***Supershuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (Jan. 25, 2019)**

The issue in this case is whether franchisees who operate shared-ride vans for SuperShuttle Dallas-Fort Worth are employees covered under Section 2(3) of the National Labor Relations Act or independent contractors and therefore excluded from coverage. On August 16, 2010, the Acting Regional Director issued a Decision and Order in which she found, based on the Board's traditional common-law agency analysis, that the franchisees in the petitioned-for bargaining unit were independent contractors, not statutory employees. Accordingly, she dismissed the representation petition at issue.

Thereafter, . . . the Union filed a request for review of that decision. . . . Before the Board issued its decision on the Union's request for review, it issued its decision in *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*), in which a Board majority purportedly sought to "more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss." The Board majority explicitly declined to adopt the holding of the United States Court of Appeals for the District of Columbia Circuit in a prior *FedEx* case "insofar as it treats entrepreneurial opportunity (as the court explained it) as an 'animating principle' of the inquiry." Rather, the Board found that entrepreneurial opportunity represents merely "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business.*"

In so doing, the Board significantly limited the importance of entrepreneurial opportunity by creating a new factor ("rendering services as part of an independent business") and then making entrepreneurial opportunity merely "one aspect" of that factor. As explained below, we find that the *FedEx* Board impermissibly altered the common-law test and longstanding precedent, and to the extent the *FedEx* decision revised or altered the Board's independent-contractor test, we overrule it and return to the traditional common-law test that the Board applied prior to *FedEx*, and that the Acting Regional Director applied in this case.

Having carefully reviewed the entire record, including the parties' briefs and the amicus brief on review, and applying the Board's traditional independent-contractor analysis, we affirm the Acting Regional Director's decision and her finding that the franchisees are independent contractors. Accordingly, we dismiss the petition.

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IV. DISCUSSION

A. Overruling the Board's FedEx Decision

The Board majority's decision in *FedEx* did far more than merely "refine" the common-law independent-contractor test--it "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of "right to control' factors relevant to perceived economic dependency." *FedEx Home Delivery*, 361 NLRB at 629 (Member Johnson, dissenting). Today, we overrule this purported "refinement."

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. . . [T]he *FedEx* majority's emphasis on drivers' "economic dependency" on the employer makes no meaningful distinction between FedEx drivers and any sole proprietor of a small business that contracts its services to a larger entity. Large corporations such as Fed-Ex or SuperShuttle will always be able to set terms of engagement in such dealings, but this fact does not necessarily make the owners of the contractor business the corporation's employees.

Properly understood, entrepreneurial opportunity is not an independent common-law factor, let alone a "super-factor" as our dissenting colleague claims we and the D.C. Circuit treat it. Nor is it an "overriding consideration," a ""shorthand formula," or a "trump card" in the independent-contractor analysis. Rather, as the discussion below reveals, entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa. Moreover, we do not hold that the Board must mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case. Instead, consistent with Board precedent as discussed below, the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate.

The Board has long considered entrepreneurial opportunity as part of its independent-contractor analysis. But, as the D.C. Circuit has recognized, the Board has over time (particularly since *Roadway*) shifted its perspective to entrepreneurial opportunity as a principle by which to evaluate the significance of the common-law factors, as demonstrated by the nonexhaustive discussion of relevant Board precedent that follows.

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C. Conclusion

Having considered all of the common-law factors, we find, in agreement with the Acting Regional . . . significant and do not outweigh those factors that support independent-contractor status.

MEMBER MCFERRAN, dissenting.

Until 2005, SuperShuttle DFW treated its drivers as employees. It then implemented a franchise model, supposedly transforming the drivers into independent contractors. Today, the majority finds that this initiative succeeded, at least for purposes of the National Labor Relations Act. To reach that finding, the majority wrongly overrules the Board's 2014 *FedEx* decision, without public notice and an invitation to file briefs. But under any reasonable interpretation and application of the common-law test for determining employee status--which everyone agrees is controlling--the SuperShuttle drivers are, in fact, employees. The drivers perform work that is the core part of SuperShuttle's business, subject to a nonnegotiable "unit franchise agreement" that pervasively regulates their work; they could not possibly perform that work for SuperShuttle without being completely integrated into SuperShuttle's transportation system and its infrastructure; and they are prohibited from working for any SuperShuttle competitor. SuperShuttle's drivers are not independent in any meaningful way, and they have little meaningful ""entrepreneurial opportunity." Under well-

established Board law--reflected in decisions leading up to and including *FedEx*--this should be a straightforward case.

Instead, purporting to "return the Board's independent-contractor test to its traditional common-law roots," the majority not only reaches the wrong result here, but also adopts a test that cannot be reconciled with either the common law or Supreme Court and Board precedent. According to the majority, the Board is required to apply the multi-factor, common-law agency test of employee status, as articulated in the *Restatement (Second) of Agency* §220 (1958), yet, at the same time, the majority insists that "entrepreneurial opportunity . . . has always been at the core of the common law test" and thus the Board must treat "entrepreneurial opportunity" as "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." Simply put, these two requirements are contradictory: "entrepreneurial opportunity" is demonstrably *not* "at the core of the common law test."

Indeed, the majority does not coherently apply the test it claims to adopt in actually deciding this case. Instead, the majority insists that it is free to adjust its test whenever and however it likes, observing that "the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." As the Supreme Court has told the Board, however, the reasoned decision making required by the Administrative Procedure Act means that federal agencies may not announce one rule but apply another. That seems to be the path the majority has chosen today.