

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

SUPERSHUTTLE INTERNATIONAL DENVER, INC,

Employer,

and

Case **27-RC-8582**

COMMUNICATIONS WORKERS OF AMERICA,

Petitioner

**COMMUNICATIONS WORKERS OF AMERICA'S
OPPOSITION TO SUPERSHUTTLE'S REQUEST FOR REVIEW**

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I. INTRODUCTION.

Pursuant to Section 102.67(e) of the Board's Rules and Regulations, Communications Workers of America ("Union") opposes the Request for Review filed by employer SuperShuttle International Denver, Inc. ("Employer") to Region 27 Regional Director Jones's September 20, 2011 Supplemental Decision and Direction of Election in the above-named case. The Employer filed a request for review by the October 4, 2011 deadline.

The Employer failed to meet its burden to prove that: (1) the Regional Director erred in determining that there was insufficient factual support of changed circumstances to warrant re-opening the underlying record or dismissing the petition; (2) the Regional Director failed to consider evidence of independent contractor status from the initial Decision and Order ("Initial Decision") in this case, issued on February 26, 2010; (3) the Regional Director wrongly accepted the finding in the Initial Decision that the employees were not supervisors under the Act; (4) the Regional Director wrongly found that the Union was not disqualified from representing the employees because of a disqualifying conflict of interest; (5) the Regional Director lacked the authority to direct an election based on the employees' alleged status as business entities; or (6) the previous Regional Director lacked authority to render his Initial Decision under *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Therefore, the Request for Review should be denied.

II. PROCEDURAL BACKGROUND.

On December 11, 2009, the Union filed a "petition seeking to represent the shuttle van drivers employed by SuperShuttle International Denver, Inc." ("Employer" or "SuperShuttle"). (See February 26, 2010 Regional Director's Decision and Order ("Initial

Decision”) at 1) (attached as **Exhibit A**). The Employer raised two issues in an attempt to get the petition dismissed, arguing that: 1) the shuttle van drivers were independent contractors, not employees, and 2) the Union’s representation of taxi cab drivers who own and operate a cooperative taxi cab firm created a disabling conflict of interest that should cause the Union to be disqualified as a representative of the Employer’s shuttle van drivers.¹ A hearing on the Employer’s two issues was held on December 28, 2009, and January 7, 8 and 12, 2010. (*Id.* at 2). On February 26, 2010, then Regional Director Jossierand issued his Decision and Order. (Ex. A). He ruled that the shuttle van drivers were employees and not independent contractors under the Act, but that CWA had a disqualifying conflict of interest. (*Id.* at 28-38). Thus, he dismissed the Union’s petition.

Both parties filed timely requests for review with the Board. The Employer petitioned for review of the Director’s finding that the shuttle van drivers were employees and not independent contractors or supervisors. The Union petitioned for review of the Director’s finding that there was a disabling conflict of interest prohibiting it from representing the drivers. On May 5, 2010, the Board issued an Order denying the Employer’s request for review but granting the Union’s request for review. (Attached as **Exhibit B**).

On July 18, 2011, the Board issued a Decision on Review and Order, reversing the Regional Director’s finding that CWA had a disabling conflict of interest. *SuperShuttle International Denver, Inc.*, 357 NLRB No. 19 (July 18, 2011). (Attached as **Exhibit C**). On August 29, 2011, Regional Director Jones issued an Order to Show

¹ In its brief to the Regional Director, the Employer also raised the question of whether the shuttle van drivers were supervisors. The Regional Director found that the Employer did not raise and the parties did not litigate the supervisory issue at the hearing. (Ex. A at 2).

Cause, requesting that the parties argue why an election should or should not be held, and requiring the parties to provide supported factual statements and documents. (Attached as **Exhibit D**). The parties timely filed responses, and on September 20, 2011, Regional Director Jones issued the Supplemental Decision and Direction of Election that SuperShuttle now challenges. (Attached as **Exhibit E**).

III. ARGUMENT

A. The Regional Director’s Supplemental Decision is Not “Clearly Erroneous” on Substantial Factual Issues.

Under Section 102.67(c) of the NLRB’s Rules and Regulations, the Board will only grant a request for review “where compelling reasons exist therefore.” Where a party challenges a factual determination, it must prove that “[t]he Regional Director’s decision . . . is clearly erroneous on the record and such error prejudicially affects the rights of a party.” (NLRB Rules and Regulations, §102.67(c)(2)).

1. Changed Circumstances.

SuperShuttle initially argues that the Regional Director erred by failing to find that holding an election would be inappropriate due to alleged changed circumstances since the issuance of the Initial Decision. But, as the Regional Director correctly points out, the Employer failed to provide any evidence whatsoever of changed circumstances that would make an election inappropriate. Rather than address that finding, the Employer instead disingenuously cites the Union’s response to the Order to Show Cause as proof that changed circumstances had occurred. *See Request for Review* at 7 (attached as **Exhibit F**). In fact, the Union simply pointed out the unlawful changes that SuperShuttle attempted to make, all of which were thwarted by the Union’s filing of

unfair labor practice charges and the subsequent settlement of those charges. To wit, these unlawful changes included:

- The termination of employee-leader Negede Assefa because of his union activities and his participation in proceedings before the Board;
- Increases in the annual franchise fee drivers must pay from \$1,000 to \$3,500;
- A requirement that employees form limited liability corporations to continue working for SuperShuttle;
- A prohibition against allowing employees from discussing statements made by management; and,
- A requirement that employees sign a confidentiality agreement prohibiting them from discussing terms and conditions of employment.

*See Settlement Agreement in the Matter of SuperShuttle International Denver, Inc., SuperShuttle Franchise Corporation, 27-CA-21609, 27-CA-21622, 27-CA-21655, 27-CA-21656 and 27-CA-21682, May 23, 2011 (attached as **Exhibit G**).* In any event, the Employer itself has failed to establish that the Regional Director’s decision on this point was clearly erroneous.

2. Independent Contractor Issue.

SuperShuttle next challenges the Regional Director’s Supplemental Decision for failing to consider “ample and undisputed evidence of the franchisee’s independent contractor status” (Ex. F at 7). But in support of this claim, the Employer goes on to cite its previous request for review, filed in March 2010, and nothing else. (*Id.*). As previously noted, that request for review was denied by the Board on May 5, 2010, and the Employer has presented absolutely nothing new to cause the Board to reconsider its previous position. The Employer itself has failed to establish that the Regional Director’s decision on this point was clearly erroneous.

3. The Supervisory Issue.

SuperShuttle also wants the Board to reconsider its May 5, 2010 denial of the Employer's request for review over the supervisory status of drivers. But again, the Employer offered nothing new in response to the Order to Show Cause, and offers nothing new now.

4. Disabling Conflict of Interest.

SuperShuttle also wants to re-litigate the disabling conflict of interest issue, notwithstanding the Board's July 18, 2011 Decision on Review and Order overruling the Initial Decision. The Employer claims that the Regional Director erred by "ignor[ing]" SuperShuttle's argument that the disabling conflict of interest issue should be decided again, (Ex. F at 9), but the Regional Director correctly obeyed the Board's Decision on Review and Order. The Employer did not demonstrate that the Regional Director's decision was clearly erroneous here.

B. The Regional Director's Supplemental Decision Does Not Depart from Board Precedent.

The Employer also claims that compelling reasons exist to grant review because the Regional Director departed from officially reported Board precedent under Section 102.67(c)(1)(ii) of the NLRB's Rules and Regulations.

1. The Regional Director's Authority Concerning the Drivers' Alleged Status as Business Entities.

SuperShuttle claims that some of the employees preparing to vote in the forthcoming election should not be allowed to do so because "they have formed business entities under state law" (Ex. F at 10). In her Supplemental Decision, the Regional Director correctly determined that SuperShuttle is merely trying to re-litigate the previous

Regional Director's finding in the Initial Decision that the employees at issue are not independent contractors. (Ex. E at 7). Moreover, the Employer has already filed a request for review over this finding, and the Board denied that request in May 2010. (See Ex. B). Since the Employer has already litigated this exact issue – and lost – it cannot now claim that officially reported Board precedent has not been followed.

2. New Process Steel.

Finally, SuperShuttle claims that the previous Regional Director lacked authority to render his Initial Decision because, under *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), all decisions of all Regional Directors were invalid if made during the period of time when the Board lacked a quorum. In rejecting this claim, the Regional Director cited both the 1961 delegation of authority under Section 3(b) of the Act, and a recent Board decision directly on point. (Ex. E at 8-9, citing *Brentwood Assisted Living Comm.*, 355 NLRB No. 49 (Aug. 27, 2010)). Incredibly, the Employer ignores this authority and simply repackages its initial argument in its request for review. Since Board precedent clearly supports the Regional Director's on this point, this claim should also be dismissed.

IV. CONCLUSION.

For the foregoing reasons, the Board should deny the Employer's Request to Review the Regional Director's Supplemental Decision and Direction of Election.

Respectfully submitted this 11th day of October, 2011.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of October, 2011, I electronically filed a true and correct copy of **COMMUNICATIONS WORKERS OF AMERICA'S OPPOSITION TO SUPERSHUTTLE'S REQUEST FOR REVIEW** with the NLRB's E-file, electronic filing system.

A true and correct copy of the foregoing and a Certificate of Service was sent via U.S. Mail, pre-paid to:

Wanda Pate Jones, Regional Director
National Labor Relations Board, Region 27
600 17th Street – 7th Floor North Tower
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Libby Russell

EXHIBIT A

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

SUPERSHUTTLE INTERNATIONAL DENVER, INC.,¹

Employer,

and

Case No. 27-RC-8582

COMMUNICATIONS WORKERS OF AMERICA,

Petitioner.

REGIONAL DIRECTOR'S DECISION AND ORDER

On December 11, 2009, Communications Workers of America (CWA or Union), filed a petition seeking to represent the shuttle van drivers employed by SuperShuttle International Denver, Inc., (SuperShuttle Denver or Employer) in its Denver, Colorado metropolitan area operations.

The Employer contends that this representation petition should be dismissed on the basis that the shuttle van drivers whom it calls "unit franchisees," are independent contractors, not employees within the meaning of Section 2(3) of the Act. The Employer also argued for the first time in its post-hearing brief that the unit franchisees are statutory supervisors under Section 2(13) of the Act because they have the ability to hire relief drivers under their franchise agreements. Finally, the Employer contends

¹ The legal name appears as it was identified throughout the record.

that the petition must be dismissed on the basis that CWA is disqualified from representing the unit franchisees because a disabling conflict of interest exists by virtue of CWA's relationship with Union Taxi Cooperative.

As discussed fully below, I find that the Employer has failed to meet its burden of establishing that the shuttle van drivers are independent contractors based on the analytical framework enunciated by the Board in *Roadway Package System, Inc.*, 326 NLRB 842 (1998) and *Dial-A-Mattress Operating Corporation*, 326 NLRB 884 (1998). I also conclude that the record before me is insufficient to make a determination regarding the supervisory status of the unit franchisees since the Employer did not raise, and the parties did not litigate, the supervisory issue at the hearing. See e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

I do, however, find merit to the Employer's contention that the petition must be dismissed because of the Union's unique relationship with Union Taxi Cooperative. Specifically, I find that relationship constitutes a disabling conflict of interest because it conflicts with the requirement of the Act that a collective-bargaining agent must have a "single-minded purpose of protecting and advancing the interests of unit employees." See, e.g., *St. John's Hospital and Health Center*, 264 NLRB 990 (1982), and the cases cited therein.

STATEMENT OF THE CASE

A hearing was held on December 28, 2009, and January 7, 8, and 12, 2010, in Denver, Colorado, before Todd Saveland, a hearing officer for the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has

delegated its authority in this proceeding to me. Petitioner seeks to represent the following bargaining unit:

INCLUDED: All full-time and part-time shuttle van drivers employed by the Employer in its Denver, Colorado operations.²

EXCLUDED: All other employees, confidential employees, professional employees, managers, guards, and supervisors as defined by the Act.

Upon the entire record in this proceeding, I make the following findings:

1. **Hearing and Procedures:** The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The Employer, SuperShuttle International Denver, Inc., a wholly owned subsidiary of SuperShuttle International, Inc., maintains an office and principal place of business in Denver, Colorado, and is engaged in the passenger transportation industry. The Employer annually, in the course and conduct of its business operations, purchases and receives goods and materials valued in excess of \$50,000 at its Denver, Colorado facility from points located directly outside the State of Colorado. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. **Claim of Representation:** The labor organization involved, Communications Workers of America, is a labor organization within the meaning of the Act.

² There is no evidence that SuperShuttle Denver has any "part-time" drivers. Rather, the record establishes that approximately 14 "relief" drivers have been screened and approved to drive vans if the unit franchisees elect to take time off. Since the record is devoid of evidence regarding the frequency with which any of the relief drivers are utilized by the unit franchisees, these relief drivers may, at best constitute casual drivers. I am declining to make any findings on this issue on the basis of my decision to dismiss the petition on other grounds.

4. **Statutory Question:** Based upon the record, no question affecting commerce exists concerning the representation of the laborers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

EMPLOYER'S TRANSPORTATION OPERATIONS

A. Background

Historically, SuperShuttle International, Inc., directly hired shuttle van drivers in various cities and airport markets throughout the United States. In approximately 1998, SuperShuttle International began transitioning from a direct hire business model to a franchise business model. The transition began on the East Coast and moved westward. The transition was completed by 2002. The record establishes that this transition process included elimination of shuttle van driver bargaining units through effects bargaining in New York, Washington DC, Baltimore, Los Angeles, Phoenix, and Austin, Texas.³ There is no evidence, however, that the Board, either at the time of the transition, or subsequently, has been called upon to make any findings related to whether the shuttle van drivers constitute independent contractors under the new franchise business model.

Under the franchise business model, SuperShuttle International is the owner and holding company of the registered trademarks and proprietary systems used within the entire SuperShuttle system. SuperShuttle Franchise Corporation is a subsidiary of SuperShuttle International, as is SuperShuttle Denver.⁴ Companies such as SuperShuttle Denver (referred to as "city licensees"), enter into a license

³ The record establishes that the Austin, Texas bargaining unit had actually been represented by CWA, which still represents dispatchers and curb agents in that location.

⁴ SuperShuttle Denver is actually owned by Veolia Transportation on Demand, Inc., which is characterized as the largest private transportation company in North America. Veolia also operates Colorado Cab Company in Denver under the Yellow Cab label.

agreement with SuperShuttle International and SuperShuttle Franchise Corporation for the use of the SuperShuttle trademarks in their respective territories or market areas. These territories or market areas may involve a license to serve a particular airport, or metropolitan area. SuperShuttle Denver is licensed to serve Denver International Airport from surrounding the Denver metropolitan area, including Golden, Colorado. SuperShuttle International has licensed another entity to serve the Boulder, Colorado area. The city licensees, in turn, enter into sublicense franchise agreements with shuttle van drivers to use the SuperShuttle systems and trademark, and to provide transportation services in the applicable market. These van drivers are called "unit franchisees."

B. Regulatory Scheme

The passenger transportation industry is highly regulated at the state and federal levels, as well as by local airport authorities. Thus, both SuperShuttle Denver and Union Taxi Cooperative (UTC) are subject to regulation by the Colorado Public Utility Commission, which has adopted many Federal Department of Transportation regulations, and Denver International Airport. SuperShuttle Denver is also subject to Federal Trade Commission franchise regulations.

1. FTC regulations:

SuperShuttle Franchise Corporation is the master franchisor for both the city franchisees and driver unit franchisees. All of the franchises issued by SuperShuttle Franchise Corporation are regulated by the Federal Trade Commission (FTC). SuperShuttle Franchise Corporation is also subject to state agency franchise regulations in thirteen states, excluding Colorado. FTC requires that prior to any franchise being offered to a prospective franchisee, they must be

provided a franchise disclosure document, which needs to comply with the FTC franchise law disclosure regulations, or applicable state law. Each city's franchise disclosure document is customized to specific state and city permit requirements, and airport authority requirements. The preparation of the franchise disclosure document is subject to annual review and updating to maintain compliance with changes in FTC regulations.

Under current FTC regulations, there are 23 elements that must be disclosed including: parent company information; the city licensee's business structure; date of formation of the legal entities; business experience of the officers and directors of Franchise Corporation and city licenses; any litigation involving either the parent company or city licenses; airport contracts; contact information for any current or former franchisee, any fees that a franchisee is obligated to pay under the terms and conditions of the franchise agreement; any initial startup costs such as the purchase of the franchise or acquisition of a vehicle, and any risks associated with the franchise.

2. Colorado Public Utilities Commission:

SuperShuttle Denver and UTC are both subject to regulation and oversight by the Colorado Public Utilities Commission (CPUC), and their operations are governed under CPUC Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6. SuperShuttle Denver and UTC have been issued certificate numbers by CPUC, authorizing them to engage in the "Transportation of Passengers and their Baggage." SuperShuttle Denver is authorized to operate 86 vans and UTC is authorized to operate 262 taxicabs.

SuperShuttle Denver's certificate specifically describes the boundaries and distances of SuperShuttle Denver's operational area, and the hours of service. There is also a tariff component which sets the maximum flat fares (called tariffs) SuperShuttle Denver can charge. The flat-rate fares range between \$19 and \$33 within the Denver metropolitan area and are set by CPUC based on zip codes. The flat-rate fares outside the Denver Metropolitan area range from \$39 to \$100. Unit franchisees are given a detailed fare chart with established fares for the entire area served by SuperShuttle Denver. SuperShuttle Denver occasionally issues discount coupons through direct mail or offers discounts through discount cards offered by chain stores. Drivers must honor this discounts, but are not allowed to offer their own discounts. Drivers also are not allowed to raise fares if customers are quoted inaccurate fares by SuperShuttle reservations system and have been issued "default letters" for attempting to do so.⁵

Under its current certificate, SuperShuttle Denver has been granted the authority to engage in four specific types of activities. SuperShuttle Denver is authorized to engage in door-to-door residential operations involving the transportation of passengers to and from DIA, or from their residence to other drop off locations such as hotels. SuperShuttle Denver also has the authority to pick up passengers in downtown Denver and transport them to Denver International Airport (DIA) or to other downtown locations. This is referred to as "call-on-demand," or "point-to-point" authorization. SuperShuttle Denver's certificate also requires it to engage in scheduled pick up services at about eight specific hotels in downtown Denver. SuperShuttle Denver must file a hotel time schedule with the CPUC, and abide by

⁵ The system of driver default letters is discussed *infra* at pages 14-16.

that schedule or risk losing its certification, and it must petition the CPUC to change the downtown hotel service locations, or to raise fares for any of these three types of operations. Finally, SuperShuttle Denver is authorized to engage in charter operations to areas outside the Denver metropolitan area.

UTC and other taxi companies operate under certificates which contain fare structures based on mileage, rather than flat rates. UTC is licensed to operate its 262 taxicabs in the City and County of Denver, and serve DIA.

CPUC regulations govern both SuperShuttle Denver and UTC relating to qualifications of drivers, signage requirements, requirements related to the vehicles including, size, age, maintenance, and numerous other items designed for protection of the public.⁶ In this regard, CPUC has adopted by reference, and incorporated various Federal Department of Transportation (DOT) regulations related to qualifications of drivers, maximum driving times, and medical fitness examinations.

3. Denver International Airport:

The rules governing the operations of SuperShuttle Denver and UTC at Denver International Airport (DIA) are set forth in DIA Regulation Manual, Section 100 Ground Transportation Rules and Regulations. DIA requires that any vehicle operating under a license to pick up and drop off passengers must have a transponder on the vehicle which records the time the vehicle arrives at the airport and leaves the airport, as well as the time the vehicle is at the curbside actively picking up or dropping off passengers, or waiting in the holding area. The transponder is called an "automated vehicle

⁶ The CPUC regulations even include a requirement that drivers be courteous to the public they serve.

identifier," and it is used by DIA to assess monthly fees based on the length of time a vehicle was on DIA property. These fees are called AVI fees. DIA bills SuperShuttle Denver for the AVI fees of its vans on a monthly basis, and SuperShuttle Denver, in turn, deducts the AVI fees from the unit franchisees' settlement checks. While the UTC taxis must also be outfitted with transponders and are assessed AVI fees by DIA, the record is silent as to whether UTC or the individual taxi operators are billed.

C. SuperShuttle Proprietary Systems

SuperShuttle International operates a nationwide reservations system and an automated dispatch system. The reservation system is comprised of two national reservation centers where there are telephone call takers. One is located in Tempe, Arizona, and the other is located in Tampa, Florida. SuperShuttle International also operates an online reservation system. This enables customers around the nation to make reservations either via talking to a live agent or booking reservations online. These reservations are automatically transmitted to the SuperShuttle dispatch system (SDS) for the specific city or market. The reservation will specify the date, time, location, and number of passengers for pick up. The SDS groups the reservations by date, and in chronological order for the time of day. Each van is equipped with a Nextel phone system which informs the van driver of available reservations.

Each van is also required to be outfitted with SuperShuttle's proprietary GPS monitoring system, which allows the city licensee to monitor the whereabouts of the shuttle vans at all times. In this regard, the dispatchers can monitor whether a van is parked in the driver's home driveway, or at a pick up or drop off location, and what route the driver is taking. The GPS tracking system also tracks

the speeds at which the vans are being driven. SuperShuttle Denver receives a weekly GPS vehicle speed report which sets forth the van number, dates, and the number of times the van was clocked traveling at speeds for each of the following ranges: 70-74.9 mph; 75-79.9 mph; 80-84.9 mph; and 85 or higher.

The unit franchisees are either assigned downtown hotel runs or door-to-door (DTD) service. The DTD van drivers are required to turn on their Nextel phone system two hours before they are scheduled to start driving, to see what reservations are available. The dispatch system automatically transmits potential trips to the Nextel phone system when it is activated. The DTD driver reviews the list of available trips, which include the pick up and drop off locations, number of passengers, number of stops, and total fares for the pick up. The driver has a 60-90 second window to bid on a trip, pass on a trip, or do nothing. If the driver bids on the trip, the SDS assigns the trip to that particular vehicle, and the vehicle proceeds to provide the service. After drivers drop off their passengers, they reactivate the Nextel phone system and the process starts over.

If a driver passes, that trip is automatically transmitted to the next driver in the vicinity of the pick up. Similarly, if the driver does not specifically bid or pass on a trip, after the time elapses, the trip passes to the next available driver. DTD drivers are automatically assigned customers by the computer system if they are available and no DTD driver bids on that run. If no DTD driver can be assigned to a customer, SuperShuttle Denver sends a Yellow Cab from its sister cab company and absorbs the cost difference.

Both downtown Denver hotel run drivers and DTD drivers can also be dispatched by the local dispatchers for "ASAP reservation" when a passenger

needs to be picked up immediately to make a flight time, or if for some reason a van is late for a scheduled pickup. Under these circumstances, a unit franchisee is subject to a fine if they refuse the ASAP dispatch.

D. Denver Management Hierarchy

The area general manager for SuperShuttle Denver is Ross Alexander. The day-to-day operations are overseen by general manager Michael Legette. Legette works at the Employer's Denver facility located at I-70 and 41st Avenue. That facility houses the sales, "cash-in," quality assurance, and dispatch departments. Legette is responsible for overseeing the daily operations in the four named departments, and Employer's ticket counter operations at Denver International Airport (DIA). Legette also oversees the franchise drivers.

The "cash-in" department reconciles the shuttle van driver weekly passenger manifests and issues driver settlement checks. The van drivers go to that facility approximately once a week to pick up their settlement checks, upcoming schedules, and any memoranda issued by the Employer.

The quality assurance department is responsible for monitoring the entire dispatch system for compliance with regulations and guest service standards. The quality assurance employees conduct random telephone surveys of guests, review guest comment cards, investigate complaint calls and letters, and conduct the "mystery rider/quality observer" program. This department also conducts bi-monthly vehicle inspections and has the right to conduct additional inspections upon 12-hours verbal or written notice.

The dispatch operations are overseen by the Director of Unit Franchising (also referred to as "franchise manager"), David Schmidt, who reports directly to

Legette. Reporting to Schmidt are four "managers-on-duty" referred to as MODs.⁷ These four managers are assigned to various shifts to cover the 24 x 7 dispatch operations. The current MODs are Alan Russell, Sean Steiner, Sean Frere, and fourth unnamed MOD who recently replaced James Kummerow.⁸ The dispatchers are responsible for monitoring the radio and shuttle van GPS systems of drivers assigned to do door-to-door pick-ups, the drivers assigned to the downtown Denver hotel circuit, and the vans at DIA engaged either actively in curbside drop offs or pick ups or awaiting dispatch in the DIA holding area.

E. Unit Franchisees' Terms and Conditions of Employment

1. Unit Franchise Agreement:

SuperShuttle Denver currently has 86 unit franchisees. These unit franchisees annually sign a Unit Franchise Agreement (UFA). The UFA is between SuperShuttle Denver and an individual driver, or a legal entity such as a partnership or limited liability corporation formed by a driver. A unit franchisee is not allowed to enter into more than one UFA, or have more than one van. The UFA states that the city licensee "strongly recommends that Franchisee form a business entity to act as the Franchisee and obtain a tax identification number from the Internal Revenue Service." Despite this encouragement, the evidence establishes that there is only one unit franchisee who has formed and LLC, and that occurred in November 2009. The UFA contains a section designed to specify the unit franchisees' hours of operation for either an "AM Franchise," "PM Franchise," or "Overnight Franchise." Many of the UFAs entered into evidence, however, did not have the some or all of the spaces in this section

⁷ The Employer uses the term "manager-on-duty interchangeably with "manager of dispatchers "

⁸ Kummerow now works at the Employer's DIA ticket counter operation.

completed. The current annual franchise fee is \$1000, although the boilerplate UFA sets that amount at \$3500. The unit franchisee also is required to pay the annual \$250 fee for the CPUC application for a vehicle decal. Finally, while the UFA provides that neither party has the right to renew the agreement, there is no evidence that SuperShuttle Denver has ever refused to renew a UFA. Unit franchisees regularly continue to operate under expired agreements until such time as SuperShuttle Denver provides them with a successor UFA.

By executing the UFA, the unit franchisee agrees to purchase or lease a van meeting specification as to make, model, color, size, age, and mechanical condition. Approximately half of SuperShuttle Denver's 86 unit franchisees own their own vehicle. The UFA also provides that the unit franchisee agrees to use "all equipment, signage, uniforms, and services" approved by SuperShuttle International, which "shall be purchased from suppliers designated or approved by the city licensee." Unit franchisees agree to orientation and training on SuperShuttle systems, and to any training required by the licensing authorities.

The UFA provides 25 bases for termination of the franchise "with notice and no opportunity to cure." The record reflects that SuperShuttle Denver has only exercised this right three times in recent years. The record does not disclose the circumstances under which the right was exercised. The 25 bases for termination without an opportunity to cure fall into two broad categories. The first category includes breaching the UFA by such conduct constituting express default of the terms of the agreement such as failure to pay franchise fees; unauthorized transfer or assignment of the UFA; unauthorized use of trademarks or trade secrets; seizure of the vehicle by a government official or repossession by a creditor; suspension or termination of any

licenses or certifications; entering into an employment or business relationship with a competitor; felony convictions for conduct reflecting unfavorably on SuperShuttle, under reporting revenue to the city licensee, using unauthorized relief drivers; and obtaining business at the expense of the city licensee.

The second category of breaches which can result in immediate termination of the UFA include items related to on-the-job conduct of the unit franchisees such as receiving excessive traffic citations; being involved in an excessive number of accidents, or in an accident resulting in serious property damage and/or bodily injury; receiving an excessive number of customer complaints; falsifying trip sheets, credit card receipts or training and driving records; testing positive for drugs or alcohol; or violating the city licensee's accessibility, violence, harassment and discrimination policies.

Finally, the UFA provides that certain breaches of the UFA will result in "notice and opportunity to cure." The UFA does not specifically enumerate these items but characterizes them as "noncompliance with any requirement in the Agreement or the Manual or prescribed by the City Licensee."

2. Event reports, default letters, and fines:

The dispatchers, MODs, and franchise managers use the so-called "event report" form to record any unusual conduct or event involving the shuttle van drivers. These event report forms are filled out by whomever is involved with the driver, and can form the basis for a subsequent default letter. The event report indicates the date and time of the event, who filled out the form, the name and van number of the involved driver, and a description of the event. If the "event" involves a specific customer, a block of information related to the customer is also filled out. There is also an "action taken" section at the bottom of the form. That section was left blank on most of the

event reports entered into evidence. The event reports are also used to record customer complaints about a discourteous driver or poor driving; unauthorized loading of passengers assigned to a different van; failure to timely bid on to Nextel system at shift start, or quitting before the end of shift; failure to report for work for a given shift; and altering the fares quoted by SuperShuttle Denver for specific passengers. The event reports are also used in instances where dispatchers make mistakes costing the drivers fares, such as dispatching two vans for the same pick up. The drivers are then made whole for the amount of the fare based on the dispatcher's error.

The driver misconduct event reports often result in the Director of Unit Franchising sending the unit franchisees a form letter constituting "official notification" of default of the UFA. These form letters have a section which is filled in for the event at issue, stating the date of default, type of default, and UFA article at issue.⁹ The vast majority of the default letters refer to Article 4, Operations by Franchisee, Section F Reservations, Dispatch, Cashiering, and Vouchers. Some of the letters also contain a brief narrative of the event at issue. The letters end with the boilerplate statement: "This notice falls under 'With Notice and Opportunity to Cure,' as such, any further violations may result in the termination of your Unit Franchise." Examples of infractions listed on the default letters entered into evidence include no call/ no show; failure to report for or abandoning shift; failure to follow dispatch procedures; self-dispatching; driver not in uniform; failure to provide 60-day inspection; failure to comply with cashiering and reporting requirements; and a variety of unsafe driving complaints.

The Employer reserves the right to fine unit franchisees for violating certain policies. On January 23, 2009, the Employer issued a memo reminding the drivers of

the following fine schedule: \$50 fine for “rolling-off” early without MOD approval; \$100 fine for working on unscheduled days without approval of franchise manager; \$100 fine for no show on a scheduled shift; \$50 for being out of uniform; and \$50 for vehicle condition not meeting standards. It appears, however, that the Employer infrequently issues fines to unit franchisees because, while there were dozens of event reports and default letters entered into evidence, only about five of the event reports state that a fine was being assessed.

3. Financial remuneration:

Under the franchise agreement, drivers franchised for AM and PM Shifts are obligated to pay 38 percent of their revenue for transporting passengers to the Employer. Drivers franchised for Overnight Shifts are required to pay 28 percent of their revenue. Drivers “cash out” on a weekly basis by submitting their daily passenger manifests to the cash-in department. These manifests set forth the number of passengers, dollar amount of fares received, whether that revenue was from cash, credit cards, or SuperShuttle's prepaid systems including airport counter tickets or on-line vouchers, and whether the fares were discounted based on coupons issued by SuperShuttle Denver. The Employer then reconciles the drivers' manifests, deletes fees owed to SuperShuttle Denver by the drivers including annual franchise payments if the driver elects to use a payment plan to distribute these payments over the course of the year, vehicle leases if the driver does not own the vehicle, vehicle liability insurance payments, and DIA AVI fees, and either issues a check, or informs the driver of the amount needed to be

⁹ The event report “action” section may also state that a default letter would issue.

tendered to SuperShuttle Denver. Typically the drivers do not turn in cash because their paper receipts from voucher payments are at least equal to the 38 percent of the weekly fares owed to SuperShuttle Denver.

The Employer does not do any tax withholding, nor does it issue W-2 forms to the drivers. The drivers are responsible for any speeding, parking, or other traffic enforcement tickets used by authorities including DIA. The drivers also pay for all of their gasoline and maintenance expenses. They do not park the vans at the Employer's facility when not in use, but park their vehicles at their homes or make other parking arrangements.

4. Vehicles:

About half of SuperShuttle Denver franchisees own their own vehicle. The rest lease vans through Veolia Transportation. Leased vehicles must be maintained by Yellow Cab's maintenance facility. The vehicles must comply with specifications set forth in the Unit Franchise Operations Manual. The specifications include the requirement that the vehicle be painted "SuperShuttle Blue" or white. If unit franchisees want their vans to be blue, they must obtain the blue paint formula specifications from the Employer. Blue vehicles must also meet the yellow decal specifications. If the van is white, the unit franchisee must display the trademark blue and yellow decals. The vehicle interiors must be blue or grey. Vehicles must be replaced when there are either five years old or exceed 450,000 miles. Finally, the vans must be specified Dodge, Ford or Chevrolet models, and must be outfitted with seat belts for eight passengers, unless special permission is obtained.

The only restriction on personal use of the vans is a prohibition on use of a SuperShuttle-marked vehicle for transportation service for another company or as a side transportation business by the unit franchisee. There is no restriction on personal use of the vans for family, day-to-day, or vacation transportation, or on who may be allowed to drive the vehicle when it is not in service for SuperShuttle Denver. There is also no restriction on using the vans for personal businesses unrelated to the transportation of passengers.

Unit franchisees must also abide by a number of policies related to their vehicles. These include restrictions on driver cell phone use, customer and driver seatbelt requirements, and rules regarding stowage of luggage. Drivers are specifically prohibited from stowing laptop computers in the luggage compartment because of past damage liability.

5. Uniforms:

Franchisee drivers are responsible for providing their own uniforms, and order and purchase them through a specified vendor. The specifications regarding what the uniforms will look like and what trademark patches the drivers must wear are contained in the Unit Franchise Operations Manual. City licenses are allowed to institute their own uniform policy by narrowing the choices contained in the Operations Manual uniform policy. The uniforms allowed can either be a blue SuperShuttle Denver polo shirt with khaki pants or shorts; or plain white collared dress shirt or blouse and black pants. All drivers must wear dark dress shoes with dark socks or stockings, and men or women may wear a tie, or women may wear a scarf. Skirts and dresses are not allowed. DIA requires that uniforms comply with its requirement that the company name only appear on the

front and back of uniform shirts and jackets, and on caps, and sets a size limitation. Finally, the unit franchisees are required to meet certain grooming standards and can be issued default letters for having an unkempt appearance.

6. Work schedules:

As noted, SuperShuttle Denver's operations primarily consist of door-to-door (DTD) service, and scheduled downtown hotel service. The Employer has also recently been certified by CPUC to have scheduled service from hotels in the Golden, Colorado area because of an increase in business in that area. DTD service, which constitutes about half of SuperShuttle Denver's overall operations, originates from the nationwide reservation system described above, and curbside service at DIA.

The scheduled start and stop times, and days of the week for the DTD (AM and PM), and Overnight unit franchisees are contained on a biweekly schedule which is put in the drivers' mail slots at the Employer's facility. The unit franchisees provide the franchise manager with their availability for a given two-week period and the franchise manager produces a schedule based on van availability. The record is silent as to the extent of deviation in these assignments from schedule to schedule.

There are 20 vans scheduled for the downtown hotel runs each day. These downtown shuttle van drivers have a scheduled start time, and are scheduled for either the South downtown hotel run or the North downtown hotel run. These vans start at one hotel, and move to the next hotel of their four scheduled hotel stops in order, and then proceed to DIA. The unit franchisees are mandated to make the scheduled hotel stops, but are free to choose their own route to DIA. The vans pick-up reservations passengers, as well as walk up passengers at the

hotel stops. There are times that there are no passengers at a given hotel, in which case the driver waits the scheduled time, and then moves on to the next hotel on the schedule. These downtown drivers can pick up point-to-point passengers at these stops if the passengers need to go to the area of another scheduled hotel stop. After dropping their passengers at DIA, they wait curbside in the area designated for downtown passengers, and pick up available passengers headed for downtown. After dropping passengers at desired downtown locations, the drivers proceed to the starting hotel for a repeat of the process. The downtown unit franchisees repeat their scheduled route five times per shift, and head home after their last drop off at DIA. There are also times that the downtown drivers pick up DTD passengers through the reservations system, but only if these passengers are located on the driver's direct route to DIA. Since many of the passengers picked up downtown are not scheduled through the reservations systems, these unit franchisees operate on the honor system for reporting the cash passengers. SuperShuttle Denver audits such cash reporting through its Mystery Rider program.

Each day, SuperShuttle Denver has six vans assigned to the recently implemented Golden, Colorado hotel schedule. The Golden run operates similarly to the downtown runs, but involves a combination of DTD pickups and hotel stops. The Golden AM drivers make three roundtrips to DIA because of the added distance. The Golden PM drivers make two scheduled DTD and hotel runs. After 6 pm, the three Golden PM vans are dispatched out of DIA holding area by the dispatchers based on walk-ups and incoming computer reservations. While the

Golden runs have fewer passengers than the downtown runs, the fares are considerably higher than the \$19 downtown fare. The Golden fares range from \$35 to \$75 depending on whether the drop-off is within Golden city limits or outside the city limits.

7. Relief drivers:

Unit franchisees may elect to park their van when they wish to take prolonged time off, but they are also permitted under the UFA to use relief drivers to provide transportation services in the franchisee's van. While the UFA provides that relief drivers are under the direct supervision of the unit franchisee, the relief driver must report for work using the same methods as the unit franchisee, and submit the same paperwork. The relief drivers, however, do not receive fare settlement checks directly from SuperShuttle Denver. Rather, the fare settlement checks go to the unit franchisee, who is responsible for paying the relief driver. Similarly, default letters are sent to the unit franchisee, not the relief driver.

Prospective relief drivers must be screened and approved by SuperShuttle Denver for compliance with CPUC and DIA regulations. The screening includes ascertaining that the individuals are properly licensed to transport passengers. SuperShuttle Denver also requires that unit franchisees and relief drivers take a defensive driving course, and pass a drug test based on DIA's requirement that drivers be drug free.

While the record establishes that SuperShuttle Denver has screened and approved 14 relief drivers, neither the Employer nor Union elicited any testimony regarding when such screening occurred, or which unit franchisees sought approval for any of the relief drivers. The record is also devoid of evidence

regarding whether any of the relief drivers have recently driven SuperShuttle Denver vans, or the frequency or number of hours these relief drivers were used.

UNION CONFLICT OF INTEREST

SuperShuttle Denver asserts that the petition should be dismissed because CWA has a disabling conflict of interest based on CWA Local 7777's relationship with UTC. Specifically, SuperShuttle Denver contends that it and UTC are competitors in the passenger transportation industry, based on the fact that they are subject to the same CPUC and DIA regulations, have overlapping transportation territories, and compete head-to-head for the highly competitive downtown hotel customer base needing transportation to and from DIA.

A. UTC's Formation

1. UTC's predecessor:

On July 2, 2007, CWA entered into an Agreement for Affiliation between the Professional Taxicab Operators of Colorado Association (ProTAXI), and the Communications Workers of America, AFL-CIO, Local 7777. The Agreement for Affiliation provided that ProTAXI would become a division of CWA, Local 7777, and abide by Local 7777's constitution and bylaws. The Affiliation Agreement also stated that the Union would provide staff support to the ProTAXI Division regarding matters involving CPUC, DIA, the City and County of Denver, and area hotels. CWA was also obligated to provide attorneys and lobbyists to advocate for the ProTAXI division with the Colorado General Assembly. The Union's advocacy included successfully lobbying for a change in the law through the Colorado legislature, which permitted the CPUC to lower transportation industry entry standards allowing for the legal formation and

certification of UTC to operate as a taxicab cooperative. The change in the law took effect July 1, 2008.

In anticipation of the change in law by the Colorado General Assembly, ProTAXI Union members met in January 2008, to formulate plans to form UTC. In April 2008, the 262 ProTAXI members sought and obtained legal advice regarding the requirements for applying to the CPUC for authorization to form a cooperative to provide taxicab service in the City and County of Denver. The record does not establish whether the Union and ProTAXI ever formally ended their Affiliation Agreement, but it appears that ProTAXI was subsumed by UTC upon UTC's formal legal creation.

2. UTC's incorporation:

On June 9, 2008, UTC filed its Articles of Incorporation of a Cooperative with the Colorado Secretary of State. UTC listed the Union's address (2840 S Vallejo, Englewood, Colorado), as its principal office street address. Abdi Buni was named as the registered agent, and incorporator for UTC. Abdi Buni's address was also given as CWA's address. In June 2008, UTC also adopted cooperative bylaws, and entered into a Colorado Commercial Lease with CWA, effective July 1, 2008, to rent office space and use of the parking lot at the Union hall. UTC entered into a successor lease effective July 1, 2009, with CWA, Local 7777, increasing the amount of monthly rent, and increasing the size of the office space UTC rents from the Union. That lease also covers all utilities except telephone service and includes the right for the UTC members to park their taxicabs at the Union hall when the cabs are not in service.

On July 1, 2008, UTC filed an application to operate as a common carrier by motor vehicle for hire with the CPUC for a permit authorizing the 262 individual UTC

members to begin to offer taxis service under the UTC name in the City and County of Denver. This application was granted, and UTC has had 262 cooperative members and corresponding taxicabs since that time.

3. UTC membership

UTC currently has 262 member drivers, which is the maximum number UTC can have based on its current CPUC certification. UTC has an office staff of eight employees, including dispatchers, call takers, a cashier and bookkeeper. The office employees are overseen by general manager Guadata Brasso. In order to join the cooperative, an individual must sign a UTC Membership Agreement and be accepted into membership by the UTC Board. UTC members pay an initial membership fee. Once accepted, they begin to pay annual membership dues which may be paid on a weekly, monthly, quarterly, or annual basis.¹⁰ UTC members are required to become members of CWA, but are not required to pay initiation fees.

UTC is overseen by a four-member board of directors and five official officers. Abdi Buni was the first president of UTC. Buni, however, was hired as a paid organizer for CWA Local 7777 in July 2009. Accordingly, at the August 2009 Board of Director's meeting, Bushra Saïdo was elected as Buni's successor. At that same meeting, Yousef Salad and Mengistab Desta were elected as Vice Presidents; Million Mengistu was elected as Secretary; and Takele Merse was elected as Treasurer. The current UTC Board Members are: Abdi Buni, Stan Hawton, Cristian Mateescu, and Gamachu Said.

B. Relationship Between CWA and UTC

¹⁰ The record does not reflect the amount of the initiation fee or annual membership fee because CWA objected to the Employer's attempt to elicit that evidence.

The documentary evidence regarding a relationship between CWA and UTC initially establishes that they have formal landlord/tenant relationship based on the lease for the UTC office space. Other aspects of the relationship between CWA and UTC are more difficult to define. While the record does not reflect direct involvement by CWA in the legal formation of UTC, as discussed, the Union was involved in lobbying efforts with the Colorado General Assembly to seek a change in the law to allow for formation of UTC, which resulted in the elimination of ProTAXI, with which the Union did have a formal affiliation agreement. The record also establishes that CWA does not have a traditional collective-bargaining relationship with UTC to represent the interests of the cooperative taxi drivers, *vis-à-vis* UTC.

The relationship between UTC and CWA is also evidenced by the fact that in July 2009, the Union hired then UTC President Abdi Buni as a paid organizer. While Buni is no longer UTC president, he still holds a position on the UTC board of directors. Buni was involved with the Union as a contact person for ProTAXI, and as such, was regularly copied on e-mail correspondence between UTC and the Union before he was hired as a paid organizer. Buni still is regularly copied on e-mail correspondence between UTC and CWA, and in fact continues to use the same ProTAXI e-mail address he used before the inception of UTC.

Finally, there is evidence that CWA representatives conducted the August UTC Board of Directors meeting at which Buni's successor was elected, and oversaw the election of officers and board of directors members at that meeting.

Notwithstanding the lack of a collective-bargaining relationship, UTC pays a monthly per capita fee of \$28 to CWA for each of its 262 members, which UTC and CWA characterize as "dues." There is no evidence that the UTC members submit

applications for actual membership in CWA, and testimonial evidence establishes that they are not required to pay union initiation fees. These monthly dues paid directly by UTC to the Union amount to \$7336 per month. These monthly per capita dues are in addition to the monthly rent paid by UTC for leasing office and parking lot space and covering utilities. UTC also directly reimburses CWA for such office expenses as the costs of photocopying.

The testimony of CWA, Local 7777's current President, Lisa Bolton, establishes that the monies paid by UTC on behalf of its drivers are mingled with dues from its traditional members, and used for the Union's general operating expenses. The evidence further establishes that in exchange for the monthly "dues" paid to the Union by UTC, the Union provides the same services to UTC that it was obligated to provide ProTAXI pursuant to the written Affiliation Agreement, despite the absence of a written agreement. In this regard, Union President Bolton testified that these services include lobbying for legislation favorable to UTC with the Colorado legislature. Bolton also testified that she has held meetings with "parking enforcement" on behalf of UTC drivers when they believe UTC is being singled out for ticketing. Bolton and other Union officials also meet with government officials regarding the herdic licenses taxi drivers must have to operate, and excise and license plate officials so that the Union can educate UTC drivers regarding issues that arise for renewals. Bolton has also met with officials at DIA regarding heater and air conditioning issues in the building made available to Muslim taxi drivers for daily prayers. CWA representatives have also accompanied UTC members to court to assist them with plea bargaining regarding trespassing tickets.

In August 2009, the also Union intervened on behalf of UTC in a dispute at the Hyatt Regency Colorado Convention Center downtown hotel. That dispute involved the Hyatt Regency filing a formal CPUC complaint against UTC for "bullying other companies out of line." In October 2009, UTC sought the Union's assistance in another dispute at the Hyatt Regency Convention Center. Specifically, UTC sought to have the Union assist in forcing the Hyatt Regency to not allow managers affiliated with SuperShuttle Denver to solicit customers in the hotel lobby.

A few days later, UTC sought assistance from the Union after it was informed that the Cherry Creek Mall intended to authorize two competitor cab companies exclusive access to the mall. CWA sought legal advice from its legal counsel regarding the action taken by Cherry Creek Mall; intervened on UTC's behalf with the mayor's office; and attempted to contact a mall official to discuss the dispute. CWA also organized a demonstration at the mall during the Thanksgiving holiday weekend, and created the leaflets used in the Cherry Creek Mall campaign on behalf of UTC. An announcement for the leafleting action at Cherry Creek Mall was put on the CWA Local 7777 website encouraging all drivers and volunteers to meet at the Local at 9:30 a.m., so the Union could put one passenger in each UTC taxi to be transported to the mall where they would leaflet until 12:30 p.m. At that time the Union leafletters would start calling for UTC taxis to come back and pick them up at the Cherry Creek Mall.

Finally, the evidence establishes that CWA was involved in researching obtaining Smith Defensive Driving Training for the taxi drivers, which included investing \$5,066 for a Smith Trainer to train up to four Union members to deliver the classes to the UTC drivers. CWA also provides photocopying services to UTC at the rate of 3 cents per page, and provides free advertising on the Union's website.

LEGAL ANALYSIS AND CONCLUSIONS

As noted, there are two primary issues in this case: 1) Whether the unit franchisees are employees within the meaning of Section 2(3) of the Act, or independent contractors as asserted by SuperShuttle Denver; and 2) whether there is a disabling conflict of interest based on the Union's relationship with UTC warranting dismissal of the petition. I find, based the record as a whole, and as will be fully explained below, that the unit franchisees are not independent contractors as asserted by the Employer. I also find that the Employer has established that CWA has a disabling conflict of interest based on its relationship with UTC, and I am dismissing the petition on that basis.

SuperShuttle Denver also raised a third issue for the first time in its post-hearing brief. Namely, that the unit franchisees are statutory supervisors within the meaning of Section 2(11) of the Act because they purportedly hire relief drivers. I find that since the Employer did not expressly raise this issue at the hearing, and, thus, the parties did not litigate the supervisory status of the unit franchisees, the record is devoid of sufficient evidence to warrant analysis of this complex issue. In this regard, while the record provides a list of names of purported relief drivers, there is no evidence regarding the relationship between the relief drivers and any current unit franchisees. Accordingly, I find that the Employer has failed to meet its burden of establishing that the unit franchisee shuttle van drivers are statutory supervisors. See e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

A. Independent Contractor Issue

1. Legal framework:

As noted by both parties, Board law establishes that the burden is on SuperShuttle Denver, to prove that the unit franchisees are not employees within the meaning of Section 2(3) of the Act. *BKN, Inc.*, 333 NLRB 143, at 144 (2001). Section 2(3) of the Act, as amended by the 1947 Labor Management Relations Act (Taft-Hartley Act), provides that the term "employee" does not include "any individual having the status of independent contractor." The meaning of this 1947 amendment was first considered by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). The Supreme Court held that the "obvious purpose of the amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." The Supreme Court also stated that there was no "shorthand formula" or "magic phrase" associated with the common-law test, instead, under the common-law test "all incidents of the relationship must be assessed and weighed with no one factor being decisive."

In *Roadway Package System, Inc.*, 326 NLRB 842 (1998) and *Dial-A-Mattress Operating Corporation*, 326 NLRB 884 (1998), which were decided the same day, the Board rejected the so-called "right of control" approach to analyzing independent contractor status. The right-of-control approach had evolved over time and resulted in greater weight being given to "the manner and means" of the work done by the individuals at issue than to other factors. The Board in *Roadway* and *Dial-a-Mattress*, affirmed that the proper analysis to be used in determining whether an individual is an employee or an independent contractor under Section 2(3), is the common-law agency test which involves the multifactor analysis set forth in Restatement (Second) of Agency,

Section 220(2).¹¹ In *Roadway*, the Board characterized the need for such analysis as follows:

The determination of 'independence' ... ultimately depends upon an assessment of 'all of the incidents of the relationship ... with no one factor being decisive.'" *NLRB v. United Ins. Co.*, 390 U.S. at 258; ... see also Restatement (Second) of Agency §220 (1958).") As the Board stated in *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982): "Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other. *Roadway*, *supra*, at 850.

Both parties urge me to analyze the factors present in this case under a recent decision by the D.C. Circuit Court of Appeals in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). In *FedEx*, the D.C. Circuit Court of Appeals rejected the weight given by the Board to evidence regarding the entrepreneurial opportunities of the drivers at issue, which the Court concluded outweighed other common law factors. Specifically, the Court stated:

We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status. The ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor of independent contractor status. Because the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views. Though evidence can be marshaled and debater's points scored on both sides, the evidence supporting independent contractor status is more compelling under our precedent. The evidence might have been stronger still had not

¹¹ The common law factors include, *inter alia*, "the extent of control which, by the agreement, the master may exercise over the details of the work"; "the kind of occupation"; whether the worker "supplies the instrumentalities, tools, and the place of work"; "the method of payment, whether by the time or by the job"; "the length of time for which the person is employed"; whether "the work is a part of the regular business of the employer", and the intent of the parties. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, fn 1 (D.C. Cir. 2009).

the Regional Director erroneously excluded the national data. But even as the record stands, the Board's determination was legally erroneous. *Id.*, at 504.

The Employer argues that the Court in *FedEx* adopted a new test which, "shifted the emphasis away from the unwieldy control inquiry in favor of a more accurate proxy: whether the 'putative independent contractors have significant entrepreneurial opportunity for gain or loss.'" I disagree with the Employer's characterization that the Court adopted a "new test" in *FedEx*. As noted, the Court specifically stated that it analyzed all of the common law factors. The quote relied upon by the Employer was part of the Court's discussion of the Board's analysis of the common law factors and its view that in *FedEx* the entrepreneurial factors predominated. Board cases decided since *Roadway* and *Dial-a-Mattress*, including *St. Joseph's News-Press*, 345 NLRB 474 (2005), and *The Arizona Republic*, 349 NLRB 1040 (2007), explicitly affirm the *Roadway* and *Dial-a-Mattress* analytical framework. In both those cases, the Board engaged in an analysis of all the Restatement factors present before concluding that the evidence of entrepreneurial factors outweighed the other factors, thereby favoring a finding that the individuals at issue were independent contractors.

Applying the common-law agency test to the facts of this case, I find that the factors weigh more strongly in favor of employee status for the SuperShuttle Denver van drivers. See e.g. *Elite Limo Limousine Plus, Inc.*, 324 NLRB 992 (1997), *O'Hare-Midway Limousine Service, Inc.*, 295 NLRB 463 (1989), *enf'd*, *NLRB v. O'Hare-Midway Limousine Service, Inc.*, 924 F.2d 692 (7th Cir. 1991). While both of these cases were decided under the pre-*Roadway* right of control test, many of the factors present in these cases are similar, if not identical to the facts present herein, supporting my finding

that the unit franchisees are statutory employees.¹² Moreover, I find that the entrepreneurial factors present in *FedEx*, *St. Joseph News-Press*, and *The Arizona Republic* are almost non-existent herein.

The *O'Hare-Midway* factors are particularly compelling because of the similarity to the factors present herein. Thus, the *O'Hare-Midway* similarly selected a.m., p.m. or all-day shift, but were not allowed to change their work schedule, or terminate a shift early, without the company's permission. Drivers kept 40 percent of gross fares and paid the remaining amount to the company. The drivers were required to adhere to company rules regarding the manner in which they collected fares, including maintaining records of each fare received. *O'Hare-Midway* had a mandatory dress code, and retained the right to fine or reprimand the drivers for failure to comply with company procedures. Finally, the Company provided no benefits to its drivers, and did not do any tax withholding.

2. Analysis of the common law factors:

While the Restatement on Agency lists ten specific factors for consideration, I have grouped those factors into five categories based on the specific evidence under consideration herein.

¹² In *St. Joseph News-Press*, supra at 478, the Board addressed the viability of its pre-*Roadway* holdings as follows: "In determining the status of the carriers in this case, we rely on the Board's analysis in *Roadway* and *Dial-A-Mattress*. With respect to the Respondent's argument that *Roadway* did not change the legal landscape, and that thus the right of control test is still applicable, we note that although *Roadway* does not directly address the continuing viability of the pre-*Roadway* cases, the Board's analysis in those cases recognized, as does Supreme Court law, that both the right of control and other factors, as set out in the Restatement, are to be used to evaluate claims that hired individuals are independent contractors. Further, we note that since *Roadway*, the Board has continued to cite pre-*Roadway* cases that are consistent with the principles set forth there. The Board will continue to rely on the analysis in such cases, without adopting the Respondent's characterization of the development of the law. [Emphasis added.]"

a. Unit franchisees' work is a part of regular business of Employer

The facts establish that between 1998 and 2002, SuperShuttle International changed its entire method of operations from a direct employment model to a franchise model. In this new model, city licensees such as SuperShuttle Denver in turn entered into UFAs with individual drivers. As a result, individuals seeking to work for SuperShuttle Denver must sign an annual UFA, and agree to be bound by the terms of the Unit Franchise Operations Manual. While the change in SuperShuttle International's business model, and the language of the UFA indicate that the intent of SuperShuttle International is to establish an arms-length, independent contractor relationship with the unit franchisees, I find that this intent factor is outweighed by other factors.

The evidence establishes that unit franchisees have no cognizable bargaining power allowing them to negotiate with SuperShuttle Denver regarding any of the terms of the UFAs. SuperShuttle International unilaterally promulgates the standard UFA, and related Unit Franchise Operations Manual, for use by its city licensees, and reserves the right to unilaterally change the terms from year to year. There is no evidence that any unit franchisee has successfully negotiated changes in any of the terms of the UFA, or any policies contained in the operations manual. Additionally, while the UFA provides that it has an annual term, the record establishes that the shuttle drivers continue to operate under expired UFA's until the Employer provides them with successor franchise agreements. There is also no evidence that SuperShuttle Denver has declined to renew a unit franchisee's agreement upon expiration, and instances of mid-term UFA terminations are rare.

Moreover, the unit franchisees are not independently performing a discrete or

unique part of the Employer's business, they are responsible for performing the entirety of SuperShuttle Denver's normal business operations in the Denver metropolitan area; namely, transporting passengers and their luggage to and from DIA, or other destinations. Because the unit franchisees are the sole face of SuperShuttle International in a particular arena, SuperShuttle International exercises a significant amount of control over the day-to-day functions of the unit franchisees, to protect and enhance its nationwide brand.

b. The method of payment

Unit franchisees charge customers established flat-rate fares and do not have any authority to deviate from the fares set by the Employer, and approved by CPUC. Similarly, unit franchisees must honor discount coupons authorized by SuperShuttle Denver, but cannot offer their own discounts. Unit franchisees must keep detailed daily records of the fares they collect, and whether those fares are from vouchers, credit cards, or cash. This paperwork is turned in weekly, and reconciled by the Employer. AM and PM franchisees are compensated at the rate of 72 percent of the gross fares they collect, and graveyard franchisees are compensated at the rate of 68 percent. After reconciling the drivers' weekly manifests, the Employer deducts its percentage of the fares collected by the unit franchisees, liability insurance payments, AVI fees, vehicle lease payments, and any other fees or fines which might be owed and issues a settlement check to the unit franchisee. SuperShuttle Denver also audits the unit franchisees through the mystery rider program, and issues default letters to drivers who failed such audits, including failure to list cash fares on their manifest.

The Board has held in a number of taxicab and airport transportation service cases that the fact that the drivers' compensation is based on a percentage of fares

collected, supports a finding that the drivers are employees because there is direct correlation between the employer's income and the fares collected. Thus, the employer has a direct financial stake in the work performed by the driver. In cases where the drivers pay a flat fee to the company, the Board has found the drivers to be independent contractors because the drivers have a strong incentive to maximize their trips, since, once the flat fee is recouped, their income is largely profit. In addition, the Board has held that a flat fee insulates a company from variations in income because, regardless of the drivers' actual earnings, the employer receives the same amount. See, e.g. *Elite Limousine* and the cases cited therein. Accordingly, I find that the factors related to the method of payment and significant control over pricing, record keeping, and through the mystery rider audits conducted by the Employer weigh in favor of employee status.

c. Instrumentalities and tools

The record establishes that the about half of the unit franchisees own their vans and the other half lease their vans through SuperShuttle Denver's parent company. The evidence further establishes that the only restriction placed on the unit franchisees is that they cannot use their SuperShuttle-marked vans in businesses that compete directly with SuperShuttle Denver. While these factors weigh in favor of a finding of independent contractor status, I find that there are various other related factors which overcome these two factors. Among the related factors are various mandates placed on the unit franchisees by SuperShuttle Denver. The Employer requires the unit franchisees to maintain specific levels of liability insurance, which they must purchase through a designated carrier by payroll deduction. Moreover, the Employer exercises direct control over the make, model, age, size, and mechanical and physical condition

of the vehicles, including performing bimonthly vehicle inspections. SuperShuttle Denver issues default letters to unit franchisees if they fail an inspection, or their vehicle is found in default. The Employer also has rigid requirements for the color and logos in the vehicles, including that the unit franchisees use specific proprietary paint color formulas. Vehicles must be replaced when they reach either five years of age or 450,000 miles. Similarly, the Employer has a strict uniform policy and grooming standards to which the unit franchisees must adhere. If the drivers are observed out of uniform or unkempt, the Employer issues them default letters, including threatening to purchase new uniform items for the drivers and takes reimbursement from their settlement checks.

The Employer also mandates specific communications equipment, and issues default letters for such things as failure to activate the Nextel system at the start of a scheduled shift. Finally, and most significantly, the Employer mandates that the vehicles have a GPS system that allows the Employer to monitor the vehicle even when it is not in service during scheduled shifts. This monitoring by the Employer includes review of weekly reports charting the speed ranges with which the vehicle was driven and issuance of default letters for traveling at excessive speeds.

d. Control over the details of work.

In addition to SuperShuttle Denver's control over the work details addressed above, I find that the Employer exercises control over other significant details of the daily work performed by the drivers, supporting my finding of employee status. The Employer specifically urges a finding that the unit franchisees are independent contractors because the door-to-door drivers can review the available reservations on their Nextel system and bid or pass on the various available customers. While this is

an important consideration, I find that it is outweighed by other controls placed on the unit franchisees. Specifically, DTD drivers are assigned to passengers by the computer system if no DTD driver accepts a bid. All of the drivers can be assigned so-called ASAP customers by dispatchers, which the unit franchisees are not at liberty to turn down. The drivers assigned to downtown routes (about half the unit franchisees) have no option to select their customers, and can be issued default letters for refusing to take passengers.

While the unit franchisees do have options related to whether they work AM, PM, or Overnight, SuperShuttle Denver controls the number of drivers assigned to each time frame. While drivers can inform the Employer of specific dates they are not available, they have no latitude to elect to take a day off without prior notification. They also cannot start work early or late, or leave work early or late without seeking permission from the MODs. All of the unit franchisees are required to start work at their scheduled time, and if they have not signed onto the Nextel system, the Employer checks their vehicle location via GPS and a dispatcher attempts to contact the driver by radio. The unit franchisees are also required to go through orientation and training on the Employer's equipment and systems when they first become a franchisee, and they are required to take periodic defensive driving courses offered through an entity related to SuperShuttle Denver, as well as other periodic on-the-job training mandated by the Employer. Finally, the unit franchisees are subject to default letters and fines for infractions of the myriad of policies and rules established by the UFA, Operations Manual, and various memoranda issued by the franchise manager, which weigh heavily in favor of my finding of employee status.

e. Entrepreneurial opportunities

In assessing whether the individuals possess entrepreneurial opportunities weighing in favor of a finding of independent contractor status, the Board looks at a variety of factors. Many of these factors discussed above, including method of payment, independence regarding setting work schedules, and vehicle ownership, establish that the Employer has placed significant limitations on the entrepreneurial opportunities of the unit franchisees. Other factors to be considered include whether the unit franchisees have established their own businesses, and are operating as independent companies. Despite language in the UFA encouraging unit franchisees to do so, the Employer only provided evidence of one individual who very recently set up an LLC. The Employer has, in fact, established some barriers to entrepreneurial activities, which warrant a finding that the entrepreneurial opportunities are insufficient to establish independent contractor status. In this regard, unit franchisees are not allowed to franchise for the operation of more than one vehicle. They are also not allowed to hire relief drivers without the relief drivers being approved by the Employer. Finally, the unit franchisees are not allowed to transfer their franchise without prior approval by the Employer.

B. Disabling Conflict of Interest Issue

At issue is whether the relationship between CWA and UTC conflicts with the obligations of the Union as a potential collective-bargaining representative of the SuperShuttle Denver van drivers, as contended by the Employer.

1. Legal framework:

In *St. John's Hospital and Health Center*, 264 NLRB 990 (1982), the Board analyzed the line of cases involving disabling conflicts of interest by unions. It characterized *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954), as "the

seminal case establishing the conflict-of-interest doctrine.” In *Bausch & Lomb*, the Board had found that the employer was no longer obligated to bargain with a union because the union had become a direct business competitor of the employer. The Board in *Bausch & Lomb*, emphasized the important interests of the bargaining unit employees when it stated:

What is envisioned by the Act is that in attempting to [reach] an agreement, the parties will approach the bargaining table for the purpose of representing their respective interests and having approximately equal economic power. The employer must be present to protect his business interests and the union must be there with the single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent, and there must be no ulterior purpose. As the Supreme Court has stated: “The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents.” [*Ford Motor Co. v. Huffman*, 345 U. S. 330, 338.] . . . In our opinion, the Union’s position at the bargaining table as a representative of the Respondent’s employees while at the same time enjoying the status of a business competitor renders almost impossible the operation of the collective-bargaining process. For, the Union has acquired a special interest which may well be at odds with what should be its sole concern--that of representing the interests of the Respondent’s employees. In our opinion, the situation created by the Union’s dual status is fraught with potential dangers. [Emphasis added.] *Id.*, at 1559.

In *St. John’s Hospital*, the Board similarly found that the petitioning union, which operated a nurse registry that dispatched 80 percent of the registered nurses to St. John’s Hospital, had an “ulterior purpose” that conflicted with the requirement that a collective-bargaining agent have a “single-minded purpose of protecting and advancing the interests” of unit employees. *St. John’s Hospital*, *supra*, at 993.¹³ In reaching this conclusion, the Board also relied on *Sierra Vista Hospital, Inc.*, 241 NLRB 631, 634 (1971), which held that: “[A]n Employer has a right to engage in collective bargaining which is not influenced by interests the bargaining representative may have outside its

employee representative capacity."

This line of cases was also discussed in *Western Great Lakes Pilots Association*, 341 NLRB 272 (2004). In that case the Board affirmed the ALJ's finding that no disabling conflict existed where the union's only action had been to support rule making by the Coast Guard which, if enacted, could have put the employer out of business. The judge noted that the union had not instituted or formulated the rule making at issue, but merely had supported one of the proposals before the Coast Guard rule making body. In finding no disabling conflict, the ALJ stated:

Here, there is no evidence that the Union operates, or ever intends to operate, a pilotage enterprise in competition with Respondent. Nor is there evidence that the Union is either a supplier/customer of Respondent or, beyond that, a creditor of Respondent. Furthermore, there is no evidence that the Union operates any type of enterprise that would naturally give rise to an inability to bargain single-mindedly on behalf of unit employees of Respondent represented by the Union or, in some other fashion, that would naturally compromise the collective-bargaining process as contemplated by the Act. *Id.*, at 282. . . .

Here, there is no other employee-unit, represented by the Union, that would benefit from implementation of the unified pilot management proposal. Moreover, implementation of that proposal cannot be accomplished through the collective-bargaining process. The only way that proposal can be implemented is through action by the Coast Guard or, perhaps, through legislation passed by Congress and signed by the President of the United States. *Id.*, at 282.

In another of the *Bausch & Lomb* line of cases, *Alanis Airport Services, Inc.*, 316 NLRB 1233 (1995), the Board reversed the Regional Director's finding that the intervening union should be disqualified as a potential representative of the unit of baggage handlers because of the union's involvement with a newly-formed company that intended to engage in baggage handling competition with the employer. The

¹³ See also, *Visiting Nurses Association, Inc. Serving Alameda County*, 254 NLRB 49 (1981).

intervenor, International Association of Aerospace Workers, District Lodge 40 (IAM), had an exclusive contract with United Airlines that any subcontracted work must be done by an IAM-represented contractor. United Airlines, and several other airlines, had petitioned the Miami Dade Commission to issue the airlines general permits to provide baggage services. At the time of the Board proceedings, commission hearings had been held, but no decision had issued. In anticipation of a favorable commission ruling, IAM was involved in the formation of Miami Airport Skycaps, Inc. (MAS). The objective of forming MAS was to secure United Airlines' baggage handling work for IAM members if the commission granted the permits.

The Board determined that since of plans of MAS had not yet, and might never, materialize, IAM's involvement in MAS did not constitute a current conflict, thus, it was premature to make a finding that the union had a disabling conflict of interest. The Board also stated:

We find it unnecessary to pass on the Intervenor's contention that its involvement with MAS is too limited to warrant a conclusion that the Intervenor controls or has a symbiotic relationship with MAS, because in any event, for the reasons set forth above, there is no showing that MAS is in competition with the Employer. *Id.*, at fn 4.

Notwithstanding that the Board did not address the intervenor's contention that its involvement was too limited based on of its finding that there was no current competition because MAS had not yet been authorized to handle baggage, the Board's analysis in *Alanis* is instructive because the facts regarding IAM's involvement with MAS are similar to CWA's involvement with UTC. In this regard, the Board listed extensive details of the relationship between IAM and MAS, and also specifically stated that it did not question that the new company would, in fact, compete with Alanis if it obtained a permit allowing it to do so. *Id.*, at fn 3. The Board also stated:

In sum, there is insufficient evidence that MAS is a competitor of the Employer or that the Intervenor would misuse its Section 9 status as set forth above. If there is a change of circumstance, in either respect, a party may raise the issue at that time through appropriate procedures under the Act. [Emphasis added.] *Id.*, at 1234.

Thus, the Board left open the possibility that if IAM won the election, and MAS commenced operations, certification could be revoked pursuant to the Board's holding in *Bausch & Lomb*.

The facts regarding the relationship between IAM and MAS were as follows. MAS was owned by 55 shareholders, each of whom owned one share of stock. Two of the shareholders were officers of IAM (president and secretary-treasurer), who also served on the five-member MAS board of directors. IAM's lodge president was also one of the two incorporators and served as the registered agent for MAS. The articles of incorporation of MAS provided that the corporation could issue shares only to dues-paying members of the IAM. The MAS shareholder baggage handlers formed a new IAM local, Local 626, with the object of representing MAS' employees. MAS and Local 626 shared office space at a building owned by the IAM and two other IAM locals, and MAS was permitted to use that space rent-free during their initial 6-month formative period.¹⁴

2. Analysis and conclusions:

Based on the above-cited authority, I find that the relationship between CWA and UTC creates a disabling conflict with the obligation of the Union as a potential collective-bargaining representative of the SuperShuttle Denver drivers to have single-minded purpose of advancing the interests of the SuperShuttle Denver employees. In

¹⁴ The Union, in its post-hearing brief distinguished various other cases in anticipation of the Employer's arguments. I find those cases inapposite to my determination that a disabling conflict exists herein.

reaching this conclusion, I am mindful that the facts do not establish that CWA has an actual ownership interest in UTC, similar to that present in *Bausch & Lomb*; or that CWA's interests are analogues to the nurse registry operated by the union in *St. John's Hospital*. I am persuaded, nonetheless, that a disabling conflict exists because of the inherent likelihood that CWA's bargaining efforts on behalf of the SuperShuttle Denver employees would be influenced by interests outside its representative capacity based on its relationship with UTC.

a. UTC and SuperShuttle are competitors

In reaching my conclusion that a disabling conflict of interest exists, I initially find that SuperShuttle Denver and UTC are, in fact, competitors. The evidence establishes that they both compete for passenger traffic to and from DIA, throughout the Denver metropolitan area. SuperShuttle Denver and UTC are also both subject to regulation by the same regulatory agencies, and compete for a finite number of licenses issued for passenger transportation in their overlapping Denver metropolitan territories. The fact that UTC and SuperShuttle are in competition is further evidenced by the fact that UTC recently sought CWA's assistance in a dispute between UTC and SuperShuttle Denver at the downtown Hyatt Regency convention center hotel. This dispute arose when UTC contended that SuperShuttle Denver was getting an unfair competitive advantage because it was being allowed by Hyatt management to solicit for passengers in the lobby of the hotel, when UTC was not similarly allowed such access.

Based on my finding that UTC and SuperShuttle are competitors, and that UTC, unlike MAS in *Alanis, supra*, is presently in operation as a competitor of SuperShuttle Denver, I must examine the nature of the relationship between CWA and UTC. While this relationship is not easily defined within the framework of the above-

cited Board cases, it is vastly different than a traditional collective bargaining relationship. In this regard, I find that CWA's involvement with UTC is most closely analogous to IAM's involvement with MAS in *Alanis, supra*. As noted above, while the Board declined to address IAM's contention that its involvement with MAS was too limited to establish a disabling conflict of interest, the Board, nonetheless, made specific findings of fact regarding the relationship between IAM and MAS, and stated that if circumstances regarding MAS changed, a party could raise the conflict issue through appropriate procedures under the Act.

b. Relationship between CWA and UTC

I find, based on the record as a whole, that here is no collective-bargaining relationship between CWA and UTC. CWA does not represent UTC drivers *vis-à-vis* UTC in matters such as collective bargaining, or grievance processing. Rather, CWA receives "dues" from the 262 UTC drivers for interests CWA has outside its employee representative capacity. *Sierra Vista Hospital, supra*.

The evidence establishes that like IAM in *Alanis, supra*, CWA was involved with UTC from its inception. Specifically, CWA assisted UTC's predecessor, ProTAXI, in successful lobbying efforts at the Colorado General Assembly for a change in the law. That change in the law allowed the ProTAXI CWA members to form UTC, enabling UTC to gain entry into the passenger transportation industry. Since its inception, UTC has also leased office and parking lot space from CWA, and has been identified with the Union on its website.

According to the Union's Local President, the assistance CWA currently provides to UTC includes legal advice and legal representation; continued lobbying at the State Legislature; representation with certifying and licensing entities including DIA, CPUC,

and traffic enforcement agencies; and assistance in competitive disputes involving commercial enterprises served by both UTC and SuperShuttle Denver, such as the dispute at the downtown Hyatt.

These facts establish that the relationship between the Union and UTC is significantly different than the circumstances relied upon by the Union in its post-hearing brief involving situations where a union receives dues from members it represents in multiple bargaining units for employers competing in the same industry. In situations where a union represents several different bargaining units of competitors' employees, the dues received are primarily for representational activities involving the bargaining unit members' relationships with their employer, not primarily for legal and lobbying matters with governmental entities, in a situation where no collective-bargaining relationship even exists.

I note also, that this is not a situation like that present in *Western Great Lakes Pilots Association*, where the union merely supported a proposal being considered by the regulatory body, which, if enacted, could have resulted in elimination of the employer. Herein, CWA lobbied for a change at the Colorado General Assembly on behalf of its affiliate ProTAXI, which resulted in the former ProTAXI members forming UTC. But the relationship did not end there, rather, CWA has continued to assist UTC in matters wholly unrelated to collective bargaining, and has a significant financial interest in the success of UTC as discussed immediately below.

c. Disabling financial conflict

The factor I find most critical in the analysis of a disabling conflict, which was not present in *Alanis*, is the financial interest CWA has in the success of UTC by virtue of the per capita monthly fee it pays to the Union. These monthly fees amount to more

than \$88,000 a year and they are received outside of any representative capacity. There is no dispute that these monies are not used by CWA to defray the costs of traditional collective-bargaining, such as bargaining a contract with UTC, or processing grievances pursuant to a contract. Rather, these monies go into the Union's general fund as payment for services to UTC that are unrelated to any obligation under the Act to represent the UTC drivers in their relationship with UTC. In return for this monthly per capita fee, the evidence establishes that the Union continues to provide UTC with the same kinds of assistance the Union had previously provided to ProTAXI by virtue of the Affiliation Agreement.

Here, the Union, in essence, is the competitor because of the kinds of managerial assistance it provides to UTC for financial remuneration in the form of the per capita "dues." Thus, while the Union does not have a direct financial ownership stake in UTC, it still gains financially when UTC prospers, which is precisely the kind of conflict the Board warned of in *Bausch & Lomb* and *St John's Hospital and Health Center*. Namely, the danger that CWA's bargaining efforts on behalf of the SuperShuttle Denver employees would be influenced by its financial interests outside its representative capacity because of its relationship with UTC.

In this regard, I conclude that everything the Union does to assist UTC in return for the monthly fees it receives could have a significant impact on the Union's representational capacity for the SuperShuttle Denver employees. The nature of the industry in which UTC and SuperShuttle Denver compete is such that intervention on behalf on one entity can result in a loss of business for another entity. This could take the form of one company gaining vehicle certificates, while the other entity loses them because CPUC issues a finite number of certificates. This is particularly troubling

since UTC has a 3 to 1 advantage in that its cooperative members hold 262 certificates, and SuperShuttle Denver has 86. Intervention by the Union on behalf of UTC could also take the form of one entity gaining a time advantage for curbside waiting at DIA, or for locations to park and wait for passengers in the downtown area, which is precisely the kind of intervention UTC was seeking from the Union in its dispute at the Hyatt.

Accordingly, I find that the form of assistance provided by the Union to UTC in exchange for monthly financial remuneration is in direct conflict with the single-minded representational purpose required of a bargaining representative, since the Union's advocacy on behalf of UTC could have direct, adverse effects on the SuperShuttle Denver bargaining unit.

ORDER

IT IS HEREBY ORDERED that the petition filed in this case is dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on – **March 12, 2010**, at 5 p.m. Eastern Time, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹⁵

A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed directions.

¹⁵ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

The responsibility for the receipt of the request for review rests exclusively with the sender.

A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED at Denver, Colorado this 26th day of February, 2010.

A handwritten signature in black ink, appearing to read "Michael W. Josserand", written over a horizontal line.

Michael W. Josserand
Regional Director
National Labor Relations Board
Region 27
600 17th Street, 7th Floor, North Tower
Denver, Co 80202-5433

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Super Shuttle International Denver, Inc.,

Employer,

and

Communications Workers of America,

Petitioner.

Case 27-RC-8582

AFFIDAVIT OF SERVICE OF REGIONAL DIRECTOR'S DECISION AND ORDER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Mr. Ross Alexander
Super Shuttle
7500 E. 41st Avenue
Denver, CO 80216

Mr. Richard Rosenblatt, Esq.
Rosenblatt and Associates, LLC
8085 E. Prentice Avenue
Greenwood Village, CO 80111

Mr. Patrick R. Scully, Esq.
Sherman & Howard, L.L.C.
633 Seventeenth Street, Suite 3000
Denver, CO 80202

Ms. Mary K. O'Melveny
General Counsel
CWA Legal Department
501 Third Street, N.W., Suite 800
Washington, DC 20001-2797

Mr. Albert H. Kogler
Organizing Coordinator
Communications Workers of America, District 7
8085 E. Prentice Avenue
Greenwood Village, CO 80111

Subscribed and sworn to before me this

26th day of February, 2010.

DESIGNATED AGENT

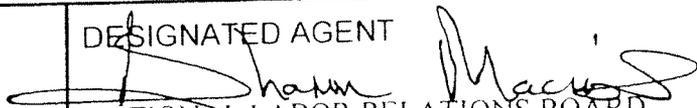

NATIONAL LABOR RELATIONS BOARD

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUPERSHUTTLE INTERNATIONAL
DENVER, INC.

Employer

and

Case 27-RC-8582

COMMUNICATIONS WORKERS OF
AMERICA

Petitioner

ORDER

Petitioner's Request for Review of the Regional Director's Decision and Order is granted as it raises substantial issues warranting review. Employer's Request for Review is denied.¹

PETER C. SCHAUMBER, MEMBER

CRAIG BECKER, MEMBER

MARK GASTON PEARCE, MEMBER

Dated, Washington, D.C., May 5, 2010.

¹ Member Schaumber would grant both the Petitioner's and the Employer's requests for review.

EXHIBIT C

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Supershuttle International Denver, Inc. and Communications Workers of America. Case 27-RC-8582

July 18, 2011

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On February 26, 2010, the Regional Director for Region 27 issued a Decision and Order (pertinent portions are attached as an appendix), in which he dismissed a petition filed by the Communications Workers of America (Union) seeking to represent a unit of the Employer's shuttle van drivers. The Regional Director found, as urged by the Employer, that the Union has a disabling conflict of interest based on the relationship between its affiliate, the Communications Workers of America, Local 7777 (the Local or Local 7777), and the Union Taxi Cooperative (UTC).

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Union filed a timely request for review of the Regional Director's Decision. The Union contends that a disqualifying conflict of interest does not exist because it is not the Employer's competitor, and even assuming that it is, there is no evidence that its competitor status would interfere with its fair and vigorous representation of SuperShuttle employees. On May 5, 2010, the Board granted the Union's request for review.¹

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, including the parties' briefs on review, we conclude, contrary to the Regional Director, that the Employer has failed in its burden of establishing that the Union is disqualified from representing the Employer's employees because of a conflict of interest. Accordingly, we reinstate the petition and remand this case to the Regional Director for further appropriate action.

Facts

The Employer, a subsidiary of SuperShuttle International, is engaged in the transportation of passengers and their baggage. It entered into a license agreement with

¹ In the same Order, the Board denied the Employer's request for review of the Regional Director's finding that the petitioned-for SuperShuttle van drivers were statutory employees rather than independent contractors.

SuperShuttle International and SuperShuttle Franchise Corporation for the use of the SuperShuttle trademarks within a designated territory. SuperShuttle Denver is licensed to serve Denver International Airport (DIA) from the Denver metropolitan area. In order to service that area, the Employer has entered into sublicense franchise agreements with shuttle van drivers to use the SuperShuttle systems and trademarks and to provide transportation services in the applicable market. The van drivers are called "unit franchisees."

SuperShuttle Denver is subject to regulation by the Colorado Public Utilities Commission (CPUC). CPUC issues certificate numbers to SuperShuttle Denver, authorizing it to engage in the "Transportation of Passengers and Baggage." Currently, SuperShuttle Denver is authorized to operate 86 vans, and there are 86 unit franchisees operating under SuperShuttle Denver.

On July 2, 2007, the Professional Taxicab Operators of Colorado Association (ProTAXI) entered into an agreement for affiliation with Local 7777. Under the affiliation agreement, ProTAXI became a division of Local 7777 and agreed to abide by its constitution and bylaws. Local 7777 agreed to provide staff support to ProTAXI regarding matters involving the CPUC, DIA, the city and county of Denver, and area hotels. The Local was also obligated to provide attorneys and lobbyists to advocate for ProTAXI with the Colorado General Assembly. In that capacity, the Local successfully lobbied for a change in the law that then enabled the members of ProTAXI to create the Union Taxi Cooperative (UTC), which operated as a nonprofit taxicab cooperative in the city and county of Denver. The record does not establish whether ProTAXI and Local 7777 formally ended their affiliation agreement, but it appears that ProTAXI was replaced by UTC. UTC and Local 7777 do not have an affiliation agreement in place.²

UTC lists its principal office address as the Local's address. It also has a commercial lease with Local 7777 to rent office space and use its parking lot.

Like the Employer, UTC is subject to regulation by the CPUC. Pursuant to its CPUC certificate, UTC is authorized to operate 262 taxicabs, and it has 262 members. In order to join the cooperative, UTC's bylaws require an individual to sign a UTC membership agreement and be accepted into membership by the UTC Board.³ UTC members pay an unspecified initial membership fee.

² The record is unclear as to whether UTC is now a formal, or in any other manner, part of the Local in the same manner that ProTAXI was a division of the Local.

³ UTC is overseen by five officers and a four-member board of directors.

market. See, e.g., *Commercial Workers Local 951 (Meijer, Inc.)*, 329 NLRB 730, 733–736 (1999), *enfd.* 307 F.3d 760 (9th Cir. 2002) (*en banc*), *cert. denied* 537 U.S. 1024 (2002). The fact that expansion of one such employer, and the union's consequent gain of members, may come at the expense of another employer in the same market, does not disqualify the union from representing the employees of both employers. The situation is no different here. The Union is not in the transportation business and its representation of taxi drivers who are is not disqualifying, as made clear by the Board in *CMT, Inc.*, 333 NLRB 1307, 1308 (2001).

Our conclusion is not altered by the fact that the Local does not represent the drivers who are members of UTC in traditional collective bargaining. Unions often advocate on behalf of their members in forums other than collective bargaining. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–567 (1978). Such advocacy often takes the form of working cooperatively with the employer of the union's members when the employer and its employees have common interests. Such advocacy does not disqualify a union from representing employees of two employers in the same market.

The Union is not profiting from the operation of a transportation business in a manner different from any union that “profits” when an employer whose employees it represents succeeds. Rather, it is collecting per capita fees from UTC, just as every international union collects per capita fees from its affiliated locals. The fact that the Union also rents space to UTC does not alter our conclusion. There is no evidence to suggest that the lease agreement was not an arms-length transaction. Neither the collection of per capita fees based on membership in UTC nor the collection of what is conceded to be reasonable rent represents the acquisition of the type of “special interest” in a competitor employer that the Board found disqualifying in *Bausch & Lomb Optical Co.*, 108 NLRB at 1559.

The cases cited by the Regional Director are distinguishable. In *Bausch & Lomb*, *supra*, the union established a company that engaged in the same business as an employer of employees represented by the union. In contrast, the record here does not demonstrate that the Union invested any moneys in UTC or that the Union controls UTC.

The facts here are also distinguishable from those in *St. John's Hospital*, *supra*, where the union operated a registry that referred nurses to the employer's hospital and received referrals of patients from the employer. The union exercised complete control over the registry, and the employer paid the union for use of the registry's services. Because the employer was the union's cus-

tommer, the Board found that the union's “financial interests in maintaining and enhancing its ‘customer’ relationship with the Employer” would cause the union to seek to further its business interest rather than to further the interests of the bargaining unit employees. 264 NLRB at 993. In the present case, by contrast, the Employer is not a customer of the Union, and the Union neither supplies personnel to the Employer nor derives any moneys from the Employer. Instead, the Local receives a per capita fee from UTC in return for advocating on behalf of its members. *Cf. Garrison Nursing Home*, 293 NLRB 122 (1989) (conflict exists because of the financial relationship between the employer and the petitioner's executive director as the holder of the employer's promissory note for \$220,000).⁵

Thus, even assuming the taxi drivers who are members of UTC are direct competitors of the Employer, we would find no disqualifying conflict of interest.

C.

In any event, we disagree with the Regional Director's finding that the UTC is a direct competitor of the Employer. Specifically, the Regional Director found that the two entities compete to carry passengers to and from Denver International Airport; they are both subject to regulation by the same regulatory agencies; they compete for a finite number of licenses issued for passenger transportation in the Denver metro area; and UTC sought the Local's assistance during the Hyatt disputes, which allegedly involved the Employer.

We agree with the Regional Director's finding that UTC and SuperShuttle Denver are competitors only insofar as they both transport passengers to and from the airport. For the reasons that follow, we find that the Employer and the UTC are not, in fact, direct competitors.

First, there is no record evidence to support the Regional Director's finding that UTC and SuperShuttle Denver compete for a fixed number of licenses. Our

⁵ While recognizing that the Board did not ultimately find a conflict of interest in *Alanis Airport Services*, 316 NLRB 1233 (1995), the Regional Director here still found the case to be “instructive” because “the facts regarding [the Machinist's] involvement with [the Miami Airport Skycaps] are similar to CWA's involvement with UTC.” We disagree. As the Board in *Alanis* specifically pointed out, there was no evidence that the Machinists, if selected as the Sec. 9 representative of the employer's employees, would utilize that position to create instability in the employer's labor relations and thereby enhance the chances that MAS would obtain the work. The same is true in respect to the Union and UTC here. Moreover, the facts in *Alanis* are distinguishable for a number of reasons. First, the employer and the entity affiliated with the union would have been direct competitors, unlike the Employer and UTC here. Second, the union's president and secretary-treasurer served on the affiliated entity's five-member board of directors. Thus, the union in *Alanis* had greater control over its affiliate, than is present in the Union's relationship with UTC here.

matters involving CPUC, DIA, the City and County of Denver, and area hotels. CWA was also obligated to provide attorneys and lobbyists to advocate for the ProTAXI division with the Colorado General Assembly. The Union's advocacy included successfully lobbying for a change in the law through the Colorado legislature, which permitted the CPUC to lower transportation industry entry standards allowing for the legal formation and certification of UTC to operate as a taxicab cooperative. The change in the law took effect July 1, 2008.

In anticipation of the change in law by the Colorado General Assembly, ProTAXI Union members met in January 2008, to formulate plans to form UTC. In April 2008, the 262 ProTAXI members sought and obtained legal advice regarding the requirements for applying to the CPUC for authorization to form a cooperative to provide taxicab service in the City and County of Denver. The record does not establish whether the Union and ProTAXI ever formally ended their Affiliation Agreement, but it appears that ProTAXI was subsumed by UTC upon UTC's formal legal creation.

2. UTC's incorporation

On June 9, 2008, UTC filed its Articles of Incorporation of a Cooperative with the Colorado Secretary of State. UTC listed the Union's address (2840 S Vallejo, Englewood, Colorado), as its principal office street address. Abdi Buni was named as the registered agent, and incorporator for UTC. Abdi Buni's address was also given as CWA's address. In June 2008, UTC also adopted cooperative bylaws, and entered into a Colorado Commercial Lease with CWA, effective July 1, 2008, to rent office space and use of the parking lot at the Union hall. UTC entered into a successor lease effective July 1, 2009, with CWA, Local 7777, increasing the amount of monthly rent, and increasing the size of the office space UTC rents from the Union. That lease also covers all utilities except telephone service and includes the right for the UTC members to park their taxicabs at the Union hall when the cabs are not in service.

On July 1, 2008, UTC filed an application to operate as a common carrier by motor vehicle for hire with the CPUC for a permit authorizing the 262 individual UTC members to begin to offer taxi service under the UTC name in the City and County of Denver. This application was granted, and UTC has had 262 cooperative members and corresponding taxicabs since that time.

3. UTC membership

UTC currently has 262 member drivers, which is the maximum number UTC can have based on its current CPUC certification. UTC has an office staff of eight employees, including dispatchers, call takers, a cashier and bookkeeper. The office employees are overseen by general manager Guadata Brasso. In order to join the cooperative, an individual must sign a UTC Membership Agreement and be accepted into membership by the UTC Board. UTC members pay an initial membership fee. Once accepted, they begin to pay annual membership dues which may be paid on a weekly, monthly, quarterly, or annual

basis.¹⁰ UTC members are required to become members of CWA, but are not required to pay initiation fees.

UTC is overseen by a four-member board of directors and five official officers. Abdi Buni was the first president of UTC. Buni, however, was hired as a paid organizer for CWA Local 7777 in July 2009. Accordingly, at the August 2009 Board of Director's meeting, Bushra Saido was elected as Buni's successor. At that same meeting, Yousef Salad and Mengistab Desta were elected as Vice Presidents; Million Mengistu was elected as Secretary; and Takele Merse was elected as Treasurer. The current UTC Board Members are: Abdi Buni, Stan Hawton, Cristian Mateescu, and Gamachu Said.

B. Relationship Between CWA and UTC

The documentary evidence regarding a relationship between CWA and UTC initially establishes that they have formal landlord/tenant relationship based on the lease for the UTC office space. Other aspects of the relationship between CWA and UTC are more difficult to define. While the record does not reflect direct involvement by CWA in the legal formation of UTC, as discussed, the Union was involved in lobbying efforts with the Colorado General Assembly to seek a change in the law to allow for formation of UTC, which resulted in the elimination of ProTAXI, with which the Union did have a formal affiliation agreement. The record also establishes that CWA does not have a traditional collective-bargaining relationship with UTC to represent the interests of the cooperative taxi drivers, *vis-à-vis* UTC.

The relationship between UTC and CWA is also evidenced by the fact that in July 2009, the Union hired then UTC President Abdi Buni as a paid organizer. While Buni is no longer UTC president, he still holds a position on the UTC board of directors. Buni was involved with the Union as a contact person for ProTAXI, and as such, was regularly copied on e-mail correspondence between UTC and the Union before he was hired as a paid organizer. Buni still is regularly copied on e-mail correspondence between UTC and CWA, and in fact continues to use the same ProTAXI e-mail address he used before the inception of UTC.

Finally, there is evidence that CWA representatives conducted the August UTC Board of Directors meeting at which Buni's successor was elected, and oversaw the election of officers and board of directors members at that meeting.

Notwithstanding the lack of a collective-bargaining relationship, UTC pays a monthly per capita fee of \$28 to CWA for each of its 262 members, which UTC and CWA characterize as "dues." There is no evidence that the UTC members submit applications for actual membership in CWA, and testimonial evidence establishes that they are not required to pay union initiation fees. These monthly dues paid directly by UTC to the Union amount to \$7336 per month. These monthly per capita dues are in addition to the monthly rent paid by UTC for leasing office and parking lot space and covering utilities. UTC

¹⁰ The record does not reflect the amount of the initiation fee or annual membership fee because CWA objected to the Employer's attempt to elicit that evidence.

terests the bargaining representative may have outside its employee representative capacity.”

This line of cases was also discussed in *Western Great Lakes Pilots Association*, 341 NLRB 272 (2004). In that case the Board affirmed the ALJ’s finding that no disabling conflict existed where the union’s only action had been to support rule making by the Coast Guard which, if enacted, could have put the employer out of business. The judge noted that the union had not instituted or formulated the rule making at issue, but merely had supported one of the proposals before the Coast Guard rule making body. In finding no disabling conflict, the ALJ stated:

Here, there is no evidence that the Union operates, or ever intends to operate, a pilotage enterprise in competition with Respondent. Nor is there evidence that the Union is either a supplier/customer of Respondent or, beyond that, a creditor of Respondent. Furthermore, there is no evidence that the Union operates any type of enterprise that would naturally give rise to an inability to bargain single-mindedly on behalf of unit employees of Respondent represented by the Union or, in some other fashion, that would naturally compromise the collective-bargaining process as contemplated by the Act. *Id.*, at 282. . . .

Here, there is no other employee-unit, represented by the Union, that would benefit from implementation of the unified pilot management proposal. Moreover, implementation of that proposal cannot be accomplished through the collective-bargaining process. The only way that proposal can be implemented is through action by the Coast Guard or, perhaps, through legislation passed by Congress and signed by the President of the United States. *Id.*, at 282.

In another of the *Bausch & Lomb* line of cases, *Alanis Airport Services*, 316 NLRB 1233 (1995), the Board reversed the Regional Director’s finding that the intervening union should be disqualified as a potential representative of the unit of baggage handlers because of the union’s involvement with a newly-formed company that intended to engage in baggage handling competition with the employer. The intervenor, International Association of Aerospace Workers, District Lodge 40 (IAM), had an exclusive contract with United Airlines that any subcontracted work must be done by an IAM-represented contractor. United Airlines, and several other airlines, had petitioned the Miami Dade Commission to issue the airlines general permits to provide baggage services. At the time of the Board proceedings, commission hearings had been held, but no decision had issued. In anticipation of a favorable commission ruling, IAM was involved in the formation of Miami Airport Skycaps, Inc. (MAS). The objective of forming MAS was to secure United Airlines’ baggage handling work for IAM members if the commission granted the permits.

The Board determined that since of plans of MAS had not yet, and might never, materialize, IAM’s involvement in MAS did not constitute a current conflict, thus, it was premature to make a finding that the union had a disabling conflict of interest. The Board also stated:

We find it unnecessary to pass on the Intervenor’s contention that its involvement with MAS is too limited to warrant a conclusion that the Intervenor controls or has a symbiotic relationship with MAS, because in any event, for the reasons set forth above, there is no showing that MAS is in competition with the Employer. *Id.*, at fn 4.

Notwithstanding that the Board did not address the intervenor’s contention that its involvement was too limited based on of its finding that there was no current competition because MAS had not yet been authorized to handle baggage, the Board’s analysis in *Alanis* is instructive because the facts regarding IAM’s involvement with MAS are similar to CWA’s involvement with UTC. In this regard, the Board listed extensive details of the relationship between IAM and MAS, and also specifically stated that it did not question that the new company would, in fact, compete with Alanis if it obtained a permit allowing it to do so. *Id.*, at fn 3. The Board also stated:

In sum, there is insufficient evidence that MAS is a competitor of the Employer or that the Intervenor would misuse its Section 9 status as set forth above. *If there is a change of circumstance, in either respect, a party may raise the issue at that time through appropriate procedures under the Act*, (Emphasis added.) *Id.*, at 1234.

Thus, the Board left open the possibility that if IAM won the election, and MAS commenced operations, certification could be revoked pursuant to the Board’s holding in *Bausch & Lomb*.

The facts regarding the relationship between IAM and MAS were as follows. MAS was owned by 55 shareholders, each of whom owned one share of stock. Two of the shareholders were officers of IAM (president and secretary-treasurer), who also served on the five-member MAS board of directors. IAM’s lodge president was also one of the two incorporators and served as the registered agent for MAS. The articles of incorporation of MAS provided that the corporation could issue shares only to dues-paying members of the IAM. The MAS shareholder baggage handlers formed a new IAM local, Local 626, with the object of representing MAS’ employees. MAS and Local 626 shared office space at a building owned by the IAM and two other IAM locals, and MAS was permitted to use that space rent-free during their initial 6-month formative period.¹⁴

2. Analysis and conclusions

Based on the above-cited authority, I find that the relationship between CWA and UTC creates a disabling conflict with the obligation of the Union as a potential collective-bargaining representative of the SuperShuttle Denver drivers to have single-minded purpose of advancing the interests of the SuperShuttle Denver employees. In reaching this conclusion, I am mindful that the facts do not establish that CWA has an actual ownership interest in UTC, similar to that present in *Bausch & Lomb*; or that CWA’s interests are analogues to the nurse registry operated by the union in *St. John’s Hospital*. I am per-

¹⁴ The Union, in its post-hearing brief distinguished various other cases in anticipation of the Employer’s arguments. I find those cases inapposite to my determination that a disabling conflict exists herein.

interests outside its representative capacity because of its relationship with UTC.

In this regard, I conclude that everything the Union does to assist UTC in return for the monthly fees it receives could have a significant impact on the Union's representational capacity for the SuperShuttle Denver employees. The nature of the industry in which UTC and SuperShuttle Denver compete is such that intervention on behalf of one entity can result in a loss of business for another entity. This could take the form of one company gaining vehicle certificates, while the other entity loses them because CPUC issues a finite number of certificates. This is particularly troubling since UTC has a 3 to 1 advantage in that its cooperative members hold 262 certificates, and SuperShuttle Denver has 86. Intervention by the Union on behalf of UTC could also take the form of one entity gaining a time advantage for curbside waiting at DIA, or for locations to park

and wait for passengers in the downtown area, which is precisely the kind of intervention UTC was seeking from the Union in its dispute at the Hyatt.

Accordingly, I find that the form of assistance provided by the Union to UTC in exchange for monthly financial remuneration is in direct conflict with the single-minded representational purpose required of a bargaining representative, since the Union's advocacy on behalf of UTC could have direct, adverse effects on the SuperShuttle Denver bargaining unit.

ORDER

IT IS HEREBY ORDERED that the petition filed in this case is dismissed.

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EXHIBIT D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

SUPERSHUTTLE INTERNATIONAL DENVER, INC.

Employer,

and

Case 27-RC-8582

COMMUNICATION WORKERS OF AMERICA

Petitioner,

ORDER TO SHOW CAUSE

On December 11, 2009, the Communications Workers of America (Petitioner), filed a petition to represent the shuttle van drivers employed by SuperShuttle International Denver, Inc., (SuperShuttle or Employer) in its Denver, Colorado metropolitan area operations. A hearing was held on December 28, 2009, and January 7, 8, and 12, 2010 in Denver, Colorado. On February 26, 2010, then Regional Director Michael Josserand issued a Decision and Order finding the petitioned-for drivers to be statutory employees, but finding that the Petitioner was disqualified from representing this bargaining unit because of a disabling conflict of interest.

Both parties filed requests for review with the National Labor Relations Board (Board). The Employer petitioned for review of the Regional Director's finding that the petitioned-for drivers were statutory employees, rather than independent contractors or statutory supervisors. The Petitioner petitioned for review of the Regional Director's finding that there was a disabling conflict of interest, which precluded it from representing the petitioned-for unit of

employees. On May 5, 2010, the Board granted the Petitioner's request for review, but denied the Employer's request for review.

On July 18, 2011, the Board issued a Decision on Review and Order, reversing the Regional Director's finding that there was a disabling conflict of interest that prevented the Petitioner from representing the petitioned-for bargaining unit, reinstated the petition, and remanded it to the Regional Director for further appropriate action.

In view of the above, **IT IS HEREBY ORDERED** that any party shall have until **close of business, September 6, 2011**, to show cause why, based upon the record in this matter, the Regional Director should or should not direct an election in the following petitioned-for unit, as an appropriate unit:

INCLUDED: All full-time and part-time shuttle van drivers employed by the Employer in its Denver, Colorado operations.¹

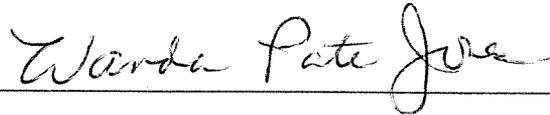
EXCLUDED: All other employees, confidential employees, professional employees, managers, guards, and supervisors as defined by the Act.

The parties shall file a written statement with the Regional Director, including supported factual statements and documents and detailed argument in support of their positions. The parties shall address the appropriateness of the petitioned-for unit. The written statement should include a showing that it was served on all other parties. After receipt of the submissions, the Region will determine if, based

¹ The Regional Director's February 26, 2010 Decision and Order, found that the record did not establish that SuperShuttle had any "part time" drivers. The Regional Director noted in the decision that there had been "14" relief drivers and, absent evidence as to frequency, such relief drivers might constitute casual drivers, at best. The Regional Director, however, declined to make a finding on the issue of part-time or casual drivers inasmuch as he decided to dismiss the petition.

upon the record evidence, an election will be directed in the above-described unit.

DATED at Denver, Colorado, this 29th day of August 2011.

A handwritten signature in cursive script that reads "Wanda Pate Jones". The signature is written in black ink and is positioned above a solid horizontal line.

Wanda Pate Jones, Regional Director
National Labor Relations Board, Region 27
Dominion Towers
600 17th Street, Ste. 700 N
Denver, Colorado 80202-5433

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Supershuttle International Denver, Inc.,

Employer,

and

Communications Workers of America,

Petitioner.

Case **27-RC-8582**

AFFIDAVIT OF SERVICE OF ORDER TO SHOW CAUSE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Mr. Ross Alexander
Super Shuttle
7500 E. 41st Avenue
Denver, CO 80216

Mr. Albert H. Kogler
Organizing Coordinator
Communications Workers of America, District 7
8085 E. Prentice Avenue
Greenwood Village, CO 80111

Mr. Patrick R. Scully, Esq.
Sherman & Howard, L.L.C.
633 Seventeenth Street, Suite 3000
Denver, CO 80202

Mr. Richard Rosenblatt, Esq.
Rosenblatt and Associates, LLC
8085 E. Prentice Avenue
Greenwood Village, CO 80111

Ms. Mary K. O'Melveny
General Counsel
CWA Legal Department
501 Third Street, N.W.
Suite 800
Washington, DC 20001-2797

Subscribed and sworn to before me this

29th day of August, 2011.

DESIGNATED AGENT

Georgette MacLeod
NATIONAL LABOR RELATIONS BOARD

EXHIBIT E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

SUPERSHUTTLE INTERNATIONAL DENVER, INC.

Employer,

and

Case 27-RC-8582

COMMUNICATIONS WORKERS OF AMERICA

Petitioner,

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. On August 29, 2011, I issued an Order to Show Cause requesting that the parties show cause why I should or should not direct an election in the petitioned-for unit. In their responses to the Order, the Communications Workers of America (Petitioner) and SuperShuttle International Denver, Inc., (SuperShuttle or Employer), presented no factual statements or documents to establish that it was necessary to take further evidence and no party requested that the record be reopened. Accordingly, I find, as discussed more fully below, that it is appropriate to direct an election in the petitioned-for bargaining unit at a date, time and place to be determined.

STATEMENT OF THE CASE

1. Procedural History:

On December 11, 2009, the Petitioner, filed a petition seeking to represent the shuttle van drivers employed by SuperShuttle in its Denver, Colorado metropolitan area

operations.¹ A hearing was held on December 28, 2009, and January 7, 8, and 12, 2010 in Denver, Colorado. On February 26, 2010, then Regional Director Michael W. Josserand issued a Decision and Order finding the petitioned-for shuttle van drivers to be statutory employees, not independent contractors, as asserted by the Employer. Additionally, the Regional Director found that the Employer failed to meet its burden of establishing that the unit franchisee shuttle drivers are statutory supervisors. The Regional Director found, however, that the Petitioner was disqualified from representing this bargaining unit because of a disabling conflict of interest, and dismissed the petition on that basis.

Both parties timely filed requests for review with the National Labor Relations Board (Board). On March 11, 2010, the Employer petitioned for review of the Regional Director's finding that the petitioned-for shuttle van drivers were statutory employees, rather than independent contractors or statutory supervisors. On March 12, 2010, the Petitioner petitioned for review of the Regional Director's finding that there was a disabling conflict of interest, which precluded it from representing the petitioned-for unit of employees.

On May 5, 2010, the Board issued an Order granting the Petitioner's request for review, but denying the Employer's request for review.

On July 18, 2011, the Board issued a Decision on Review and Order, reversing the Regional Director's finding that there was a disabling conflict of interest that

¹ The petitioned-for bargaining unit is as follows:

INCLUDED: All full-time and part-time shuttle van drivers employed by the Employer in its Denver, Colorado operations.

EXCLUDED: All other employees, confidential employees, professional employees, managers, guards, and supervisors as defined by the Act.

prevented the Petitioner from representing the petitioned-for unit, reinstated the petition, and remanded it to me for further appropriate action.²

On August 29, 2011, I issued an Order to Show Cause, affording the parties an opportunity to show cause why, based upon the record in this matter, I should or should not direct an election in the petitioned-for unit. The Order to Show Cause specifically required that any party responding to the Order: "shall file a written statement with the Regional Director, including supported factual statements and documents and detailed argument in support of their positions. The parties shall address the appropriateness of the petitioned-for unit." The Petitioner and Employer filed timely responses to the Order to Show Cause.

2. Positions of the Parties In Response To the Order To Show Cause:

The Petitioner asserted that there were no changed circumstances necessitating reopening the record, and that an election should be scheduled as soon as possible.

The Employer asserted that an election should not be directed, citing six specific bases for dismissing the underlying petition. Notably, the Employer did not explicitly assert that the underlying record must be reopened to obtain evidence relating to any changed circumstances since the original Decision and Order issued on February 26, 2010. Rather, the Employer stated that there were "critical impediments to an election." The Employer did not provide any new evidence relating to changed circumstances, but instead, based its arguments primarily on its pleadings filed in the underlying proceedings. The Employer appended the following pleadings to its response: Employer's Post-Hearing Brief; Request for Review; Statement in Opposition to the Union's Request for Review; and Brief on Review to Sustain Disqualification of Petitioner.

² *SuperShuttle International Denver, Inc.*, 357 NLRB No. 19 (July 18, 2011).

The Employer made the following six assertions in response to the Order to Show Cause:

- A. Changed circumstances make an election of the petitioned-for unit inappropriate.
- B. The Regional Director's Decision improperly failed to consider the ample and undisputed record of independent contractor status and entrepreneurial freedom.
- C. The Regional Director's Decision failed to decide the supervisory issue.
- D. The NLRB has no authority to invalidate business entities or void valid franchise agreements.
- E. The NLRB's Decision overturning the disqualification of the Union misstates the record and abandons Board precedent.
- F. The Regional Director's Decision in Case 27-RC-8582, in light of the Board's refusal to grant review on the independent contractor issue, lacks authority under *New Process steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010).

Based on the fact that neither the Petitioner nor the Employer has asserted that it would be inappropriate to direct an election without first reopening the underlying record, and no evidence was presented to warrant such action, I find that it is appropriate to direct an election herein. In this regard, while the Employer has asserted various reasons why it contends it is inappropriate to hold an election at all, and that the petition should be dismissed, the Employer has not urged that the underlying record be reopened. Accordingly, I shall direct that an election be held in the petitioned-for bargaining unit, at a date, time and place (or dates, times, and places), to be determined.

3. Analysis of the Employer's assertions:

- A. Changed circumstances make an election of the petitioned-for unit inappropriate.

The Employer asserts that there are changed circumstances because of employee turnover, and because the current drivers are operating under a new annual Unit Franchise Agreement (UFA). With regard to employee turnover the Employer did not provide any direct evidence. Rather, the Employer asserted that: "there has been

not insignificant turnover in franchisees; there are several new franchisees, and an even larger number of franchisees at the time of the Hearing have ceased their business relationship with SuperShuttle Denver.”

With regard to the new UFA, the Employer did not provide a copy with its response, and also did not provide a detailed description or analysis of any language changes between the UFA in effect at the time of the hearing and the most recent iteration of the UFA as explicitly required by the Order to Show Cause. Moreover, the Employer did not assert that the purported changed circumstances warranted reopening the underlying record, but merely stated: “Because the record on which the Decision was based is stale, the Regional Director should not direct an election in this case.”

I find that the Employer’s response to the Order to Show Cause did not provide sufficient factual support or legal arguments to establish a basis that would require reopening of the underlying record to elicit evidence of changed circumstances, and, accordingly, I am declining to do so.

B. The Regional Director’s Decision improperly failed to consider the ample and undisputed record of independent contractor status and entrepreneurial freedom.

In support of this assertion, the Employer argues that the underlying finding that drivers are statutory employees and not independent contractors is clearly erroneous. Accordingly, the Employer states that I “should not direct an election, but rather reconsider this matter based on the current facts.” As noted, however, the Employer did not provide sufficient evidence to establish that there are any changed circumstances warranting reopening the record. Since the Board expressly denied the Employer’s Request for Review of the underlying independent contractor findings, I find that it is inappropriate for me to reopen the record or dismiss the petition in these circumstances.

C. The Regional Director's Decision failed to decide the supervisory issue.

In its response to the Order to Show Cause, the Employer stated: "The Decision in Case 27-RC-8582 also is clearly erroneous because it failed to decide [the] supervisory issue, which SuperShuttle Denver briefed and explicitly raised on the record." The Employer further asserted, apparently based on the underlying record evidence, that all of the shuttle van drivers are statutory supervisors because they may elect to use relief drivers to operate their vans.

The Employer appears to rely on preliminary comments in the February 26, 2010, Decision and Order (page 2) wherein the Regional Director concluded that the record was insufficient to make a determination regarding the supervisory status of the unit franchisees. However, in the "Legal Analysis and Conclusions" section of the Decision (page 28), then Regional Director Josserand also found that: "the Employer has failed to meet its burden of establishing that the unit franchisee shuttle van drivers are statutory supervisors. See e.g., *NLRB v. Kentucky River Community Care*, 532 U. S. 706 (2001)."

The Employer acknowledged in its response to the Order to Show Cause that it raised this supervisory issue in its Request for Review, which was denied by the Board in the May 5, 2011 Order. Since the Employer raised this issue in its Request for Review, it would be inappropriate for me to reconsider the supervisory issue in the absence of clear evidence of changed circumstances relating to the purported supervisory status of any specific shuttle van driver.

My Order to Show Cause requested that the parties provide factual statements and documents relating to its arguments, which the Employer did not provide in support of this contention. Rather, the Employer proffered the same arguments already rejected

by the Board. Accordingly, it would be inappropriate for me to reconsider the record or dismiss the petition on this basis.

D. The NLRB has no authority to invalidate business entities or void valid franchise agreements.

The Employer argues that: "the Regional Director is without authority (1) to direct an election of franchisees who do business as businesses, which would have the effect of invalidating entities lawfully formed under state law, or (2) to void franchise agreements lawfully formed under state and federal law." In support of its arguments, the Employer cites two Supreme Court cases involving complicated preemption issues: *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), and *Lodge 76, International Association n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976).

The Employer's argument appears to be a challenge to the original finding by the Regional Director, as affirmed by the Board,³ that the van drivers are statutory employees. I find the cases cited by the Employer inapposite to the issues decided by the Board regarding the independent contractor status of the shuttle van drivers. The Board in *Roadway Package System, Inc.*, 326 NLRB 842 (1998) and *Dial-A-Mattress Operating Corporation*, 326 NLRB 884 (1998), decided the same day, affirmed that the proper analysis to be used in determining whether an individual is an employee or an independent contractor under Section 2(3), is the common-law agency test that involves the multifactor analysis set forth in Restatement (Second) of Agency, Section 220(2).⁴ The Regional Director specifically found that

³ See the Board's Decision on Review and Order, *Id.*, fn. 1, in which the Board stated that in its May 5, 2010 Order granting the Petitioner's request for review, it also "denied the Employer's request for review of the Regional Director's finding that the petitioned-for SuperShuttle van drivers were statutory employees rather than independent contractors."

⁴ The common law factors include, *inter alia*, "the extent of control which, by the agreement, the master may exercise over the details of the work"; "the kind of occupation"; whether the worker "supplies the instrumentalities, tools, and the place of work"; "the method of payment, whether by

while some of the shuttle van drivers had formed their own legal business entities, the Employer put sufficient restrictions on those entities, including the prohibition on franchisees transferring their franchise without obtaining the Employer's approval, to weigh in favor of a finding that the drivers were not independent contractors. Since this matter was fully litigated in the underlying proceeding, it would be inappropriate for me to reopen the record or dismiss the petition based on the Employer's contention that the drivers are independent contractors, which has already been rejected by the Board.

E. The NLRB's Decision overturning the disqualification of the Union misstates the record and abandons Board precedent.

This assertion by the Employer appears to seek my reconsideration of the Board's Decision on Review and Order, which I do not have the authority to do.

F. The Regional Director's Decision in Case 27-RC-8582, in light of the Board's refusal to grant review on the independent contractor issue, lacks authority under *New Process steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010).

The Employer asserts that because the underlying Regional Director's Decision and Order was issued at a time when the National Labor Relations Board lacked a quorum, the Regional Director also lacked authority to issue decisions.

In issuing his Decision and Order, the Regional Director acted pursuant to a 1961 delegation of authority by the Board under Section 3(b) of the Act, granting regional directors authority to decide representation case issues. In its response to the Order to Show Cause, the Employer has not cited any authority establishing that this long-standing authority granted to regional directors to issue decisions was altered by the Supreme Court in its *New Process Steel* decision. I find that subsequent Board cases, in fact, establish the opposite. See e.g., *Brentwood Assisted Living Community*, 355 NLRB No. 149 (August 27, 2010), in which the Board rejected the employer's contention

the time or by the job"; "the length of time for which the person is employed"; whether "the work is a part of the regular business of the employer"; and the intent of the parties. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, fn 1 (D.C. Cir. 2009)

that, pursuant to the Supreme Court's *New Process Steel* decision, the Agency's processing of a representation case while there was a two-member Board was undertaken without a proper quorum. Specifically, the Board held that "[t]he Regional Director properly processed the underlying representation proceeding by virtue of the authority delegated to him under Sec. 3(b) of the Act. See 26 F.R. 3911 (Board's delegation of authority in representation proceedings to regional directors.)"

Moreover, even assuming that the Regional Director lacked authority to issue his Decision and Order while there was a two-member Board, there is no reason to conclude that the result would have been different had the Regional Director elected to abstain from issuing his decision until the Board had a quorum after March 27, 2010. Thus, the timing of the Regional Director's issuance of the Decision and Order was, at worst, harmless error. See, e.g., *Contemporary Cars, Inc.*, 355 NLRB No. 113 (August 23, 2010) (holding that a regional director's conduct of an election and counting of ballots during the period when there was a two-member Board "was, at worst, harmless error that did not affect the validity of ballots"); and *Fred Meyer Stores, Inc.*, 355 NLRB No. 130 (August 26, 2010).

I find the case cited by the Employer, *Rochelle Waste Disposal, LLC*, 355 NLRB No. 100 (2010), inapposite. In *Rochelle Waste Disposal*, the Board stated: "However, the postelection representation issues raised by the Respondent were resolved in a two-member decision and we do not give that decision preclusive effect." Thus, it was an actual two-member Board decision - not a Regional Director's decision - that the Board determined must be revisited by the Board once it had attained a quorum.

Finally, after the Regional Director issued his Decision and Order, the Employer and the Petitioner each filed a request for review with the Board. The Board issued a decision on those requests for review on May 5, 2010, after it had a quorum.

Specifically, on May 5, 2010, Board Members Schaumber, Becker, and Pearce participated in the determination to deny the Employer's request for review and grant the Petitioner's request for review. Thus, it is clear that the Employer obtained review of the Regional Director's Decision and Order from a three-member panel of the Board. Accordingly, the Employer has not been prejudiced by the mere fact that when the Regional Director issued his Decision and Order on February 26, 2010, there were only two Board members.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find that the following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and part-time⁵ shuttle van drivers employed by the Employer in its Denver, Colorado operations.

EXCLUDED: All other employees, confidential employees, professional employees, managers, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by:

Communications Workers of America

The election will be held at a date, time and a place (or dates, times and places) to be determined by the Regional Director. The date, time and place of the election will

⁵ The underlying record establishes that some shuttle van drivers have occasionally utilized relief drivers. The Employer concedes in its response to the Order to Show Cause that relief drivers "are subsumed within the petitioned-for unit." Because it cannot be determined at this time whether the relief drivers have worked sufficient hours to constitute regular part-time employees or are casual employees, the relief drivers may vote subject to challenge.

be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the **full** name and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 600 17th Street, 7th Floor, North Tower, Denver, Colorado, on or before **September 27, 2011**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,⁶ by mail, or by facsimile transmission at (303-844-6249). The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Since the list will be made

⁶ To file the eligibility list electronically, go to www.nlr.gov and select the **E-GOV** tab. Then click on the **E-FILING** link on the menu, and follow the detailed instructions.

available to all parties to the election, please furnish a total of two (2) copies of the list, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

Pursuant to the Board's Rules and Regulations, Sections 102.111-102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **October 4, 2011**, at **5 p.m. Eastern Time**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for**

review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁷

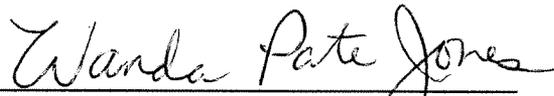
A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-GOV tab, click on E-Filing, and follow the detailed directions. The responsibility for the receipt of the request for review rests exclusively with the sender.

⁷ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED at Denver, Colorado, this 20th day of September 2011.

A handwritten signature in cursive script that reads "Wanda Pate Jones". The signature is written in black ink and is positioned above a horizontal line.

Wanda Pate Jones, Regional Director
National Labor Relations Board, Region 27
Dominion Towers
600 17th Street, Suite 700, North Tower
Denver, Colorado 80202-5433

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 27

SUPERSHUTTLE INTERNATIONAL DENVER, INC. Employer and COMMUNICATIONS WORKERS OF AMERICA Petitioner	Case 27-RC-008582
---	-------------------

AFFIDAVIT OF SERVICE OF SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION: dated September 20, 2011

I depose and say that on **September 20, 2011**, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

PATRICK R. SCULLY, ESQ.
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ALBERT H. KOGLER
ORGANIZING COORDINATOR
COMMUNICATIONS WORKERS OF
AMERICA
8085 E. PRENTICE AVE.
GREENWOOD VILLAGE, CO 80111-2705

September 20, 2011

Date

Sharon Macias, Designated Agent of NLRB

Name



Signature

EXHIBIT F

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

SUPERSHUTTLE INTERNATIONAL DENVER, INC.,

Case No. 27-RC-8582

Employer,

and

COMMUNICATIONS WORKERS OF AMERICA,

Petitioner.

REQUEST FOR REVIEW

SHERMAN & HOWARD L.L.C.
Patrick R. Scully
Matthew M. Morrison
633 17th Street, Suite 3000
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Phone: (303) 297-2900

Attorneys for SuperShuttle

TABLE OF CONTENTS

I. INTRODUCTION.....2

II. PROCEDURAL BACKGROUND.....4

III. ARGUMENT AND AUTHORITIES5

 A. On Substantial Factual Issues, the Regional Director’s Supplemental Decision Is Clearly Erroneous on the Record.....6

 1. The Regional Director’s Finding That There Is Insufficient Factual Support of Changed Circumstances to Warrant Re-opening the Underlying Record or Dismissing the Petition Is Clearly Erroneous.....6

 2. The Regional Director’s Supplemental Decision Is Clearly Erroneous Because It Failed to Consider Significant and Undisputed Facts Establishing the Franchisees’ Independent Contractor Status.....7

 3. The Regional Director’s Finding that the Initial Decision Addressed and Decided the Franchisees’ Supervisory Status Is Clearly Erroneous.....8

 4. The Regional Director’s Supplemental Decision Is Clearly Erroneous Because It Failed to Consider the Union’s Disqualifying Conflict of Interest.....9

 B. The Regional Director’s Supplemental Decision Departs From Reported Precedent.10

 1. By Directing that an Election Occur and Thereby Invalidating Lawfully Formed Business Entities and Franchise Agreements, the Regional Director’s Supplemental Decision Departed from Established Board Precedent.10

 2. The Supplemental Decision Erred in Holding that the Regional Director Possessed Authority to Issue the Initial Decision, Notwithstanding the Supreme Court’s Holding in *New Process Steel*.11

IV. CONCLUSION12

TABLE OF AUTHORITIES

Cases

Alanis Airport Services, Inc., 316 N.L.R.B. 1233 (1995).....9

Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954).....9

Don Bass Trucking, 275 N.L.R.B. 1172 (1985))7

Lodge 76, Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin
Employment Relations Comm’n, 427 U.S. 132 (1976) 10

New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010)1, 3, 11, 12

Rochelle Waste Disposal, LLC, 355 N.L.R.B. No. 100, 2010 WL 3324865 (August
23, 2010)..... 11

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)..... 10

St. John’s Hospital and Health Care Center, 264 N.L.R.B. 990 (1982)..... 9

Western Great Lakes Pilots Ass’n, 341 N.L.R.B. 272 (2004).....9

Statutes

National Labor Relations Act, Section 2(13)8

Rules

National Labor Relations Board Rules and Regulations § 102.67(c)..... 1

National Labor Relations Board Rules and Regulations § 102.67(c)(1) and (2)5

Comes now the Respondent, SuperShuttle International Denver, Inc. (“SuperShuttle,” “Respondent,” or the “Company”), pursuant to Section 102.67(c) of the National Labor Relations Board’s (“N.L.R.B.” or “Board”) Rules and Regulations, and requests review of the Regional Director’s Supplemental Decision and Direction of Election (the “Supplemental Decision”) in the above-referenced case, dated September 20, 2011. The Supplemental Decision is attached to this Request for Review as Exhibit A.

SuperShuttle seeks review of the following findings set forth in the Regional Director’s Supplemental Decision: (1) that there was insufficient factual support of changed circumstances to warrant re-opening the underlying record or dismissing the petition, (2) that the Regional Director’s failure to consider undisputed evidence of independent contractor status and entrepreneurial freedom in rendering the Decision and Order of February 26, 2011 (“Initial Decision”) did not preclude an election in this case,¹ (3) that the Initial Decision decided the supervisory status of SuperShuttle’s drivers, (4) that the Regional Director had authority to direct an election of franchisees who do business *as* businesses, despite the fact that such an election would effectively invalidate the franchisees’ lawful business entities and their valid franchise agreements, (5) that an election was not precluded by the Board’s abandonment of Board precedent and mischaracterization of the record with regard to the disqualification issue, and (6) that the Regional Director had authority to render the Initial Decision, notwithstanding the Supreme Court’s holding in New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). These findings are based on clearly erroneous findings of substantial fact which are prejudicial to

¹ The Regional Director’s Initial Decision is attached to this Request for Review as Exhibit B.

SuperShuttle. Moreover, the Supplemental Decision is a clear departure from reported Board and Supreme Court precedent.

I. INTRODUCTION

SuperShuttle is engaged in the sole business of franchising to other business the right to use SuperShuttle trademarks and proprietary systems. Communications Workers of America (“CWA”), which collectively with its local Union, CWA Local 7777, is referred to as the “Union” or “Petitioner,” filed the instant Petition to represent a group of Respondent’s franchisees who are independent contractors engaged in the transportation of shuttle passengers in the Denver metropolitan area. On February 26, 2010, the Regional Director issued the Initial Decision, which found that SuperShuttle’s franchisees were not independent contractors under the National Labor Relations Act (“NLRA” or “Act”).

The Board refused to review the Regional Director’s Initial Decision with regard to the franchisees’ independent contractor or supervisory status. The Board granted review on the disqualification issue and erroneously overturned the Regional Director’s finding that a disabling conflict of interest precluded the Union from representing Respondent’s drivers. Thereafter, on August 29, 2011, the Regional Director issued an Order to Show Cause why an election should or should not be directed, to which the Petitioner and Respondent filed responses. On September 20, 2011, the Regional Director issued the Supplemental Decision, which directed an election.

In rendering the Supplemental Decision, the Regional Director ignored the fact that circumstances have significantly changed during the twenty-one months that have passed since the Petition was filed on December 12, 2009. There has been a significant turnover in franchisees. In addition, franchisees today are working under circumstances differing from those

that existed in December 2009, as the 2009 Unit Franchise Agreement (“UFA”) considered by the Regional Director when rendering the Initial Decision is now largely obsolete; most current franchisees are doing business with SuperShuttle under the 2011/2012 UFA.

The Regional Director also ignored the fact that the Initial Decision disregarded significant and undisputed facts which support a finding of independent contractor status and entrepreneurial freedom, and that the Initial Decision failed to decide or meaningfully address the supervisory status of SuperShuttle’s franchisees notwithstanding ample record evidence. In addition, the Supplemental Decision failed to acknowledge that an election was precluded because the Board’s decision on review, attached hereto as Exhibit C, ignored well-established Board precedent and disregarded the facts which conclusively demonstrate the Union’s disabling conflict of interest.²

The Supplemental Decision also failed to recognize that an election should not be directed for the petitioned-for unit because, with respect to franchisees doing business *as* business entities, such an election would have the effect of unlawfully invalidating those business entities and voiding their franchise agreements with Respondent.

Finally, in rendering the Supplemental Decision, the Regional Director improperly held that the Board, acting through the Regional Director, could issue a decision while the Board lacked a three-member quorum, despite the Supreme Court’s holding in New Process Steel, L.P. v. N.L.R.B., 130 S. Ct. 2635, 2645 (2010).

² Among other matters, Union Taxi Cooperative (“UTC”) still describes itself as a “member of CWA 7777,” and CWA admittedly founded UTC and has controlled its business affairs.

The Supplemental Decision is therefore clearly erroneous with respect to several substantial factual issues. It also represents a substantial departure from established Board and Supreme Court precedent.

II. PROCEDURAL BACKGROUND

On December 12, 2009, the Union filed a Petition with Region 27 of the N.L.R.B. (Petition, Case No. 27-RC-8582), seeking certification as the representative of all SuperShuttle “van drivers employed by the employer at its Denver location.” On December 28, 2009, January 7, 8, and 12, 2010, this matter came before Hearing Officer Todd Saveland of the N.L.R.B., Region 27, at 600 17th Street, Suite 700N, Denver, Colorado 80202. In the Hearing, the parties presented evidence on the following issues: (1) CWA’s disqualification from representing SuperShuttle drivers, (2) the independent contractor status of SuperShuttle franchisees and their exclusion from the definition of “employees” under Section 2(3) of the Act, and (3) the supervisory status of the franchisees. Although the Hearing Officer did not solicit the parties’ respective positions for the record, Respondent nevertheless articulated these positions, including its position that SuperShuttle’s franchisees are independent contractors and supervisors. (S. Tr. 6:21–7:10.)³

On February 26, 2010, the Regional Director issued his Initial Decision. (Ex. B.) The Regional Director decided that SuperShuttle’s franchisee drivers are statutory employees, but dismissed the Petition based on the Union’s disabling conflict of interest with Respondent. (Ex. B at 2.) The Regional Director also held that SuperShuttle did not raise the supervisor issue at

³ The Subpoena Record (S. Tr. __:__) is part of the official record in this case and was segregated from the Testimony Record (Tr. __:__) at the hearing only for convenience in the event of ancillary litigation on subpoena issues.

the hearing. (Id. at 28.) Respondent and Petitioner filed Requests for Review with the Board; Respondent requested review of the Regional Director's finding that the SuperShuttle's drivers were statutory employees rather than independent contractors or statutory supervisors, and Petitioner requested review of the Regional Director's finding that there was a disabling conflict of interest which precluded the Union from representing SuperShuttle's drivers. On May 5, 2010, the Board granted the Union's Request for Review and denied Respondent's Request for Review.

On July 18, 2011, the Board issued a Decision reversing the Regional Director's finding that there was a disabling conflict of interest. The Board therefore reinstated the Petition and remanded the case to the Regional Director for further action. On August 29, 2011, the Regional Director issued an Order to Show Cause why an election should or should not be directed. Respondent filed a response to the Order to Show Cause, attached hereto as Exhibit D. The Union likewise filed a response to the Order to Show Cause, attached hereto as Exhibit E.⁴

On September 20, 2011, the Regional Director issued her Supplemental Decision and Direction for election.

III. ARGUMENT AND AUTHORITIES

SuperShuttle requests review of the Supplemental Decision pursuant to the Board's Rule § 102.67(c)(1) and (2).

⁴ The Union's response to the Order to Show Cause referenced the ample record of changed circumstances submitted to the Region in Case Nos. 27-CA-21609, 27-CA-21622, 27-CA-21655, 27-CA-21656, and 27-CA-21682. (Ex. E at 3-4.)

A. On Substantial Factual Issues, the Regional Director's Supplemental Decision Is Clearly Erroneous on the Record.

1. The Regional Director's Finding That There Is Insufficient Factual Support of Changed Circumstances to Warrant Re-opening the Underlying Record or Dismissing the Petition Is Clearly Erroneous.

The Regional Director should not have directed an election because changed circumstances since the issuance of the Initial Decision have rendered an election inappropriate. Specifically, the Initial Decision was based on a record relating to now-obsolete 2009 UFAs executed by the franchise drivers. Most current franchisees doing business with SuperShuttle are doing business under the 2011/2012 UFA and therefore are working under circumstances differing from those that existed in December 2009, when the Union filed the Petition. In addition, there has been a significant turnover in franchisees, and a large number of franchisees who did business with Respondent at the time of the hearing have since ended their relationships with SuperShuttle. Current franchisees have also repeatedly reaffirmed their independent contractor status under Federal Trade Commission regulations and applicable contract law. Accordingly, as significant changed circumstances have rendered the record underlying the Initial Decision outdated and irrelevant with regard to current conditions, the franchisees' current independent contractor or employee status cannot be based on the Initial Decision and an election should not have been directed.

In her Supplemental Decision, however, the Regional Director held that "the Employer's response to the Order to Show Cause did not provide sufficient factual support . . . to establish a basis that would require reopening the underlying record to elicit evidence of changed circumstances." (Ex. A at 5.) The Regional Director's holding completely ignores the fact that the Region has been fully apprised of the changed circumstances that have occurred over the last

two years. Specifically, the Region has been made aware of significant and relevant changes to the UFA (as well as the franchisees' reaffirmations of their independent contractor status) as a result of the Region's investigation into the related Unfair Labor Practice ("ULP") Charges filed by the Union. In addition, in the course of investigating and settling these ULP Charges and monitoring compliance, the Region has received several rosters of franchisees demonstrating the substantial turnover that has occurred since the filing of the Petition in December 2009. The Region cannot claim that it has no notice or proffer of changed circumstances. Indeed, Petitioner concurs that circumstances have changed significantly in the two years since the Petition was filed. (Ex. E. at 3-4.)

2. The Regional Director's Supplemental Decision Is Clearly Erroneous Because It Failed to Consider Significant and Undisputed Facts Establishing the Franchisees' Independent Contractor Status.

In response to the Order to Show Cause, Respondent also noted that the Regional Director should not direct an election because the Initial Decision failed to consider ample and undisputed evidence of the franchisees' independent contractor status and entrepreneurial freedom.⁵ (Ex. D. at 2.) As set forth in detail in Respondent's previous Request for Review, the Initial Decision clearly erred in disregarding undisputed evidence with regard to the nature of SuperShuttle's business, the absence of purported scheduling of drivers or assignment of work, vehicle ownership, limitations on franchises, rates and fares, the use of relief/associate drivers,

⁵ In rendering the Initial Decision, the Regional Director also made factual findings regarding purported elements of control. However, such "control" is in fact required by government regulations and rules and thus, as a matter of governing Board precedent, could not constitute evidence of control with regard to the franchisees' independent contractor status. (Ex. D at 2) (*citing Don Bass Trucking*, 275 N.L.R.B. 1172, 1174 (1985)). The departure of the Initial Decision and the Supplemental Decision from established Board precedent therefore provides additional grounds to review and reverse the Supplemental Decision.

and the regulatory nature of alleged elements of “control.” Accordingly, the Regional Director should not have directed that an election occur in this case.

3. The Regional Director’s Finding that the Initial Decision Addressed and Decided the Franchisees’ Supervisory Status Is Clearly Erroneous.

In rendering the Initial Decision, the Regional Director did not decide the supervisory status of franchisees based on an erroneous finding that SuperShuttle argued for the first time in its Brief that unit franchisees are statutory supervisors under Section 2(13) of the Act. (Ex. B at 28.) Specifically, the Regional Director found that “since the Employer did not expressly raise [the franchisees’ supervisory status] at the hearing . . . the record is devoid of sufficient evidence to warrant analysis of this complex issue.” (*Id.* at 28.)

However, at the first day of the hearing Respondent’s counsel stated on the record that Respondent contended that the franchisees were independent contractors *and supervisors*. Respondent also elicited testimony from three Company witnesses and one Union witness concerning the franchisees’ supervisory control over the relief/associate drivers that franchisees hire to operate their vans. (Tr. 156:6–157:5 (testimony of Judy Robertson), 226:8–14 (testimony of Ross Alexander), 366:21–367:4 (testimony of Michael Legette); see also Tr. 520:24–521:2 (testimony of Fekadu Ejigdegsew).) Although the issue was clearly raised, the Hearing Officer did not solicit the parties’ respective positions for the record.

In response to the Order to Show Cause, Respondent noted that the Regional Director failed to address the supervisory issue in the Initial Decision even though it was properly raised at the hearing and briefed by Respondent. (Ex. D at 2–3.) SuperShuttle also noted that this failure, combined with the fact that franchisees have at all times had authority to hire, fire, discipline, assign, and direct their relief/associate drivers, clearly demonstrated cause as to why

an election should not be directed in this case. In her Supplemental Decision, however, the Regional Director erroneously held that the Initial Decision did in fact address and decide the franchisees' supervisory status, despite clear language in the Initial Decision to the contrary. (Ex. A at 6.) Neither the Regional Director nor the Board have ever addressed or decided the supervisory status of the franchisees. The Regional Director's erroneous finding on this point, which has prejudiced SuperShuttle, is proper grounds for review.

4. The Regional Director's Supplemental Decision Is Clearly Erroneous Because It Failed to Consider the Union's Disqualifying Conflict of Interest.

As noted in SuperShuttle's response to the Order to Show Cause, the NLRB's decision overturning the disqualification of the Union misstated the record and erroneously held that no disabling conflict of interest existed. (Ex. D at 3-4.) As a result, the Supplemental Decision should not have directed an election due to the Union's disabling conflict of interest.⁶ (*Id.*) The Regional Director's Supplemental Decision simply ignored this argument, as well as the critical facts demonstrating that a disabling conflict of interest exists. (Ex. A at 8.) In particular, the Supplemental Decision, like the Board's decision on review, completely disregarded the fact that the Union created and ostensibly runs UTC, a direct competitor to SuperShuttle and its franchisees, and that the Union retains a substantial financial interest in the success of UTC. As noted above, UTC remains listed as "a member of CWA 7777," a fact blatantly disregarded by the Board and the Regional Director. The record at the hearing also demonstrated that the finances of UTC and the Union are intricately and unavoidably enmeshed, as are their personnel

⁶ The Board's decision also abandoned or ignored Board precedent regarding disqualifying conflicts of interest, including the holdings in Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954), St. John's Hospital and Health Care Center, 264 N.L.R.B. 990 (1982), Western Great Lakes Pilots Ass'n, 341 N.L.R.B. 272 (2004), and Alanis Airport Services, Inc., 316 N.L.R.B. 1233 (1995), among others. The Regional Director ignored this fact when rendering the Supplemental Decision, providing additional grounds for review.

and interests. Accordingly, based on the Regional Director's clearly erroneous findings of fact prejudicing Respondent, review is proper.

B. The Regional Director's Supplemental Decision Departs From Reported Board Precedent.

1. By Directing that an Election Occur and Thereby Invalidating Lawfully Formed Business Entities and Franchise Agreements, the Regional Director's Supplemental Decision Departed from Established Board Precedent.

With respect to franchisees that have formed business entities under state law for the purpose of doing business with SuperShuttle, the Regional Director's Supplemental Decision unlawfully invalidates those entities and, in addition, voids the franchise agreements lawfully formed and entered into between Respondent and those business entities. As noted in SuperShuttle's response to the Order to Show Cause, it is well-established that the NLRA only preempts state laws directed at conduct actually or arguably prohibited or protected by the Act, see San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959), or conduct that Congress intended to leave unregulated, see Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976). (Ex. D at 3.) The business entities formed by franchisees and the UFAs under which those entities operated are products of state and federal law. Undoubtedly, such laws are not directed at conduct prohibited or protected by the NLRA, and neither are those laws directed at conduct that Congress intended to leave unregulated. Accordingly, the Regional Director may not lawfully direct an election which would have the effect of abdicating those state and federal laws, invalidating franchisees' business entities, and voiding their lawful franchise agreements.

2. The Supplemental Decision Erred in Holding that the Regional Director Possessed Authority to Issue the Initial Decision, Notwithstanding the Supreme Court's Holding in *New Process Steel*.

As noted in the Company's response to the Order to Show Cause, in light of the Supreme Court's holding in *New Process Steel*, 130 S. Ct. at 2645, the Regional Director lacked authority to decide the independent contractor issue in the Initial Decision, and therefore should not have treated the Initial Decision's resolution of that issue as Board precedent when rendering the Supplemental Decision. (Ex. D. at 4.) In *New Process Steel*, the Supreme Court held that Congress mandated a three-member quorum in order for the Board to issue decisions and orders, and therefore the Board cannot issue decisions or orders when it acts with only two members. *New Process Steel*, 130 S. Ct. at 2644–45. As a result, issues determined by a two-member Board are not entitled to preclusive effect. See *Rochelle Waste Disposal, LLC*, 355 N.L.R.B. No. 100, 2010 WL 3324865 (August 23, 2010).

It is undisputed that the Regional Director issued the Initial Decision in this case when the N.L.R.B. lacked a three-member quorum and thus lacked authority to issue decisions or delegate decision-making authority to the Regional Director. Thereafter, the Board, with a three-member quorum, declined to review the merits of the Initial Decision. Because of the peculiarity of the Board's procedures, the Regional Director's merit determination cannot be appealed except through a "test of certification" unfair labor practice case. In the course of that case, General Counsel will assert that SuperShuttle is precluded from a merits review of the independent contractor issue, in view of the Board's decision in the representation case. Thus, even if, as the Supplemental Decision asserts, the Board may have made a prior delegation of authority to the Regional Director to decide issues in representational cases, the Initial Decision

(issued at a time when the Board lacked a three-member quorum) is undoubtedly treated as, and functions exactly like, a decision of the Board. It therefore follows that, because the two-member Board lacked authority to render such a decision under New Process Steel, the Regional Director's Initial Decision cannot have the force of law.

In the Supplemental Decision, the Regional Director contends that, because a three-member panel of the Board denied SuperShuttle's Request for Review on the independent contractor issue, the Board "reviewed" the Regional Director's Initial Decision with regard to that issue. However, it is axiomatic that a denial of a request for review is not a decision on the merits.

Finally, the Regional Director asserted in the Supplemental Decision that, even assuming the Regional Director lacked authority to issue the initial decision under New Process Steel, such a defect was, "at worst, harmless error." (Ex. A at 9.) In New Process Steel, the Supreme Court rejected this argument. See New Process Steel, 130 S. Ct. at 2644 ("In sum, we find that the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little or no import.") Moreover, the harm is evident in the fact that the Regional Director's decision voids the valid and enforceable business contracts between SuperShuttle and its franchisees. Without authority, the Region has blithely destroyed a business model recognized and approved by federal and state law.

IV. CONCLUSION

For all of the reasons set forth above, SuperShuttle requests review of the Regional Director's Supplemental Decision dated September 20, 2011. Because this Request presents

substantial and numerous issues impacting a fundamental Board principles, SuperShuttle requests oral argument before the Board on the matters raised in its Request for Review.

Respectfully submitted this 3rd day of October, 2011.

A handwritten signature in black ink, appearing to read "Matthew M. Morrison". The signature is written in a cursive style and is positioned above the typed name and address.

Patrick R. Scully

Matthew M. Morrison

SHERMAN & HOWARD L.L.C.

633 17th Street, Suite 3000

Denver, Colorado 80202

(303) 297-2900

Attorneys for SuperShuttle.

CERTIFICATE OF MAILING

I hereby certify that on October 3, 2011, a true and correct copy of the foregoing **REQUEST FOR REVIEW** was served to the following:

National Labor Relations Board (original and seven copies), via FedEx:

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Regional Director, National Labor Relations Board (original and one copy), via FedEx:

Wanda Pate Jones
Regional Director
National Labor Relations Board
Region 27
600 17th Street
7th Floor – North Tower
Denver, CO 80202-5433

Attorney for Petitioner (one copy), via FedEx:

Stanley M. Gosch, Esq.
Richard Rosenblatt & Associates, L.L.C.
8085 East Prentice Avenue
Greenwood Village, CO 80111



EXHIBIT G

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF SUPERSHUTTLE INTERNATIONAL DENVER, INC., SUPERSHUTTLE FRANCHISE CORPORATION, CASES 27-CA-21609, 27-CA-21622, 27-CA-21655, 27-CA-21656, 27-CA-21682

The undersigned Charged Parties and the undersigned Charging Party, in settlement of the above matters, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE — Upon approval of this Agreement and receipt of the Notices from the Region, which may include Notices in more than one language as deemed appropriate by the Regional Director, the Charged Parties will post immediately in conspicuous places in and about its plant/office in Denver, Colorado, including all places where notices to employees/members are customarily posted, and maintain for 60 consecutive days from the date of posting, copies of the attached Notice (and versions in other languages as deemed appropriate by the Regional Director) made a part hereof, said Notices to be signed by a responsible official of the Charged Parties and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting. Further, in the event that the charged union maintains such bulletin boards at the facility of the employer where the alleged unfair labor practices occurred, the union shall also post Notices on each such bulletin board during the posting period.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, or other electronic means, if the Charged Parties customarily communicates with its employees or members by such means. The electronic posting shall remain posted for 60 consecutive days from the date it was originally posted. The Charged Parties will e-mail the Region's Compliance Officer at erika.bailey@nlrb.gov with a link to the electronic posting location on the same day as the posting. In the event that passwords or other log-on information is required to access the electronic posting, the Charged Parties agree to provide such access information to the Region's Compliance Officer. If the Notice is distributed via e-mail, the Charged Parties will forward a copy of the e-mail distributed to the Regional Compliance Officer.

COMPLIANCE WITH NOTICE — The Charged Parties will comply with all the terms and provisions of said Notice.

NON-ADMISSION: Entry into this Settlement Agreement by the Charged Parties does not constitute an admission of any unfair labor practices.

BACKPAY --- Within 14 days from a Regional Office request, the Charged Parties will make whole the franchisees named below.

The Charged Parties will make whole Negede Assefa by payment of an amount of back pay, plus interest, to be determined by the Regional Director (in accordance with Board law). The Charged Party will make appropriate withholdings.

All drivers in 2010-2011 who paid more than a \$1,000 franchise fee; each driver to be refunded the overpayment, plus interest.

All drivers in 2010-2011 who incurred costs as a result of being required to form a business entity, those expenses to be reimbursed, plus interest.

JOINT AND SEVERAL LIABILITY

The Charged Parties assume joint and several liability for making whole Negede Assefa and all drivers who are due payment under the terms of this Settlement Agreement. Charged Parties will make appropriate withholdings. Within 14 days from approval of this Agreement, SUPERSHUTTLE INTERNATIONAL DENVER will pay 1/2 of the total amount due under the terms of the settlement agreement and SUPERSHUTTLE FRANCHISE CORPORATION will pay 1/2 of the total amount due under the terms of the settlement agreement. SUPERSHUTTLE INTERNATIONAL DENVER will pay an additional 1/2 of the total amount due only upon being informed by the Regional Director that efforts to obtain payment from SUPERSHUTTLE FRANCHISE CORPORATION have failed. SUPERSHUTTLE FRANCHISE CORPORATION will pay an additional 1/2 of the total amount due only upon being informed by the Regional Director that efforts to obtain payment from SUPERSHUTTLE INTERNATIONAL DENVER have failed.

SCOPE OF THE AGREEMENT — This Agreement settles only the following allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters:

- (a) On or about April 1, 2010, Respondents increased the annual franchise renewal fee that drivers paid from \$1,000 to \$3,500, in retaliation for employees union activities and participation in a Board proceeding.
- (b) In or about April 2010, Respondents imposed a requirement that, in order to obtain or renew a franchise agreement, drivers establish a formally-established business entity and obtain a tax identification number from the Internal Revenue Service, in retaliation for employees union activities and participation in a Board proceeding.
- (c) On or about June 28, 2010, Respondents discharged employee Negede Assefa in retaliation for his union activities and participation in a Board proceeding.
- (d) On or about June 23, 2010, Respondents, by supervisor Mike Legette, at a drivers' meeting held at the Red Lion Hotel in Denver, told employees that their annual franchise renewal fee was being raised as a result of their union and other protected activities.
- (e) On or about June 30, 2010, at Respondents' Denver facility, the Respondents, by its agent Vicki Swanson, told an employee that he could not repeat any discussions that he had with Respondents' managers.
- (f) On or about June 30, 2010, at Respondents' Denver facility, the Respondents, by its agent Vicki Swanson, required an employee to sign an overly-broad confidentiality clause, which prohibits the discussion of terms and conditions of employment.

(g) Since about February 2, 2010, Respondents have maintained an overly-broad confidentiality and nondisclosure agreement and have required drivers to sign this agreement.

The complaint will seek an order requiring the Charged Parties to comply with all of the provisions set forth in the attached Notice to Employees and to post and electronically distribute the Notice to Employees, as set forth above in the Posting of Notice section.

It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

REFUSAL TO ISSUE COMPLAINT — In the event the Charging Party fails or refuses to become a party to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Parties and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 14 days thereof. This Agreement shall be null and void if the General Counsel does not sustain the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in the above captioned case(s), as well as any answer(s) filed in response.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTIES.

Counsel for the Charged Parties authorize the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Parties. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes _____ No DHC
 Initials Initials

PERFORMANCE — Performance by the Charged Parties with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Parties of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

The Charged Parties agree that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Parties, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Parties, the Regional Director will issue a complaint that will include the allegations spelled out above in the Scope of Agreement section. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Parties understand and agree that all of the allegations of the aforementioned complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether the Charged Parties defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Parties on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order *ex parte*, after service or attempted service upon Charged Parties/Respondent at the last address provided to the General Counsel.

NOTIFICATION OF COMPLIANCE — The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Parties has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above captioned case(s).

Charged Party	SUPERSHUTTLE INTERNATIONAL DENVER, INC.	Charging Party	COMMUNICATIONS WORKERS OF AMERICA
By: Name and Title	Date	By Name and Title	Date
<u>[Signature]</u> , Atty	5/19/11	/s/ Stanley M. Gosch, Attorney	5/23/2011
Recommended By: <u>[Signature]</u> Board Agent	Date	Approved By: <u>[Signature]</u> Regional Director	Date
	5/23/11		5/25/11
Charged Party	SUPERSHUTTLE FRANCHISE CORPORATION		
By: Name and Title	Date		
<u>[Signature]</u> , Atty	5/19/11		