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**SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338.** Case 16–RC–010963

January 25, 2019

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN,  
KAPLAN, AND EMANUEL

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, pursuant to Section 102.67 of the National Labor Relations Board’s Rules and Regulations, the Union filed a request for review of that decision. On November 1, 2010, the Board granted the Union’s request for review. The Union and the Employer filed briefs on review, and the AFL–CIO filed an amicus brief. The Employer also filed a response to the AFL–CIO’s brief.

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*), enf. denied 849 F.3d 1123 (D.C. Cir. 2017) (*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.” *Id.* at 610. 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<sup>1</sup> “insofar as it treats entrepreneurial opportunity (as the court explained it) as an ‘animating principle’ of the inquiry.” *FedEx Home Delivery*, 361 NLRB at 610. 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.*” *Id.* at 620 (emphasis in original).

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<sup>2</sup> 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.

I. LEGAL FRAMEWORK

A. *The Common-Law Agency Test*

Section 2(3) of the Act, as amended by the Taft-Hartley Act in 1947, excludes from the definition of a covered “employee” “any individual having the status of an independent contractor.” 29 U.S.C. § 152(3). The party asserting independent-contractor status bears the burden of proof on that issue. See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001); accord *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001) (upholding Board’s rule that party asserting supervisory status in representation cases has burden of proof).

To determine whether a worker is an employee or an independent contractor, the Board applies the common-law agency test. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). The inquiry involves application of the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency §220 (1958):

- (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.

<sup>1</sup> *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I*).

<sup>2</sup> As the Board noted in *Roadway Package Systems, Inc.*, 326 NLRB 842, 849 (1998), Supreme Court cases “teach 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.”

(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 part of the regular business of the employer.

(i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in business.

In applying these factors, the Court noted that there is no “shorthand formula” and held that “all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.” *Id.* at 258.

#### B. *Developments Since United Insurance*

In the 50 years since the Supreme Court’s decision in *United Insurance*, the Board and the courts have revisited and refined the proper application of the common-law factors to the independent-contractor analysis. See, e.g., *Roadway Package System, Inc.*, 326 NLRB 842 (1998), *St. Joseph News-Press*, 345 NLRB 474 (2005), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998) (considering, among other things, (1) the Board’s authority to change or modify the common-law right-of-control test to determine if an individual is an employee; (2) the relative importance of factors indicative of employee or independent-contractor status; and (3) evidence of financial gains and losses by drivers in the *Roadway* cases). The District of Columbia Circuit Court of Appeals observed in *FedEx I*, 563 F.3d at 497, that over time, the Board, while retaining all the common-law factors, had shifted the emphasis from control to whether putative independent contractors have significant entrepreneurial opportunity for gain or loss (citations omitted). The court noted that “while the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.” *Id.* Further, the court noted that the common-law test “is not merely quantitative . . . there also is a qualitative assessment to evaluate which factors

are determinative in a particular case, and why.” *Id.* at 497 fn. 3. Thus, entrepreneurial opportunity is not an individual factor in the test<sup>3</sup>; rather, entrepreneurial opportunity, like employer control, is a principle to help evaluate the overall significance of the agency factors. Generally, common-law factors that support a worker’s entrepreneurial opportunity indicate independent-contractor status; factors that support employer control indicate employee status. The relative significance of entrepreneurial opportunity depends on the specific facts of each case.<sup>4</sup>

In 2014, the Board again reviewed its independent-contractor analysis in *FedEx Home Delivery*, 361 NLRB 610, involving the drivers at a FedEx facility in Hartford, Connecticut. The Board majority sought “to more clearly define the analytical significance of a putative independent contractor’s entrepreneurial opportunity for gain or loss.” *Id.* at 610. The Board held that it would give weight to actual, not merely theoretical, entrepreneurial opportunity, and that it would necessarily evaluate the constraints imposed by a company on an individual’s ability to pursue this opportunity. In addition, the Board held that it would evaluate—in the context of weighing all relevant common-law factors—whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.<sup>5</sup> The Board held that this factor would encompass not only whether the putative contractor has a significant entrepreneurial opportunity, but also whether the putative contractor (a) has a realistic ability to work for other companies; (b) has a proprietary or ownership interest in his work; and (c) has control over important business decisions, such as the scheduling of performance, the hiring, selection, and assignment of employees, the purchase of equipment, and the commitment of capital.<sup>6</sup>

#### C. *Other Relevant Board Law*

In applying the common-law test to the taxicab industry, the Board has given significant weight to two factors: “the lack of any relationship between the company’s compensation and the amount of fares collected,” and

<sup>3</sup> Although the Board has occasionally listed entrepreneurial opportunity as a separate factor, see, e.g., *Pennsylvania Academy of Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004), it is not one of the factors listed in the Restatement (Second) of Agency.

<sup>4</sup> Despite our dissenting colleague’s overwrought claims to the contrary, the D.C. Circuit does not (and we do not) consider entrepreneurial opportunity to be a “super-factor,” an “overriding consideration,” a “shorthand formula,” or a “trump card” in the Board’s independent-contractor analysis. But as our review of the Board’s case law shows, entrepreneurial opportunity, however it is characterized, has always been at the core of the common-law test.

<sup>5</sup> *Id.* at 620.

<sup>6</sup> *Id.* at 621.

“the company’s lack of control over the manner and means by which the drivers conduct business after leaving the [company’s] garage.” *AAA Cab Services*, 341 NLRB 462, 465 (2004) (citing *Elite Limousine Plus*, 324 NLRB 992, 1001 (1997)); *City Cab Co. of Orlando*, 285 NLRB 1191, 1193 (1987).<sup>7</sup> The Board has also held that when a driver pays a company a fixed rental and retains all fares he collects without accounting for those fares, there is a strong inference that the company does not exert control over the means and manner of his performance. *Metro Cab Co.*, 341 NLRB 722, 724 (2004). The theory underlying this inference is that in a flat-rate system, the company makes its money irrespective of the fares received by drivers; therefore, the company has no compelling reason to try to control the means and manner of the drivers’ performance. *Id.*

Finally, the Board has held that requirements imposed by governmental regulations do not constitute control by an employer; instead, they constitute control by the governing body. *Elite Limousine Plus*, 324 NLRB at 1002. The Board has stated that employee status will be found only where “pervasive control” by the private employer “(exceeds) governmental requirements to a significant degree.” *Teamsters Local 814 (Santini Bros. Inc.)*, 223 NLRB 752, 753 (1976), *enfd.* 546 F.2d 989 (D.C. Cir. 1976), *cert. denied* 434 U.S. 837 (1977); see also *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 875–876 (D.C. Cir. 1979); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983).

## II. FACTUAL BACKGROUND

SuperShuttle Dallas-Fort Worth (DFW), an independent business entity, maintains a license agreement with SuperShuttle International and SuperShuttle Franchise Corporation for the right to use the SuperShuttle trademark and transportation system in the Dallas-Fort Worth area. SuperShuttle International, which owns the SuperShuttle name, logo, and color scheme, develops proprietary software for dispatching, cashiering, and taking reservations for use in administering a shuttle van transportation system. Pursuant to the license agreement, SuperShuttle DFW is permitted to market and deploy the SuperShuttle transportation system in its designated local market.

The SuperShuttle DFW franchisees in the petitioned-for unit primarily transport passengers to and from Dallas-Fort Worth and Love Field airports. Before 2005, SuperShuttle DFW designated its drivers as employees. During that period, SuperShuttle assigned drivers—who earned hourly wages—to regularly scheduled shifts pick-

ing up customers in company-owned shuttle vans. In 2005, SuperShuttle converted to a franchise model, which remains in place. Under the current franchise model, drivers are required to sign a 1-year Unit Franchise Agreement (UFA) that expressly characterizes them as nonemployee franchisees who operate independent businesses.<sup>8</sup> Franchisees are required to supply their own shuttle vans and pay SuperShuttle DFW an initial franchise fee and a flat weekly fee for the right to utilize the SuperShuttle brand and its Nextel dispatch and reservation apparatus. Franchisees work no set schedule or number of hours or days per week; they work as much as they choose, whenever they choose. Franchisees are then entitled to the money they earn for completing the assignments that they select. Individual franchisees may also hire and employ relief drivers to operate their vans.

Amalgamated Transit Union Local 1338 (the Union) seeks to represent a unit of SuperShuttle DFW drivers, including those who operate as franchisees pursuant to the UFA, and relief drivers. At the time of the hearing, there were approximately 88 drivers who operated as franchisees and 1 relief driver.

### A. Airport Contract and Permits

SuperShuttle DFW is permitted to operate at DFW Airport pursuant to a shared-ride contract (Airport Contract) between the Company and the Dallas-Fort Worth International Airport Board, a public governmental agency.<sup>9</sup> The 130-page document has extensive terms, which dictate most of the ways that SuperShuttle DFW operates its business. The Employer is required to maintain a customer complaint procedure, screen franchisees for drugs and alcohol, and train franchisees. As to the SuperShuttle vans, which franchisees must own or lease, the contract governs marking on the vans, the internal condition of the vans including the number of seats, vehicle maintenance requirements, and postaccident safety inspections. DFW Airport has the right to inspect vans operated by SuperShuttle and to audit SuperShuttle’s compliance with the Airport Contract.

Under the Airport Contract, franchisees must have a permit issued by Airport Operations. SuperShuttle must perform criminal background checks, a driving history background check, and drug and alcohol screening in accordance with Department of Transportation standards.

<sup>8</sup> The agreement states that “persons who do not wish to be franchisees and independent business people but who prefer a more traditional employment relationship should not become SuperShuttle franchisees.”

<sup>9</sup> Franchisees are not signatories to the Airport Contract. Although franchisees in the petitioned-for unit serve both DFW and Love Field airports, the Airport Contract entered into evidence only refers to DFW Airport.

<sup>7</sup> *FedEx*, *supra*, which involved package delivery drivers, did not purport to modify the Board’s precedent regarding taxicab drivers.

A franchisee must be at least 19 years old, a legal resident, have a valid Texas driver's license, be able to effectively communicate in English, and not be suspended from another ground transportation service.

### *B. Unit Franchise Agreement*

The Unit Franchise Agreement (UFA), which governs the relationship between the franchisees and SuperShuttle, describes the SuperShuttle transportation system and delineates how franchisees are to operate within that framework.<sup>10</sup> It is a standard agreement that is not subject to negotiation by individual franchisees.

Under the UFA, a franchisee, subject to some restrictions, pays an initial fee of \$500 for the right to provide transportation to and from DFW and Love Field airports, or a \$300 fee for access only to Love Field airport. In addition to the initial franchise fee, the UFA requires that franchisees pay to SuperShuttle a weekly system fee—\$575 for a Dallas-Fort Worth and Love Field franchise and \$375 for a Love Field franchise. This flat fee does not change and is not related to the amount of business that a franchisee generates. The weekly fee covers the franchise fee, the cost of providing the Nextel system through which franchisees bid on routes, and marketing of the SuperShuttle brand. Franchisees also pay a \$250 decal fee.

### *C. Shared-Ride Vehicles*

The UFA requires that franchisees purchase or lease a van that meets the system specifications, i.e., make, model, color, size, age, and mechanical condition.<sup>11</sup> SuperShuttle DFW General Manager Ken Harcrow testified that the average cost of a passenger van is about \$30,000.<sup>12</sup> With regard to van acquisition, Harcrow testified that some franchisees get their own vans or leases, and that SuperShuttle also has a leasing company, Blue Van Leasing, to assist franchisees. Franchisees are also responsible for paying for gas, vehicle maintenance,

tolls, and access fees. Franchisees park the vans at their homes, and there are no restrictions on franchisees using their vans for personal use.

The Airport Contract imposes guidelines regarding essential equipment and vehicle age and condition. For instance, the Airport Contract requires that all vehicles have, among other things, an air conditioner, heater, fire extinguisher, and credit card machine. The Airport Contract also includes detailed provisions regarding the physical condition of the vehicle; for example, the Contract requires that the vehicles be free of large dents, that all interior and exterior surfaces be free of dirt and grease, and that seats be consistent in color and have no more than two small holes. SuperShuttle dictates that all vehicles use the Company's trademarked blue-and-yellow paint scheme and logo.

The Airport Contract requires that shared-ride vehicles must pass a mechanical inspection on two separate occasions during the calendar year. Pursuant to the UFA, SuperShuttle has the right, without prior notice, to inspect any shared-ride vehicle. SuperShuttle conducts its own in-house inspection of vehicles every 60 days.

Franchisees must purchase insurance through a designated insurer. Franchisees must obtain licensing approval from DFW Airport, pay a licensing fee, and undergo background checks. Franchisees must also complete 34 hours of training and 18 hours of on-the-job training. The Airport Contract requires SuperShuttle to provide 8 hours of customer training in the first week and at least 16 hours per year. This training includes permit qualifications, vehicle requirements, duties and responsibilities under the Airport Contract, disciplinary guidelines, dress standards, customer service, and loading area and van requirements.

All SuperShuttle vans are equipped with a Nextel communications system owned and operated by SuperShuttle. Part of the franchisees' weekly fee covers the cost of operating the Nextel system. Franchisees also receive a pager, a two-way radio, and a global positioning navigation system, also owned and operated by SuperShuttle. Franchisees may use only equipment, signs, uniforms, and services approved by SuperShuttle.

### *D. Franchisees' Hours, Schedules, and Bid Process*

Franchisees set their own work schedules and select their own assignments; SuperShuttle does not set schedules or routes, nor does it require franchisees to be active during certain days or hours. Thus, franchisees have complete control over their schedules. All bidding and work assignments are handled through the Nextel system. Generally, when a franchisee wants to start work and pick up an assignment, he can do so by turning on the Nextel apparatus. Customers can coordinate pickup

<sup>10</sup> The UFA notes that "[t]he airport ground transportation business is a regulated industry and, as a result, there are and will be a substantial amount of restrictions arising from government regulation . . . These restrictions are not imposed by SuperShuttle, but effectively are passed along in order to implement the governmental regulatory scheme."

<sup>11</sup> According to the Franchise Disclosure Document, the vehicle must seat 8 persons including the driver and be no more than 5 years old; acceptable models are the Ford Econoline, the Dodge B1500 or B2500, the Chevy Express, and the GMC Savana.

<sup>12</sup> The Franchise Disclosure Document that franchisees receive estimates that the total investment necessary to begin a SuperShuttle franchise is \$18,100 to \$40,500; this includes the cost of a vehicle, \$300–\$500 for the initial franchise fee, \$250 for the application of decals, a security deposit of \$1,500 for decals and specialized equipment, and the first payment of \$50 to the weekly airport expense reimbursement fund.

requests and pay by credit card via the national SuperShuttle website or phone number. Once processed by SuperShuttle dispatchers, these requests appear on franchisees' Nextel devices as job "bids" that franchisees can choose to accept or decline. For each bid, the device displays the fare amount, the passenger's name and address, and the pickup time. If the franchisee declines a bid or fails to respond, the dispatcher will generate another bid for his consideration. Generally, a franchisee incurs no negative consequences from passing on a trip. However, if the franchisee accepts a bid, he is required to complete the pickup or he may be subject to a \$50 fine that is paid to the franchisee who completes the job.

Several bidding variations occur within this general framework. In "available bidding," a franchisee will make himself available in his current location, and the system will generate a bid within a 20-mile radius. In "outbound finals bidding," franchisees who are leaving the airport enter their final destination, and the system automatically generates outbound bids near that destination. In "AM bidding," the dispatcher releases a list of bids at 7:30 p.m. for the next morning, and franchisees can pre-select jobs for the following day. In "stand bidding" and "holding lot bidding," franchisees line up at a set location, e.g., a hotel stand or a holding lot, and are offered bids in the order that they are assembled. In all variations, bids are processed through the Nextel device; franchisees are not permitted to use any other service or their personal cell phones to obtain business.

In addition to bidding, franchisees have the option to drive "hotel circuits," in which a franchisee is responsible for providing regularly scheduled pickup service at a hotel. General Manager Harcrow testified that SuperShuttle DFW maintains circuits that service major hotels in Dallas and Fort Worth. Franchisees who choose to drive hotel circuits are responsible for creating pickup schedules and writing bylaws for the route. If a franchisee is unable to drive his scheduled route, he is responsible for finding a replacement, with no involvement from SuperShuttle. Finally, a franchisee can run a charter service, which entails transporting non-airport passengers from one location to another. Charter jobs sometimes show up as Nextel bids. Franchisees can also arrange their own charter jobs, provided that they notify SuperShuttle at least 2 hours in advance and observe a 2-hour charter minimum. There is no record evidence of franchisees running charter operations. The Airport Contract specifically forbids franchisees from independently soliciting passengers at the Airport.

The Airport Contract is generally silent as to the specific operating procedures that SuperShuttle and its franchisees employ away from the airport. The Contract

does set forth express pickup time goals that SuperShuttle is required to meet: no more than 15 minutes from the pickup request from 9 a.m. to 9 p.m., and no more than 20 minutes from the request from 9 p.m. to 9 a.m. The Airport Contract also requires franchisees to provide every passenger with a receipt, maintain a passenger log, and operate the vehicle in a "safe and competent manner."

In all instances, i.e., pickups from the airport, hotels, and residences, SuperShuttle sets the fares that customers pay; the fare that appears in the Nextel system is the fare that the franchisee must charge the customer. Franchisees are required to turn in all receipts, trip sheets, and vouchers to SuperShuttle on a weekly basis. SuperShuttle then issues each franchisee a reimbursement check for the fares that he earned in excess of the weekly fees owed to SuperShuttle. (The administration of billing and processing of payments by SuperShuttle is one of the services provided by SuperShuttle pursuant to a franchisee's weekly service payment.)

#### *E. Fares and Payments*

The franchisee is entitled to all fares paid by customers and does not share the fare with SuperShuttle in any way. The franchisee's flat weekly fee does not vary with revenues earned. Passengers may pay in the form of credit cards, vouchers, coupons, or cash. Franchisees are required to accept SuperShuttle vouchers. Although the record is unclear as to whether the Company reimburses them for all vouchers in full, it does appear from the testimony that franchisees are reimbursed in full for complimentary rides and hotel coupons.

According to the UFA, franchisees have the option of purchasing an a.m., a p.m., or a 24-hour license. The testimony, however, reflects that regardless of their license, franchisees are unlimited in the hours during which they can operate.

Franchisees pay their own expenses, which include gas, tolls, licensing fees, and vehicle maintenance.

#### *F. Franchisee Conduct and Termination*

The Airport Contract dictates that all franchisees must be dressed in a uniform that clearly identifies them as representatives of SuperShuttle. The Airport Contract includes various general guidelines for franchisee conduct while on the job, including a requirement that franchisees act in a reasonable, courteous, cooperative, and professional manner. The Contract includes prohibitions on, among other things, the use of improper language, loud boisterous conduct, sleeping on the job, soliciting, and consuming any food or drink in plain sight. If a franchisee violates a term of the Airport Contract, the Airport will assess to SuperShuttle liquidated damages,

which are set out in an attachment to the Contract. For instance, if a franchisee is caught sleeping on Airport property, SuperShuttle will be assessed \$35 for the second offense, \$70 for the third offense, and \$105 for subsequent incidents.

The UFA includes a list of 25 examples of conduct for which SuperShuttle can terminate a franchisee without recourse. These include, among other things, unauthorized use of SuperShuttle marks or trade secrets; failure, on more than three occasions within the course of the contract term, to pay fees on a timely basis or comply with a requirement of the UFA; foreclosure on or repossession of the shared-ride vehicle; suspension or termination of any required license or permit; receipt of an excessive number of complaints, citations, or notices; falsification of trip sheets, credit card receipts, or training or driving records; use of a relief driver who does not complete the required training or have the mandatory qualifications; and entrance into an employment relationship or affiliation with a business that is competitive with SuperShuttle. SuperShuttle can also terminate a franchisee for not complying with the UFA or failing to make any payments due to SuperShuttle and failing to cure within 3 days after written notice of default. The UFA also gives SuperShuttle the right to institute a point system, whereby points are assessed to the franchisee every time he fails to comply with rules, and accumulation of points may result in fines and termination. There is no evidence that SuperShuttle has implemented a points-based progressive discipline system.

#### *G. Additional Terms and Conditions*

The UFA requires that the signer of the document (i.e., the franchisee) be the principal driver of the vehicle and that the operation of the vehicle must be under his direct supervision. The franchisee may use a substitute driver or relief driver, provided that written notice is provided to SuperShuttle; the substitute driver is an employee, agent, shareholder or partner of the franchisee; the substitute driver completes the required training program; and the substitute driver meets SuperShuttle's other criteria for driver eligibility. General Manager Harcrow testified that SuperShuttle is otherwise not involved in the arrangement between the franchisee and the relief driver. The franchisee and relief driver enter into an agreement that governs their relationship, setting forth when the relief driver will work, what he will be paid, and other terms and conditions of their arrangement. At the time of the hearing, one franchisee employed a relief driver. Franchisees do not have the right to subfranchise.

The UFA includes detailed rules and procedures that a franchisee must follow if he wishes to transfer, assign or sell his franchise to another individual. The franchisee

must first notify SuperShuttle in writing of the proposed transfer, setting forth the name and address of the proposed transferee and the purchase price and payment terms of the offer. SuperShuttle has a first right of refusal, under which it can notify the franchisee within 30 days that it wishes to accept the transfer for itself at the price and terms in the notice. If SuperShuttle declines, the UFA states that SuperShuttle "shall not unreasonably withhold consent to any transfer" if certain enumerated conditions are met. These include, among other things, that all of the franchisee's outstanding obligations to SuperShuttle have been satisfied; that the proposed transferee is "of good moral character, and possesses the business experience and capability, credit standing, driving record, health and financial resources necessary to successfully operate Franchisee's business in accordance with the terms of this Agreement"; that the transferee will execute the standard form of the UFA; that the franchisee must reimburse SuperShuttle for its costs in providing training to the transferee and for evaluating and processing the transfer, including legal and administrative fees; and that before the closing, the franchisee pay a transfer fee to SuperShuttle of the lesser of \$500 or 10 percent of the sale price. Vice President Robertson testified that there were two franchise assignments at SuperShuttle DFW in 2009.

SuperShuttle does not provide to franchisees any fringe benefits, sick leave, vacation time, or holiday pay. In addition, SuperShuttle does not withhold taxes for franchisees. The Airport Contract requires SuperShuttle to have all franchisees covered under its insurance policy; specifically, SuperShuttle's insurance policy must provide combined single limits of liability for bodily injury and property damage of no less than \$500,000 for each occurrence for each vehicle. The UFA provides that the franchisee will reimburse SuperShuttle for the insurance that it provides at a cost of between \$125 and \$200 per week.

Finally, the UFA requires that franchisees agree to indemnify SuperShuttle and hold it harmless "against any and all liability for all claims of any kind or nature arising in any way out of or relating to the Franchisee's and Operator's actions or failure to act."

#### III. THE ACTING REGIONAL DIRECTOR'S DECISION AND THE CONTENTIONS OF THE PARTIES AND AMICUS ON REVIEW

The Acting Regional Director found that SuperShuttle met its burden of establishing that the franchisees are independent contractors and not employees under Section 2(3) of the Act. Citing the Board's decision in *Roadway Package System, Inc.*, 326 NLRB at 842, the Acting Regional Director applied the common-law agency test and assessed "all incidents of the parties' relation-

ship.” In so doing, she noted that, in cases involving the taxicab industry, the Board has given significant weight to two factors: “the lack of any relationship between the company’s compensation and the amount of fares collected,” and “the company’s lack of control over the manner and means by which the drivers conduct business after leaving the [company’s] garage.” *AAA Cab Services*, 341 NLRB at 465 (citations omitted). Accordingly, the Acting Regional Director emphasized that here, (1) franchisees do not share fares with SuperShuttle, and (2) franchisees operate their vehicles with little control by SuperShuttle. In so finding, the Acting Regional Director noted that the franchisees “are free to work if they want and when they want, and have total autonomy in this respect.” Although the Acting Regional Director acknowledged some evidence of control by SuperShuttle—including its imposition of fare amounts, its dress requirements, and its installation of GPS tracking devices—she concluded that SuperShuttle does not exercise control “over the manner and means” by which the franchisees conduct the actual business of transporting customers.

In finding independent-contractor status, the Acting Regional Director also assigned significance to the franchisees’ ownership of their vehicles and their “opportunities for loss or gain.” To this end, the Acting Regional Director found that franchisees face a meaningful risk of loss in light of the substantial costs that go into owning a franchise, i.e., vehicle payments, weekly system fees, insurance costs, gas, maintenance, licensing fees, and tolls. The Acting Regional Director also found that franchisees “make calculated choices between which trips to choose,” noting that, because franchisees pay for the costs of operating their vans, their decisions in choosing trips affect profit margins. She also stated that “a driver’s determination of when and how much he will work impacts his profit margin. All drivers take similar risks, but by their decisions and efforts, they do not all achieve the same profits.” Finally, she noted that franchisees can hire a relief driver, which creates the “potential to generate more gross revenue while spending less time driving when a relief driver is hired.”<sup>13</sup>

The Union contends that, on review, the Board should find that the franchisees are employees. Contrary to the Acting Regional Director, the Union argues that SuperShuttle “exercises substantial control over the drivers’ daily performance.” For example, the Union emphasizes that SuperShuttle unilaterally promulgates the UFA, re-

quires that franchisees display the SuperShuttle logo on their vehicles, imposes strict rules regarding uniforms and appearance, requires franchisees to attend training, can fine franchisees if they decline certain mandatory assignments, can unilaterally change the type of van that franchisees are permitted to use, and can discipline and terminate franchisees for various transgressions. The Union also notes that franchisees perform a regular and essential part of SuperShuttle’s business; are prohibited from working for SuperShuttle’s competitors; play no role in soliciting passengers and arranging pickups; do not have any special skills or expertise; must acquire Nextel systems, logo decals, and uniforms from SuperShuttle; and are not permitted to modify fares to get more business. As to entrepreneurial opportunities, the Union notes that franchisees are not permitted to operate more than one route or vehicle, and that franchisees’ ability to assign or sell the routes is constrained by the terms of the UFA.

SuperShuttle agrees with the Acting Regional Director’s holding that the franchisees are independent contractors. In addition to the factors that the Acting Regional Director addressed, SuperShuttle argues that State regulatory control over the franchisees, which is effectuated through the Airport Contract, is more extensive than set forth in the decision. Specifically, it states that the Airport Contract requires franchisees to wear a uniform, keep records, and submit vehicles for inspection. Accordingly, such requirements are evidence of control by the State, not SuperShuttle. SuperShuttle also emphasizes that franchisees have “unfettered entrepreneurial freedom,” as evidenced by their complete control over selecting bids, setting hours, and selecting the type of work they do. SuperShuttle also points to franchisees’ substantial investment in their vans and associated business costs, as well as the fact that the parties agreed to enter an independent-contractor relationship, in which franchisees can incorporate as independent entities. Finally, SuperShuttle does not provide benefits or withhold taxes.

#### 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

<sup>13</sup> Although the Acting Regional Director made fact findings regarding the Airport Contract, the existence of regulatory control by the Airport Board did not factor heavily in her analysis or her conclusion that the franchisees were independent contractors.

(Member Johnson, dissenting). Today, we overrule this purported “refinement.”<sup>14</sup>

The *FedEx* Board begins its alteration of the independent-contractor test with a classic straw-man analysis of the D.C. Circuit’s description of entrepreneurial opportunity in *FedEx I*. As previously stated, the court, following its review of the Board’s and the court’s independent-contractor jurisprudence, concluded that, “while all the considerations of 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.” *FedEx I*, 563 F.3d at 497. This statement of the law is fully consistent with Board precedent and affirms that all the common-law factors “remain in play.” But the *FedEx* Board majority, in its attempt to discredit the court’s analysis of whether the common-law factors demonstrate that the drivers possess entrepreneurial opportunity, inflated the court’s holding, finding that the court “treats the existence of ‘significant entrepreneurial opportunity’ as the *overriding consideration* in all but the clearest cases” and as the “*single animating principle* in the inquiry.” 361 NLRB at 617–618 (emphasis added). Relying on this hyperbolic misreading of the court’s description of entrepreneurial opportunity, the Board purported to “refine” the independent-contractor test by confining the significance of entrepreneurial opportunity to “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*.” *Id.* at 620 (emphasis in original). Thus, rather than considering the entrepreneurial opportunity, if any, afforded a putative contractor by the common-law factors, the Board limited that inquiry to a single aspect of a newly coined factor, thereby altering the test and greatly diminishing the significance of entrepreneurial opportunity to the analysis.

<sup>14</sup> We do not suggest that the Board cannot refine or clarify its independent-contractor analysis, as it did in *Roadway* and as we do here today. Instead, we find that the *FedEx* majority’s purported “refinement” was an impermissible (or at least an unwarranted) diminution of the importance of entrepreneurial opportunity for the reasons discussed below.

Our dissenting colleague complains that the Board is overruling precedent here without public notice and an invitation to file briefs. We dismiss this claim for several reasons. First, the *FedEx* majority promulgated its “refinement” to the independent-contractor test without public notice or invitation to file briefs. Our decision here to undo this refinement, by the *FedEx* majority’s own example, requires no such action. Second, as the Board has noted, it has on many occasions overruled or modified precedent without supplemental briefing. See, e.g., *The Boeing Co.*, 365 NLRB No. 154, slip op. at 21 (2017), and cases cited. Finally, to the extent *FedEx* represents precedent, it is, at 4 years old, hardly “longstanding.”

Contrary to the *FedEx* Board majority’s and our dissenting colleague’s claim that entrepreneurial opportunity was the *FedEx I* court’s “overriding consideration,” the court noted that an emphasis on entrepreneurial opportunity “does not make applying the test mechanical.” 563 F.3d at 497. Indeed, the court applied and considered all of the relevant common-law factors, including whether the parties believe they are creating a master/servant relationship, the extent of the employer’s control over details of the work, the extent of employer supervision, and who supplies the instrumentalities for doing the work, before concluding that, “on balance, . . . they favor independent contractor status.” *Id.* at 504. See also *FedEx II*, 849 F.3d at 1128 (rejecting Board majority’s contention that the *FedEx I* court did not consider and weigh all common-law factors).

In sum, we do not find that the *FedEx I* court’s decision departed in any significant way from the Board’s traditional independent-contractor analysis, and we therefore find that the *FedEx* Board’s fundamental change to the common-law test in reaction to the court’s decision was unwarranted. The court acknowledged that “the ten-factor test is not amenable to any sort of bright-line rule” and that “‘there is no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no one factor being decisive.’” 563 F.3d at 496 (quoting *United Insurance Co.*, 390 U.S. at 258). The court followed that guidance. The court further noted that the Board’s and the court’s evolving emphasis on entrepreneurial opportunity was a “subtle refinement . . . done at the Board’s urging,” and it reiterated that “all the considerations at common law remain in play.” *Id.* at 497. Thus, no “refinement” of the court’s analysis was required. Indeed, while courts afford the Board substantial deference in matters requiring application of special expertise when interpreting the Act, “a determination of pure agency law involve[s] no special administrative expertise that a court does not possess.” *United Insurance Co.*, 390 U.S. at 991. As the D.C. Circuit pointedly remarked in *FedEx II* when rejecting the Board’s deference argument in support of the *FedEx* majority standard at issue here, “We do not accord the Board such breathing room when it comes to new formulations of the legal test to be applied.” 849 F.3d at 1128.

Moreover, we reject the characterization of the *FedEx* decision as mere “refinement” because, as former Member Johnson explained in detail in his dissent in *FedEx*, the majority shifted the independent-contractor test to one of “economic dependency,” a test that was specifi-



cally rejected by Congress.<sup>15</sup> *FedEx Home Delivery*, 361 NLRB at 629–634 (Member Johnson, dissenting). In *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), the Supreme Court articulated a policy-based economic realities test for determining independent-contractor status in cases involving New Deal social legislation. As the Court explained in *U.S. v. Silk*, 331 U.S. 704 (1947),

[t]he problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, 29 U.S.C.A. s 151 et seq., we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was “some simple, uniform and easily applicable test.” The word “employee,” we said, was not there used as a word of art, and its content in its context was a federal problem to be construed “in the light of the mischief to be corrected and the end to be attained.” We concluded that, since that end was the elimination of labor disputes and industrial strife, “employees” included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the “technical concepts pertinent to an employer’s legal responsibility to third persons for the acts of his servants.” This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, s 220. We approved the statement of the National Labor Relations Board that “the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act.”<sup>16</sup>

<sup>15</sup> *United Insurance Co.*, 390 U.S. at 256. The *FedEx* majority’s limitation of the significance of entrepreneurial opportunity to a single aspect of whether the contractor rendered services as part of an independent business derived directly from former Member Liebman’s dissent in *St. Joseph News-Press*, 345 NLRB at 484 (Member Liebman, dissenting), where she wrote: “[I]t is entirely appropriate to examine the economic relationship between the [r]espondent and the carriers to determine whether the carriers are economically independent business people, or substantially dependent on the [r]espondent for their livelihood.” Notably, the *FedEx* majority overruled *St. Joseph News-Press* “as inconsistent with the view articulated today.” 361 NLRB at 621.

<sup>16</sup> 331 U.S. at 713.

In the Taft-Hartley amendments of 1947, Congress reacted to this expansive alternative to the common-law test by specifically excluding independent contractors from coverage under the Act. In subsequent cases, the Supreme Court recognized that Congress had effectively abrogated the holdings of *Hearst* and *Silk* to the extent they authorized policy-based alternatives to the common-law agency test of employee and independent-contractor status in the absence of express statutory language. See, e.g., *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324–325 (1992) (“In each case, the Court read ‘employee’ to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning.”). In short, the *FedEx* majority’s reformulation of the independent-contractor analysis impermissibly revives an “economic dependency” standard that Congress has explicitly rejected.

In addition, the *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 FedEx 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.<sup>17</sup>

<sup>17</sup> Our dissenting colleague claims that we insist that we are “free to adjust [our] test whenever and however [we] like.” To the contrary, we simply observe that the Board will not mechanically apply the principle

The Board has long considered entrepreneurial opportunity as part of its independent-contractor analysis.<sup>18</sup> 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.

In *Roadway*, the Board, in finding that the disputed drivers were employees rather than independent contractors, devoted much of its analysis section to the evaluation of how certain common-law factors limited the drivers' entrepreneurial opportunity for gain or loss. See 326 NLRB at 851–853. For example, the Board found that obstacles created by the employer through its demanding schedules for the drivers and detailed specifications for the drivers' trucks effectively prevented drivers from taking on additional business during their off hours and therefore limited the “entrepreneurial independence” that ownership of their trucks may have otherwise provided them. See *id.* at 851 & fn. 36 (“[The employer] has simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities.”). In addition, the Board found that the drivers' ability to increase their “entrepreneurial profit” through their own “efforts and ingenuity” was limited by the employer's control over their routes, the number of packages and stops on their routes, and the prices charged to customers, and that the employer's compensation system provided “an important safety net for the fledging driver to shield him from loss.” See *id.* at 852–853. Finally, the Board found that the employer's “considerable control” over the drivers' ability to sell their routes limited the possibility of the drivers “influ-

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of entrepreneurial opportunity where it does not apply, i.e., when the factual circumstances of a case render entrepreneurial opportunity irrelevant to a particular common-law factor or factors. But, in every case, the Board will evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain.

<sup>18</sup> See, e.g., *Roadway Package System*, 288 NLRB 196, 198 (1988) (*Roadway I*) (finding that the drivers “[bore] few of the risks and enjoy[ed] little of the opportunities for gain associated with an entrepreneurial enterprise” where the employer controlled the number of packages and stops for each driver and their service areas, did not give drivers a proprietary interest in their service areas, and utilized a compensation system that effectively balanced the drivers' incomes); *Standard Oil Co.*, 230 NLRB 967, 971 (1977) (finding that the employer controlled “all meaningful decisions of an entrepreneurial nature which affect profit or risk of loss” where the employer unilaterally determined the drivers' compensation and delivery territories, the prices of the products, and the customers to whom they could deliver).

enc[ing] their profits like entrepreneurs” through their proprietary interests in their routes.<sup>19</sup>

In other cases, the Board has found that certain common-law factors significantly supported independent-contractor status because they provided workers with the entrepreneurial opportunity for gain or loss. In *Dial-A-Mattress*, the companion case to *Roadway*, the Board, in finding that the drivers were independent contractors, emphasized that the drivers had significant entrepreneurial opportunity for gain or loss where they could own multiple trucks and hire their own employees without being subject to control or requirements of the employer, they were not guaranteed minimum compensation, they could decline orders, and they were not required to provide delivery services on every workday. See 326 NLRB at 891. In *St. Joseph News-Press*, the Board found that the conditions “enabl[ed] carriers to take economic risk and reap a corresponding opportunity to profit from working smarter, not just harder” where the carriers could hire full-time substitutes over whom they had complete control, hold contracts on multiple routes, deliver other products (including for competitors) while making deliveries for the employer, and solicit new customers. See 345 NLRB at 479 (internal quotations omitted).<sup>20</sup>

Our dissenting colleague argues that the Board has merely considered the presence of entrepreneurial opportunity as an aspect of the “method of compensation” factor when citing it in support of an independent-contractor finding and has generally cited the absence of entrepreneurial opportunity as support for finding employee status. As demonstrated by the discussion above, however,

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<sup>19</sup> See also *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000) (finding that the drivers had “no significant opportunity for entrepreneurial gain or loss” where the employer determined the routes, the base pay, and the amount of freight on each route, and did not allow the drivers to add or reject customers), *enfd.* 292 F.3d 777 (D.C. Cir. 2002); *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000) (finding that the drivers did “not have a significant entrepreneurial opportunity for financial gain or loss” where the employer controlled the drivers' rates of compensation and the prices charged to the customers, and that despite the “theoretical potential for entrepreneurial opportunity” that came with the drivers' ability to hire their own drivers, the evidence did not demonstrate any resulting “economic gain” given the employer's control).

<sup>20</sup> See also *Arizona Republic*, 349 NLRB 1040, 1044–1045 (2007) (finding that the carriers had entrepreneurial potential to increase their income where they could use full-time substitutes, hold contracts on multiple routes, deliver other newspapers, negotiate the piece rate for delivering the employer's newspaper, solicit new customers, and receive tips); *Argix Direct, Inc.*, 343 NLRB 1017, 1020–1021 (2004) (finding that some of the employer's drivers were entrepreneurs who owned multiple trucks and hired their own drivers and that all of the drivers could “choose to maximize or minimize their income” because they set their own schedules and therefore chose when and when not to work).

the Board has never thus limited its consideration of entrepreneurial opportunity but has evaluated a number of other common-law factors to determine whether workers in a given case were provided opportunities for economic gain.

Moreover, we reject our colleague's suggestion that the Board has not previously evaluated entrepreneurial opportunity in a manner consistent with our decision today. Rather, as discussed above, the Board has found that specific common-law factors may or may not demonstrate entrepreneurial opportunity depending on the overall circumstances of the case.<sup>21</sup> Going forward, we will continue to consider how the evidence in a particular case, viewed (as it must be) in light of all the common-law factors, reveals whether the workers at issue do or do not possess entrepreneurial opportunity.<sup>22</sup> Our cases simply do not support the *FedEx* majority's or our dissenting colleague's attempt to cabin consideration of entrepreneurial opportunity to one aspect of a single factor.

As a more general matter, our dissenting colleague claims that our approach is inconsistent with the common-law agency test. In support, she argues that "if the common-law agency test has a core concept, it is . . . 'control.'" However, as she acknowledges, the *Roadway* Board rejected the "proposition that those factors which do not include the concept of 'control' are insignificant when compared to those that do." 326 NLRB at 850. Moreover, the Restatement expressly recognizes that a master-servant relationship can exist in the absence of the master's control over the servant's performance of work. See Restatement (Second) of Agency § 220 cmt. d ("[T]he full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking."). But most importantly, the Board's subtle shift in emphasis from control to entrepreneurial opportunity, which the D.C. Circuit first recognized and we explicitly acknowledge today, did not fundamentally alter the Board's independent-contractor analysis. As stated, control and entrepreneurial opportunity are two sides of the same coin: the more of one, the less of the other. Indeed, entrepreneurial opportunity often flowers where the employer takes a "hands off" approach. At the

<sup>21</sup> For example, in some cases, vehicle ownership provides the driver with significant entrepreneurial opportunity. *Dial-a-Mattress*, supra. Under other facts, vehicle ownership provides no such opportunity. *Roadway*, supra.

<sup>22</sup> We acknowledge that the Board's precedent in this area, like in many areas, has not been entirely consistent. See *FedEx I*, 563 F.3d at 498 ("[T]he Board's language has not been as unambiguous as this court's binding statement."). Today's decision is intended to eliminate any ambiguity over how to treat entrepreneurial opportunity in the Board's independent-contractor analysis in the future.

end of the day, the Board has simply shifted the prism through which it evaluates the significance of the common-law factors to what the D.C. Circuit has deemed a "more accurate proxy" to "capture[] the distinction between an employee and an independent contractor." See *FedEx I*, 563 F.3d at 497 (citing *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (2002)). As the D.C. Circuit has made clear, the Board's independent-contractor analysis is qualitative, rather than strictly quantitative; thus, the Board does not merely count up the common-law factors that favor independent contractor status to see if they outnumber the factors that favor employee status, but instead it must make a qualitative evaluation of those factors based on the particular factual circumstances of each case. See *FedEx I*, 563 F.3d at 497 fn. 3. Where a qualitative evaluation of common-law factors shows significant opportunity for economic gain (and, concomitantly, significant risk of loss), the Board is likely to find an independent contractor.

Our dissenting colleague further claims that our approach is inconsistent with the Supreme Court's decision in *United Insurance*. To the contrary, we will continue to adhere, as we must, to the Court's decision, considering all of the common-law factors in the total factual context of each case and treating no one factor (or the principle of entrepreneurial opportunity) as decisive. And where the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, we will likely find independent-contractor status. Thus, our approach is faithful to *United Insurance* and the common-law agency test that it requires.<sup>23</sup>

In conclusion, we find that the Board majority in *FedEx*, based on a mischaracterization of the D.C. Circuit's opinion in *FedEx I*, impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial

<sup>23</sup> We do not find our dissenting colleague's citation of *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014), to be persuasive because in that case, the court applied the California state law standard for determining employee status, which, as the California Supreme Court has explained, is "not inherently limited by common law principles" but, rather, "must be construed with particular reference to the history and fundamental purposes of the statute." *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399, 405 (Cal. 1989) (internal quotations omitted); see also *Alexander*, 765 F.3d at 992 ("The *Borello* court noted that the "'control-of-work-details' test for determining [employee status] must be applied with deference to the purposes of the protective legislation.") (quoting *Borello*, 769 P.2d at 406) (alteration in *Alexander*); *FedEx Home Delivery*, 361 NLRB at 631 fn. 11 (Member Johnson, dissenting) (explaining that while the California standard considers secondary indicia that overlap with the common-law factors in the Restatement, it is not the equivalent of the common-law test that the Board must apply but is, instead, "a variant of the policy-based economic realities test of *Hearst* [and] *Silk*").

opportunity to the analysis. We therefore overrule the Board's *FedEx* decision and return the Board's independent-contractor test to its traditional common-law roots.

### B. Applying the Common-Law Factors

Applying the Board's traditional common-law factor test to the facts of this case, we find, in agreement with the Acting Regional Director, that SuperShuttle franchisees are independent contractors. Like most entrepreneurs or small business owners, SuperShuttle franchisees make a significant initial investment in their business by purchasing or leasing a van and entering into a Unit Franchise Agreement that requires certain payments, including an initial fee and a weekly flat fee. Like small business owners, franchisees have nearly unfettered opportunity to meet and exceed their weekly overhead: with total control over their schedule, they work as much as they choose, when they choose; they keep all fares they collect, so the more they work, the more money they make; and they have discretion over the bids they choose to accept, so they can weigh the cost of a particular trip (in terms of time spent, gas, and tolls) against the fare received. As explained in more detail below, these factors (i.e., extent of control by employer, method of compensation, and ownership of principal instrumentality), which demonstrate that the franchisees have significant opportunity for economic gain and significant risk of loss, strongly support finding independent-contractor status, and they are not outweighed by any countervailing factors supporting employee status.

#### i. Extent of control by the employer

As the Acting Regional Director found, the Board has held that the control exerted by an employer "over the manner and means by which drivers conduct[] business" is one of two factors given significant weight in the taxicab industry. *AAA Cab Services*, 341 NLRB at 465. Stated differently, the fact that an employer does not exercise control over the manner and means by which drivers conduct business may reliably signal the existence of significant entrepreneurial opportunity. We agree with the Acting Regional Director's finding that the shared-ride industry is an extension of the taxicab industry and that this factor should be afforded significant weight.

As noted above, SuperShuttle franchisees are free from control by SuperShuttle in most significant respects in the day-to-day performance of their work. Franchisees have total autonomy to set their own work schedule. They merely turn on their Nextel device and wait for the next bid offer. Once a trip is offered, franchisees, except

in very limited circumstances,<sup>24</sup> can decide whether to accept the trip or not. Further, when a franchisee wishes to take a break or end the work day, he merely turns off his Nextel device. Other than the receipt of data from the Nextel device, there is little record evidence of communication between a franchisee and SuperShuttle during day-to-day operations. Franchisees' discretion in deciding when to work and which trips to accept weighs in favor of independent-contractor status. *AAA Cab Services*, 341 NLRB at 465.<sup>25</sup>

In addition, franchisees are largely free to choose where they work. Although they are practically limited to the Dallas-Fort Worth area, SuperShuttle does not impose any restrictions or control over where franchisees work within that area. Franchisees have no set routes and are not confined to any specific region of the Dallas-Fort Worth area. Thus, the absence of control over franchisees' routes affords franchisees considerable opportunity and independence during those times they choose to work. This geographic freedom is indicative of independent-contractor status. *Id.*

Franchisees are required under the UFA to indemnify SuperShuttle and hold it harmless "against any and all liability for all claims of any kind or nature arising in any way out of or relating to the Franchisee's and Operator's actions or failure to act." Such indemnification greatly lessens SuperShuttle's motivation to control a franchisee's actions, since SuperShuttle is not liable for a franchisee's negligent or intentionally harmful acts. This fact weighs in favor of independent-contractor status. *Dial-A-Mattress*, 326 NLRB at 891 ("[I]n employment relationships, employers generally assume the risk of third-party damages, and do not require indemnification from their employees.")<sup>26</sup>

<sup>24</sup> The record indicates that franchisees can be asked to bid on a trip that no one else has accepted. The Petitioner presented evidence that, in *one* instance, a trip was forced into a franchisee's Nextel and that when the franchisee refused the trip, he was fined \$50.

<sup>25</sup> In an effort to minimize the franchisees' freedom to choose when they work, how long they work, and which trips they accept, our dissenting colleague makes much of the fact that the franchisees must use the Nextel device to accept trips. However, the Nextel device does not allow SuperShuttle to exercise control over the franchisees. Instead, it is simply the mechanism that SuperShuttle uses to transfer the passengers' trip reservations to the franchisees. Without such a transfer mechanism, SuperShuttle's operation would be all for naught, as the franchisees would not know who to pick up, when and where to pick them up, and where to take them. Because the franchisees decide when to turn on the Nextel device and what trips to accept, the Nextel device does not allow SuperShuttle to control their work.

<sup>26</sup> Our dissenting colleague distinguishes the present case from *Dial-A-Mattress* by pointing out that the Airport Contract requires SuperShuttle to have all franchisees covered under its insurance policy. While that is correct, it proves nothing because the Airport Contract does not require that SuperShuttle have the franchisees agree to indem-

Although franchisees enjoy broad latitude in controlling their daily work, they are subject to certain requirements. The Airport Contract requires franchisees to wear a uniform and maintain certain grooming standards. Franchisees must display the SuperShuttle decals and markings on their vans, and they must maintain the interior condition of the vans, including the number of seats. DFW Airport has the right to inspect vans operated by SuperShuttle and to audit SuperShuttle's compliance with the Airport Contract. But these requirements are not evidence of SuperShuttle's control over the manner and means of doing business because they are imposed by the state-run DFW Airport. *AAA Cab Services*, 341 NLRB at 465; *Don Bass Trucking Co.*, 275 NLRB 1172, 1174 (1985) ("Government regulations constitute supervision not by the employer but by the state.") (internal citations omitted). Thus, these controls do not mitigate the substantial weight of the factors supporting independent-contractor status.

Fares received by franchisees are set by SuperShuttle,<sup>27</sup> and franchisees must accept vouchers and coupons. SuperShuttle requires more frequent vehicle inspections than the Airport Contract, and franchisees are required to display a "How am I driving?" sticker on their vehicle. SuperShuttle also requires some additional training. However, we find that these limited employer controls are vastly outweighed by the general control that franchisees have over their working conditions, including scheduling and selecting bids.<sup>28</sup> In short, this factor weighs heavily in favor of independent-contractor status.

#### ii. Method of payment

The method of payment is the second factor to which the Board has traditionally given significant weight in the taxicab industry. *AAA Cab Services*, 341 NLRB at 465; *Elite Limousine Plus*, 324 NLRB at 1001. As noted

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nify it and hold it harmless against any and all liability. The Airport Contract allows for SuperShuttle to assume the risk of third-party damages, and the fact that SuperShuttle shifts that risk to franchisees weighs in favor of independent-contractor status.

<sup>27</sup> As a practical matter, fares are set by the competitive airport transportation market, so even if franchisees could negotiate their own fares, those fares are unlikely to vary significantly from SuperShuttle's fares.

<sup>28</sup> Our dissenting colleague emphasizes that the UFA requires franchisees "not to deviate from the standards, specifications and operating procedures" in it. However, she has not explained how those "standards, specifications and operating procedures" significantly exceed the requirements in the Airport Contract, which, as government regulations, are not evidence of SuperShuttle's control. As discussed above, the UFA itself states that many restrictions imposed by the Airport Contract are effectively passed along in the UFA. Overall, we simply have not found that the UFA's requirements exceed the requirements of the Airport Contract to such an extent that they outweigh the significant evidence, discussed above, of the franchisees' control over their work.

above, franchisees pay a monthly flat fee pursuant to the UFA, and their monthly fee does not vary based on revenues earned. They are entitled to all fares they collect from customers, and they do not share the fares in any way with SuperShuttle. When an employer does not share in a driver's profits from fares, the employer lacks motivation to control or direct the manner and means of the driver's work. *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300, 1309-1310 (2004). Moreover, the franchisees' freedom to keep all fares they collect, coupled with their unfettered freedom to work whenever they want, provides them with significant entrepreneurial opportunity. Thus, the Board has found that "the lack of any relationship between the company's compensation and the amount of fares collected" supports a finding that franchisees are independent contractors.

#### iii. Instrumentalities, tools, and place of work

The primary instrumentalities of franchisees' work are their vans and the Nextel dispatching system. As noted, franchisees purchase their vans, an investment of \$30,000 or more, or they lease their vans, also a significant investment. The Nextel devices are a part of the franchise agreement, and franchisees pay for them as part of their weekly fee. In addition, franchisees pay for gas, tolls, repairs, and any other costs associated with operating their vans. Franchisees' full-time possession of their vans facilitates their ability to work whenever and wherever they choose.<sup>29</sup> These factors weigh in favor of independent-contractor status.

#### iv. Supervision

Franchisees are not generally supervised by SuperShuttle. The evidence shows that the only daily communication between SuperShuttle and the franchisees occurs through the Nextel dispatch system. Because franchisees have the right to accept or decline any bid, SuperShuttle, through the Nextel system, does not "assign" routes to franchisees or perform any other supervisory role. SuperShuttle may fine a franchisee \$50 for accepting a bid and then later declining it. The \$50 is given to the franchisee who picks up the previously de-

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<sup>29</sup> We acknowledge that the UFA's prohibition on franchisees entering into business relationships with SuperShuttle's competitors limits to some extent the potential for entrepreneurial opportunity that would otherwise come with ownership of their vans. However, that limitation is mitigated by the fact that SuperShuttle does not limit its hours of service and that the franchisees can drive for SuperShuttle whenever and for as long as they choose. Thus, the franchisees do not need the option to work for SuperShuttle's competitors to maximize their entrepreneurial opportunity to the same extent that they would need that option if SuperShuttle's hours of service were limited or if SuperShuttle limited the number of hours that they could drive.

clined trip. There was also evidence that, on one occasion, SuperShuttle forced a trip into a franchisee's Nextel and that, when the franchisee declined the trip, he was fined \$50.

Franchisees' near-absolute autonomy in performing their daily work without supervision supports a finding that they are independent contractors. The few minor and isolated fines do not diminish the force of that conclusion.

v. The relationship the parties believed they created

The UFA states unequivocally, in bold, capital letters: **FRANCHISEE IS NOT AN EMPLOYEE OF EITHER SUPERSHUTTLE OR THE CITY LICENCEE.** In Article O of the UFA, "Relationship of Parties," the agreement further states: **IT IS ACKNOWLEDGED THAT THE FRANCHISEE IS THE INDEPENDENT OWNER OF ITS BUSINESS.** These provisions leave little doubt as to the intention of the parties to create an independent-contractor relationship between SuperShuttle and its franchisees.

As the Acting Regional Director found, two other factors support this conclusion. SuperShuttle does not provide franchisees with any benefits, sick leave, vacation time, or holiday pay. Further, SuperShuttle does not withhold taxes or make any other payroll deductions from franchisees' pay. Finally, the record shows that five franchisees entered into the franchise agreement as corporations. Such a relationship is rare in employer-employee relationships and is associated with independent-contractor status. In short, this factor supports finding that franchisees are independent contractors.

vi. Engagement in a distinct business; work as part of the employer's regular business; the principal's business

As the Acting Regional Director noted, these three factors are closely related. Certain specialized occupations are commonly performed by individuals in business for themselves, and workers in such occupations are usually deemed independent contractors. In this case, driving is not considered a distinct occupation. In addition, SuperShuttle is clearly involved in the business of transporting customers, and its revenue comes from providing that service. Thus, these related factors weigh in favor of employee status.

vii. Length of employment

Generally, a longer employment relationship indicates employee status. In this case, the Unit Franchise Agreement is a one-year contract. On this basis, the Acting Regional Director found that this factor favored independent-contractor status. Although the UFA is a one-year contract, the evidence shows that most franchisees

renew their agreements yearly. Under these circumstances, we find that this factor is neutral.

viii. Skills required

As the Acting Regional Director found, the record does not indicate that franchisees have any particular skill or require any specialized training. This factor favors finding employee status. *Prime Time Shuttle International*, 314 NLRB 838, 840 (1994).

C. Conclusion

Having considered all of the common-law factors, we find, in agreement with the Acting Regional Director, that SuperShuttle established that its franchisees are independent contractors. Franchisees' ownership (or lease) and control of their vans, the principal instrumentality of their work, the nearly complete control franchisees exercise over their daily work schedules and working conditions, and the method of payment, where franchisees pay a monthly fee and keep all fares they collect, all weigh strongly in favor of independent-contractor status. Moreover, these three factors provide franchisees with significant entrepreneurial opportunity and control over how much money they make each month. Further, we emphasize again that the shared-ride industry is an extension of the taxicab industry,<sup>30</sup> and that in taxicab cases, the Board has particularly focused on the company's "control over the manner and means by which the drivers conduct[] business" and "the relationship between the company's compensation and the amounts of fares collected." *AAA Cab Services*, 341 NLRB at 465 (citing *Elite Limousine Plus*, 324 NLRB at 1001); *City Cab Co.*, 285 NLRB at 1193.<sup>31</sup> Thus, our findings that SuperShuttle has little control over the means and manner of the franchisees' performance while they are actually driving and that SuperShuttle's compensation is not related at all to the amounts of fares collected by the franchisees, and conversely, that these facts provide franchisees with significant entrepreneurial opportunity, strongly point toward independent-contractor status. In addition, the absence of supervision of franchisees and the understanding between parties that franchisees are independent operators, as clearly expressed in the Unit Franchise Agreement, also weigh in favor of independent-contractor status. Although the skill required as a franchisee, the fact that driving is not a distinct occupation, and SuperShuttle's involvement in the business all weigh in favor of employee status, we agree with the Acting Regional Director that these factors are relatively less

<sup>30</sup> Our dissenting colleague does not dispute this finding.

<sup>31</sup> Our dissenting colleague does not dispute or take issue with this taxicab precedent.

significant and do not outweigh those factors that support independent-contractor status.

ORDER

The petition is dismissed.

Dated, Washington, D.C. January 25, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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,<sup>1</sup> without public notice and an invitation to file briefs.<sup>2</sup> 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

<sup>1</sup> *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017).

<sup>2</sup> The current majority has routinely broken with established Board practice in this respect, at the cost of public participation and fully-informed decision making. See, e.g., *The Boeing Co.*, 365 NLRB No. 154, slip op. at 31–33 (2017) (dissenting opinion).

The majority explains its failure to provide notice and an opportunity for briefing by pointing out that the *FedEx* Board did not invite briefs either. I was not a Board member when *FedEx* was decided. It is worth noting, however, that at the time, the Board effectively was required to address the District of Columbia Circuit’s decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009), because every reviewable Board decision may be challenged in that court. See National Labor Relations Act, Sec. 10(f), 29 U.S.C. §160(f). Thus—in contrast to today’s out-of-the-blue ruling—the Board’s refinement of independent-contractor doctrine in the *FedEx* decision could easily have been anticipated, and amicus participation sought.

Insofar as the majority suggests that a Board decision issued without notice and an invitation to file briefs may be overruled the same way, its own reversals of precedent are vulnerable. This prospect, of course, only shows that institutional norms, once broken, may be hard to fix.

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.<sup>3</sup> That seems to be the path the majority has chosen today.

I.

<sup>3</sup> *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 374–375 (1998). As the Supreme Court explained there:

Reasoned decisionmaking, in which the rule announced is the rule applied, promotes sound results, and unreasoned decisionmaking the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel . . . and effective review of the law by the courts.

*Id.* at 375.

Assessing the majority's decision here first requires understanding its legal background, as well as carefully analyzing what the Board actually said and did in the 2014 *FedEx* decision. I address each point in turn.

*A. The Common-Law Origins of the Employee/Independent Contractor Test*

Section 2(3) of the National Labor Relations Act excludes independent contractors, as opposed to employees, from statutory coverage.<sup>4</sup> The starting point for independent-contractor determinations under the National Labor Relations Act is the Supreme Court's decision in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). There, the Court held that the Act incorporated the "common law agency test in distinguishing an employee from an independent contractor." 390 U.S. at 256. Upholding the Board's determination that insurance-company "debit agents" were statutory employees (and reversing the Seventh Circuit's contrary determination), the Court explained that:

There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor. . . .

. . . .

*There is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.* What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.

*Id.* at 258 (footnote omitted; emphasis added).

In later decisions involving application of the common-law agency test to employee-status determinations under federal statutes, the Supreme Court has consistently been guided by the multifactor test articulated in Section 220 of the *Restatement (Second) of Agency*, which addresses the tort liability of "masters" for the actions of their "servants."<sup>5</sup> See, e.g., *Nationwide Mutual Insur-*

*ance Co. v. Darden*, 503 U.S. 318, 323–324 (1992) (applying Employee Retirement Income Security Act). The *Restatement* notes that "[u]nder the existing regulations and decisions involving the Federal [sic] Labor Relations Act, there is little, if any, distinction between employee and servant as here used."<sup>6</sup> No Supreme Court decision has cast doubt on the continuing viability of *United Insurance* or the later cases that look to the *Restatement* for authoritative guidance.

The Board's seminal independent-contractor case is *Roadway Package System*, 326 NLRB 842 (1998), a unanimous full-Board decision<sup>7</sup> that, not surprisingly, endorsed the use of the open-ended, multifactor *Restatement* test. There, relying heavily on the Supreme Court's decision in *United Insurance*, the Board (1) rejected the

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[T]he 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.

(emphasis added).

<sup>6</sup> *Restatement (Second) of Agency* §220, comment g. The focus of the *Restatement*, of course, is the common-law liability of employers ("masters") for torts committed by their employees ("servants"), not issues of federal statutory coverage turning on employee status or the existence of an employment relationship. As the *Restatement* explains:

The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally.

. . . .

[W]ith the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit. As a result of these considerations, historical and economic, the courts of today have worked out tests which are helpful in predicting *whether there is such a relation between the parties that liability will be imposed upon the employer for the employee's conduct which is in the scope of employment.*

*Id.*, §219, comment a (emphasis added).

<sup>7</sup> Four of the Board's five members participated; the remaining member was recused. *Id.* at 842 & fn. 8.

<sup>4</sup> Sec. 2(3) provides that "[t]he term 'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor." 29 U.S.C. §152(3).

<sup>5</sup> Under Sec. 219(1) of the *Restatement*, a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Sec. 220(1) provides that "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." Sec. 220(2), in turn, identifies a long list of factors to be considered "[i]n determining whether one acting for another is a servant or an independent contractor." It provides that:



argument that “those factors which do not include the concept of ‘control’ are insignificant when compared to those that do;” (2) correctly noted that the *Restatement* “specifically permitt[ed] the consideration of . . . relevant factors” other than those identified by the *Restatement*; and (3) concluded that the “common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control.”<sup>8</sup> *Roadway* has never been overruled, and the majority today cites the decision with approval—as it must, if it wants to claim (and maintain) continuity with the Board’s well-established approach in this area.

### B. The FedEx Cases

The Board’s 2014 *FedEx* decision, overruled today, was a response to a 2009 divided-panel decision of the District of Columbia Circuit, which also involved drivers working for FedEx Home Delivery. Reversing a Board decision that had found the drivers to be employees,<sup>9</sup> the panel majority interpreted the Circuit’s case law—and the Board’s—as having shifted over time

away from the unwieldy control inquiry in favor of a more accurate proxy: whether the “putative independent contractors have ‘significant entrepreneurial opportunity for gain or loss.’”

*FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009), quoting *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002). “Thus,” the panel majority announced, “while all of the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.” *Id.*

This description of the Board’s independent-contractor caselaw as evolving was inaccurate, as Circuit Judge Garland explained in his detailed dissent.<sup>10</sup> First, the Board had *not* treated “control” as an “animating principle” or master factor. The *Roadway* decision makes this plain. There, the Board rejected the argument that the *Restatement* factors that did not involve the right to control were relatively insignificant. Second, the Board decisions cited by the Circuit panel majority as marking the Board’s supposed shift in emphasis—away from control

and to “entrepreneurial opportunity”—reveal nothing of the sort.<sup>11</sup>

What *has* characterized the Board’s independent-contractor doctrine since *Roadway* has been continuity, not change: a consistent emphasis on the *Restatement*’s multi-factor common-law test and a corresponding adherence to the Supreme Court’s admonition in *United Insurance* that “[t]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”<sup>12</sup>

The Board’s 2014 *FedEx* decision<sup>13</sup> responded to the District of Columbia Circuit’s misperception that the Board had *already* taken a new approach in evaluating employee status, and to the court’s endorsement of that

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<sup>11</sup> Indeed, the Circuit panel majority itself “readily concede[d] that the Board’s language ha[d] not been as unambiguous as” the court’s own decisional language assertedly had. *FedEx Home Delivery*, supra, 563 F.3d at 498. But this concession was an understatement. In *Corporate Express*, 332 NLRB 1522 (2000), for example, the Board found that driver “owner-operators” working for a delivery company were statutory employees, not independent contractors, but gave no special emphasis to the concept of “entrepreneurial opportunity.” In *Arizona Republic*, 349 NLRB 1040 (2007), meanwhile, a divided Board also reaffirmed *Roadway* and considered several factors (including “entrepreneurial potential” in connection with “method of compensation”) in determining that the newspaper carriers at issue were independent contractors. But here, too, there was no hint of a shift in emphasis or the elevation of “entrepreneurial opportunity” into an “animating principle.”

The same is true of two other Board decisions briefly cited by the Circuit panel majority. In *St. Joseph News-Press*, 345 NLRB 474 (2005), a divided decision involving newspaper carriers, a divided Board reaffirmed *Roadway*, observing that “both the right of control and other factors, as set out in the *Restatement*, are to be used to evaluate claims that hired individuals are independent contractors.” *Id.* at 478. The Board majority concluded that “[o]n balance . . . under the common law test . . . the factors weigh in favor of finding independent contractor status.” *Id.* at 479. Among the five factors relied upon, but given no special weight, was the “method of compensation, which allowed for a degree of entrepreneurial control.” *Id.* In *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998), the companion case to *Roadway*, the Board observed that the “list of factors differentiating ‘employee’ from ‘independent contractor,’ is nonexhaustive, with no one factor being decisive.” *Id.* at 891. The Board observed that the “separateness” from the company of the owner-operator drivers was “manifested in many ways, including significant entrepreneurial opportunity for gain or loss,” *id.* at 891 (emphasis added), but the decision relied on multiple factors, *id.* at 891–893, none of which was treated as of overriding importance.

<sup>12</sup> 390 U.S. at 258.

<sup>13</sup> *FedEx 2014* involved drivers at the company’s Hartford, Connecticut facility. The Board initially denied review of a Regional Director’s finding that the drivers were statutory employees. The District of Columbia Circuit then issued its own *FedEx* decision, which (as discussed) found that drivers at the company’s Wilmington, Massachusetts facility were independent contractors. In turn, FedEx argued to the Board that, in light of the court’s decision, it was required to revisit the earlier denial of review, prompting the Board to take up the issue. *FedEx*, supra, 361 NLRB at 610.

<sup>8</sup> *Id.* at 850.

<sup>9</sup> A Regional Director, applying *Roadway*, determined that the drivers were employees. The Board denied the company’s request for review of the Regional Director’s decision. After an election that led to the union’s certification, the Board ultimately found that the company had unlawfully refused to bargain. *FedEx Home Delivery*, 351 NLRB No. 16 (2007) (not reported in Board volumes).

<sup>10</sup> *FedEx Home Delivery*, supra, 563 F.3d at 504–519.

supposed shift. The *FedEx* Board first reaffirmed the Board's longstanding commitment to the principles articulated by the Supreme Court in *United Insurance*, to the "seminal" *Roadway* decision, and to the "nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency."<sup>14</sup> Second, the Board "more clearly define[d] the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss, a factor that the Board has traditionally considered."<sup>15</sup> It "decline[d] to adopt the District of Columbia Circuit's . . . holding insofar as it treat[ed] entrepreneurial opportunity . . . as an 'animating principle' of the inquiry."<sup>16</sup>

"Entrepreneurial opportunity," the Board held, "represents 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."<sup>17</sup> The Board carefully explained *why* it chose not to adopt the District of Columbia Circuit's approach, observing that this approach was not mandated by the Act, by the Supreme Court's decision in *United Insurance*, or by Board precedent and that "adopting it would mean a broader exclusion from statutory coverage than Congress appears to have intended."<sup>18</sup> The Board observed, in turn, that the "Restatement makes no mention at all of entrepreneurial opportunity or any similar concept," a "silence [that] does not rule out consideration of such a principle, but . . . cannot fairly be described as requiring it."<sup>19</sup> Meanwhile, the *United Insurance* admonition against relying on a "shorthand formula or magic phrase" weighed against the District of Columbia Circuit's approach.<sup>20</sup>

The Board has since applied the *FedEx* decision faithfully, continuing to examine each of the traditional common-law factors enumerated in the *Restatement*, as well as the independent-business factor, in making inde-

pendent-contractor determinations.<sup>21</sup> The District of Columbia Circuit, meanwhile, denied enforcement to the Board's *FedEx* decision, applying the law-of-the-circuit doctrine and holding that the issue addressed there—the independent-contractor status of the company's drivers—had already been resolved by the Circuit's earlier decision.<sup>22</sup> Notably, other courts have reached a contrary conclusion, finding FedEx drivers to be employees under the common law. See, e.g., *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014) (applying California common law).<sup>23</sup>

As I will explain, while I did not participate in *FedEx* (which issued before I joined the Board), I am persuaded

<sup>21</sup> See *Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124 (2017); *Pennsylvania Interscholastic Athletic Assn.*, 365 NLRB No. 107 (2017); *Sisters' Camelot*, 363 NLRB No. 13 (2015); *Porter Drywall, Inc.*, 362 NLRB 7 (2015).

<sup>22</sup> *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017). However, it is noteworthy that in a post-*FedEx* decision, considering "entrepreneurial opportunity" as a "factor," the District of Columbia Circuit has also enforced the Board's decision (issued before *FedEx*) in which the Board determined that symphony orchestra musicians were statutory employees, not independent contractors, based on an analysis that seemingly departs from the court's own preferred approach. See *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016), enfg. 357 NLRB 1761 (2011). The court described "entrepreneurial opportunity" as a "factor which does not appear in the Restatement but which the Board and this court use in assessing whether workers are employees or independent contractors." *Id.* at 569. The court analyzed the *Restatement* factors, then seemed to consider "entrepreneurial opportunity" as a separate factor, concluding that in the case of the musicians, it was "limited" and "provide[d] only miniscule support for independent contractor status." *Id.* at 570. "Summing up," the court determined "that the relevant factors point in different directions" and accordingly "defer[red] to the Board's conclusion that the . . . musicians [were] employees." *Id.*

<sup>23</sup> See also Mark J. Lowenstein, *Agency Law and the New Economy*, 72 *Bus. Law.* 1009, 1017–1020 (2017) (describing litigation involving FedEx drivers and collecting decisions).

Professor Lowenstein writes that "businesses often have crafted contracts to fit their workers within the definition of independent contractor" and that "[n]o business has been more creative in that regard than FedEx . . . whose efforts to craft an independent contractor relationship with its drivers spawned litigation across the country." *Id.* at 1017. As the U.S. Commission on the Future of Worker-Management Relations (the blue-ribbon Dunlop Commission) observed nearly 25 years ago:

[C]urrent tax, labor and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations. For example, an employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, workers' compensation, and health insurance, will save the administrative expense of withholding, and will be relieved of responsibility to the worker under labor and employment laws. . . . Many low-wage workers have no practical choice in the matter.

U.S. Commission on the Future of Worker-Management Relations, *Final Report* 62 (1994) (available at [www.digitalcommons.ilr.cornell.edu](http://www.digitalcommons.ilr.cornell.edu))

<sup>14</sup> 361 NLRB at 610–611.

<sup>15</sup> *Id.* at 610.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (emphasis omitted). The Board explained that it "should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity." *Id.* at 610. Accordingly, the Board overruled two prior decisions by divided Board panels—*St. Joseph News-Press*, supra (decided in 2005), and *Arizona Republic* (decided in 2007)—"[t]o the extent that . . . [they] may have suggested that" the constraints effectively imposed on a putative contractor's ability to render services as part of an independent business "are *not* relevant to the Board's independent-contractor inquiry." *Id.* at 621 (emphasis added).

<sup>18</sup> *Id.* at 617.

<sup>19</sup> *Id.* at 618.

<sup>20</sup> *Id.*

that the Board’s decision was sound and defensible, and I see no good reason to abandon it—in particular, not for the confused approach adopted by the majority today, which cannot be reconciled with common-law principles or Supreme Court authority.

## II. THE BOARD MAJORITY’S NEW TEST

Today, the majority overrules the *FedEx* decision, essentially embracing the District of Columbia Circuit’s approach to “entrepreneurial opportunity.” But the majority cannot have it both ways; it cannot claim fidelity to both the common-law test and the Circuit’s approach, because that approach actually broke with the traditional test. In support of this shift, the majority claims that the *FedEx* Board gave too little weight to “entrepreneurial opportunity,” and the Circuit, just the right amount—purportedly the *same* amount as the Board had traditionally given it. However, as explained above, this view is refuted by any fair reading of the decisions: the Board’s, the Circuit’s, and the Supreme Court’s decision in *United Insurance*, which matters most of all.

The majority also claims that the approach taken by the *FedEx* Board is somehow contrary to the common-law agency test, and that its own approach conforms to that test. That claim is similarly baseless. Indeed, there is no real evidence to suggest that the traditional common law of agency, as reflected in the *Restatement* and as developed to address issues of tort liability, was informed by the concept of “entrepreneurial opportunity” at all. The majority seems to have been bewitched by just the sort of “magic phrase” the Supreme Court warned about and has accordingly elected to replace a sound test with an unsupportable formulation that is inconsistent with Board precedent as well as both the common-law and Supreme Court precedent.

### A. Board precedent

There is no principled way to reconcile the District of Columbia Circuit’s approach, now adopted by the majority, with Board precedent. With respect to the independent-contractor analysis, the court treated “entrepreneurial opportunity” as a “more accurate proxy” than the “unwieldy control inquiry.”<sup>24</sup> But the *Roadway* Board in 1998’s seminal decision had definitively rejected the claim that “control” was the key analytical concept—and, in the process, made clear that there *is* no such key, no “animating principle” (to use the court’s phrase) of independent-contractor doctrine. In supposedly replacing “control” with “entrepreneurial opportunity,” then, the court began with an incorrect premise (that one prin-

ciple guides the analysis) and ended with a conclusion that fundamentally departed from Board doctrine.

Similarly, the court in *Fed Ex* erred when it explicitly rejected the Board’s view “[b]ecause the indicia favoring a finding that the contractors are employees are clearly outweighed by the evidence of entrepreneurial opportunity.” No Board decision has ever treated “evidence of entrepreneurial opportunity” as such a trump card. To the contrary, the two Board decisions in which such evidence was cited in support of finding independent-contractor status treated the evidence as simply one aspect of a common-law factor (“method of compensation”) that was itself part of a multifactor test, with no factor receiving special weight.<sup>25</sup> It is simply incorrect to claim, as the majority does, that the District of Columbia Circuit’s decision did not “depart[] in any significant way from the Board’s traditional independent-contractor analysis.”

Here, the majority fails in its attempt to explain how the District of Columbia Circuit’s approach comports with *Roadway* or other Board precedent. It tellingly fails to cite a single Board decision that employs “entrepreneurial opportunity” as the Circuit does: to “evaluate” the common-law factors, and to ask—as the decisive question—“whether the position presents the opportunities and risks inherent in entrepreneurialism.”<sup>26</sup> The majority echoes the Circuit in asserting that “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.” But this is simply not how the Board has ever before approached independent-contractor determinations applying the common-law agency test.

Remarkably, the majority cites with apparent approval two Board decisions in which the *absence* of “entrepreneurial opportunity”—a function of constraints imposed by the employer—was relied upon as one factor among others in finding that drivers were employees, not independent contractors. Thus, in *Roadway*, *supra*, the Board explained:

As in *United Insurance*, the drivers here do not operate independent businesses, but perform functions that are an essential part of one company’s normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company’s name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company’s busi-

<sup>24</sup> *FedEx*, *supra*, 563 F.2d at 497.

<sup>25</sup> See *Arizona Republic*, *supra*, 349 NLRB at 1042–1046; *St. Joseph News-Press*, *supra*, 345 NLRB at 478–479.

<sup>26</sup> *Id.*

ness under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. All these factors weigh heavily in favor of employee status.

326 NLRB at 851 (emphasis added). Of course, even to find that the lack of “entrepreneurial opportunity” is enough to establish *employee* status would not mean that the presence of some “entrepreneurial opportunity,” no matter how limited, would be enough to establish independent-contractor status. Nothing in *Roadway* suggests that if the drivers there had enjoyed “significant entrepreneurial opportunity for gain or loss,” this alone would have been decisive.<sup>27</sup> The *Roadway* Board clearly did not use “entrepreneurial opportunity” to “evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain” (as the majority would have it).<sup>28</sup>

Nor did the Board do so in the companion case to *Roadway*, *Dial-A-Mattress*, supra, where it found delivery drivers to be independent contractors. The Board, citing *Roadway*, observed that the “list of factors differentiating ‘employee’ from ‘independent contractor’ status under the common-law agency test is nonexhaustive, with no one factor being decisive” and found that in the

<sup>27</sup> To recall, the *Roadway* Board explicitly rejected the view that the non-control factors were relatively insignificant to the common-law analysis. 326 NLRB at 850. The majority mistakenly posits that “employer control and entrepreneurial opportunity are opposite sides of the same coin,” ignoring the fact that “entrepreneurial opportunity” has no apparent basis in the common law of agency. But even by the majority’s token, *Roadway* cannot possibly be read to hold that “entrepreneurial opportunity” (any more than “control”) diminishes the weight to be given to factors that do not implicate either control or its supposed obverse.

<sup>28</sup> The majority also cites *Corporate Express*, supra, but to no avail. There, in the course of addressing the usual range of traditional factors, the Board observed:

They [the drivers] have no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss. The routes, the base pay, and the amount of freight to be delivered daily on each route are determined by the [employer], and owner-operators have no right to add or reject customers.

332 NLRB at 1522 (emphasis added). But the Board did not treat “entrepreneurial opportunity” as the analytical key to the case.

Nor did the Board do so in *Slay Transportation Co.*, 331 NLRB 1292 (2000), also cited by the majority. There, the Board examined all of the traditional common-law factors in holding the drivers to be employees, observing (among other things) that the drivers were “given specific instructions as to the manner in which they [were] to perform their tasks,” that they did not “operate independent businesses,” and that they performed functions that were “the very core of [the employer’s] business.” *Id.* at 1293–1294. “Having considered all of the incidents of the [drivers’] relationship with the [e]mployer,” the Board concluded “that the various factors of the common law agency test weigh[ed] heavily in favor of employee status.” *Id.* at 1294.

case before it, the “factors weigh[ed] more strongly in favor of independent-contractor status.”<sup>29</sup> To be sure, the Board found that the drivers’ “separateness from [the company] was manifested in many ways, including significant entrepreneurial opportunity for gain or loss,” but the Board also distinguished *Roadway* in several respects, including by observing that the employer there “exercise[d] more control over its drivers’ manner and means of accomplishing their work.”<sup>30</sup> There was no “shorthand formula” at work in *Dial-A-Mattress* any more than in *Roadway*, but instead a nuanced analysis and weighing of multiple factors.

The Board’s *FedEx* decision is entirely consistent with *Roadway* and *Dial-A-Mattress*, whereas the formulation adopted by the majority today manifestly is not.<sup>31</sup> Tellingly, the Circuit’s *FedEx* decision did not cite either decision as evidence of the Board’s supposed focus on “entrepreneurial opportunity,” and the majority today is forced to say that the imaginary “shift[.]” in the Board’s “perspective” occurred “particularly since *Roadway*” (emphasis added)—when, in fact, it never happened at all (until today). As the District of Columbia Circuit has itself explained, “[a]n agency’s failure to come to grips with conflicting precedent constitutes ‘an inexcusable departure from the essential requirement of reasoned decision making.’”<sup>32</sup> Under the cover of the Circuit’s decision, this is just what the majority has done here: departed from Board precedent—that is, the precedent before *FedEx*—without ever acknowledging that it conflicts with today’s decision.

The most the majority will say is that “the Board’s precedent in this area . . . has not been entirely consistent” and that “[t]oday’s decision is intended to eliminate any ambiguity over how to treat entrepreneurial opportunity in the Board’s independent-contractor analysis in the future.” In fact, however, it was the Board’s *FedEx* decision that, responding to the District of Columbia Circuit, actually eliminated ambiguity and clarified Board doctrine, within permissible bounds. The majority’s decision, in contrast, adopts an impermissible approach that cannot be reconciled with what came before and that provides no clear guidance for the future.

<sup>29</sup> 326 NLRB at 891.

<sup>30</sup> *Id.* at 893.

<sup>31</sup> It merits notice that, by citing *Roadway* and *Corporate Express* with approval, the majority seems to recognize (as it must) that to the extent that the “entrepreneurial opportunity” of a purported independent contractor is, as a practical matter, constrained by the company he works for, it is entitled to correspondingly lesser weight in the analysis. If a purely theoretical “entrepreneurial opportunity” were enough to make a worker an independent contractor, then the *Roadway* Board would not have found the drivers there to be employees.

<sup>32</sup> *NLRB v. CNN America, Inc.*, 865 F.2d 740, 751 (D.C. Cir. 2017).

### B. Supreme Court Precedent and the Common Law

Even more troubling than this inconsistency with Board precedent is the majority's failure to reconcile its new approach with common law principles and the Supreme Court's decision in *United Insurance*. Certainly, today's majority repeats the District of Columbia Circuit's profession that its approach was faithful to *United Insurance* and pays lip service to the settled principle that the "ten-factor [*Restatement*] test is not amenable to any sort of bright-line rule."<sup>33</sup> But the approach adopted by the Circuit, and now by the Board majority today, is precisely the kind of "shorthand formula" that both the common law and the *United Insurance* decision reject.<sup>34</sup>

The majority argues that it is *required* to overrule the Board's *FedEx* decision because the decision "impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis." According to the majority, the *FedEx* Board effectively abandoned the common-law agency test in favor of the "economic realities" test endorsed by the Supreme Court's 1944 *Hearst* decision, but then legislatively overruled by Congress in 1947. This claim is baseless. Indeed, it is the majority's approach today—with its endorsement of "entrepreneurial opportunity" as a sort of super-factor—that subordinates the common law to a particular vision of supposed "economic reality" where workers are deemed "entrepreneurs" and labor law, irrelevant. Neither the common law nor the policies of the Act support the majority's expansive view of how "entrepreneurial opportunity" should operate to exclude workers from statutory coverage.<sup>35</sup>

The majority's position rests on the premise that "entrepreneurial opportunity" is the core concept of the traditional common-law agency test. There is no support for such a claim. If the common-law agency test has a core concept, it is demonstrably not "entrepreneurial opportunity," but rather "control" (although, to be sure, the

*Roadway* Board rejected the view that the *Restatement* factors "which do not include the concept of 'control' are insignificant when compared to those that do"<sup>36</sup>). As the District of Columbia Circuit itself has just told us, "the 'right to control' [not 'entrepreneurial opportunity'] runs like a *leitmotif* through the *Restatement* (Second) of Agency."<sup>37</sup> Thus, as noted, *Restatement* Section 220(1) defines a "servant" (as opposed to an independent contractor) as "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 of control*." *Restatement* Section 220, comment g, in turn, traces this definition to the idea that because "the master can exercise control over the physical activities of the servant," he is properly held liable for harm caused by the servant.

The *Restatement* certainly does not define a "servant" as a "person employed to perform services in the affairs of another and who in the performance of the services lacks entrepreneurial opportunity for gain or loss."<sup>38</sup> But this is how the majority, embracing the District of Columbia Circuit's approach, has effectively rewritten the definition. None of the *Restatement* Section 220(2) factors, meanwhile, explicitly or implicitly incorporate the concept of "entrepreneurial opportunity." "Entrepreneurial opportunity" does not inform (in any clear and direct way, at least): "extent of control;" "distinct occupation or business;" "kind of occupation;" "skill required;" who supplies the instrumentalities; "length of time . . . employed;" "method of payment;" "part of the regular business;" the parties' belief in what relationship they are creating; and the "business" of the principal.<sup>39</sup> Citing the *Restatement*, the Supreme Court has observed that "[a]t common law the relevant factors defining the master-servant relationship focus on the master's control over the servant," and that in determining whether a person is an "employee" under a federal statute that does not otherwise define the term, "the *common-law element of*

<sup>33</sup> 563 F.3d at 496.

<sup>34</sup> It is clear from the District of Columbia Circuit's decision that it was, indeed, applying a new standard and thus rejecting the Board's view (that the FedEx drivers were employees) "[b]ecause the indicia favoring a finding that the contractors are employees are clearly outweighed by the evidence of entrepreneurial opportunity." 563 F.3d at 504. This approach amounts to a "shorthand formula," despite any disclaimer. It was the adoption of this formula, in turn, that enabled the Circuit to reject the Board's view of the case, despite the deferential standard of judicial review established by *United Insurance*.

<sup>35</sup> The explicit policy of the National Labor Relations Act is "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . ." NLRA, Sec. 1, 29 U.S.C. §151. In light of that policy, exclusions from statutory coverage should be interpreted narrowly.

<sup>36</sup> 326 NLRB at 850.

<sup>37</sup> *Browning-Ferris Industries of California, Inc. v. NLRB*, No. 16-1028, slip op. at 27 (D.C. Cir. Dec. 28, 2018). "[A]t bottom," the court observed, the "independent-contractor test considers *who, if anyone, controls the worker* other than the worker herself." *Id.* at 33 (emphasis added).

<sup>38</sup> The dictionary definition of an "independent contractor" (the term actually used in Sec. 2(3) of the National Labor Relations Act) is "one that contracts to do work or perform a service for another and that *retains total and free control* over the means and methods used in doing the work or performing the service." *Webster's Third New International Dictionary of the English Language* 1148 (1966) (emphasis added).

<sup>39</sup> See fn. 5, *supra* (quoting *Restatement* §220(2) factors).

control is the principal guidepost that should be followed.”<sup>40</sup>

To be clear, the Supreme Court has not held that “entrepreneurial opportunity” is “the principal guidepost that should be followed.” Nor does the majority’s incorrect description of “employer control” and “entrepreneurial opportunity” as “opposite sides of the same coin” do the analytical trick. As explained, the focus of the common law of agency is determining tort liability—a master is liable for the torts of his servant—and liability follows from control.<sup>41</sup> The servant’s “entrepreneurial opportunity” (or lack of it) is simply not part of the common-law equation. While one can debate whether the common law of agency is well suited to determining covered-employee status under a federal statute like the National Labor Relations Act, that was the choice that Congress made, as the Supreme Court has definitively held. Here, as in the joint-employer context, the Board “must color within the common-law lines identified by the judiciary.”<sup>42</sup>

Quoting then-Member Johnson’s dissent, the majority criticizes the *FedEx* Board’s approach because (in the majority’s view) it “greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of ‘right to control’ factors relevant to perceived economic dependency.” What the majority fails to explain, however, is where, how, and why traditional common-law agency doctrine not only incorporates the concept of “entrepreneurial opportunity,” but also subordinates the “control” factors to it (along with the remaining *Restatement* factors, as well). With approval, the majority cites the supposed “evolving emphasis on entrepreneurial opportunity” in the decisions of the District of Columbia Circuit and the Board, as described by the *FedEx* court. But the majority does not explain how the common-law agency test applied by the Board (or the Circuit) could evolve in a fundamental way and yet still adhere to the *Restatement*, the legal

<sup>40</sup> *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448 (2003) (emphasis added) (addressing employee status under Americans with Disabilities Act of 1990). The majority—citing the *Restatement*’s example of a full-time cook regarded as a servant, despite the fact that the employer exercises “no control over the cooking”—observes that a “master-servant relationship can exist in the absence of the master’s control over the servant’s performance of work.” This single example, however, in no way suggests that “entrepreneurial opportunity” informs the common-law analysis. Indeed, it refutes the majority’s assertion that “entrepreneurial opportunity” is simply the obverse of “control.” That the cook’s employer does not control his cooking does not mean that the cook has “entrepreneurial opportunity.”

<sup>41</sup> See *Restatement (Second) of Agency* §219.

<sup>42</sup> *Browning-Ferris Industries*, supra, No. 16–1028, slip op. at 21.

source treated as authoritative by the Supreme Court.<sup>43</sup> Put somewhat differently, the traditional common law of agency does not develop through the decisions of the Board and the District of Columbia Circuit, but rather exists independently of them.<sup>44</sup> *United Insurance*, meanwhile, contains no hint that “entrepreneurial opportunity” was an “animating principle” of the common-law test. The approach taken by the *FedEx* Board, unlike the majority’s today, is entirely consistent with common-law agency principles.

The *FedEx* Board did no more than permissibly refine the way that the Board would apply the common-law agency test.<sup>45</sup> Essential to the majority’s criticism of *FedEx* is the suggestion that it was somehow illegitimate to treat “entrepreneurial opportunity” as a factor, or as an element of a factor, in the independent-contractor analysis. Thus, the majority insists that “[p]roperly understood, entrepreneurial opportunity is not an independent common-law factor;” rather, it 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” and thus (according to the majority), the *FedEx* Board “impermissibly altered the Board’s traditional common law test . . . by severely limiting the significance of entrepreneurial opportunity to the analysis.” As

<sup>43</sup> See, e.g., *Nationwide Mutual Insurance*, supra, 503 U.S. at 323–324.

<sup>44</sup> Thus, in recently upholding the Board’s joint-employer standard, the District of Columbia Circuit “look[ed] first and foremost to the ‘established’ common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947.” *Browning-Ferris Industries*, supra, No. 16–1028, slip op. at 22. There is no clear indication that in adopting the “independent contractor” exclusion in 1947—and thus incorporating the common-law agency test into the National Labor Relations Act (as the Supreme Court held in *United Insurance*)—Congress intended for the test to evolve over time, much less that this evolution was to be directed by the Board or by the federal courts.

<sup>45</sup> As explained, the *FedEx* Board sought to refine how evidence of “actual entrepreneurial opportunity for gain or loss” is “to be properly assessed as part of the traditional common-law factors.” 361 NLRB at 620. It observed that the Board “has been less than clear about this point.” *Id.* In some cases, “entrepreneurial opportunity ha[d] been analyzed expressly as a separate factor.” *Id.*, citing *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011), and *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004). In others, it was “integrated into the Board’s analysis of other factors.” *Id.*, citing *Roadway*, supra, 326 NLRB at 851–853, and *Stamford Taxi*, 332 NLRB 1372, 1373 (2000). The Board had also “spoken in terms of the ‘economic independence’ of putative contactors from their employing entities.” *Id.*, citing *Slay Transportation*, supra, 331 NLRB at 1294. Synthesizing the Board’s prior decisions, the *FedEx* Board articulated a new “independent-business” factor, which “supplements—without supplanting or overriding—the traditional common-law factors,” and explained that the “weight given to the independent-business factor will depend upon the factual circumstances of the particular case.” *Id.* at 621.

explained already, it is the majority's treatment of "entrepreneurial opportunity" as a sort of super-factor that contradicts the common-law agency test. As for the *FedEx* Board's approach, in contrast, the *Restatement* explicitly states that the factors listed in Section 220(1) are considered "among others." The *Roadway* Board, in turn, accurately described the *Restatement* as "specifically permitting the consideration of other relevant factors as well, depending on the factual circumstances presented."<sup>46</sup> Pre-*FedEx* decisions by the Board, as noted, have treated "entrepreneurial opportunity" as a factor. And, as earlier pointed out, the District of Columbia Circuit itself, in a post-*FedEx* decision, has described "entrepreneurial opportunity" as a "factor" to be considered, along with those identified in the *Restatement*.<sup>47</sup>

The majority's insistence that the *FedEx* Board impermissibly abandoned common-law agency principles to return to the "economic realities" test articulated by the Supreme Court in *Hearst*, supra, is baseless—as demonstrated by any fair reading not only of *FedEx*, but of the Board decisions that have since applied *FedEx*, all of which reflect a careful analysis of the *Restatement* factors and the independent-business factor articulated in *FedEx*. In *Porter Drywall*, for example, the Board followed this approach and determined that "crew leaders" hired as drywall-installation subcontractors were independent contractors, not employees.<sup>48</sup> Then-Member Johnson (who had dissented in *FedEx*) concurred, observing that the result would have been the same under the test he had advocated there.<sup>49</sup> If *FedEx* had actually left the common law behind, one might think it would yield different results.

On that score, finally, it is worth pointing again to the Ninth Circuit's *Alexander* decision involving FedEx drivers. There, the court—just like the *FedEx* Board—held that the drivers were not independent contractors, but rather employees. Applying California common law, which closely resembles the approach of the *Restatement*, the Ninth Circuit rejected the company's reliance on the District of Columbia Circuit's *FedEx* decision, observing that there was "no indication that California had replaced its longstanding right-to-control test with the *new entrepreneurial opportunities test developed by the D.C. Circuit*" and explaining that under California law, the sort of company-constrained "entrepreneurial

opportunities" available to the drivers "did not override other factors in [the] multi-factor analysis."<sup>50</sup> The Ninth Circuit's decision, then, illustrates that the test adopted by the Board majority today is the novelty, a departure from traditional common law.

### III.

The "entrepreneurial opportunities" test, in short, cannot be reconciled with the Board's pre-*FedEx* precedent (to which the majority claims to adhere) or with Supreme Court precedent and the common law of agency (to which the Board *must* adhere). But that is not where the problems with today's decision end, because while the majority adopts the "entrepreneurial opportunities" test, it does not apply the test as articulated.

Under the test adopted and articulated by the majority, "entrepreneurial opportunity . . . 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." Precisely what this means, even in theory, is not easy to understand. In its subsequent analysis of the record evidence here, however, the majority does not evaluate "the overall effect of the common-law factors." Instead, it begins its analysis by reciting ways in which the SuperShuttle drivers assertedly resemble "entrepreneurs or small business owners," and then asserts that "these factors"—which are not, in fact, drawn from the *Restatement*—"are not outweighed by any countervailing

<sup>50</sup> 765 F.3d at 993–994 (emphasis added). The majority discounts the Ninth Circuit's decision based on its mistaken view that the court applied a California test fundamentally different than the common-law agency test that the Board is required to apply. The Ninth Circuit described California law this way:

California's right-to-control test requires courts to weigh a number of factors: "The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."

...

California courts also consider "several 'secondary' indicia of the nature of a service relationship. . . ." The right to terminate at will, without cause, is "[s]trong evidence in support of an employment relationship." Additional factors include:

"(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee."

765 F.3d at 988 (citations omitted). The close similarity to the *Restatement* test is obvious.

<sup>46</sup> 326 NLRB at 850. The District of Columbia Circuit is in agreement on this point. See, e.g., *FedEx Home Delivery*, supra 849 F.3d at 1125 (describing *Restatement* as "provid[ing] a non-exhaustive list of ten factors to consider").

<sup>47</sup> *Lancaster Symphony Orchestra*, supra, 822 F.3d at 569–570.

<sup>48</sup> *Porter Drywall*, supra, 362 NLRB 7.

<sup>49</sup> *Id.* at 12.

factors supporting employee status.” Only then does the majority turn to the *Restatement* factors. In short, the majority does, indeed, treat “entrepreneurial opportunity” as an “overriding consideration.” The internal inconsistencies in the majority’s approach are reason enough to reject its analysis.<sup>51</sup>

By contrast, even putting aside the now-overruled *FedEx* approach, looking only to pre-*FedEx* Board precedent (which remains good law), and keeping SuperShuttle’s burden of proof in mind, a careful examination of the *Restatement* factors, as the Board has traditionally applied them, should lead to a finding of employee status here. Notably, the SuperShuttle drivers bear a strong resemblance to the insurance agents found by the Supreme Court to be employees, not independent contractors, in *United Insurance*, supra. Thus, the Regional Director erred in dismissing the Union’s representation petition: the SuperShuttle drivers should be permitted to pursue the union representation that they seek.

#### A. Essential Facts

The essential facts here are straightforward and not in dispute—although the majority’s discussion neglects certain facts that cut against its ultimate conclusion that the drivers are independent contractors.

SuperShuttle has a contract with the Dallas/Fort Worth International Airport Board, a public agency, to provide a shared-ride service to airport customers. The relationship between SuperShuttle and its drivers, in turn, is governed in comprehensive detail by the “Unit Franchise Agreement” (UFA).

The UFA is effectively imposed on the drivers by SuperShuttle. It is a standard agreement, not subject to negotiation by individual drivers, and (by its terms) it may be changed by SuperShuttle at will. The UFA prohibits drivers from engaging in any business activity that will conflict with their obligations under the agreement—including working for a SuperShuttle competitor and any involvement with another business that provides transportation services (a fact the majority ignores).

Under the UFA, drivers pay SuperShuttle not only an initial “franchise fee,” but also a flat, weekly system fee (\$575 for a Dallas/Fort Worth Airport franchise) and a \$100-per-week contribution to reimburse SuperShuttle for its payment of certain driving-related fees.

The UFA requires drivers to buy or lease a van that meets SuperShuttle’s detailed specifications. Most drivers lease their vehicles—and SuperShuttle has its own, affiliated leasing company, which (as SuperShuttle’s general manager testified) “helps these guys who have poor credit”—a fact the majority ignores.

<sup>51</sup> See *Allentown Mack*, supra, 522 U.S. at 374–375.

SuperShuttle provides training to its drivers, not only the training required by its contract with the airport board, but also training in its “brand standards” and the operation of its communication systems—subjects that the UFA describes as “unique to the SuperShuttle system.” (The majority does not mention this.)

Central to the drivers’ work is SuperShuttle’s Nextel trip generating system, which the UFA requires drivers to use. The specialized equipment drivers must use includes a pager, a two-way radio, and a global-positioning navigation system—all owned by SuperShuttle, which prohibits the drivers from using the equipment outside the SuperShuttle system.

SuperShuttle does not set drivers work schedules, routes, or assignments. But SuperShuttle’s Nextel trip generating system is integral to dispatch services. The system generates job “bids,” that drivers ostensibly may accept or decline. However, drivers testified that they had been fined for declining bids. One driver testified that deciding whether to accept or decline a bid was “commonsense stuff,” based on the time and distance involved in picking up a passenger. Drivers testified that whether or not SuperShuttle required them to work, they felt a practical need to work to be able, at least, to make the fixed, weekly system payments to the company that SuperShuttle required. SuperShuttle, not the drivers, sets the fares. And, as mentioned, if drivers wish to work as drivers, they must do so only for SuperShuttle.

Under the UFA, a driver may use a substitute or relief driver, but only if the other driver meets SuperShuttle’s detailed requirements. The UFA also imposes detailed requirements on the transfer, assignment, or sale of a SuperShuttle franchise.

#### B. The Restatement Factors

##### 1. Factors the majority concedes support employee status

Starting with the factors that the majority concedes favor a finding of employee status, it is clear here that the drivers are not “engaged in a distinct occupation or business.”<sup>52</sup> In fact, their “work is a part of the regular business of the employer,” SuperShuttle.<sup>53</sup> The “principal,”

<sup>52</sup> *Restatement (Second) of Agency* §220(2)(b).

<sup>53</sup> *Id.*, §220(2)(h). Beyond the common color scheme and driver uniforms (which are required by the Airport Contract), every aspect of driver performance manifests SuperShuttle’s “uniform method and philosophy of operation, customer service, marketing, advertising, promotion, publicity, and technical knowledge relating to the airport shuttle service business.” At the outset, drivers receive training in brand standards and the Company’s proprietary system designed to foster a consistent customer experience across SuperShuttle vehicles and affiliates.

In their work, drivers are fully integrated into SuperShuttle’s nationwide organization and “central reservation system”: trip requests



SuperShuttle, “is . . . in business.”<sup>54</sup> The majority correctly explains that “SuperShuttle is clearly involved in the business of transporting customers, and its revenue comes from providing that service.” As for the “skill required in the particular occupation,”<sup>55</sup> the majority acknowledges that “the record does not indicate that drivers have any particular skill.”<sup>56</sup> Putting these factors together, of course, reveals unskilled workers who perform the core function of a particular commercial enterprise.<sup>57</sup> That picture is very strongly suggestive of an employment relationship, as traditionally understood.<sup>58</sup>

The suggestion is reinforced, moreover, by a fact the majority tellingly minimizes, relegating to a footnote the fact that SuperShuttle, through the nonnegotiable franchise agreement, prohibits the drivers from working for other transportation companies. The Board has previously relied on such restrictions as demonstrating employer control.<sup>59</sup> Even with respect to their own work for Su-

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are processed via the Company’s website and central telephone number, and jobs are allocated to drivers by a network of dispatch managers. By General Manager Harcrow’s account, drivers also receive support from SuperShuttle’s franchise manager, training and safety manager, sales and marketing team, and accounting department.

Drivers also rely on the Nextel system, which is required to receive jobs and process customer fares. In addition, the availability of work for drivers largely depends on SuperShuttle’s access to Airport facilities, name recognition, marketing and advertising efforts, relationships with hotels, and internet partnerships.

<sup>54</sup> Id., §220(2)(j). SuperShuttle DFW, by the terms of the UFA, operates “a demand responsive and/or scheduled airport shuttle . . . providing transportation to passengers traveling to and from specific metropolitan airports and destinations within the general markets surrounding those airports.” Accordingly, drivers’ work “is the precise business of the [employer].” *Community Bus Lines/Hudson County Executive Express*, 341 NLRB 474, 475 (2004).

<sup>55</sup> Id., §220(2)(d).

<sup>56</sup> Drivers are not required to have any special training or skills. Apart from the required licenses and shuttle certifications, drivers acquire the skills and information they need during the training and ride-along sessions that SuperShuttle provides.

<sup>57</sup> It is almost inconceivable that at common law, such an enterprise would *not* be held liable for a tort committed by one of its workers while working. And that, of course, is the proper reference point, because (as described) common-law agency principles were developed for the purpose of determining a principal’s liability for the acts of his agent.

<sup>58</sup> See, e.g., *Prime Time Shuttle*, 314 NLRB 838, 840 (1994) (“The business of the [employer] is providing shared rides to the public and its vans and drivers perform that function. Driving is not merely an essential part of [the employer’s] business it is [the employer’s] business.”); *Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000) (drivers “devote virtually all of their time, labor and equipment to providing the essential functions of the [employer’s] . . . business.”); see also *Slay Transportation Co.*, supra, 331 NLRB at 1294 (“[Drivers] perform functions that are not merely a ‘regular’ or even an ‘essential’ part of the Employer’s normal operations, but are the very core of its business”).

<sup>59</sup> See, e.g., *Metro Cab Co.*, 341 NLRB 722, 724 (2004); *Stamford Taxi*, supra, 332 NLRB at 1373; see also *Argix Direct, Inc.*, 343 NLRB

perShuttle, meanwhile, the drivers may not arrange for a substitute or surrogate, unless SuperShuttle approves. At the time of the hearing, only 1 of 88 drivers employed a relief driver. The *Restatement* observes that “an agreement that the work cannot be delegated” is a factor “indicating the relation of master and servant.”<sup>60</sup>

Thus, even under the majority’s own view, SuperShuttle performs the very core of its business with a work force consisting entirely of unskilled workers, who are otherwise prohibited from working in the industry and who are subject to a uniform agreement imposed by the company on each of them. This situation, it is fair to say, is the antithesis of the independent-contractor relationship envisioned by the common law of agency. But there are, of course, additional common-law factors to consider.

## 2. Factors the majority characterizes as neutral

In addition to the factors that the majority concedes support finding employee status (engagement in a distinct business, work as part of the employer’s regular business, the principal’s business, and skill required), the majority treats length of employment as neutral, observing that drivers are required to sign the 1-year Unit Franchise Agreement, but “most drivers renew their agreements yearly.” On this record, however, it should be apparent that the length-of-employment factor actually weighs in favor of employee status.

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1017, 1021 (2004) (finding drivers to be independent contractors, relying in part on fact that company’s agreement with drivers reserved drivers’ right to provide services for other carriers). Restrictions on working for a competitor certainly do not suggest an independent-contractor relationship. It is hard to imagine, for example, a company engaging a skilled tradesman (like a plumber), with his own business, to make repairs—but only if he agrees not to do similar repair work for a competing company.

The majority “acknowledge[s] that the UFA’s prohibition on franchisees entering into business relationships with SuperShuttle’s competitors limits to some extent the potential for entrepreneurial opportunity that would otherwise come with ownership of their vans.” It is obviously no answer to say, as the majority does, that this “limitation is mitigated” because the drivers are free to drive *for SuperShuttle* as much as they want. The point is that the drivers are locked into SuperShuttle’s system and cannot drive—at any time—for another company (including one of their own creation) that might allow them greater economic gains.

<sup>60</sup> *Restatement (Second) of Agency* §220, comment h. The independent-contractor plumber may well choose to send someone else to do the repair, but the employee plumber must show up for work himself if he wants to keep his job. The facts here stand in contrast to those in *Argix Direct*, supra, where some independent-contractor drivers had their own independent contractors and hired their own drivers, independently setting their terms and conditions of employment. 343 NLRB at 1020–1021.

The majority acknowledges, as it must, that “a longer employment relationship indicates employee status.”<sup>61</sup> Here, driver relationships with SuperShuttle have continued indefinitely, and General Manger Harcrow testified that he had never denied a renewal request. As the Board has observed, such an “open-ended duration” of the working relationship indicates employee status.<sup>62</sup>

### 3. Factors the majority characterizes as supporting independent contractor status

The majority characterizes the extent of control exercised by the employer as a factor strongly supporting independent contractor status. However, here the evidence of SuperShuttle’s control over the drivers and the details of their work, as reflected in the Unit Franchise Agreement, is overwhelming. The majority ignores or minimizes that evidence at every turn.<sup>63</sup>

To begin, there is the obvious fact of the non-negotiable Unit Franchise Agreement itself. Its identical terms are imposed by SuperShuttle on every driver, and there is no contractual limit at all on what SuperShuttle may require the drivers to do while performing work. Notably, the UFA requires drivers “not to deviate from the standards, specifications and operating procedures as specified in this Agreement . . . in order to ensure uni-

<sup>61</sup> *Id.*, comment j (“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.”). In this respect, as several others, driving for SuperShuttle is very much SuperShuttle’s job—not the drivers’.

<sup>62</sup> *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984).

<sup>63</sup> The UFA, imposed by the SuperShuttle on the drivers, is distinct from the Airport Contract between SuperShuttle and the DFW Airport Board, which allows SuperShuttle to operate at the airport subject to certain conditions. The conditions required by the Airport Contract do not include the UFA or its provisions, of course.

The majority points out that the Airport Contract does effectively impose certain requirements on SuperShuttle drivers: they must wear a uniform, maintain grooming standards, display SuperShuttle decals and markings on their vans, and maintain the interior condition of their vans. Because these requirements are imposed by a governmental agency, they are immaterial (under current Board law) to the issue of SuperShuttle’s control over the drivers. But, as I show here, SuperShuttle’s control is easily demonstrated without relying at all on the Airport Board-imposed requirements. The majority identifies no example of SuperShuttle’s control on which I rely that is, in fact, required by the Airport Contract. The UFA goes far beyond anything required by the Airport Contract, and the majority does not argue otherwise. Instead, it equivocates, pointing to the fact the UFA “states that many restrictions imposed by the Airport Contract are effectively passed along in the UFA.” But the Airport Contract does not (for example) require SuperShuttle to impose the UFA on its drivers, to prohibit drivers from working for other transportation companies, to buy or lease a van that meets SuperShuttle’s detailed specifications, to charge drivers a “franchise fee” and a weekly system fee, to provide training in SuperShuttle’s “brand standards” and the operation of its communications systems, and to use SuperShuttle’s specialized equipment and the Nextel trip generating system.

formity and quality of services offered to the public.” The UFA explains that the SuperShuttle system has been “developed as a uniform method and philosophy of operation, customer service, marketing, advertising, promotion, publicity, and technical knowledge relating to the airport shuttle service business.” Not even the requirements incorporated in the UFA are fixed. Rather, the UFA authorizes SuperShuttle to “from time to time . . . add to, subtract from or otherwise modify or change [the driver’s] obligations under the [SuperShuttle] System, including, without limitation, changes reflecting SuperShuttle’s adoption and use of new or modified Marks, services, equipment and new techniques relating to the promotion and marketing of shuttle services.” If this is not control “by the agreement . . . over the details of the work” (in the *Restatement’s* formulation), then it is hard to grasp what control could be—even excluding the fact that the UFA prohibits drivers from working for another transportation company, a demonstration of employer control under Board precedent (as already shown).

The majority virtually ignores what the Unit Franchise Agreement is and what it does. Instead, the majority insists that drivers “are free from control by SuperShuttle in most significant respects in the day-to-day performance of their work.” The majority points out that drivers may decide when to work and which trips to accept. But this hardly demonstrates freedom from control, in light of the fact that if and when the drivers work—and they can only work for SuperShuttle—they must operate entirely within SuperShuttle’s Nextel trip generating system, which generates job “bids” and which can lead to fines if a driver accepts a bid, but fails to complete the pickup.<sup>64</sup> There is no other way for drivers to perform their services for SuperShuttle. And, of course, drivers need to work, because they are required to make substantial weekly payments to SuperShuttle, whether or not they are working; SuperShuttle, as noted, uniformly fixes both the payments to be made and the fares the drivers receive.<sup>65</sup>

<sup>64</sup> The majority insists that the “Nextel device does not allow SuperShuttle to exercise control over the” drivers, but certainly it does. The drivers must use the device, and without the device, they have no way to find passengers. The *Restatement* considers “the extent of control which, by the agreement, the master may exercise over the details of the work.” Finding passengers is surely a detail of the drivers’ work—and SuperShuttle controls it.

<sup>65</sup> The majority necessarily acknowledges that “[f]ares received . . . are set by SuperShuttle,” but still insists that even if drivers “could negotiate their own fares, those fares are unlikely to vary significantly from SuperShuttle’s fares” because “[a]s a practical matter, fares are set by the competitive airport transportation market.” There is no evidence in the record here to support the majority’s claim. Indeed, given the crucial role of the Dallas/Fort Worth International Airport Board—whose contract with SuperShuttle makes the company’s operations

The only SuperShuttle-imposed requirements on the drivers that the majority is prepared to acknowledge involve (in addition to fare-setting) the required acceptance of fare vouchers and coupons, vehicle inspections, a “How am I driving?” sticker, and training. These “limited employer controls are vastly outweighed by the general control that [the drivers] have over their working conditions.”<sup>66</sup> If these supposedly “limited employer controls” were really all that was involved in this case, then the “extent of control” factor might pose a closer question here. But what the majority omits from its analysis, the failure to see the bigger picture, is what actually matters most.

The majority relies on four other factors to find independent-contractor status, but none provide much help to SuperShuttle in carrying its burden of proof here. Indeed, contrary to the majority, some of these factors actually further support a finding of employee status.

Under Board precedent, the “method of payment” factor<sup>67</sup> points away from an employment relationship, because the drivers do not share the fares they collect from customers with SuperShuttle. As the majority explains, the rationale for this principle is that “[w]hen an employer does not share in a driver’s profits from fares, the employer lacks motivation to control or direct the manner and means of the driver’s work.” But here, as explained, SuperShuttle does indeed have the authority to control the manner and means of the driver’s work—and exercises it. Its “motivation” is obvious: it wishes to retain its contract with the Airport Board. Thus, the “method of payment” factor—a secondary consideration, at least as

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possible in the first place—it is not at all clear that there is a “competitive airport transportation market.” And SuperShuttle itself, in the UFA, has taken steps to eliminate competition in whatever market there is, by prohibiting drivers from working for competing companies. In short, the majority’s claim here is at best an unsupported speculation.

<sup>66</sup> The majority also cites, as evidence of independent-contractor status, that the drivers are required to indemnify SuperShuttle, citing *Dial-A-Mattress*, supra, for the proposition that “[i]n employment relationships, employers generally assume the risk of third-party damages.” 326 NLRB at 891. However, SuperShuttle’s contract with the Airport Board requires that all drivers be covered under its insurance policy, and SuperShuttle, in turn, requires the drivers to reimburse SuperShuttle for the insurance it provides to them. In short, the insurance-related dealings between SuperShuttle and the drivers are mediated by the Airport Board, making the situation in *Dial-A-Mattress* easily distinguishable. The majority insists that the role of the Airport Board here is immaterial, but just as controls on the drivers effectively imposed by the Airport Board (not SuperShuttle) are not probative of an employment relationship, so the role of the Airport Board in connection with liability insurance must be taken into account.

<sup>67</sup> See *Restatement (Second) of Agency* §220(2)(g) (distinguishing between “by time” or “by the job”).

the Board has explained it—should be given relatively little weight.<sup>68</sup>

The majority cites the terms of the Unit Franchise Agreement as evidence that the parties believed that they were creating an independent-contractor relationship.<sup>69</sup> Certainly the terms of the UFA are clear. But the agreement itself is imposed by SuperShuttle on the drivers, with no opportunity for negotiation, and at least 30 percent of the drivers demonstrated their (correct) view that they are employees, by signing union-authorization cards in connection with the Union’s representation petition filed with the Board. In similar circumstances, the Board has held that the parties’-belief factor “point[ed] in no clear direction,”<sup>70</sup> and it does little here toward satisfying SuperShuttle’s burden of proof.

Contrary to the majority, the “instrumentalities, tools, and place of work” factor at best (for the majority) points in no clear direction either, while there are very good reasons to treat it as weighing in favor of employee status. True, drivers own or lease their vans. But SuperShuttle plays an important role in this process through its affiliated leasing company (never mentioned by the majority)—which makes it possible for drivers with bad credit, in particular, to acquire a van (then outfitted to meet SuperShuttle’s specifications).<sup>71</sup> The majority says that drivers’ “full-time possession of their vans facilitates their ability to work whenever and wherever they choose,” but under the UFA, the drivers are *never* free to use their vans to work for any business except SuperShuttle. Perhaps even more significant, the drivers undeniably could not perform their work without SuperShuttle’s required communications equipment, which the company supplies and owns—and which drivers are also not free to use independently, unlike the traditional independent contractor and his work tools.

Finally, the majority cites the “supervision” factor as favoring independent-contractor status, invoking the drivers’ supposed “near-absolute autonomy in performing their daily work without supervision.” But drivers are subject to the SuperShuttle System at all times. Pursuant to the UFA, drivers must adhere to the “mandatory specifications, standards, operating procedures, and rules for the SuperShuttle system” set forth in the UFA and the Drivers’ Operations Manual, as well as the specific oper-

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<sup>68</sup> See *Metro Cab*, supra, 341 NLRB at 724–725 (inference of minimal control overcome by “evidence of the [e]mployer’s extensive control” over drivers’ work).

<sup>69</sup> See *Restatement (Second) of Agency* §220(2)(i).

<sup>70</sup> *Lancaster Symphony*, 357 NLRB at 1766.

<sup>71</sup> One might compare this case to *Argix Direct*, supra, where the Board observed that the putative employer did not own or lease any of the independent-contractor drivers’ trucks or provide them with financial help to acquire trucks. 343 NLRB at 1020.

ating procedures imposed by the trip generating system. It is certainly true that no SuperShuttle supervisor sits in the front passenger seat, telling drivers what to do, but under the UFA, SuperShuttle clearly would have the right to adopt such a practice, and drivers would have to no choice but to accept it. SuperShuttle enjoys broad authority, meanwhile, to discipline and terminate drivers, both for driving-related infractions and for other violations of the UFA. In any case, the *Restatement* notes that the “control or right to control needed to establish the relation of master and servant may be very attenuated.”<sup>72</sup> The “supervision” factor, as described in the *Restatement*, addresses “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.*”<sup>73</sup> Here, the unskilled drivers cannot fairly be called “specialists.” Indeed, as the *Restatement* notes, “[u]nskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price.”<sup>74</sup>

#### 4. Overall assessment of the Restatement factors

Having addressed the *Restatement* factors, the majority sums them up to conclude that the SuperShuttle drivers are independent contractors—without ever mentioning the established rule that it is SuperShuttle that bears the burden of proof.<sup>75</sup> The factors that the majority concedes support *employee* status—the drivers are unskilled, driving is not a distinct occupation, and “SuperShuttle’s involvement in the business”—are deemed “relatively less significant” and as “not outweigh[ing] those factors that support independent-contractor status.” But the majority makes little attempt to explain *why* this is so, beyond claiming that certain factors that assertedly support independent-contractor status—control of the “principal instrumentality” (i.e., the drivers’ vans), the drivers’ “nearly complete control . . . over their daily work schedules and working conditions,” and the “method of payment—all provide the drivers with “significant entrepreneurial opportunity.”

As already shown with reference to Board precedent and the *Restatement*, the majority’s analysis of the “control” factor is badly mistaken, largely ignoring the Unit Franchise Agreement and the extensive power it gives SuperShuttle over the drivers. Just as mistaken, for the same reasons, is the majority’s unjustified attempt to

minimize the importance of the factors that everyone acknowledges support finding employee status. Invoking “entrepreneurial opportunity” does not cure the fundamental flaws in the majority’s reasoning, not only because this move has no good basis in traditional common law principles, but also because the drivers’ supposed “entrepreneurial opportunity” here is minimal at best. As already demonstrated, it is SuperShuttle that creates, controls, and constrains that “opportunity.”

SuperShuttle drivers “bid” on trips, but unlike in conventional bidding (in which contractors contend for work), drivers here lack the ability to compete on price, quality of service, or any other distinguishing variable. Instead, drivers compete primarily to be the first to register interest in a job via the mandated Nextel device—hardly the type of competition that favors entrepreneurial skill. Moreover, drivers’ job selections are guided largely by geographic proximity—what one driver characterized as “commonsense stuff”—rather than any business strategy. In every instance of bidding, drivers are providing what amounts to the same service for fixed fares. Such a compensation arrangement “leaves little room for the drivers to increase their income through their own efforts or ingenuity.”<sup>76</sup> Indeed, it cannot be said that a driver “takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder.”<sup>77</sup> Notably, SuperShuttle is seemingly free to enter into non-negotiable franchise agreements with as many drivers as it wishes, allowing it to control the number of drivers “competing” for jobs, while continuing to fix fares that drivers may charge and the weekly payments they must make to SuperShuttle.

Unlike independent businesspeople who operate in the marketplace, SuperShuttle drivers are expressly prohibited from working for competing transportation companies.<sup>78</sup> The fact that vehicles are tailored specifically for use as part of the SuperShuttle system significantly limits their suitability for other business ventures in any case. And, as a practical matter, drivers’ considerable financial commitment to working for SuperShuttle—including their vehicle investment and their weekly system fees and insurance payments—all but requires them to work exclusively for the company simply to recoup expenses. Drivers do not set fares, offer discounts, solicit customers, or generate business in any way; nor do they “advertise for business or maintain any type of business opera-

<sup>72</sup> *Restatement (Second) of Agency* §220, comment d.

<sup>73</sup> *Id.*, §220(2)(c) (emphasis added).

<sup>74</sup> *Id.*, §220, comment i.

<sup>75</sup> See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001). Early in its opinion, citing *BKN*, the majority does recite that “[t]he party asserting independent-contractor status bears the burden of proof on that issue”

<sup>76</sup> *Slay Transportation*, *supra*, 331 NLRB at 1294.

<sup>77</sup> *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002).

<sup>78</sup> See *Stamford Taxi, Inc.*, *supra*, 332 NLRB at 1373.

tion or business presence.”<sup>79</sup> All these features of SuperShuttle’s relationship with its drivers “severely restrict the drivers’ entrepreneurial opportunities to engage in . . . business independent of the [employer]”<sup>80</sup> and “weigh heavily in favor of employee status.”<sup>81</sup>

The SuperShuttle drivers, in crucial respects, resemble the insurance agents found to be employees by the Supreme Court in *United Insurance*: (1) the drivers “do not operate their own independent businesses, but perform functions that are an essential part of the company’s normal operations;” (2) they “need not have any prior training or experience, but are trained by company supervisory personnel;” (3) they “do business in the company’s name and with considerable assistance from the company and its managerial personnel;” (4) the agreement “that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company;” and (5) they have what amounts to “a permanent working relationship with the company and which they may continue as long as their performance is satisfactory.”<sup>82</sup> In short, applying traditional common-law principles, and even taking “entrepreneurial opportunity” into account—in a way that recognizes the “reality of the actual working relationship”<sup>83</sup>—the Board should find that SuperShuttle has failed to carry its burden of proof to establish that the drivers are independent contractors.

#### IV.

Nearly 75 years ago, the *Hearst* Supreme Court recognized the difficulties inherent in applying common-law agency principles to employee-status questions under the National Labor Relations Act—and accordingly concluded that Congress could not have intended the com-

mon law to control.<sup>84</sup> But Congress responded by making clear that this was precisely what it intended. As the Court then observed in *United Insurance*, it is not for the Board, or even the federal appellate courts, to somehow mitigate the consequences of Congress’ choice by deploying magic phrases or shorthand formulas to simplify or rationalize the unwieldy common-law test. The majority’s approach here might easily be called the “economic *unrealities*” test—impermissibly departing from the common law (just like the “economic realities” test endorsed in *Hearst* and overruled by Congress), but in no way based on a real-world appraisal of working relationships.

If workers are independent contractors under the common law, then they cannot be employees under the National Labor Relations Act. But if, as here, workers are employees under the common law, then they must be treated as such for labor-law purposes. Calling the SuperShuttle drivers “entrepreneurs” or “small business owners” does not make them any less employees entitled to the protection of the National Labor Relations Act. The drivers sought that protection presumably because they understood, all too well, how limited their “entrepreneurial opportunity” really is. An agency charged with “encouraging the practice and procedure of collective bargaining” (in the words of the statute) should act accordingly, so that, if the drivers choose, the non-negotiable Unit Franchise Agreement might be replaced by a collective-bargaining agreement.

Dated, Washington, D.C. January 25, 2019

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

<sup>79</sup> See *Metro Cab Co.*, 341 NLRB at 724; *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000), *enfd.* 292 F.3d 777 (D.C. Cir. 2002).

<sup>80</sup> *Stamford Taxi*, *supra*, 332 NLRB at 1373.

<sup>81</sup> *Id.*; see also *Prime Time Shuttle*, *supra*, 314 NLRB at 840.

<sup>82</sup> 390 U.S. at 259. In two respects, the SuperShuttle drivers differ from the insurance agents: they do not account to SuperShuttle for the fares they collect, and they do not participate in the company’s benefit plans. But, for reasons explained, those distinctions do not outweigh the overwhelming similarities here.

<sup>83</sup> *Id.*

<sup>84</sup> The *Hearst* Court observed that the “assumed simplicity and uniformity, resulting from application of ‘common-law standards,’ does not exist.” 322 U.S. at 122. “Few problems in the law have given greater variety of application and conflict in results than the cases arising at the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.” *Id.* at 121 (footnote omitted).