independent contractors, not employees, and even includes a direct acknowledgement of that status in Schedule N. A key provision of the ICOC guarantees the Owner-Operators’ freedom to provide services to any company they choose:

Contractor may operate the Vehicle for alternative uses. . . . Except as restricted by Applicable Law (including 49 CFR Part 376), nothing in this Contract will prohibit Contractor from performing transportation services for other carriers, brokers or directly for shippers.

And this is no mere illusion. The record contains evidence that Owner-Operators can and do choose to simultaneously operate either under their own authority or under that of another motor carrier. Similarly, Section 12 of the ICOC underscores that Owner-Operators are not “prohibited from using Contractor’s Vehicles for the pickup, transportation, or delivery of property for more than one motor carrier or any other person or entity.”

The ICOC has a term of 90 days, after which it must be renewed by the parties. Within that term, an Owner-Operator can terminate the ICOC for any reason by providing 30 days’ notice to STG. STG, on the other hand, may terminate the ICOC only for a material breach.

Schedule B of the ICOC, which is unique to each terminal, provides a schedule of rates being offered for specific types of work and expressly contemplates that Owner-Operators may engage in pay negotiations with STG. This is not mere verbiage, because Owner-Operators do in fact negotiate premium pay above the rates offered in Schedule B, which is reviewed and

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12 See STG Exh. 13 at 3, 4, Schedule N.
13 STG Exh. 13 at Section 4(C).
15 STG Exh. 13 at Section 12.
16 Darling: 100:14-24. STG Exh. 13 at Section 3.
17 STG Exh. 13 at Section 21(A).
18 STG Exh. 13 at Section 21(B).
19 STG Exhs. 6, 7 at Schedule B, Section 2: “Changes In Fees.”
reissued every 90 days. In fact, since 2018, STG’s intermodal operations have become even more nimble in making adjustments to Owner-Operator compensation on Schedule B and the payment of negotiated premiums above schedule B. Particularly in those situations where market conditions and the demand for trucking services are high, STG must negotiate with Owner-Operators to carry available loads, and the price they will charge to do so.

Owner-Operators do not receive an hourly rate and are not guaranteed any revenue from STG. Instead, Owner-Operators are paid based on the acceptance and performance of any assignment. Owner-Operators also indemnify STG for various losses or damages that may arise during the performance of their services.

While STG can prevent an Owner-Operator from utilizing a specific driver to carry loads for STG’s customers, STG has no control over whether the Owner-Operator hires a driver to carry loads for a different motor carrier. As the customer of the Owner-Operators, STG has the ability without affecting employment status to insist that the Owner-Operator not use a particular driver who disrupts and interferes with the safety of STG’s dispatching operation.

2. **STG Contracts Only With Owner-Operators That Possess Specialized Skills and Experience**

To provide services to STG and its customers, Owner-Operators and second-seat drivers must have at least 12 months of verifiable tractor-trailer driving experience. Federal regulations also require that they be proficient in areas such as “safe operations regulations,” “CMV safety...
control systems,” “backing,” “extreme driving conditions,” “hazard perceptions,” “emergency maneuvers,” “skid control and recovery,” “relationship of cargo to vehicle control,” “vehicle inspections,” “hazardous materials,” “fatigue and awareness,” “air brakes,” and “combination vehicles.’’ 49 C.F.R. §§ 383.111, 383.113. Beyond these basic requirements, some Owner-Operators and second-seat drivers possess special licensing endorsements, which require additional testing and enable them to perform specialized deliveries, which, if they choose to carry those loads, generate higher revenue for the Owner-Operator.29 Owner-Operators and second-seat drivers confirmed that driving a tractor for STG requires specialized skill.30

3. Owner-Operators Make Substantial Capital Investments In Their Businesses

Owner-Operators are referred to as “Owner-Operators” because they own the tractor that they operate. 49 C.F.R. § 376.2. The tractor itself represents a massive capital investment, and the decision of what tractor to buy, how to buy or lease it, or whether to buy a used or new tractor is entirely up to the Owner-Operator.31 STG does not in any way assist with the purchase or financing of the tractors.32

Owner-Operators in fact obtain the trucks from a variety of sources and have complete discretion over color, make, and model.33 The Owner-Operators control the appearance of their truck, except only for the federal regulatory requirement that the Department of Transportation Authority of the company they are serving be on the truck.

28 Freeman: 1548:5-20.
29 Freeman: 308:6-19; Alvarez: 1161:3-18.
31 Limuaco: 622:6-12.
32 STG Exh. 13 at Sections 1(A), 4(A)(1); Limuaco: 622:6-14.
Protecting their investment requires the Owner-Operators to responsibly maintain their tractors. Where, how, and when they do so is entirely their decision. Failure to make good maintenance decisions can directly affect an Owner-Operator’s profitability.

4. **Owner-Operators Take Advantage of Entrepreneurial Opportunities to Expand Their Businesses**

Ultimately, Owner-Operators are responsible for putting their trucks to profitable use, which can have life-changing effects. They do so in a number of ways beyond maximizing the productive use of their tractor. Those that have the financial capacity and appetite for risk expand their businesses through the purchase of additional tractors and the hiring of additional drivers. The record shows that numerous Owner-Operators in Commerce and especially in San Diego own multiple trucks and hired a half dozen or more drivers to operate them.

Whether they own one or multiple tractors, Owner-Operators often hire “second-seat” drivers to operate them. This maximizes the Owner-Operators’ productive use of their investment by extending the operating period of the tractor. For example, Omar Saib and Ali Aljibory are a father-son team that operate eight trucks with multiple second-seat drivers out of the San Diego terminal. Recruiting, hiring, and paying second-seat drivers exclusively is the responsibility of the Owner-Operator. Owner-Operators set the terms of engagement for second-seat drivers and determine what hours they will work. Owner-Operators must also compete for the services of second-seat drivers. While STG reviews qualifications of second-

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34 STG Exh. 13 at Section 6.
35 Avalos: 143:5-17, 144:2-11.
38 Aldrete: 1202:2-6, 1270:3-21, 1578:6-13; Vasquez: 1308:11-13, 18-23; Ramirez: 1409:6-8; STG Exhs. 14, 15.
41 STG Exh. 13 at Section 11.
seat drivers, this function is a legally required ministerial act to insure second-seat drivers are qualified operators of a commercial motor-vehicle. See 49 C.F.R. § 391.21.

Owner-Operators choose from the more than one-thousand competitors of STG to which they will offer their services. Many Owner-Operators have contracted to provide services for many different companies. Owner-Operators also operate some of their trucks for STG and others for different motor carriers, or get their own authority and haul for their own customers.

5. **Owner-Operators Control And Operate Their Businesses**

The evidence demonstrates that Owner-Operators have almost complete discretion over when, how, and where they will perform any work. They decide for themselves (and the second seaters they hire) if and when they will work; no minimum amount of days is required except that a tractor of a particular Owner-Operator must move under the contract at least once every 35 days. Vacation decisions are made by Owner-Operators and they have no obligation to even inform STG. Mr. Alvarez, for example, discussed his ability to take up to six weeks off from work. Mr. Avalos, too, described the freedom to take vacation when he chooses.

Since STG typically has loads available 24 hours a day, no limitation exists on what hours Owner-Operators and second-seat drivers can work except for those limits imposed by the FMCSA regulations that apply to all commercial drivers. STG does not schedule start times, end times, or shifts. Owner-Operators unilaterally decide when to drive based entirely on their

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42 West: 801:2-10.
43 STG Exh. 13 at Schedule T.
47 Alvarez: 1162:19-24
preferences. For example, some Owner-Operators and their drivers only drive once a week or a couple of times a month. Another Owner-Operator only drives once a week because his wife won’t let him work more than that.

Owner-Operators even decide what driving work they will perform. They are not assigned to any specific deliveries or regions. STG frequently provides Owner-Operators and second-seat drivers with multiple delivery options from which they can choose or, over time, tailors the offers made to Owner-Operators and second-seat drivers based on established preferences Owner-Operators communicate to dispatchers. In fact, Owner-Operators are free to accept or reject loads “sitting on a couch at home.”

Evidence also shows that Owner-Operators and second-seat drivers have the freedom to reject loads offered to them by STG. They can reject loads not to their liking, including, for example, for customers of STG that they choose not to serve and routes they prefer not to drive, loads that they do not believe are financially worthwhile, and loads that require going over scales or involve other delays. In fact, the right to turn down work is an express term of the ICOA.

There is no penalty to Owner-Operators or second-seat drivers for rejecting loads. They are offered other available loads, which they can similarly accept or reject.

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50 Dominguez: 1485:4-10; Alvarez: 1160:22-25; Aldrete: 1282:18-1283:10; STG Exh. 133.
52 Freeman: 257:15-18.
54 Limuaco: 565:2-5.
56 STG Exh. 133.
57 STG Exh. 13 at Section 4(D) (No Forced Dispatch or Volume Commitments).
Once accepted, an Owner-Operator or second-seat driver has control of the load and the manner of delivery.\(^{59}\) STG merely provides the Owner-Operator with delivery information and the customer's timeframe.\(^{60}\) Customer delivery windows differ—some have set times, while others have 24-hour or multiple-day windows.\(^{61}\) Whatever the customer requirement, Owner-Operators determine the best way to timely complete the delivery.\(^{62}\) Thus, Owner-Operators may make multiple deliveries in what they determine is the most efficient and profitable manner.\(^{63}\) While performing this work, Owner-Operators and second-seat drivers are completely free to make meal and rest stops and to choose the route they take to their destination.\(^{64}\)

In the performance of their deliveries, Owner-Operators function with independence from STG.\(^{65}\) That is a necessary characteristic of delivery work that is performed away from STG’s terminal. Interactions between Owner-Operators or their drivers and STG’s terminal staff are limited to sharing the basic information needed to complete the load, such as where to pick up the load and where to deliver it.\(^{66}\) STG uses its Rail Optimizer electronic platform and the Intermodal Fleet application to communicate this information to Owner-Operators and second-seat drivers and does not require them to start from or return to terminals for dispatches.\(^{67}\)

Significantly, the Owner-Operators and second-seat drivers, unlike STG employees, are not subject to STG’s employee rules and policies.\(^{68}\) Nor are they subject to any performance reviews, discipline, evaluations, audits, or ride-alongs. The limited oversight STG does perform

\(^{59}\) STG Exh. 13 at Section 10(A).
\(^{60}\) Avalos: 1026:3-10.
\(^{61}\) Limuaco: 578:6-17; STG Exh. 135.
\(^{62}\) Freeman: 341:5-11.
\(^{63}\) Freeman: 300:11-301:13.
\(^{64}\) STG Exh. 13 at Sections 4(A)(1) and 11(A).
\(^{65}\) Freeman: 341:5-11.
\(^{66}\) Limuaco: 13-21; Dominguez: 1468:8-11.
\(^{67}\) Darling: 109:1-10; Limuaco 565:2-12.
\(^{68}\) See Freeman: 376:4-9.
is safety-related as required by law, such as removal from service for certain conditions.\textsuperscript{69}

6. **Owner-Operators Obtain Their Own Operating Authority or Establish a Corporate Identity Under Which to Do Business**

Owner-Operators have the option to incorporate or form a limited liability company, and many do.\textsuperscript{70} Indeed, 32 Commerce Owner-Operators and 48 San Diego Owner-Operators formed business entities.\textsuperscript{71} Owner-Operators can also obtain their own Department of Transportation Operating Authority, which they can use when they are not hauling for STG.\textsuperscript{72} Fifteen Commerce and 19 San Diego Owner-Operators have their own operating authority.\textsuperscript{73}

7. **STG Compensates Owner-Operators as Independent Contractors**

Owner-Operators do not receive an hourly rate and are not guaranteed any revenue from STG.\textsuperscript{74} Rather, on a weekly basis, STG compensates Owner-Operators pursuant to the ICOC and its Schedule B based on the type of delivery, the distance traveled in miles, and any premiums the Owner-Operators negotiate for transporting a particular load.\textsuperscript{75}

While the ICOC includes the basic terms of compensation, Owner-Operators negotiate changes to their compensation.\textsuperscript{76} In many cases involving deliveries that cannot be handled in the normal course, on-the-spot negotiations occur which lead to higher rates for these deliveries.\textsuperscript{77} These "unplanned premiums," which are paid above the rates offered in Schedule B are a regular occurrence.\textsuperscript{78} Ultimately, the unplanned premium amounts paid on any given route or "lane" are

\textsuperscript{69} Dominguez: 1502:15-1503:1; Freeman: 539:10-24.
\textsuperscript{71} STG Exhs. 52-83, 84-131.
\textsuperscript{72} Vasquez: 1338:6-9.
\textsuperscript{73} STG Exhs. 17-31; Exhs. 33-51.
\textsuperscript{74} STG Exh. 13 Section 12.
\textsuperscript{75} STG Exh. 13 at Section 2; STG Exhs. 6, 7.
\textsuperscript{76} STG Exhs. 6, 7 at Section 2: "Changes In Fees."
\textsuperscript{77} Naemo: 816:4 - 817:1.
considered and factored into the new Schedule B rates that are offered when the subsequent iteration of Schedule B is introduced at each terminal.\textsuperscript{79}

Other than to ensure compliance with federal regulations, Owner-Operators’ and second-seat drivers’ hours are not tracked.\textsuperscript{80} Rather, they are paid weekly settlements based on proof-of-delivery documents.\textsuperscript{81} Owner-Operators also are paid flat fees for tasks such as tying down loads with chains, blanketing loads, making extra stops, making a chassis flip, making a chassis split, or cleaning out containers.\textsuperscript{82} Owner-Operators are paid for waiting time at a rate in 15-minute increments if they wait at a customer site for more than one hour to make a delivery.\textsuperscript{83}

Consistent with their work and payment as independent contractors, STG does not provide Owner-Operators with any benefits or insurance, nor does STG withhold any taxes from their payments.\textsuperscript{84} While STG will make payments on behalf of Owner-Operators for some expenses, those payments are made only upon request of the Owner-Operators and funded entirely by them through deductions.\textsuperscript{85}

As a result of all these variables in compensation, and the ability to manage expenses, compensation among Owner-Operators is directly linked to their entrepreneurial efforts. The highest-earning Owner-Operator in 2021 earned over $680,000, and others earned similarly considerable sums.\textsuperscript{86} On the other end of the spectrum, some Owner-Operators earn less,\textsuperscript{87} and in between, there are numerous Owner-Operators who made over $100,000 in a given year.\textsuperscript{88} This

\textsuperscript{79} Schedule B rate increases are determined at the individual terminal level. STG Exh. 138.
\textsuperscript{80} Freeman: 482:13-21.
\textsuperscript{81} Pet. Exhs. 224, 268.
\textsuperscript{82} STG Exhs. 6, 7.
\textsuperscript{83} Freeman: 342:21 - 343:5.
\textsuperscript{84} STG Exh. 13 at Schedule N(2).
\textsuperscript{85} STG Exh. 13 at Schedule N(2), N(4).
\textsuperscript{87} STG Exh. 137.
\textsuperscript{88} STG Exh. 137; Ramirez: 1413:14-1414:7.
is largely a function of how many loads an Owner-Operator chooses to have their trucks and drivers carry.\textsuperscript{89} One example worth noting is that of Mr. Alvarez, who works around his school schedule and worked his way up from being a second-seat driver to being an Owner-Operator.\textsuperscript{90}

D. Second-Seat Drivers Do Not Have A Contractual Or Employment Relationship With STG

STG has contractual agreements only with Owner-Operators. Second-seat drivers do not and have never executed ICOCs with STG.\textsuperscript{91} These drivers sign only Schedule K to the Owner-Operators’ ICOC with STG, confirming their contractor status.\textsuperscript{92} STG does not dictate their hours or pay nor do these drivers receive any compensation from STG.\textsuperscript{93} In fact, only Owner-Operators receive a 1099 tax form from STG; second-seat drivers do not.\textsuperscript{94}

The evidence shows that Owner-Operators enter into independent-contractor agreements with their second-seat drivers and that the Owner-Operators are the ones who provide their drivers with 1099 tax forms.\textsuperscript{95} Owner-Operators set the compensation for these drivers.\textsuperscript{96} Second-seat drivers also exercise the ability to negotiate pay rates from Owner-Operators.\textsuperscript{97} Indeed, despite perceptions among certain second-seat drivers that there is a set level of pay for second-seat drivers, there is a range in the second-seat drivers’ payment terms, none of which is controlled by, or even known to, STG.\textsuperscript{98}

\textsuperscript{89} Alvarez: 1161:25-1162:12.
\textsuperscript{91} STG Exh. 13; Limuaco: 620:11-20.
\textsuperscript{92} STG Exh. 13 at Schedule K; Freeman: 402:25-403:3.
\textsuperscript{94} Alvarez: 1147:15-25; Alvarez: 1151:4-6.
\textsuperscript{96} Dominguez: 1509:5-9; Ramirez: 1368:11-17.
\textsuperscript{97} Dominguez: 1499:20-23; Banales: 1536:5-20.
\textsuperscript{98} Banales: 1536:5-20.
E. The Operations in Commerce And San Diego Are Separate and Distinct

STG’s San Diego and Commerce locations, which are 130 miles apart, are sufficiently distinct that a multi-facility unit is inappropriate. Beyond mere geographic separation, the facilities are managed and operated separately, including having different hours of operation, different support staff, and separate dispatch, recruiting, and onboarding functions. There is no shared involvement with the day-to-day activities of the Owner-Operators or their second-seat drivers at the two facilities. San Diego and Commerce vary greatly in how they operate, including the number of hard and open appointments, average haul length, premiums paid above Schedule B, and compensation for wait time and scale stops. Each site has a Terminal Leader with full operational oversight for their facility and responsibility over separate profit and loss statements. Further oversight of terminal operations in San Diego and Commerce occurs only at the level of the Regional Vice President of STG intermodal operations. The same Regional Vice President also has operational oversight over other West Coast intermodal facilities. In addition, there is little to no interchange between Owner-Operators servicing San Diego and Commerce. San Diego serves mostly the just-in-time inventory of a single automotive industry customer in Mexico, while Commerce serves a varied customer base in the greater Los Angeles area.
V. APPLICABLE LEGAL STANDARD AND ANALYSIS

A. The Regional Director Erred on the Facts and the Law in Concluding That Owner-Operators and Second-Seat Drivers Are Not Independent Contractors But Are Employees

1. Appropriate Standard

The Board must apply the common law agency test to determine whether a worker is an employee or an independent contractor. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). This inquiry involves the application of the non-exhaustive common-law factors enumerated in the Restatement (Second) of Agency §220 a-j (1958).

Over the years, the Board’s application of these common law factors has resulted in substantial clarification—and, often, rejection of the Board’s approach—by the courts of appeals, especially in D.C. Circuit. Thus, in *FedEx I*, the D.C. Circuit disagreed with the Board’s analysis and application of the common law factors, and the court emphasized that the inquiry must focus substantially on the entrepreneurial opportunity available to service providers, including their potential for profit or loss, rather than focusing indiscriminately on the extent of “control.” *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (“while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism”).

Subsequently, the Board in *FedEx II* discounted the importance of “entrepreneurial opportunity” by finding that it represented 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.” *FedEx Home Delivery*, 361 NLRB 610, 620 (2014). The D.C.

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107 Section 2(3) of the National Labor Relations Act provides that the term “employee” shall not include “any individual having the status of an independent contractor.” 29 U.S.C. § 152(3).
Circuit rejected the Board’s position a second time in *FedEx II*, where the court once again held that the Board did not properly apply the common law test, and consistent with *United Insurance Company of America*, the D.C. Circuit reiterated that the Board had “no special administrative expertise” warranting deference regarding these issues. *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127-28 (D.C. Cir. 2017) (citation omitted).

The Board then issued *SuperShuttle DFW, Inc.*, which—consistent with *FedEx I* and *FedEx II*—upheld the appropriateness of resolving independent contractor status resolved by evaluating common-law factors “through the prism of entrepreneurial opportunity. . . .” 367 NLRB No. 75, slip op. at 9 (2019). The *SuperShuttle* Board found that “entrepreneurial opportunity is not an independent common-law factor,” but rather “a principle by which to evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain.” *Id.* at 9. The Board has since issued three other decisions on how the common-law factors need to be reviewed through the prism of entrepreneurial opportunity. *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at *1* (2019); *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. *1* (2020); *Centerfold Club*, 370 NLRB No. 2, slip op. *1* (2020). The analysis focuses on discretion, not action. See *SuperShuttle*, 367 NLRB No. 75 at *12-13; *Intermodal Bridge Transport*, 369 NLRB No. 37 at *2; Velox Express, Inc.*, 368 NLRB No. 61 at *3-4.

2. **Classifying Owner-Operators As Independent Contractors Is A Practical Result Of STG’s Intermodal Transportation Operations**

STG’s intermodal transportation operations move customer cargo using two modes of transportation: railway and tractor trailers. Intermodal transport is an alternative to faster “over-the-road” long-haul trucking; slower to deliver freight provides a less-expensive option.\(^\text{108}\)

Tractor trailers transport cargo a short distance by road, typically from a port or warehouse to a

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railyard, where the cargo is loaded onto a railcar and moved via railway near to its final customer destination. To cover this initial truck-based portion of the journey, STG engages the services of Owner-Operators, whether individuals or corporate entities.

The Regional Director gave no weight to the relationship between (1) Owner-Operators and second-seat drivers and (2) STG’s customers. In the intermodal business, Owner-Operators provide only a limited portion of the overall transportation services needed to move STG’s customers’ freight. The entire intermodal move contains a long-haul rail move that is bookended by two local short-haul truck moves. Because Owner-Operators are providing services that constitute a small piece of a much larger move, the nature of their business prevents them from negotiating with STG’s customers. It is not possible for Owner-Operators to negotiate directly with the cargo owners in the intermodal business because they do not have contracts with railroad providers as STG does, nor do they have the ability to organize trucking services thousands of miles away at the other end of the move. Thus, the Owner-Operators are bidding for a small piece of a bigger move that is paid separately from what the customer pays STG.

The Regional Director also overlooked that Owner-Operators willingly choose to partner with STG over numerous competitors. This is because STG’s model recognizes and capitalizes on the opportunity of establishing a mutually-beneficial arrangement between Owner-Operators and a company that commands access to a large customer base. In this regard, companies like STG are the Owner-Operators’ customers, and each operates a different business. A large, highly-skilled, pre-qualified pool of independent Owner-Operators in the trucking business

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109 As discussed above, there is another truck move at the other end of the overall move that is not dispatched out of either the Commerce or San Diego terminals.
111 Tibbetts: 43:9-46:1; STG Exh. 3.
112 Tibbetts: 43:9-46:1; STG Exh. 3.
already exists in the marketplace that does not have access to the volume of available work that
STG’s logistics business makes available.\textsuperscript{113} Once these business relationships are properly
understood, it is readily apparent that the Owner-Operators have extensive interaction with their
own customers: STG and similar companies. Thus, they are not operating in the same business,
contrary to the Regional Director’s erroneous conclusion.

Any focus on contact with STG’s customers, moreover, is inconsistent with Board law.
\textit{Dial-a-Mattress Operating Corp.}, 326 NLRB 884, 893 (1998); \textit{The Arizona Republic}, 349
NLRB 1040, 1043 (2007). The absence of contact by Owner-Operators and second-seat drivers
with the customers of STG does not carry significant weight.

3. \textbf{Owner-Operators And Second-Seat Drivers Are Not Employees}

Whether viewed under the Board standard applied in \textit{FedEx II} or the standards applied by
the D.C. Circuit in \textit{FedEx I} and \textit{FedEx II} and by the Board in \textit{SuperShuttle}, it is clear that
Owner-Operators and second-seat drivers providing services at STG’s Commerce and San Diego
facilities are independent contractors and, thus, fall outside the Board’s jurisdiction under the
Act. The second-seat drivers are even further removed from any purported employment
relationship with STG. Owner-Operators elect to hire them and set their compensation and other
terms and conditions of work, including when and if at all to work for STG.\textsuperscript{114}

The Regional Director’s findings to the contrary resulted only by drawing erroneous
factual conclusions and ignoring existing Board law. For instance, with regard to “whether the
worker and business are in a distinct business,” the Regional Director found that STG and
Owner-Operators and second-seat drivers were in the same business: so-called delivery

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{113} Tibbetts: 52:21-53:23.
\item \textsuperscript{114} Vasquez: 1308:11-13, 18-23; Ramirez: 1368:11-17; Domínguez: 1496:3-15.
\end{itemize}
\end{footnotesize}
This vague formulation is an unjustifiable misstatement of STG’s business model in light of the more precise description in the record. Owner-Operators and second-seat drivers are not at the “heart” of STG’s business as the Regional Director claims. The record is clear that they represent only a tiny piece of fulfilling orders from customers and that when they do not take on the job, STG uses core carriers when necessary to complete the moves; there is no similar substitute for the moves provided by the railroads. In reality, they are in distinct businesses: Owner-Operators are in the commercial freight short-hauling business, while STG is in the intermodal transportation logistics business.\(^{116}\)

4. **The Owner-Operators and Second-Seat Drivers Exercise Significant Control Over Their Work**

Owner-Operators and second-seat drivers maintain significant control over whether, when, where, and how long to work. *See FedEx II*, 361 NLRB at 619. Owner-Operators elect to accept or reject whichever jobs they choose without fear of repercussions, and maintain total autonomy over what days, what specific hours, and what hours they will work (if any).\(^{117}\) STG does not assign Owner-Operators shifts and it does not define the geographic region in which they work.\(^{118}\) Unlike in *FedEx*, STG does not direct the work of Owner-Operators, and STG does not prevent Owner-Operators from engaging in independent business. For example, Owner-Operators decide whether to hire second-seat drivers.\(^{119}\) They also provide services to STG’s direct competitors. *Id.* at 627. Similar to the franchisees in *SuperShuttle*, Owner-Operators have

\(^{115}\) (DDE at 45.)

\(^{116}\) Further confusing the terminology and the issues, the Regional Director claims the Owner-Operators and second-seat drivers are involved in “last mile delivery.” (DDE at 3.) This is not the case. Last mile delivery refers to the very last step of the delivery process when a parcel is moved from a transportation hub to its final destination—which, usually, is a personal residence or retail store.

\(^{117}\) Drivers are able, and do, tell STG’s dispatch when they want to work, and what types of loads they want to take. STG Exh. 133; Naeemo: 857:21-858:1; Samayoa Rosales: 1430:19-22; Avalos: 1049:5-7.


“total control over their schedule, they work as much as they choose, when they choose[,]” and have the geographic freedom to choose where they work. SuperShuttle, 367 NLRB No. 75, at 12. STG maintains no control over the relationship between Owner-Operators and second-seat drivers, including their pay and hours.\textsuperscript{120}

Despite clear testimony, record evidence, and binding Board precedent, the Regional Director engaged in various acrobatics to find employee status erroneously. For instance, the Regional Director found that STG “directed and supervised” Owner-Operators’ work while at the same time, recognizing and acknowledging the basic facts of the actual relationship, including how Owner-Operators decide if, when, and what specific “moves” they elect to accept. The Decision’s distorted version of the facts disproportionately focused on insignificant appendages of Owner-Operators’ contractual relationship with STG, such as a lack of direct customer contact (a constituent of the intermodal model), “technology monitoring” (used merely to deliver reliable results to customers), and mandated reporting of issues/accidents (required for regulatory and insurance purposes), none of which outweigh the control Owner-Operators and their second-seat drivers possess over all of the material terms and conditions of their business. While the Decision suggests that STG’s enforcement of its minimally-controlling practices indicates an employment relationship,\textsuperscript{121} such minimal oversight for safety and quality assurance is the mark of a well-run business serving the public interest, and not one that necessarily has employees.

\textsuperscript{120} Limuaco: 570:1-10; Zouri: 894:16-19; Aldrete: 1275:19-1276:18; Ramirez: 1368:11-17.
\textsuperscript{121} (DDE at 40.)
a. **Owner-Operators Have Total Autonomy To Decide Whether, When, Where, And How Long They Work**

STG does not dictate the work schedule of Owner-Operators or second-seat drivers. STG does not require them to work a set number of hours. STG does not control when they choose to take days off from working, or how many days off they take.\(^{122}\) Indeed, Owner-Operators never need to drive at all and can have second-seat drivers drive for them.\(^{123}\) Unlike in *Intermodal Bridge Transport*, moreover, there are no “shifts”. STG does not schedule start times, end times, or any required hours of work for Owner-Operators or their drivers, nor does STG require that those drivers report to the Commerce or San Diego terminals to accept or reject work.\(^{124}\) Indeed, while some Owner-Operators elect to park their trucks at the Commerce terminal because STG offers safe and free parking there, Owner-Operators who do not chose to avail themselves of this option can go weeks or even months without ever appearing at the terminal.\(^{125}\) All of these facts are clear indicator of independent contractor status under *SuperShuttle*, 367 NLRB No. 75 at *12.*

Owner-Operators are not assigned specific delivery regions. Rather, they elect and decide whether and where they want to work based on their geographic preferences or any work or life factors of their choosing.\(^{126}\) Like in *SuperShuttle*, the Owner-Operators have “total control over their schedule, they work as much as they choose, when they choose[,]” and have the geographic freedom to choose where they work. *SuperShuttle*, 367 NLRB No. 75 at *12.*

Moreover, Owner-Operators are free to provide services to other companies, including direct competitors of STG, or they can operate independently if they obtain their own DOT

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\(^{123}\) Limuaco: 542:20-543:3.


\(^{125}\) Freeman: 261:9-21.

Operating Authority. San Diego Owner-Operator Zouri operates multiple tractors for both STG and a different carrier.\footnote{Zouri is not an employee of STG. 34 Owner-Operators in Commerce and San Diego have their own Operating Authority and can elect to haul freight themselves or for STG. \textit{FedEx II}, 361 NLRB at 637 ("the ability to work for other companies" governs); \textit{FedEx I}, 563 F.3d at 497-499 (opportunity, and not practice, is controlling); see also \textit{The Arizona Republic}, 349 NLRB at 1045.}

b. Owner-Operators Exercise Autonomy Over the Work They Accept From STG

Contrary to the Regional Director’s erroneous Decision and the record evidence, STG permits Owner-Operators to accept or reject any offered loads at will without penalty. As established in the ICOC and borne out in actual daily experience plainly reflected in the record testimony, Owner-Operators have broad discretion in determining whether to accept an assignment. This allows Owner-Operators to weigh the cost of a particular trip in terms of distance, weight of the load (which impacts fuel costs), and determine if a particular customer or location (such as at the Ports) has a reputation for wasting the Owner-Operator’s time, all against the compensation received.\footnote{Here, Owner-Operators are more akin to the franchisees in \textit{SuperShuttle}, not the drivers in \textit{Velox Express} and \textit{Intermodal Bridge Transport} who had a limited ability to reject work. This ability to accept or reject loads is so absolute, that if Owner-Operators elect not to take a load, STG either has to reschedule the load or contract with a core carrier to move the freight.} Here, Owner-Operators are more akin to the franchisees in \textit{SuperShuttle}, not the drivers in \textit{Velox Express} and \textit{Intermodal Bridge Transport} who had a limited ability to reject work. This ability to accept or reject loads is so absolute, that if Owner-Operators elect not to take a load, STG either has to reschedule the load or contract with a core carrier to move the freight.\footnote{Freeman: 258:10-259:1, 327:6-11; West: 793:13-20; Zouri: 877:18-22.}

\footnote{Freeman: 258:10-259:1, 327:6-11; West: 793:13-20; Zouri: 877:18-22.}
\footnote{Freeman: 524:2-7, 523:16-23; Limuaco: 567:21-568:3.}
The Regional Director stakes much of his Decision on the fact that Owner-Operators who reject a dispatched load may have to wait for a new assignment, but he cites to no cases that say such a factor supports employee rather than independent contractors status. That the Owner-Operator is not automatically entitled to be offered a new load to accept or reject demonstrates the opposite. The Owner-Operator or second-seat driver does not need to wait at all; STG does not dictate their work schedule. When the Owner-Operator and second-seat drivers are offered a new load, often quickly, they will once again possess complete control of deciding whether to accept the dispatched load or not, or seek other opportunities. Furthermore, it was clear error for the Regional Director to focus on the costs and risks of certain refusals (phrased in terms of discretionary hypotheticals) rather than on the factual record evidence that Owner-Operators and second-seat drivers have unfettered ability and discretion to refuse jobs dispatched by STG.\textsuperscript{130} This right of refusal is not only enshrined in the ICOC, but also demonstrated based on drivers’ actual experiences in practice.\textsuperscript{131}

The Regional Director’s erroneous focus on the delay in reassignment attendant to drivers who reject loads is actually overshadowed by his claim that STG withholds “bobtail” pay after loads are rejected.\textsuperscript{132} These are instances that the Regional Director cherry-picked only for San Diego drivers working out of Los Angeles who wanted a job taking them towards home. Rather than employer-like control by STG, the instances where certain drivers had to pay for and stay at hotels after they ran out of available service hours and were not offered bobtail pay because their


\textsuperscript{131} (Id.)

\textsuperscript{132} (DDE at 21-22.)
lack of hours prevented them from accepting the trip offered, such events demonstrate the entrepreneurial know-how required to efficiently operate the truck.\textsuperscript{133}

As ignored by the Regional Director, the manner of selection or rejection of loads reflects freedom, flexibility, and entrepreneurial opportunity for Owner-Operators. Because Owner-Operators can elect or reject loads at will, the record testimony demonstrated how important it was for the dispatchers working for STG to learn an Owner-Operator’s preferences.\textsuperscript{134} Dispatchers first acquired this knowledge during the introductions of new Owner-Operators and second-seat drivers to the dispatchers who try to learn an Owner-Operator or second-seat driver’s load preferences, what their needs are, and their preferred schedules, as well as any capabilities or licenses for handling special work outside of just local dispatch.\textsuperscript{135} This makes operations more effective and efficient for both parties.

Dispatcher knowledge about Owner-Operator preferences is critical as the dispatchers cannot require Owner-Operators to take loads. Thus, dispatchers use this information when they have to dispatch undesirable loads.\textsuperscript{136} If a dispatcher cannot get an Owner-Operator to take a particular load, he can bundle the move together with other sufficiently attractive ones to get the Owner-Operator to accept the package of moves.\textsuperscript{137} Whereas an incentive payment might encourage the Owner-Operator to take a load, bundling involves creating a package of multiple moves that an Owner-Operator could accept if it might make an undesirable move worthwhile.\textsuperscript{138}

Technological advancements since 2018 have also facilitated the Owner-Operators’ ability to accept or reject loads. Between 2018 and 2019, STG updated its transportation

\textsuperscript{133} If that Owner-Operator partnered with a second-seat driver, they may have been able to accept the job since the extra driver may have had available service hours without needing the required rest.
\textsuperscript{134} Limuaco: 703:4-8.
\textsuperscript{136} Freeman: 228:1-17.
\textsuperscript{137} Freeman: 309:19-310:4.
\textsuperscript{138} Id.
management system into what is known as Rail Optimizer. Part of this update included the
development of a mobile application, Intermodal Fleet, which has fully digitized the dispatch
experience. With the Intermodal Fleet app, Owner-Operators and second-seat drivers can
receive dispatches without even going to an STG terminal—they can thus accept or reject loads
remotely, thereby enhancing flexibility and efficiency. Intermodal Fleet allows Owner-
Operators and second-seat drivers to see loads offered by STG dispatch on their mobile device,
including the origin and destination point for that load. Additionally, Intermodal Fleet will
display information regarding the remuneration for the load, including for the amount of fuels
charged, and any premiums offered. All Owner-Operators can see the remuneration amounts,
and so can second-seat drivers who have been authorized to do so by their Owner-Operator.
After completing a load, Owner-Operators and second-seat drivers can scan and submit the
necessary paperwork through the Intermodal Fleet application.

c. **Owner-Operators Have Extraordinary Opportunities to
Increase Their Compensation Yet Also Risk Losses**

The Regional Director erred in giving little weight to the clear record evidence
demonstrating the entrepreneurial risk for profit and loss borne by Owner-Operators. The range
of compensation and financial opportunities, the ability to foster efficient and productive use of
their tractors, the risk inherent in maintenance decisions and the ICOC’s indemnification in favor
of STG. These factors clearly favor independent contractor status. The Regional Director erred in
failing to provide proper weight to these critical factors.

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141 Darling: 114:3-22.
142 Freeman: 530:12-20.
143 Freeman: 530:12-20.
144 Darling: 172:7-14.
The record indisputably illustrates a wide range in compensation among Owner-Operators, which varies depending on many factors e.g., number of deliveries, miles driven, number of trucks leased or owned, and the number of second-seat drivers Owner-Operator utilizes to transport loads.\textsuperscript{145} Other compensation factors include the desire and willingness of Owner-Operators to drive during hours when there is less traffic, whether they were willing to take some of the less desirable loads, and whether they have special endorsements, which allows them to haul higher revenue loads.\textsuperscript{146}

Notably, however, Owner-Operators need not drive at all. In fact, STG contracts with a number of Owner-Operators who either do not drive at all, or do so only minimally so as to stay qualified while leaving the bulk of the driving duties to their second seat drivers.

By hiring second-seat drivers and operating multiple trucks, Owner-Operators are running and controlling their businesses. Using second-seat drivers means they can maximize their revenue per day, especially during the periods when an Owner-Operator is prohibited to work by federal regulation or just chooses not to work.\textsuperscript{147} Because of federal hours of service regulations, an individual Owner-Operator can drive for only a certain maximum amount of hours per day if they choose to drive at all. See generally 49 C.F.R. § 395.3. If Owner-Operators have multiple trucks and hire drivers to work for them, they are able to increase exponentially their compensation, as demonstrated by Mr. Zouri, whose company, American Eagle Transportation, earned over $680,000 from STG alone in 2021.\textsuperscript{148}

As established, the compensation among Owner-Operators is directly linked to their entrepreneurial efforts. It is no accident that the highest-earning Owner-Operator earned over

\textsuperscript{145} Alvarez: 1163:22-1164:3; Aldrete: 1201:4-10; Dominguez: 1485:4-10.
\textsuperscript{146} Freeman: 308:6-19; Avalos: 967:18-25; Alvarez: 1161:3-18.
\textsuperscript{147} Moore: 853:24-32.
\textsuperscript{148} STG Exh. 137.
$680,000. Others earned much less. In between those extremes are the majority of Owner-
Operators who made over $100,000 in 1099 compensation. See Argix Direct, Inc., 343 NLRB
1017, 1021 (2004). Unlike in Velox Express, 368 NLRB No. 61 at 3, where “drivers receive the
same amount of compensation no matter what they do,” the wide range in compensation alone
shows that Owner-Operators do have actual significant potential for economic gain (or,
conversely, risk of loss) through their own efforts and initiative.

Economic risk is borne exclusively by the Owner-Operators. Their potential for losses
due to the ICOC indemnity provisions weighs in favor of independent contractor status. In
SuperShuttle, the Board considered the franchisee’s requirement to indemnify and hold
SuperShuttle harmless “against any and all liability for all claims of any kind or nature arising in
any way out of or relating to the Franchisee’s and Operator’s actions or failure to act.” 367
NLRB No. 75 at 12. The indemnification weighs in favor of independent-contractor status
because “[s]uch indemnification greatly lessens SuperShuttle’s motivation to control a
franchisee’s actions, since SuperShuttle is not liable for a franchisee’s negligent or intentionally
harmful acts.” Id. Here as well, Owner-Operators indemnify STG for various losses or damages
that may arise during the performance of their services.

Owner-Operators are not guaranteed any compensation by STG. See Porter Drywall,
Inc., 362 NLRB 7 (2015). The experience of Roni Naemo underscores the Owner-Operators’
significant opportunity for profit and loss. Naemo had purchased his first tractor shortly before
the pandemic. When work dried up as a result, he was unable to maintain payments on his

149 Driver pay can vary greatly, from $680,350.91 to $542.01. STG Exh. 137.
151 STG Exh. 13 at Section 31(A), 1(C), 6(A)(7), 6(A)(8), 20.
152 Naemo: 806:14-19.
tractor and had to sell it.\textsuperscript{153} He is currently a second-seat driver, but he aspires to again become an Owner-Operator and to own multiple trucks so that he can make more money.\textsuperscript{154} What happened to Naemo is the epitome of economic risk, complete with the potential for new opportunity. The Regional Director erred in overlooking these facts in the record and failing to give them proper weight.

Conversely, generating revenue is within the exclusive control of Owner-Operators. They determine which and how many trucks to buy (and where to maintain and fuel them), the days and hours to operate, or even whether to operate at all.\textsuperscript{155} The Owner-Operators decide which loads to take and turn down, or which to delegate to second-seat drivers.\textsuperscript{156} The Owner-Operators decide whether to employ other drivers, and thus increase the time that their trucks are in productive use, rather than sitting idly.\textsuperscript{157} And the Owner-Operators set the compensation for second-seat drivers and determine when they will work.\textsuperscript{158} Owner-Operators possess full control of the entrepreneurial risk of profit and loss. The Regional Director clearly erred by ignoring these uncontroverted record facts demonstrating independent contractor status.

(i) **Owner-Operators Control Hiring Second-Seat Drivers To Perform The Contracted Services**

STG's contracts provide that Owner-Operators can provide one or more trucks and qualified drivers for them. This driver can, but is not required to be, the individual Owner-Operator, or the individual who owns the incorporated Owner-Operator.\textsuperscript{159} Many Owner-

\textsuperscript{153} *Id.*
\textsuperscript{154} Naemo: 808:23 - 809:17.
\textsuperscript{155} Alvarez: 1148:5-20, 1152:22-1153:10; Aldrete: 1213:4-8, 17-20; Samayoa Rosales: 1430:19-23.
\textsuperscript{156} Freeman: 254:14-256:8; West: 759:20-760:17; Banales: 1520:21-23.
\textsuperscript{158} Aldrete: 1271:6-1272:8; Ramirez: 1368:11-17; Dominguez: 1509:5-9.
\textsuperscript{159} STG Ex. 13 at Section I(A).
Operators elect to hire second-seat drivers to drive for them.\textsuperscript{160} This ability represents a significant entrepreneurial opportunity completely within the Owner-Operator’s control.

Moreover, Owner-Operators must compete for the services of qualified second-seat drivers, and even if an Owner-Operator hires another driver, there is no guarantee that the arrangement will be successful.\textsuperscript{161} Owner-Operators always face the potential of losing a second-seat driver to another Owner-Operator, and have to offer favorable compensation structures.\textsuperscript{162} Crucially, however, STG plays no role in setting second-seat driver compensation, nor does STG know what any particular driver is paid.\textsuperscript{163} For various reasons Owner-Operators often choose not to hire second-seat drivers or own multiple trucks.\textsuperscript{164} That is their decision. Similarly, STG has absolutely no control over whether the Owner-Operator hires a driver to carry loads for a different motor carrier.\textsuperscript{165}

Furthermore, to the minimal extent STG’s oversight is involved in review of qualifications of second-seat drivers, it is a function of federal mandates. Owner-operators and second-seat drivers simply cannot drive a commercial motor vehicle unless they complete and furnish to STG an application meeting certain requirements. 49 C.F.R. § 391.21. STG simply performs the ministerial act of ensuring that second-seat drivers complete these forms as required by federal and local regulations.\textsuperscript{166} Complying with regulations does not support employee status. \textit{FedEx I}, 563 F.3d at 501; see \textit{SuperShuttle}, 367 NLRB No. 75 at *13.

\textsuperscript{160} STG Exhs. 14, 15.
\textsuperscript{161} Dominguez: 1496:3-15; Banales: 1539:9-11.
\textsuperscript{162} Id.
\textsuperscript{164} Ramirez: 1409:6-8.
\textsuperscript{165} STG Exh. 13 at Section 4(C) ("Except as restricted by Applicable Law (including 49 CFR Part 376), nothing in this Contract will prohibit Contractor from performing transportation services for other carriers, brokers or directly for shippers.").
\textsuperscript{166} Freeman: 1572:14-19.
As the customer of Owner-Operators, STG has the ability, without affecting employment status, and sometimes an obligation, to insist that an Owner-Operator not use a specific driver who disrupts and interferes with STG’s dispatching operation.\textsuperscript{167} Cal. Gov’t Code § 12940(j)(1). Moreover, federal regulations require STG to examine the character of a driver, and STG’s refusal to allow an Owner-Operator to utilize a specific driver for STG’s customers is consistent with that mandate. 49 C.F.R. § 391.21; 49 C.F.R. § 391.67(b); 49 C.F.R. § 391.68(b). Thus, the regulations presume that STG will be able to decide whether a particular driver may perform services for it, regardless of whether a driver is an employee or an independent contractor. The Regional Director erred in not giving weight to these considerations.

(ii) **Owner-Operators Negotiate Their Compensation**

The Regional Director erred by overlooking the clear record evidence that Owner-Operators know that under certain circumstances they can negotiate for additional pay above and beyond what is set forth in Schedule B of the ICOC.\textsuperscript{168} The ICOC expressly contemplates such pay negotiations.\textsuperscript{169} The on-the-spot pricing negotiations are not a “ruse” and do not “result[] in across-the-board pay increases for the drivers regardless of whether or not they ‘negotiated’ with [the putative employer].” *Intermodal Bridge Transport*, 369 NLRB No. 37 at *2 n.6. STG regularly negotiates with Owner-Operators and second-seat drivers in order to find a someone willing to take on a less desirable or urgent delivery.\textsuperscript{170} Since Owner-Operators have broad discretion to accept (or reject) assignments, this increased bargaining power in on-the-spot

\textsuperscript{167} STG Exh. 13 at Section 5(A).
\textsuperscript{168} Pet. Exhs. 289, 290.
\textsuperscript{169} STG Exhs. 6, 7 (Schedule B at Section 2: “Changes In Fees”).
\textsuperscript{170} Freeman: 228:1-17.
pricing negotiations results in individual Owner-Operators and drivers earning extra pay per load of $50, $100, and even $500, depending on the situation.\textsuperscript{171}

The Regional Director acknowledged that spot pricing occurs, but then proceeded to diminish its significance by claiming that such negotiations are “controlled” by STG’s dispatcher.\textsuperscript{172} This conclusion is in error and contrary to the facts in the record. The evidence demonstrates that drivers can always reject loads, so the Regional Director’s conclusion that all of the control lies within the dispatcher in such a scenario plainly mischaracterizes the dynamics at issue and is, thus, clearly erroneous.\textsuperscript{173} The same holds true for “bundling,” a completely legitimate form of compensation negotiation.\textsuperscript{174}

Owner-Operators and second-seat drivers also have the opportunity to turn these on-the-spot negotiations into more permanent increases in compensation on Schedule B to the JOC, which is re-issued every 90 days.\textsuperscript{175} STG regularly analyzes the unplanned premiums paid on a given route or lane and considers whether to incorporate the increased compensation demands of Owner-Operators into the subsequent base offer for that lane on the next iteration of Schedule B.\textsuperscript{176} In Commerce, where the Schedule B rates are based on market rates set for drayage in Los Angeles, STG must endeavor to maintain competitive prices otherwise the drivers may choose to work for a different motor carrier.\textsuperscript{177} As established above, the significantly different compensation arrangements in San Diego and Commerce result from the inherent differences in STG’s varied operations in each location: while San Diego has a handful of routes and clients,

\begin{footnotesize}
\textsuperscript{171} STG Exhs. 11(a), 135; Alvarez: 1161:3-18.
\textsuperscript{172} (DDE at 43.)
\textsuperscript{173} (Id.)
\textsuperscript{174} Freeman: 309:19 - 310:4.
\textsuperscript{175} STG Exh. 13.
\textsuperscript{176} STG Exh. 138.
\end{footnotesize}
Commerce has a dynamic, competitive, multi-customer business. 178

5. Compliance with Federal Mandates is Not An Indicium of Control

The Regional Director also erred by failing to recognize that many of the supposed indicia of control on which his erroneous conclusion of employee status is based are requirements that STG is subject to as a federally-licensed motor carrier. STG is required to “demonstrate it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with: [multiple FMCSA violations].” 49 C.F.R. § 385.5; see also id. § 385.3. Federal regulations require STG to ensure Owner-Operators comply with legal regulations. 49 C.F.R. § 390.11. If STG does not comply with federal regulations, FMCSA may suspend or revoke STG’s motor carrier registration. Id. § 385.905(a). Crucially, the regulations permit STG to go beyond federal minimum safety requirements, including rigorous enforcement of its policies, and to advise, coach, onboard, and train drivers to which it has delegated its DOT motor carrier authority. 179

Accordingly, the following evidence (among many other examples cited in the record), consistent with STG meeting its government mandated safety obligations, has no bearing on the employee or independent contractor status of Owner-Operators and second-seat drivers: (1) setting a maximum CSA score of 75 points and informing Owner-Operators and second-seat drivers when they approach that threshold; 180 (2) maintaining driver information and driving history; 181 (3) tracking hours to ensure hours of service requirements are met; 182 (4) requiring

179 49 C.F.R. § 391.1(a), 49 CFR § 390.3(d).
180 Freeman: 473:2-24, 483:5-11. CSA points are determined based on violations found during truck inspections, and contrary to the assertion of some Union witnesses, are not calculated by STG itself. STG Exh. 140.
medical examination and drug tests; \(^{183}\) (5) requiring pre and post-trip inspections; \(^{184}\) (6) requiring drivers to maintain medical cards, registration, and insurance; \(^{185}\) (7) disqualifying drivers for speeding; \(^{186}\) and (8) requiring drivers have sufficient insurance. \(^{187}\) Each of these facts relates directly to safety, and regardless of the Owner-Operators’ status as independent contractors or employees, STG is required to ensure Owner-Operators comply with legal regulations and ensure adequate safety management controls are in place. \(^{188}\)

STG’s emphasis on safety does not support the Regional Director’s erroneous finding of employee status. \(^{189}\) Even assuming arguendo that STG’s focus on safety concerns impacting Owner-Operators goes beyond the stated minimum requirements, they are still consistent with the FMCSA’s regulatory scheme because the regulations establish only “the minimum qualifications for persons who drive commercial motor vehicles,” and nothing in the regulations “shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health.” 49 C.F.R. § 391.1(a), § 390.3(d); see also 49 C.F.R. § 390.5 (defining “employee” as “including an independent contractor while in the course of operating a commercial motor vehicle”).

Even if “advising” or “training” or any other practice related to safety may not be explicitly required by federal law, it all falls under the FMCSA regulatory regime’s focus on maintaining “adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements.” \(\text{Id} \) § 385.5. This also applies to any


\(^{184}\) Freeman: 1551:25-1556:2; 49 CFR §392.7, §396.11; §396.13.

\(^{185}\) Freeman: 1548:21-24; Aldrete: 1187:19-22; 49 CFR §387.7; 49 CFR §391.51(a)-(b).

\(^{186}\) 49 CFR §383.51, tbs. 1 & 2.

\(^{187}\) Freeman: 525:14-21; 49 CFR §387.3, §387.7 (a), §387.9 tbl. 1.


\(^{189}\) Freeman: 1572:14-19; Freeman: 536:2-537:15.
policy STG had about disqualifying drivers for speeding or if they committed a series of other driving history-related infractions that may have been more stringent than what federal law requires. Finally, just because a policy or course of action is not explicitly mandated, the FMCSA regulations are not to be construed to “prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health.” 49 C.F.R. § 390.3(d). Thus, it is clear that nothing in the regulations prevents STG from maintaining and enforcing any of the above safety policies. Indeed, it is contrary to public policy for the Regional Director to consider safety measures in evaluating independent contractor status because it may lead others to disregard safety in order to preserve their business models.

Illustrating the error in the Regional Director’s findings and conclusions, the Decision placed weight on STG’s request that Owner-Operators attend non-mandatory safety meetings, which risks reducing safety on the roads. Moreover, the Regional Director ignored the safety concerns underlying supposed examples of discipline when he incorrectly found that STG can and does discipline Owner-Operators, but then concedes that the record shows that STG merely communicated with the offending drivers, given them warnings or coaching, or has placed them on safety dispatch holds. The Regional Director failed to acknowledge that each of those actions were functions of federally-required safety assurances, not indicia of control. American roads and highways will be less safe if his reliance on safety measures in the Decision is left to stand.

6. The Owner-Operators Have Significant Entrepreneurial Opportunity

The Regional Director erred by ignoring that beyond maintaining nearly complete control over their own businesses, Owner-Operators have significant opportunity for economic gain (or risk of loss) through their own efforts and initiative.\textsuperscript{190} They run their businesses on their

\textsuperscript{190} Vasquez: 1300:20-24.
terms. Second-seat drivers are employees of Owner-Operators. Second-seat drivers compensations derives from the Owner-Operator for whom they perform services. See SuperShuttle, 367 NLRB No. 75, at 9 (2019). While STG determines the offered fee for a particular load, Owner-Operators have the ability to negotiate higher fees and, therefore, increase their opportunity for economic gain. Moreover, negotiations over those premium rates are factored into STG’s quarterly reassessments of the rate schedules. Precisely because Owner-Operators have significant “entrepreneurial opportunity” and “independence to pursue economic gain,” the Regional Director clearly erred in not finding Owner-Operators to be independent contractors and second-seat drivers to be their employees or independent contractors, not STG’s.

7. **Owner-Operators and Second-Seat Drivers Are All Skilled Workers**

As discussed above, Owner-Operators and second-seat drivers are specially licensed and experienced commercial drivers whom STG does not train. In fact, STG will not allow anyone to haul loads under its authority without at least 12 months of experience. It takes several months for them to obtain their licenses and to acquire the special skills needed to safely drive an 80,000 pound tractor and trailer combination.

Moreover, in order to move certain specialized loads, such as hazardous materials, Owner-Operators and second-seat drivers must also acquire the particular endorsements to be able to do such work. In fact, contrary to Regional Director’s assertion, “special trainings” (i.e. hazmat, etc.,) are not “done through STG for the furtherance of STG’s business,” but rather, like

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101 Vasquez: 1308:2-8, 1346:10-25.
102 Dominguez: 1496:3-15.
103 Banales: 1536:5-20.
104 Naemo: 816:4-817:1; STG Exh. 135; Pet. Exhs. 289, 290.
105 STG Exh. 138.
a higher education degree, are certifications an Owner-Operator or second-seat driver can take to
one of STG’s numerous competitors at any time if they so choose.199 Nothing about the ability of
Owner-Operators and second-seat drivers to enhance their credentials and increase their earning
capacity suggests an employment relationship. Instead, whether to get such certifications is
ultimately an economic decision that Owner-Operators must make for their small business to
enhance their economic opportunities. The Regional Director erred in concluding otherwise.

8. **Owner-Operators And STG Believed They Were Creating An Independent Contractor Relationship**

The Regional Director discounted and minimized the best evidence of the parties’
intentions concerning their relationship—the ICOC. Rather, he credited disputed testimony over
an undisputedly valid enforceable contract.200 The ICOC identifies the relationship between
Owner-Operators and STG as an independent contractor relationship and any allegation that
Owner-Operators did not understand the agreement should have been rejected. Independent
contractor agreements constitute strong evidence that the parties believed they were creating an
independent contractor relationship. See, e.g., *The Arizona Republic*, 349 NLRB at 1045; *St.
Joseph News-Press*, 345 NLRB 474, 479 (2005); *Dial-A-Mattress*, 326 NLRB at 891; *Central
Transport*, 299 NLRB 5, 13 (1990); *see also Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87,
93 (2013), as modified (Sept. 18, 2013) (courts “presume parties understood the agreements they
sign, and that the parties intended whatever the agreement objectively provides, whether or not
they subjectively did”). Indeed, many Owner-Operators understand the clear implication of the
agreement.201

200 (DDE at 45.)
There is no dispute that the ICOC labels the parties’ relationship as independent contractor relationship rather than an employee relationship.\textsuperscript{202} In \emph{SuperShuttle}, the Board also found that the provisions in the franchise agreement left “little doubt as to the intention of the parties to create an independent-contractor relationship between \emph{SuperShuttle} and its franchisees.” \emph{SuperShuttle}, 367 NLRB No. 75 at *14. Moreover, two other factors supported this conclusion: the company did not provide franchisees with any benefits, sick leave, vacation time, or holiday pay and it did not withhold taxes or other deductions from franchisees’ pay. \textit{Id.} Here, like in \emph{SuperShuttle}, the Owner-Operators signed the ICOC and the attached Schedule N acknowledging their independent contractor status and the responsibilities and rights therein, and STG does not withhold taxes from the Owner-Operators’ pay or provide them with benefits.\textsuperscript{203} In addition, STG provides Owner-Operators forms 1099 at the end of each tax year, and these same business owners take advantage of tax deductions further reflecting their independent contractor status.\textsuperscript{204} Critically, to conclude that there was no understanding or belief that the parties were establishing an independent contractor relationship, as the Regional Director did, amounts to finding that drivers are employees simply because they say they are employees. \emph{Sisters Camelot}, 363 NLRB No. 13, slip op. at *4 (2015).

9. \textbf{The Method of Payment Supports Independent Contractor Status}

Owner-Operators are paid by the jobs they complete, and with the exception of occasional waiting time, not by the hours they work.\textsuperscript{205} But regularity in payments, even weekly, is an insufficient basis for this factor to weigh in favor of employee status. \textit{See The Arizona Republic}, 349 NLRB at 1041, 1045 (weekly); \emph{Dial-A-Mattress}, 326 NLRB at 887, 891-92 (bi-

\begin{footnotes}
\item[202] STG Exh. 13.
\item[203] Aldrete: 1277:8-1278:2
\item[204] \textit{Compare} Alvarez: 1151:4-6; Vasquez: 1354:16-17, \textit{with} Aldrete: 1279:2-12.
\item[205] Pet. Exhs. 224, 268.
\end{footnotes}
weekly); see also 49 C.F.R. § 376.12(f). Inexplicably, after acknowledging that everything in this compensation arrangement favors independent contractor status, the Regional Director concluded that “regular intervals” of pay and alleged “tight control of compensation rates and expenses” favored employee status.  

At the end of the tax year, STG issues Owner-Operators a form 1099. It does not issue a similar document to second-seat drivers because STG does not pay them. The second-seat drivers’ compensation arrangements are made directly between Owner-Operators and second-seat drivers. Owner-Operators and second-seat drivers (when authorized by Owner-Operators) negotiate over compensation for a particular load, which the ICOCs expressly contemplate. Each of these facts weighs in favor of independent contractor status.

The Regional Director’s lack of faith to the record is further demonstrated by his failure to even acknowledge, let alone truly contend with, the fact that the allegedly “tight controlled” compensation rates are actually a function of a dynamic Los Angeles “drayage” market.

10. **Owner-Operators Function In The Corporate Form And Operate Like Independent Businesses**

Owner-Operators operate as independent businesses, which gives them a host of choices in deciding how to optimally run their small business. For instance, numerous Owner-Operators operate their businesses as a corporation or a limited liability company. They take tax deductions for their business expenses. Some have home offices from which they conduct

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206 (DDE at 43.)


210 STG Exhs. 6, 7 (Schedule B at Section 2: “Changes In Fees.”)

211 STG Exhs. 52-131.

212 Aldrete: 1277:8-1278:2; Ramirez: 1414:12-20.
their business operations. Some choose to hire second seat drivers who drive the trucks they own for them or in addition to them. Some hire outside accountants, and others use family members to do their financial books. By all accounts, Owner-Operators are small business owners operating independently, not as employees of STG. The Regional Director erred.

11. The Instrumentalities, Tools and Places of Work Weigh In Favor of Independent Contractor Status

As discussed above, STG does not own the tractors operated by Owner-Operators and second-seat drivers. Nor does STG own the containers or chassis that it hires them to move. Indeed, Owner-Operators and second-seat drivers pay for virtually all of the costs associated with operating their trucks, including maintenance, insurance, and licensing (among others). They also decide how much maintenance to conduct and where to obtain their insurance. The Board itself has recognized in other contexts that the decision to conduct or defer maintenance is entrepreneurial. See, e.g. UOP, Inc., 272 NLRB 999, 1000 (1984) (closure of plant due to obsolete equipment). Thus, this factor clearly weighs in favor of independent contractor status.

Contrary to the facts and the law, the Regional Director “on balance” found this factor neutral (rather than weighing it in favor of contractor status as was required). Demonstrating his failure to consider the entrepreneurial aspect of the analysis, the Regional Director concedes that the drivers are responsible for maintenance of the trucks, yet completely overlooks the plethora of binding case law counseling that such a fact heavily weighs in favor of independent contractor status. The Decision accomplishes this partly by mischaracterizing the contractual relationship inherent to the ICOC: Owner-Operators don’t “surrender control” of their trucks—they

undertake serious entrepreneurial effort in order to purchase or lease a truck and then decide to work with STG rather that its thousands of competitors. This fundamental misunderstanding of the business models at play and the entrepreneurial motivations underpinning Owner-Operators’ relationship with STG completely clouded the Regional Director’s Decision, which resulted in clear error on every prong of the contractor versus employee analysis.

12. **The Length-of-Time Factor Favors Independent-Contractor Status**

While some Owner-Operators contract with STG for many years, the ICOC has a duration of 90 days, and must be renewed every 90 days.\(^{217}\) Moreover, Owner Operators can terminate their contracts with STG on 30 days’ notice without justification.\(^{218}\) An Owner-Operator’s voluntary decision to continue contracting with STG because it is financially favorable is not an indication of employee status. In this environment, and in the complete absence of contrary evidence, all that the length of time demonstrates is the pursuit of economic opportunity, i.e., that Owner-Operators who continue to work for STG find it in their best interest to do so and those that do not move on. Where the length of time does not indicate that a contractor is beholden to the company, the length of time adds little to the analysis. *Cf. Lancaster Symphony Orchestra*, 357 NLRB 1761, 1766 (2011) (orchestra members returning for successive one-year periods for up to 30 and 59 years not conclusive of employee status).

Based on the fact that many Owner-Operators have continued working with STG, the Regional Director found that Owner-Operators have an “expectation of a continuous working relationship,” despite the ICOC’s express pronouncement that this is not the case. This finding is clear error. Owner-Operators and second-seat drivers are not guaranteed work. They are not guaranteed remuneration. Thus, it is unclear on what basis the Regional Director found such an

\(^{217}\) STG Exh. 13, Section 3.

\(^{218}\) *Id.*

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“expectation.” There is no record evidence to support it. On the contrary, the record shows that STG stands out among its competitors in terms of opportunity and flexibility, and for this reason, many Owner-Operators and second-seat drivers elect to continue working with STG. Moreover, that some, second-seat drivers move to different Owner-Operators so they can continue to move freight for STG, in a relationship controlled entirely by the Owner Operator, says nothing about employment status with STG. Instead, it suggests STG is a desirable carrier to haul freight and it is worthwhile for second-seat drivers to try to find a good arrangement with a different Owner-Operator rather than going out and looking to work for a new carrier with different commercial short-hauling customers.

13. The Second-Seat Drivers Clearly Are Not STG’s Employees

As explained previously, STG has no contractual relationship with second-seat drivers nor any direct control over the terms and conditions of their employment, since an Owner-Operator’s second-seat drivers do not execute full ICOCs with STG.219 While STG has contractual agreements with Owner-Operators, their second-seat drivers do not execute full ICOCs with STG.220 Instead, these drivers sign Schedule K to the ICOC with STG, confirming their contractor status.221 STG does not dictate their hours or pay nor do these drivers receive compensation from STG.222 Only Owner-Operators receive a 1099 tax form from STG, including for work performed by their second-seat drivers.

In fact, unless separately authorized to accept a load without their Owner-Operator’s approval, second-seat drivers cannot decide when, what, and how to perform work for STG.
without guidance from their Owner-Operator because second-seat drivers work for their Owner-Operators, and some Owner-Operators even enter into independent contractor agreements with their drivers. Owner-Operators, not STG, determine the compensation for these drivers and provide them with annual tax forms. Second-seat drivers also exercise the ability to negotiate higher rates and other details about the relevant terms and conditions of their employment from Owner-Operators. The Regional Director clearly erred by including the second-seat drivers in the petitioned-for unit.

B. The Regional Director Clearly Erred in Directing an Election in a Multi-Facility Unit

The Los Angeles and San Diego areas are sufficiently distinct that two Teamster Local Unions (one in Long Beach and one in San Diego) joined together to file the petition at issue in this case. Similarly, STG’s San Diego and Commerce locations, which are 130 miles apart, are sufficiently distinct to overcome the Regional Director’s incorrect finding that a multi-facility unit is appropriate.

1. The Standard For Determining An Appropriate Bargaining Unit

Section 9(b) of the National Labor Relations Act (“NLRA” or “Act”) mandates that the Board must determine what constitutes an appropriate unit “in each case.” 29 U.S.C. § 159(b). Although nothing in the Act requires the unit for bargaining to be the only appropriate unit or the most appropriate unit, it mandates that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. See Overnite Transp. Co., 322 NLRB 723, 726 (1996).

A bargaining unit is inappropriate where the petitioned-for employees lack a significant community of interest. According to PCC Structuralss, consideration is given to “both the shared and distinct interest of petitioned-for and excluded employees.” PCC Structuralss, 365 NLRB No.
160, at 11. The Board refined this standard and announced a three-step process to determine whether the petitioned-for and excluded employees share a community of interest. See The Boeing Company, 368 NLRB No. 67, at 3 (2019). In determining whether the interest shared by the petitioned-for employees are too disparate to form a community of interest within the petitioned-for unit, the Board considers the traditional community of interest factors. Id. at 2 (citing PCC Structural, at 5). The burden of demonstrating whether a petitioned-for unit is appropriate falls upon the petitioning party. Id. at 2.

In Boeing, the Board determined that the petitioned-for unit which included two classifications of employees at the employer’s single plant was not an appropriate unit. Id. at 1. The Board found that the two classifications of employees belonged to separate departments, did not share any supervision, had fundamentally different job functions from one another, and that there was no interchange between the two classifications. Id. at 4-5. These factors outweighed the similarities between the two job classifications, including their shared identical terms and conditions of employment, the frequent daily contact between the two classifications, and the shared set of skills and training between the two classifications. Id.

When evaluating bargaining unit appropriateness, the Board has also applied a longstanding presumption favoring single-location units. The principles underlying the single-unit presumption are instructive here. See Dixie Belle Mills, Inc., 139 NLRB 629, 631 (1962) (a single-facility unit is “presumptively appropriate” unless two locations have been “so effectively merged into a more comprehensive unit by bargaining history” or “so integrated with another as to negate its identity . . . .”); see also Sutter West Bay Hosps., 357 NLRB 197, 200 (2011) (party contesting a single-facility unit bears a “heavy burden of overcoming the presumption.”).
2. The Petitioned-For Unit is Not An Appropriate Unit

The unit sanctioned by the Regional Director is inappropriate. The record clearly does not support a conclusion that Owner-Operators and second-seat drivers at STG’s separate Commerce and San Diego facilities share a community of interest. As discussed above, Owner-Operators and second-seat drivers operate out of two separately managed and operated facilities with little interchange. See Boeing, at 1 (finding that employees belonging to separate departments did not share a community of interest). Yet, the Regional Director erroneously discounted how the two terminals are separately managed and operated and instead focused on “Centralized Control of Policies.” Specifically, the two terminals have different cadences of customers and thus ultimately different business models. These high-level differences result in significant on-the-ground differences such as pay and typical driver work experiences, as the uncontroverted record evidence shows.

Contrary to the Regional Director’s findings, there is also no significant interchange between the two STG facilities; if one facility is short on drivers, it generally does not look to the other facility to overcome that shortage. See id. In fact, on the concept of “functional integration,” the Regional Director engaged in cherry-picking. (DDE at 51) (finding 0.8% or 160 out of 20,000 weekly loads in the Fourth Quarter of 2021 demonstrative of significant interchange and enough to overcome the single facility presumption.) In fact, the figures on which the Regional Director placed great significance (figures suspiciously generated solely by one husband and wife team who testified on behalf of the Unions) demonstrated nothing more than evidence of de minimis overlap, yet the Regional Director somehow came to the inexplicable conclusion that 0.8% is “significant.”

Moreover, because they receive dispatches almost exclusively out of one facility or the other,224 Owner-Operators and second-seat drivers at the two separate facilities have little to no contact with one another, much less “frequent daily contact” as the Regional Director erroneously and inexplicably claimed.225 (DDE at 4). While some San Diego Owner-Operators and second-seat drivers occasionally utilize the Commerce facility to have overweight loads repositioned, there is no evidence that they interact with the Commerce Owner-Operators and second-seat drivers.

Owner-Operators and second-seat drivers at each facility also serve different customer bases. Those working out of San Diego facility typically run loads to the Mexican border almost exclusively serving a single client in Mexico.226 By contrast, Owner-Operators and second-seat drivers having their loads dispatched out of Commerce serve the entire geographic region of the Los Angeles basin and its highly varied customer base.227 This reality also impacts the terms and conditions of work, which are different at the two facilities. Each sets separate rate schedules and premium payments for Owner-Operators.228 Similarly, routes offered out of San Diego are typically longer than those out of Commerce,229 schedule predictability of the loads offered is more consistent out of San Diego, which offers a pre-dispatch program, and separate operating hours differentiates the nature of the work out of San Diego from that offered out of Commerce.230 Moreover, San Diego-based Owner-Operators and second-seat drivers frequently cross weight scales, which brings additional responsibilities.231

225 Yablo: 1451:1-3; Samayo Rosales: 1433:4-10; Banales: 1531:9-15.
231 Limuaco: 720: 19-23.
Accordingly, similar to the petitioned-for unit in *Boeing* that involved two job classifications at a single plant, the petitioned-for unit here is inappropriate because it involves two distinct groups of Owner-Operators and second-seat drivers performing work under different conditions at two functionally and geographically separate locations over 130 miles apart. The record shows no support for a finding that Owner-Operators in Commerce and San Diego share an “internal” community of interests, *Boeing*, slip op. at 3, and the record is clearly inadequate to treat the Commerce and San Diego facilities as a single combined bargaining unit, as opposed to two separate single-location units. See *Sutter West Bay Hosps.*, 357 NLRB at 200. Contrary to the record facts, the Regional Director erroneously ordered an election in a single unit encompassing both terminals.

**VI. CONCLUSION**

Based on the foregoing facts, argument and authorities, STG hereby requests the Board grant this Request for Review.

DATED: June 27, 2022

Respectfully submitted,

STG LOGISTICS CARTAGE, LLC

By: ________________________________

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