Nos. 14-1196, 15-1066, 15-1116

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT ENGLEHART
Supervisory Attorney

KELLIE ISBELL
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2978
(202) 273-2482

RICHARD F. GRIFFIN, JR
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

(A) Parties and Amici: FedEx Home Delivery, the petitioner/cross-respondent herein, was a respondent in the case before the National Labor Relations Board. The Board is the respondent/cross-petitioner herein, and the Board's General Counsel was a party in the case before the Board. The International Brotherhood of Teamsters, Local No. 671 was the charging party before the Board. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is participating as amicus in support of the Board; the Chamber of Commerce of the United States of America, the American Trucking Associations, Inc., and the National Association of Manufacturers are participating as amici in support of FedEx.

(B) Rulings Under Review: This consolidated case involves two petitions for review and a cross-application for enforcement of the Board's Decision and Order issued on September 30, 2014, and reported at 361 NLRB No. 55, and the Board's denial of FedEx's motion for reconsideration issued on March 16, 2015 and reported at 362 NLRB No. 29.

(C) Related Cases: This case was previously before this Court. On October 29, 2010, the Board issued a decision finding that FedEx's refusal to bargain

violated the Act, and FedEx filed a petition for review (No. 10-1534). The Board vacated its decision following this Court's decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (2009) ("*FedEx I*"), and the Court granted the Board's motion to dismiss FedEx's petition for review. On September 30, 2014, the Board issued the decision under review here.

GLOSSARY

9/29/08 DO Remanding	Board's 2008 Decision and Order Remanding Case to Administrative Law Judge
2010 DO1	Board's 2010 Decision and Order, reported at 356 NLRB No. 10, 2010 WL 4474378
3/16/15 order denying MFR	Board's 2015 Order Denying FedEx's Motion for Reconsideration
ABr.	Amicus brief of Chamber of Commerce of the United States of America, the American Trucking Associations, Inc., and the National Association of Manufacturers
Br.	FedEx's opening brief
DCR	Board's 2010 Decision and Certification of Representative
Dec. on Objs.	Administrative Law Judge's 2007 Decision on Objections
DDE	Regional Director's 2007 Decision and Direction of Election
DO	Board's 2014 Decision and Order, reported at 361 NLRB No. 55, 2014 WL 4926198
DOT	Department of Transportation
FX	FedEx's exhibits from the 2007 pre-election representation hearing
FXW 4	FedEx's exhibit 4 from the 2005 hearing in case numbers 1-RC-22034 and 1-RC-22035
Supp. Dec. on Objs.	Administrative Law Judge's 2009 Supplemental Decision on Objections
Tr.	Transcript of the 2007 pre-election representation hearing

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Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of FedEx Home Delivery, an Operating Division of FedEx Ground Package System, Inc. ("FedEx") to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against FedEx. The Board found that FedEx violated Section 8(a)(5) and (1) (29 U.S.C. § 158 (a)(5) and (1)) of the National Labor Relations

Act, as amended, 29 U.S.C. §§ 151, et seq., by refusing to bargain with Local Union No. 671, International Brotherhood of Teamsters, the Union certified as the collective-bargaining representative of a unit of FedEx's employees.

The Board's Decision and Order issued on September 30, 2014, and is reported at 361 NLRB No. 55, 2014 WL 4926198. (DO1-33.)[1] The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final. The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board, in that circumstance, to cross-apply for enforcement.

As the Board's Order is based, in part, on findings made in the underlying representation proceeding (No. 34-RC-002205), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d), however, does not give the Court general authority over the representation proceeding, but instead authorizes review of the Board's actions in that proceeding for the limited

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[1] "DO" refers to the Board's 2014 Decision and Order. Other abbreviations are set forth in the glossary. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board." The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

FedEx filed its petition on October 8, 2014.[2] The Board filed its cross-application on April 24. Both are timely; the Act places no time limit on filing actions to review or enforce Board orders. The American Federation of Labor and Congress of Industrial Organizations is participating as amicus in support of the Board; the Chamber of Commerce of the United States of America, the American Trucking Associations, Inc., and the National Association of Manufacturers are participating as amici in support of FedEx.

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[2] FedEx also petitioned for review of the Board's denial of its motion for reconsideration, reported at 362 NLRB No. 29 (2015). The Court consolidated the petitions.

STATEMENT OF THE ISSUES

Does substantial evidence support the Board's finding that FedEx violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified representative of its single-route drivers? That question turns on two subsidiary issues:

1. whether the Board reasonably found that the single-route drivers are statutory employees, not independent contractors; and

2. whether the Board abused its discretion in overruling FedEx's objections to the election won by the Union.

RELEVANT STATUTORY AND RESTATEMENT PROVISIONS

Relevant sections of the National Labor Relations Act, the Restatement (Second) Agency, and the Restatement of Employment Law are reproduced in the attached Addendum.

STATEMENT OF THE CASE

The Board found that FedEx violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union, which was certified as the collective-bargaining representative of its Hartford, Connecticut single-route drivers. FedEx does not dispute that it refused to bargain, but contests the Board's finding that the drivers are employees covered by the Act, as well as the Board's decision to overrule FedEx's election objections. Relevant portions of

the factual and procedural history of the case are set forth below, followed by a summary of the Board's Decision and Order.

I. THE REPRESENTATION PROCEEDING

A. Factual Background

1. FedEx's business organization

FedEx[3] delivers small packages to primarily residential customers. (DO3,DDE4; Tr.9.) Drivers sign operating agreements with FedEx which obligate them to deliver FedEx packages. Single-route drivers operate only one delivery route; multiple-route drivers operate more than one route (using additional vans and hiring supplemental drivers). (DO3,DDE4; Tr.12.) FedEx also uses temporary drivers, employed by a temporary agency, who fill in for drivers when necessary. (DO3,DDE5-6; Tr.12.)

At the time of the representation hearing in 2007, the Hartford, Connecticut terminal involved in this case had about 26 routes. (DO3,DDE4; Tr.381.) Two multiple-route drivers, Roger Jones and Keith Ignasiak, operated six of these routes. (DO3,DDE4; Tr.382.) FedEx assigned two routes to Paul Chiappa; Chiappa operated one route, and Robert Dizinno operated the other. In addition, two routes were unassigned. (DO3,DDE4; Tr.382,386.)

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[3] "FedEx" refers to FedEx Home Delivery.

2. FedEx hires unskilled workers and trains them

FedEx advertises for drivers, and those interested complete a job application. (DDE5; Tr.53,164,665.) FedEx conducts motor vehicle and criminal record checks, and applicants are required to submit to a physical examination (by a FedEx-approved physician) and drug test, all of which are required by the Department of Transportation's Federal Motor Carrier Safety Regulations (DOT regulations). (DO3,DDE5; Tr.913.)

Successful candidates are hired by FedEx through a temporary agency. (DDE5; Tr.391.) No prior commercial delivery training or experience is required. (DDE5-6; Tr.982.) Temporary drivers without experience complete FedEx's 14-day driver training course called "Quality Packaging Delivery Learning" (QPDL), which includes 8 days of classroom and on-the-road training plus 5 additional days accompanying managers while they deliver packages. (DO3,DDE6; Tr.354.) In addition to safety training required by DOT regulations, the course provides an orientation to FedEx procedures, including loading packages, using a scanner to track packages, reading road plans, and proper delivery procedure. (DO3,DDE6; Tr.945.) FedEx provides QPDL training at no-cost, and temporary drivers are paid while they attend the training. (DO3,DDE5-6; Tr.355-56,917.)

3. Drivers' agreements establish a full-time work arrangement and control their work

After completing the training (if required) and acquiring a van, drivers sign a Standard Operating Agreement with FedEx. (DDE6; Tr.277.) The agreement is the same nationwide and essentially unchanged since 2000. (DO3,DDE6; Tr.279.) Except for the route assigned to the driver and the temporary core zone payment, the agreements are non-negotiable and presented to each driver on a take-it-or-leave-it basis. (DO3-4,DDE6.) The agreement states that the driver is "strictly [] an independent contractor, and not [] an employee of [FedEx] for any purpose." (DO3,DDE7; FXW4 p.4.)

FedEx promises, on the first page of the agreement, to "seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment." (DO15 n.68; FXW4 p.4.) In return, drivers must provide daily service and "conduct his/her business so that it can be identified as being a part of the [FedEx] system." (DO5,DDE10; FXW4 p.4.) Under the agreement, drivers have the right to use their vans for "outside" business if they first remove or cover the FedEx logos. (DO4,DDE8; FXW4 p.6,Tr.607-08.) No Hartford driver has ever used his van for outside businesses. (DDE26; Tr.295.)

The agreement requires all drivers to wear a FedEx uniform, maintained in good condition, and to keep their personal appearance "consistent with reasonable

standards of good order as maintained by competitors and promulgated from time to time by" FedEx. (DO5,DDE8; FXW4 p.10.)

Drivers can sign the agreement for one- or two-year periods; the agreement automatically renews for successive one-year periods thereafter. (DO14,DDE6-7; FXW4 p.22.) Contracts can be terminated under certain circumstances: mutual agreement, driver's intentional misconduct or willfully negligent operation of his van, breach of contract, cessation or reduction of delivery service in the driver's area, or 30 days' written notice by the driver. (DO4,DDE7; FXW4 pp.22-23, Tr.234-36.) Drivers failing to provide the required notice owe FedEx $500 in liquidated damages. (DDE7; FXW4 p.23,Tr.236.)

To encourage compliance with its work rules, FedEx offers bonuses and reduces liability for losses. Drivers who do not comply with the Safe Driving Program must obtain their own public liability insurance. (DO6; DDE19,Tr.1193-94.) Drivers who meet customer service goals—including no at-fault accidents and no verified customer complaints—are eligible for individual and facility group bonuses. (DDE16; FXW4 Add.8,Tr.1082.) Drivers who comply with the Driver Release Program qualify for monthly bonuses and are not held liable for lost packages. (DDE11,25; FXW4 DRP Add.,Tr.207-08.)

4. Drivers must buy vans meeting certain specifications and are required to have certain equipment; FedEx helps pay for expensive repairs and higher priced fuel

Drivers are required to purchase or lease a van before signing an operating agreement, and FedEx must approve each van. (DO4,DDE25; Tr.399,1053-54.) Vans must be white, have interior shelves, and have backing cameras. (DO3,DDE15; Tr.942-43,1062-63.) Although FedEx does not specify a particular make or model of van, it does require that the vans be a certain size. (DO3,DDE15; Tr.683-84.)

Drivers' vans must meet FedEx standards of cleanliness and be free from body damage or other extraneous markings. (DO3,DDE15; FXW4 p.10.) Vans must carry the FedEx Home Delivery logo. (DO3,DDE15; Tr.143,178-79,942.) To foster name recognition, FedEx requires a larger logo than that required by DOT regulations. (DO3,DDE15.)

Drivers are responsible for the costs of all fuel and maintenance on their vans, but FedEx assists with these costs through its Service Guarantee Program and fuel price supplements. (DO4,6,DDE15,17; Tr.399,FXW4 p.17,Add. 3.) FedEx establishes and pays interest on a Service Guarantee Account for each driver to encourage them to save for expensive repairs. (DO6,DDE17; FXW4 Add. 3, Tr.761.) For each quarter that a driver maintains a $500 average balance in his account, FedEx contributes an additional $100. (DO6,DDE17; FXW4 Add 3.)

FedEx also has a loan program to help drivers pay for repairs that exceed the balance in their accounts, up to a maximum of $5,000. (DDE15; FXW4 Add.3.) When gas prices rise above a certain level, FedEx pays drivers a fuel supplement to compensate them for the higher prices. (DO6,DDE17; FXW4 Add.3.)

FedEx, consistent with DOT regulations, maintains general liability insurance on drivers' vans for personal injuries and damages caused in connection with FedEx's business. (DO6,DDE18-19; FXW4 Add.2,Tr.517,1193-96.) FedEx also indemnifies drivers against liability for those damages, if they comply with the Safe Driving Program. (DO6,DDE19; Tr.1193-94.) Deductibles are eliminated after two years with no at-fault accidents. (DO6,DDE19; FXW4 Add.2.) FedEx requires that drivers maintain collision liability insurance and work accident coverage in specified amounts, which can be purchased through a policy negotiated by FedEx. (DO6,DDE19; FXW4 Add.2,Tr.180,1194-95.)

FedEx offers drivers a Business Support Package (BSP), the cost of which it deducts from the drivers' weekly pay. (DO3,5,DDE17; FXW4 Add.6.) The BSP provides required items, including scanners, uniforms, FedEx decals for the vans, random drug tests, annual DOT vehicle inspection, mapping software, and a vehicle washing service. (DO5,DDE17; FXW4 Add.6,Tr.625-26.) Drivers are not required to purchase the BSP from FedEx but would have to find these items from other vendors if they did not. (DDE27; Tr.645.) There is no evidence that any

Hartford driver has ever used an outside vendor, or that some items, such as the FedEx scanner, would even be available from another vendor. (DO5,DDE17.)

5. FedEx assigns and can unilaterally reconfigure "primary service areas"

FedEx assigns each driver a delivery route, also known as the "primary service area." The route corresponds to one or more zip codes, and FedEx considers drivers to have a proprietary interest in the route. (DO3,DDE4; FXW4 p.19 & Add. 5,Tr.398,417-19.) The driver is responsible for providing daily delivery service within that area, and is expected to deliver all packages on the day assigned to them. (DO5,DDE13; FXW pp.8-9,18.) FedEx may, in its sole discretion, reconfigure a driver's service area with 5 days' notice. (DO4-5,DDE7; FXW4 p.18,Tr.420-21.) FedEx may also, in its sole discretion, "flex" or transfer packages between drivers if a manager believes a driver has too many packages to deliver on a given day. (DO6,DDE13; FXW4 p.8,Tr.422-23.) Drivers may flex packages among themselves, without FedEx's permission. (DO6,DDE13; Tr.563-64.)

6. Drivers work full-time for FedEx, on days and schedules convenient to FedEx

FedEx requires each driver to work Tuesday through Saturday. (DO5,DDE10; Tr.375,595.) Drivers must log their on-and off-duty time into their scanners, so that FedEx can calculate the hours they spend on the road.

(DO5,DDE10-11; Tr.943-45.) FedEx does not establish a set time for drivers to begin deliveries, but drivers cannot leave for their routes until after the packages are delivered and sorted each morning—between 8:30 and 9 a.m. (DO5,DDE10-11; Tr.409-10,596,636-37,1010.) FedEx discourages drivers from delivering packages after 8 p.m. (DO5,DDE10; Tr.631-32.)

Each morning, between 4:00 and 6:30 a.m., trucks from FedEx's distribution hub bring packages to the Hartford terminal. (DO5,DDE10; Tr.375.) FedEx's package handlers sort the packages by route and place them on pallets for the drivers. (DO5,DDE10; Tr.376-78.) During QPDL training, FedEx teaches drivers a preferred method of loading the vans. (DO3,DDE6; Tr.1008.) FedEx provides each driver with a manifest showing his deliveries for the day and a "turn-by-turn" map showing each stop and a suggested route. Drivers can choose a different route. (DO5,DDE10-11; Tr.378-79,636.) Drivers must scan each package with a handheld scanner before it is loaded onto the van and upon delivery, which gives FedEx a computerized record of deliveries and hours worked. (DO5,DDE10-11; Tr.376,633,640,943-44.)

7. Driver income depends upon rates set by FedEx; FedEx provides some benefits

FedEx unilaterally sets drivers' compensation. (DO6,DDE28; FXW4 Add.3.) Drivers receive a daily "availability fee," a core zone payment, and a variety of bonuses. (DDE16-17,28; FXW4 pp.16-17 & Add.3, Att.3.1, Att.3.4,

Add.8.) Shippers place their deliveries directly with FedEx, and FedEx sets the delivery prices. (DO6,DDE13.) Drivers are not responsible for soliciting customers. (DDE13,26.)

FedEx provides no fringe benefits, such as health insurance or vacation, but offers a voluntary Time-Off Program, the cost of which is deducted from drivers' weekly settlements. (DO6,DDE18; FXW4 Att.6.1,Tr.81.) The fee buys drivers two weeks of leave per fiscal year, which drivers sign up for before the fiscal year begins. FedEx selects leave based on seniority. (FXW4 Att.6.1.) FedEx does not withhold any taxes from drivers' paychecks and provides drivers with IRS 1099 forms at the end of the year. (DO6,DDE18; FXW4 p.17.) Three drivers have incorporated as businesses. (DO4,DDE8; Tr.388-89.)

8. Drivers can, in theory, sell their routes

When FedEx creates new routes or reassigns routes abandoned by other drivers, it gives them away without charge. (DDE9; Tr.197,421,587.) Under the operating agreement, drivers can assign or sell their contractual rights to a replacement driver, so long as the replacement meets all FedEx requirements and enters into an operating agreement on "substantially the same terms and conditions" as the original driver. (DDE9; FXW4 p.25.) If a driver wishes to terminate his contract with FedEx and cannot find a buyer, he must relinquish the route to FedEx at no charge. (DO7; FWX4 p.25,Tr.357-58.) At the time of the

hearing, two drivers at the Hartford terminal had sold their routes. (DO7,DDE10; Tr.271-72.)

B. The Board Certifies the Union

The Union filed a petition to represent the single-route drivers at FedEx's Hartford facility. (DO3;DDE21-23.) After a hearing, the Board's Regional Director issued a decision and direction of election in which he found that the single-route drivers were employees, not independent contractors, within the meaning of Section 2(3) of the Act (29 U.S.C. § 152(3)). (DDE24.) He included Chiappa and Dizinno in the unit, finding that Dizinno shared a sufficient community of interest to be included in the unit and that FedEx failed to satisfy its burden of proving that Chiappa was a supervisor under the Act. (DDE31.)

Specifically, the Regional Director found that in 2004, Chiappa operated a single route. Robert Dizinno was interested in operating a route but could not get credit to buy his own van. (DDE21; Tr.1053,1055,1091.) As a result, FedEx would not contract with him. (DDE21; Tr.1053.) The terminal manager suggested that Dizinno operate a route under Chiappa's contract. (DDE21; Tr.729, 1058-59,1088.) Chiappa agreed but stated that he did not want to operate a second route or supervise another driver, and any supervisory issues would be strictly between the manager and Dizinno. (DDE22; Tr.712,826.) The Regional Director found that Chiappa had never supervised Dizinno and that FedEx "treat[ed] Dizinno as a

contract driver in his own right." (DDE22-23; Tr.713,1082,1077,1084.) On these facts, the Regional Director found that Chiappa was not a supervisor under the Act and Dizinno shared a sufficient community-of-interest with other single-route drivers. (DDE30-31.) He included both men in the petitioned-for unit. (DDE32.) The Union did not seek to represent multiple-route drivers Jones and Ignasiak, the drivers hired by Jones and Ignasiak, supplemental drivers hired during the busy peak season, or temporary drivers. (DDE2 n.4.)

The Union won the election, 12 to 9, with 2 non-determinative challenged ballots. (DCR1.) FedEx filed two election objections, alleging that the Union "improperly conferred valuable benefits, including legal services, to eligible voters" and that the Board agent who conducted the election erred by commingling and counting the ballots of two voters, Chiappa and Dizinno, without first making a determination as to their eligibility to vote. (Supp.Dec. on Objs., pp.1-2.)

An administrative law judge held a hearing and, thereafter, issued a report recommending that the objections be overruled. Regarding Objection 1, the judge found that the Union did not initiate or pay any of the legal fees for two employee lawsuits instituted against FedEx. (Dec. on Objs., p.2.) The judge further found that Objection 2 should be overruled because both Chiappa and Dizinno were eligible to vote. (Dec. on Objs., p.5.) FedEx, the judge found, failed to show that Chiappa was a supervisor under the Act or that there were changed circumstances

since the close of the hearing that would make Dizinno ineligible to vote. (Dec. on Objs., pp.4-5.)

FedEx filed exceptions with the Board. After considering those exceptions, the Board remanded the case to the judge. (9/29/08 DO Remanding.) The Board found that the judge improperly limited evidence to the question whether the Union directly financed the employee lawsuits against FedEx. (9/29/08 DO Remanding, p.4.) Further, the Board found that the Board agent erred by commingling and counting the ballots of Chiappa and Dizinno, but also that the "error did not necessarily affect the outcome of the election." (9/29/08 DO Remanding, p.7.) The Board found that the judge erred by precluding the parties from litigating whether changed circumstances affected the voter eligibility of Chiappa and Dizinno. (9/29/08 DO Remanding, p.6.)

On remand, the judge again recommended that Objection 1 be overruled. He found no evidence that the Union "arranged, or took credit, for the free legal services" or that, if it had provided the legal services, that it made those services contingent on a union victory in the election. (Supp.Dec. on Objs., p.5.) Regarding Objection 2, the judge recommended that Chiappa be included in the unit, and that circumstances had changed sufficiently to make Dizinno ineligible to vote. (Supp.Dec. on Objs., p.8.)

The Board adopted the judge's recommendation to overrule Objection 1 for the reasons he gave. (DCR1.) The Board also overruled Objection 2. The Board agreed with the judge that FedEx had not shown changed circumstances with regard to Chiappa's eligibility to vote. (DCR2-3.) But the Board disagreed with the judge on the issue of Dizinno's eligibility, finding that FedEx "presented no evidence of changes in the material community of interest factors relied on by the Regional Director to find that Dizinno was properly included in the driver unit." (DCR4.) The Board therefore overruled both objections and certified the Union as the collective-bargaining representative.

II. THE UNFAIR LABOR PRACTICE PROCEEDING

Following the Union's election win, FedEx refused to bargain, and the Union filed unfair labor practice charges. (2010 DO1.) The Board's General Counsel issued a complaint alleging that FedEx's refusal violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (2010 DO1.) FedEx admitted its refusal to bargain but challenged the validity of the Union's certification, arguing, among other things, that the certified unit was invalid because its drivers were independent contractors. (2010 DO1.)

On October 29, 2010, the Board issued a decision finding that FedEx's refusal to bargain violated the Act. The Board vacated that decision following this Court's decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (2009) ("*FedEx*

I"). In *FedEx I*, the Court reversed the Board's finding that FedEx's drivers at its Wilmington, Massachusetts terminals were employees and held that a single consideration—"significant entrepreneurial opportunity for gain or loss"—was the "proxy" for distinguishing between employees and independent contractors under the Act. 563 F.3d at 497.

III. THE BOARD'S CONCLUSIONS AND ORDER

On September 30, 2014, the Board (Chairman Pearce, Members Hirozawa, and Schiffer, Member Johnson dissenting) issued a Decision and Order reexamining the merits of the representation proceeding in light of *FedEx I* and refining its analysis for determining whether workers are employees or independent contractors. (DO1,8-12.) The Board reaffirmed its longstanding approach that it would consider the nonexhaustive common-law agency factors. (DO1,8-9.) It also determined that it should evaluate whether the putative independent contractor is rendering services as part of an independent business. (DO1,9-12.) After reviewing the record in light of its refined analysis, the Board concluded that FedEx's Hartford drivers are statutory employees and that FedEx violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (DO12-16,18-19.)

The Board's Order requires FedEx to cease and desist from refusing to bargain with the Union, and from in any like or related manner interfering with,

restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's Order requires FedEx to bargain with the Union on request, embodying any understanding in a signed agreement, and to post a remedial notice. (DO19.)

SUMMARY OF ARGUMENT

The Board, in response to this Court's decision in *FedEx I*, refined its approach to determining whether a worker is an employee under the Act or excluded as an independent contractor. First, the Board reaffirmed its longstanding position that independent-contractor status should be evaluated in light of the traditional common-law factors and that all incidents of the employment relationship should be considered. Second, the Board more clearly defined the analytical significance of entrepreneurial gain or loss and concluded that it should evaluate whether the worker actually renders services as part of an independent business. The Board's refined approach comports with congressional intent, Supreme Court and Board precedent, and labor policy. Therefore, it should be upheld.

Contrary to FedEx's claim, *FedEx I* is not controlling. The Board, as the agency tasked with defining employee under the Act and establishing national labor policy, is free to refine its analyses, so long as it provides a reasoned justification.

Applying its test, the Board determined that FedEx's single-route drivers are employees under the Act. The great majority of the common-law factors weigh in favor of employee status: FedEx exercises control over the drivers' work; the drivers are not engaged in a distinct business; they work under FedEx's supervision; they are not required to have special skills; they have a permanent working relationship with FedEx; FedEx controls the rate of pay; FedEx is in the same business as the drivers; and the drivers do not render services as an independent business. In addition, FedEx failed to show that it suffered a manifest injustice from the Board's retroactive application of its refined approach.

Lastly, the Board properly overruled FedEx's election objections. FedEx provided no evidence that the Union provided or took credit for legal services or made those legal services contingent on a union victory in the election. Moreover, FedEx failed to show that the election should be set aside because the Board agent commingled and counted two challenged ballots. The two voters were eligible to vote and the Board agent's action, by itself, did not affect the election outcome.

ARGUMENT

I. THE BOARD REASONABLY DETERMINED THAT FEDEX'S DRIVERS ARE EMPLOYEES UNDER THE ACT

Section 7 of the Act (29 U.S.C. § 157) gives employees the right to choose a collective-bargaining representative and to have that representative bargain with the employer on their behalf. Employers have the corresponding duty to bargain with their employees' chosen representative, and a refusal to bargain violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).[4] FedEx admits (Br.21) it refused to bargain with the Union, but argues that it had no obligation to do so because the drivers are excluded from the Act's coverage as independent contractors and, consequently, the Board's certification of the Union is invalid. As described below, the Board properly found that the drivers are employees under the Act. Accordingly, FedEx's refusal to bargain violated the Act, and the Board is entitled to enforcement of its Order. *See Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004).

[4] A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

A. Standard of Review

As this Court has recognized, "Congress empowered the Board to assess the[] significance in the first instance, with limited review," of the facts that distinguish employees from independent contractors under the common-law agency standard. *City Cab of Orlando, Inc. v. NLRB*, 628 F.2d 261, 265 (D.C. Cir. 1980). Consistent with the standard of review set forth in Section 10(e) of the Act (29 U.S.C. § 160(e)), a reviewing court may not "'displace the Board's choice between two fairly conflicting views [of the facts], even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968) (Board's finding that insurance agents are employees, not independent contractors, was a "choice between two fairly conflicting views" and, therefore, should have been enforced by court of appeals) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). *Accord Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 779 (D.C. Cir. 2002). Where the Board's interpretation of the agency factors is reasonable, "the Board's construction of th[e] term [employee] is entitled to considerable deference." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995). *Accord Seattle Opera v. NLRB*, 292 F.3d 757, 765 n.11 (D.C. Cir. 2002).

Indeed, this Court has explained that common-law agency questions are "permeated at the fringes by conclusions drawn from the factual setting of the

particular industrial dispute … [and] the court must, in light of this factual predicate to the legal determination, allow some latitude for the Board's judgment." *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (1989). Accordingly, this Court reviews the Board's agency law decisions "to determine whether its decision is reasonable, consistent with its prior decisions, supported by substantial evidence, and consistent with common-law determinations on similar facts." *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 1998) (internal quotation omitted). In doing so, this Court "must bear in mind that transplantation of ordinary agency law, which arises out of ordinary contract and tort disputes, into the NLRA context necessarily requires sensitivity to the particular circumstances of industrial labor relations." *Id*.

Moreover, statutory employee and independent-contractor status make up two sides of the same coin, and there is no dispute that the "task of defining the term 'employee' is one that 'has been assigned primarily to the [Board as the] agency created by Congress to administer the Act.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (quotations omitted); *see Chevron U.S.A. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43 (1984). The Board's expertise in labor relations and its congressionally mandated role in interpreting the Act lend weight to its application, in the labor context, of the common-law test under which, as the Supreme Court has recognized, "[t]here are innumerable

situations which arise … where it is difficult to say whether a particular individual is an employee or an independent contractor." *United Ins.*, 390 U.S. at 258; *see North Am. Van Lines*, 869 F.2d at 599; *Overnite Transp.*, 140 F.3d at 265.

That the question of whether FedEx's drivers are employees or independent contractors under the Act implicates the Board's jurisdiction, as noted in the Court's *FedEx I* decision, 563 F.3d at 496, does not diminish the requisite deference to the Board's decisionmaking. *Cf. City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1871 (2013) (explaining, subsequent to the issuance of *FedEx I*, "*Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers") (citation omitted).

B. This Court's Rejection of the Board's Approach in *FedEx I* Does Not Preclude the Board from Refining, Explaining, and Restating Its Standard, as It Did Here

In *FedEx I*, the Court reversed the Board's decision and found that FedEx's Wilmington, Massachusetts drivers were independent contractors. 563 F.3d at 504. In doing so, the Court stated that both it and the Board had, over decades of applying the common-law agency test, shifted emphasis from the company's right to exercise control over the means and manner of a worker's performance "in favor of a more accurate proxy: whether the putative independent contractors have 'significant entrepreneurial opportunity for gain or loss.'" *Id*. at 497 (quoting *Corp. Express*, 292 F.3d at 780). The Court further observed that [w]hile all the

considerations at common law remain in play, an important animating principle by which to evaluate those factors … is whether the position presents the opportunities and risks inherent in entrepreneurialism." *Id*.

Contrary to FedEx's and its amicus' claims (Br.29-34, ABr.16-17), *FedEx I* does not, as law of this circuit, preclude the Board – the agency tasked with defining "employee" under the Act and establishing national labor policy – from refining and explaining its application of the common-law agency factors that determine whether an individual is an employee or independent contractor. Indeed, the Board is free to overrule its own precedent and alter or refine its analyses, so long as it provides "reasoned justification." *W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1346-47 (D.C. Cir. 2008) (upholding Board decision applying new standard "[b]ecause the Board provided a reasoned justification for its partial abandonment" of its former standard in decision adopting new standard).

This is particularly true where, as here, the Court's earlier decision was based, in part, on the Court's interpretation of the Board's own precedent. In *FedEx I*, the Court read Board caselaw, most particularly the Board's decision in *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), *enforced*, 292 F.3d 777 (D.C. Cir. 2002), as explicitly adopting an independent-contractor analysis that, while retaining all of the common-law factors, focused on "whether the 'putative independent contractors have 'significant entrepreneurial opportunity for

gain or loss.'" 563 F.3d at 497. But as the Board explained (DO9), and as detailed below, the Court misinterpreted *Corporate Express* and ignored Board precedent, such as *Roadway Package Systems*, 326 NLRB 842, 850 (1998), that firmly establishes the Board's commitment to examining all of the common-law agency factors, without giving any one factor decisive weight. And to the extent any Board cases may suggest otherwise, the Board expressly overruled them, bringing all of its jurisprudence in line with its updated analytical approach, for which it provided a well-reasoned explanation. (DO11 n.26,12 (noting and overruling inconsistent aspects of *St. Joseph News-Press*, 345 NLRB 474, 481-82 (2005), and *Arizona Republic*, 349 NLRB 1040, 1045 (2007).)

Specifically, in response to the Court's *FedEx I* decision, the Board here "restate[d] and refine[d] [its] approach" to determining whether an individual is an employee or an independent contractor under the Act. (DO1.) The Board first reaffirmed its longstanding position that all of the common-law factors must be assessed to evaluate independent-contractor status, with no one factor being decisive. (DO1,10-11.) It then clearly defined the "analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss," which the Board has traditionally considered. (DO1,11-12.) The Board determined that it "should evaluate – in the context of weighing all relevant factors – whether the evidence tends to show that the putative independent contractor is, in

fact, rendering services as part of an independent business." (DO1.) Further, when conducting that analysis, it "should give weight to actual, not merely theoretical, entrepreneurial opportunity.[5] (DO1,10-11).

As shown below, the Board's approach is reasonable, and consistent with Supreme Court precedent, congressional intent, and national labor policy. At a minimum, it thus constitutes a "fairly conflicting view" of how best to assess the agency factors in the labor context, which the Board has the prerogative to choose over this Court's emphasis on just one factor. *See United Ins.*, 390 U.S. at 260. Therefore, it should be upheld. In addition, ample evidence supports the Board's application of its test to find that the drivers here are statutory employees.

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[5] Because the Board announced and applied a refined rule, different from the one it had applied in *FedEx I*, and did so in a distinct Decision and Order, there is no merit to FedEx's insistence (Br.28) that *FedEx I* controls as "law of the case." Under that doctrine, "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). *Accord Arizona v. California*, 460 U.S. 605, 618 (1983) (court decision "should continue to govern the same issues in subsequent stages in the same case"). The doctrine is inapplicable in subsequent litigation between the same parties and "does not deprive an appellate court of discretion to reconsider its own prior rulings, even when the ruling constituted a final decision in a previous appeal." *Rezzonico v. H&R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999).

C. The Board's Approach to the Common-Law Agency Test Comports with Congressional Intent, Supreme Court Precedent, and the Board's Role in Effectuating the Policies of the Act

The proper context for analyzing the independent-contractor *exclusion* from the coverage of the Act is the intended scope of the statute's protections. The Supreme Court has long adopted an expansive interpretation of "employee," finding that the term broadly covers those individuals who work for others. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-68 (1971). It has described the breadth of the Act's definition of employee as "striking," noting that the only limitations are enumerated in the Act. *Sure-Tan*, 467 U.S. at 891 (quotation omitted). The Supreme Court has also specifically endorsed the "Board's broad, literal interpretation of the word 'employee' [a]s consistent with several of the Act's purposes, such as protecting the right of employees to organize for mutual aid without employer interference and encouraging and protecting the collective-bargaining process." *Town & Country Elec.*, 516 U.S. at 91 (citations and internal quotations omitted). In accordance with those statutory purposes, and Supreme Court jurisprudence, the Board narrowly interprets any exemptions from the Act's protection. *See Bos. Med. Ctr. Corp.*, 330 NLRB 152, 160 (1999); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) ("[A]dministrators and reviewing courts must take care to assure

that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.”).

As part of the 1947 Taft-Hartley amendments to the Act, Congress excluded independent contractors from the definition of employee under Section 2(3) (29 U.S.C. § 152(3)). The Supreme Court held that “[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.” *United Ins.*, 390 U.S. at 256 & n.2.[6] *See also Seattle Opera*, 292 F.3d at 765 n.11; *Roadway*, 326 NLRB at 849. The same considerations that animate the Board’s and courts’ analysis of other statutory exclusions from the definition of employee – preserving and safeguarding the Act’s protections – are equally relevant to the analysis of the independent-contractor exclusion.

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[6] As both FedEx (Br.39-40) and its amicus (ABr.8-10) emphasize, Congress excluded independent contractors in response to *NLRB v. Hearst Publications*, 322 U.S. 111, 125-26 (1944) (rejecting interpretation of Act excluding independent contractors as defined by common-law agency principles). But that simply confirms an undisputed proposition stated in the legislative history, confirmed by the Supreme Court in *United Insurance*, and accepted by the Board and this Court – that agency principles must form the basis of any approach to drawing the line between statutory employees and independent contractors. *See* H.R.Rep.No.245, 80th Cong., 1st Sess. 18 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, p. 1537 (amendment was to ensure that “employee” as used in Act does not “embrace persons outside that category under the general principles of the law of agency”).

Indisputably, an individual's entrepreneurial opportunity (and risk) is one of the many relevant factors that the Board and courts will consider in conducting an agency analysis to distinguish between employees and independent contractors. The more difficult issue – and the one that the Board directly examined and definitively resolved for the first time in this case – is how to incorporate that consideration in a manner that best illuminates the ultimate question of whether the individual is truly a statutory employee entitled to the Act's protections, or more properly classified as an independent contractor excluded from the Act's scope. After considering past decisions struggling with that problem, including its own and this Court's prior *FedEx* decisions, the Board determined that: (1) as the Supreme Court mandated long ago, all common-law agency factors must be considered in each case, with no one factor predominating; and (2) *actual*, as opposed to theoretical, entrepreneurial opportunity is best evaluated as just one aspect of the independent-business factor, which focuses broadly on whether an individual truly *functions* as an entrepreneur in his day-to-day work rather than narrowly on whether he may occasionally have an entrepreneurial risk or opportunity.

1. Consistent with the Supreme Court's directive in *United Insurance*, the Board reasonably reaffirmed that it will consider all common-law factors and that no one factor is controlling

The Board began by reaffirming its "longstanding position – based on the Supreme Court's *United Insurance* decision" – that independent-contractor status should be evaluated "'in light of the pertinent common-law agency principles,'" and that "'all of the incidents of the [employment] relationship must be assessed and weighed with no one factor being decisive.'" (DO1, quoting *United Ins.*, 390 U.S. at 258, 2-3, 9). *See also Roadway*, 326 NLRB at 850 (rejecting argument that there is a "'most important' or 'predominant' factor" in agency analysis). *Accord Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 n.31 (1989) (reaffirming principle that no one common-law factor is determinative). As the Board has cautioned, "the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors in another case." *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 848 (2004).

Consistent with that settled approach, and contrary to this Court's characterization of Board precedent in *FedEx I*, the Board has never given more weight to entrepreneurial opportunity than to any of the other agency factors when assessing whether an individual is an employee or an independent contractor. Indeed, in *Corporate Express*, 332 NLRB at 1522, *enforced*, 292 F.3d 777 (D.C. Cir. 2002), although noting that drivers "had no proprietary interest in

their routes and no significant opportunity for entrepreneurial gain or loss," the Board thoroughly considered and balanced all relevant agency factors.[7]

Specifically, the Restatement (Second) of Agency §220 sets forth the following, nonexhaustive list of relevant factors: (1) the extent of control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or business; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the company's direction or by an unsupervised specialist; (4) the skill required in the particular occupation; (5) whether the company or the individual supplies the instrumentalities, tools, and place of work; (6) the length of time the individual is employed; (7) the method of payment, whether by time or by the job; (8) whether the work in question is part of the company's regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the company is in the business. In addition, the Board has traditionally considered a worker's entrepreneurial opportunity and risk when assessing the status of an individual as an employee or independent contractor. *See, e.g.*, *Standard Oil Co.*,

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[7] Likewise, the Board and the General Counsel have "urged the Court to consider the absence of entrepreneurial opportunities, but only as a single factor." (DO9, n.22.) In any event, as the Board noted, even if the General Counsel's briefs urged the Court to focus on entrepreneurial opportunity, "the General Counsel's position on appeal could not substitute for, much less displace, the view of the Board itself." (DO9 n.22, citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

230 NLRB 967, 968 (1977) (among the factors considered by the Board was the individual's "opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss").

In sum, given the established Supreme Court precedent, the Board reasonably reaffirmed its long-standing approach of considering all relevant agency factors in each particular case. That renewed commitment to a comprehensive, case-by-case analysis comports with the Supreme Court's admonition that "there is no shorthand formula" to determine who is an employee and who is an independent contractor. *United Ins.*, 390 U.S. at 258.

2. The Board's clarified focus on actual entrepreneurial activity as just one aspect of an independent-business factor corresponds to the core characteristics of employment, effectuating congressional intent to protect all true employees

The Board then refined its approach to one aspect of the independent-contractor analysis by announcing two principles that will guide its consideration of an individual's entrepreneurial activity. First, it clarified that entrepreneurial activity, properly conceived, involves more than just risk of loss and opportunity for gain. The ultimate consideration is "whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*." (DO11.) Second, the Board held that, in making that assessment, it will give weight to actual, not theoretical, entrepreneurial opportunity and risk.

As explained below, those guidelines renew and implement the Board's proper focus when examining workers' status as either employees protected by the Act or independent contractors exempted from the Act's coverage. Specifically, the Board weighs all circumstances relevant to discerning an individual's entrepreneurial independence, rather than focusing exclusively on potential profit or loss. And, equally important, it does so by identifying the on-the-ground realities of the individual's daily work life as the key to its analysis.

a. Functioning as an independent business encompasses more than just economic risk and opportunity

First, in determining whether an individual is, in fact, rendering services as part of an independent business, the Board will examine not only whether the individual has significant entrepreneurial opportunities or risks, but also whether the individual has a realistic ability to work for other companies, a proprietary or ownership interest in the work, and control over important business decisions. (DO10,12.) This analysis is grounded in established law recognizing the importance of a worker's overall experience and the role of his duties in the company's enterprise in addition to his ultimate opportunity for personal gain or risk of loss.[8]

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[8] Contrary to FedEx's contention (Br.39), it is not comparable to the *Hearst* test Congress rejected. In *Hearst*, the Supreme Court focused on whether "the economic facts of the relation" and "[i]nequality of bargaining power" suggest an individual should enjoy the Act's protections *instead of* examining common-law

For example, as the Board explained (DO11-12), the Supreme Court found the insurance agents to be employees in *United Insurance*, rather than independent contractors, after assessing the "total factual context . . . in light of the pertinent common-law agency principles" and finding that the "agents [did] not operate their own independent businesses, but perform[ed] functions that are an essential part of the company's normal operations." *United Ins.*, 390 U.S. at 258-59. Relying on *United Insurance*, the Board likewise found that the drivers in *Roadway* were employees in part because they did "not operate independent businesses but rather perform[ed] functions that are an essential part" of the employer's operations. 326 NLRB at 851. That broader focus on whether the worker is properly an independent businessman is also consistent with legislative history explaining that independent contractors, as opposed to employees, "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result,

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agency principles. 322 U.S. 127-29. As just described, the Board looks at several factors (none of which relate to bargaining power) in assessing whether an individual functions as an independent business. And, as discussed below, it does so based on common-law principles and jurisprudence, and "in the context of weighing all relevant, traditional common-law factors identified in the Restatement." (DO10.)

that is, upon profits." H.R.Rep.No.245, 80th Cong., 1st Sess. 18 (1947), reprinted in 1 Legislative History of the Labor Management Relations Act, 1947, 309 (1948).

Accordingly, the Board further emphasized (DO12) that an analysis of whether an individual is functioning as a business (or entrepreneur) requires consideration not only of his prerogatives, which may exceed those of a traditional employee, but also of any company-imposed constraints, which may be more confining than those imposed by a traditional business-to-business relationship. For example, the Board will consider whether a particular company restricts the putative independent contractor from making arrangements directly with clients and developing personal good will independent of the company's, *see NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008), whether the terms and conditions under which the individual operates "are promulgated and changed unilaterally by the company," *United Ins.*, 390 U.S. at 259, and whether the company restricts the individual's control over important business decisions, *Standard Oil*, 230 NLRB at 971. Only an assessment of the interaction of an individual's on-the-job prerogatives and constraints can illuminate the worklife

realities ultimately key to accurately discerning employee (or independent-contractor) status.[9]

Delving into the day-to-day realities of the individual's particular workplace and role in the employer's operations to assess his experience and the nature of the relationship allows the most accurate determination as to whether the individual is an employee protected by the Act or an unprotected independent contractor. That comprehensive analysis comports with the requirement that statutory exemptions be narrowly construed. *Holly Farms*, 517 U.S. at 399.

Moreover, as the Board noted (DO12), its "more comprehensive" approach is consistent with contemporary developments in both worklife and jurisprudence. *See NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (emphasizing Board's "responsibility to adapt the Act to changing patterns of industrial life"). In this regard, the Board's broad focus on entrepreneurialism, rather than just opportunity or risk, tracks the recently issued Restatement of Employment Law §1.01 (2015), which states that "[a]n individual renders services as an independent businessperson and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decisions,

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[9] In other words, and contrary to the amicus' suggestion (ABr.12), the purpose of the Board's inquiry is to focus on the realities of workers' particular business relationship with the company and to exclude those individuals who are living out "their own version of the American dream" as, for example, owner-operators of truly independent trucking businesses.

including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers." Moreover, it is in accord with similar, though not controlling, cases from around the country that have found FedEx and other drivers to be employees, not independent contractors, using analyses similar to the Board's.[10]

b. The Board reasonably limits its inquiry to *actual* entrepreneurial opportunities

The Board's refined analysis also firmly establishes that the evidence of entrepreneurial opportunities for risk or gain must be actual, not merely theoretical, to weigh in favor of finding a worker to be an independent contractor. The same policies that support the Board's focus on assessing overall business independence

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[10] *See, e.g., In re FedEx Ground Package Sys., Inc. Employment Practices Litigation*, 792 F.3d 818, 820 (7th Cir. 2015) (FedEx drivers employees under Kansas law where FedEx's policies and procedures were factor in determining right to control drivers' work); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 993-94 (9th Cir. 2014) (FedEx drivers employees under California law where FedEx controlled drivers' work, including ability to exercise entrepreneurial opportunities); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1045 (9th Cir. 2014) (FedEx drivers employees under Oregon law; "entrepreneurial opportunities do not undermine a finding of employee status when a company must consent to its workers' exercise of those opportunities"); *Berwick v. Uber Techs, Inc.*, 2015 WL 4153765, Cal. Labor Commission (No. 11-46739EK) (June 3, 2015), *appeal filed* Cal. Superior Court (June 16, 2015), pp.8-9 (Uber driver employee under California state law where driver's work was "integral" to Uber's business; driver had no investment in business aside from her car; and "[b]ut for [Uber's] intellectual property, [the driver] would not have been able to perform the work").

also support this requirement. Consideration of a worker's entrepreneurial opportunities or risks without assessing whether – or how frequently – they materialize does not illuminate his actual experience and need for the protections of the Act. Even less probative of that question is information regarding individuals outside of the petitioned-for unit. This reasonable requirement, for evidence of actual and unit-specific opportunity, is consistent with established Board and Supreme Court precedent and labor policy.[11]

As the Board explained, it has always "been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial autonomy, and those that are circumscribed or effectively blocked by the employer." (DO10.) For example, in *Slay Transp. Co.*, 331 NLRB 1292, 1294 (2000), the Board found that owner-operators did not have significant entrepreneurial opportunity for financial gain or loss, in part because, even though the drivers were permitted to hire other drivers, they could only do so at wage rates set by the employer. In those circumstances, the Board found that "despite th[e] theoretical potential for entrepreneurial opportunity, the control exercised by the [e]mployer … severely circumscribed such opportunity." *See Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000) (employer's rules "severely restrict[ed] the drivers'

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[11] This Court's different approach in *FedEx I* does not, as explained above (pp.24-27) preclude the Board's reasoned decision to adopt the approach it did.

entrepreneurial opportunities to engage in taxicab business independent of the [employer]"); *Roadway*, 326 NLRB at 853 (drivers' proprietary interest in routes did not establish independent-contractor status where employer "imposed substantial limitations and conditions" on right to sell and where drivers had little room "to influence their income through their own efforts or ingenuity"). This and other circuit courts have largely approved and implemented that focus on putative independent contractors' *actual* experience when assessing entrepreneurial risk and opportunity.[12] This focus ensures that an individual is excluded from the Act's protections only when he genuinely enjoys autonomy in his working relationship with the company analogous to that of an independent business or entrepreneur, as Congress intended when enacting the exclusion.

As a logical corollary to its assessment of actual, not theoretical, opportunity, the Board also reasonably limited its focus to evidence of

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[12] *See, e.g., NLRB v. Igramo Enter., Inc.*, 310 F. App'x 452, 454 (2d Cir. 2009) ("time constraints of working for [the company] did not leave workers with opportunities to pursue other entrepreneurial outlets"); *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) (entrepreneurial opportunities that cannot be "realistically" taken "do[] not add any weight to the company's claim that the workers are independent contractors"); *Allbritton Commc'ns Co. v. NLRB*, 766 F.2d 812, 818 (3d Cir. 1985) (mailroom workers were employees and "had no opportunity to take entrepreneurial risks"); *NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57, 62 (1st Cir. 1981) (drivers employees where customers "belong" to company, not drivers; customers negotiate rates with company, not drivers; and drivers receive assistance loading their trucks from company employees); *City Cab*, 628 F.2d at 264 (finding cab drivers' ability to refuse dispatcher calls and instead prospect for their own fares to be "illusory").

entrepreneurialism that pertains directly to the individuals that the petitioning union seeks to represent. Accordingly, the Board will assess "the specific work experience of those individuals in the petitioned-for unit." (DO11.)[13] Like the Board's other refinements, limiting the agency analysis to the circumstances of individuals in the petitioned-for unit minimizes the risk of excluding workers from the Act's coverage when they, in fact, have no entrepreneurial opportunities.

Finally, this approach is in accord with Board practice in other representation contexts. (DO11.) For example, the Board has refused to consider the supervisory characteristics of employees not included in the petitioned-for unit. *See Oakwood Healthcare, Inc.*, 348 NLRB 686, 698 (2006) (evidence relating to authority exercised by charge nurses in other areas of hospital not relevant to determining authority exercised by charge nurses in petitioned-for emergency room unit).[14] In both contexts, the Board's targeted approach defines the Act's

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[13] Given this appropriately narrow focus, the Board reasonably upheld the hearing officer's decision to exclude systemwide evidence of entrepreneurial opportunity that FedEx sought to present. Excluding such evidence was also fully consistent with the hearing officer's "duty to 'protect the integrity of [the Board's] processes against unwarranted burdening of the record and unnecessary delay.'" (DO10-11 (quoting *Jersey Shore Nursing & Rehab. Center*, 325 NLRB 603, 603 (1998)). In any event, as explained below (p.53), the systemwide evidence that FedEx sought to introduce would not, even if admitted and credited, have affected the Board's ultimate conclusion.

[14] *See also D&L Transp. Inc.*, 324 NLRB 160, 161 (1997) (in unit-determination Board will only consider evidence of actual interchange among petitioned-for unit

scope according to congressional intent by basing an individual's status on his own work experience and thus correlating the Act's protections to the realities of the workplace.

D. The Board Applied Its Clarified Test and Reasonably Rejected FedEx's Claim that Its Drivers Are Independent Contractors

Applying its refined test, the Board carefully considered all relevant common-law agency factors, as well as its revised independent-business factor, and determined that FedEx failed to establish that the drivers are independent contractors.[15] Rather, the Board found that "the great majority of the traditional common-law factors … point toward employee status." (DO18.) Moreover, the evidence does not show that the "drivers render services to FedEx as part of their own, independent businesses." (DO18.) Therefore, the Board found that the drivers are employees under the Act. As shown below, the record fully supports this finding.

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not among employees at other company facilities); *Tele-Computing Corp.*, 125 NLRB 6, 7-8 n.6 (1959) (same).

[15] It is well established that the party asserting independent-contractor status bears the burden of proof. *BKN, Inc.*, 333NLRB 143, 144 (2001). *See NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710-12 (2001) (party asserting individual is a supervisor (exempt from the Act's protections) has burden of proof).

1. Extent of control by FedEx

Substantial evidence supports the Board's finding that FedEx "exercises pervasive control over the essential details of drivers' day-to-day work." (DO12.) FedEx's relationship with its drivers is governed by the Standard Operating Agreement, which is presented to drivers on a take-it-or-leave-it basis, and prescribes the drivers' compensation, work requirements, and delivery route. Although drivers can negotiate the temporary core zone payment and the delivery route, no Hartford driver has ever negotiated an increase in the core zone payment, and FedEx retains the unilateral right to eliminate the payment altogether.

The ability to work when you want to, for how long you want to, and how you want to are hallmarks of independent-contractor status. But here, FedEx's operating agreement makes its intentions clear: FedEx intends to make "full use" of the drivers' time and equipment. (FXW4, p.4.) The drivers must agree to provide daily pickup and delivery service and to conduct their business so that it is "identified as being a part of the [FedEx] system." (FXW4, p.4.) Thus, drivers are required to work for FedEx, Tuesday through Saturday, in their primary service area and other areas, as assigned by FedEx.[16] While drivers control the order in

[16] Nor can drivers take a vacation without first finding a FedEx-approved substitute. Even under FedEx's Time-Off Program, drivers must choose their vacation weeks at the beginning of each fiscal year, and FedEx assigns vacation weeks to drivers by seniority. (FXW4 Att.6.1.)

which they deliver packages, and have some control over start and end times, the Board reasonably found that this "minimal discretion over logistical choices does not outweigh FedEx's fundamental control over their job performance." (DO13.) Drivers cannot begin deliveries until after the day's packages have arrived and been sorted by FedEx's package handlers, and most drivers do not leave the terminal to begin their deliveries until 8:30 or 9 a.m. In addition, FedEx discourages drivers from making deliveries after 8 p.m. *See Friendly Cab*, 512 F.3d at 1100 (requiring that drivers "service all reasonable customer calls from dispatcher" is indicative of employee status); *City Cab of Orlando, Inc. v. NLRB*, 628 F.2d 261, 264 (D.C. Cir. 1980) (finding drivers whose hours were "significantly" regulated to be employees).

FedEx also controls where and how much drivers work by maintaining unilateral control over the size of the route and the number of packages delivered each day. It determines, on a daily basis, how many packages the driver can deliver, which affects the driver's compensation, and no driver can refuse to deliver an assigned package. Moreover, it can unilaterally reconfigure a driver's route. Such tight control stands in stark contrast to the freedom of drivers the Board has found to be independent contractors. *See Argix Direct, Inc.*, 343 NLRB 1017, 1019 (2004) (independent contractors free to work, or not, on any particular

day without penalty); *Dial-A-Mattress Operating Corp*., 326 NLRB 884, 891-92 (1998) (independent contractors free to refuse orders without penalty).

FedEx argues (Br.37) that the Board's reliance on its control over the drivers is improper because its protocols and procedures "spring from customer demands, government regulations, and FedEx's own business model." FedEx wants to have it both ways: drivers who provide identifiable FedEx-branded service—in uniforms and vans with the larger-than-mandated FedEx logo, and in accord with FedEx-created protocols—but under the guise of an independent-contractor relationship. Moreover, the Board reasonably found that FedEx's requirements far exceed that demanded by government regulations and, thus, weigh in favor of employee status. *See Friendly Cab*, 512 F.3d at 1098-99 (drivers' inability to develop their own customers, strict dress code, training in excess of government requirements, employer control over type of vehicle used, and employer control over service area were all indicative of employee status); *Time Auto Transp., Inc. v. NLRB*, 377 F.3d 496, 499 (6th Cir. 2004) (rejecting employer's argument that control over drivers "was directed solely at achieving the ends of performance and ensuring customer satisfaction"); *NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1225 (5th Cir. 1974) (regulations in excess of government requirements indicate employee status).

2. Work is usually done under the direction of FedEx or by a specialist without supervision

Substantial evidence also supports the Board's finding that FedEx subjects the drivers to extensive supervision. FedEx requires drivers to adhere to strict protocols regarding all aspects of their appearance and dress, and FedEx supervises drivers' work through its required company protocols, including the Driver Release and Safe Driving Programs. (DO13,DDE11-12,19.) FedEx monitors compliance with the programs; drivers who comply can be eligible for bonuses; those who do not can be held responsible for lost packages or required to obtain their own liability insurance. (DDE11,19; FXW4.)

FedEx also evaluates driver performance through twice annual customer service rides. Managers may memorialize the results of these evaluative rides and rely on them to decide whether to terminate drivers' operating agreements. Moreover, FedEx fired two Hartford drivers for failing to comply with its protocols. It also terminated another driver's contract for two routes because one of his delivery vehicles was repossessed (even though the driver rented a van and was able to continue deliveries). (DDE7 n.7,12; Tr.358-59,431.) Under these circumstances, the Board reasonably found that "FedEx essentially directs [drivers'] performance via the enforcement of rules and tracking mechanisms." (DO13.)

The amount of control FedEx exerts over its drivers distinguishes this case from cases where the Court has found drivers to be independent contractors. *See,e.g.*, *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995) (drivers found to be independent contractors where employer did not set work hours, exercise any control over dress or appearance, or have a conventional disciplinary system). Accordingly, the Board reasonably found that FedEx's ability to track work performance and impose discipline, including termination, on drivers weighs in favor of employee status.

3. Whether or not the individual is engaged in a distinct occupation or business

The record evidence also fully supports the Board's finding that FedEx's drivers are not engaged in a distinct occupation or business. (DO13.) FedEx's drivers do business in FedEx's name – they wear FedEx uniforms and identification badges, and their vans must be marked with a FedEx logo larger than that required by DOT regulations. While drivers have the right to incorporate their businesses, only three Hartford drivers have done so, and those drivers, like the others, conduct business in FedEx's name. (DDE15,28.) Moreover, drivers "are fully integrated into FedEx's organization" – they rely on FedEx scanners and package handlers, who sort packages and load them on pallets for each driver at the start of the work day. (DO13,DDE5.)

FedEx's customers contract directly with FedEx, not the drivers, and FedEx unilaterally sets delivery charges. Drivers have no authority to seek additional customers, nor can they charge a customer more or less. Indeed, without FedEx, the drivers would have no customers and no infrastructure to support an independent delivery business. (DO6,13.) *See United Ins.*, 390 U.S. at 258-59 (considering whether workers "perform functions that are an essential part of the company's normal operations").

4. Skill required in the occupation

The undisputed evidence also demonstrates that FedEx's drivers do not require any specialized training or skill to be hired by FedEx. FedEx provides any training they need to meet DOT requirements at no charge to the driver, and also trains drivers on how to load the van and comply with FedEx's driver protocols. The Board's reliance on drivers' lack of training or skill as indicative of employee status is fully supported by the record and consistent with settled law. *See United Ins.*, 390 U.S. at 258-59 (that agents lacked prior experience and were trained by company personnel supports employee status).

5. Whether FedEx or the drivers supply the instrumentalities, tools, and place of work

The Board found the instrumentalities factor to be neutral. (DO14.) While the fact that drivers provide their own vehicles weighs in favor of independent-contractor status, the Board reasonably found that "the significance of vehicle

ownership [was] undercut considerably" by FedEx's "primary role in dictating vehicle specifications and facilitating the transfer of vehicles between drivers." (DO13.) Many of FedEx's vehicle requirements, contrary to FedEx's suggestion (Br.43), are not compelled by DOT, including requirements that the vans be white, of a certain size, have shelving systems and backing cameras installed, and be emblazoned with FedEx's extra-large logo. (DO4,DDE15.) While drivers can purchase or lease a vehicle from any dealer, many use one of the companies on a FedEx-provided list. Drivers seeking to purchase or sell a used delivery vehicle can search ads on a FedEx-maintained website. (DO13,DDE27; Tr.530.) FedEx also provides package handlers who sort each driver's packages at the terminal. (DO13,DDE5.) Given the contradictory evidence, the Board reasonably found this factor to be neutral.

6. Length of time for which individual is employed

That FedEx's drivers have an open-ended, long-term relationship with FedEx is further evidence of employee status. *See A.S. Abell Publ'g Co.*, 270 NLRB 1200, 1202 (1984); Restatement (Second) Agency §220, Comment J (1958). FedEx's drivers sign one- or two-year agreements that automatically renew for subsequent one-year periods. (DO14.) In effect, drivers have a "permanent relationship" with FedEx that will "continue as long as their performance is satisfactory." *United Ins.*, 390 U.S. at 259.

7. Method of payment

The record evidence that FedEx controls drivers' compensation, and that drivers have little opportunity to increase their pay, strongly supports the Board's finding that the method of payment factor weighs in favor of employee status. (DO14.) In fact, pay rates are uniform and set by FedEx in the operating agreement. In addition, FedEx insulates drivers from the vagaries of the marketplace by providing a vehicle availability payment each day the driver makes a van available for delivery, a fuel bonus when fuel prices rise, and compensation when FedEx transfers packages from one driver to another. Because FedEx controls the pay structure, there is little room for drivers to make decisions involving "risks taken by the independent businessman which may result in profit or loss." *Standard Oil Co.*, 230 NLRB 967, 968 (1977). *See also Dial-A-Mattress*, 326 NLRB at 885 & n.11 (drivers independent contractors where they had opportunity to, and did, enter individual deals reducing rates in exchange for routes in certain delivery zones).

Moreover, unlike drivers the Board has found to be independent contractors, FedEx drivers cannot solicit new customers, determine rates to charge customers, or refuse to deliver to customers. *See Am. Publ'g Co. of Mich.*, 308 NLRB 563, 564 (1992) (drivers could, and were expected to, solicit new customers); *Glens Falls Newspapers*, 303 NLRB 614, 614 (1991) (drivers determined retail rate to

charge customers and could refuse to deliver to customers). Instead, FedEx drivers must deliver all assigned packages, including those assigned outside their primary service areas, and have no ability to increase the amount of business in their service areas. Because FedEx sets the rates and solicits its own customers, drivers have little opportunity for financial gain or loss. *See NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57, 62 (1st Cir. 1981) (drivers employees where customers "belong" to company, not drivers, and customers negotiate rates with company, not drivers); *Slay Transp.*, 331 NLRB at 1294 (owner-operators did not have significant entrepreneurial opportunity for financial gain or loss because employer established and controlled compensation rates).

8. Work is part of the regular business of the employer

The evidence unquestionably shows that FedEx's drivers are engaged in "performing essential functions that allow [FedEx] to compete in the package delivery market." (DO14, quoting *Roadway*, 326 NLRB at 851). Drivers, therefore, perform "the very core of [FedEx's] business," which further supports the Board's finding that they are employees. (DO14.)

9. Whether or not the parties believe they are creating an independent-contractor relationship

FedEx believes it is creating an independent-contractor relationship with the drivers, as stated in the Standard Operating Agreement. Because the drivers do not have the opportunity to negotiate over that term in the contract, and a majority of

unit members voted to be represented by the Union, the Board found this factor to be inconclusive. (DO14.)

10. Whether the individual is, in fact, rendering services as an independent business

The Board applied its new independent-business factor and examined whether the drivers have a significant entrepreneurial opportunity for actual, not merely theoretical, gain or loss; a realistic ability to work for other companies; a proprietary interest in the work; and control over important business decisions. (DO10,12.) Substantial evidence supports the Board's finding that FedEx's drivers do not operate as independent businesses.

FedEx adduced limited evidence of "actual entrepreneurial opportunity for drivers." (DO15.) Specifically, with only two route sales having occurred at the Hartford terminal by the time of the hearing, the Board reasonably found that the drivers' ability to sell their routes is "more theoretical than actual." (DO15 & n.66.) Moreover, the Board explicitly considered the drivers' ability to sell and found that their "opportunities in this area were significantly constrained" by FedEx. (DO10.) For example, drivers are not free to sell to whomever they want. FedEx must approve any buyer, and the buyer must accept the Standard Operating Agreement on "substantially the same terms and conditions" as the original

driver.[17] (DO10,15,DDE9; FXW4 p.25.) Further, FedEx controls the route itself, thus limiting any potential proprietary interest: it assigns new routes without charge, and it can reconfigure or discontinue routes at any time. (DO15.)

Moreover, although under its refined test the Board will only consider evidence pertaining to the individuals in the petitioned-for unit, the Board here found that FedEx's proffer of systemwide evidence of route sales would not change its conclusion that the drivers' ability to sell is significantly constrained. Specifically, FedEx failed to provide details of the sales or indicate whether any profits were realized. (DO15 n.66; FX 33, Resp.to Notice Exh.8.) Furthermore, because FedEx places such extensive constraints on drivers' ability to sell their routes, the Board found that the systemwide evidence of route sales would not weigh significantly in favor of independent-contractor status, were it relevant. (DO15 n.66.)

Although under the operating agreement, drivers have the right to use their vans for "outside" business if they first remove or cover the FedEx logos, no Hartford driver had ever used his van to work for an outside employer. This is unsurprising: FedEx's operating agreement states that it intends to make "full use" of the driver's equipment, and drivers are required to deliver packages each

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[17] FedEx approval goes beyond meeting mere DOT requirements. FedEx rejected one potential driver who wanted to acquire a route directly from FedEx because he could not obtain credit and buy his own van. (DDE21.)

Tuesday through Saturday. FedEx presented no evidence that drivers advertise for business or maintain any business presence. (DO15.)

Moreover, drivers are not permitted to use their vans for any other reason while delivering packages for FedEx, and the amount of time they are required to work for FedEx "effectively prevents them from working for other employers." (DO15.) As the Board explained, drivers work for FedEx from approximately 6 a.m. to 8 p.m. Tuesday through Saturday and therefore are not available when most other commercial enterprises would need them. (DO15,DDE26.) On top of that, DOT regulations limit drivers to a maximum of 11 driving hours (14 total hours) per day or 70 hours in an eight-day week. (Tr.943-44.) In these circumstances, drivers can hardly pursue outside delivery business. *See NLRB v. Igramo Enter., Inc.*, 310 F. App'x 452, 454 (2d Cir. 2009) (unpublished) ("time constraints of working for [the company] did not leave workers with opportunities to pursue other entrepreneurial outlets").

Nor do drivers have any control over business decisions. Drivers cannot solicit customers, change delivery rates, or influence FedEx's business strategy. Drivers can decide what van to buy, but only if that van is a FedEx-approved size, style, and color. Even the Standard Operating Agreement signed by drivers is presented on a take-it-or-leave-it basis and can be unilaterally changed by FedEx. In these circumstances, the drivers "do not have the independence, nor are they

allowed the initiative and decision-making authority, normally associated with an independent contractor." (DO15-16 (quoting *United Ins.*, 309 U.S. at 248).)

After conducting a careful examination of all the common-law agency factors, as dictated by longstanding Board and Supreme Court precedent, the Board found that all but two of the traditional factors weighed in favor of employee status, and that the remaining two were "inconclusive." The Board therefore reasonably concluded that FedEx's Hartford drivers are employees under the Act. The Board's decision is grounded in substantial evidence and consistent with governing case law.

E. By Applying Its Decision to FedEx Retroactively, the Board Did Not Cause FedEx To Suffer a Manifest Injustice

In accord with its routine practice of applying new policies "to all pending cases in whatever stage," *Aramark School Servs.*, 337 NLRB 1063, 1063 n.1 (2002), the Board applied its decision to FedEx. (3/16/15 order denying MFR, p.1.) The Board typically follows this practice unless doing so will work a "manifest injustice," which the Board determines by examining the reliance of the parties on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive application of the decision. *SNE Enters., Inc.*, 344 NLRB 673, 673 (2005). The Board's standard comports with Supreme Court and circuit precedent. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (propriety of retroactive application determined by balancing ill

effects of retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles"); *Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) ("[r]etroactivity is the norm in agency adjudications").

Applying these criteria, the Board properly employed its revised standard here. First, the Board's decision is not a significant departure from prior precedent. As it has since at least 1998, the Board applied the common-law factors and considered "all the incidents of the relationship" in assessing employee status. (3/16/15 order denying MFR, p.1.) *See Roadway*, 326 NLRB at 849. The factors considered by the Board were "substantially similar" to factors it had considered in prior cases, including, among other things, the extent of control over the drivers, whether the drivers were engaged in a distinct occupation or business, method of compensation, and skill or training required. *See id.* at 843. Next, the Board determined that applying its decision retroactively "aided in accomplishing the purposes of the Act by clarifying . . . and illustrating" the standard to be applied in independent-contractor decisions. (3/16/15 order denying MFR, p.1.) Finally, the Board noted that FedEx had not asserted that it suffered any injustice from retroactive application.[18] Moreover, all of the factors considered by the Board

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[18] Without citation, FedEx suggests (Br.48) that the Board "violated its own precedent" by failing to engage in a retroactivity analysis. Any error on the

were "litigated exhaustively" in the underlying hearing. (3/16/15 order denying MFR, p.1.)

Contrary to FedEx's claims (Br.48-49), the Board did not change its proof standards. Rather, the Board considered the evidence presented and found that the "great majority of the traditional common-law factors, as incorporated in the Restatement (Second) of Agency, point toward employee status." (DO18.) Likewise, the Board "would reach the same conclusion even considering the systemwide evidence that FedEx proffered." (DO18.)

II. THE BOARD DID NOT ABUSE ITS DISCRETION BY OVERRULING FEDEX'S ELECTION OBJECTIONS

Following the Union's election victory, FedEx filed two objections and sought to have the election set aside. FedEx's first objection alleged that the Union "improperly conferred valuable benefits, including legal services, to eligible voters." (Supp.Dec. on Objs., p.1.) Its second objection alleged that the Board agent who conducted the election erred by commingling and counting the ballots of two voters, Chiappa and Dizinno, without first making a determination as to their eligibility to vote. (*Id.*, pp.1-2.)

Board's part was rectified in the Board's order denying FedEx's motion for reconsideration. *See* 362 NLRB No. 29 (2015).

In overruling Objection 1, the Board found that it was "undisputed that the [Union] made no direct payments for [] legal services." (9/29/08 DO Remanding, p.3.) The Board further agreed with the administrative law judge that there was "no evidence that the [Union] arranged, or took credit, for the free legal services" or that there was even "a scintilla of evidence" that the Union, if it had arranged or took credit for the legal services, made those legal services contingent on a union victory. (DCR1-2, 8/27/10 Order, Supp.Dec. on Objs., p.5.)

FedEx makes two claims. First, FedEx disputes (Br.50) the Board's factual findings and contends, contrary to the credited evidence, that the Union provided valuable legal benefits to voters. Second, FedEx claims (Br.50) that the Board's decision is inconsistent with *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1996), and that the Board erred by requiring proof that the Union arranged or took credit for the legal services contingent on a favorable outcome. Both claims fail.

The Court "accord[s] the Board an especially 'wide degree of discretion'" on questions that arise in the context of representation elections and will only overturn the Board's order to bargain upon finding that the Board abused that wide discretion. *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (quoting *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946)). The Board did not abuse its discretion in overruling FedEx's election objections.

Other than its bare assertion that the Union "conferred valuable legal benefits," FedEx provides no basis for this Court to overturn the Board's factual and credibility findings. *See Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984) (Court will not overturn credibility determinations "absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its face incredible") (citation omitted).

Further, the Board's decision is consistent with this Court's decision in *Freund*. There, the Court found that the Board should have ordered a new election where an employee lawsuit was filed against the employer one week before the election, the union encouraged voters to believe it was responsible for the lawsuit, the same attorney represented the union and the employee plaintiffs in the lawsuit, and union representatives publicized the lawsuit the day before the election. Indeed, the Court assumed that the union's responsibility for the lawsuit had been "conclusively established." *Freund*, 165 F.3d at 932. Under these circumstances, the Court concluded that the "[u]nion's sponsorship of the employees' lawsuit against the Company clearly violated the rule against providing gratuities to voters in the critical period before a representation election." *Id*. at 935.

In contrast, here, the Board found that the Union did not provide gratuities to voters in the critical period before the election. In fact, it was "undisputed" that the

Union "made no direct payments for [] legal services." (9/29/08 DO Remanding, p.3.) Nor were the lawsuits instituted during the critical period: both lawsuits filed by employees of the Hartford facility were filed 11 days after the election. (DO Remanding, p.2.) Further, the Board found "no evidence" that the Union arranged or took credit for the lawsuit. (Supp.Dec. on Objs. p.5.) Rather, the Union provided no monetary assistance for the lawsuit, and different attorneys and law firms represented the Union and the employee plaintiffs.[19] Moreover, contrary to FedEx's claim (Br.50), the Board did not err by asking whether the Union arranged or took credit for the lawsuits contingent on the election's favorable outcome. While a union cannot offer employees a "tangible economic benefit" during the critical period, it "can promise benefits to which employees would be *entitled* as union members or as employees of a union-signatory company," as long as the promise is not "contingent on the vote results." *King Elec., Inc. v. NLRB*, 440 F.3d 471, 474 (D.C. Cir. 2006) (emphasis in original). FedEx has failed to show that the Board abused its discretion in finding that the Union neither provided a tangible economic benefit nor promised a benefit contingent on the vote results.

In overruling Objection 2, the Board concluded that both Dizinno and Chiappa were eligible to vote in the election, their ballots were properly counted,

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[19] In 2011, after the relevant Board decisions on FedEx's election objections in this case, the Board adopted the Court's reasoning in *Freund*. *See Stericycle, Inc.*, 357 NLRB No. 61 (2011).

and "the Board agent's error in commingling them with other ballots prior to final resolution of [FedEx's] challenges did not adversely affect the conduct of the election." (DCR4.)

FedEx does not argue that the Board erred by including Dizinno and Chiappa in the unit. Instead, FedEx argues (Br.51-52) that the Board failed to address its argument that the Board agent's failure to follow procedures should have resulted in a new election. In support of its argument, FedEx cites *Fresenius USA Mfg., Inc.*, 352 NLRB 679 (2008).[20] But *Fresenius* does not require an election to be set aside whenever a Board agent "fail[s] to follow the Board's procedures for handling challenged ballots." (Br.52.) There is not a "per se rule that … elections must be set aside following any procedural irregularity." *St. Vincent Hosp., LLC*, 344 NLRB 586, 587 (2005). *See also Affiliated Computer Servs., Inc.*, 355 NLRB 899 (2010). Rather, the Board sets aside an election only if the irregularity is sufficient to raise "a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enforced*, 414 F.2d 999 (2d Cir. 1969); *Physicians & Surgeons Ambulance Serv., Inc. v. NLRB*, 477 F. App'x 743, 744 (D.C. Cir. 2012) (unpublished). The Board found that the irregularities in *Fresenius* rose to that level: the Board agent, who was

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[20] *Fresenius* issued at a time when the Board had no quorum. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-88 (2010).

color blind, twice misidentified colored ballots, insisted voters mark ballots with erasable pencil, prevented the employer from verifying the accuracy of the count, and took the ballots home overnight. *Fresenius*, 352 NLRB at 680-81. The Board set aside that election because "the cumulative effect of [] irregularities, particularly those during the ballot count, raise[d] a reasonable doubt as to the fairness and validity of the election." *Id*. at 681.

There are no similar irregularities here. Although the Board found that the agent erred by commingling and counting Chiappa's and Dizinno's challenged ballots, it also found that both were eligible to vote, and their ballots were properly included in the ballot count. The Board thus concluded that, despite the Board agent's error, "commingling … prior to final resolution of [FedEx's] challenges did not adversely affect the conduct of the election." (DCR4.) In the circumstances, the Board did not abuse its discretion by overruling FedEx's objection to the election.

CONCLUSION

The Board respectfully requests that this Court enforce its Order in full and deny FedEx's petition for review.

/s/ Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

/s/ Kellie Isbell
KELLIE ISBELL
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2978
(202) 273-2482

RICHARD GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

October 2015

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDEX GROUND DELIVERY, AN OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC.	)	
Petitioner/Cross-Respondent	)	Nos. 14-1196, 15-1066 & 15-1116
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case No. 34-CA-012735
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,865 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 5th day of October, 2015

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NATIONAL LABOR RELATIONS BOARD	)	Board Case No. 34-CA-012735
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 5th day of October, 2015

STATUTORY ADDENDUM

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1. NATIONAL LABOR RELATIONS ACT

Section 2(3) of the Act (29 U.S.C. § 152(3)) provides:

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7 of the Act (29 U.S.C. § 157) provides:

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 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 8(a)(3) [section 158(a)(3) of this title].

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this

title].

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not

entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act, 29 U.S.C. 160, provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and 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. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) 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 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, United States Code [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.

Restatement (Second) of Agency §220

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

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

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

Restatement (Second) of Agency, Comment J

j. Period of employment and method of payment. The time of employment and the method of payment are important. If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him. This is especially true if payment is to be made by the job and not by the hour. If, however, the work is not skilled, or if the employer supplies the instrumentalities, the workman may be found to be a servant.

Restatement of the Law: Employment Law §1.01

(a) Except as provided in §§ 1.02 and 1.03, an individual renders services as an employee of an employer if:

(1) the individual acts, at least in part, to serve the interests of the employer;
(2) the employer consents to receive the individual's services; and
(3) the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson.

(b) An individual renders services as an independent businessperson and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers.