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**Velox Express, Inc. and Jeannie Edge.** Case 15–CA–184006

August 29, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN,  
KAPLAN, AND EMANUEL

The issues in this case arise from Respondent Velox Express, Inc.’s allegedly unlawful misclassification of certain of its drivers as independent contractors and its discharge of Charging Party Jeannie Edge allegedly for raising group complaints about that classification.

Velox provides medical courier services under a contract with Associated Pathologists, LLC d/b/a PathGroup, which performs laboratory testing of medical specimens for facilities such as doctors’ offices, clinics, and hospitals. Velox’s drivers collect medical specimens from PathGroup’s customers in Arkansas and western Tennessee. Velox consolidates the specimens collected in Arkansas at its storage unit in Little Rock, Arkansas, and then transports them to its Memphis, Tennessee office, where the Arkansas specimens are further consolidated with the specimens collected in western Tennessee for delivery to PathGroup’s laboratory in Nashville, Tennessee.

As a threshold matter, the judge found, applying *Fed-Ex Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017), that Charging Party Edge and Velox’s other drivers who service its contract with PathGroup in western Tennessee and Arkansas—hereafter referred to collectively as “the drivers”—are employees under Section 2(3) of the National Labor Relations Act and, contrary to Velox’s claim, are therefore not excluded from the coverage of the Act as independent contractors. The judge further found that Velox violated Section 8(a)(1) by discharging Edge, misclassifying Edge and the other drivers as independent contractors, and maintaining a “Non-Disparagement” provision in its contracts with the drivers.<sup>1</sup>

On February 15, 2018, the National Labor Relations Board issued a Notice and Invitation to File Briefs in this matter, asking the parties and interested amici to address the following question:

<sup>1</sup> On September 25, 2017, Administrative Law Judge Arthur J. Amchan issued the attached decision. Velox filed exceptions and a supporting brief, the General Counsel filed an answering brief, and Velox filed a reply brief.

Under what circumstances, if any, should the Board deem an employer’s act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?<sup>2</sup>

The Board has considered the decision and the record in light of the exceptions and briefs<sup>3</sup> and has decided to affirm the judge’s rulings, findings,<sup>4</sup> and conclusions

<sup>2</sup> The General Counsel, Velox, and Charging Party Edge filed initial briefs. Velox filed a brief in response to the General Counsel’s initial brief, and Edge filed a brief in response to the amici’s briefs. Amicus/amici briefs were filed by American Federation of Labor and Congress of Industrial Organizations; American Trucking Associations, Inc.; Chamber of Commerce of the United States of America and Coalition for a Democratic Workplace, jointly; Customized Logistics and Delivery Association, National Home Delivery Association, and Truck Renting and Leasing Association, jointly; HR Policy Association; International Brotherhood of Teamsters; Massachusetts, Pennsylvania, and 10 other States, jointly; Mechanical Contractors Association of America and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, jointly; National Employment Law Project, Inc.; Signatory Wall and Ceiling Contractors Alliance; United Brotherhood of Carpenters and Joiners of America; Washington Legal Foundation; and World Floor Covering Association, Inc.

<sup>3</sup> No party excepts to the judge’s dismissal of the allegations that Velox violated Sec. 8(a)(1) by requiring drivers to sign the “Route Driver Agreement” that it issued on August 15, 2016, and by promulgating an overbroad work rule prohibiting the discussion of wages and other working conditions in a July 24, 2016 email.

Velox has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties and amici.

Additionally, Velox excepts to the omission from the transcript of certain excerpts from an audio recording of Edge’s June 2, 2017 deposition, which Velox played on the record during the hearing. In its brief in support of exceptions, Velox has transcribed the excerpts from Edge’s deposition that it argues should be in the transcript. We find it unnecessary to pass on Velox’s exception because even if we were to consider Velox’s suggested addendum to the transcript, it would not affect the outcome of this case.

Finally, Velox moved to strike the “History of the Case” section of the General Counsel’s brief in response to the Notice and Invitation to File Briefs, arguing that this section is not responsive to the question presented but instead improperly bolsters the General Counsel’s answering brief. We deny Velox’s motion to strike because the “History of the Case” section is relevant to the General Counsel’s proposed rationale for why Velox’s misclassification of its drivers as independent contractors violated Sec. 8(a)(1).

<sup>4</sup> Velox has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In finding Velox’s maintenance of the “Non-Disparagement” provision unlawful, the judge applied the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer’s maintenance of a facially neutral work rule would be unlawful “if employees would reasonably construe the language to prohibit [Sec.] 7 activity.” *Id.* at 647. Recently, the Board overruled the *Lutheran Heritage* “reasonably construe” test and an-

only to the extent consistent with this Decision and Order.<sup>5</sup>

Subsequent to the judge's decision in this case, the Board issued its decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), in which it overruled *FedEx*, supra, to the extent that the Board in *FedEx* "revised or altered the Board's independent-contractor test" by finding 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.'" *SuperShuttle*, supra, slip op. at 1 (quoting *FedEx*, supra at 620 (emphasis in *FedEx*)).

For the reasons discussed by the judge and the reasons discussed below in Section I, we find that under *SuperShuttle*, Velox has failed to establish that Edge and its other drivers are independent contractors. We find that they are therefore employees under Section 2(3) of the Act. Further, for the reasons discussed by the judge, we affirm his finding that Velox violated Section 8(a)(1) by discharging Edge for raising group complaints to Velox about its treatment of the drivers as employees<sup>6</sup> and her subsequent conduct, such as contacting an attorney to review the "Route Driver Agreement" issued by Velox, that was a logical outgrowth of her earlier protected activity.<sup>7</sup>

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nounced a new standard that applies retroactively to all pending cases. *Boeing Co.*, 365 NLRB No. 154, slip op. at 14–17 (2017). Accordingly, we shall sever and retain for further consideration the allegation that the "Non-Disparagement" provision is unlawful and issue a notice to show cause why that allegation should not be remanded to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening of the record, and issuance of a supplemental decision.

In his decision, the judge inadvertently stated that PathGroup executive Mike Fuller is PathGroup manager Kent Tidwell's subordinate. Fuller is actually Tidwell's superior. (Tr. 276.)

<sup>5</sup> We have amended the judge's conclusions of law and remedy and modified the judge's recommended Order consistent with our findings and legal conclusions herein and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

<sup>6</sup> Although Velox classified its drivers as independent contractors, Edge perceived, correctly, that it was treating its drivers as employees. Edge and others wanted to be independent contractors, and Edge raised group complaints to Velox that the drivers were not being treated as such.

<sup>7</sup> See, e.g., *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (finding that an individual employee's telephone call to the Department of Labor about the employer's lunch hour policy was protected activity because it was a logical outgrowth of employees' earlier complaints about the policy); *Every Woman's Place*, 282 NLRB 413, 413 (1986) (finding that an individual employee's telephone call to the Department of Labor about an overtime compensation issue was protected activity because it was a logical outgrowth of earlier complaints that employees made to the employer), enf. mem. 833 F.2d 1012 (6th Cir. 1987); see also *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991) (observing that "[the

However, as discussed in more detail below in Section II, after considering the briefs of the parties and amici, we hold that an employer's misclassification of its employees as independent contractors does not violate the Act. We therefore reverse the judge and dismiss the allegation that Velox's misclassification of Edge and the other drivers as independent contractors violated Section 8(a)(1).

#### I. VELOX'S DRIVERS ARE EMPLOYEES UNDER SECTION 2(3)

As the judge correctly stated, Section 2(3) of the Act excludes independent contractors from the definition of "employee" and thus from the Act's coverage. The party asserting independent-contractor status has the burden of proving such status. See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001). To determine whether a worker is an employee or an independent contractor, the Board applies the common-law agency test. See *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968).<sup>8</sup>

The judge first applied the common-law factors to the factual circumstances of this case. However, he then applied the "independent business" factor established in *FedEx*, a decision that, as discussed above, the Board subsequently overruled. See *SuperShuttle*, supra, slip op. at 1, 7–9 (explaining that the *FedEx* majority impermis-

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Board] will find that an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group").

<sup>8</sup> The Board considers the following list of nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency § 220 (1958):

- (a) The extent of control which, by 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 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.

See *SuperShuttle*, supra, slip op. at 1–2.

sibly altered the common-law agency test by diminishing the significance of entrepreneurial opportunity in the Board's independent-contractor analysis and reviving an "economic dependency" standard that Congress explicitly rejected with the Taft-Hartley amendments of 1947). Entrepreneurial opportunity is not a separate factor in the independent-contractor analysis or a mere aspect of a separate factor; instead, 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." *Id.*, slip op. at 9.<sup>9</sup> And "[w]here 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." *Id.*, slip op. at 11. As required by the Supreme Court's decision in *United Insurance*, the Board continues to consider all the common-law factors in the total factual circumstances of the particular case and treats no one factor or the principle of entrepreneurial opportunity as decisive. *SuperShuttle*, supra, slip op. at 11.

Evaluating the common-law factors through the prism of entrepreneurial opportunity, we find that on the facts of this case, Velox's drivers have little opportunity for economic gain or, conversely, risk of loss. Unlike in *SuperShuttle*, Velox's drivers do not have discretion to determine when and how long they work or to set their routes and the customers they service. Cf. *id.*, slip op. at 9, 14 (finding that the franchisee-drivers' discretion to choose when to work and which bids to accept provided them with significant entrepreneurial opportunity and weighed in favor of independent-contractor status). Instead, Velox assigns routes containing specific stops that the drivers must service on designated days. Moreover, Velox requires those specific stops to be serviced during specific time periods, as drivers cannot retrieve specimens prior to the designated pick-up time at each stop, and they must deliver all of the retrieved specimens to either Velox's Little Rock storage unit or its Memphis office in time for consolidation. Further, the drivers do not have a proprietary interest in their routes, and thus they cannot sell or transfer them, nor can they hire employees to service their routes.<sup>10</sup> Cf. *FedEx Home Deliv-*

<sup>9</sup> The Board is not required to mechanically apply the principle of entrepreneurial opportunity to each individual common-law factor in every case, especially where the factual circumstances of a case would make such an evaluation inappropriate or irrelevant. See *id.*, slip op. at 9 & fn. 17.

<sup>10</sup> The drivers cannot hire their own substitutes. Instead, they must ask Velox for permission to take time off, and Velox provides a substitute with whom it has a contract to cover the route. Drivers may recommend a suitable substitute, but Velox will still pay the substitute directly.

*ery v. NLRB*, 563 F.3d 492, 502 (D.C. Cir. 2009) ("[T]his case is relatively straightforward because not only do these contractors have the ability to hire others without [the employer's] participation, only here do they own their routes—as in they can sell them, trade them, or just plain give them away."). Velox's drivers can increase their income by choosing to service a weekday route and a weekend route, but the drivers who request a weekend route are more like employees who volunteer for overtime than independent contractors seizing an entrepreneurial opportunity. See *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1766 (2011), *enfd.* 822 F.3d 563 (D.C. Cir. 2016).

In addition, Velox's method for compensating the drivers does not afford them significant entrepreneurial opportunity. Velox pays drivers a flat rate, which it unilaterally sets, for servicing their routes each day. If PathGroup adds stops to a route, Velox unilaterally increases the rate; conversely, if PathGroup removes stops from a route, Velox unilaterally decreases the rate.<sup>11</sup> Because the drivers are guaranteed the same rate of compensation each day, over which they have no control, they do not have any real opportunity for economic gain (or, conversely, risk of loss) through their own efforts and initiative, especially where, as discussed above, they effectively must service their routes during certain specific time periods each day. See *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000), *enfd.* 292 F.3d 777 (D.C. Cir. 2002); *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000); *Roadway Package System, Inc.*, 326 NLRB 842, 852–853 (1998). Given those constraints, the drivers cannot work harder, let alone smarter, to increase their economic gain. The drivers receive the same amount of compensation no matter what they do.

The drivers' ownership of the principal instrumentality of their work—their vehicles—provides them with some

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Velox argues that the drivers can subcontract their routes because driver Bret Woods testified that he had his wife, who was also a Velox driver, cover his route on two or three occasions without informing Velox. However, no evidence suggests that Velox was aware of, let alone approved, Woods' conduct.

<sup>11</sup> Velox argues that drivers can negotiate their compensation, citing a March 2017 email exchange in which driver David Chastain asked Velox to "look at [his] cost and mileage again" because he only received an additional \$11 for new stops added to his route. In response, Velox increased the rate for Chastain's route by \$9. We do not find that Chastain negotiated with Velox. Rather, he simply requested that Velox consider making a technical correction to his pay. Moreover, Velox's claim that drivers can generally negotiate their compensation is contradicted by evidence that it unilaterally determined the flat rates for the routes serviced by drivers Edge and Woods *after* they signed their contracts. Thus, Edge and Woods had no opportunity to negotiate their compensation before contractually binding themselves to service those routes.

entrepreneurial opportunity for economic gain because they can use their vehicles to perform other paid work when they are not servicing their routes for Velox. Thus, this factor does weigh in favor of independent-contractor status. And in fact, driver Edge also worked as a contract phlebotomist and used her vehicle to drive to phlebotomy appointments.<sup>12</sup> However, the drivers' ability to use their vehicles to work for other employers does not so much reflect significant entrepreneurial opportunity as it does the part-time nature of their work for Velox. The drivers are not free to choose a more lucrative opportunity in lieu of servicing their routes for Velox on any given day because, as discussed above, they must service their routes each day or ask Velox for permission to take time off.

Overall, the record establishes that Velox's drivers must personally service preestablished routes, in which they have no proprietary interest, during certain specific time periods on designated days, and, for performing those services, they receive flat rates of compensation over which they have no control. Given those factual circumstances, we find that the drivers do not have any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative. Instead, Velox has "simply shifted certain capital costs [(i.e., the cost of the vehicles)] to the drivers without providing them with the independence to engage in entrepreneurial opportunities." *Roadway*, supra at 851.

Moreover, as discussed by the judge in greater detail, many of the other common-law factors, which do not relate to entrepreneurial opportunity given the specific facts here, also support a finding of employee status. The drivers have very little control over their day-to-day work for Velox.<sup>13</sup> Although the drivers are not subject to

in-person supervision while driving their routes—which would be highly impractical given the nature of their work—Velox still directs the drivers' work through its detailed procedures and its requirement that the drivers must respond to all of its communications, and Velox can discipline the drivers with fines. See *Slay Transportation*, supra at 1293–1294.<sup>14</sup> The drivers are not required to possess any special skills or education, as Velox provides the necessary training in a single 1 to 1-1/2 hour session. The parties have an open-ended relationship that resembles at-will employment, as the drivers sign 1-year contracts that automatically renew and that either party may terminate at any time with 1 day's notice. See *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984). Finally, Velox is in the business of providing courier services, and the drivers are fully integrated into Velox's normal operations and perform a function that is not merely a regular part of Velox's business but is at "the very core of its business." *Slay Transportation*, supra at 1294.<sup>15</sup>

In conclusion, after evaluating all of the common-law factors in the particular factual context of this case, we find that the many factors supporting employee status significantly outweigh the two factors supporting independent-contractor status, and the drivers have little entrepreneurial opportunity for economic gain. Therefore, we affirm the judge's finding that Velox failed to establish that its drivers are independent contractors. The drivers are thus employees under Section 2(3) of the Act.

## II. MISCLASSIFICATION DOES NOT VIOLATE THE ACT

The judge found that Velox violated Section 8(a)(1) by misclassifying its drivers as independent contractors. In the absence of any Board precedent to support such a violation, the judge reasoned that,

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sheets; and (6) instructs drivers on how to conduct themselves in its Little Rock storage unit and its Memphis office. Thus, the record shows that Velox has sought to manage the minute details of the drivers' day-to-day work. Such extensive control is strong evidence of employee status.

<sup>14</sup> Velox argues that the drivers' work is normally done by independent contractors in the locality because its predecessor on the PathGroup contract classified its drivers as independent contractors. However, Velox's predecessor lost its contract with PathGroup because of what Velox accurately describes in its brief in support of exceptions as "severe service issues"; thus, Velox has understandably sought to exercise much greater control over its drivers to avoid a similar fate.

<sup>15</sup> However, we find, contrary to the judge, that the "parties' belief" factor supports a finding of independent-contractor status because the parties' contracts state that the drivers are independent contractors; Velox does not withhold taxes, make any other payroll deductions, or provide benefits to the drivers; and Edge repeatedly told Velox that she was an independent contractor and took issue with any of its actions that were incompatible with that status. This finding does not, however, change our overall agreement with the judge that the drivers are statutory employees.

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<sup>12</sup> We note that the judge mischaracterized the "Non-solicitation" provision in the parties' contracts as a non-compete agreement. The "Non-solicitation" provision limits the drivers' entrepreneurial opportunity to some extent by prohibiting them from doing business with Velox's clients and customers or hiring Velox's workers for 2 years after the termination of their contracts, but it does not prevent the drivers from doing business with Velox's competitors either during or after the term of their contracts.

<sup>13</sup> Velox argues that any control mandated by its customer, PathGroup, is not evidence of employee status. Even if we were to ignore all evidence of control mandated by PathGroup, we would still find that Velox maintains extensive control over the drivers' day-to-day work. In addition to forms of control cited by the judge that PathGroup has not mandated, we note that Velox (1) prohibits drivers from having other people in their vehicles while driving their routes; (2) prohibits drivers from starting their routes early even if, for example, they just want to avoid rush hour traffic; (3) requires drivers to "gas up" their vehicles and eat before starting their routes; (4) requires drivers to answer all Velox emails, text messages, and telephone calls; (5) requires drivers to check and recheck their specimen totals on their route

[b]y misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection.

For the following reasons, we reverse the judge's decision in this regard and hold that an employer's misclassification of its employees as independent contractors does not violate the Act.

#### A. Positions of the Parties and Amici

Charging Party Edge and certain amici<sup>16</sup> have taken the position that an employer's misclassification of its employees as independent contractors, standing alone, violates Section 8(a)(1) in all circumstances.<sup>17</sup> They argue that by misclassifying employees as independent contractors, an employer, regardless of its motive or intent, inherently interferes with, restrains, and coerces those employees in the exercise of their Section 7 rights because the employer effectively conveys that the misclassified employees do not have any rights or protections under the Act when, in fact, they do. See *American Freightways Co.*, 124 NLRB 146, 147 (1959) (“[I]nterference, restraint, and coercion under Sec[.] 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.”). Relatedly, Edge and these amici argue that a misclassification effectively conveys to employees that engaging in union or other protected activities is futile. See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6 (2015). Further, they assert that a misclassification preemptively prevents the misclassified employees from engaging in Section 7 activity. See *Parexel International, LLC*, 356 NLRB 516, 518–519 (2011).

The General Counsel, the Respondent, and certain amici<sup>18</sup> take the position that an employer's misclassifi-

<sup>16</sup> Those amici are International Brotherhood of Teamsters; Mechanical Contractors Association of America and United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States of America and Canada, AFL–CIO, jointly; National Employment Law Project, Inc.; Signatory Wall and Ceiling Contractors Alliance; and United Brotherhood of Carpenters and Joiners of America.

<sup>17</sup> For brevity, we will at times refer to this broad theory that a misclassification, standing alone, violates the Act in all circumstances as a “stand-alone misclassification violation.” The judge's rationale for finding a misclassification violation falls under this broad theory.

<sup>18</sup> Those amici are American Trucking Associations, Inc.; Chamber of Commerce and Coalition for a Democratic Workplace, jointly; Cus-

tomized Logistics and Delivery Association, National Home Delivery Association, and Truck Renting and Leasing Association, jointly; HR Policy Association; and Washington Legal Foundation.

tion of its employees as independent contractors, standing alone, does not violate the Act. They argue that an employer merely expresses a legal opinion when it informs its workers that they are independent contractors, and that an employer's statement of a legal opinion, even if that opinion is ultimately mistaken, is protected by Section 8(c). In addition, they contend that when Congress excluded independent contractors from the Act's coverage, it did not intend to unduly restrict business formation by penalizing employers for making mistakes when initially classifying their workers, especially given that classification decisions are rendered complicated not only by the multifactor common-law standard for purposes of the Act, but also because employers must consider a variety of independent-contractor standards under different Federal, State, and local laws and regulations. They further argue that by finding a stand-alone misclassification violation, the Board would impermissibly shift the burden to the employer to prove that its classification did not violate the Act.<sup>19</sup> Finally, they assert that finding a stand-alone misclassification violation could severely complicate the Board's administration and enforcement of the Act, as the rationale for finding such a violation would apply equally to the misclassification of other types of workers, such as supervisors and managers.

Certain parties and amici have proposed alternative legal theories for finding that an employer's misclassification violates the Act in more limited circumstances. The General Counsel has proposed that “an employer violates Section 8(a)(1) only when the employer actively uses the misclassification of its employees as independent contractors to interfere with activity that is protected by Section 7.” Relatedly, Edge and the AFL–CIO have proposed that an employer's continued misclassification of its employees as independent contractors violates Section 8(a)(1) in the context of other related violations of the Act. The 12 States that jointly filed an amici brief (the States) have proposed that an employer violates Section 8(a)(1) when it purposefully misclassifies its employees. Finally, Edge and the International Brotherhood of Teamsters have proposed that, even if a misclassification itself is not a violation of the Act, the remedy for violations that involve misclassified employees should include reclassification of the misclassified employees.

#### B. Discussion

The Board has never previously found that an employer's misclassification of its employees as independent

tomized Logistics and Delivery Association, National Home Delivery Association, and Truck Renting and Leasing Association, jointly; HR Policy Association; and Washington Legal Foundation.

<sup>19</sup> We describe this argument fully in the Discussion section, below.

contractors (or as any other classification excluded from the Act's coverage, such as supervisors or managers), standing alone, is a per se violation of the Act. After reviewing the briefs of the parties and amici, we agree with the General Counsel, the Respondent, and like-minded amici that an employer does not violate the Act by misclassifying its employees as independent contractors.<sup>20</sup>

We begin with the relevant provision of the Act. Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. Charging Party Edge and the amici in support of a stand-alone misclassification violation argue that an employer's misclassification of its employees as independent contractors inherently coerces employees in the exercise of their Section 7 rights and does so regardless of the employer's intent. They note the well-settled principle that a Section 8(a)(1) violation may be found even without unlawful motive. See *American Freightways*, supra at 147. But this argument assumes that a misclassification of employees as independent contractors is, in fact, coercive. We are unpersuaded that it is. An employer's mere communication to its workers that they are classified as independent contractors does not expressly invoke the Act. It does not prohibit the workers from engaging in Section 7 activity. It does not threaten them with adverse consequences for doing so, or promise them benefits if they refrain from doing so. Employees may well disagree with their employer, take

the position that they are employees, and engage in union or other protected concerted activities. If the employer responds with threats, promises, interrogations, and so forth, *then* it will have violated Section 8(a)(1), but not before.

When an employer decides to classify its workers as independent contractors, it forms a legal opinion regarding the status of those workers, and its communication of that legal opinion to its workers is privileged by Section 8(c) of the Act, which states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit." Moreover, the communication of that legal opinion is no less protected by Section 8(c) if it proves to be erroneous. See *North Star Steel Co.*, 347 NLRB 1364, 1367 fn. 13 (2006) ("Sec. 8(c) does not require fairness or accuracy.") (internal quotations omitted); *Children's Center for Behavioral Development*, 347 NLRB 35, 36 (2006) ("[T]here is nothing unlawful in stating a legal position, even if it is later rejected.")<sup>21</sup>

Erroneously communicating to workers that they are independent contractors does not, in and of itself, contain any "threat of reprisal or force or promise of benefit." In this regard, it is important to distinguish the type of per se violation urged by Edge and the supporting amici from cases in which the Board has found violations

<sup>20</sup> Our dissenting colleague claims that we are unnecessarily "reaching out" to decide the stand-alone misclassification issue. She is incorrect. The complaint alleges a stand-alone misclassification violation, i.e., that "[s]ince about May 1, 2016, [Velox] has misclassified its employee-drivers as independent contractors thereby inhibiting them from engaging in Sec[.] 7 activity and depriving them of the protections of the Act." The judge found a stand-alone misclassification violation, concluding that Velox violated Sec. 8(a)(1) by "[c]lassifying Jeannie Edge and other driver/couriers servicing PathGroup as independent contractors, rather than as employees." And the Respondent excepts to the judge's stand-alone misclassification violation finding. Thus, this case squarely presents the Board with the question of whether Velox's misclassification of its drivers as independent contractors, standing alone, violated the Act. Moreover, as discussed above, the Board, including our dissenting colleague, invited the parties and interested amici to brief the following question: "Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Sec[.] 8(a)(1) of the Act?" Nevertheless, the dissent now contends that we should avoid answering this question either by finding a misclassification violation on narrower grounds than those on which the judge relied or by ordering a remedy that would make it unnecessary to decide the issue. For the reasons discussed below, we reject the dissent's alternative proposals for disposing of the misclassification allegation. Therefore, we must and do answer the stand-alone misclassification question squarely presented—and briefed at length—in this case.

<sup>21</sup> Contrary to the dissent's contention, our finding that an employer's communication of its legal opinion that its workers are independent contractors, standing alone, is privileged by Sec. 8(c) even if that opinion turns out to be incorrect is not inconsistent with *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). In *Dal-Tex*, the Board held that an employer's implied threats during pre-election campaign speeches that it will refuse to bargain if its employees select a union as their representative—even when stated as a legal position—are not protected by Sec. 8(c) but instead interfere with employees' exercise of their Sec. 7 rights in violation of Sec. 8(a)(1) and "with the exercise of a free and untrammelled choice in an election." *Id.* at 1785–1787. Our decision today does not in any way "sanction implied threats couched in the guise of statements of legal position." *Id.* at 1787. Instead, we merely find that, unlike the implied threats in *Dal-Tex*, an employer's communication to its workers of its legal opinion regarding their status is privileged by Sec. 8(c) because, for the reasons discussed at length in this decision, communication of that legal opinion does not, on its own, reasonably tend to interfere with their Sec. 7 rights.

Edge and some like-minded amici argue that a misclassification is not protected by Sec. 8(c) because it involves more than just an employer expressing a legal opinion that its workers are independent contractors, as the employer must also treat its workers in a way that is inconsistent with that classification. However, an employer's communication to its workers of its legal opinion that they are independent contractors *is* the conduct that is alleged to be coercive under the stand-alone misclassification theory. An employer's treatment of its workers as statutory employees is not alleged to be (and would not be) unlawful under the Act.

stemming from misclassification. Those cases involved statements that referred to Section 7 activity, either expressly or by clear implication, or classification decisions that were in retaliation for protected activity. For example, the Board has found that an employer violated the Act by invoking a misclassification to expressly prohibit employees from engaging in Section 7 activity or to indicate that engaging in union or other protected activities would be futile. See, e.g., *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6 (finding that, in response to a union organizing campaign, the employer, which had misclassified its employees as independent contractors, violated Sec[.] 8(a)(1) by “informing employees that it would never accept a ‘boss/employee relationship,’” which “indicated that union organizing would be futile”);<sup>22</sup> see also *Wal-Mart Stores*, 340 NLRB 220, 225 (2003) (finding that the employer’s instruction to four employees whom it misclassified as “department managers” that they could not participate in union activities constituted an unfair labor practice where the employer failed to demonstrate that they were, in fact, Sec. 2(11) supervisors). The Board has also found that employers unlawfully reclassified their employees as independent contractors in order to interfere with their union activities. See, e.g., *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1049–1051 (1979) (finding that the employer violated the Act when, in response to its delivery drivers’ union organizing activities, it attempted to reclassify those drivers as independent contractors and discharged drivers who refused to change status), enf. in relevant part 633 F.2d 1054 (3d Cir. 1980); *Houston Chronicle Publishing Co.*, 101 NLRB 1208, 1211–1215 (1952) (finding that the employer’s reclassification of its

<sup>22</sup> Our dissenting colleague argues that *Sisters' Camelot* is closely on point to the situation here. She fails to acknowledge, however, the significance of the fact that in *Sisters' Camelot*, the employer stated that “it would never accept a ‘boss/employee relationship’” in the midst of its misclassified employees’ union organizing effort and in response to their demand that it recognize and bargain with their newly formed union. *Id.*, slip op. at 6, 13–14. We do not dispute that in those specific circumstances, the employer’s statement “indicated that union organizing would be futile.” *Id.*, slip op. at 6. To be clear, we do not, as our dissenting colleague seems to think, suggest that an employer’s statements to its workers regarding their classification can only be coercive when made directly in response to their union activity. Instead, where, as here, an employer merely tells its workers that they are independent contractors without more—i.e., outside the context of union organizing or other protected activities and without expressly invoking the Act or mentioning union or other protected activities—we do not believe that the workers would be interfered with, restrained, or coerced in the exercise of their Sec. 7 rights simply because it turns out that the employer was wrong. As our dissenting colleague acknowledges, an employer’s misclassification of its employees is coercive only if, “as reasonably understood by employees, it implies ‘[a] threat of reprisal’ if employees engage in Sec[.] 7 activity.” No such threat is implied here.

employees as independent contractors was unlawfully motivated by and intended to defeat their union organizing activities), enf. denied 211 F.2d 848 (5th Cir. 1954).<sup>23</sup>

However, it is a bridge too far for us to conclude that an employer coerces its workers in violation of Section 8(a)(1) whenever it informs them of its position that they are independent contractors if the Board ultimately determines that the employer is mistaken. We do not agree with our dissenting colleague, Charging Party Edge, and like-minded amici that by doing so, an employer inherently threatens that those employees are subject to termination or other adverse action if they exercise their Section 7 rights or that it would be futile for them to engage in union or other protected activities. In and of itself, an employer’s communication of its position that its workers are independent contractors simply does not carry either implication.<sup>24</sup>

<sup>23</sup> Several amici cite *Parexel*, supra, in support of finding a stand-alone misclassification violation. In that case, the Board found that an employer violated Sec. 8(a)(1) by discharging an employee who had not yet engaged in Sec. 7 activity as “a pre-emptive strike to prevent her from engaging in activity protected by the Act,” and specified that “[w]hat is critical . . . is not what the employee did, but rather the employer’s intent to suppress protected concerted activity.” *Id.* at 518–519 (internal quotation omitted; emphasis added). As discussed above, if an employer’s decision to classify its employees as independent contractors was intended to suppress union or other protected activity, the Board may find that the employer violated the Act. However, Edge and the amici in support of a stand-alone misclassification violation argue that an employer’s misclassification of its employees as independent contractors violates Sec. 8(a)(1) regardless of the employer’s motive or intent. Thus, *Parexel* does not support their theory.

The States rely on *Parexel* to propose that an employer violates Sec. 8(a)(1) when it purposefully misclassifies its employees. The States do not clearly explain what constitutes a purposeful misclassification, but they argue that in the present case, Velox’s purposeful intent to misclassify its drivers as independent contractors is “evident from the lack of circumstances upon which it could reasonably have concluded that its drivers were anything other than statutory employees.” While the Board may find that an employer violated the Act by classifying its workers as independent contractors to interfere with or suppress their union or other protected activities, we will not infer an employer’s motive solely from the strength or weakness of the case that the employer presented to establish independent-contractor status.

We express no view as to the soundness of the *Parexel* “pre-emptive strike” theory.

<sup>24</sup> We agree with our colleague that the determination of whether a misclassification would reasonably tend to interfere with employees’ exercise of their Sec. 7 rights should be made from the perspective of employees, but we disagree with her opinion regarding what employees would reasonably perceive. When viewed from employees’ perspective, an employer’s communication of its legal opinion that its workers are independent contractors, in the absence of any ongoing union or other protected activities and without expressly invoking the Act or mentioning union or other protected activities, simply would not reasonably tend to interfere with employees’ exercise of their Sec. 7 rights.

Further, we reject the dissent’s inflammatory contention that an employer-imposed contract—like the “Independent Contractor Agreement” that Velox required Edge and the other drivers to sign—stating

We additionally find that important legal and policy concerns weigh against finding a stand-alone misclassification violation.<sup>25</sup> First, to form a legal opinion as to its workers' status under the Act, an employer has the unenviable task of applying the common-law agency test. The conclusion to be drawn from the application of that test may be far from self-evident. As the Supreme Court has stated, "[t]here 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." *United Insurance*, 390 U.S. at 258. An employer must consider all 10 of the common-law factors found in the Restatement (Second) of Agency § 220, with no one factor being decisive. Further complicating matters, the Board's independent-contractor analysis is dependent on the particular factual circumstances presented, and employers cannot necessarily rely on Board precedent that may appear to present similar circumstances on the surface, as "the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors." *Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982). Moreover, reasonable minds can, and often do, disagree about independent-contractor status when presented with the same factual circumstances. For example, Board members regularly reach different conclusions

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that the signatory worker is an independent contractor is "functionally equivalent to a 'yellow-dog' contract," i.e., a contract obligating a statutory employee to refrain from union membership or engaging in union or other protected activities. The "Independent Contractor Agreement" does not even mention the Act or union or other protected activities, let alone require the signatory worker to expressly agree to refrain from engaging in those activities. Moreover, one of the factors relevant to determining independent-contractor status is "[w]hether or not the parties believe they are creating the relation of master and servant," Restatement (Second) of Agency § 220(i), and an independent-contractor agreement bears on that factor as evidence that the parties did *not* so believe. Thus, whenever an employer uses an independent-contractor agreement and turns out to be mistaken—and independent-contractor determinations are among the most difficult and disagreement-prone that the Board is called upon to make—our colleague would brand it with the most shameful label in the lexicon of traditional labor law. Such overreaching refutes itself.

<sup>25</sup> Our dissenting colleague accuses us of "protecting the power of employers to structure working relationships to their benefit" (emphasis in original) at the expense of employees' Sec. 7 rights. To the contrary, we have already explained why an employer's misclassification, standing alone, neither coerces nor interferes with employees' exercise of their Sec. 7 rights. We discuss the legal and policy concerns below to demonstrate that it would not only be contrary to the Act to find a stand-alone misclassification violation, but that the negative consequences that would result further caution against finding such a violation. Moreover, the dissent's assumption that only employers benefit from independent-contractor arrangements ignores the reality that there are good reasons why an individual might *prefer* to be an independent contractor, and it disregards that Charging Party Edge *herself* preferred to be an independent contractor and protested against being treated as an employee.

when faced with questions concerning independent-contractor status,<sup>26</sup> and reviewing courts often disagree with the Board's application of the common-law agency test and deny enforcement of Board decisions finding employee status.<sup>27</sup>

Independent-contractor determinations are difficult and complicated enough when only considering the Act, but the Act is not the only relevant law. An employer must consider numerous Federal, State, and local laws and regulations that apply a number of different standards for determining independent-contractor status. Unsurprisingly, employers struggle to navigate this legal maze. Further, in classifying its workers as independent contractors, an employer may be correct under certain other laws but wrong under the Act—which is all the more reason why it would be unfair to hold that merely communicating that classification is unlawful.

Moreover, once a classification determination is made by the employer, it *must* be communicated to its workers. An employer must first inform its workers of their classification status before it can intelligently discuss other facets of their business relationship. Further, as discussed above, the common-law test includes consideration of whether the parties believed that they were entering into an independent-contractor relationship. An employer must communicate its belief that its workers are independent contractors to satisfy that factor. If the Board were to establish a stand-alone misclassification violation, it would penalize employers for taking this step whenever the employer's belief turns out to be mistaken.

In light of these considerations, the Board would significantly chill the creation of independent-contractor

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<sup>26</sup> See, e.g., *SuperShuttle*, 367 NLRB No. 75, slip op. at 12–15, 23–29 (majority found that employer's franchisee-drivers were independent contractors; Member McFerran dissented); *FedEx*, 361 NLRB at 621–625, 642 (majority found that employer's drivers were statutory employees; Member Johnson dissented); *Lancaster Symphony Orchestra*, 357 NLRB at 1763–1766, 1767–1769 (majority found that employer's musicians were statutory employees; Member Hayes dissented); *Arizona Republic*, 349 NLRB 1040, 1043–1046, 1046–1047 (2007) (majority found that employer's newspaper carriers were independent contractors; Member Liebman dissented); *St. Joseph News-Press*, 345 NLRB 474, 478–483, 485–486 (2005) (majority found that employer's newspaper carriers were independent contractors; Member Liebman dissented); *Slay Transportation*, 331 NLRB at 1293–1294, 1296–1297 (majority found that employer's drivers were statutory employees; Member Brame dissented).

<sup>27</sup> See, e.g., *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127–1128 (D.C. Cir. 2017); *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305, 1311–1314 (11th Cir. 2016); *FedEx Home Delivery*, 563 F.3d at 498–504; *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858–861 (D.C. Cir. 1995); *North American Van Lines v. NLRB*, 869 F.2d 596, 600–604 (D.C. Cir. 1989); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 920–925 (11th Cir. 1983); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 357–360 (9th Cir. 1975).



relationships by holding that an employer's misclassification of its employees as independent contractors, standing alone, is a per se violation of the Act. Any decision by an employer to classify its workers as independent contractors would subject the employer to a potential unfair labor practice charge, and with it the possibility of protracted litigation—even if it is ultimately determined that the employer was correct. To avoid this risk, employers may decide to forgo entering into or continuing independent-contractor relationships. Perhaps that is the goal of some proponents of a stand-alone misclassification violation. We do not share it. More importantly, we do not believe Congress intended to chill such relationships. In the Taft-Hartley amendments, Congress excluded independent contractors from the definition of “employee” in Section 2(3) of the Act. It did so in response to the Board's and the Supreme Court's more expansive interpretation of the definition of “employee” in the early years of the Act. See *SuperShuttle*, supra, slip op. at 9. Thus, Congress sought to preserve independent-contractor relationships. The Act, as stated in Section 1, was intended to “eliminate the causes of certain substantial obstructions to the free flow of commerce,” not to create new obstructions to the formation of legitimate business relationships.

Moreover, the Supreme Court has stated that an employer “must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice.” *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981). Creating a stand-alone misclassification violation would fly in the face of the Court's edict. Given the uncertainties that beset independent-contractor determinations, if the Board were to establish a stand-alone misclassification violation, an employer that classifies its workers as independent contractors would most assuredly *not* have a sufficient degree of certainty that the Board would not later label its communication of that legal opinion to its workers an unfair labor practice. Therefore, we will continue to treat an employer's independent-contractor determination and communication of it to its workers as a legal opinion protected by Section 8(c).<sup>28</sup>

<sup>28</sup> We readily acknowledge that some employers' misclassification of individuals as independent contractors may be intentional rather than mistaken. The General Counsel in this case has presented no evidence to suggest that Velox's misclassification of its drivers was intentional. As previously stated, if the General Counsel can prove the misclassification was intended to interfere with Sec. 7 rights, most notably the right to organize, an 8(a)(1) violation can be found. But in many, if not most cases, intentional misclassification is designed to interfere with rights under other Federal and State statutes involving an employer's tax, social security, and overtime obligations to employees. While we

We also agree with the General Counsel, the Respondent, and like-minded amici that establishing a stand-alone misclassification violation would improperly shift the burden of proof in unfair labor practice cases. Section 10(c) of the Act places the burden on the General Counsel to establish by a preponderance of the evidence that the respondent engaged in an unfair labor practice. See also *Spectrum Health–Kent Community Campus v. NLRB*, 647 F.3d 341, 347 fn. 5 (D.C. Cir. 2011) (“The Board's General Counsel bears the burden of proving a violation of the NLRA by a preponderance of the evidence.”). Determining whether an employer has violated Section 8(a)(1) of the Act involves a two-step inquiry. First, if employee status is in dispute, the Board must determine if the workers at issue are employees covered by the Act. If they are, the Board then determines if the employer interfered with, restrained, or coerced them in the exercise of their Section 7 rights. By establishing a stand-alone misclassification violation, the Board would condense this two-step inquiry into the threshold issue of employee status, as the employer would be strictly liable if the Board finds that it misclassified its workers. What is more troubling is that this would also shift the burden from the General Counsel to prove that the employer violated Section 8(a)(1) to the employer to prove that it did not. As the party asserting independent-contractor status, the employer has the burden to establish that status. See *BKN*, 333 NLRB at 144. Thus, if the General Counsel alleged that an employer misclassified its workers as independent contractors and therefore violated the Act under the proposed stand-alone misclassification theory, he would not have the burden of proving that the workers were employees. Rather, the General Counsel could simply *allege* employee status, and the employer would have the burden of proving that the workers were independent contractors, which would effectively place on the employer the burden of proving that it did not violate the Act. This would be contrary to Section 10(c) of the Act.<sup>29</sup>

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do not condone such employer misconduct, it does not, without more, warrant finding a stand-alone 8(a)(1) violation.

<sup>29</sup> Our dissenting colleague proposes that where the complaint alleges only a stand-alone misclassification violation, the Board could require the General Counsel to establish that the allegedly misclassified workers are in fact employees and not independent contractors. We reject her proposal, as it would arbitrarily shift the burden of proving independent-contractor status depending on the circumstances and, in any event, would not fully address our concerns articulated above. First, her proposal would require placing the burden to establish independent-contractor status on different parties in different types of cases. When the complaint alleges only a stand-alone misclassification violation, the dissent would shift the burden to the General Counsel to prove that workers are not independent contractors. But apparently, the dissent would continue to place the burden of proving independent-

Finally, we agree with the General Counsel, the Respondent, and like-minded amici that establishing a stand-alone misclassification violation would have far-reaching implications for the Board's treatment of other statutory exclusions. Neither Charging Party Edge nor the amici supporting a stand-alone misclassification violation have explained how the rationale for finding such a violation would not apply equally to an employer's misclassification of its employees as supervisors or any other category of workers excluded from the Act's coverage. We do not believe that the rationale for finding a stand-alone misclassification violation could be limited, in any principled manner, to independent-contractor misclassifications alone, and the implications of extending it to other statutory exclusions are significant.<sup>30</sup> The Charging Party and supporting amici have no real answer for this, other than to say that those exclusions are not currently before us. That answer will not do.

Even if misclassification, standing alone, does not violate the Act, the General Counsel, Charging Party Edge, and the AFL–CIO argue that Velox's misclassification of its drivers as independent contractors still violated Section 8(a)(1) here. Although they frame their theories slightly differently,<sup>31</sup> they all essentially argue that Velox's misclassification of its drivers as independent contractors became coercive when Velox discharged Edge for raising group complaints regarding this issue. They contend that unless Velox is ordered to reclassify its

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contractor status on the employer when the complaint alleges that the employer has unlawfully misclassified its employees and "taken any other action that would be unlawful if the workers had employee status." In the latter circumstance, the employer would still have the burden of proving that it did not violate the Act by classifying its employees as independent contractors, contrary to Sec. 10(c) as explained above.

<sup>30</sup> For example, in representation cases, disputes over particular workers' supervisory status under Sec. 2(11) are typically resolved through ballot challenges; such disputes do not typically result in a rerun election. If misclassification of employees as supervisors violated Sec. 8(a)(1), however, then the Board would potentially have to set aside representation elections in any consolidated C- and R-case proceeding where, in the context of an organizing drive, an employer asserts incorrectly (and post-petition) that particular workers are supervisors, unless the violation is de minimis. See *Airstream, Inc.*, 304 NLRB 151, 152 (1991) ("A violation of Sec[.] 8(a)(1) found to have occurred during the critical election period is, a fortiori, conduct which interferes with the results of the election unless it is so de minimis that it is "virtually impossible to conclude that [the violation] could have affected the results of the election.") (quoting *Enola Super Thrift*, 233 NLRB 409, 409 (1977)), enfd. mem. 963 F.2d 373 (6th Cir. 1992).

<sup>31</sup> As stated above, the General Counsel has proposed that an employer's misclassification is unlawful when the employer actively uses it to interfere with Sec. 7 activity, while Edge and the AFL–CIO have proposed that a misclassification becomes unlawful in the context of other related violations of the Act. Edge expressed support for the General Counsel's "active use" theory in her brief in response to the amici's briefs.

drivers, the drivers will be chilled from raising similar complaints or engaging in other protected activity regarding their misclassification out of fear that they will suffer the same fate as Edge. We agree with the judge that Velox violated Section 8(a)(1) by discharging Edge, and we do not dispute that Velox's unlawful discharge of Edge may chill its other drivers from engaging in protected activity, particularly regarding their misclassification. However, absent extraordinary circumstances warranting special remedies, the Board has long regarded its notice-posting remedy as sufficient to dispel the chilling effect of employers' unfair labor practices. See, e.g., *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940) (explaining that the notice's declaration "that the company would cease and desist from hampering, interfering with and coercing them in selection of a bargaining agent, which the Board found the company had done successfully in the past, was essential if the employees were to feel free to exercise their rights without incurring the company's disfavor"); *J. Picini Flooring*, 356 NLRB 11, 12 (2010) ("[Notices] help to counteract the effect of unfair labor practices on employees by informing them of their rights under the Act and the Board's role in protecting the free exercise of those rights. They inform employees of steps to be taken by the respondent to remedy its violations of the Act and provide assurances that future violations will not occur."); *Chet Monez Ford*, 241 NLRB 349, 351 (1979) ("[T]he Board long ago determined that the posting of a remedial notice for a 60-day period—subsequent to its Decision containing the unfair labor practice findings—is necessary as a means of dispelling and dissipating the unwholesome effects of a respondent's unfair labor practices."), enfd. mem. 624 F.2d 193 (9th Cir. 1980). We do not find it necessary to create a new misclassification violation to remedy the chilling effect of Velox's unlawful discharge of Edge.<sup>32</sup> Instead, as the Board has done for the entirety of its existence, we will order—in addition to the standard remedies due Edge for her unlawful discharge, including reinstatement and backpay—a notice-posting remedy to combat the chilling effect of the unlawful discharge.<sup>33</sup>

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<sup>32</sup> The General Counsel also argues that Velox's reaffirmance of the drivers' putative independent-contractor status in response to Edge's protected complaints constituted active use of the misclassification to interfere with Sec. 7 rights. However, it would not be appropriate for us to find a misclassification violation to eliminate the chilling effect of conduct that the General Counsel did not specifically allege to be unlawful.

<sup>33</sup> We do not accept that in any circumstances, an employer's misclassification itself will become unlawful because of other related conduct by the employer. If the General Counsel determines that the related conduct is unlawful, then he should allege it as a violation of the Act; if the Board agrees, it will provide the appropriate remedy as it

In sum, we decline to hold that an employer's misclassification of its employees as independent contractors, standing alone, violates the Act. Further, we do not find that Velox's misclassification here violated the Act on the basis that it occurred in the context of a related violation of the Act or that Velox actively used it to interfere with the drivers' Section 7 rights. Accordingly, we reverse the judge's finding that Velox violated Section 8(a)(1) of the Act by misclassifying its drivers as independent contractors, and we will dismiss that allegation of the complaint.

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always has done. The creation of a new misclassification violation is not necessary to remedy the chilling effect of other unlawful conduct.

Our dissenting colleague argues that the situation here is analogous to cases where the Board has found that the application of an otherwise lawful work rule to restrict Sec. 7 activity renders the rule itself—and not just its application—unlawful. See, e.g., *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 7–8 & fn. 18 (2016). Although our colleague has correctly described extant precedent, we have previously expressed willingness to reconsider that precedent in a future appropriate case. See *Desert Cab, Inc. d/b/a ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 fn. 1 (2019) (Chairman Ring and Member Kaplan, concurring); *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 1 fn. 4 (2018) (Member Emanuel, concurring). In any event, we find that precedent inapplicable here. As stated above, we agree with the judge that Velox's decision to discharge Edge was unlawfully motivated by Edge's protected concerted complaints that Velox was treating its drivers as employees. However, because the evidence does not show that Velox cited or referred to Edge's classification as an independent contractor or its "Independent Contractor Agreement" with Edge as the basis for discharging her, we cannot find that Velox applied the misclassification to restrict her Sec. 7 activity. Accordingly, the dissent fails in her attempt to draw an analogy between this case and those where the Board has found work rules unlawful because employers applied them to restrict Sec. 7 activity. Cf. *North West Rural Electric*, supra, slip op. at 1 (finding unlawful two policies where the employer's manager testified that the discharge of an employee for a protected Facebook post was pursuant to those policies, and its supervisor told the employee at the time of the discharge that the employer "had 'policies in effect' prohibiting his Facebook post"); *Cayuga Medical Center at Ithaca, Inc.*, 365 NLRB No. 170, slip op. at 2 (2017) (finding unlawful an employer's customer service rules where the employer cited them as the basis for issuing an unlawful verbal warning to an employee and subsequently referenced its customer service requirements during a meeting in which it unlawfully demoted that employee), enfd. mem. per curiam 748 Fed. Appx. 341 (D.C. Cir. 2018); *Medco Health*, supra, slip op. at 7–8 (finding unlawful a dress code provision prohibiting apparel containing "confrontational," "insulting," or "provocative" statements where the employer characterized the message on a union shirt as "insulting" and "confrontational" in instructing an employee to remove the shirt). Thus, Velox's unlawful discharge of Edge does not compel a separate finding that Velox's misclassification of its drivers as independent contractors is also unlawful. Simply finding that the discharge violated the Act and ordering the traditional remedies for such a violation (including reinstatement, backpay, and a notice posting) will suffice to remedy the Respondent's unlawful conduct.

#### AMENDED CONCLUSIONS OF LAW

1. The Respondent, Velox Express, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by discharging employee Jeannie Edge on August 21, 2016.

3. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### AMENDED REMEDY

Having found that Velox engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Velox violated Section 8(a)(1) by discharging employee Jeannie Edge, we shall order Velox to offer her full reinstatement to her former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order Velox to compensate Jeannie Edge for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, Velox shall be required to compensate Jeannie Edge for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, we shall order Velox to remove from its files any reference to the unlawful discharge of Jeannie Edge, and to notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.<sup>34</sup>

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<sup>34</sup> Charging Party Edge and the International Brotherhood of Teamsters have proposed, and our dissenting colleague apparently agrees, that, even if a misclassification is not itself a violation of the Act, the remedy for a violation that involves misclassified employees should

## ORDER

The National Labor Relations Board orders that the Respondent, Velox Express, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any of its employees for engaging in and/or planning to engage in protected concerted activities, such as challenging the Respondent's assertion that they are independent contractors.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Jeannie Edge whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Jeannie Edge for the adverse tax consequences, if any, of receiving a lump-sum backpay

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include reclassification of the misclassified employees. We decline to adopt this proposal. We have held that it is not an unfair labor practice to misclassify an employee as an independent contractor. Thus, misclassification does not violate the Act, and no remedy is warranted for lawful conduct. Put somewhat differently, in the absence of a misclassification violation, an order to reclassify a misclassified worker would represent an extraordinary remedy, and extraordinary remedies are warranted only "when the [r]espondent's unfair labor practices are so numerous, pervasive, and outrageous that such remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found." *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) (internal quotations omitted), *enfd.* 400 F.3d 920 (D.C. Cir. 2005). Accordingly, it is not the case that whenever an employer commits a violation against a misclassified employee, a reclassification remedy is necessary to fully dissipate the coercive effects of the violation. Our dissenting colleague argues that a reclassification remedy would not represent a "special" remedial measure in these circumstances. However, as discussed above, the Board has traditionally used its notice-posting remedy to dissipate any lingering chilling effect of an employer's violations, including when the employer has committed violations against misclassified employees. See, e.g., *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 7–10 (ordering the Board's traditional remedial measures—including reinstatement, backpay, and a notice posting—to remedy the employer's unlawful discharge of an employee who was misclassified as an independent contractor). We find that the Board's notice-posting remedy—which will assure the drivers that in the future Velox will not discharge them for raising protected complaints about their classification or interfere with their exercise of Sec. 7 rights in any like or related manner—will dissipate fully the coercive effects of Velox's unlawful discharge of Edge. A reclassification remedy is therefore neither necessary nor appropriate.

award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Memphis, Tennessee and Little Rock, Arkansas facilities copies of the attached notice marked "Appendix."<sup>35</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 21, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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<sup>35</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint allegation involving the Respondent’s maintenance of the allegedly unlawful “Non-Disparagement” provision is severed and retained for further consideration, and that the complaint is dismissed insofar as it alleges any other violations of the Act not specifically found.

In addition, NOTICE IS GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before September 12, 2019 (with affidavit of service on the parties to this proceeding), why the complaint allegation involving the Respondent’s maintenance of the allegedly unlawful “Non-Disparagement” provision should not be remanded to the administrative law judge for further proceedings consistent with the Board’s decision in *Boeing Co.*, 365 NLRB No. 154 (2017), including reopening the record if necessary. Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C. August 29, 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, concurring in part and dissenting in part.

Independent contractors, as opposed to employees, have no rights under the National Labor Relations Act. The employer here imposed a contract on its drivers insisting that they were independent contractors. But, in fact, the drivers *were* employees, and they *did* have labor-law rights. When the employer fired one of the drivers, Jeannie Edge, for complaining about her misclassification, it violated the Act. The majority correctly finds that the drivers were statutory employees, even under the too-strict test the Board now uses.<sup>1</sup> And the majority is

<sup>1</sup> See *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), overruling *FedEx Home Delivery*, 361 NLRB 610 (2014). Although I adhere to my dissent in *SuperShuttle* (slip op. at 15), I agree with the majority that the Respondent has not established that its drivers are independent contractors under the standard adopted in that decision.

correct in finding that the discharge of Jeannie Edge was unlawful.<sup>2</sup> But the majority gets two important issues wrong. First, reaching out to decide an issue unnecessarily—whether misclassifying employees as independent contractors, standing alone, violates the Act—the majority fails to recognize that misclassification itself chills the exercise of statutory rights. Second, the majority fails to fully remedy the violation it does find. By not requiring the employer to treat all of its drivers as statutory employees and to notify them of that fact, the drivers are left in the dark about their protected status and chilled from exercising their rights.

The Respondent, in firing Edge, unlawfully applied its misclassification of the drivers to her in a manner that violates the Act: it dismissed her for protected concerted activity, which would have been lawful if she had been a contractor, but was unlawful because she was an employee. Thus, because the misclassification in this case was enforced in a manner that violated the Act, the Board does not need to reach the question whether misclassification, standing alone and in the absence of any such enforcement, would also violate the law.<sup>3</sup>

But, even if this question were properly presented, the majority’s finding that misclassification alone does not violate the Act is wrong. As I will explain, the issue turns on whether the misclassification reasonably tends to chill employees from acting on their statutory rights—such a chilling effect occurs whenever employees reasonably would believe that exercising their rights would be futile or would lead to adverse employer action. That standard is satisfied where (as here) an employer tells its employees that it has classified them as independent contractors, sending a clear message that (in the employer’s view) they have no rights under the Act. And it is certainly satisfied where (as here again) an employer makes its employees sign an independent-contractor agreement

<sup>2</sup> On this point, there is no need to rely on the judge’s finding that the General Counsel, as part of his initial *Wright Line* burden, established a “nexus” between Edge’s protected activity and the Respondent’s decision to discharge her. It is well settled that there is no separate “nexus” element in the General Counsel’s initial burden; to establish that protected activity was a motivating factor in a discharge decision, the General Counsel needs only to establish protected activity by the employee, employer knowledge of that activity, and employer animus toward protected activity. See *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015); *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011).

<sup>3</sup> Today’s decision continues an unfortunate pattern of reaching out to decide an issue not necessary to resolve a case before the Board, whether to set precedent (as here) or to overrule it, as in *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110, slip op. at 12, 15 (2019) (Member McFerran, dissenting); and *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156, slip op. at 36, 37–38 (2017) (Members Pearce and McFerran, dissenting), vacated 366 NLRB No. 26 (2018).

accepting the employer’s classification decision. In that situation, employees reasonably would believe that they risk being fired if they act inconsistently with the agreement—such as by asserting statutory rights that belong only to protected employees (and not to independent contractors).

Even if the majority were right about the misclassification issue, they concede that there is a violation here with respect to the discharge of Edge, and they are wrong about how to remedy it. Edge was not unique: all of the Respondent’s drivers, not just Edge, were statutory employees (and not independent contractors). It follows that the Respondent must be ordered to classify *all* the drivers as statutory employees for purposes of the National Labor Relations Act and to notify them that the Act protects them. Without those remedies, Edge’s fellow drivers are just as vulnerable as she was, if they engage in activity protected by the Act. “You really should just drop the employee crap,” Edge was told, and now other drivers might feel compelled to obey.

#### I.

The National Labor Relations Act protects employees—but only employees. Section 2(3) of the Act expressly excludes from coverage “any individual having the status of an independent contractor.”<sup>4</sup> Therefore, independent contractors—like other individuals expressly excluded under Section 2(3), such as agricultural laborers—have no right under Section 7 of the Act, 29 U.S.C. § 157, to form, join, or assist unions for purposes of collective bargaining, or to engage in concerted activity for mutual aid or protection.<sup>5</sup> Consequently, employers are free to discipline or dismiss independent contractors for engaging in those activities. It is tempting, then, for employers not only to create legitimate independent-contractor relationships, but also to deliberately misclassify employees as independent contractors. 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 exam-

<sup>4</sup> 29 U.S.C. § 152(3).

<sup>5</sup> See, e.g., *Porter Drywall*, 362 NLRB 7 (2015) (affirming Regional Director’s exclusion of certain employees from a petitioned-for unit upon finding that they were independent contractors); *Stark Brothers Nurseries & Orchards Company*, 40 NLRB 1243 (1942) (dismissing complaint alleging that the employer unlawfully refused to bargain with its production and maintenance employees’ designated union upon finding that those employees were agricultural laborers within the meaning of Sec. 2(3) of the Act).

ple, 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 law. . . . 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)). Board precedent reveals that employers have deliberately imposed purported independent-contractor status on employees and discharged them to frustrate protected activities.<sup>6</sup> But even an employer’s mistaken classification of employees as independent contractors can lead to serious violations of the Act, including unlawful discharges.<sup>7</sup> The majority does not and cannot deny these workplace realities.

Not surprisingly, the Board, has never had occasion to address the “pure” misclassification issue taken up today. It is hard to imagine how a case limited to that issue would arise, unless an employee sought the equivalent of a declaratory judgment from the Board—the Board’s determination of employee status—*before* engaging in Section 7 activity. Far more likely are unfair labor practice cases triggered by an employer’s *application* or *enforcement* of misclassification against employees—its denial to them of rights under the Act that are properly available to employees. That fact is demonstrated by the examples cited above. And this case, too, illustrates the point, as it does not involve misclassification without more, but rather misclassification *with* more: an employ-

<sup>6</sup> See, e.g., *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1051 (1979) (finding that the employer unlawfully converted its delivery drivers from employees to independent contractors and discharged those drivers who refused to accept the change in order to stymie the drivers’ union organizing effort), *enfd.* 633 F.2d 1054 (3d Cir. 1980); *Houston Chronicle Publishing Co.*, 101 NLRB 1208, 1211–1215 (1952) (finding that the employer’s reclassification of its employees as independent contractors was unlawfully motivated by and intended to defeat their union organizing activities), *enf. denied* 211 F.2d 848 (5th Cir. 1954).

<sup>7</sup> See, e.g., *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 560 & fn. 9 (7th Cir. 1993) (employer acts at its peril in taking action against individuals the employer believes to be supervisors, but who are later found to be employees); *NLRB v. Save-On Drugs, Inc.*, 728 F.2d 1254, 1256 (9th Cir. 1984) (no defense to unlawful discharges that employer believed—and Regional Director had accepted its belief—that alleged discriminatees were supervisors where Board later found that they were statutory employees).

er's reprisal against an employee for concertedly challenging the Respondent's misclassification of its drivers.

## II.

The facts here are straightforward. The Respondent provided medical courier services for a client that performed laboratory testing of medical specimens for facilities such as doctors' offices, clinics, and hospitals. The Respondent's drivers collected those specimens and transported them.

Jeannie Edge was one of the Respondent's drivers. When she began driving for the Respondent in June 2016, she was made to sign an "Independent Contractor Agreement," declaring her status as a "Contractor" and providing: "Contractor acknowledges that she is an independent contractor and is not an employee of Company."

In July and August, however, Edge began discussing with other drivers a number of work-related issues, including some of the Respondent's policies and mandates that seemed to be inconsistent with the drivers' classification as independent contractors. Edge testified that she was "kind of chosen as the spokesperson for the group because [she] was bold enough to speak up," and other drivers were not willing to risk losing their jobs. In a July 25 email to Manager Carol Christ, Edge asserted that the Respondent's treatment of the drivers was inconsistent with their designation as independent contractors. Christ clearly was not happy with Edge's ongoing challenges to the Respondent's treatment of its drivers. A few weeks later, Christ told Edge, via text message, "You really should just drop the employee crap."

In August, the Respondent issued a "Route Driver Agreement" to the drivers that imposed further restrictions on the manner in which they carried out their assignments. Edge discussed with at least one other driver whether they should sign the "Route Driver Agreement," and told that driver that she would not sign the agreement until she discussed it with an attorney, because she did not want to mistakenly make herself an employee. Manager Christ then told Edge that she needed to sign and return the "Route Driver Agreement," but Edge refused to do so. Instead, Edge told Christ, too, that she would not sign the agreement until consulting with an attorney.

Two days after Edge refused to sign the "Route Driver Agreement," the Respondent fired her. The Respondent claimed that it had to terminate Edge because its client company would not allow Edge to continue servicing its contract, accusing her of dropping a specimen in a parking lot. But the judge discredited this claim, finding instead that it was a pretext to cover the Respondent's real reason for discharging Edge: her statutorily-protected complaints.

## III.

Even if the Respondent's misclassification of its drivers as independent contractors was a good-faith mistake, it was plainly unlawful insofar as the Respondent actually effectuated its misclassification by discharging Edge for her protected activity. The best analogy here is with an employer's application of an otherwise lawful work rule to restrict Section 7 activity.<sup>8</sup> It is clear under longstanding Board law that the application of an otherwise lawful rule to restrict protected activity is unlawful, and renders the rule unlawful. The situation here is no different. Both the violation and the remedy should be clear: the Respondent must be ordered to rescind its misclassification of the drivers and inform them of their rights under Section 7 of the Act.<sup>9</sup> All the Board needs to decide in this case, then, is that the Respondent unlawfully applied the independent-contractor classification and that this violation—which touched all the misclassified (and so vulnerable) drivers—must be redressed. That should be the end of this case.<sup>10</sup>

## IV.

Instead, the majority goes on to address the pure misclassification issue—as if Edge had never been discharged—broadly holding "that an employer does not violate the Act by misclassifying its employees as independent contractors." This holding rests primarily on the majority's view that misclassification does *not* have a reasonable tendency to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. There can be no such infringement, the majority says, because an employer's mere communication to its employees that it has deemed them independent contractors "does not expressly invoke the Act," "does not prohibit the workers from engaging in Section 7 activity," and "does not threaten them with adverse consequences for

<sup>8</sup> See, e.g., *Medco Health Solutions, Inc.*, 364 NLRB No. 115, slip op. at 9–10 (2016) (finding that employer unlawfully applied dress code policy to restrict Sec. 7 activity).

<sup>9</sup> See *id.*, slip op. at 9–10 & fn. 18.

<sup>10</sup> The majority concedes that a facially neutral employer work rule is unlawful if it is applied to interfere with protected activity. But the majority mistakenly refuses to apply that principle here. Even if the Independent Contractor Agreement did not explicitly threaten retribution against employees for exercising rights under the Act, once the Respondent discharged Charging Party Edge for challenging the misclassification, the threat was clear. Thus, the discharge is comparable to an unlawful application of a neutral work rule. When a neutral work rule is applied unlawfully, the Board finds the rule itself unlawful, because employees' reasonable interpretation of the rule will necessarily be informed by the employer's unlawful application of the rule. Likewise, here, after Edge was discharged, the employees would understand that the Independent Contractor Agreement embodied a restriction on the exercise of Sec. 7 rights.

doing so, or promise them benefits if they refrain from doing so.” In the majority’s view, a violation of the Act arises only if “the employer responds with threats, promises, interrogations, and so forth . . . but not before.” At bottom, the majority sees misclassification as just the employer’s communication of its “legal opinion” that its workers are independent contractors, an “opinion” the majority says is protected by Section 8(c) of the Act. This view is demonstrably incorrect as a legal matter, and it certainly finds no support in the flawed policy arguments the majority asserts.

A.

The fundamental flaw in the majority’s position is clear. It fails to recognize the chilling effect of “pure” misclassification on employees’ exercise of statutory rights. Instead, the majority focuses on protecting the power of *employers* to structure working relationships to their benefit, including by avoiding legal obligations to their workers. Protecting employer power is certainly not a primary concern of the National Labor Relations Act—which was enacted because employers had too *much* power.<sup>11</sup> Section 1 of the Act declares that the policy of the United States is to protect “the exercise by *workers* of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”<sup>12</sup> Taking the proper statutory perspective—by focusing on the rights Congress gave *employees*—reveals the defects in the majority’s position.

Start with an easy example: If an employer *expressly* told statutory employees that they were not covered by the Act and therefore could not engage in protected activities, then that statement indisputably would be unlawful.<sup>13</sup> Likewise, if an employer made statutory employees sign individual contracts expressly providing that they would not engage in union or other protected activities, then that contract, too, would be unlawful on its face.<sup>14</sup> An employer-imposed independent-contractor

<sup>11</sup> Congress expressly found that the “inequality of bargaining power between employees . . . and employers . . . tends to aggravate recurrent business depressions,” pointing to the “denial by some employers of the right of employees to organize and the refusal by some employers to accept . . . collective bargaining . . . as burdening or obstructing commerce. . . .” Act, Sec. 1, 29 U.S.C. § 151 (emphasis added).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> See, e.g., *Wal-Mart Stores, Inc.*, 340 NLRB 220, 223, 225 (2003) (employer unlawfully told statutory employees—whom the employer had deemed supervisors—that they could not participate in union activities and that it would be unlawful for them to do so).

<sup>14</sup> See generally *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (holding that employer violated Sec. 8(a)(1) of the Act by entering into individual employment contracts with its employees under which the employees relinquished their statutory rights); *J.I. Case v. NLRB*, 321

agreement like the one here is no different as a practical or legal matter from such unlawful statements and contracts because its likely consequences for employees are the same.<sup>15</sup>

The Respondent’s “Independent Contractor Agreement”—which declared each driver to be a “Contractor” and required her agreement “that she is an independent contractor and is not an employee of Company”—did not *expressly* state that drivers were excluded from the Act’s coverage or recite that drivers were agreeing not to engage in Section 7 activities. But the agreement clearly *implied* that drivers had no rights under the Act, and that is unlawful as well. In considering that implicit message, we must remember the Supreme Court’s admonition about applying the Act:

Any assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting” and must “take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

*NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

The Board has consistently done what the Court demands in analyzing the lawfulness of employer communications in analogous circumstances. Thus, the Board has recognized that the potential chilling effect of employer-imposed work rules must be considered *from the perspective of employees* to properly determine whether the rules would reasonably tend to deter employees from engaging in protected activity.<sup>16</sup> And, perhaps even

U.S. 332, 337 (1944) (holding that contract, “may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act,” regardless of whether contract was imposed in response to protected activity).

<sup>15</sup> The Respondent’s “Independent Contractor Agreement” was functionally equivalent to a “yellow-dog” contract, which all must agree is unlawful. A “yellow-dog” contract is any agreement by which statutory employees obligate themselves to refrain from union membership or union activity. See *M & M Affordable Plumbing, Inc.*, 362 NLRB 1303, 1308 fn. 10 (2015); *The Developing Labor Law*, p. 1–21 (7th ed. 2017). The Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 et seq., rendered “yellow-dog” contracts unenforceable, and the Board has consistently found all variations of such contracts unlawful to maintain. See *Barrow Utilities & Electric*, 308 NLRB 4, 11 fn. 5 (1992). The Respondent’s “Independent Contractor Agreement” forced the drivers to forego their Sec. 7 rights because it required them to disavow employee status.

<sup>16</sup> In *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), the Board explained that to determine whether the maintenance of certain work rules violates Sec. 8(a)(1) of the Act, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Sec[.] 7 rights.” As the Board further explained in *Lutheran Heritage Village-Livonia*, 343



more closely on point, the Board has found that an employer, which had misclassified its employees as independent contractors, violated Section 8(a)(1) of the Act by informing its employees that “it would never accept a ‘boss/employee relationship,’” because that statement would reasonably be understood by employees to “indicate[] that union organizing would be futile.”<sup>17</sup> So here, the “Independent Contractor Agreement” must be viewed from the perspective of the drivers, who were subjected to it by the Respondent, on whom they depended for work.

That compels a finding that the Respondent’s employees would reasonably have understood that agreement—with its requirement that each driver acknowledge “that she is an independent contractor and is not an employee of Company”—as excluding them from the protected status of “employees” under the Act. The agreement certainly did not contain any qualifying language suggesting the employees retained their statutory rights.<sup>18</sup> Rather, the “Independent Contractor Agreement” unambiguously defined the Respondent’s relationship with its drivers as a contractual one. That left the drivers no hope of asserting their rights under the Act. In this respect, the Respondent effectively told the drivers that “it would never accept a ‘boss/employee relationship,’” and as a result they would have reasonably understood “that union organizing would be futile.”<sup>19</sup> But that is not all.

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NLRB 646, 647 (2004), that determination is to be made from the perspective of employees reading the rules. Although the Board recently overruled *Lutheran Heritage Village-Livonia* in part in *Boeing Company*, 365 NLRB No. 154 (2017), the Board nevertheless at least still declared its adherence to that basic principle: “[W]hen interpreting any rule’s impact on employees, the focus should rightfully be on the employees’ perspective. This is consistent with established Board and court case law, and it is especially important when evaluating questions regarding alleged interference with protected rights in violation of Sec[.] 8(a)(1). As the Board stated in *Cooper Thermometer Co.*, 154 NLRB 502, 503 fn. 2 (1965), Sec[.] 8(a)(1) legality turns on ‘whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.’” (emphasis added in original).

<sup>17</sup> See *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 6 (2015).

<sup>18</sup> Cf. *Prime Healthcare Paradise Valley, Inc.*, 368 NLRB No. 10, slip op. at 6 (2019) (holding that unqualified requirement that employees arbitrate “all claims or controversies for which a federal or state court would be authorized to grant relief” would reasonably lead employees to conclude that they could not file and pursue charges with the Board).

<sup>19</sup> See *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 6 (2015). Consistent with *Sisters’ Camelot*, longstanding precedent demonstrates that the Board will find a violation of Sec. 8(a)(1) where employers make statements conveying that protected activity is futile or inconsistent with employment or continued employment. See, e.g., *Shamrock Foods, Inc.*, 366 NLRB No. 117, slip op. at 1 (2018) (statement that employer would not have to agree to anything in collective bargaining was unlawful threat of futility); *Equipment Trucking Co.*, 336 NLRB 277, 277 (2001) (employer statement to employee that the em-

The drivers here would also have understood that if they acted inconsistently with the agreement, by engaging in protected activity open only to employees, the Respondent would act accordingly against them.<sup>20</sup> And, of course, that is exactly what the Respondent did in discharging Edge. That discharge surely confirmed the clear implication of the agreement and further chilled employees from attempting to exercise their statutory rights.<sup>21</sup> Contrary to the majority, it is immaterial that the Respondent did not “expressly invoke the Act” or expressly “prohibit” Section 7 activity. The Respondent’s unqualified statement to its drivers that they were independent contractors was enough.<sup>22</sup> The Act explicitly excludes “independent contractors” from coverage. For purposes of administering the Act, then, the Board should assume that a reasonable employee who is aware of her rights under the Act is *also* aware of the independent-contractor exclusion. Thus, even without expressly referring to the Act, the Respondent’s classification of its drivers as independent contractors effectively communicated to them that attempting to exercise their statutory rights would not only be futile, but also inconsistent with

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employer’s president would run the company “any way she wanted, and if [the employee] didn’t like it, find another job,” threatened discharge because it conveyed that the employer considered union and other protected activity incompatible with continued employment).

The majority contends that *Sisters’ Camelot* and similar cases are different because the threats in those cases were made in response to union activity. But whether statutory employees are told upon hire, or upon engaging in union activity, that their employer has classified them as independent contractors, the implicit threat—and resulting chilling effect—is apparent. Even if an employer’s threat made in direct response to union activity is *more* coercive than an employer’s standing communication to its employees that they are independent contractors, the latter communication remains coercive enough to violate the Act. Further, the majority’s view ignores that Sec. 7 protects not just union activity, but protected concerted activity generally. Statutory employees may forego engaging in that protected activity as well, having been told by their employer that they are *not* employees.

<sup>20</sup> Indeed, the contract itself spelled out exactly what employees should expect if they violated its terms. Section 12 explained that if the employee violated or threatened to violate the agreement, the Respondent could seek damages, a restraining order, and any and all other rights and remedies that may be available, all of which would be cumulative and not mutually exclusive.

<sup>21</sup> See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 314 (2014), *enfd.* 629 Fed. Appx. 33 (2d Cir. 2015) (by unlawfully discharging employees for participating in an online discussion about the employer and its owners, the employer provided the employees with an authoritative indication of the scope of its prohibition against inappropriate discussions and confirmed they should construe its rule against inappropriate discussions to include such protected activity).

<sup>22</sup> Cf. *Prime Healthcare Paradise Valley*, above, 368 NLRB No. 10, slip op. at 6 (even absent mention of the Act or the Board, employer’s unqualified requirement that employees arbitrate “all claims or controversies for which a federal or state court would be authorized to grant relief” would reasonably lead employees to conclude that they could not file unfair labor practice charges).

keeping their jobs.<sup>23</sup> Discharging Edge reinforced that message, but the chilling tendency would have been present in any case.<sup>24</sup>

### B.

Contrary to the majority, there are no countervailing statutory considerations that weigh against finding the Respondent's misclassification of its drivers unlawful. The majority argues that when an employer classifies its employees as independent contractors, "it forms a legal opinion regarding the status of those workers, and its communication of that legal opinion to its workers is privileged by Section 8(c) of the Act." But this argument rests on a misapplication of Section 8(c) and on a mistaken view that misclassification does not adversely affect employees.

Under Section 8(c), the "expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."<sup>25</sup> This provision is clearly inapplicable when an employer misclassifies its employees and communicates that misclassification in an independent-contractor agreement imposed on employees. The imposition of such an agreement is not the "expressing of any views, argument, or opinion," in the Act's words. Rather, it is employer conduct that directly affects statutory employees, the terms and conditions of their employment, and their exercise of statutory rights. Such conduct is not protected speech.<sup>26</sup>

<sup>23</sup> Although the "Independent Contractor Agreement" did not reference the "Act," "Sec[.] 7," "unions," or "concerted activity," the requirement that each driver expressly acknowledge that she was "not an employee of the Company" effectively told the driver she could not both retain her position and engage in statutorily-protected activity, as noted above.

<sup>24</sup> Cf. *Lafayette Park*, above, 326 NLRB at 825 (where employer-imposed work rules are likely to have a chilling effect on Sec. 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement).

<sup>25</sup> 29 U.S.C. § 158(c) (emphasis added).

<sup>26</sup> The notion that the establishment of terms and conditions of employment might be shielded as protected "speech" has been rejected by the Board and the courts, including the Supreme Court. In *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 63 (2006), the Court rejected a similar free-speech argument as follows:

Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. See *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct").

Likewise, the Respondent's "Independent Contractor Agreement" mandating independent-contractor status only was not mere "speech."

Nor was the Respondent's misclassification of its drivers—even if a good-faith mistake—an innocuous assertion of a "legal opinion." Although offered in a different context, the Board's discussion of asserted "legal positions" in *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962), is apt here. In *Dal-Tex*, the question was whether an employer's preelection statements that it would not bargain with the union were objectionable. In prior *representation* cases, the Board had excused such statements as "merely an expression of the Employer's 'legal position.'" But in prior *unfair labor practice* cases the Board had found that similar statements fell outside the "free speech" protection of Section 8(c) and, instead, constituted unlawful interference, restraint, and coercion of employees' Section 7 rights. The *Dal-Tex* Board abandoned this difference in treatment, opting to apply the stricter, unfair labor practice approach to all cases, explaining:

To adhere to those [representation] decisions would be to sanction *implied threats couched in the guise of statements of legal position*. Such an approach is too mechanical, fails to consider all the surrounding circumstances, and is inconsistent with the duty of the Board to enforce and advance the statutory policy of encouraging the practice and procedure of collective bargaining by protecting the full freedom of employees to select representatives of their own choosing.

Id. at 1787 (emphasis added). The same criticisms apply to the majority's view that the Respondent was merely asserting a "legal position." Here, again, we follow the Supreme Court's admonition to put ourselves in the position of the drivers subject to the Respondent's power. For reasons explained, an employer's communicated misclassification of its employees *is* coercive; as reasonably understood by employees, it implies "[a] threat of reprisal" if employees engage in Section 7 activity, and thus it enjoys no protection under Section 8(c).<sup>27</sup>

### C.

The majority's policy arguments similarly lack merit. The majority argues that determining whether workers are statutory employees or independent contractors is hard for employers and that finding an unfair labor practice when employers are mistaken would discourage them from establishing bona fide independent-contractor relationships. This argument turns the Act on its head. As shown, the Act is intended to protect employees' ex-

<sup>27</sup> The majority suggests that *Dal-Tex* is distinguishable because the employer there asserted its "legal opinion" in the context of an organizing campaign. But, as explained above, that is a distinction without a difference from the perspective of employees, such as the Respondent's drivers.

ercise of certain rights, not to preserve employers' power to structure the workplace as they wish, even if it infringes on employees' rights. The burden of any additional care employers may need to take in classifying employees is outweighed by the need to prevent the chilling of Section 7 rights where a purported independent-contractor relationship is actually an employment relationship.<sup>28</sup>

That does not mean, of course, that the Act is hostile to the establishment of bona fide independent-contractor relationships.<sup>29</sup> The Act is not intended to encourage or discourage any particular type of working relationship. But the Act expressly covers employees, and it expressly excludes independent contractors. Where misclassification has occurred, deliberately or not, the Act is being evaded and its purposes, frustrated. For the majority to ignore that reality is "inconsistent with the duty of the Board to enforce and advance the statutory policy."<sup>30</sup>

Even accepting that a pure misclassification violation could, as a practical matter, risk discouraging the formation of some bona fide independent-contractor relationships, this potential must be accepted if the Board is to fulfill its statutory mandate. This case certainly does not stand alone in that respect. It is well established that exclusions from statutory coverage are to be construed narrowly. Section 2(3) commands that "[t]he term 'employee' shall include *any* employee."<sup>31</sup> As noted by the Supreme Court, the "breadth of §2(3)'s definition is striking: the Act squarely applies to 'any employee.'"<sup>32</sup> That section is circumscribed only by the narrowly defined categories of workers expressly exempted from the Act's coverage.<sup>33</sup> And, the Board, with Supreme Court

approval, has consistently construed those exemptions narrowly, to fulfill Congress' expressed intent that statutory employees not be denied the protections of the Act.<sup>34</sup> The need to achieve that objective simply far outweighs the risk that some employers might think twice before seeking to establish excluded relationships.<sup>35</sup>

#### D.

Finally, the majority contends that recognizing a stand-alone misclassification violation would improperly relieve the General Counsel of his burden of proving an unfair labor practice because, once it is determined that an employer *has* misclassified employees, the employer would be "strictly liable." And, according to the majority, the General Counsel "could simply *allege* employee status, and the employer would have the burden of proving that the workers were independent contractors, which would effectively place on the employer the burden of proving that it did not violate the Act." These concerns, however, are either vastly overstated or easily addressed.

First, the majority's strict liability argument fails to recognize that many cases may present additional circumstances that might dispel the otherwise coercive message of a communicated misclassification. For example, an employer may have misclassified employees as independent contractors, but nevertheless informed employees in some manner that they retain their rights under the Act. Similarly, an employer may have advised

<sup>34</sup> See, e.g., *FedEx Home Delivery*, 361 NLRB 610, 618 (2014) (exclusion of "independent contractors" should be construed narrowly), *enf. denied* on other grounds 849 F.3d 1123 (D.C. Cir. 2017), and overruled on other grounds by *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (endorsing narrow interpretation of exclusion of "agricultural workers").

<sup>35</sup> Relatedly, the majority expresses concern that establishing a stand-alone misclassification violation would have far-reaching implications for the Board's treatment of other statutory exclusions. In particular, the majority criticizes Charging Party Edge and supporting amici for failing to explain how "the rationale for finding such a violation would not apply equally to an employer's misclassification of its employees as supervisors or any other category of workers excluded from the Act's coverage." As Edge and her supporting amici have pointed out, those other categories of workers are not at issue in the present case. But, more importantly, if the Board were to find that the rationale for finding a stand-alone misclassification as to independent contractors does extend to other excluded categories of workers, then that would be primarily a function of the statute as written by Congress. The Board's duty to enforce the Act accordingly would remain unless and until Congress were to address the supposed negative consequences feared by the majority. See generally *Carpenters (Klassen & Hodgson, Inc.)*, 81 NLRB 802, 806 (1949) ("Manifestly, the Board, as the administrative agency entrusted with the enforcement of the Act, cannot assess the wisdom of, or rewrite or engraft exceptions upon, legislation which represents the considered judgment of Congress on a matter of serious and controversial public policy."), *enf. d.* 184 F.2d 60 (10th Cir. 1950), *cert. denied* 347 U.S. 947 (1951).

<sup>28</sup> From a remedial perspective, moreover, it should be noted that the "harm" suffered by mistaken employers would consist of a cease-and-desist order and a notice posting fully informing employees of their Sec. 7 rights, hardly draconian measures.

<sup>29</sup> The majority contends that I am ignoring the benefits to workers of independent contractor status, and notes that Edge herself preferred an independent contractor relationship. The relative advantages and disadvantages of *bona fide* independent contractor arrangements is not the issue presented here, however. That Edge as an individual preferred independent-contractor status, and may have even willingly signed the Respondent's "Independent Contractor Agreement," in no way frees the Respondent to violate the law by telling workers properly classified as employees that they have no rights under the Act. See generally *J.I. Case*, above, 321 U.S. at 337 (even individual employment contracts voluntarily entered into by employees "may not be avoided to defeat or delay the procedures prescribed by the National Labor Relations Act").

<sup>30</sup> *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 (1962).

<sup>31</sup> 29 U.S.C. § 152(3) (emphasis added).

<sup>32</sup> *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); see also *NLRB v. Town & Country*, 516 U.S. 85, 91–92 (1995); *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189–190 (1981); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–186 (1941).

<sup>33</sup> See *Sure-Tan*, above, 467 U.S. at 891–892.

employees that its classification determination is limited to specific Federal or State statutes, not including the Act. In those circumstances, and potentially others, there may be a genuine question whether employees would reasonably have been coerced by the misclassification, and the burden of persuading the Board on that point would fall upon the General Counsel.

The majority's second concern—that the General Counsel could merely allege employee status and the employer would have to prove independent contractor status—is both overstated and easily addressed. First, as a practical matter, it seems highly unlikely that the General Counsel would issue a complaint where his investigation failed to reveal substantial evidence that the relationship was *not* an independent-contractor relationship. Although any person is free to file an unfair labor practice charge, no case can proceed without an investigation by the General Counsel and his determination that the charge has merit. This statutory constraint significantly reduces the risk that employers with bona fide independent-contractor relationships will be called upon to defend those relationships.

In any event, even where the General Counsel proceeds on an allegation that an employer misclassified statutory employees as independent contractors, the Board could require the General Counsel to establish—not merely allege—the necessary predicate to finding the violation; namely, that the workers were in fact employees. This would be consistent with the basic rationale underlying the misclassification violation: the chilling effect conveyed when an employer *tells* employees that they are independent contractors. Indeed, whether the employer can establish that they actually are independent contractors is beside the point.<sup>36</sup>

In sum, there are good, precedent-based reasons to find that an employer's communicated misclassification of its employees violates Section 8(a)(1) of the Act, and no good statutory or policy arguments to find otherwise.

#### V.

It is obvious that the majority's erroneous view on the stand-alone misclassification issue has led it to a fundamental error in remedying Edge's discharge. The majority appropriately orders the Respondent to offer Edge

<sup>36</sup> To be sure, as the majority recognizes, the Board has consistently and properly held that the party seeking to exclude individuals from statutory coverage bears the burden of proof. See *Porter Drywall*, 362 NLRB 7, 9 (2015) (employer seeking to exclude workers as "independent contractors" bears the burden of establishing that status); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (same). But in stand-alone misclassification cases—where representation is not at issue and the employer has not taken any other action that would be unlawful if the workers had employee status—the Board could rationally conclude that the employer is not seeking to "exclude" workers from coverage.

reinstatement, to make her whole, and to post a notice stating, among other things, that it will not discharge its drivers for engaging in concerted activity, "such as challenging our assertion that you are independent contractors." The majority, however, refuses to order the Respondent to reclassify its drivers as "employees," and to notify them that they, in fact, *are employees*, for purposes of the National Labor Relations Act. Incredibly, the majority simultaneously concedes that the Respondent's "unlawful discharge of Edge may chill its other drivers from engaging in protected activity, particularly regarding their misclassification." The majority is mistaken in thinking that the usual notice posting will suffice to dispel that chilling effect. It will not.

It is clear that the Respondent's unlawful discharge of Edge likely will have a chilling effect on all of the Respondent's drivers who, like Edge, were required to sign the "Independent Contractor Agreement," but have been found to be statutory employees. To fully dispel that chilling effect, the Respondent must notify the drivers that they actually are employees covered by the Act and treat them as such going forward.<sup>37</sup> It is not enough to inform the drivers that the Respondent will not discharge them for engaging in concerted activities or for "challenging its assertion" that they are independent contractors. These limited assurances will leave the drivers in the dark about their actual status as "employees" with the full panoply of rights under the Act. That is particularly so given that (under the majority's approach) the "Independent Contractor Agreements" declaring each driver to be a contractor and "not an employee of the Company" will remain in place. Only by ordering the Respondent to formally reclassify the drivers as employees for purposes of the Act and to notify them of this change will the chilling effect of Edge's unlawful discharge be fully undone. These additional remedial measures are not "special," as the majority calls them. They are what is minimally necessary to undo the effects of the Respondent's unlawful conduct as found by the Board.

In this respect, the majority should draw guidance from *Lily Transport Corp.*,<sup>38</sup> in which the Board found it necessary to modify its usual remedial order and notice to appropriately remedy the employer's unfair labor practices. In that case, the Board found that the employer had maintained, in its employee handbook, several rules that reasonably would have chilled employees from exercising their Section 7 rights. Shortly before the unfair labor practice hearing, however, the employer had re-

<sup>37</sup> This "reclassification" would have no necessary bearing on the Respondent's classification or treatment of the drivers for *other* purposes.

<sup>38</sup> 362 NLRB 406 (2015).

vised its handbook to delete those rules and had distributed the revised handbook—although without any notice or explanation to employees of the deletions. The judge ordered the usual remedies requiring the employer to rescind the offending rules and to provide inserts for the handbook informing employees that the unlawful rules had been rescinded. But the rescission and insertions were not needed because the employer already had rescinded the rules and revised its handbook. What remained necessary, however, was adequate notice *to the employees* that the employer *had* rescinded the rules and that the employees were no longer subject to them. Accordingly, the Board ordered the employer to post a notice that, in addition to the standard provisions, explained that the Board had found the challenged rules unlawful and that the employer had issued a revised handbook deleting the rules. These remedial measures were necessary to ensure that going forward no employee would be chilled from engaging in Section 7 activity on the mistaken belief that the rules remained in effect. Similarly, here, the Respondent must reclassify the drivers as “employees” and tell them it has done so, lest any one of them continue to believe that she is an independent contract without rights under the Act.

VI.

This should be a straightforward case, but the majority has made it unnecessarily complicated—and has made bad law as a result. We all agree that the Respondent’s drivers were statutory employees, that the Respondent had misclassified them as independent contractors, and that the Respondent then unlawfully discharged a driver for engaging in protected concerted activity. It would have been enough here to find the discharge unlawful and to remedy it fully, by undoing the effects of that violation not just on Edge, but on all of the drivers whom the Respondent had also misclassified as independent contractors. Instead, the majority reaches out to decide the pure misclassification issue—and gets it wrong, which in turn leads the majority to provide a remedy that falls short. When an employer misclassifies its employees as independent contractors and informs them of that status, not least by making them sign a binding agreement, the chilling effect on labor-law rights is undeniable. We should recognize that effect and redress it, not ignore it in the misguided view that the National Labor Relations Act cares more about empowering employers than about protecting employees. Accordingly, I dissent.

Dated, Washington, D.C. August 29, 2019

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Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
 POSTED BY ORDER OF THE  
 NATIONAL LABOR RELATIONS BOARD  
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you for engaging in and/or planning to engage in protected concerted activities, such as challenging our assertion that you are independent contractors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board’s Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeannie Edge whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Jeannie Edge for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharge of Jeannie Edge, and WE WILL, within 3

days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

VELOX EXPRESS, INC.

The Board's decision can be found at [www.nlr.gov/case/15-CA-184006](http://www.nlr.gov/case/15-CA-184006) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Linda Mohns, and Kyle McKenna, Esqs.*, for the General Counsel.

*Benjamin C. Fultz and E. Rachael Dahlman Warf, Esqs. (Fultz Maddox Dickens PLC)*, of Louisville, Kentucky, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Little Rock, Arkansas on July 24 and 25, 2017. Jeannie Edge filed the initial charge in this matter on September 12, 2016. The General Counsel issued the complaint on March 31, 2017, and an amended complaint on April 13, 2017.

The General Counsel alleges that the Respondent, Velox Express, violated the Act in discharging the Charging Party, Jeannie Edge, and in misclassifying its drivers as independent contractors, as opposed to employees. He also alleges that Respondent has promulgated unlawful rules and a discriminatory route driver agreement.

As explained below, I conclude that Jeannie Edge was an employee of Respondent and that Respondent violated the Act in discharging her. I also find that Respondent violated the Act in misclassifying some other drivers as independent contractors.

With regard to the allegedly violative rules, I conclude that Respondent's non-disparagement policy violates the Act, but that it did not, by Carol Christ, violate the Act in sending an email to employees stating that all pay issues, complaints, concerns etc. should go through her and no one else. Finally, I find that Respondent did not violate the Act by issuing the route drivers agreement.

On the entire record,<sup>1</sup> including my observation of the de-

<sup>1</sup> Tr. 155, line 7: should read, "the relevance of "rather than "letters."

meanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a corporation, operates a courier service.<sup>2</sup> It has headquarters in Indiana and maintains a facility in Memphis, Tennessee, where it annually performs services valued in excess of \$50,000 in states other than Tennessee and purchases and receives goods in Memphis valued in excess of \$50,000 from outside of Tennessee. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>3</sup>

### II. ALLEGED UNFAIR LABOR PRACTICES

This case largely involves Respondent's operations in Arkansas and to some extent western Tennessee. Velox has a contract with Associated Pathologists, LLC (PathGroup), which is a diagnostic medical laboratory company, to collect medical samples from facilities such as doctor's offices, clinics and hospitals. Respondent delivers these specimens to PathGroup's laboratory in Nashville, Tennessee for analysis. Several drivers pick up samples in Arkansas, which are consolidated in Little Rock for transport by Velox's "long haul" drivers to Velox's Memphis facility. Then the samples are further consolidated for shipment by Velox to the PathGroup laboratory in Nashville.

Jeannie Edge worked for Velox picking up samples in Arkansas. Prior to working for Velox, Edge worked for Lab Express, which was replaced by Velox as the contractor collecting PathGroup specimens.

In 2016 Velox entered into independent contractor agreements with Edge and other drivers who collected the samples. These contracts, drafted by or for Velox, are "take or leave it" documents. There was no true negotiation or opportunity to negotiate on the part of the driver/courier.

Essentially, the drivers (also called medical couriers) were offered specific routes to service and compensation was based on the size of the route. So far as this record shows, drivers could not have more than one route that operated at the same time. Thus, they were unable to make a profit by hiring drivers

<sup>2</sup> Respondent describes itself as a logistics company. It states it is not just a courier service because it designs routes for its customers. However, there is no credible evidence that Respondent is anything other than a courier service insofar as its contract with PathGroup is concerned. Indeed, the contract between PathGroup and Velox specifies that Velox will provide "courier services;" it does not mention any other type of service Velox is to render to PathGroup, R. Exh. 9.

PathGroup provided Velox with routes it had already designed; Velox then hired drivers to run those routes, Tr. 32, 185-187, 336. Larry Lee testified that Velox made many suggestions and changes to those routes. However, there is no evidence for this other than his self-serving testimony, which I decline to credit. So far as PathGroup is concerned, Velox is a courier company and advertises itself as such, GC Exh. 41.

<sup>3</sup> While Respondent contends that it is not the employer of its drivers, it concedes that it has other employees, such as its dispatchers, Tr. 339-340.

to operate a route that they were not driving personally. If they could not drive their route on a given day, they had to ask permission from Velox's management for a day off. Velox then selected a substitute driver.

A driver's compensation could change if stops were added or subtracted to their route. Drivers had no responsibility or ability to develop business for Velox. They were not precluded from working for other businesses at the same time they worked for Velox. Jeannie Edge, for example, worked as an independent contract phlebotomist when not driving her assigned route for Velox. However, it is unclear whether drivers could work for someone other than Velox instead of covering their Velox routes. So far as this record is concerned, Velox drivers' ability to work for other businesses was no different than the opportunity for any employee to moonlight.

A threshold issue in this case is whether the drivers were independent contractors or employees, since the Act accords rights to the latter but not the former. Edge worked for Respondent from June 22, to August 21, 2016, at which time Respondent either terminated her contract or discharged her, depending on how you view her status. Prior to working for Velox, Edge worked for Lab Express, which Velox replaced as the contractor collecting medical samples for PathGroup's Nashville, Tennessee laboratory. During the period Edge drove for Velox, other drivers who worked for Respondent in Arkansas were Brett Woods, Jill Cross and Marilyn, whose last name does not appear in this record.

In June 2016, Edge executed an independent contractor agreement with Velox. Edge performed this job in her privately owned vehicle, purchased her own insurance and maintained her car at her own expense. Velox did not withhold income tax and did not provide health insurance to drivers. Velox couriers were not covered by Velox's workers compensation insurance policy either.

Velox promulgated many rules specifying how the drivers/couriers were to perform their jobs (GC Exhs.3, 5 and 11). When Edge needed a day off, she contacted Velox for permission. Respondent obtained a substitute driver. Drivers were generally not allowed to choose a substitute. In some cases it appears they could do so with the approval of Velox. This was a change from Lab Express' practice in which the driver was responsible for obtaining a substitute.

On July 24, Carol Christ, Velox's manager in Memphis emailed Velox's PathGroup drivers. She advised them that they must answer phone calls from Velox's dispatcher and respond to her emails. Christ also told drivers they must not leave lids off the Styrofoam containers and keep the Memphis storage areas neat.

In response to what she considered micromanaging by Christ, Edge began to complain that Velox treated the drivers as employees, rather than as independent contractors. Christ was aware that this was an issue with other drivers as well, Tr. 53-54, 235-236. In an email dated July 25, Edge told Christ that another driver had already said he was going to report the situation to the Internal Revenue Service. Christ forwarded Edge's email to Larry Lee, a Velox vice-president, who was Respondent's only witness in this case (GC Exh. 4 (reverse side)) and is the person who terminated Edge.

On August 1, Christ sent an email to the drivers/couriers announcing a number of Velox policies, including the following:

Line hauls **MUST** run on time every time therefore **DRIVERS** must be in the office on time.

If you go early you risk missing stops. If you arrive at a pick up location and there are no specimens in the box, you should always **KNOCK ON THE DOOR!** It is your responsibility to make 100% sure that no one is inside finishing up specimens or running late.

(GC Exh. 5.)

On August 12, 2016, Edge collected specimens from the Compassionate Women's Clinic in Nashville, Arkansas (located in southwest Arkansas). A PathGroup representative called Velox on August 15 and said a specimen had been found in the parking lot at that facility. Respondent's manager in the Memphis, Carol Christ, sent Edge back to retrieve this specimen.

On about August 15, Velox issued a "Route Driver Agreement" to its drivers,<sup>4</sup> (GC Exh. 11), which it required each driver to sign.<sup>5</sup> That document states as follows:

#### **Route Driver Agreement**

##### **1. Scheduled pickup times**

- a. Do not start your route early**
- b. Do not pickup from scheduled stops early**
- c. Always check both the lockbox and inside**
- d. Do not leave a stop that always has specimens, call your dispatcher so they can contact PathGroup.**
- e. Always take a picture of your LB ticket in the empty lockbox and log the ticket number on your route sheet.**

##### **2. Frozen Specimens**

- a. Frozen specimens MUST be completely covered in dry Ice Inside your frozen cooler**
- b, Do not take the green pouch unless in a sealed pink sheet bag**

##### **3. Will Calls**

- a. You are to verbally call in your pick up on ALL will call orders.**

<sup>4</sup> The complaint alleges that Respondent violated the Act by requiring drivers to sign the route driver agreement, complaint paragraphs 8(d), (f) and 9. I see no evidence that supports this allegation. The timing between Edge's July 25 email and promulgation of route driver agreement is insufficient to establish discriminatory motive. An equally plausible explanation is that the drivers route agreement was promulgated in light of recent service failures on the part of the Velox drivers.

<sup>5</sup> R. Exh. 24 is the same document. Larry Lee testified that he drafted this document and then sent it to Kent Tidwell at PathGroup for review. According to Lee, Tidwell told him his draft was perfect. Regardless, many of the specific requirements in this document emanate from Velox; not PathGroup.

b. You are to NEVER leave a will call until the dispatcher releases you.

c. Will Call users will always have something to pickup

#### 4. Shoulder Bag

a. You are required to use a shoulder bag on ALL pickups, no exception.

b. Specimens go straight from the lockbox to your shoulder bag.

c. Always double check the area around the lockbox before returning to your vehicle.

#### 5. Route Sheet

a. Your route sheet should be neat and complete.

b. Double check your route sheet before entering the consolidation area.

#### 6. Consolidation

a. You are not to enter the consolidation area until asked to.

b. You are to double check that your totes, shoulder bag, coolers, and vehicle are empty before departing the consolidation office. You will then sign the Clear Tote log and have another Velox employee or IC sign as your verifier.

#### 7. Line Hall,

a. Line haul drivers are to get food, gas, etc. before departing with the line haul.

b. Line haul drivers are to immediately contact their dispatcher if they are delayed for any reason.

c. Line haul drivers are expected to drive straight to GRM with no stops unless absolutely necessary.

d. You are to have someone at GRM acknowledge that your totes are empty prior to departing

#### 8. Penalty

a. Drivers agree that they are subject to a \$150.00 fine and or removal from the route if it is determined that through your negligence or failure to follow the standard operating procedure results in a service failure.

#### Acknowledgement

I have read and understand the above policy

Also on August 15, Respondent required Edge and other route drivers to participate telephonically in a meeting/conference call with Velox's Memphis Manager, Carol

Christ.<sup>6</sup> A few days later, Christ demanded that Edge send her a copy of her driver's license and social security card so that Respondent could perform a background check. During that exchange, Christ texted Edge that, "You should really drop the employee crap. Had you simply done as asked yesterday [send Christ a picture of her SSN card and driver's license] it should have been done" (GC 13, pg. 00121).

On Friday, August 19, Christ demanded that Edge sign Velox's driver route agreement that night (GC Exh. 13, p. 00132). In a telephone call later that evening, Edge told Christ that she had consulted with an attorney and would sign the agreement on Monday if her attorney advised her to do so (Tr. 70-71, GC Exh. 14). Edge drove her route on Saturday August 20, and Sunday, August 21. On Sunday night, Christ texted Edge to inform her that her contract with Velox had been terminated.<sup>7</sup>

Larry Lee, Respondent's vice-president, testified that Kent Tidwell, a PathGroup manager, called him on August 15, about the specimen found in the Compassionate Care parking lot. According to Lee, Tidwell was very angry and told him that he did not want the driver who was responsible to handle PathGroup specimens any more. PathGroup was Velox's only customer in the Little Rock area. Lee testified that he had a telephone conversation with Edge on August 15, in which she denied leaving the specimen in the Compassionate Care parking lot.<sup>8</sup> She told him that the paperwork in the bag containing the specimen was not wet, which it should have been had it been left outside over the weekend.

Lee testified further that he found Edge's explanation not to be credible and that on August 15, after the call, he directed Memphis manager Christ to terminate Edge's contract.<sup>9</sup> Lee did not explain why he found Edge's explanation incredible. He did not investigate the circumstances surrounding the specimen found on August 15 despite the fact some of these lent some support to Edge's claim (Tr. 363). Lee also did not explain why Christ waited 6 days to terminate Edge's contract after he had told her to do so, or why Christ allowed Edge to continue to handle PathGroup samples for another 6 days.

Normally, if there was a discrepancy between the number of specimens left by the Clinic and the number picked up the courier, it would be noticed immediately. Nobody reported any such discrepancy with regard to the August 12 collection at the Compassionate Care Clinic (GC Exh. 17, pp. 2-3). Blood specimens were drawn at Compassionate Care on Saturday and

<sup>6</sup> Respondent notes that not all drivers attended this meeting. However, GC Exh. 9 makes it clear that attendance was mandatory. Respondent apparently did not enforce this requirement.

<sup>7</sup> Christ, a manger still employed by Velox, did not testify, thus Edge's account of this phone call is uncontradicted and credited.

<sup>8</sup> Obviously, this conversation occurred after Edge retrieved the specimen.

<sup>9</sup> Other errors admitted to by Edge are irrelevant to this case. Respondent's position is clearly that it was forced to terminate her contract due demands by PathGroup's Kent Tidwell arising out of the August 12 incident. There is no evidence that Tidwell was aware of Edge's prior mistakes when he allegedly demanded she be barred from handling PathGroup samples. Lee testified that when he talked to Tidwell and decided to bar the driver from handling PathGroup samples, he didn't even know that Edge was the driver responsible for the August 12 pick-up at Compassionate Care, Tr. 327.



Sunday, August 13 and 14; thus, it is quite possible that the specimen found on August 15, was not in Compassionate Care's lock-box when Edge collected their samples on August 12 (Tr. 357–360).

#### *Credibility Determinations*

I do not find Lee's testimony regarding the reasons he terminated Edge's contract to be credible. Thus, I conclude that Velox did not terminate Edge's contract at the behest of PathGroup. I find this explanation to be a pretextual reason for the termination of her contract/discharge.

Curiously, Lee testified that he would have terminated Edge's contract even if he found her explanation of what happened on August 12 credible (Tr. 327). This, in of itself, is compelling evidence that Respondent's stated reason for terminating her is pretextual.

Moreover, there is no documentation supporting his claim that Tidwell demanded that the driver who serviced Compassionate Care on August 12 not handle PathGroup samples again. Tidwell advised his subordinates on August 15 that "this driver has been terminated" (R. Exh. 28). However, there is nothing to suggest that this was done at his behest. Neither Tidwell, nor any other representative of PathGroup testified in this proceeding.<sup>10</sup> Nothing in this record explains the circumstances surrounding Tidwell's August 15 email, which is clearly inaccurate, since Edge was not terminated until August 21, and there are many indications in this record that Respondent had no intention of terminating her on August 15.

For one thing, Edge continued to handle PathGroup samples for almost a week after Tidwell communicated with Lee. Secondly, the communication between Carol Christ, Velox's manager in Memphis, and Edge does not indicate any intention of terminating her contract prior to August 20. On August 17–18, Christ demanded that Edge send her photos of her license and social security card, a demand that makes no sense if Velox had already decided to terminate Edge's contract, (GC Exh. 13). What is also significant in this exchange is the animus demonstrated by Christ towards Edge's assertions that Velox is treating her like an employee rather than as an independent contractor.

On August 20, Christ demanded Edge sign a route driver agreement and return it immediately. This is also a demand that makes no sense if Velox had already decided to terminate Edge's contract. Christ, who is still Velox's manager in Memphis, did not testify in this proceeding.

Edge consulted a private attorney about the route driver agreement and inadvertently informed Christ of this fact on or about August 19. Shortly thereafter Larry Lee had a conversation with Christ. On the evening of Sunday, August 21, Christ informed Edge that he independent contract agreement was being terminated.

The record is also devoid of any explanation as to why Tidwell would demand that the driver in the August 12 incident be

<sup>10</sup> Lee also testified that Tidwell ordered him to look into how the sample was left on August 12, Tr. 322; this he did not do—other than talking to Edge and deciding that he did not believe her. Lee's lack of curiosity supports my inference of discriminatory motive in terminating Edge's employment, *K & M Electronics*, 283 NLRB 279, 291 (1987).

barred from handling PathGroup samples and not make a similar demand in many other incidents in which Velox employees failed to pick up or mishandled PathGroup samples.

Lee testified that he often received complaints from Tidwell and Tidwell's subordinate, Mike Fuller, PathGroup's Director of Market Operations, about service failures in the West Tennessee/Little Rock Market (Tr. 292–293, 305–306, 308). Respondent did not terminate the contract of any driver servicing PathGroup in that market other than Jeannie Edge, Tr. 11.

An example of misconduct by another driver is as follows: a Velox driver ruined 3 samples on or about June 28, 2016, requiring that the specimens be redrawn. PathGroup demanded a \$450 credit from Velox but made no demands about the driver. Velox did nothing with respect to this driver other than counseling (R. Exh. 25, Tr. 318). By way of contrast, the specimen left at the Compassionate Women's Care Clinic on August 12, was not ruined.

Another example of misconduct by another driver(s) occurred just prior to a mandatory meeting for Velox drivers on August 15. One or more Velox drivers in Tennessee failed to collect specimens left in a lockbox (Tr. 54–55, 354). Velox took no action against that driver(s).<sup>11</sup>

A third example is that in early August, 3 Velox drivers mishandled PathGroup specimens (GC Exh. 7). They were fined \$150 for their errors, but there is no evidence that PathGroup requested that they be barred from handling PathGroup specimens in the future (Tr. 377–378).

Due to Lee's lack of credibility on the reasons for Edge's termination, I decline to credit any of his testimony unless corroborated by documentary evidence or other reliable evidence of record.<sup>12</sup> In this regard, I note that much of his testimony on significant matters was elicited by leading questions from Respondent's counsel.

#### *Analysis*

##### *The Independent Contractor Issue*

Sections 7 and 8 of the National Labor Relations Act accord rights and protections to employees. Section 2(3) specifically excludes individuals having the status of independent contractor from the definition of "employee." A party seeking to exclude individuals performing services for another from the protection of the Act, has the burden of proving independent contractor status, *BKN* 333 NLRB 143, 144 (2001). The Board applies a multi-factor analysis in determining whether particular individuals are employees or independent contractors. No single factor is controlling.

Very often the line between "employee" and "independent contractor" is a fine one. However, in determining whether individuals fall on one side or another, one must keep in mind the admonition of the United States Supreme Court that, "ad-

<sup>11</sup> Respondent states at p. 12 of its brief that the meeting on August 15 was "a direct result of Edge's mishandling a patient's medical specimen." This has not been established. In fact the record strongly suggests that meeting was called due a number of service failures by several Velox employees.

<sup>12</sup> I also do not take Edge's testimony at face value—unless corroborated by other reliable evidence-or uncontradicted by Respondent.

ministrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach and that the NLRA and similar statutes are “to be narrowly construed against employers seeking to assert them,” *Holly Farms Corp. v. NLRB*, 517 US 392, 399 (1996). Thus, where it is a “close call,” agencies and courts should err on the side on finding employee status.

The Board has addressed the “independent contractor” vs. “employee” in a number of cases, such as the recent decision in *Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107 (July 11, 2017). In that case, the Board discussed its leading cases on this issue, including *Fed Ex Home Delivery*, 361 NLRB 610 (2014) enf. denied 849 F. 3d 113 (D.C. Cir. 2017); *Big East Conference*, 282 NLRB 335 (1986) enf. 836 F. 3d 143 (3d Cir. 1987); *Sisters Camelot*, 363 NLRB No. 13 (2015) and *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004). Since each case is very fact intensive, it is best to analyze each factor with regard to the record in this case:

(1) Extent of control by the employer

Several provisions of the drivers’ independent contractor agreement are more consistent with employee status than independent contractor status. These include the drivers agreeing to submit to routine and random drug tests and the non-solicitation (in fact non-compete) provisions of the agreement (GC 2, paragraph 11, pp. 5–6). This contrasts with the situation in *Saleem v Corporate Transportation Group*, 854 F. 3d 131 (2d Cir. 2017) in which drivers could and did compete with the business they claimed was their employer.

Velox mandates the places at which the drivers collect specimens and the times at which the specimens must be collected. Drivers must not pick up samples earlier than the pick-up time required by Velox. They are also under a less precise requirement that specimens not be picked up too late because the drivers must return the specimens on time to Little Rock for consolidation and transport to Memphis. From Memphis, Velox drivers then take the samples to PathGroup’s laboratory in Nashville.

Edge was not free to work when she wanted. Whenever she wanted a day off from work, she had to ask permission from Carol Christ. As mentioned previously, this was a change from the practices of Edge’s previous employer, Lab Express.

Respondent’s route driver agreement, set forth in detail above, shows that Velox sought to exercise a great deal of control of its drivers/couriers. The record also establishes that Carol Christ ordered Edge to return to Nashville, Arkansas to retrieve a specimen not picked up on August 12.

The drivers’ contracts with Velox provided that drivers would be liable for any expense that Velox would have to bear due to their errors. PathGroup, at least on some occasions, required Velox to credit it for the damage to specimens by Velox drivers (Exh. R-25).

Drivers were required to wear a Velox shirt, khaki pants and closed-toed shoes (GC Exh. 12, Tr. 229–230). They were also required to have an Android phone.

Respondent argues that the extent of its control cannot be

considered in a finding that the drivers were employees, because Velox was merely passing along PathGroup’s or HIPPA’s requirements. This may be true for some of the rules it imposed on drivers, but not for many others. The uniform requirement and many of the items in the route driver agreement emanate from Velox; not PathGroup or HIPPA (GC Exh. 12).

There is no evidence that PathGroup required couriers to wear Velox uniforms for example. PathGroup only required that couriers dress professionally (R. Exh. 9, pg. 4, par. g). There is no evidence that PathGroup required Velox to subject its couriers to random drug tests. Many of the mandates in the route driver agreement were initiated by Velox VP Larry Lee, not PathGroup. This can be ascertained by comparing the route driver agreement (GC Exh. 11), with the Service Agreement between PathGroup and Velox (Exh. R. 9) and PathGroup’s SOP for new and sensitive clients (Exh. R. 12).

Nowhere did PathGroup mandate a \$150 fine for service failures. Its contract with Velox provides that Velox will indemnify PathGroup for actual losses. However, Velox’s fine could be levied in a situation in which there was no loss to PathGroup, such as a missed specimen pick-up that does not result in the specimen having to be redrawn.

I conclude this factor, establishing that Velox exercised a great deal of control over the way its driver/couriers performed their jobs, weighs heavily in favor of employee status.

(2) Whether the individual is engaged in a distinct occupation or business

Collecting medical samples is Respondent’s business. Although Edge is free to work for other entities, she was not free to do so during the times she was supposed to cover her route. Edge’s freedom to work for others is indistinguishable from the ability of any employee to work a second job.

Edge and other drivers are not in the courier business except insofar as they work for Velox. They are generally required to wear a shirt with a Velox logo and present themselves to the public as representatives of Velox rather than their alleged independent contractor business.

This factor favors employee status.

(3) Whether the work is usually done under the direction of the employer or by a specialist without supervision

Velox drivers work independently in completing their routes without one-on-one supervision. However, the drivers are not free to perform the job in any way they see fit. Velox cared very much how the drivers did their job as opposed to simply requiring that it be completed in a satisfactory manner. It required the job to be performed with a shoulder bag, mandated how the specimens were handled and when they were to be picked up.

Given the control exercised by Velox as to how the drivers’ job was performed, this factor weighs in favor of employee status.

(4) Skill required in the occupation

Velox drivers are not highly skilled. I credit the testimony of

Jill Cross that the job requires minimal training.<sup>13</sup> Other evidence in the record also supports this conclusion. For example, Brett Woods testified that when Velox took over the contract in Arkansas and West Tennessee, Velox provided only an hour and a half training for him and another driver, who unlike Woods, had no prior experience as a medical courier.

A driver must know which specimens must be frozen, which must be refrigerated, and which can be kept at room temperature. A driver must also be familiar with a few uncomplicated procedures, such as using a shoulder bag when gathering samples, so that none are dropped. A driver must also be somewhat familiar with the requirements of HIPPA<sup>14</sup> regarding patient confidentiality and the security of medical information.

This factor favors employee status. Every person working for another person, whether an employee or independent contractor, needs to have some knowledge as to how the job is to be performed. Virtually no new employee is turned loose to perform a job for which they were just hired without some training. The level of knowledge required to be a Velox driver/courier does not rise to the level of a skill.

(5) Whether the employer or individual supplies the instrumentalities, tools, and place of work.

Velox drivers use their own vehicles to perform their tasks. They are free to use their vehicles for purposes other than Velox's business. The drivers pay for their fuel, insurance and upkeep of their vehicles. Velox provides Velox shirts, shoulder bags, Rubbermaid tubs, ticket books and a route; little else. Drivers are not required to use the equipment provided by Velox except the shirt (assuming they have been provided one).

This factor, in isolation, favors independent contractor status.

(6) Length of time for which the individual is employed

While the term of a driver's independent contractor agreement is for one year, either party may terminate the contract for any reason with one day's notice (GC Exh. 2). This is much more akin to an employment-at-will relationship than a contractual relationship in which one is hired to do a discrete task. In some more typical independent contractor situations, the relationship between the contractor and client ends when the discrete task is performed.

Nevertheless, long-term independent contractor relationships have become more common in today's "gig economy." Some of these would not pass scrutiny if the Supreme Court's admonition in *Holly Farms Corp. v. NLRB* were adhered to.

This factor favors employee status.

(7) Method of payment

The fact that the drivers are paid by the job, rather than by time usually favors independent contractor status. However, on close examination, Velox drivers' situation is more similar to

an employee paid by the hour than an individual contractor paid to do a discrete job regardless of the time it takes. Drivers do not invoice Velox for time and materials; instead they are paid a fixed rate determined by Velox for their route. That rate is calculated according to the mileage and number of stops on the route.

The drivers must do their route every day, unless they call off to Respondent.<sup>15</sup> The time frame in which their job is to be performed is set by the pickup times at each stop on their route (they may not pick up early) and the need to have their collection samples ready for transport to Memphis in a timely fashion. In reality, the drivers' compensation is for the time spent picking up the samples, as well as completing a job.

Moreover, Respondent maintains total control over the drivers' compensation. It offers drivers a route with a set figure for payment. The driver has no ability to alter his or her compensation; they cannot collect samples from other routes and as a practical matter they cannot work for anyone else during the hours they perform their tasks for Velox.

Velox contends that drivers are able to negotiate their compensation, citing the example of David Chastain (R. Exh. 11), who asked for an increase in compensation when stops were added to his route. However, as a matter of policy, Respondent increased drivers' compensation when stops were added and decreased their compensation when stops were subtracted from a route (GC Exh. 3). Thus, it appears that Respondent merely increased Chastain's compensation in conformance with its general compensation policy.

Despite the fact that Velox drivers are nominally paid for by the job, the reality of their situation favors employee status.

(8) Whether the work is part of the regular business of the employer

This factor morphs into the same analysis as factor # 2. Collecting medical specimens is Respondent's business. The drivers do not perform any tasks for Velox that are not part of Velox's core mission.

This factor weighs heavily in favoring employee status.

(9) Whether the parties believe they are creating an independent contractor relationship

Both Velox and Jeannie Edge believed they were creating an independent contractor relationship when Edge began her tenure with Velox. However, Driver Jill Cross believed that in fact she was an employee of Velox, Tr. 219.

Velox provided Edge with a 1099, rather than a W-2 form. Respondent did not withhold her income tax or have a workers compensation policy that covered her or other drivers. Couriers were not insured in any respect by Velox.

While Respondent believed it had an independent contractor relationship with its drivers, Edge came to believe this was no

<sup>13</sup> At p. 24 of its brief, Respondent discusses Edge's experience prior to her employment with Velox; Cross and other drivers had no such experience.

<sup>14</sup> Health Insurance Portability and Accountability Act of 1996. Every employee in health care related industries is subject to HIPPA. Given the consequences of a violation of that statute, it would be surprising if any such employee did not receive some training in its requirements.

<sup>15</sup> At p. 29 of its brief, Respondent states that drivers are free to take off for work whenever they wish. I credit Edge's testimony at Tr. 44 that drivers had to ask Christ for permission to take a day off. Moreover, Christ's email of July 24, GC Exh. 3 (also R. Exh. 29) states that "requesting days off or calling out of work should go through me."

longer the case as Respondent increased its control over her. Moreover, Edge' subjective belief as to whether she was an employee or independent contractor is far less important than the economic realities of her relationship to Velox. A non-attorney is not in a particularly good position to understand the difference between being an employee and an independent contractor.

In light of the above, I find this factor weighs in neither direction.

(10) Whether the principal is or is not in the business

Velox is in the business of collecting medical specimens. That is the business of the drivers. This factor favors employee status.

(11) Whether the evidence shows the individual is rendering services as part of an independent business

I interpret this to be the same inquiry as to whether the individual has a significant entrepreneurial opportunity for gain or loss, *Corporate Express Delivery Systems v. NLRB*, 292 F. 3d 777, 780 (D.C. Cir. 2002). The record herein establishes that the drivers had no real opportunity to increase their "profit." Respondent offered Edge one route at a compensation rate Velox determined on the basis of mileage. Velox told her that was the only courier route available. Thus, she did not have any ability to increase the amount she received for driving for Velox. Furthermore, pursuant to the contract between Velox and PathGroup, Edge could not collect samples for PathGroup outside of her relationship with Velox (R. Exh. 9).<sup>16</sup>

Velox argues that drivers could increase their profit by shopping for example, for cheaper gas. That opportunity is indistinguishable from an employee's opportunity to make their wages go further by searching for the best price on gas and other commodities.<sup>17</sup> In *Standard Oil Co.*, 230 NLRB 967, 971 (1977), the Board noted that such costs are more or less standardized and provide no significant opportunity for drivers to influence their net compensation.

Considering all the above factors, I conclude that Jeannie Edge was an employee of Velox.

*Complaint paragraph 5 (misclassification as a separate 8(a)(1) violation)*

The General Counsel alleges that Respondent violated the Act in misclassifying its drivers/couriers, apart from whether or not it violated the Act in discharging Jeannie Edge. This record establishes that all Respondent's courier/drivers who pick up

<sup>16</sup> Analysis of a courier service would be much different if a driver was allowed to own multiple routes and lease them out for a profit. They may have been the arrangement between Lab Express and its drivers. The maintenance of control by Velox over who drove its routes, which limited the ability of its drivers to "profit" from the work of other drivers is important to my finding that Velox drivers are employees.

<sup>17</sup> In *Standard Oil Co.*, 230 NLRB 967, 968 (1977), the Board expressed the relevant factors somewhat differently than in some recent cases. Regarding factors mentioned in that case, I would note that the drivers perform their tasks in the name of Velox; not their allegedly independent businesses and that the drivers' working arrangement with Velox appears to be permanent, so long as performance is satisfactory.

specimens for PathGroup out of the Memphis office, have working conditions virtually identical to those of Edge—as evidenced by Velox's requirement that they sign the route driver agreement. I find that other Velox drivers collecting PathGroup specimens out of Velox's Memphis office are employees.

By misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection.

*The Independent 8(a)(1) allegations*

The General Counsel alleges that Respondent violated and is violating Section 8(a)(1) by maintaining the following Non-Disparagement Provision in its Independent Contractor Agreements (GC Exh. 2, pg. 6).

During the Term and following the termination of this Agreement, regardless of the reason for such termination, Independent Contractors shall not do or say anything that a reasonable person would construe as detrimental or disparaging to the goodwill and good reputation of the Company, including making negative statements about the Company's method of doing business, the effectiveness of its business policies and practices or the quality of any of the Company's services or personnel.

The General also alleges that Respondent promulgated a violative rule when Carol Christ sent an email to the driver/couriers on July 24, 2016, (GC Exh. 3).

The email in pertinent part states:

Some of you were hired by John Willis, some were hired by me.

If you work at the Memphis office, Little Rock AR, Jackson TN or Jackson MS, you are part of the Memphis branch and should report directly to me.

Not John Willis and not Jim Gibson.

Any pay issues, complaints, concerns, requesting days off or calling out of work should go through me.

No one else.

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). As stated above, a rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; and/or (2) that the rule was promulgated in response to protected activity and/or (3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

In *Lutheran Heritage* the Board retreated somewhat from its prior decisions in light of the decision of United States Court of Appeals for District of Columbia in *University Medical Center v. NLRB*, 335 F. 3d 1079 (D.C. Cir. 2003). In that case the Court declined to enforce the Board's decision at 335 NLRB

1318 (2001), regarding a rule prohibiting “disrespectful conduct.” In *Lutheran Heritage*, the Board stated that it would not conclude that a reasonable employee would read a rule to apply to Section 7 activity simply because the rule *could* be so interpreted.

As to Christ’s email, I find that it would not reasonably be read to prohibit employees from discussing wages, hours and working conditions with each other and seeking help on these issues from third parties (such as a union). On the contrary I find the email is more fairly read as requiring drivers to cease contacting other managers such as Willis and Gibson (Respondent’s President) about pay and other issues pertaining to the drivers’ working conditions and to contact Christ instead. I infer that Christ sent the email because employees were going to Willis and Gibson with their concerns, instead of her. Therefore, I dismiss complaint paragraph 7(a).

On the other hand, I find that the Non-Disparagement provision in the independent contractor agreement violates Section 8(a)(1). First of all, that provision applies to employees protected by Section 7 of the Act. By prohibiting negative statements about the Company’s method of doing business, the effectiveness of its business policies and practices or the quality of any of the Company’s services or personnel this provision purports to deny employees protected rights. For example, negative statements about Velox’s business policies and practices would reasonably be read to include employee statements relating to company policies concerning wages, hours and other terms and conditions of employment, *Claremont Resort & Spa*, 344 NLRB 832 (2005). Employees not only have Section 7 rights to make negative statements about such matters to other employees, they may also appeal to third parties, such as the press, the public or a labor organization, in order to get such policies changed, *Kitty Clover, Inc.*, 103 NLRB 1665, 1687–1688 (1953); *Arlington Electric*, 332 NLRB 845, 846 (2000); *Emarco, Inc.*, 284 NLRB 832, 833 (1987).

*Respondent violated Section 8(a)(1) in discharging  
Jeannie Edge*

Having found that Jeannie Edge was Respondent’s employee, I turn to the question of whether her employment was terminated in violation of the Act.

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging an employee because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, “employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . (Emphasis added)”

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that “concerted activities” protected by Section 7 are those “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” However, the activities of a single employee in enlisting the support of

fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Jeannie Edge clearly engaged in protected activity in complaining to management that she was being treated as an employee rather than as an independent contractor. She also discussed this with other employees. The record also establishes that Carol Christ and Larry Lee knew that the classification of employees was an issue for employees other than Edge (Tr. 53–54, 235–36, GC Exh. 4 (reverse side)).<sup>18</sup> Thus, they were aware that her protected activity was concerted.

In order to prove a violation of Section 8(a)(3) and/or (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer’s adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.<sup>19</sup> Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

The record establishes that Respondent was aware of Edge’s protected activity (i.e., her agitation over the employee/independent contractor issue); that it bore animus towards that activity (E.g. GC 13, pg. 00121 in which Christ texts “You should really drop the employee crap. Had you simply done as asked yesterday [send Christ a picture of her SSN card and driver’s license] it should have been done.”). The timing of Edge’s discharge, 3 days later, is sufficient to meet the General Counsel’s initial burden of establishing a nexus between her protected activity and discharge.<sup>20</sup> Additionally, the timing between Respondent’s knowledge that Edge was consulting an attorney over the route driver agreement and her termination is sufficient to satisfy the General Counsel’s burden in establishing a relationship between her protected activity and her discharge.

Respondent’s affirmative defense that it decided to terminate Edge on August 15 for her alleged misconduct in failing to pick up the Compassionate Women’s Care Clinic specimen on August 12, is not credible. Moreover, I find, as stated previously, that is it a pretextual reason upon which I also rely in concluding that Velox fired Edge in retaliation for her protected concerted agitation on the employee/independent contractor issue,

<sup>18</sup> Lee admitted to seeing GC Exh. 4, which establishes that he knew that the employee/independent question was an important issue to drivers other than Edge.

<sup>19</sup> *Flowers Baking Co., Inc.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

<sup>20</sup> I recognize that some cases hold that this is not part of the General Counsel’s initial burden, e.g., *Neises Construction Co.*, 365 NLRB No. 129 fn.6 (2017). However, assuming that it is, the General Counsel satisfied it.

*Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000); *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9th Cir. 1966); *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988); *Flour Daniel, Inc.*, 304 NLRB 970, 971 (1991); *Norton Audubon Hospital*, 341 NLRB 143, 150–151 (2004). Finally, Respondent’s failure to adequately investigate the circumstances of the “dropped specimen” at the Women’s Care Clinic supports the inference of discriminatory motive.

#### CONCLUSIONS OF LAW

Respondent, Velox Express violated Section 8(a)(1) of the Act by

1. Discharging employee Jeannie Edge on August 21, 2016.
2. Maintaining a Non-Disparagement Policy that would reasonably be read to prohibit employees from disparaging Velox and its officials insofar as employees’ negative statements may relate to wages, hours and other terms and conditions of employment.
3. Classifying Jeannie Edge and other driver/couriers servicing PathGroup as independent contractors, rather than as employees.

#### REMEDY

The Respondent, having discriminatorily discharged Jeannie Edge, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall compensate her for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee’s backpay to the proper quarters on her Social Security earnings record.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>21</sup>

#### ORDER

Respondent, Velox Express, Inc. its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, such as challenging Respondent’s assertion that they are independent contractors.
  - (b) Maintaining a Non-Disparagement rule or policy which

<sup>21</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

prohibits employees from making negative statements about the company insofar as they would be reasonably construed to include a prohibition of negative statements pertaining to wages, hours and other terms and conditions of employment.

(c) Classifying route drivers who are employees as independent contractors.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board’s Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Jeannie Edge whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision. Respondent shall compensate her for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings, as set forth in the remedy section.

(c) Compensate Jeannie Edge for the adverse tax consequences due to receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Revise or Rescind its Non-Disparagement policy.

(e) Take whatever steps are necessary to reclassify the courier-drivers servicing the PathGroup account out of Velox’s Memphis office as employees and to treat them as employees rather than as independent contractors.

(f) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Jeannie Edge in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its offices in Little Rock, Arkansas and Memphis, Tennessee copies of the attached notice marked “Appendix.”<sup>22</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for

<sup>22</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 22, 2016.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 25, 2017

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, such as challenging your classification as an independent contractor.

WE WILL NOT maintain a policy that prohibits you from disparaging this company or its officials insofar as it relates to

wages, hours and other terms and conditions of employment.

WE WILL NOT continue to classify drivers who are employees as independent contractors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeannie Edge whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Jeannie Edge for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

WE WILL compensate Jeannie Edge for the adverse tax consequences due to receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Jeannie Edge, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

VELOX EXPRESS, INC.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/15-CA-184006](http://www.nlrb.gov/case/15-CA-184006) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

