

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE ATLANTA OPERA, INC.

and

**MAKE-UP ARTISTS AND HAIR
STYLISTS UNION, LOCAL 798,
IATSE**

Case 10-RC-276292

**BRIEF OF *AMICUS CURIAE*
CONSTRUCTION EMPLOYERS OF AMERICA**

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I. STATEMENT OF INTEREST

The Construction Employers of America (“CEA”) submits this *amicus curiae* brief in response to the National Labor Relations Board’s (“Board”) call for such briefs in *The Atlanta Opera, Inc.*, 371 N.L.R.B. No. 45 (Dec. 27, 2021).

The CEA is a coalition of specialty construction trade associations representing 15,000 signatory contractors who employ approximately 1.4 million skilled construction craft workers. The CEA is comprised of: FCA International, the International Council of Bricklayers and Allied Craftworkers (ICE-BAC), the Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association of America (NECA), the Sheet Metal and Air Conditioning Contractors’ National Association (SMACNA), the Signatory Wall and Ceiling Contractors Alliance (SWACCA), and The Association of Union Constructors. All member companies under the CEA association umbrella are signatory to union collective bargaining agreements for installing specialty construction jobsite and related work with highly skilled union-represented craft workers. They are committed to providing the highest-quality fully registered apprenticeship and journeyworker upgrade skills training as well as middle-class wages, retirement benefits, and health plans to their employees. CEA members employ tens of thousands of building trades personnel throughout the United States.

The issue presented in this case – i.e., how the Board is to determine who is an employee and who is an independent contractor for purposes of the National Labor Relations Act – is of particular interest to the CEA and to the construction industry as a whole. Misclassification of employees as independent contractors is commonplace – many studies have documented for many years that it is in fact rampant in the construction industry, and extremely deleterious to high workforce development investments CEA employers make on an ongoing basis in the

jointly administered workforce development and deployment systems with the Building Trades in the construction industry. In 2019, Signatory Wall and Ceiling Contractors Alliance (SWACCA) President Matt Townsend highlighted this problem when he testified before the Workforce Protections Subcommittee of the Education and Labor Committee of the U.S. House of Representatives:

In my industry, misclassification is not about making tough calls applying complicated laws to ambiguous facts. Rather, it is a choice simply to disregard wage and hour laws, workers' compensation laws, unemployment insurance regulations, and other basic responsibilities of being an employer. This is done for the purpose of gaining an advantage against law-abiding competitors, realizing tremendous profits, and avoiding the financial risks that honest entrepreneurs must accept. Business owners using the misclassification model do not bear the risks of unanticipated overtime, bad planning, or poor execution. Instead, this racket transfers these risks onto workers and taxpayers.¹

It is with this concern in mind that CEA respectfully proposes that the proper standard for determining whether someone is an independent contractor is the standard established by the Board in *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014), and not the test established by the Board in *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, 2019 WL 342288 (Jan. 25, 2019).

II. INTRODUCTION AND QUESTIONS PRESENTED

In its Notice and Invitation to File Briefs, the Board invited interested *amici* to answer the following questions:

1. Should the Board adhere to the independent-contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)?
2. If not, what standard should replace it? Should the Board return to the standard in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), either in its entirety or with modifications?

¹ Testimony of Matt Townsend, Hearing on Misclassification of Employees: Examining the Costs to Workers, Businesses and the Economy, 116th Congress (2019), available at <https://edlabor.house.gov/imo/media/doc/TownsendTestimony092619.pdf> (accessed Jan. 18, 2022).

371 N.L.R.B. No. 45. The issue of who is an employee for purposes of the NLRA is especially relevant in the construction industry, where misclassification is common and can provide unscrupulous employers with a significant competitive advantage over its honest, law-abiding and responsible contractor competitors. Proper worker classification under the NLRA is just as important for our industry as Fair Labor Standards Act wage-and-hour compliance, tax, and other regulatory compliance regimes.

The incentives to misclassify construction industry employees across the broad range of labor and employment laws are great – and unscrupulous employers are assiduous in finding naked pretenses to cloak misclassification as some form of entrepreneurialism. The subterfuges used by unscrupulous employers in these schemes are as various as they are transparent. Airport taxi drivers working controlled shifts in leased company vehicles are no more modern-day Cornelius Vanderbilts in waiting than construction piece-work drywall installers are likely to become international prime contractors. And if they are, they can just as readily make their starts as bona fide employees. The notion of entrepreneurialism in this context is a cynical pretense for exploitation – at the expense of workforce standards and workforce equity for the good of the economy overall. Specific costs associated with lawful labor and employment classification include NLRA, Title VII, and FLSA protections, and then workers' compensation insurance premiums, unemployment insurance premiums, and payroll taxes. Additional costs include but are not limited to worker safety responsibility and training and compliance with employment laws such as overtime requirements under the FLSA. These costs, in addition to any risk of workers organizing to negotiate higher wages and benefits, and joining in other protected concerted activity, can be avoided by classifying workers as independent contractors – and that is all too easy and very deleterious to the maintenance of high workforce standards in our industry

and our economy overall. Fissured workplaces diminish high labor and community economic standards – and impair effective law enforcement.

Workers' compensation and unemployment insurance premiums alone can represent a significant share of labor costs in the construction industry. The elimination of these premiums can confer an immediate 10-20% or more total project cost advantage to an employer that misclassifies its employees as independent contractors. It's important to note that this 10-20% cost advantage assumes full compliance with tax and other legal requirements in an already unlawful relationship and doesn't include the additional cost advantage gained over employers whose properly classified employees exercised their rights under the NLRA to form and be represented by a union and negotiate for contributions to benefit plans.

The nature of the construction industry work accession and project deployment overall for all types of jobsite specialty contractors reduces the risk to employers who are all too willing to misclassify employees. First, the majority of the construction industry operates on a project basis, which isolates misclassification risks to specific time periods. Second, the construction industry as a whole in some market and in some localities relies heavily on foreign-born workers who are especially vulnerable to employee misclassification. These realities of the construction industry mean employers who misclassify their employees are less likely to be caught and held accountable for their violations, resulting in rampant employee misclassification in the construction industry and a significant unlawful disadvantage to employers unwilling to participate in the scheme. As described by Mr. Townsend in his congressional testimony:

Under the typical misclassification schemes used in my industry, our competitors and their labor brokers tell the workers where to go and what to do. They control and direct their workers at the jobsite just like my company does. These workers have no capacity to negotiate what they will be paid. They are regular crews, economically dependent on a labor broker as they move from jobsite to jobsite as directed by someone who is clearly the boss. These workers are not exercising

discretion and independent business judgment in scheduling their work like legitimate business owners do. To the extent wages vary among these workers because one installs more sheets of drywall than another on a given day, these differences are no more an indication that they are independent business owners than the disparate pay nineteenth-century miners received at the end of a workday based on the varying amounts of coal they hauled from the earth.²

III. SUMMARY OF FACTS

This case arises from a decision by the Acting Regional Director that the employer opera company failed to establish that its makeup artists and hair stylists were independent contractors. *See* Acting Regional Director’s Decision and Direction of Election, Case 10-RC-276292, issued June 17, 2021. Accordingly, the Acting Regional Director ordered an election pursuant to section 9(b) of the NLRA. *Id.* The employer requested review of the decision and, as noted above, the Board invited *amicus curiae* briefs on the independent contractor standard that should be applied.

IV. ARGUMENT

The long-standing purpose of the NLRA is to encourage collective bargaining for employees. *See, e.g.*, 29 U.S.C. § 151 (“Findings and Purpose” section of the NLRA); *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1630 (2018) (“... the legislative policy embodied in the NLRA is aimed at ‘safeguard[ing], first and foremost, workers’ rights to join unions and to engage in collective bargaining’”) (quotation omitted; alteration in original); *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 753 (1985) (“The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment...”). A legal standard that allows more workers to be designated as independent contractors – whether at

² Testimony of Matt Townsend, *supra* n.1.

the outset by dishonest employers or after the fact by a tribunal applying a misguided standard – undercuts the very purpose of the Act.

A. The *FedEx Home Delivery* and *SuperShuttle* Standards

In *FedEx Home Delivery*, the Board expressly declined to adopt the D.C. Circuit Court’s holding in a prior case involving FedEx “insofar as it treats entrepreneurial opportunity ... as an ‘animating principle’ of the [independent contractor] inquiry.” 361 N.L.R.B. at 610 (citing *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009)). The Board opined that it “should evaluate – in the context of weighing all relevant common-law factors – whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.” *Id.* Five years later, in *SuperShuttle DFW, Inc.*, the Board reversed course, stating that the *FedEx* Board “impermissibly altered the common-law test and longstanding precedent.” 2019 WL 342228 at *1. It therefore overruled the *FedEx* Board decision and held that it was “return[ing] to the traditional common-law test that the Board applied prior to *FedEx*.” *Id.*

The disconnect between the two Board decisions comes down to the concept of entrepreneurial opportunity: while the *FedEx* Board treated entrepreneurial opportunity as a “relevant consideration” but not a “decisive factor” in its independent contractor analysis³, 361

³ Specifically, the *FedEx* Board stated:

Actual entrepreneurial opportunity for gain or loss, then, remains a relevant consideration in the Board’s independent-contractor inquiry. We address here how such evidence is to be properly assessed as part of the analysis of the traditional common-law factors. In the past, the Board has been less than clear about this point: In some cases, entrepreneurial opportunity has been analyzed expressly as a separate factor; in others, it has been integrated into the Board’s analysis of other factors [footnote omitted]. The Board has also spoken in terms of the “economic independence” of putative contractors from their employing entities [footnote

N.L.R.B. at 612, 620, the *SuperShuttle* Board treated it as a “prism” through which it may conduct its analysis:

...entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa.

2019 WL 342228 at *15. *See also, id.* (“...the Board has over time ... shifted its perspective to entrepreneurial opportunity as a principle by which to evaluate the significance of the common-law factors...”)⁴; *FedEx Home Delivery v. NLRB*, 563 F.3d at 505 (Garland, J., dissenting) (noting that the common-law test treats entrepreneurial opportunity “as only one factor” while the D.C. Circuit majority treats it “as the focus of the test”).

Focusing too much on “entrepreneurial opportunity” can lead to less than equitable results, particularly in the construction industry. The use of multiple contractors on a single project is standard practice in construction. Multiple contractors may work under a general

omitted]. Today, we make clear that entrepreneurial opportunity represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*.

361 N.L.R.B. at 620 (emphasis in original). Turning to the facts of the case before it, then, the Board analyzed an 11th factor (in addition to the non-exhaustive list of 10 factors set forth in the Restatement (Second) of Agency § 220): “Whether the Evidence Tends to Show that the Individual is, in Fact, Rendering Services as an Independent Business.” *Id.* at 624.

⁴ Applying this standard to the facts before it, the *SuperShuttle DFW* Board found that the airport shuttle drivers were independent contractors, emphasizing the entrepreneurial opportunities available to them. 2019 WL 342228 at *17 (“Like most entrepreneurs or small business owners, SuperShuttle franchisees make a significant initial investment in their business by purchasing or leasing a van and entering into a Unit Franchise Agreement that requires certain payments, including an initial fee and a weekly flat fee. Like small business owners, franchisees have nearly unfettered opportunity to meet and exceed their weekly overhead: with total control over their schedule, they work as much as they choose, when they choose; they keep all fares they collect, so the more they work, the more money they make; and they have discretion over the bids they choose to accept, so they can weigh the cost of a particular trip (in terms of time spent, gas, and tolls) against the fare received.”)

contractor, directly for a project owner, or under a hybrid arrangement where the project owner contracts directly with multiple contractors who are overseen by a construction manager that also contracts with the project owner. These arrangements are ordinarily lawful and legitimately structured for the use of specialized contractors to perform specific scopes of work. However, these subcontracting structures may also be exploited by unscrupulous employers to avoid various obligations, including those of the NLRA.

Indeed, the “entrepreneurial opportunity” factor can be (and is) manipulated by employers and labor brokers looking for an unfair advantage over competitors. The typical scenario is as follows: an employer or labor broker designates each worker doing framing, drywall, or ceiling work on a jobsite as an independent contractor. The workers use their own tools to complete the work. The employer pays them, sometimes in cash; issues them a 1099; and maybe even creates an LLC in their name. They are paid a certain amount for each sheet of drywall they hang or finish or for each square foot of framing they complete or ceiling they install. A tribunal analyzing the facts of such a case could, if focused too much on the entrepreneurial opportunities allegedly provided to these workers, find that they are independent contractors and not employees. Yet as Mr. Townsend testified, this scenario is a sham: “these paperwork formalities are an absurd example of placing form over substance. Given the control the subcontracted labor brokers have over these workers, such paperwork no more makes them independent contractors than if the staff in a Congressional office had their own LLCs and were issued 1099s.”⁵ In fact these types of abuses abound in other sectors of the construction industry too – from rig welders to piece-work plumbers and electricians and many others. Off-the-clock

⁵ Testimony of Matt Townsend, *supra* n.1.

overtime is common, as are many other types of abuses including the violation of Section 7 rights.

Indeed, several recent examples demonstrate the lengths to which some employers, both big and small, will go to save costs and to avoid their obligations under federal law by misclassifying workers as independent contractors:

- In 2016, two Massachusetts construction employers were ordered to pay nearly \$2.4 million in back wages and liquidated damages to 478 employees, the bulk of whom had been misclassified as independent contractors. This misclassification allowed the employers to avoid paying overtime and other benefits under the FLSA. In announcing the remedy and penalties, the Department of Labor observed that, “[t]he misclassification of employees as independent contractors is a serious problem that hurts workers, taxpayers, and the entire economy in multiple ways. ... It robs employees of their rights to proper wages, safe workplaces, social security payments, and unemployment and workers compensation insurance. It deprives federal and state governments of needed tax revenues. And, it undercuts law-abiding employers who pay their workers legally and play by the rules.”⁶
- In 2017, two owner-operators of a drywall employer in Georgia were sentenced to federal prison for submitting false payroll forms in connection with a construction project at the CDC. The employer maintained a double payroll system, paying employment taxes for one set of employees (labeled “W2.REAL”) and not paying such taxes for another set of employees (labeled “W2.F.2CHK”). The U.S. Attorney noted that “[w]orkers classified as ‘W2.F.2CHK’ performed many of the same job duties as those who classified ‘W2.REAL.’”⁷
- In 2021, a North Carolina cabinet remodeling contractor was ordered to pay \$100,504 in back wages for eight employees who had been misclassified as independent contractors and were denied overtime pay.⁸ The Department of Labor stated, “Misclassifying employees as independent contractors is a serious and costly problem. This practice denies workers the wages – including proper overtime compensation – that they rightfully earned under the law.”⁹

⁶ Dept. of Labor News Release dated Aug. 2, 2016, available at <https://www.dol.gov/newsroom/releases/whd/whd20160802>.

⁷ U.S. Attorney News Release dated Dec. 13, 2017, available at <https://www.justice.gov/usao-ndga/pr/norcross-business-owners-sentenced-defrauding-cdc>.

⁸ U.S. Department of Labor News Release dated Sept. 21, 2021, available at <https://www.dol.gov/newsroom/releases/whd/whd20210921>.

⁹ *Id.*

- In 2021, a New Hampshire carpentry contractor was ordered to pay \$53,839 in back wages and \$53,839 in liquidated damages after misclassifying 52 employees as independent contractors as failing to pay them overtime.¹⁰ The Department of Labor noted that, “Contractors cannot evade overtime requirements by misclassifying employees or by failing to pay them in accordance with the law.”¹¹
- In 2021, a Massachusetts construction contractor was ordered to pay \$438,000 in back wages to 250 employees for violation of the FLSA. The Department of Labor found that, between August 2017 and November 2020, the employees were misclassified as independent contractors and were not paid overtime. The contractor was also ordered to pay civil penalties in the amount of \$64,750 for willful violations of the FLSA.¹²

As these examples make clear, workers in the construction industry (whether U.S.- or foreign-born) are at risk of being misclassified and losing the protections available to them under the NLRA and other laws. Emphasizing “entrepreneurial opportunities” over other factors in determining their status as employees increases this risk, as it allows employers to paper the file to create the (mis)impression that such workers are more like small business owners than employees.

B. The Board should return to the test established in *FedEx Home Delivery* to determine who qualifies an independent contractor for purposes of the NLRA.

In deciding the case now before it, the Board should therefore return to the standard established in *FedEx Home Delivery* to determine if the makeup artists and hair stylists are independent contractors or employees for purposes of the NLRA.¹³ Importantly, the *FedEx Home Delivery* standard does not ignore whether entrepreneurial opportunities are afforded to workers. Rather, entrepreneurial opportunity is one of several common-law factors in the

¹⁰ U.S. Department of Labor News Release dated Dec. 2, 2021, available at <https://www.dol.gov/newsroom/releases/whd/whd20211202>.

¹¹ *Id.*

¹² U.S. Department of Labor News Release dated Dec. 20, 2021, available at <https://www.dol.gov/newsroom/releases/whd/whd20211220>.

¹³ CEA takes no position on the merits of the makeup artists and hair stylists’ claims.

inquiry.¹⁴ See 361 N.L.R.B. at 612 (“In addition to the factors set forth in Restatement § 220, the Board has considered, as one factor among others, whether putative contractors have ‘significant entrepreneurial opportunity for gain or loss.’”) (citing cases).

The incentives to misclassify workers in the construction industry are numerous, and, given the project-based nature of the industry, there is significantly less risk of law enforcement to construction employers for misclassification than in other industries. In addition to providing a cost savings and competitive advantage to employers, misclassification can be (and is) used as a preemptive strike against potential concerted activity by employees – conduct that the Board has consistently found to be in violation of the NLRA. See, e.g., *Morgan Corp.*, Case 10-CA-250678, 2020 WL 5814605 (N.L.R.B. Sept. 25, 2020) (“When an employer acts to ‘nip the bud’ [of] protected activity, the employer violates section 8(a)(1) of the [NLRA]”) (citation omitted); *Paralex Int’l*, 356 N.L.R.B. No. 82, 2011 WL 288784 (Jan. 28, 2011) (agreeing that employee’s discharge was a preemptive strike to prevent her and other employees from engaging in concerted activity); *Proffitt & Sons, Inc.*, Case 10-CA-185899, 2017 WL 3309859 at *2 (N.L.R.B.G.C. March 30, 2017) (“...the Board has held that an employer violates Section 8(a)(1) when its actions operate to chill or curtail future Section 7 activity of statutory employees”) (footnote omitted). Over-emphasizing entrepreneurial opportunity can and will lead to inequitable results, particularly when dishonest employers can fabricate “entrepreneurial opportunities” in an attempt to avoid their obligations under federal and other laws. For these reasons, CEA and its member specialty contractor employer associations request that the Board

¹⁴ “Related to this question, the Board has assessed whether purported contractors have the ability to work for other companies, can hire their own employees, and have a proprietary interest in their work.” *FedEx Home Delivery*, 361 N.L.R.B. at 612 (citing cases; footnotes omitted).

adopt return to the *FedEx Home Delivery* standard for purposes of determining who qualifies as an employee under the FLSA.

V. CONCLUSION

For the foregoing reasons, CEA respectfully requests that the Board return to the independent contractor standard established in *FedEx Home Delivery*. On related items, we commend the NLRB and the Labor Department Wage and Hour Division's recent Memorandum of Understanding to enhance your agencies' joint law enforcement on these crucial issues. We would encourage DOL, NLRB, IRS and others to find ways to more effectively provide guidance to the industry on the proper classification of employees. Moreover, on another related item, we would encourage the NLRB to put more teeth into its worker classification measure, by revisiting the recent *Velox Express, Inc.* (368 NLRB No. 61, Aug 29, 2019) decision by adding a necessary and fair element of strict liability by holding that misclassification itself and alone is a per se violation of an employee's right to engage in protected concerted activity under section 7 of the NLRA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Amicus Brief of the Construction Employers of America was electronically filed with the National Labor Relations Board on February 10, 2022, using the Board's E-filing system and was served via e-mail (as shown) upon the following persons on February 10, 2022:

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