UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
VELOX EXPRESS, INC.	)	
	)	
Respondent,	)	
	)	**Case 15-CA-184006**
and	)	
	)	
JEANNIE EDGE,	)	
	)	
an Individual.	)	

REPLY IN SUPPORT OF EXCEPTIONS TO THE NATIONAL LABOR RELATIONS BOARD ON BEHALF OF RESPONDENT VELOX EXPRESS, INC.

Submitted by:

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I. INTRODUCTION

Velox Express, Inc. ("Velox") submits this Reply in support of its Exceptions to the Administrative Law Judge's ("ALJ") Decision and its Brief in Support ("Exceptions Brief"). As set forth in the Exceptions Brief, this matter arose when a bitter former independent contractor, Charging Party Jeannie Edge ("Edge"), vowed to ruin Velox's business because of her interpersonal dispute with Velox's Memphis manager, Carol Christ ("Christ"). The ALJ ignored inconvenient facts, engaged in a twisted reading of the record, and misapplied the law to find that Edge was an employee and that Velox violated the National Labor Relations Act ("Act") in various ways.

Counsel for the General Counsel's ("GC") Answering Brief ("Answering Brief"), like the ALJ's decision, ignores or twists inconvenient evidence and misapplies law. For instance, GC heavily relies on the National Labor Relation Board's ("Board") decision in *FedEx Home Delivery*, 361 NLRB No. 55 (2014) ("*FedEx II NLRB*") finding that drivers were employees, despite that the decision was unequivocally overturned by the D.C. Circuit in *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) ("*FedEx II*") because the drivers were, in fact, independent contractors. GC also ignores evidence reflecting significant entrepreneurial opportunities Velox's drivers had, including the ability to limit expenses and control capital investments to maximize profits. Further, GC downplays indisputable evidence that drivers could subcontract their routes and negotiated pay and routes.

Moreover, GC argues for a baseless and unwarranted expansion of the law that would essentially re-write the Act to impose strict liability on companies for nothing more than the mere misclassification of employees as independent contractors, even when that misclassification is totally innocent and in good faith. And in arguing that the termination of Edge's contract was pretextual and based on protected activities, GC fails to grapple with Edge's admission that she was not terminated for protected activity, as well as the undeniable proof from PathGroup's contemporaneous internal emails that destroys any notion that the termination was pretextual.

II. GC RELIES ON OVERTURNED CASE LAW AND BLATANT FACTUAL MISSTATEMENTS TO ARGUE THAT VELOX'S DRIVERS WERE EMPLOYEES

As explained in the Exceptions Brief, whether an individual is an independent contractor or an employee is governed by a multi-factor test, for which the majority of factors weigh in favor of independent contractor status. GC's Answering Brief, arguing to the contrary, heavily relies on an overturned case, ignores relevant facts, and misstates the record.

A. GC heavily relies on *FedEx II NLRB*, which was directly overturned on its merits.

In support of its argument that the drivers were employees, GC relies heavily on the decision in *FedEx II NLRB*, citing it so many times in its brief that it does not even list the pages on which it is cited in its Table of Authorities, instead using the term *passim*. *See* Answ. Br. at iii, 22-23, 26-35. However, as GC is no doubt aware, the decision in *Fed Ex II NLRB* holding that FedEx drivers were employees was unequivocally overturned on its merits by the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit"), which vacated the Board's Order and concluded that the FedEx drivers were independent contractors. *FedEx II*, 849 F.3d at 1127. Thus, GC's analogies to *FedEx II NLRB* have little meaning; after all, in spite of (or because of) such analogous facts, the D.C. Circuit found the FedEx drivers to be independent contractors.

For instance, citing *FedEx II NLRB*, GC asserts that the fact that drivers must go to specific pick-up locations and cannot arrive early supports a conclusion that the drivers were employees. Answ. Br. at 25-26. Of course, picking up medical specimens at their location and after the time the office has been told they would be picked up is inherent in the nature of the job, not control over the drivers' work. But still, the D.C. Circuit concluded ***twice*** that the fact that the FedEx drivers that had to deliver packages at precise locations did not make them employees. The same goes for GC's reliance on *FedEx II NLRB* to support the propositions that tracking the drivers' routes or the length of the arrangement between Velox and drivers somehow turned drivers into employees rather than independent contractors. Answ. Br. at 27, 29. The D.C. Circuit clearly disagreed.

Indeed, in one of the most befuddling passages of the ALJ's Decision, he twists himself in knots to find that even though Velox paid the drivers per route, that pay was hourly pay and the form of compensation weighed in favor of employee status. ALJ Decision at 12. GC's support of that incorrect proposition again leans heavily on *FedEx II NLRB*, despite that the drivers at issue in that case were, in fact, independent contractors, pursuant to the D.C. Circuit's decisions.

B. GC instead ignores or minimizes salient points and misstates the record relating to whether the drivers are independent contractors.

As explained by the D.C. Circuit in *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I*), entrepreneurial opportunity is an "animating principle" for evaluating a worker's status. Here, the most crucial factor of the drivers' businesses – their vehicles and related costs – was in their exclusive and complete control. GC disparagingly, but wrongly, argues that drivers' abilities to generate profits through such choices are "negligible." Answ. Br. at 33. GC's unsupported statement is out of touch with reality. Whether to lease or own; whether to buy a low mileage car or a cheaper, older car; how to maintain the car; whether to use a more fuel efficient, but costly, vehicle or not; whether to have a higher or lower insurance deductible – these are all important financial decisions that have an impact on both profit and risk, a trade-off that only an independent contractor, not an employee using a company-owned vehicle, would make. These decisions regarding capital investments have clear and significant financial consequences, and it takes nothing but common sense to see that; why GC thinks otherwise is mystifying.

In an attempt to downplay the entrepreneurial opportunities enjoyed by the drivers, GC ignores that Edge ran multiple businesses ***using the same vehicle she utilized for Velox***. The best GC can muster in the face of that crucial evidence is to note that the agreements between Velox and drivers contained non-solicitation provisions prohibiting them from soliciting work from Velox's customers. Answ. Br. at 33-34. Yet the provision was narrowly tailored; it was not a non-competition provision and did not preclude the drivers from soliciting for any driving or other work

for any entity, including other medical specimen businesses, except for PathGroup. GC Ex. 2 at § 11(a)(2). Put simply, the non-solicitation provision applied to just one company out of thousands operating in the region, leaving Velox's drivers with almost unfettered entrepreneurial opportunities, including to use the primary instrumentalities they used for Velox for such work. That Velox tried to protect the goodwill it engendered with its customer via a narrowly-tailored non-solicitation provision found in many commercial contracts does not undercut that conclusion.

Perhaps recognizing that the drivers did have significant entrepreneurial opportunity, both by choosing how to run their business by making capital investment choices and by having virtually unfettered ability to contract to work for other businesses (including using the same instrumentalities they use for Velox's work), GC resorts to repeated claims that the drivers had no ability to negotiate with Velox over various aspects of their work as drivers. Answ. Br. at 3, 7, 30. Yet, GC's arguments are unsupported by, if not outright contrary to, the record evidence.

For instance, GC asserts that the "drivers are offered amounts on a 'take it or leave it' basis, which is a fact that the Board has found to weigh in favor of employee status."[1] Answ. Br. at 30. The D.C. Circuit in *FedEx I* expressly rejected the notion that any inference should be drawn from "'the economic controls which many corporations are able to exercise over independent contractors with whom they contract.'" *FedEx I*, 563 F.3d at 502 n.8. The Board's reiteration of the opposite sentiment in *FedEx II NLRB* was overruled by D.C. Circuit in *FedEx II*.

Moreover, GC's statement that drivers are only offered compensation on a "take it or leave it" basis is simply untrue. The record unequivocally reflects that David Chastain, a Memphis driver, asked for and received increased pay. Resp. Ex. 11; Tr. at 289-90. GC acknowledges as much. Answ. Br. at 7. Likewise, Jill Cross explicitly asked for and received the highest-paying route. Then, when she wanted a shorter route, she asked for and received one. Again, GC openly acknowledges that.

[1] GC points out that this was true of the drivers in *FedEx II NLRB* (*see* Answ. Brief at 30 n.25), but the D.C. Circuit still found that such drivers were independent contractors in *FedEx II*.

Answ. Br. at 6. In a bemusing attempt to downplay the evidence that drivers not only could, but did, negotiate pay and routes, GC states that after Chastain accepted increased compensation and Cross obtained a shorter route, there was "no ***further*** negotiation" between the drivers and Velox. Answ. Br. at 7 (emphasis added). Yet, the very concept of no "further" negotiation is an admission that there was, ***in fact, negotiation in the first place***, destroying the entire premise of the argument.

Even setting aside the evidence regarding negotiations between drivers and Velox over pay and routes, there is nothing in the record showing that any of GC's witnesses – Edge, Cross, or Woods – attempted to negotiate their compensation but were denied that opportunity. It is not Velox's fault that GC's witnesses did not attempt to negotiate any further. *Cf. FedEx I*, 563 F.3d at 502 (noting that it is the right to engage in entrepreneurial activity rather than the regular exercise of the right that is most relevant to determine if one is an independent contractor).

Finally, GC also denies the irrefutable truth that drivers could subcontract their routes. Answ. Br. at 35. The Independent Contractor Agreements clearly allow for it. GC Ex. 2 ¶¶ 4, 5. And Woods did subcontract his route, wholly undermining GC's position that doing so was not allowed.[2] *See C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) (noting that single example of subcontracting in the record "shows that there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right").

C. PathGroup's requirements for Velox's drivers are not evidence of "control" by Velox.

As set forth in Velox's Exceptions Brief (Exceptions Br. at 6-9; 18-29), almost every aspect of control GC asserts Velox exercised stemmed from PathGroup requirements and Velox's efforts to satisfy them. Velox's contract with PathGroup made clear that Velox's failure to comply with PathGroup practices and procedures would be a "service failure" under the contract (Resp. Ex. 9, ¶

[2] PathGroup necessarily limited the ability to subcontract to individuals approved by Velox (discussed in the Exceptions Brief at 10 and below) in part because handling specimens required HIPAA training, as violations of that law could have disastrous financial consequences for all involved – the subcontracting driver, subcontractor, PathGroup, Velox, and the office from which the specimen was being collected.

6(g)), which could place the entire contract at risk. Tr. at 305. In an effort to combat the inescapable conclusion that Velox's "control" over drivers was nothing other than passing on PathGroup requirements, GC argues that the cases on which Velox relies for the proposition that control aimed at satisfying a business's customers is not indicative of employee status is "inapposite as those cases involve regulatory controls imposed by government entities." Answ. Br. at 26. GC is wrong.

Courts and the Board have openly recognized that requirements aimed at customer satisfaction do not make a worker an employee, regardless of the presence of government regulations. For instance, in *C.C. Eastern*, a case that had nothing to do with regulatory controls, the D.C. Circuit held, "Where a company's control over an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship." 60 F.3d at 859. And in *Central Transport, Inc.*, the Board, holding that drivers were independent contractors, noted repeatedly that requirements flowing from customer service were directed to the ends to be achieved, not the means to achieve them. 299 NLRB 5, 14 (1990).

Nor is GC correct in its effort to distinguish cases as having been solely about "regulatory controls imposed by government entities": *Air Transit, Inc. v. NLRB*, 679 F.2d 1095 (4th Cir. 1982) and *SIDA of Hawaii v. NLRB*, 512 F.2d 354 (9th Cir. 1975). Answ. Br. at 26. Those cases expressly found that controls over independent contractors imposed by a company to satisfy the company's other contracts did not turn the workers into employees, even setting aside regulatory requirements. *Air Transit*, 679 F.2d at 1098 ("Most of the rules which Air Transit has enforced against it drivers in the past are either mandated by Air Transit's contract with the FAA or required by Virginia law.") and 1100 ("All of these requirements are mandated by Air Transit's contract with the FAA. Failure to promulgate and enforce such rules and regulations would place that contract in jeopardy."); *SIDA*, 512 F.2d at 359 ("Several of [SIDA's] regulations simply incorporate the requirements imposed on SIDA by its commercial contracts and certain state and local ordinances.").

GC suggests, without analysis or quotation, that the ALJ "carefully considered and rejected Respondent's argument" that the driver requirements stemmed from PathGroup and should not be considered as evidence of the drivers' employee status. Answ. Br. at 26-27. To the contrary, the ALJ's decision on that point only serves to underscore his flawed analysis. The ALJ did not cite any applicable law. More importantly, the ALJ dismissed the notion that it was PathGroup dictates that led to driver controls, despite all evidence to the contrary. For instance, GC complains that Edge could not start routes early; this requirement was in numerous PathGroup directives (Resp. Ex. 16 ¶ I(1)(a); Resp. Ex. 21). GC also complains that drivers had to call dispatch to report information about will call stops and stay until released (Answ. Br. at 24); again, this requirement was from PathGroup (Resp. Ex. 12). GC further complains that drivers had to use a shoulder bag (Answ. Br. at 24); this, too, was a PathGroup requirement (Resp. Ex. 16 at ¶ I(1)(f)).

What "controls" are left after shedding PathGroup's requirements are those regarding how drivers should treat Velox's office space, namely that they had to keep bags and supplies in a neat and orderly fashion there and wait in a particular area of the office. But this is not control over their work. It is simply an effort to ensure that Velox's own property and work space were maintained in an orderly manner. It is no different than a homeowner that hires a carpenter to install cabinets and requests that the carpenter not track dirt through her home and maintain tools and materials in the area where the carpenter works. Just as there is no viable argument that such requests change the carpenter into an employee, there is no viable argument that Velox's efforts to maintain its office space transform the drivers into employees. Simply put, classification as an independent contractor does not give a person free reign to do whatever they want with their client's property; a conclusion to the contrary would be absurd.

III. GC'S ANALYSIS THAT MISCLASSIFICATION ALONE IS A VIOLATION OF THE ACT IS AN UNSUPPORTED AND UNWARRANTED EXPANSION OF LAW.

The ALJ unthinkingly accepted the proposition that misclassification of workers as independent contractors is in and of itself a violation of the Act. That proposition is a clear expansion of law; despite many cases regarding classification of workers as employees or independent contractors, ***no case*** has held that misclassification by itself violates the Act. Yet the ALJ, without any analysis whatsoever, came to that very conclusion, essentially imposing strict liability under the Act when a party mistakenly and in good faith misclassifies workers as independent contractors. What a dangerous and ill-advised precedent such a ruling would set.

GC argues that the Board should adopt that unthinking expansion of the law, noting that employers violate the Act when they take actions to chill or curtail future protected activity. Answ. Br. at 37-39. Such a formulation might suggest that intent is crucial to a violation of the Act, but what GC really seeks is a finding that simple misclassification without any further evidence of intent is in and of itself a violation of the Act. Such a strict liability formulation is what the ALJ seemed to impose, but the law does not in any way support GC's position and the ALJ's decision. As set forth in the Exceptions Brief, the Board has already stated a framework for assessing whether workplace rules and regulations improperly curtail protected activity. Exceptions Br. at 47-48 (discussing *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)). GC fails to address why the standards in *Lutheran Heritage* should not apply or how they would apply here.

In fact, despite GC's rhetoric, the record is wholly devoid of any evidence whatsoever that Velox classified drivers as independent contractors in an effort to curtail protected activity. ***GC's entire argument is wholly devoid of any citation to any record facts whatsoever***. Answ. Br. at 37-39.[3] GC's empty rhetoric is clearly intended to make up for a lack of actual evidence.

[3] GC asserts that the classification of drivers as independent contractors has no "legitimate business purpose other than to deny the drivers the protections that inure to them as statutory employees." Answ. Br. at 39. The statement is unsupported by any evidence and is ludicrous. The business was built around having independent contractor drivers that used their own cars of their own choice, paid their own insurance and gas, and ran routes when they wanted for pay on a per-route basis, out of which they would manage their own expenses, in contrast to a business centered around employees that driving Velox-owned cars with Velox-paid insurance and gas who earned hourly wages without any

IV. GC IGNORES CLEAR EVIDENCE THAT EDGE'S CONTRACT WAS TERMINATED DUE TO HER MISHANDLING OF SPECIMENS.

GC's argument that Edge's alleged protected activities were the reason for termination of her contract is also fatally flawed in numerous respects. GC, unable to rebut Edge's own statements under oath that she was not terminated for engaging in protected activity, simply ignores them. GC also largely fails to address the fact that Velox had minimal knowledge, at best, of Edge's supposed protected activities. For instance, none of Edge's conversations about the route driver agreement (which the ALJ found did not violate the Act) with other drivers were known to Velox. When Edge made statements to Carol Christ about the route driver agreement, she did so using first person language, and did not indicate she was acting with or on the authority of anyone but herself.

Again, rather than address salient facts that undermine GC's argument, GC ignores them. GC's analysis of whether Velox terminated Edge for protected activity largely skips over the key question of what Velox even knew of Edge's supposed protected activities to argue that the reason provide by Velox for termination of her contract – Edge's mistake that caused PathGroup to insist she not drive PathGroup routes anymore – was pretextual. *See* Answ. Br. at 39-44.

The closest GC comes to addressing that issue is GC's reliance on GC Ex. 44 to try to show that Lee had reason to know that Edge was engaging in protected activity. Answ. Br. at 43. But that exhibit, an email reflecting a forward of a text Edge sent Christ, only demonstrates that Edge was complaining about herself, not on behalf of anybody else; she uses only first person pronouns and does not mention any other driver. More importantly, there is nothing in the record showing that Lee received this message from Christ or knew anything about it. GC failed to even establish any foundation for introduction of the message. Tr. at 391-395. Further, the date of the email forward was nearly two months ***after*** Edge's contract was terminated, meaning it could not have been used

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opportunity to manage expenses in a way to generate more profit. GC's dim understanding of business does not qualify as evidence that supports its rhetoric in its Answering Brief.

as a basis for her termination. GC could have asked Lee if he ever saw it prior to the termination to establish a link, but chose not to do so. The only other evidence GC submitted that Lee knew of Edge's complaints or that she had discussed the matter with other drivers was a single email nearly a month prior to her termination. GC Ex. 4. However, Edge's email was clearly written as her own complaint, repeatedly using the first person. And Velox did not take any activity after receiving that email to discipline Edge or any other driver in any way. As noted above, it was nearly a month later before Velox terminated Edge's contract – and only after she erred with respect to a specimen.

GC's argument as to why termination of Edge's contract due to the specimen mishandling was supposedly pretextual ignores significant evidence that it was not. In that regard, GC fails to address that PathGroup had internal discussions about termination of Edge's contract. That PathGroup, completely independently of Velox, had internal discussion regarding the termination of Edge's contract thoroughly dispels any notion that the service failure was a pretext. GC wholly ignores that objective evidence precisely for that reason.

V. VELOX RAISED THE ISSUE OF THE INCORRECT RECORD BEFORE THE ALJ

Finally, GC, understanding that Edge's sworn deposition testimony that was played at the hearing but not recorded in the transcript is damning as to Edge's credibility and the validity of her charges, suggests that Velox cannot raise the issue of the inaccurate record now because it failed to raise it before the ALJ. That is not true, however. In its post-trial brief to the ALJ – who was present at the hearing and heard the audio being played – Velox expressly quoted the missing excerpts from the record. Resp.'s Post-Hearing Br. to ALJ at 13-14, 38. Moreover, the Rules explicitly state that any exceptions to the record shall be filed with the Board. 29 C.F. R. § 102.46(a). Thus, Exception 53 and Velox's arguments relating thereto are properly before the Board.

VI. CONCLUSION

The Board should dismiss the Complaint in its entirety.

Dated: December 4, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2017, I caused a copy of the foregoing document to be electronically served upon the following:

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