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

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

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

Petitioner/Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

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

REPLY BRIEF OF PETITIONER

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

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

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

OTHER AUTHORITIES

GLOSSARY

APA: Administrative Procedure Act

DA: Deferred Appendix

DDE: Regional Director's Decision and Direction of Election

NLRA: National Labor Relations Act

NLRB or Board: National Labor Relations Board

Operating Agreement: FedEx Home Delivery Standard Contractor Operating Agreement

SUMMARY OF THE ARGUMENT

The Board's brief does not identify any material facts in this case that are distinguishable from those that this Court considered in *FedEx I,* in which this Court held that single route contractors of FedEx are independent contractors. *FedEx I* is therefore clearly the "law of the circuit" and/or the "law of the case." The Board's brief cites no authority, and there is none, that would allow this panel to ignore the previous panel's holding on the identical issue involving the same parties and materially indistinguishable facts.

In any event, as FedEx has previously argued, the Board's stated reasons for refusing to abide by the *FedEx I* decision are wrong as a matter of fact and law. The Board brief's attempt to justify the Board's "refinement" of its standard for determining whether drivers are independent contractors must be rejected. Contrary to the Board's claims, the restated test further departs without rational explanation from Congressional intent and this Court's directly controlling authority.

Also contrary to the Board's argument, the agency has acted arbitrarily in failing to give adequate consideration to FedEx's proffered evidence of system-wide route sales and profits among contractors, and in otherwise failing to find that the Hartford contractors meet the (improperly) restated independent business test announced in the Board's Decision. The Board's brief also fails to justify the

Board's retroactive application of its refined standard to FedEx, which constitutes a manifest injustice under this Court's precedent and that of the Board.

Finally, the Board's brief fails to support the Board's overruling of FedEx's objections to the election, and for this reason as well the certification of the Union as the contractors' representative should be set aside.

ARGUMENT

I. Contrary to the Board's Argument, The Holding Of This Court in *FedEx I* Is Controlling As The Law Of The Circuit And/Or The Law Of The Case.

As demonstrated in FedEx's opening brief, the facts of this case are indistinguishable in every material respect from the facts of *FedEx I*. (FedEx Br. at 8-18, 29-31). Indeed, the actual record on which this Court decided the *FedEx I* appeal was made part of the record in the present case. (*Id*.).[1] Under these circumstances, the rules of this Court require that the previous panel decision resolving the exact same issue (the independent contractor status of FedEx single route contractors) must be applied to the present appeal as the law of the circuit. (*Id*. at 31-34).

[1] The Board's brief frequently cites to the record of *FedEx I*, which was entered by stipulation into the record of this case. (DDE at 3 (DA 260); Tr. 189, DA 40). In particular, the Standard Operating Agreement ("FXW 4"), which was entered into the Hartford record with its Wilmington, MA exhibit identifier intact (DA 190), is referred to 36 times in the Board's Brief. Such reliance belies the Board's claim on reconsideration that it "declined to consider evidence" from the earlier case in deciding the Hartford matter. (DA 398, n.6).

In response, the Board's brief fails to cite any case in this Circuit departing from this principle under remotely similar circumstances, and there is none. Indeed, the first case cited by the Board's brief in its "Standard of Review" section, actually confirms FedEx's argument. *See City Cab of Orlando, Inc. v. NLRB*, 628 F.2d 261, 265 (D.C. Cir. 1980) (cited in the Board's brief at 22). In that decision, this Court observed that where the facts of a previous panel decision are "indistinguishable from those in the case before us, … our task truly will be a simple one, because we are bound by the decision of another panel of this court.").[2] *See also Murphy Oil Co. v. NLRB*, 2015 U.S. App. LEXIS 18673 (5th Cir. 2015) (adhering to prior panel decision rejecting NLRB legal standard).

The Board's brief claims that *FedEx I* does not preclude the Board from "refining and explaining its application of the common-law agency factors that determine whether an individual is an employee or independent contractor." (Board Br. at 25). Again the Board cites no case in support of this proposition.[3] It is also worth noting that the Board's brief does not claim its refinements have

[2] The *City Cab* Court ultimately did not consider itself bound by the previous panel decision, which involved different parties, only because the facts of the two cases were "materially different." *Id*. No such differences are present here vis-à-vis the facts of *FedEx I*.

[3] The only case cited by the Board's brief for the passage quoted above, *W&M Props. Of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1346-47 (D.C. Cir. 2008), did not deal at all with a previous court decision involving the same parties, applying materially indistinguishable facts and reaching a result contrary to the Board.

created a "new" independent contractor standard, and even notes that the Board's refined holding is "not a significant departure from prior precedent." (Board Br. at 56).

In any event, this Court in *FedEx I* has already applied the common-law agency factors with specific reference to single-route contractors at FedEx, considering the same facts that are now at issue under materially indistinguishable circumstances, and has held that contractors at FedEx are independent contractors under the common law of agency. The holding of *FedEx I* continues to be binding on any panel of this Court considering the same issue, *i.e.*, whether single route contractors at FedEx operating under indistinguishable facts are independent contractors. *FedEx I* is the law of the circuit with regard to this identical question as to the identical party with no material change in facts, regardless of any "refining or explaining" of the agency factors by the Board. *See Al Maqaleh v. Hagel*, 738 F.3d 312, 332 (D.C. Cir. 2013); *In Re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011); *LaShawn v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (*en banc*); *United States v. Kolter*, 71 F.3d 425, 431 (D.C. Cir. 1995); *City Cab of Orlando, Inc. v. NLRB*, 628 F.2d at 265.

The Board's brief does not even attempt to distinguish the foregoing authority regarding the law of the circuit, previously cited in FedEx's Brief (FedEx Br. at 27). The Board argues only that *FedEx I* does not constitute the "law

of the case," because the present appeal constitutes "subsequent litigation between the same parties." (Board Br. at 27, n.5). While FedEx disputes this Board assertion as well, it again misses FedEx's primary point, namely that the law of the *circuit* must decide the outcome of this appeal. It remains undisputed that the *FedEx I* panel considered the same facts and legal issue that are now before this Court, and that *FedEx I* determined single route contractors at FedEx to be independent contractors under the National Labor Relations Act. Based upon the law of the circuit, the outcome of this appeal must be the same as in *FedEx I*.

The Board's brief further argues, again without support, that *FedEx I* is not controlling because the Court's earlier decision "was based, in part, on the Court's interpretation of the Board's own precedent," which the Court "misinterpreted." (Board Br. at 25). Even if this claim were correct, and it is not, the Board is not entitled to re-litigate *FedEx I* here. *See United States v. Kolter*, 71 F.3d 425, 431 (D.C. Cir. 1995) (explaining that "this panel would be bound by [a prior] decision even if [the panel] did not agree with it."). It must also be observed that while the Board's Brief criticizes *FedEx I*'s interpretation of *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), the Board ignores several other decisions of this Court upon which the *FedEx I* panel relied. These include the Court's decisions in *C.C. Eastern, Inc. v. NLRB,* 60 F.3d 855 (D.C. Cir. 1995); *North American Van Lines v. NLRB,* 869 F.2d 596 (D.C. Cir. 1989); and *Corporate Express Delivery*

Systems v. NLRB, 292 F.3d 777 (D.C. Cir. 2002). All of these holdings support *FedEx I*'s binding determination that single route contractors at FedEx are independent contractors and are not employees within the meaning of the Act.

Because *FedEx I* remains the law of the circuit as to the independent contractor status of single-route contractors at FedEx, it is unnecessary for this Court to consider or address the Board brief's criticism of the Court's *FedEx I* decision. (Board Br. at 26-27). As explained in FedEx's opening brief, however, the Board's criticism is entirely unjustified. (FedEx Br. at 34-37). First, contrary to the Board's Brief, at 27, *FedEx I* is fully consistent with the Supreme Court's holding in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). The *FedEx I* Court expressly stated that it was adhering to the Supreme Court's common-law agency test, that it considered "all the common law factors," and that it was the balance of factors that led to the Court's finding of independent contractor status. 563 F. 3d 492, 504.

Though the Board's brief cites *United Insurance* no less than ten times, it is significant that the Board never acknowledges the seminal holding of that case on the question of deference (or lack of it) to which the Board is entitled on the legal standard for evaluating independent contractor status. Specifically, the Supreme Court declared that Board determinations as to the legal standard for independent contractor status "involve no special administrative expertise that a court does not

possess," and that a court "need not accord the Board's decision that special credence which we normally show merely because it represents the agency's considered judgment." *United Ins*., 390 U.S. at 260. For this reason as well, it does not matter whether the Board has "refined or explained" its standard for applying the common law of agency to contractors at FedEx. The Board is entitled to no "special credence" with regard to the common law of agency, as this Court properly held in *FedEx I*.

The Board brief's further claim that this Court somehow elevated the factor of entrepreneurial opportunities to an undue level of prominence in *FedEx I* (Board Br. at 24) is inconsistent with the plain language of the opinion in *FedEx I* and this Court's prior precedents. To the contrary, as noted above, this Court in *FedEx I* correctly applied all of the common law agency factors. 563 F.3d at 492. At the same time, the Court correctly adhered to its own previous holding in *Corporate Express*, which in turn relied on the Restatement's comment that it is not "the degree of supervision under which [one] labors but … the degree to which [one] functions as an entrepreneur…that better illuminates one's status." 563 F.3d at 502, quoting 292 F.3d at 780.

Contrary to the Board brief's assertions, *FedEx I's* use of entrepreneurial opportunity as an "animating principle" by which to evaluate common-law agency factors was not novel and remains entirely consistent with Supreme Court

precedent. Entrepreneurial opportunity has long been characterized by this Court as "most relevant for the purpose of determining whether [a worker] is an independent contractor." *C.C. Eastern*, 60 F.3d at 860. As noted in FedEx's opening brief (FedEx Br. at 34-35), such opportunity has been recognized by this Court as a consideration that "better captures the distinction between an employee and an independent contractor." *Corporate Express*, 292 F.3d at 780.

Further, contrary to the Board brief's "cf." citation of *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1871 (2013) (Board Br. at 24), that case has no relevance to the present appeal. As explained in FedEx's opening brief, the *Arlington* case addressed a statutory provision completely different from the NLRA's independent contractor clause. Here, Congress has specifically amended the statute to overrule the Board's previous determinations on the subject of independent contractor status. On the matter of deference, this case is controlled by the Supreme Court's holding in *United Insurance Co. of America*, 390 U.S. at 260, not *City of Arlington*. This Court was not required to defer to the Board's erroneous statement of the legal standard in *FedEx I,* and the Court is not required to defer to the Board's "refinement" of that erroneous legal standard here.

In claiming that the Supreme Court has adopted an expansive interpretation of "employee" (Board Br. at 28), the Board's brief relies on several cases that do

not deal at all with independent contractor status.[4] The Board has no authority to act in contravention of Congressional intent by narrowing the class of independent contractors who are exempt from the Act's coverage, and this Court is not required to defer to such an action by the Board. Contrary to the Board's assertions in the Decision under review, the Board is not entitled to any greater judicial deference now than the *FedEx I* opinion gave it in defining independent contractor status.

II. The Board Has Failed To Justify Its Purported Refinement Of The Independent Contractor Standard, Which Conflicts With Congressional Intent And Settled Authority.

Even if the Board were entitled to ignore the holding of *FedEx I* based upon a "refined" standard of agency, which it is not, the Board's brief fails to reconcile its refined standard with Congressional intent. As shown in FedEx's opening brief (at 39-40), the Board's purported refinement of its independent contractor standard impermissibly discounts the historical significance of evidence pertaining to entrepreneurial opportunity under the traditional common-law agency test. The Board's brief fails adequately to address the legislative history of the exemption for independent contractors, which shows that Congress clearly and specifically intended that the exemption should not be so narrowly construed. *See, e.g.*, H.R.

[4] The Board's brief relies on such inapposite cases as *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-68 (1971) (dealing solely with retired employees); *Sure-Tan v. NLRB*, 467 U.S. 883, 891 (1984) (undocumented aliens); and *Town & Country Elec. v. NLRB*, 516 U.S. 85, 91 (1995) (union organizers). (Board Br. at 28). None of these cases considered the unique statutory issues presented by independent contractor status.

Rep. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947).

The Board's brief also fails to refute FedEx's contention (persuasively expressed in Member Johnson's dissent at 21 (DA 385)) that the Board's refined standard is another form of the economic dependency test that Congress expressly rejected in overruling *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) and *U.S. v. Silk*, 331 U.S. 704 (1947). The Board brief's claim that the refined standard is materially different from the discredited *Hearst* standard is belied by the plain language of the Hearst opinion itself, which Congress expressly overruled.[5]

Contrary to the Board's brief, at 31-33, and that of its *amicus*, the cases relied on by the Board in the Decision under review do not support the creation of a refined or "clarified" "independent business test" and are factually distinguishable from the present case. The Board's brief also gives no rational explanation for the agency's departure from and overruling of past precedent in *Arizona Republic, supra*, 349 NLRB at 1045, and *St. Joseph News-Press, supra*, 345 NLRB at 481-482. As FedEx previously argued (FedEx Br. at 40-41), the

[5] It is worth repeating the Supreme Court holding in *Hearst* that Congress overruled, noting its similarity to the Board's "refined" independent contractor standard in this case: "In short, when …the economic facts of the relation make it more nearly one of employment than of *independent business enterprise* with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections." 322 U.S. at 128 (emphasis added).

Board's purportedly revised standard fails to adhere to the agency's own decision in *Roadway III*, which the Board has not overruled, and which held that a key factor in an independent contractor determination under the NLRA is whether putative contractors have "significant entrepreneurial opportunity for gain or loss." 326 NLRB at 851. *See also Dial-A-Mattress Operating Corp*., 326 NLRB 884, 894 (1998) (also not overruled), which found drivers to be independent contractors based upon entrepreneurial opportunities comparable to the present facts).[6]

The Board's brief also improperly relies on a version of the Restatement of Employment Law § 1.01 (2015) that was not published until after the Board rendered its decision. This *post hoc* rationalization cannot be considered by the Court. It must be noted, however, that the Restatement section quoted by the Board's brief actually supports a finding of independent contractor status in this case, because the record clearly shows that contractors for FedEx "exercise 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." *Id*.

[6] Significantly, *Dial-A-Mattress* was quoted by *St. Joseph News Press*, 345 NLRB at 478, and by *FedEx I*, 563 F.2d at 496, as follows: "Supreme Court precedent teaches us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it*." (emphasis added in *FedEx I* opinion). The Board has improperly departed from that holding here.

Finally, the Board fails to support the Decision's assertion that evidence of entrepreneurial opportunities for risk or gain must be "actual, not merely theoretical, to find the worker to be an independent contractor."[7] Contrary to the Board's brief, the Board's arbitrary attempt to ignore potential (and actual) entrepreneurial opportunities here, merely because some contractors have chosen not to exercise their full rights under FedEx's Standard Operating Agreement, cannot be sustained. As this Court held in *C.C. Eastern, Inc. v. NLRB*, 60 F.3d at 874: "[I]t is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor." In any event, as further discussed below and in FedEx's Opening Brief, at 38-47, there is ample evidence in the record of this case, even more than there was in *FedEx I*, that contractors have *actually* exercised their entrepreneurial opportunities, not only in Hartford but throughout the FedEx system.[8]

---

[7] This "refinement" of the common law of agency cannot be squared with the Board's subsequent holding in *Browning-Ferris Industries of California, Inc*., 362 NLRB No. 186 (Aug. 27, 2015), with regard to the related issue of "joint employer" status. There the Board held that the common law of agency looks to "potential" authority, not merely "actual" conduct. *Id*., slip op. at 14, 26.

[8] The Board's brief, at 53, fails to justify the Board's refusal to allow FedEx to present evidence of system-wide entrepreneurial opportunities, a failure which this Court unanimously condemned in *FedEx I* and which Chief Judge Garland found to be "particularly arbitrary." *See* 563 F.3d at 518 (Garland, J. concurring). The Board's brief compounds this error by criticizing the Company's proffer of

III. Contrary To Its Brief, The Board's Application Of Its "Refined" Independent Contractor Standard To The Facts Of This Case Is Arbitrary And Capricious.

As FedEx demonstrated throughout its opening brief, the facts of this case should result in a finding of independent contractor status, even if the Board's overemphasis on independent businesses were accepted as a valid reading of the common law agency test, which it is not. Again, nothing has changed since this Court reviewed these same facts in *FedEx I*. The Board's brief, like the Board's Decision itself, twists the facts and law to paint a picture at odds with the Court's previous holding, when in reality contractors at FedEx have repeatedly demonstrated their actual entrepreneurial opportunity and independent status, in both *FedEx I* and again here.

Thus, contrary to the Board's brief, at 52, a significant number of the Hartford contractors have taken advantage of opportunities to incorporate their businesses, have purchased multiple routes, and have hired others to service the routes. (FedEx Br. at 42; FedEx 2010 Response to Notice to Show Cause (DA 343); *see also* Board Dec. at 4 (DA 368) – acknowledging multiple contractor incorporations; Tr. 55-56, 67 (DA 25-26, 28) – at least five Hartford contractors have contracted for multiple routes; Tr. 265 (DA 50) – contractors can and do sell

---

evidence for lacking sufficient "details." As further shown below, FedEx's system-wide proffer and Hartford-specific evidence fully established the contractors' entrepreneurial opportunities under any reasonable standard.

their routes; Tr. 397 (DA 71) – contractors can and do hire drivers). By any objective definition, the Hartford contractors clearly have a "realistic ability to work for other companies," have a "proprietary or ownership interest in their work," and have "control over important business decisions." (FedEx Br. at 42; *see also* Tr. 142-143, 607 (DA 34-35,97) – contractors using vehicles for personal and non-FedEx business reasons; Tr. 399 (DA 73) – FedEx does not set contractor hours of work; Tr. 594 (DA 92) – contractors believe they are entrepreneurs).

Further evidence of the proprietary decisions of contractors in the record include but are not limited to: whether to continue to contract with FedEx; whether to grow or sell their businesses; and whether to add employees while determining the terms and conditions of their employment. (FedEx Br. at 42; *see also* Tr. 61 (DA 27) - contractor purchase of vans; Tr. 74 (DA 29) – vehicle financing; Tr. 271 (DA 51) – contractors deciding to display their own corporate identities; Tr. 671-73 (DA 113-115), Tr. 1125-1145 (DA 165-185); FedEx Ex. 33 (DA 255) – contractor purchases of routes; Tr. 908-09, 950-51 (DA 129-29, 142-43) – contractors negotiating directly with customers and generating new customers; Tr. 970 (DA 144) – contractors turning a profit; Tr. 561 (DA 88) – contractors increasing their earnings through their own initiative).

In response, the Board's brief errs repeatedly in applying its "refined" factors to the facts found by the Regional Director's DDE. Thus, the Board's brief

incorrectly claims that FedEx exercises "pervasive control over the essential details of drivers' day-to-day work." (Board Br. at 43). To the contrary, the Regional Director found and the record shows that contractors enjoy considerable discretion over important facets of their work, including the order in which to deliver packages, the specific routes they travel, and when and where to start deliveries and take breaks. DDE at 11, 12, 28 (DA 268, 269, 285); *see also* Tr. 78-79 (DA 30-31) - contractors are responsible for determining delivery and route order; Tr. 399 (DA 73) - FedEx does not set contractor hours; Tr. 599 (DA 95) - contractors can make their own routes; Tr. 915-16, 1053-54 (DA 133-34, 149-150) - contractors' flexibility to schedule their own work and non-work times and decide where and when they engage in personal or professional (non-FedEx) activities.

The Board's brief also ignores the extent to which contractors are engaged in a distinct occupation, giving excessive weight to stylistic issues such as clothes and insignia, and exaggerating the contractors' acceptance of guidance suggestions and mere offers of assistance from FedEx. (Board Br. at 45; *compare* Tr. 140 (DA 33) - contractors publicly representing themselves as a small business). The Board's brief also errs in finding that FedEx "essentially directs" contractors' performance, notwithstanding clear evidence and specific fact findings by the Regional Director that contractors are free of supervision in their work duties. *Compare* Board Br. at 46 *with* DDE at 28 (DA 285); *see also C.C. Eastern, Inc.*, 309 NLRB 1070 (1992),

enf. denied, 60 F. 3d 855 (D.C. Cir. 1995); Tr. 78, 79, 599 (DA 30, 31, 95) – contractors are responsible for determining route/delivery order; Tr. 399 (DA 73) – FedEx does not set contractor hours; Tr. 600 (DA 96) – contractors may choose when or if to take breaks; Tr. 607 (DA 97) – contractors can use vehicles for personal reasons).

The Board's brief further errs in claiming that the significance of the contractors' undisputed ownership of their vehicles is "undercut considerably" by FedEx's alleged "primary role in dictating vehicle specifications and facilitating vehicle transfers." (Board Br. at 45). To the contrary, as previously noted (FedEx Br. at 43), FedEx is a motor carrier subject to Department of Transportation regulations, and FedEx's effort to insure consistency with such standards is not evidence of an employee relationship. 563 F. 3d at 500. *See also Central Transport, Inc*., 299 NLRB 5 (1990); *see also* Tr. 912-914 (DA 130-132) – FedEx safe driving program follows DOT requirements; Tr. 228-230 (DA 44-46) – FedEx physical requirements for contractors are an effort to follow DOT requirements; Tr. 937 (DA 136) – FedEx vehicle consistency efforts comport with industry standards; Tr. 943-946 (DA 138-141) – tracking contractor hours is required by

DOT regulations).[9]

The Board's brief also improperly asserts that the Hartford contractors' ownership of their vehicles is a "neutral" factor, when in reality it strongly supports this Court's finding in favor of independent contractor status. (Board Br. at 48-49). *Compare C.C. Eastern, supra*, 60 F. 3d at 859. The Board's brief similarly errs in arguing that 1-year or 2-year agreements signed by the drivers were somehow a "permanent working arrangement with the company…." (Board Br. at 49). The record evidence showed that numerous contractors negotiated new agreements and/or left the unit by purchasing multiple routes. *See* FedEx 2010 Response to Notice to Show Cause. (DA 343); see also Tr. 658, 671-673, 678, 1125-1145 (DA 110, 113-115, 117, 165-185) – contractors purchasing additional routes. The Board's brief, at 51-52, likewise errs in finding "inconclusive" the obvious belief of the parties to the Standard Operating Agreement that they were creating an independent-contractor relationship. FedEx 2010 Response to Notice to Show Cause (DA 343); *see also* FXW 4 (DA 190) – Standard Operating

[9] The Board's brief claims that FedEx's vehicle specifications exceed the minimums established by DOT. (Board Br. at 48-49). But the DOT regulations are not so precise as the Board would lead the Court to believe. See 49 C.F.R. 390.21(c)(3), leaving questions of "legibility" to be determined by carriers. Nor has any level of precision in complying with federal regulations previously been required in order to make a finding of independent contractor status. *See also FedEx I* at 501 ("[C]onstraints imposed by customer demands [branding to facilitate recognition by customers and access] and government regulations do not determine the employment relationship.").

Agreement; Tr. 857-58, Tr. 565 (DA 126-127, 90) – contractors believe they are independent contractors; Tr. 857-858 (DA 126-127), contractors understand and agree that they are entering into an independent contractor relationship).

The Board's brief again unfairly discounts contractors' incentives in compensation and the absence of fringe benefits or accident insurance, while incorrectly asserting that FedEx "establishes and controls drivers' rates of compensation." (Board Br. at 50). The evidence is clear that contractors have numerous opportunities to increase their compensation by taking advantage of available incentives and maximizing their productivity, over which FedEx exercises no control. FXW 4 (DA 190); Tr. 16-17; Tr. 561 (DA 22-23, 88) – contractors increasing earnings through their own initiative; Tr. 970 (DA 144) – contractors can and do turn a profit.

As noted above, the Board's brief is also wrong to give "little weight" to the contractors' right to sell their routes and in characterizing such sales as "more theoretical than actual." (Board Br. at 52-56). It remains undisputed that multiple contractors actually took such entrepreneurial opportunities, which should have been enough proof that the opportunities "actually" existed and are not merely theoretical. *See* Tr. 658, 671-673, 678, 1125-1145 (DA 110, 113-115, 117, 165-185) – contractors have purchased additional routes and sold routes. The Board's

brief nevertheless argues that "not enough" people in the proposed unit took the opportunity and/or that by taking the opportunity of buying or selling their routes, the purchasing or selling contractors removed themselves from the unit. The Board does not address this Court's finding in *C.C. Eastern*, 60 F.3d at 874, that even one example of entrepreneurial activity is enough to support an independent contractor finding. The Board's brief does not dispute FedEx's showing, at every stage of this proceeding, of numerous route sales by contractors, including two such sales in Hartford prior to 2007, and 20 more sales by contractors within the petitioned-for unit between 2007 and 2010. (FedEx Br. at 44-45).

The Board brief's claim that FedEx retains too much control over such sales is itself based upon theoretical speculation rather than any evidence of actual impact on the sales themselves. (Board Br. at 52-53). Like the Board Decision, the Board's brief faults FedEx for failing to include evidence of the "circumstances of each sale or whether any profit was realized by the drivers." (*Id.*). As noted in FedEx's brief, at 45, there has never previously been such a proof requirement, and it is a violation of FedEx's due process rights for the Board to impose such a requirement retroactively in this case. In any event, FedEx did provide proof of contractor profits from route sales, both system wide and at Hartford, which the Board's brief erroneously ignores. *See* FedEx 2010 Response to Notice to Show Cause. (DA 343); *see also* Tr. 970, 1114, 1120-1121 (DA 144, 161, 162-163) –

contractors have sold routes and turned profits.

The Board's brief also fails to refute Member Johnson's observation that there is a market for route sales among contractors, indicating that these are businesses of independent value that are being evaluated and sold by business owners, and are not "controlled" by FedEx. Dissent at 31 (DA 395). *See also FedEx I*, 563 F. 3d at 502 ("[N]ot only do these contractors have the ability to hire others without FedEx's participation, only here do they own their routes – as in they can sell them, trade them, or just plain give them away.").

The Board's brief fails to justify in any way the Board Decision's refusal to consider the ability of contractors to acquire multiple routes, and the Decision on this point remains circular, arbitrary and capricious. Contrary to the Board's argument, at 53, acquisition of multiple routes does not constitute "severance" of an ongoing relationship with FedEx, but is an entrepreneurial *expansion* of that relationship, under the same operating agreement, on the part of truly independent contractors. *See C.C. Eastern*, 60 F.3d 855; *Dial-A-Mattress*, 326 NLRB 884.This is particularly significant in light of the post-hearing evidence that the number of single route contractors who transacted to become multiple route contractors increased from three such contractors in 2007 to a majority of the bargaining unit by 2010. *See* Finch Affidavit attached to FedEx March 2010 Motion to Dismiss.

(DA 331).

Finally, as noted above, the Board's brief fails to justify the agency's continuing arbitrary treatment of FedEx's evidence of system-wide entrepreneurial activity by contractors. The Board arbitrarily refused to allow FedEx to introduce its system-wide evidence at the hearing in this case, just as this Court found to have unlawfully occurred in FedEx I. Had the Board allowed such testimony instead of limiting FedEx to a proffer, the "details" which the Board Decision found to be wanting would no doubt have been more fully explored, contrary to the Board's brief, at 53. As it is, the proffer showed very substantial entrepreneurial transactions among the contractors that strongly should have compelled a finding of independent contractor status. *See* FX 33 (DA 255); *see also* FedEx 2010 Response to Notice to Show Cause, Ex. 9 (DA 343).

For all of these reasons, the Board's brief fails to show that the evidence was insufficient to establish the members of the petitioned-for unit were rendering services to FedEx as part of their own independent businesses, even under the improperly "refined" standard announced by the Board. To the contrary, the Board's arbitrary application of its "refined" independent business test to find that the Hartford contractors are FedEx "employees," in spite of all the facts set forth above, is simply a repackaging of arguments rejected by this Court in *FedEx I* and

should be given no deference here. The Decision conflicts even with the standard wrongly restated by the Board in this case.

IV. Contrary To Its Brief, The Board's Application Of Its "Refined" Independent Contractor Standard Retroactively In This Case Constitutes A Manifest Injustice.

The Board's brief fails to justify the Board's retroactive application of its revised standard *eight years* after the hearing in this case was conducted under a previous standard. (Board Br. at 55-57). Under such circumstances, as explained in FedEx's Opening Brief, at 45-46, this Court should adhere to its holding in *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001), and the Board's own precedent in *SNE Enterprises*, 344 NLRB 673 (2005), both of which instruct the Board against causing a manifest injustice by such retroactivity. The Board's Brief does not address or distinguish this Court's *Epilepsy Foundation* opinion, which constitutes sufficient grounds for denying enforcement in and of itself. It remains unnecessary to reach the manifest injustice issue because the Court should adhere to its controlling *FedEx I* decision and vacate the Board's decision in its entirety. (FedEx Br. at 49).

IV. The Board's Brief Fails To Justify The Board's Overruling Of FedEx's Objections To The Election.

As noted in FedEx's opening brief, in addition to challenging the Board's direction and certification of an election among independent contractors, FedEx

filed objections to the election itself. Contrary to the Board's brief, at 57, the election should be set aside because the Board departed from precedent in overruling FedEx's objections.

Considering first Objection Number 1, FedEx has argued that the Board Decision violated this Court's holding in *Freund Baking Co v. NLRB*, 165 F.3d 928 (D.C. Cir. 1996), because the Teamsters arranged for valuable legal benefits – free legal services - on unit employees in connection with two lawsuits that were filed against the Employer prior to the election on behalf of these employees. *See also Stericycle, Inc.*, 357 NLRB No. 61 (2011) (adopting the holding in *Freund Baking*). In response, the Board's brief claims that the Board made "factual and credibility findings" to which the Court should defer, but the brief does not identify any such findings that are material to the proper outcome. To the contrary, the record evidence established that union representatives arranged for attorneys to meet with voters during the critical period, and voters were offered and received agreements for free legal services only days before the election was held with the understanding that law suits would be filed on their behalf claiming significant monetary damages. *See* ALJ Supp. Dec. dated May 22, 2009, at pp. 4-5 (DA 313-314).

The Board's brief does not dispute that, in contravention of the *Freund Baking* holding, the Board and ALJ required proof that the Union arranged or took

credit for the provision of free legal services to unit employees "contingent on a favorable outcome of the Petitioner in the election, or…on individual plaintiffs' votes for the Petition." (Board Br. at 60). *See* ALJ Supplemental Dec. at 5 (DA 314), affirmed and later reaffirmed without further comment by unpublished Board orders dated May 27, 2010 (DA 338) and August 27, 2010 (DA 358). The Board's brief fails to explain how such a ruling fails to violate *Freund Baking,* in light of this Court's holding that a union's sponsorship of employees' lawsuit against their employer violated the rule against providing gratuities to voters, regardless of whether the union actually paid for the lawsuit, and regardless of any *quid pro quo*. As the Court stated: "[I]t is the appearance of support, not the support itself, that may have interfered with the voters' decision making." *Id*. at 932. The Board's brief erred by failing to address or adhere to this Court's holding.[10]

As to the second Objection, FedEx's opening brief (at 51-52) establishes that the Board's election agent improperly commingled with unchallenged ballots the challenged ballots of a multi-route contractor, Paul Chiappa, and a driver whom Chiappa had independently hired, Robert Dizinno, improperly affecting the results of the vote. FedEx produced evidence of changed circumstances following the pre-

[10] The Board's brief relies on the inapposite decision of this Court in *King Elec., Inc. v. NLRB*, 440 F.3d 471, 474 (D.C. Cir. 2006), where a union was allowed to promise benefits to which employees would be entitled as union members or as employees of a union-signatory company. That is not the type of benefit that the Union offered in the present case.

election hearing that should have compelled the exclusion of both voters.

In response, the Board's brief (at 61-62) ignores the findings of the ALJ who agreed with FedEx that changed circumstances compelled a finding that Dizinno was not a FedEx employee and did not share a community of interests with other voters, which potentially affected the outcome of the election. (ALJ Supp. Dec. at 8) (DA 317). The Board's brief attempts to distinguish the case on which FedEx relied, *Fresenius USA Mfg., Inc*., 352 NLRB No. 86 (2008), though the Board itself failed to do so. In that case, the Board set aside a close election due to similar irregularities in the Board agent's handling of ballots, without requiring each individual ballot to be outcome determinative. Because the Board failed to address or distinguish its own precedent on ballot handling, and for this additional reason, the Board Decision should be vacated and the certification of the Union overturned.

CONCLUSION

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

Respectfully submitted,

/s/ Maurice Baskin

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

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,106 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

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

*/s/ Maurice Baskin*_____

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

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 2015, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/ Maurice Baskin
Counsel for Petitioner