ORAL ARGUMENT NOT YET SCHEDULED
CASE NOS. 14-1196, 15-1066 and 15-1166

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC.,

Petitioner/Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW FROM ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD
361 NLRB No. 55 (SEPTEMBER 30, 2014)
362 NLRB No. 29 (MARCH 16, 2015)

BRIEF OF PETITIONER

Maurice Baskin
Joshua Waxman
Littler Mendelson, P.C.
1150 17th St., N.W.
Washington, D.C. 20036
P: 202-772-2526
F: 202-318-4048
mbaskin@littler.com
jwaxman@littler.com

Attorneys for Petitioner

CORPORATE DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

Petitioner FedEx Home Delivery, an Operating Division of FedEx Ground Package System, Inc. (hereafter "FedEx") is a licensed motor carrier engaged in the transportation and delivery of small packages throughout the United States, and is a wholly owned corporate subsidiary of FedEx Corporation, a publicly held company.

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amici*

1. FedEx is the Petitioner. [1]
2. The National Labor Relations Board ("Board" or "NLRB") and the International Brotherhood of Teamsters, Local No. 671 ("Union" or "Teamsters") are the Respondents.
3. The Teamsters were the charging party in the proceeding before Region 34 of the Board.
4. There were no *amici* in the proceedings before the Board.

B. Ruling Under Review

Petitioner FedEx seeks review of the Board's Decision and Order in Case Nos. 34-CA-012735 and 34–RC–002205, issued by the Board on September 30,

[1] The correct name of the Petitioner is FedEx Ground Package System, Inc.

2014, and reported at 361 NLRB No. 55. Petitioner FedEx also seeks review of the Board's Decision and Order in Cases Nos. 34–CA–012735 and 34–RC–002205, dated March 16, 2015 and reported at 362 NLRB No. 29, denying the Petitioner's Motion for Reconsideration of the Board's Decision in case 361 NLRB No. 55. On April 3, 2015, this Court granted FedEx's Unopposed Motion to Consolidate the review of the decisions of the Board published at 361 NLRB No. 55 and 362 NLRB No. 29, as these cases involve the same Record and underlying facts.[2]

C. Related Cases

This Court's decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (hereafter "*FedEx I*") is factually indistinguishable from the instant matter and is part of the record of this case. In *FedEx I*, this Court held that single route contractors operating at two Boston-area facilities are "independent contractors and not employees." 563 F.3d 492, 495. The Board and the Teamsters filed petitions for rehearing *en banc* from the Court's Decision, which were denied on Sept. 4, 2009. The Board and the Teamsters then chose not to petition for *certiorari* to the Supreme Court.

Also related to the present appeal is a petition for review filed by FedEx from the Board's previous decision in Cases Nos. 34-CA-012735 and 34-RC-

[2] A deferred appendix will be filed pursuant to F.App.R. 30(c).

002205, finding the Hartford-area contractors to be employees and not independent contractors, in direct conflict with this Court's *FedEx I* decision. *FedEx Ground Packaging System, Inc. v. NLRB*, C.A. No. 10-1354 (petition for review docketed Nov. 1, 2010). On December 20, 2010, FedEx filed a motion for summary disposition to set aside the Board's previous decision based on this Court's holding in *FedEx I.* Without waiting for the Court to rule on FedEx's motion, the Board vacated its prior decision on January 7, 2011and moved for dismissal of FedEx's petition on that basis, which this Court granted in an unpublished *per curiam* decision. (*Id*., Order of Dismissal dated March 16, 2011).

Respectfully submitted,

*/s/ Maurice Baskin*_____
Maurice Baskin
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

* Authorities on which FedEx chiefly relies are marked by an asterisk.

STATUTES

OTHER AUTHORITIES

GLOSSARY

APA: Administrative Procedure Act

DA: Deferred Appendix

DDE: Regional Director's Decision and Direction of Election

NLRA: National Labor Relations Act

NLRB or Board: National Labor Relations Board

Operating Agreement: FedEx Home Delivery Standard Contractor Operating Agreement

I. JURISDICTION

This is a petition for review from decisions of the Board, and a cross-application for enforcement by the Board, as to which this Court has jurisdiction pursuant to Section 10 of the National Labor Relations Act (the "NLRA" or the "Act"), 29 U.S.C. § 160. The Board's Orders are final with respect to all parties.

II. ISSUES PRESENTED

1. Whether the decision of the Board finding "single route" package delivery service contractors to be employees of FedEx, and not independent contractors, violated the NLRA and/or the (APA) by failing to adhere to this Court's controlling decision in *FedEx Home Delivery v. NLRB ("FedEx I")*, 563 F.3d 492 (D.C. Cir. 2009), which held on the same and/or indistinguishable facts that such contractors are independent contractors and not employees of FedEx.

2. Whether the Board erred in excluding and disregarding relevant evidence as to single route contractors' entrepreneurial opportunities and activities, such as multiple route acquisition and operation; buying and selling routes, vehicles, and equipment; and hiring others to perform some or all of the contracted work, prior to unlawfully finding the contractors to be employees of FedEx.

3. Alternatively, whether the Board's decision violated the NLRA and/or the APA by imposing a "restated and refined" standard for independent contractor

status that conflicts with Congressional intent and departs without rational explanation from the Board's own precedent and this Court's controlling authority.

4. Whether the Board applied a new standard for independent contractor status retroactively and unfairly to FedEx, in such a manner as to deprive the Petitioner of its due process right to a fair hearing.

5. Whether the Board erred in overruling FedEx's objections to the election in this case based upon the Teamsters having arranged for voters to receive free legal services during the critical period before the election and upon the Board agent's having opened, commingled, and based upon counted challenged ballots without following the Board's challenged ballot rules.

III. RELEVANT STATUTES AND REGULATIONS

Section 2(3) of the NLRA, 29 U.S.C. § 152(3):

The term "employee" shall include any employee, … but shall not include … any individual having the status of an independent contractor, ….

Section 7 of the NLRA, 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 158(a):

It shall be an unfair labor practice for an employer – …

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 10 of the NLRA, 29 U.S.C. § 160:

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

IV. STATEMENT OF THE CASE AND FACTS

A. Introduction

FedEx provides ground package pickup, delivery and transportation services to business and residential customers throughout the country.[3] FedEx has contracted with a network of contractors who have an entrepreneurial incentive to run efficient small package delivery services that facilitate the pickup, delivery and transportation of packages. At all times relevant to the present appeal, FedEx's Hartford-area operations utilized the same Standard Contractor Operating Agreement ("Operating Agreement") that was described and analyzed in *FedEx I* with regard to FedEx's Boston-area operations. (DA __). As before, FedEx's contractor business model operates on the premise that those who have an equity interest and financial stake in the performance of their work will be more invested in their businesses and more dedicated to providing excellent customer service.

In *FedEx I*, this Court held that single work area contractors providing delivery service for FedEx at its Boston-area facilities are independent contractors, and thus beyond the statutory jurisdiction of the Board. Notwithstanding this Court's controlling decision in *FedEx I*, and indeed in outright defiance of it, on

[3] Background facts about FedEx Ground's nationwide Home Delivery (residential) and Ground (business) service offerings, operations, and network of independent contractors providing small package delivery service are detailed in this Court's *FedEx I* decision. 563 F.3d at 495. All of those facts remain present in the current record.

September 30, 2014 the NLRB issued a decision holding that the same types of contractors at FedEx's Hartford facilities, only about 100 miles away from Boston, are employees and not independent contractors. FedEx Home Delivery, 361 NLRB No. 55 (2014), *reconsid. den*. 362 NLRB No. 29 (2015) (hereinafter the "Board Decision" or the "Decision under review"). (DA __).

As explained in greater detail below, the factual findings by this Court and the NLRB in the *FedEx I* and Board Decisions are indistinguishable in every material respect, and the governing contract and statutory language remains the same. This Court's clear and unambiguous *FedEx I* decision holding in favor of independent contractor status remains the law of this Circuit and must control the outcome of this appeal.

B. This Court's Holding In *FedEx I* that Single Route Contractors For FedEx Are Independent Contractors

As noted above, this Court ruled in *FedEx I* that single route contractors for FedEx operating at two Boston-area facilities were "independent contractors and not employees." 563 F.3d 492, 495. After assessing "all of the incidents of the relationship" between FedEx and contractors providing package delivery services, this Court described its conclusion as "particularly straightforward" under a line of cases previously decided by this Court. *Id.* at 503.[4] Because the "overwhelming

[4] *See Corporate Express Delivery Systems v. NLRB*, 292 F. 3d 777 (D.C. Cir. 2002); *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855 (D.C. Cir. 1995); and *North*

majority" of factors favored independent contractor status – particularly but not exclusively significant evidence of "entrepreneurial opportunity" – this Court concluded that the evidence "clearly" and "strongly" proved that single route contractors for FedEx "are independent contractors." *Id.* at 503-504.

It is worth reiterating that the *FedEx I* Court, in its own words, "appl[ied] the common-law agency test," recognizing that the "legal distinction between 'employees' . . . and 'independent contractors' . . . is permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute.'" *Id.* at 503 (quoting *NAVL*, 869 F.2d at 599). After "consider[ing] all the common law factors," this Court concluded they are "strongly in favor of independent contractor status" and "clearly outweigh[ ]" indicia favoring employee status. Id. at 503-4; *see also* n.4.

The Court applied *United Insurance*'s and *NAVL*'s "total factual context" and "all incidents of the relationship" commands in considering how FedEx's national package delivery business model makes it an "intermediary between a diffuse group of senders and a broadly diverse group of recipients"—"mostly . . . residential customers"—within specific geographic areas for which contractors have exclusive delivery rights. *Id.* at 501. Having considered the total factual

---

American Van Lines v. NLRB ("NAVL"), 869 F.2d 596 (D.C. Cir. 1989), all of which are cited and relied upon in the *FedEx I* opinion.

context, the Court concluded that the distinctions upon which the Board relied "reflect differences in the type of service the contractors are providing rather than differences in the employment relationship." *Id*. [5]

The Court observed that in *Corporate Express*, it had "agree[d]" with the Board that "whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss' . . . better captures the distinction between an employee and an independent contractor." 292 F.3d at 780. Accordingly, it explained that "while all the considerations at common law remain in play," entrepreneurial opportunity is "an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other . . . ." Slip op. at 7 (citing *Corporate Express*, 292 F.3d at 780).

The Court determined that the record in *FedEx I* "shares many of the same characteristics of entrepreneurial potential" that both the Board and this Court have ruled support independent contractor status. *Id*. at 498. As the Court further held: "Because the indicia favoring a finding the contractors are employees are clearly

[5] The Court applied its precedent holding that "'control over an aspect of the workers' performance [that] is motivated by a concern for customer service'" and "constraints imposed by customer demands and government regulations do not determine the employment relationship." *Id.* at 501 n.7 (citing *C.C. Eastern*, 60 F.3d at 859; *NAVL*, 869 F.2d at 599).

outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views." *Id*. at 504.[6]

The NLRB and the Teamsters filed petitions for rehearing *en banc* from the Court's *FedEx I* Decision, which this Court denied on Sept. 4, 2009. The NLRB and the Teamsters then chose not to petition for certiorari at the Supreme Court. Accepting *FedEx I* as the law of the case, the Boston NLRB Regional Director dismissed all pending charges, and the General Counsel's Office of Appeals denied a contractor's appeal from the Regional Director's dismissal. *See* General Counsel's letter dated Jan. 20, 2010, attached to FedEx's 2010 Motion to Dismiss the current proceedings. (DA __). *See also* FedEx's Aug. 26, 2010 Response to Notice to Show Cause, at 8. (DA __).

C. Comparison of FedEx's Hartford and Boston Operations

FedEx's Hartford facility is only about 100 miles from FedEx's Boston facilities. As noted above, the business relationships between FedEx and the Hartford contractors are governed by the same Operating Agreement under which the Boston-area contractors performed their services in *FedEx I*. (DA __). For this reason, the parties and the Regional Director incorporated into the record of the

[6] While Judge Garland dissented in part from the *FedEx I* decision, he agreed with the majority that the Board erred in refusing to allow FedEx Ground to introduce evidence of its system-wide route sales and profits. *Id*. at 504, 518 (calling the Board's action "particularly arbitrary"). The Board committed the same error in the present case.

representation hearing in this case the entire record of *FedEx I's* NLRB proceedings – *FedEx Home Delivery,* Case Nos. 1-RC-22034 and 22035 – along with the records of several other representation hearings presenting similar facts at other FedEx facilities. *See* Regional Director's Decision and Direction of Election ("DDE"), slip op. at 3. (DA __). [7] As summarized below, the facts of the two cases are materially indistinguishable:

1. The Hartford contractors have the same opportunities to hire employees as in *FedEx I*.

In *FedEx I*, this Court held that the "ability to . . . hire additional drivers (including drivers who substitute for the contractor) and helpers . . . augurs strongly in favor of independent contractor status." 563 F.3d 492, 504. This Court emphasized that the "ability to hire 'others to do the Company's work' is no small thing in evaluating 'entrepreneurial opportunity.'" The Court found it "[t]elling[]" that "contractors may . . . hire their own employees for their single routes" and noted that "more than twenty-five percent of contractors have hired their own employees at some point." *Id.*

The contractors in Hartford, like those in *FedEx I*, can and do hire others to do all or some of the work. In its Decision here under review, the Board concluded

[7] In its Order denying FedEx's Motion for Reconsideration (DA __), the Board does not dispute that the Boston record was made part of the record of this case. Without explanation or justification, the Board states only that it "declined to consider" the Boston evidence in deciding the present case. (*Id*. at n.6).

that the Hartford contractors "need not perform all of their contractually-obligated deliveries" and that "at least half of the Hartford drivers have used supplemental vehicles and drivers," to fulfill the route's demands." Board Dec. at 7 (DA __). The Board acknowledged that "a [Hartford] driver may hire another DOT-qualified and Respondent-approved driver . . . to perform her deliveries." *Id.*

Likewise, just as in *FedEx I*, the contractors in Hartford do not need to show up at work every day (or ever, for that matter); instead, at their discretion, "they can take a day, a week, a month, or more off, so long as they hire another to be there." 563 F.3d 492, 499; *accord* Board Dec. at 7 (DA __) ("[s]ingle-route drivers need not personally perform all of their contractually-obligated deliveries").

2. The Hartford contractors have the same ability to own and transfer the proprietary interests in their routes as in *FedEx I*.

In *FedEx I*, this Court found that the independent contractor determination was "particularly straightforward" because the contractors "can . . . own and transfer the proprietary interest in their routes." 563 F.3d 492, 502-503. Boston contractors could "assign at law their contractual rights to their routes" and thus "can sell, trade, give, or even bequeath their routes" which is a feature not found in an employer-employee relationship." *Id*. at 500.

Similarly, in Hartford, the NLRB Regional Director expressly found that the Hartford independent contractors "have the right to convey their current route to

existing contract drivers or other interested individuals." DDE, slip op. at 11 (DA __). The Regional Director concluded that FedEx "does not become involved in any negotiations between these parties, or approve the terms of the negotiation." *Id.* In the Decision now under review, the NLRB acknowledged the same, recognizing that Hartford independent contractors are "permitted under the Agreement to convey their routes." Board Dec. at 4 (DA __).

Just like the NLRB's decision reversed by this Court in *FedEx I*, the Board's Decision here purposely downplays the contractors' proprietary interests by asserting that certain routes were available from FedEx "without charge." Board Dec. at 10 (DA __). But this Court expressly rejected that view in *FedEx I*, explaining that it is "confused to conclude FedEx gives away routes for free" where, as here, "[a] contractor agrees to provide a service in return for compensation, *i.e.*, both sides give consideration." 563 F. 3d 492, 500.

In this regard, at every stage of this proceeding, FedEx has produced evidence of route sales by contractors, including two such sales prior to 2007, and 20 more sales between 2007 and 2010. 2010 FedEx Response to Notice to Show Cause (DA __). The NLRB's claim that FedEx retains too much control over such sales is itself based upon theoretical speculation rather than any evidence of actual impact on the sales themselves. *See e.g.,* Board Dec. at 10 (DA __). The NLRB faults FedEx for failing to include evidence of the "circumstances of each sale or

whether any profit was realized by the drivers." *Id*. at 15, n.66 (DA __). To the contrary, FedEx did provide proof of contractor profits from route sales, both system wide and at Hartford, which the NLRB's Decision erroneously ignores. *See* FedEx 2010 Response to Notice to Show Cause. (DA __).

It is also undeniable, as Member Johnson observed in his dissent from the Board's Decision, that there is a market for route sales among contractors, indicating that these are businesses of independent value that are being evaluated and sold by business owners, and are not "controlled" by FedEx. Board Dec. at 26-32 (DA __). The existence of this market was a determinative factor supporting the independent contractor determination by this Court in *FedEx I*, and the same facts here compel the same result. *See* 563 F. 3d 492, 502 ("[N]ot only do these contractors have the ability to hire others without FedEx's participation, only here do they own their routes – as in they can sell them, trade them, or just plain give them away.").

3. The Hartford contractors have the same freedom to acquire and operate multiple routes as in *FedEx I*.

In *FedEx I*, this Court found it "[t]elling[]" that "contractors may contract to serve multiple routes" and that all contractors "have sole authority to hire and dismiss their drivers" and "are responsible for the drivers' wages and all expenses associated with hiring drivers." 563 F. 3d 492, 499. The Regional Director below made identical findings, noting that Hartford independent contractors "have the

right under the Agreement to obtain and operate multiple routes" – and what's more, "six contract[ors] have at one time or another operated multiple routes." DDE, slip op. at 24 (DA __). The NLRB acknowledged the same in its Decision, conceding that contractors have the "ability to operate multiple routes." Board Dec. at 7 (DA __).

Nevertheless, in the Decision under review, the NLRB erroneously disregarded evidence of the opportunity to contract for multiple routes because the union excluded multi-route contractors from the petitioned-for unit. Board Dec. at 15 (DA __). In *FedEx I*, this Court found that same disregard of evidence "puzzling," reasoning that because "[m]ulti-route contractors signed the same contract as the others," their activities are just as "relevant in assessing the rights available under the contract." 563 F.3d at 499, n 6. The same is true in Hartford.

Also contrary to the NLRB's Decision (Board Dec. at 15 (DA __)),, acquisition of multiple routes does not constitute "severance" of an ongoing relationship with FedEx but is instead an entrepreneurial *expansion* of that relationship on the part of truly independent contractors. 563 F.3d 492, 499.

In *FedEx I*, this Court properly held that "it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right which is most relevant" in "determining whether he is an independent contractor." *FedEx,* 563 F.3d 492, 502. This Court thus re-affirmed that even a

single instance of exercising entrepreneurial opportunity is enough to "show that there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right." *Id.*; *see also Id.* at 502 ("the failure to take advantage of an opportunity is beside the point.").

In the Decision now under review, the NLRB again found that independent contractors can contract for multiple routes but discounted that finding because only three contractors were doing so at the time of the hearing before the Regional Director. Board Dec. at 7 (DA __).[8] The NLRB found that all Hartford independent contractors have the right to "sell" and convey their current routes but diminished that finding because there had been "only" two route sales at Hartford. *Id.*

This Court reversed the NLRB in *FedEx I* because the Board had erroneously discounted entrepreneurial activities relating to contractors' abilities to hire others, buy and sell routes, and acquire and operate multiple routes because there were not "enough" instances of the actual exercise of those opportunities – the same glaring errors are present in the Board Decision. 563 F.3d 492, 499 ("[t]his ability to hire others to do the Company's work is no small thing in evaluating entrepreneurial opportunity.").

[8] This is the exact same number of contractors who were found to be operating multiple routes in *FedEx I*, as acknowledged by the Board in its discussion of the Court's decision. Board Dec. 10 (DA __).

4. Hartford contractors have expressed the same intent to form independent contractor relationships with FedEx as in *FedEx I*.

In *FedEx I*, this Court concluded that "the parties' intent expressed in the contract . . . augurs strongly in favor of independent contractor status." 563 F.3d 492, 504. In the case at bar, FedEx and the Hartford independent contractors have entered into the ***same standard operating agreements*** that: 1) state the parties' intention for contractors to provide services "strictly as an independent contractor and not as an employee," and (2) establish the contractors' rights to, inter alia, control independently the delivery and order and routes, which have varying daily deliveries to a "broadly diverse group of recipients." Board Dec. at, *14 (DA __); 563 F.3d 492, 501. Accordingly, the independent contractors here – just like those this Court found to be independent contractors in *FedEx I* – have clearly expressed their intent to form an independent contractor relationship with FedEx. While the NLRB found that the evidence that the parties were creating an independent contractor relationship in Hartford was "inconclusive," this finding cannot be squared with this Court's decision in *FedEx I*.

5. The Hartford contractors share the same ownership obligations for vehicles, incorporation rights, and obligations for operating costs as in *FedEx I*.

In *FedEx I*, this Court noted that "all contractors here own their vehicles"

which was significant in an independent contractor analysis. 563 F.3d 492, 503. Yet again, the same is true here, as the NLRB recognized in its Decision that "[i]n order to service their routes, drivers must purchase a van or truck . . . and bear all expenses in operating their vehicles." Board Dec. at 4 (DA __). While the NLRB found vehicle ownership a "neutral" factor in its Decision, this Court held in *FedEx I* that such ownership strongly augurs in favor of independent contractor status. 563 F.3d 492, 503; *see also C.C. Eastern, supra*, 60 F. 3d at 859.

Additionally, in *FedEx I*, this Court noted that contractors could independently incorporate, and "have done so." 563 F.3d 492, 498-99. The same is true here and "three current contract[ors] ... have incorporated" Board Dec. at 4 (DA __).

6. The Hartford contractors have the same ability to use their vehicles for personal purposes and other ventures as in *FedEx I*.

Similarly, in *FedEx I*, this Court found it significant that contractors could use their vehicles "for other commercial or personal purposes." 563 F.3d 492, 498-99. Again, in the Decision under review, the NLRB found the same, noting that "[a]t all other times, drivers may use their vehicles for other commercial or personal purposes." Board Dec. at 4 (DA __).

7. Hartford contractors share the same right to set their own start, stop and break times as in *FedEx I*.

In *FedEx I,* this Court found it significant that under the standard Operating Agreement, "FedEx may not prescribe the hours of work" or "whether or when the contractors take breaks." 563 F.3d 492, 498. Likewise, in its Decision under review, the NLRB held that contractors "have discretion to operate their routes and perform deliveries in the sequence and manner they see fit. FedEx does not have the authority to direct drivers regarding their specific hours of work, whether or when they take breaks, the order in which they make deliveries, or other details of their work." Board Dec. at 5 (DA __).

8. Hartford contractors share the same contractual obligations arising from customer demands, government regulation, and FedEx's business model as in *FedEx I*.

In *FedEx I*, this Court held that the NLRB erroneously deemed a number of industry-specific contractual undertakings arising from customer demands, government regulations, and the Company's particular business model – such as uniforms and efforts to evaluate and improve contracted-for results – to be indicative of employee status. *See* 563 F.3d 492, 501. The NLRB's Decision here relies upon the same discredited legal conclusions as those which were explicitly rejected in this Court's *FedEx I* Decision.

Specifically, in its Decision under review, the NLRB held that the significance of the independent contractors' undisputed ownership of their vehicles is "undercut considerably" by FedEx's "primary role in dictating vehicle

specifications and facilitating vehicle transfers." Board Dec. at 13 (DA __). To the contrary, as this Court properly held in *FedEx I*, FedEx is a motor carrier subject to Department of Transportation regulations, and FedEx's effort to ensure that its contractors meet such standards is not evidence of an employee relationship. 563 F. 3d 492, 500. *See also Central Transport, Inc*., 299 NLRB 5 (1990).

The NLRB similarly found that 1-year or 2-year agreements signed by the drivers were somehow a "permanent working arrangement with the company…." Board Dec. at 14 (DA __). This finding is impossible to square with the evidence showing that numerous contractors negotiated new agreements and/or left the unit by purchasing multiple routes. *See* FedEx 2010 Response to Notice to Show Cause. (DA __). Likewise, as was true in *FedEx I*, the contractors received incentives in their compensation and received no fringe benefits or accident insurance from FedEx. (DA __). The NLRB incorrectly asserted that FedEx "establishes and controls drivers' rates of compensation." Board Dec. at 14.(DA __). The same Board findings were rejected by the Court in *FedEx I*. 563 F. 3d at 501.

D. Proceedings Leading To The Board's Issuance Of Its Decision Rejecting This Court's Ruling In *FedEx I*

On February 2, 2007, Teamsters Local 671 filed a petition seeking an election for a unit of "single route contract drivers" operating out of Hartford. (DA

__). A hearing was held in which FedEx submitted substantial evidence of independent contractor status, including particular evidence of entrepreneurial opportunities, together with offers of proof of system-wide exercise of such opportunities that the Hearing Officer refused to allow into evidence. See DDE, slip op. at __ (April 11, 2007) (DA __). Nevertheless, on April 11, 2007, the Regional Director decided that the Hartford contractors were not independent contractors and directed that an election be held for the petitioned-for bargaining unit of contract single route drivers at Hartford. *Id*.[9]

An election was thereafter held in which a slim majority of Hartford contractors voted in favor of union representation. FedEx filed objections to the conduct of the election, and on September 29, 2008, the NLRB sustained those objections in part, remanding for further proceedings. (DA __). On remand, the election results were reaffirmed by an Administrative Law Judge, and the case returned to the Board for a final decision. Meanwhile, this Court's *FedEx I* decision was issued on April 21, 2009. Accordingly, on March 17, 2010, FedEx filed with the NLRB a Motion to Dismiss the representation petition in this matter

[9] This refusal to consider FedEx's systemwide evidence again paralleled the proceedings considered by this Court in *FedEx I.* 563 F.3d at 504.

based on this Court's *FedEx I* holding. (DA __).[10] FedEx's Motion to Dismiss to the NLRB also proffered additional evidence supporting the entrepreneurial opportunities and activities of the Hartford independent contractors, as follows:

(1) Between the 2007 hearing and the 2010 Motion, five more single route contractors at Hartford had grown their businesses by exercising their entrepreneurial options to operate multiple routes. Motion at 4, citing Finch Affidavit (DA __).

(2) As a result, by 2010, a majority of the contractors operating the 30 contracted routes at Hartford were multiple route contractors, who by that time operated 26 of the 30 routes. *Id*.

(3) Also, the number of route sales by Hartford contractors had grown from two at the time of the 2007 hearing to more than 20 by 2010. *Id*. at 4-5.

(4) The number of Hartford contractors who had incorporated their businesses had doubled between 2007 and 2010, increasing from three to six. *Id*. at 5.

(5) As of January 1, 2010, 65.5% percent of all FedEx routes nationwide were serviced by multiple route contractors. *Id*.

On May 27, 2010, however, the NLRB issued a Decision and Certification

[10] An earlier motion to dismiss filed with the Regional Director was not addressed either by that official or by the Administrative Law Judge who issued a supplemental decision on FedEx's election objections.

of Representative Status, without acknowledging or ruling on FedEx's Motion to Dismiss. (DA __). After FedEx refused to bargain with the Union (in order to challenge the NLRB's Certification), the NLRB on October 29, 2010 issued a Decision and Order finding FedEx violated Section 8(a)(5) of the Act. (DA __).[11]

FedEx filed a Petition for Review of the NLRB's Decision and Order in this Court and further filed a Motion for Summary Disposition based on this Court's controlling decision in *FedEx I*. *See FedEx Ground Packaging System, Inc. v. NLRB*, C.A. No. 10-1354 (D.C. Cir.) (petition for review docketed Nov. 1, 2010; motion for summary disposition filed Dec. 20, 2010). Without waiting for a ruling by this Court on FedEx's motion, the Board on January 7, 2011 vacated its own October 29, 2010 Decision and Order and filed for voluntary dismissal by this Court on due to the vacated status of the Order being petitioned from. The Court granted the Board's motion in a *Per Curiam* Order dated March 16, 2011. *Id*.

The NLRB then retained this case on its docket for nearly four years, until finally issuing a revised Decision and Order on September 30, 2014, which is the

[11] The NLRB's Decision failed meaningfully to address FedEx's Response to Notice to Show Cause filed on Aug. 26, 2010, incorporating and attaching FedEx's July 2, 2010 Proffer of entrepreneurial evidence at both Hartford and system-wide. (Exhibit 9 to FedEx's Response) (DA __). The 2010 proffer highlighted among other things, the increased number of contractors owning and operating multiple service areas; incorporating their businesses; hiring others to service their areas and operate additional vehicles; buying and selling routes and vehicles; generating wide ranges of gross income; and other activities influencing income based on contractors' efforts, ingenuity and business judgment. *Id*.

subject of the present petition. Board Dec. (DA __). The Board's new Decision declared that this Court's *FedEx I* ruling was wrongly decided and that the Board would not adhere to it. At the same time, the Board declared that it was "restating" and "refining" its own independent contractor test. Board Dec. at 9-10 (DA __).

On October 8, 2014, FedEx filed the present Petition for Review with this Court from the NLRB's new Decision. Shortly thereafter, FedEx filed a Motion for Reconsideration with the NLRB. On March 16, 2015, the NLRB issued an Order denying FedEx's Motion for Reconsideration. 362 NLRB No. 29 (March 16, 2015) (DA __). FedEx filed a second Petition for Review with this Court from the latter decision of the Board, which has been consolidated with the first Petition and the Board's Cross-Petition for Enforcement.

E. Facts And Proceedings Relating To Objections To The Election

As noted above, aside from challenging the Board's direction and certification of an election among independent contractors, FedEx filed objections to the election itself in 2007. First, FedEx objected that the Teamsters conferred valuable legal benefits on unit voters in connection with two lawsuits that were filed against FedEx on behalf of voters during the critical period prior to the election. Second, FedEx objected that the Board's election agent improperly commingled the challenged ballots of a multi-route contractor, Paul Chiappa, and a

driver whom Chiappa had independently hired, Robert Dizinno, together with unchallenged ballots, improperly affecting the results of the vote.

As to the first Objection, the record evidence established that the Teamsters arranged for voters to receive free legal services in connection with a lawsuit filed eleven days before the election was held, and that five voters were named plaintiffs in a second lawsuit challenging the voters' classification as independent contractors rather than employees. *See* ALJ Supp. Dec. dated May 22, 2009 (DA __). The Board ultimately affirmed the Administrative Law Judge's Supplemental Decision overruling the Objection on the ground that the Union did not arrange or take credit for the provision of free legal services for unit employees "contingent on a favorable outcome of the Petitioner in the election, or…on individual plaintiffs' votes for the Petition." ALJ Supplemental Dec. at 5 (DA __), affirmed without further comment by a 2-member Board on May 27, 2010 (DA __), reaffirmed by unpublished Board order on August 27, 2010 (DA __). Neither the ALJ nor the Board addressed FedEx's contention that the standard applied in upholding the election violated this Court's holding in *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1996).

As to the second Objection, FedEx introduced evidence of changed circumstances indicating that neither of the challenged ballots should have been opened, comingled, and tallied, due to Chiappa's status as a multi-route contractor

and due to Dizinno's status as Chiappa's (not FedEx's) employee. (ALJ Supp. Dec. at 8) (DA __). The ALJ in his Supplemental Decision agreed that changed circumstances compelled a finding that Dizinno was not a FedEx employee and did not share a community of interests with other voters, which potentially affected the outcome of the election. (*Id.*). On review, however, the 2-member Board reversed the ALJ's Supplemental Decision on this point and overruled the Objection, finding that the changed circumstances were insufficient to warrant removal of Dizinno from the unit. The Board failed to address FedEx's contention that the Board agent's failure to follow the Board's procedures for the handling of challenged ballots should have caused the election to be set aside under the Board's holding in *Fresenius USA Mfg., Inc*., 352 NLRB 679 (2008) (setting aside a close election due to irregularities in the Board agent's handling of ballots).

V. SUMMARY OF THE ARGUMENT

In issuing the Decision under review, the Board improperly refused to adhere to this Court's controlling ruling in *FedEx I*. *FedEx I* is clearly the "law of the circuit" and is arguably the "law of the case," since the facts underlying *FedEx I* are materially indistinguishable from the present facts, and are actually part of the record of this case. For either or both reasons, the decision is binding on this panel and on the Board, and must be followed here. In any event, the Board's stated reasons for refusing to abide by the *FedEx I* decision are wrong as a matter of fact

and law.

Failing in the effort to evade this Court's controlling decision, the Board's attempt to "refine" its standard for determining whether drivers are independent contractors must also be rejected. The Board's purportedly restated test further departs without rational explanation from the Board's own precedent, Congressional intent, and this Court's directly controlling authority. The Board has also acted arbitrarily in failing to give adequate consideration to FedEx's proffered evidence of system-wide route sales and profits among contractors, and in otherwise failing to find the Hartford contractors to meet the (improperly) restated independent business test announced in the Board's Decision. The Board has again not made a "choice between fairly conflicting views." *FedEx I*, 563 F.3d at 504.

The Board has also applied its newly refined standard retroactively and unfairly to FedEx, again departing from its own precedent. The Board thereby deprived the Employer of its due process right to a fair hearing on the independent contractor issue and changed the evidentiary standard of proof after the fact. Finally, the Board improperly overruled FedEx's objections to the election, and for this reason as well the certification of the Union as the contractors' representative should be set aside.

VI. STANDING

FedEx has standing to seek review in this Court as an aggrieved party to a

final order of the Board pursuant to 29 U.S.C. § 160(f). *See Retail Clerks Local 1059 v. NLRB*, 348 F. 2d 369, 370 (D.C. Cir. 1965).

VII. ARGUMENT

A. Standard of Review

The standard of review of the Board's decision in this case is constrained by the "law of the circuit" doctrine. This Court in *FedEx I* addressed and resolved the same legal question under the NLRA regarding the independent contractor status of single route contractors performing deliveries for FedEx, based upon materially indistinguishable facts. This Court has repeatedly held that the "law of the circuit" doctrine means that "the same issue presented in a later case in the same court should lead to the same result, and that one three-judge panel…does not have the authority to overrule another three-judge panel of the court." *Al Maqaleh v. Hagel*, 738 F.3d 312, 332 (D.C. Cir. 2013), quoting from *In Re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011), and citing *LaShawn v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (*en banc*); *see also United States v. Kolter,* 71 F. 3d 425, 431 (D.C. Cir. 1995) (explaining that "this panel would be bound by [a prior] decision even if [the panel] did not agree with it."). The decision of this Court in *FedEx I*, and the circuit precedent on which the *FedEx I* panel relied, are unquestionably the "law of the circuit," and are binding on any panel that reviews the Board's Decision.

The binding status of *FedEx I* is given even greater force in the present case because the factual record of the *FedEx I* decision was made part of the record of the Board's subsequent Hartford proceeding, now under review. Where the record

before the Board includes evidence and legal conclusions that have previously been reviewed by this Court, as is true here, the previous decision not only constitutes the law of the circuit but should also be deemed to be the "law of the case" and should therefore be binding on the Board as well as this Court. *See LaShawn A. v. Barry,* 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*) ("[T]he *same* issue presented a second time in the *same* case in the same court should lead to the *same* result." (emphasis in original); *see also IBEW v.* NLRB, 2005 U.S. App. LEXIS 9770 (D.C. Cir. 2005) ("[t]he doctrine encompasses a court's explicit decisions, as well as those issues decided by necessary implication).

With regard to the standard of review of independent contractor status generally under the NLRA, the Supreme Court has held that Congress intended the Board and the courts to "apply the common law agency test" for independent contractor status. *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). In applying the common law test, the Court further held that NLRB determinations of the sort at issue here "involve no special administrative expertise that a court does not possess," and that a court "need not accord the Board's decision that special credence which we normally show merely because it represents the agency's considered judgment." *Id*. at 260. The *FedEx I* decision applied this same standard of review, which again is the law of the circuit. 563 F.3d at 496.

Finally, this Court is required to deny enforcement and vacate a Board order

where the Board's decision has "no reasonable basis in law or when the Board has failed to apply the proper legal standard." *Titanium Metals Corp. v. NLRB*, 392 F. 3d 439, 445-46 (D.C. Cir. 2004); *see also Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F. 3d 19, 25 (D.C. Cir. 2001). The Board's departure from its own established precedent without a reasoned analysis similarly renders its decision arbitrary and unenforceable. *See E.I. du Pont de Nemours & Co. v. NLRB*, 682 F. 3d 65, 66-67 (D.C. Cir. 2012); *Mail Contractors of America v. NLRB*, 514 F. 3d 27, 31 (D.C. Cir. 2008).

B. The Facts Underlying The Board Decision And This Court's *FedEx I* Decision Are Materially Indistinguishable.

In *FedEx I*, this Court applied the common law of agency to conclude that FedEx single route contractors "share[d] many of the same characteristics of entrepreneurial potential" that helped to establish independent-contractor status in previous cases. 563 F.3d 492, 498.[12] The undisputed material facts in this case compel the same conclusion.

Summarizing the more detailed factual comparison above that shows how the factual findings in the Board Decision now under review mirror the evidence

[12] *See Corporate Express Delivery Systems v. NLRB*, 292 F. 3d 777 (D.C. Cir. 2002); *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855 (D.C. Cir. 1995); and *North American Van Lines v. NLRB*, 869 F.2d 596 (D.C. Cir. 1989), all of which are cited and relied upon in the *FedEx I* opinion.

found to be determinative by this Court in *FedEx I*, it is clear that the cases are factually indistinguishable in every material aspect. Specifically, in both cases, the contractors:

- "[N]eed not personally perform all their contractually-obligated deliveries" and "may hire" others of their choosing to perform the work "at employment terms negotiated exclusively between" them- "[A]t least half . . . use supplemental vehicles and drivers," usually during peak periods (Board Dec. at 7 (DA __); *accord FedEx I,* 563 F.3d at 498-500);

- Have the right to "sell their routes to buyers," as further evidenced by "two route sales at the Hartford Terminal" (Board Dec. at 7 (DA __); *accord* 563 F.3d at 500);

- "[H]ave the right under the Agreement to obtain and operate multiple routes", as evidenced by "six contract[ors] having ... operated multiple routes" at Hartford (Board Dec. at 7 (DA __); *accord* 563 F.3d at 504);

- "The Agreement gives the drivers the option of incorporating as a business," as evidenced by "three Hartford drivers [having] incorporated" (Board Dec. at 4 (DA __); *accord* 563 F .3d at 498-99);

- "[A]re not obligated to purchase or lease their vehicles" and are responsible for their vehicle's maintenance, repair and fuel costs" (Board Dec.at 4 (DA __); *accord* 563 F.3d at 498-500);

- Enter into written operating agreements stating the intent to provide services "strictly as an independent contractor, and not as an employee of [FedEx] for any purpose" (Board Dec. at 3 (DA __); *accord* 563 F.3d at 498-99);

- "[M]ay use their vehicles for other commercial [purposes] or personal purposes, provided that they remove or mask FedEx logos" (Board Dec. at 4 (DA __); *accord* 563 F.3d at 498-99);

- "[C]an and do deliver packages in any order and by any route they choose" (Board Dec. at 5 (DA __); *accord* 563 F .3d at 498);

- Are not subject to ordinary discipline and may challenge the termination of their Agreement through binding arbitration (Board Decision at 4 (DA __); *accord* 563 F.3d at 498);

- "FedEx does not have the authority to direct drivers regarding their specific hours of work, whether or when they take breaks, the order in which they make deliveries, or other details of their work. Drivers are free to use their vehicles to perform personal duties during the day, and most park their vehicles at their homes at night." (Board Dec. at 5 (DA __); *accord* 563 F.3d at 498); and

- "FedEx does not provide drivers with any fringe benefits" nor "does it withhold taxes from their settlement checks" (Board Dec. at 6 (DA __); *accord* 563 F.3d at 499, n.4).

C. Based On The Foregoing Indistinguishable Facts, The Holding Of This Court in *FedEx I* Is Controlling As The Law Of The Circuit And/Or The Law Of The Case.

It is undisputed that the status of the Hartford contractors is indistinguishable in every material respect from the contractors who were deemed by this Court to be independent contractors in *FedEx I*. In addition, the NLRB acquiesced to this Court's Decision in *FedEx I* by failing to appeal it and by dismissing all charges relating to it. Finally, as noted above, the record on which this Court decided the *FedEx I* case was made part of the record in the present case, so the NLRB's Decision now under review is based in part upon the *same facts as FedEx I,* along with facts relating specifically to the Hartford independent

contractors that are materially indistinguishable from the facts in the Boston case.[13]

Under these circumstances, as set forth above in the "Standard for Review," the rules of this Court require that the previous panel decision directly on point be applied to the present appeal as the law of the circuit. *Al Maqaleh v. Hagel*, 738 F.3d at 332 ("[O]ne three judge panel…does not have the authority to overrule another three-judge panel of the court."); *In Re Grant*, 635 F.3d at 1232; *see also United States v. Kolter,* 71 F. 3d at 431. In the present case, the facts of *FedEx I* are not just "similar" to the facts underlying the Board Decision; rather the facts are *materially indistinguishable*. Therefore, there can be no doubt that the law of the circuit doctrine applies here, and the holding of *FedEx I* compels reversal of the Board's Decision now under review.

This is particularly so because, as noted above, the factual record on which *FedEx I* was decided was made part of the record of the Hartford proceedings before the NLRB. Therefore, the Board was required to adhere to the D.C. Circuit's Decision in *FedEx I* as the "law of the case" in addition to being the law of the circuit. *See LaShawn A. v. Barry,* 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en

[13] In denying FedEx Ground's motion for reconsideration, the Board "disagreed" that its holding in the present case was based on the same facts as the Boston Decision, because "in the underlying decision, the Board expressly declined to consider evidence regarding practices at FedEx facilities not at issue." 362 NLRB No. 29, at *1 (DA __). To the contrary, that the Board improperly ignored the record evidence from the Boston case does not alter the fact that such evidence was nevertheless made part of the record of this case, and was therefore subject to this Court's ruling in *FedEx I*.

banc); *IBEW v.* NLRB, 2005 U.S. App. LEXIS 9770 (D.C. Circuit 2005); *see also NLRB v. Goodless Bros. Elec. Co., Inc.*, 285 F.3d 102, 107 (1st Cir. 2002) (reversing NLRB decision that failed to adhere to appeals court's previous holding in related case); *NLRB v. Indianapolis Power & Light*, 898 F.2d 524 (7th Cir. 1990) (same); *Ithaca College v. NLRB*, 623 F.2d 224 (2d Cir. 1983).. The NLRB improperly failed to acknowledge this legal requirement and/or expressly refused to follow it, and thereby exceeded the agency's authority under the APA and the NLRA.

The Board also had no authority to "decline to adopt the District of Columbia Circuit's recent holding" in *FedEx I* (Board Dec. at 4 (DA __)), because *FedEx I* and the present case both involve this Court's review of a Congressional standard expressly intended to restrict the Board from expanding the definition of employee status beyond the bounds of common-law agency, in a manner inconsistent with Supreme Court precedent. 563 F.3d 492, 496. For this reason, this Court in *FedEx I* "vacate[d]" the Board's decision outright, in accordance with the Court's settled interpretation of "clear congressional will." 563 F.3d 492, 496, 504.

It must also be reiterated that *FedEx I* does not stand alone as the binding precedent of this Court. Rather, the Court's holding in that case cited and relied on a series of similar decisions in this Circuit, cited above. *See Corporate Express*

Delivery Systems, 292 F. 3d 777; *C.C. Eastern, Inc., 6*0 F.3d 855; and *North American Van Lines*, 869 F.2d 596. All of these holdings support *FedEx I*'s binding decision that FedEx's contractors are independent contractors and are not employees within the meaning of the Act. Taken together, these consistent precedents certainly compel reversal of the Board's Decision in the present case.

D. The Board's Stated Reasons For Failing To Adhere To *FedEx I* Are Wrong As A Matter Of Fact And Law.

The NLRB's criticism of and departure from this Court's *FedEx I* decision is entirely unjustified. First, contrary to the Board's claim (Board Dec. at 8) (DA __), *FedEx I* was fully consistent with the Supreme Court's holding in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). The *FedEx I* Court expressly stated that it was adhering to the Supreme Court's common-law agency test, that it considered "all the common law factors," and that it was the balance of factors that led to the Court's finding of independent contractor status. 563 F. 3d 492, 504. The Board's claim that this Court somehow elevated the factor of entrepreneurial opportunities to an undue level of prominence is inconsistent with the plain language of the opinion in *FedEx I* and this Court's prior precedents. To the contrary, in *FedEx I*, this Court correctly followed *Corporate Express*, which in turn relied on the Restatement's comment that it is not "the degree of supervision under which [one] labors but … the degree to which [one] functions as an

entrepreneur…that better illuminates one's status. 563 F.3d at 502, quoting 292 F.3d at 780.

Thus, contrary to the Board's assertions, *FedEx I's* use of entrepreneurial opportunity as an "animating principle" by which to evaluate common-law agency factors was not novel and remains entirely consistent with Supreme Court precedent. Entrepreneurial opportunity has long been characterized by this Court as "most relevant for the purpose of determining whether [a worker] is an independent contractor." *C.C. Eastern*, 60 F.3d at 860. Such opportunity has equally been adopted as a consideration that "better captures the distinction between an employee and an independent contractor." *Corporate Express*, 292 F.3d at 780. Entrepreneurship has also been declared to be "the most important among several elements useful in distinguishing an employee from an independent contractor." *Grange Debris Box and Wrecking Co. v. NLRB*, 210 F. App'x 7, 8 (D.C. Cir. Dec. 21, 2006) (unpublished).

Further, contrary to the Board's assertion (Board Dec. at 8) (DA __), the Court's decision not to defer to the Board in *FedEx I* was in no way inconsistent with the Supreme Court's subsequent holding in *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1871 (2013). The *Arlington* case did not address a statutory provision at all comparable to the NLRA's independent contractor clause, where Congress has expressly amended the statute to overrule the Board's previous

determinations on the subject of independent contractor status. There is also no indication that the *Arlington* Court intended to overrule the Supreme Court's holding in *United Insurance Co. of America*, 390 U.S. at 260, in which the Court declared that agency determinations as to the standard for independent contractor status "involve no special administrative expertise that a court does not possess," and that a court "need not accord the Board's decision that special credence which we normally show merely because it represents the agency's considered judgment."

Unlike the issue before the Court in *Arlington*, the present petition involves an issue as to which Congress has spoken directly of its intent to overrule past excesses of the Board with regard to the status of independent contractors. The Board had no authority to act in contravention of Congressional intent by narrowing the class of independent contractors who are jurisdictionally exempt from the Act's coverage, and this Court is not required to defer to such an action by the Board.[14] Contrary to the Board's assertions in the Decision under review, the Board is not entitled to any greater judicial deference than the *FedEx I* opinion gave it in defining independent contractor status.

Equally misguided is the Board's reliance on an inapposite decision of the Ninth Circuit in *Alexander v. FedEx Ground Package System, Inc.*, 765 F. 3d 981

[14] Because Congress has so clearly spoken on the independent contractor issue, as further discussed below, the *FedEx I* decision is also consistent with *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), again contrary to the Board Decision. (Board Dec. at 3, 22 (DA __)).

(9th Cir. 2014), in which that court decided that certain drivers should be considered employees of FedEx under the California Labor Code. Board Dec. at 16, n.77 (DA __). The issue in that case was governed by a state law with entirely different aims than the NLRA, under a multi-factor test that the California Supreme Court has described as being "different" from the common law principles that control determinations under the NLRA. *See S.G.Borello & Sons v. Department of Industrial Relations*, 48 Cal.3d 341, 352 (1989). For the same reason, the Board improperly relied on the case of *Slayman v. FedEx Ground Package System, Inc.,* 765 F. 3d 1033 (9th Cir. 2014). The Ninth Circuit itself has recognized the distinction between the NLRA and state law definitions of independent contractor status. *Compare Merchants Home Delivery, Inc. v. NLRB*, 580 F.2d 966, 974-75 (9th Cir. 1978) (holding that "entrepreneurial characteristics … tip decidedly in favor of independent contractor under the NLRA.").

Furthermore, the Board Decision under review relies upon the same flawed legal conclusions from the facts that this Court rejected in *FedEx I*. Specifically, it rests on legally erroneous characterizations of measures such as uniforms, logos, identification badges, and timely deliveries as "controls" indicative of employee status, when those measures spring from customer demands, government regulations, and FedEx's own business model. Board Dec. at 9, 13 (DA __); *compare* 563 F.3d at 501. This Court correctly held that the above features relied

on by the Board "reflect differences in the type of service the contractors are providing rather than differences in the employment relationship." *Id*.

Finally, the Board has exaggerated the supposed constraints on contractor opportunities in this case and has ignored evidence that the number of route sales has increased substantially since 2007. Board Dec. at 15, n.67 (DA __). Significantly, the Board did not cite any *actual* imposition of constraints by FedEx on driver entrepreneurship. The Board likewise improperly discounted evidence that numerous drivers have bought and sold multiple routes, which is itself evidence of actual entrepreneurial opportunity, and the Board arbitrarily gave no weight to evidence that the number of such multiple route contractors has increased substantially since 2007. Board Dec. at 15 (DA __).

E. The Board's Purported Revision Of Its Independent Contractor Standard Cannot Evade This Court's FedEx I Holding And In Any Event Conflicts With Congressional Intent And Settled Judicial Authority.

In a further effort to evade this Court's ruling in *FedEx I,* while at the same time rejecting the Court's holding, the Board's Decision purports to "more clearly define the analytical significance" of entrepreneurial activity in determining independent contractor status. (Board Dec. at 1, 11) (DA __). This "clarification" does not change the facts or law applicable to this case, which have already been established by the Court in *FedEx I*. Of equal importance, the Board's purported

refinement of its independent contractor standard impermissibly discounts the historical significance of evidence pertaining to entrepreneurial opportunity under the traditional common-law agency test. Contrary to the Board's holding, the legislative history of the exemption for independent contractors shows that Congress clearly and specifically intended that the exemption should not be so narrowly construed. *See, e.g.*, H.R. Rep. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947).

As Board Member Johnson explained in his dissenting opinion, the NLRB here has articulated another form of the economic dependency test that the Supreme Court adopted in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) and *U.S. v. Silk*, 331 U.S. 704 (1947), which was thereafter rejected by Congress in 1947. (Dissent at 21) (DA __). In *Hearst*, the Board and the Court wrongly decided that "employees" could include anyone who was dependent on the "employer" as a "matter of economic reality," rejecting reliance on "technical concepts" in favor of giving primary consideration to "securing to the individual the rights guaranteed … by the Act." 322 U.S. at 128-29.[15] In the House Report referenced above, Congress expressly cited the Court's decision in passing the Taft-Hartley

[15] As the Supreme Court stated this view in *Hearst*: "In short, when …the economic facts of the relation make it more nearly one of employment than of *independent business enterprise* with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections." 322 U.S. at 128 (emphasis added).

"independent contractor" amendment, overruling both the Board and the Court's views at that time. The Board's attempt to revive the discredited independent business/economic realities test must be rejected again now.

The *FedEx I* decision properly stated that the Board's underlying Boston Decision was not entitled to deference, 563 F. 3d at 496; and for the same reason, the Board's Decision in this case is not entitled to any deference in this appeal. In both cases, the Board's decisions conflicted with Congressional intent in the Taft-Hartley amendments which were drafted to overrule previous NLRB expansion of the term "employee."

In any event, even if the Board somehow was permitted to refuse to abide by *FedEx I* with regard to FedEx's evidence of entrepreneurial opportunities for its drivers, based on the newly announced revision to the Board's "independent business" test, the Board has acted arbitrarily in departing from and overruling its own precedents without adequate justification. In particular, the Board Decision incorrectly summarized extant Board law since the NLRB's seminal decision in *Roadway Package System,* 326 NLRB 842 (1998) *(Roadway III)*. (Board Dec. at 9) (DA __). The Board improperly minimized or overruled its own previous decisions such as *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), *enf'd*. 292 F. 3d 777 (D.C. Cir. 2002); *St. Joseph News-Press*, 345 NLRB 474 (2005); and *Arizona Republic*, 349 NLRB 1040 (2007), in which the Board gave prominence to

entrepreneurial opportunity as an important factor in independent contractor determinations. *Id*.[16] The Board likewise erred in its comparison of this Court's *FedEx I* decision with past Board rulings where employee status was found based upon the absence of "any" significant entrepreneurial characteristics. (Board Dec. at 10) (DA __). *Compare Roadway III, supra*, 326 NLRB at 853, and *Slay Transportation*, 331 NLRB at 1294.

Thus, the cases relied on by the Board in the Decision under review do not support the creation of a new or "clarified" "independent business test" and are factually distinguishable from the present case. The Board gives no rational explanation for its departure from and overruling of past precedent in *Arizona Republic, supra*, 349 NLRB at 1045, and *St. Joseph News-Press, supra*, 345 NLRB at 481-482. Indeed, it is the Board's purportedly revised standard that fails to adhere to the agency's own decision in *Roadway III*, which the Board has not overruled, and which held that a significant factor in an independent contractor determination under the NLRA is whether putative contractors have "significant entrepreneurial opportunity for gain or loss." 326 NLRB at 851.

---

[16] The Board further erred in disclaiming its own focus on entrepreneurial opportunity in *Corporate Express*. *See* Decision at 9, n.22 (DA __). As this Court properly found in *FedEx I*: "In [*Corporate Express*], both this court and the Board, while retaining all of the common law factors, shifted the emphasis away from the unwieldy control inquiry in favor of a more accurate proxy: whether the "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss'." 292 F. 3d 777, 780, *quoting Corp. Express Delivery Sys*., 332 NLRB No. 144, at 6 (Dec. 19, 2000).

It must also be observed that the facts of this case should result in a finding of independent contractor status, even if the Board's overemphasis on independent businesses were accepted as a valid reading of the common law agency test. The undisputed facts here proved the existence of real independence among the Hartford contractors, just as the Court found existed in *FedEx I*. A significant number of the contractors took advantage of opportunities to incorporate their businesses, purchase multiple routes, and hire their own employees to service the routes. By any objective definition of the terms newly imposed by the Board, the Hartford contractors clearly have a "realistic ability to work for other companies," have a "proprietary or ownership interest in their work," and have "control over important business decisions." Board Dec. 12 (DA __). Such decisions include but are not limited to: whether to continue to contract with FedEx; whether to grow or sell their businesses: and whether to add employees while determining the terms and conditions of their employment.

In this regard, the Board erred repeatedly in applying the foregoing factors to the facts found by the Regional Director's DDE. Thus, the Board incorrectly held that FedEx exercises "pervasive control over the essential details of drivers' day-to-day work." *Id*. at 13 (DA __).. To the contrary, the Regional Director found that contractors enjoy considerable discretion over important facets of their work, including the order in which to deliver packages, the specific routes they travel,

and when and where to start deliveries and take breaks. DDE at 11, 12, 28 (DA __,__,__). The Board also ignored the extent to which contractors are engaged in a distinct occupation, DDE at 8, 12-13 (DA __, __), giving excessive weight to stylistic issues such as clothes and insignia, and exaggerating the contractors' acceptance of guidance suggestions and mere offers of assistance from FedEx. *Id*. (DA __). The Board also erred in finding that FedEx "essentially directs" contractors' performance, notwithstanding clear evidence and specific fact findings by the Regional Director that contractors are free of supervision in their work duties. *Id*. at 13; *compare* DDE at 28; *see also C.C. Eastern, Inc*., 309 NLRB 1070 (1992), *enf. denied*, 60 F. 3d 855 (D.C. Cir. 1995).

The Board further erred in finding that the significance of the contractors' undisputed ownership of their vehicles is "undercut considerably" by FedEx's alleged "primary role in dictating vehicle specifications and facilitating vehicle transfers." *Id*. at 13-14 (DA __). To the contrary, as this Court properly held in *FedEx I*, FedEx is a motor carrier subject to Department of Transportation regulations, and FedEx's effort to insure consistency with such standards is not evidence of an employee relationship. 563 F. 3d at 500. *See also Central Transport, Inc*., 299 NLRB 5 (1990). The Board also improperly found vehicle ownership to be a "neutral" factor when in reality it strongly augurs in favor of independent contractor status. *Id*. at 503; *see also C.C. Eastern, supra*, 60 F. 3d at

859.

The Board similarly erred in finding that 1-year or 2-year agreements signed by the drivers were somehow a "permanent working arrangement with the company…." *Id*. at 14 (DA __). The record evidence showed that numerous contractors negotiated new agreements and/or left the unit by purchasing multiple routes. *See* FedEx 2010 Response to Notice to Show Cause. Likewise, the Board unfairly discounted contractors' incentives in compensation and the absence of fringe benefits or accident insurance, while incorrectly asserting that FedEx "establishes and controls drivers' rates of compensation." *Id*. (DA __). Lastly, the Board erred in finding "inconclusive" the obvious belief of the parties that they were creating an independent-contractor relationship. *Id*. (DA __).

The Board further erred in giving "little weight" to the contractors' right to sell their routes and in characterizing such sales as "more theoretical than actual." *Id*. at 15 (DA __). The fact that more than one contractor actually took such an entrepreneurial opportunity should have been enough proof that the opportunity "actually" existed. Here of course, the number of contractors who sold their routes was significant higher. Moreover, if "actual" entrepreneurial opportunities did not exist at the Hartford station, one would expect there would have been no contractors with more than one route or none who utilized a helper or supplemental

driver.

The Board nevertheless has arbitrarily declared that the contractors' actual taking of their entrepreneurial opportunities amounted to nothing, because "not enough" people in the proposed unit took the opportunity and/or because by taking the opportunity of buying or selling their routes, the purchasing or selling contractors removed themselves from the unit. To the contrary, at every stage of this proceeding, FedEx has produced evidence of route sales by drivers, including two such sales prior to 2007, and 20 more sales between 2007 and 2010.

The Board's claim that FedEx retains too much control over such sales is itself based upon theoretical speculation rather than any evidence of actual impact on the sales themselves. *Id*. at 15 (DA __). In this regard, the Board faults FedEx for failing to include evidence of the "circumstances of each sale or whether any profit was realized by the drivers." *Id*. at 15 (DA __). There has never previously been such a proof requirement, and it is a violation of FedEx's due process rights for the Board to impose such a requirement retroactively in this case. In any event, FedEx did provide proof of driver profits from route sales, both system wide and at Hartford, which the Board's Decision erroneously ignores. *See* FedEx 2020 Response to Notice to Show Cause. (DA __). It is also undeniable, as Member Johnson observed, that there is a market for route sales among contractors,

indicating that these are businesses of independent value that are being evaluated and sold by business owners, and are not "controlled" by FedEx. Dissent at 31 (DA __). *See also FedEx I*, 563 F. 3d at 502 ("[N]ot only do these contractors have the ability to hire others without FedEx's participation, only here do they own their routes – as in they can sell them, trade them, or just plain give them away.").

The Board's refusal to consider the ability of contractors to acquire multiple routes is utterly circular, arbitrary and capricious. Contrary to the Board's Decision at 15 (DA __), acquisition of multiple routes does not constitute "severance" of an ongoing relationship with FedEx, but an entrepreneurial *expansion* of that relationship on the part of truly independent contractors. This is particularly significant in light of the post-hearing evidence that the number of single route contractors who went on to become multiple route drivers increased from three such contractors in 2007 to a majority of the bargaining unit by 2010, *See* Finch Affidavit attached to FedEx March 2010 Motion to Dismiss. (DA __). Accordingly, the Board erred by concluding that the evidence was insufficient to establish the members of the petitioned-for unit were rendering services to FedEx as part of their independent businesses, as newly defined by the Board.

The Board's arbitrary application of its "refined" independent business test to find that the Hartford contractors are FedEx "employees" in spite of all the facts

set forth above, constitutes an additional ground for giving the Board's' sham test no deference. The Board's Decision directly conflicts with the record evidence and the controlling precedent of this Court and of the Board itself. The Decision finally conflicts even with the standard wrongly restated by the Board in this case.

F. The Board Erroneously Failed To Hold That The Retroactive Application Of Its Decision To The Contractors In This Eight-Year-Old Case Causes Manifest Injustice.

As discussed above, the Board has not only acted in defiance of controlling D.C. Circuit precedent, but it has retroactively imposed a new evidentiary standard of proof with regard to independent contractor status, *eight years* after a hearing was conducted under a previous standard. Under such circumstances, the Board's own precedent required the agency to determine that a retroactive application of such a change would cause manifest injustice. *SNE Enterprises*, 344 NLRB 673 (2005); see also *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001) (denying enforcement of the Board's retroactive application of a new policy due to manifest injustice). In *SNE*, the Board held that it will not apply new standards retroactively upon a finding of manifest injustice, as to which the Board is supposed to balance three factors: "[1] the reliance of the parties on preexisting law; [2] the effect of retroactivity on accomplishment of the purposes of the Act; and [3] any particular injustice arising from retroactive application."

Id. This Court's test is similar, turning on "notions of equity and fairness." *Epilepsy Foundation*, 268 F.3d at 1102.

The Board plainly violated its own precedent by failing to engage in the foregoing analysis in its initial Decision in this case. In response to FedEx's motion for reconsideration, however, the Board purported to engage in the required analysis, but reached an inequitable and unfair conclusion.

Contrary to the Board's Reconsideration Decision (DA __), it is clear that FedEx relied on the Board's preexisting standards, as set forth in such cases as *Roadway Express III, Dial-A-Mattress Operating Corp., 326 NLRB 884 (1998),* and *Corporate Express*, in structuring its driver contracting program. As this Court held in *FedEx I*, the pre-existing standards of the Board fully supported FedEx's belief that its drivers were (and are) independent contractors. Thus, the first factor of *SNE Enterprises* indisputably applies here. The second manifest injustice factor, which requires consideration of the effect of the change on the purposes of the Act, likewise applies to Fedex. Far from accomplishing the purposes of the Act, the Board's change in its independent contractor test defies Congressional intent in the Taft-Hartley amendments as interpreted by controlling judicial authority.

Finally, it is manifestly unjust to fault FedEx for the manner in which the Company submitted its evidence of entrepreneurial opportunity in 2007 and 2010,

and to discount that evidence, when FedEx's submissions complied with the Board's own evidentiary standards at the time, along with those of this Court. The Board incorrectly claimed FedEx asked that its system-wide evidence of entrepreneurial opportunity "substitute for the absence of similar evidence relating to employees in the petitioned-for unit;" when in reality FedEx's system-wide evidence *confirms* the existence of "actual" opportunities in the unit that the Board has improperly discounted.

For similar reasons, this Court found manifest injustice in the Board's retroactive application of a change in policy in *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001). The same result should obtain in the present case, though it is of course unnecessary to reach the manifest injustice issue if the Court adheres to its controlling *FedEx I* decision and vacates the Board's decision in its entirety.

G. The Board Further Erred In Overruling FedEx's Objections To The Election

As noted above, in addition to challenging the Board's direction and certification of an election among independent contractors, FedEx filed objections to the election itself. Though it is unnecessary to reach this issue once the contractors are found to be independent contractors ineligible to vote, the election should in any event be set aside because the Board departed from precedent in

overruling FedEx's objections.

Considering first Objection Number 1, the Board Decision plainly violated this Court's holding in *Freund Baking Co v. NLRB*, 165 F.3d 928 (D.C. Cir. 1996), because the Teamsters conferred valuable legal benefits – free legal services - on unit employees in connection with two lawsuits that were filed against the Employer prior to the election on behalf of these employees. The record evidence established that union representatives arranged for attorneys to meet with voters during the critical period, and voters were offered and received agreements for free legal services and the filing of lawsuits on their behalf claiming significant monetary damages only days before the election was held. (*See* ALJ Supp. Dec. dated May 22, 2009) (DA __).

In overruling the Objection, the ALJ, as affirmed by the Board, improperly required proof that the Union arranged or took credit for the provision of free legal services to unit employees "contingent on a favorable outcome of the Petitioner in the election, or…on individual plaintiffs' votes for the Petition." (ALJ Supplemental Dec. at 5 (DA __), affirmed and later reaffirmed without further comment by unpublished Board orders dated May 27, 2010 (DA __) and August 27, 2010 (DA __). Neither the ALJ nor the Board addressed FedEx's contention that the standard applied in upholding the election violated this Court's holding in *Freund Baking Co.* In that case, this Court held that a union's sponsorship of

employees' lawsuit against their employer during the critical period before an NLRB election violated the rule against providing gratuities to voters, regardless of whether the union actually paid for the lawsuit, and regardless of any *quid pro quo*. As the Court stated: "[I]t is the appearance of support, not the support itself, that may have interfered with the voters' decision making." *Id*. at 932. The Board erred by failing to address or adhere to this Court's holding.

As to the second Objection, FedEx established that the Board's election agent improperly commingled with unchallenged ballots the challenged ballots of a multi-route contractor, Paul Chiappa, and a driver whom Chiappa had independently hired, Robert Dizinno, improperly affecting the results of the vote. The evidence showed that neither of the challenged voters should have been allowed to vote in the election, due to Chiappa's status as a multi-route driver and due to Dizinno's status as Chiappa's (not FedEx's) employee. In particular, FedEx produced evidence of changed circumstances following the pre-election hearing that compelled the exclusion of both voters.

As noted above, the ALJ in his Supplemental Decision agreed that changed circumstances compelled a finding that Dizinno was not a FedEx employee and did not share a community of interests with other voters, which potentially affected the outcome of the election. (ALJ Supp. Dec. at 8) (DA __). On review, however, the Board reversed the ALJ's Supplemental Decision on this point and overruled the

Objection, finding that the changed circumstances were insufficient to warrant removal of Dizinno from the unit. (DA __). The Board failed to address FedEx's contention that the Board agent's failure to follow the Board's procedures for handling challenged ballots should have caused the election to be set aside under the Board's holding in *Fresenius USA Mfg., Inc*., 352 NLRB No. 86 (2008). In that case, the Board set aside a close election due to similar irregularities in the Board agent's handling of ballots, without requiring each individual ballot to be outcome determinative. The Board failed to address or distinguish its own precedent on ballot handling, and for this additional reason, the Board Decision should be vacated and the certification of the Union overturned.

VIII. CONCLUSION

For each of the reasons set forth above, FedEx's Petition(s) should be granted and the Board's Order(s) should be vacated and denied enforcement.

Respectfully submitted,

/s/ Maurice Baskin

Maurice Baskin
Joshua Waxman
Littler Mendelson, P.C.
1150 17th St., N.W.
Washington, D.C. 20036
P: 202-772-2526
F: 202-318-4048
mbaskin@littler.com
jwaxman@littler.com

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,113 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Word 2003 in Times New Roman, Font 14.

/s/ Maurice Baskin

Maurice Baskin
Joshua Waxman
Littler Mendelson, P.C.
1150 17th St., N.W.
Washington, D.C. 20036
P: 202-772-2526
F: 202-318-4048
mbaskin@littler.com
jwaxman@littler.com

CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of August, 2015, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/ Maurice Baskin
Counsel for Petitioner