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The Atlanta Opera, Inc. *and* Make-Up Artists and Hair Stylists Union, Local 798, IATSE. Case 10–RC–276292

December 27, 2021

ORDER GRANTING REVIEW AND NOTICE AND INVITATION TO FILE BRIEFS

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, RING, WILCOX, AND PROUTY

The Employer has requested review of the Acting Regional Director's Decision and Direction of Election in this case, based on the finding that the workers whom the Petitioner seeks to represent—makeup artists, wig artists, and hairstylists (collectively known as stylists)—are employees of The Atlanta Opera, Inc. and not independent contractors.

The Employer's request for review is granted as it raises a substantial issue warranting review.[1]

To aid in the consideration of the issue, the Board invites the filing of briefs in order to afford the parties and interested amici the opportunity to address 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?

We reject our dissenting colleagues' position that it is inappropriate for the Board to reexamine its recent precedent in this important area of Federal labor law. The Board may grant a request for review when compelling reasons support the reconsideration of an important Board policy. See Section 102.67(d) of the Board's Rules and Regulations. In doing so, we find it appropriate to provide an opportunity for public participation.[2]

Briefs not exceeding 20 pages in length may be filed with the Board in Washington, DC on or before February 10, 2022. The parties (but not amici) may file responsive briefs on or before February 25, 2022, which shall not exceed 30 pages in length. No other responsive briefs will be accepted. Motions for extensions of time in which to file briefs will not be granted absent compelling circumstances. The parties and amici shall file briefs electronically at http://mynlrb.nlrb.gov/efile and are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/10-RC-276292 under the heading "Participants." If assistance is needed with E-Filing on the Board's website at www.nlrb.gov, please contact the Office of the Executive Secretary at 202-273-1940 or Executive Secretary Roxanne L. Rothschild at 202-273-2917.

Dated, Washington, D.C. December 27, 2021

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] No party seeks review of the Acting Regional Director's decision to order an election by mail ballot and, accordingly, that issue is not before the Board.

[2] Our dissenting colleagues argue that there is "no need for the Board to revisit *SuperShuttle*," but none of the reasons they offer is consistent with the Board's recent practice or with their own prior views.

First, our colleagues state that "no party to this case has asked the Board to overrule, modify, or even revisit *SuperShuttle*." On several occasions, however, our dissenting colleagues were members of Board majorities that overruled precedent sua sponte (but without inviting briefing). See, e.g., *Baylor University Medical Center*, 369 NLRB No. 43 (2020); *Johnson Controls,* 368 NLRB No. 20 (2019)*; Ridgewood Healthcare Center, Inc.*, 367 NLRB No. 110 (2019); *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019); *Boeing Co.*, 365 NLRB No. 154 (2017). Notably, in *SuperShuttle DFW, Inc.*, supra, the Board reversed precedent, *FedEx Home Delivery*, supra, without providing notice and an opportunity for public participation – an approach our colleagues endorsed. 367 NLRB No. 75, slip op. at 8 fn. 14.

Second, our colleagues assert that "[n]othing has happened since the issuance of *SuperShuttle* to warrant a re-examination" of the decision, noting that "[t]here have been no adverse judicial decisions on point." But in recent years, prior Board majorities (which included our colleagues) have not hesitated to reverse precedent despite the absence of adverse judicial decisions. See, e.g., *Baylor University*, supra; *Ridgewood Healthcare*, supra; *Alstate Maintenance*, supra; *Boeing Co.*, supra; *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (2019); *PCC Structurals*, *Inc.*, 365 NLRB No. 160 (2017).

Chairman McFerran was not a member of the Board when *FedEx* was decided. Member Wilcox and Member Prouty were not Board members when either *FedEx* or *SuperShuttle* were decided. Therefore, and because it is premature to do so, we do not address our dissenting colleagues' arguments on the relative merits of *SuperShuttle* and *FedEx*.

MEMBERS KAPLAN and RING, dissenting.

Today, a newly-constituted Board majority, in granting review, asks whether to overrule the independent-contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), and reinstate the standard in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014) (*FedEx II*), enf. denied 849 F.3d 1123 (D.C. Cir. 2017), or some variation of it. If the Chairman's dissent in *SuperShuttle* is any guide,[1] our colleagues' solicitation of briefing in this case is a likely precursor to overruling *SuperShuttle*. Contrary to our colleagues, we see no need for the Board to revisit *SuperShuttle*, which was carefully considered and decided less than 3 years ago.

To begin, no party to this case has asked the Board to overrule, modify, or even revisit *SuperShuttle*.[2] On the contrary, in the request for review of the Acting Regional Director's finding that the makeup artists, wig artists, and hairstylists (collectively known as stylists) are employees of The Atlanta Opera (the Employer) and not independent contractors, the Employer argues that the Acting Regional Director's analyses of nearly all of the independent-contractor factors departed from extant Board precedent. The Employer further argues that this case presents novel issues of law and policy, as the Board has never issued a published decision addressing the classification of hair and makeup artists in the cosmetology industry. We agree with the Employer that the Acting Regional Director may have failed to apply extant law. Accordingly, we believe that the Board should grant review only to evaluate, based on a reading of the entire hearing record, whether the stylists are statutory employees or independent contractors under the common-law agency test, as restated in *SuperShuttle*. Unless our colleagues in the majority similarly believe that the request for review raises a genuine issue of factual or legal error, their sua sponte determination to invite reconsideration of the *SuperShuttle* legal standard, rather than to deny the request for review, ill serves employees in the petitioned-for unit, who will now be deprived of the benefit of an expeditious representation election.[3]

In *SuperShuttle*, the Board returned to its longstanding independent-contractor standard, reaffirming its adherence to the traditional common-law agency test.[4] The Board overruled the prior Board decision in *FedEx II*, explaining in detail why the majority there improperly altered the Board's traditional common-law agency test for independent contractors by greatly diminishing the significance of entrepreneurial opportunity to the analysis and reviving an "economic dependency" standard that Congress explicitly rejected with the Taft-Hartley amendments of 1947. More specifically, the *SuperShuttle* Board overruled *FedEx II* to the extent that it "revised or altered the Board's independent-contractor test" by holding 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*, 367 NLRB No. 75, slip op. at 1 (quoting *FedEx II*, 361 NLRB at 620 (emphasis in original)).

As members of the *SuperShuttle* majority, we believe that the Board rightly concluded that the *FedEx II* decision significantly limited the importance of entrepreneurial opportunity to the Board's independent-contractor analysis by "creating a new factor ('rendering services as

[1] 367 NLRB No. 75, slip op. at 15.

[2] There are, of course, circumstances in which it is appropriate for the Board to consider issues and overrule precedent sua sponte, even in the absence of arguments raised by a party contesting a decision below. Most obviously, longstanding precedent holds that the Board can sua sponte address remedial issues in unfair labor practice cases, as it did in *Ridgewood Health Care Center*, 367 NLRB No. 110 (2019). Apart from that, sua sponte reconsideration of precedent in unfair labor practice and representation-election cases has been limited in practice to certain circumstances. As discussed below, none of those circumstances exist here.

[3] In this respect, our opposition to reconsideration of precedent *in this case* reflects a concern previously voiced by the Chairman in her dissent in *Kroger Limited Partnership*, 368 NLRB No. 64, slip op. at 17 (2019), where she criticized the majority for, among other things, departing from the "norm of exercising administrative restraint: disposing of a case without deciding unnecessary issues." While we disagreed with her view in that case, where the issue decided was closely related to the applicability of the rationale from other recent Board decisions setting new precedents, we suggest that the preferable approach here in light of the norm she once championed would be for the majority to note their concerns about *SuperShuttle* and express an interest in reconsidering that precedent in a future appropriate case. See, e.g., *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 1 fn. 2 (2019).

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

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.

(b) Whether or not the one employed is engaged in a distinct occupation or business.

(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

(d) The skill required in the particular occupation.

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.

(h) Whether or not the work is part of the regular business of the employer.

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

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

part of an independent business') and then making entrepreneurial opportunity merely 'one aspect' of that factor." Id., slip op. at 1. 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; see also *FedEx Home Delivery*, 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I*) (noting that "while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism"), rehearing en banc denied Sept. 4, 2009. This approach of treating entrepreneurial opportunity as a principle to help assess the overall effect of the common-law factors is consistent with the common-law agency test because it considers all the common-law factors in the total factual circumstances of a particular case and treats no one factor or the principle of entrepreneurial opportunity as determinative. *SuperShuttle*, 367 NLRB No. 75, slip op. at 11. It also represents an appropriate response to the D.C. Circuit's twice-made criticism of the Board's failure to adequately consider the significance of entrepreneurial opportunity in a matter of legal interpretation as to which the court owes the Board no deference. See *FedEx II*, 849 F.3d at 1128.

The majority correctly states that the Board will grant review in representation proceedings when there are compelling reasons for reconsideration of an important Board policy. See Section 102.67(d) of the Board's Rules and Regulations. But here the majority has failed to identify any compelling reason to grant review on this basis. Nothing has happened since the issuance of *SuperShuttle* to warrant a re-examination of this well-reasoned precedent. Unlike in *SuperShuttle* itself, where the Board was responding to the D.C. Circuit's rejection of the then-extant standard, there have been no adverse judicial decisions on point.[5] Likewise, there have not been any intervening changes in relevant Board law,[6] nor is there an apparent need to address conflicting precedents in order to resolve an issue before us.[7] Further, application of *SuperShuttle* in several recent cases makes clear that the test poses no great bar to finding that individuals are employees rather than independent contractors. See *Nolan Enterprises, Inc. d/b/a Centerfold Club*, 370 NLRB No. 2, slip op. at 1 (2020) (finding that the judge correctly analyzed the common-law factors through the prism of entrepreneurial opportunity, as required under *SuperShuttle,* in determining that a worker lacked sufficient opportunity for economic gain to render her an independent contractor); *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 1–2 (2020) (finding that the employer's drivers had little opportunity for economic gain or risk of loss after considering the common-law factors through the prism of entrepreneurial opportunity, which weighed heavily against a finding of independent-contractor status); *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 3–4 (2019) (finding that the employer failed to establish that its drivers were independent contractors where, among other things, the drivers had little opportunity for economic gain or risk of loss).

Further, the new Board majority offers no reason or guidance to the parties for reconsidering *SuperShuttle* and potentially returning to the standard in *FedEx II*—an approach that will invariably put the Board at odds with the D.C. Circuit, a forum with national jurisdiction to hear appeals from parties adversely affected by Board decisions. In addition, it cannot be ignored that the current General Counsel has raised the possibility of seeking Board review and reconsideration of the holding in *Velox Express*, 368 NLRB No. 61, slip op. at 5 et seq., that an employer's misclassification of employees as independent contractors, standing alone, is not an independent violation of Section 8(a)(1) of the Act.[8] If the Board were eventually to overrule *Velox* and find the per se violation, even employers who in good faith *correctly* classified individuals as independent contractors under the *SuperShuttle* test could be found to have committed an unfair labor practice.[9]

[5] Similarly, the majority's rationale for overruling precedent in *Johnson Controls*, 368 NLRB No. 20 (2019), was based in part on recent judicial criticism of the application of that precedent in *Scoma's of Sausalito v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017), discussed at 368 NLRB No. 20, slip op. at 7. And the majority's rationale for overruling precedent in *Boeing Co.*, 365 NLRB No. 154 (2017), was based not only on judicial criticism but also on a host of apparently inconsistent Board decisions nominally applying the same extant legal standard.

[6] Thus, this case is distinguishable from *Kroger*, supra.

[7] See, e.g., *Alstate*, supra, 367 NLRB No. 68 (overruling precedent held to be irreconcilable with the legal standard for protected concerted activity previously set forth in *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)); see also *Baylor University Medical Center*, 369 NLRB No. 43 (2020) (aligning *Clark Distribution Systems*, 336 NLRB 747 (2001), with closely related precedent and overruling that case to the limited extent that it stated a rule broader than necessary to protect Sec. 7 rights).

[8] Memorandum GC 21-04 at p. 4 (Aug. 12, 2021).

[9] Should legislation currently pending in Congress ultimately be enacted into law, there even exists the possibility that employers who engage in such misclassification unfair labor practices would incur civil financial penalties.

For all these reasons, we cannot support the majority's decision to revisit *SuperShuttle* and potentially return to the standard in *FedEx II,* or some variation of that discredited standard. We respectfully dissent.

Dated, Washington, D.C. December 27, 2021

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Marvin E. Kaplan, Member

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John F. Ring, Member

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