Case 10–RC–276292

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

The Atlanta Opera, Inc.

and

Make-Up Artists and

Hair Stylists Union, Local 798, IATSE

BRIEF OF *AMICUS CURIAE*

THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

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INTEREST OF AMICUS CURIAE

The Owner-Operator Independent Drivers Association ("OOIDA") is the largest international trade association representing the interests of the truck drivers whose classification is at issue in this litigation: independent owner-operators, small business motor carriers, and professional truck drivers. OOIDA's more than 150,000 members are professional drivers and small businessmen and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. OOIDA is the leading advocate of single truck motor carriers, which represent nearly half of the total active motor carriers in the United States, and owner-operators, drivers who own or lease their truck and equipment and typically choose to work as independent contractors for a single motor carrier.

OOIDA actively promotes the views of professional drivers and small business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA's mission includes the promotion and protection of the interests of independent truckers, whether they are owner-operators, small-business motor carriers, or professional truck drivers, on any issue that might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways.

The term independent owner-operator is used to describe two different types of businesses arrangements. In one category, the truck owner has obtained federal operating authority granted by the U.S. Department of Transportation allowing it to do business directly with shippers and brokers to move freight in interstate commerce. Owner-operators with federal operating authority are considered motor carriers and are unquestionably in business for themselves and fall into the independent contractor category.

The second type of owner-operator is an individual trucker who operates under an exclusive contract with a motor carrier under that motor carrier's federal operating authority. These are the owner-operators who can be the subject of classification disputes. OOIDA seeks to preserve the true independent owner-operator business model of this second group by both ensuring that motor carriers treat them as independent contractors and ensuring that agencies and courts making classification decisions do not adopt a test that is so broad that it mistakenly classifies true owner-operators as employees, depriving them of their hard-earned businesses.

The Current Debate on Worker Classification

The classification of workers, and especially truck drivers, has been an emerging public policy issue for the last several years. OOIDA is aware of, and sympathetic to, the plight of truck drivers who are mistreated by motor carriers. This most often occurs when a motor carrier labels its drivers as independent contractors but imposes onerous demands on them and exercises such control over them that the drivers cannot be considered to be managing their businesses. Instead of enforcing existing traditional classification standards and other legal remedies that would support owner-operators' rights, some policymakers have sought to remedy these drivers' poor working conditions by establishing new categorical classification rules that threaten to abolish the owner-operator business model itself. Such proposals ignore the long history of the owner-operator model described above and disregard the successful efforts of truly independent owner-operators to build their own businesses.

For example, the "ABC Test," as adopted in California through AB5, presumes that all workers are employees unless they can demonstrate that they meet the test's specific criteria. Prong B of the ABC test, which requires that the worker performs work outside the usual course of the hiring entity's business, is the most problematic test for owner-operators. The mere fact

that an individual performs work that is important, or even central, to a business's work does not indicate whether individual drivers operate their own businesses. If an owner-operator has control over all aspects of their work and can increase earnings based on their business acumen or investments, then they are likely in business for themselves, even if they operate under an agreement with a motor carrier. While California's classification law does provide for a limited business-to-business exemption, OOIDA believes it would be difficult, if not impossible, for truly independent owner-operators to satisfy each and every one of these criteria. Furthermore, proposals at the federal level to implement the ABC test have not included any exemptions. If an owner-operator cannot meet this high standard, then AB 5 automatically considers them employees. It is important for the NLRB to ensure that the test it chooses is not so broad as to take away the hard-earned businesses of owner-operators who truly have the discretion to operate their business as they see fit.

SUMMARY OF THE ARGUMENT

The tests adopted by both the *FedEx Home Delivery,* 361 NLRB 610 (2014) ("*FedEx*") and *SuperShuttle DFW*, 367 NLRB No. 75 (2019) ("SuperShuttle") require fact-intensive inquiries that give the decision-maker broad discretion to appropriately classify most truck-drivers as independent owner-operator drivers or employees. These classification tests have much in common regarding the accurate classification of most truck drivers. However, the discussion in each of the Board's decisions highlights the risks that either test could be misused to harm or effectively eliminate the traditional independent owner-operator business model.

For example, the *FedEx* decision admits that "[n]othing in the text of the Act, or its legislative history, speaks directly to the precise issue in this case: how to interpret and apply common-law agency principles in distinguishing between employees and independent

contractors…" *FedEx*, 361 NLRB at 617. In light of recent efforts by policymakers to change or reinterpret the traditional common law factors in ways that may classify true independent contractors as employees, OOIDA is concerned as to whether such an open-ended classification test would accommodate such a departure from precedent. Without some unifying principle, guidelines, or limits on the use of the common law factors, there is a risk that true owner-operators may incorrectly be classified as employees, causing them to lose their hard-earned businesses.

The *SuperShuttle* decision's focus on the entrepreneurial opportunity test provides some certainty that owner-operators will not be misclassified as employees. OOIDA believes that in some circumstances, informed by the common law factors where appropriate, the entrepreneurial test may, by itself, accurately discern between employees and independent contractors. However, even if the observation by the minority in *FedEx* accurately describes that the NLRB's classification decisions have been increasingly focused on entrepreneurial opportunity,[1] OOIDA is unaware of any legal authority the requires the Board to move now to embrace this inquiry as the only measuring stick by which to make a classification decision.

The establishment of an entrepreneurial opportunity test does not appear to take into account the circumstances where the motor carrier's control over its drivers is so complete or oppressive that drivers are constructively deprived of the independence to run their own businesses as traditional owner-operators. OOIDA agrees that in some circumstances an examination of entrepreneurial opportunity, alone, may be sufficiently comprehensive to make an accurate classification decision. But a disciplined inquiry into a motor carrier's control of its drivers is also appropriate to determine whether the driver is truly independent.

[1] *FedEx*, 361 NLRB at 633.

Moreover, the examination of the entrepreneurial opportunity and control factors must take into consideration how the relationship between a motor carrier and its drivers actually operates, not just how it might theoretically operate under the terms of their agreement. This inquiry, however, must avoid giving too much weight to factors that are extraneous to the operation of the ongoing business that is the subject of the contract (not the businesses' sale at the end of the relationship) or uncommon to the class of workers at issue (the experience of a couple of workers may not be representative of the class), as the *FedEx* dissent suggested may be relevant.

ARGUMENT

The Regulatory Setting for Independent Owner-Operator/Motor Carrier Relationships

The federal government has long recognized an imbalance in the bargaining position between owner-operator and motor carriers. Contracts under which owner-operators provide the truck they own and their driving services to motor carriers are known as "leases."[2] Motor carriers who operate vehicles leased from owner-operators must comply with the "Truth in Leasing" regulations found at 49 C.F.R. § 376. These rules require the lease to take a certain form and to make specific disclosures such as how compensation and any deductions thereto will be calculated. They also prohibit a carrier from requiring the owner-operator to purchase or rent any products, equipment, or services from the carrier as a condition of entering into the lease arrangement. 49 C.F.R. § 376.12(i). Not only must the content of a lease comply with the regulations, but "the lease provisions shall be adhered to and performed by the authorized carrier." 49 C.F.R. § 376.12.

[2] This type of lease is not to be confused with lease-purchase programs, discussed below, where a motor carrier leases a truck to a driver, promising the driver's purchase of the truck, and then the motor carrier leases it back from the driver as governed by specific federal regulation.

A properly executed lease agreement recognizes the independence of the owner-operator by allowing them to choose their jobs (or not accept any at all), control how they will complete their work, and end their relationship with a carrier according to the terms of their negotiated lease. Independent leased-on owner-operators also have the ability to negotiate the rate for work included in their lease, and they can negotiate other compensation during their work with the carrier. Under these leases, a trucker is usually responsible for maintenance of their equipment and managing the business aspects of their operation. When done right, traditional lease arrangements offer truckers control over their work and the opportunity for profit or loss. When a leased-on owner-operator fits this description, they are in "business for themselves" and should be classified as an independent contractor. There are hundreds of thousands of truckers who currently fit this model.

The fact that the federal government regulates motor carrier/owner-operator contracts should be taken as strong presumption in favor of preserving the traditional owner-operator business model. A motor carrier's compliance with the leasing rules can be a strong indication the driver is an independent contractor. In practice however, even under leases that appear to comply with the regulation, OOIDA members have experienced all manner of motor carrier pressure and coercion than can have the effect of depriving drivers of the discretion and ability to run their own businesses, circumstances that indicate that they should be treated as employees.

Notes on the Control Factor

An examination of a motor carrier's control of its drivers requires a complex, fact-intensive inquiry. Some motor carrier supervision and control of owner operators is provided by law. Other areas of control can affect a driver's entrepreneurial opportunity, and yet other forms

of control simply leave drivers without discretion to run their business as they see fit. A truck driver's opportunity to be an entrepreneur can be a legitimate inquiry, alone (and informed by relevant common law factors), to classify a driver. But OOIDA agrees with the majority in *FedEx* that, when used, the entrepreneurial opportunity must be demonstrated as the actual experience of the typical member of the group of drivers being evaluated, rather than a theoretical possibility. *FedEx*, 361 NLRB at 14-16.

In some circumstances, however, the amount of control that a motor carrier demands over a driver's business can deprive that driver of independence and support the finding that a driver is an employee—a classification decision that would be independent from the issue of entrepreneurial opportunity. Motor carriers employ myriad opportunities to control their drivers.

Motor Carrier Control of Owner-Operators Under the Guise of Government-Imposed Control

OOIDA recognizes, as the majority noted in *SuperShuttle*, that the NLRB and courts have held that where the government requires an employer to exert certain controls over the worker, this is considered government control and not employer control for purposes of worker classification. *SuperShuttle,* 367 NLRB at 4. In the truck driver context, the Truth in Leasing regulations governing contracts between motor carriers and truck owners and operators require a certain amount of motor carrier control of an owner-operator:

> The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

49 CFR § 376.12(c)(1). The rules further provide that:

> Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

Id. at § 376.12(c)(4). As governmental controls, these requirements cannot weigh in favor of the determination of an employer-employee relationship. Noncompliance with these legal obligations, however, should weigh strongly in favor determining that a driver is not being treated like an independent contractor but is an employee.

It would seem that there are potentially unlimited ways for a carrier to claim that a control is imposed on an owner-operator in the name of safety, and that such requirements are government control not relevant to classification decisions. These include:

- A requirement that drivers install and use speed limiters in their trucks: There is no federal requirement for the use of speed limiters. OOIDA has presented comments to Department of Transportation that such devices detract from safety rather than enhance it. (https://www.regulations.gov/document/NHTSA-2007-26851-0008; https://www.regulations.gov/document/NHTSA-2007-26851-3873). Such a requirement controls the fundamental activity of the driver. It also deprives drivers from using their best judgement in how to control their vehicle safely and otherwise operate their business.

- The use of Electronic Logging Devices (ELDs): Federal law requires drivers use ELDs to keep track of their compliance with the rules governing the number of hours a driver can operate a truck each day and week. However, many ELDs allow a motor carrier to go beyond this requirement and monitor a driver's duty status and location and to know in real time whether the driver is operating the truck. Motor carriers are known to use such devices to micromanage their drivers' activities and decisions—purposes outside of regulatory compliance. Motor carriers who observe that a driver has stopped, but also see that the driver still has time to drive in the day, are known to then call the driver to pressure them to get back on the road or take additional work. This occurs even when the driver has decided he is too fatigued to operate safely under the rules.

- Some motor carriers require drivers to go to specific medical examiners: Drivers are required by federal law to get a medical certification, and motor carriers are required to ensure they have the certification. But nothing in the rules requires a motor carrier to dictate to the driver who must perform the physical exam.

Even broader examples may include the motor carrier requirement that their owner-operators attend safety meetings and training alongside the motor carrier's employees. A motor carrier could also limit the times of day an independent contractor could work and the number of

jobs they could complete in a month, claiming that these restrictions help to improve safety and, therefore, are the government's control of the owner-operators.

OOIDA believes that factors such as these should not be exempt from consideration when determining if a business exerts control over a worker. While the presence of any one of these requirements, such as the use of a speed limiter, in a contract doesn't necessarily mean that an owner-operator should be classified as an employee, these factors should be considered alongside all other factors. Therefore, we oppose a broad interpretation of "compliance with government rules or regulations" that would include motor carrier requirements of owner-operators that are not requirements of the law. The "government control" exemption must be limited to specific legal requirements.

Motor Carriers' Economic Control of Drivers

Motor carriers can also exert control over drivers by depriving them of the discretion to make strategic and purchasing decisions in the conduct of their business. Motor carriers are known to require drivers to use specific repair shops, purchase insurance from a specific company or the carrier itself, use specific fuel cards, use specific towing services, purchase proprietary electronic logging devices, and to pay a monthly fee for the carrier's proprietary ELD service. Some carriers also recruit drivers, front the cost of their training, and simultaneously hire them so they can pay off that training debt.

Even if the driver believes he is freely choosing to purchase one or more of these products or services through or from a motor carrier, the result is the creation of a debt to the motor carrier. When a motor carrier creates, possesses, and controls the driver's debt, the motor carrier gains powerful control over the driver. The motor carrier decides how to deduct payments on the debt from a driver's compensation. Under such pressure to address their debt

and keep their job so that they can pay off the debt, the driver must accede to motor carrier's demands to drive more loads and maximize their driving hours, take less profitable loads than they might otherwise not accept, and make other decisions they might not otherwise make if they were not in debt to the motor carrier. Holding driver debt allows motor carriers to exercise more control over a driver's business.

"Lease-Purchase" and "Lease-to-own" Programs

The most egregious examples of motor carriers' exercise of economic control of drivers are known as "lease-purchase" or "lease-to-own" agreements. Under such programs, motor carriers seek to attract individuals with no or little trucking experience and promise to make them new independent owner-operator drivers with their own trucks and a promise that they will be their own bosses. The motor carrier (or an affiliated company) leases a truck to a driver with the promise of the eventual sale of the truck to the driver. Then the driver leases the truck back to the motor carrier under the Truth-in-Leasing rules, with the promise of generating income to fulfill their lease-purchase obligations. Lease-purchase schemes can only be described as indentured servitude—drivers are paid pennies on the dollar, will likely never own the truck, and have zero independence.

When drivers routinely default in such programs, the carrier repossesses the truck from the driver, and the driver loses all of the equity they thought they had invested toward the goal of purchasing it. OOIDA has observed motor carriers keeping such drivers on the precipice of default to exert greater control of them. Under the worst programs, drivers work extremely long hours, get no time off to go home or see their family, and leave the lease-purchase relationship owing money to the motor carrier. Although the case settled before trial, one former truck driver's brief in the 2019 Supreme Court case of *New Prime, Inc. v. Dominic Oliveira* makes

allegations regarding his experience under one lease-purchase program that are not atypical of some OOIDA members' experiences.[3]

The various controls by motor carriers of drivers described under the last three headers demonstrate the need for a classification investigation to examine both: 1) the contractual arrangement between motor carriers and drivers; and 2) the non-contractual decisions and actions of a motor carrier to exercise control over its drivers.

The Independence of the Control Factor from Entrepreneurial Opportunity

Clearly many of these control factors deprive drivers of the ability to run their own business and are relevant to entrepreneurial opportunity analysis. But even where there may be a factual finding that supports the finding of a facially entrepreneurial opportunity, a motor carrier's control of a driver's work and business, as described above, may be so complete or oppressive that the drivers have none of the independence that owner-operators have traditionally enjoyed and that attracted them to the trucking profession. Under some circumstances, drivers who are compensated by the mile driven and whose compensation covers his costs may be no more an independent contractor than an employee factory worker earning piece-rate compensation. In those instances, the independent contractor label acts only to shield motor carriers from employers' responsibilities. A disciplined "control" standard has a role, independent of the entrepreneurial test, in making truck driver classification decisions. Motor carriers who control drivers like employees but who do not bear the financial responsibilities of an employer compete unfairly with motor carriers who respect owner-operators' independence.

[3] (Brief for Respondent at 7-9*, New Prime, Inc. v. Dominic Oliveira*, 139 S. Ct. 532 (2019) No. 17-340) http://www.supremecourt.gov/DocketPDF/17/17-340/54725/20180718163542954_17-340.New%20Prime%20v.%20Oliveira.Respondent%20Br..pdf

This puts pressure on their competitors to adopt similar cost-saving practices that further blur the proper distinction between the employee and owner-operator business models.

CONCLUSION

OOIDA appreciates the use of both the common law and entrepreneurial opportunity test to determine whether a worker is an employee or independent contractor. Each test offers wide discretion to allow for the proper classification of truck drivers. In some instances, the entrepreneurial opportunity inquiry, alone, can be an appropriate classification analysis, and may be informed by the common law factors where appropriate. But a well-defined and disciplined analysis of the common law factors, particularly the control factor, should also be used to identify those instances where the driver might receive enough compensation to stay in business, but the actions of their motor carriers constructively deprive them of their discretion to run their business. Such business arrangements have no resemblance to the traditional owner-operator model.

OOIDA suggests that the Board modify one or both decisions to find a balance between the potentially open ended or an unreasonably expansive use of the common law factors and the need to accommodate the innumerable fact patterns in each industry. The entrepreneurial opportunity test should also be recognized as a potential basis, alone, upon which to make a classification decision. But it should not be used in a vacuum when the strong presence of any of the traditional common law factors, such as control, demand attention. Finally, classification decisions should be based not upon theoretical interpretations of a contract, but on the actual and typical experience between a business and the workers being classified.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing brief was electronically filed with the National Labor Relations Board February 10, 2022, using the Board's E-filing system and was served via e-mail upon the following persons:

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