UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VELOX EXPRESS, INC.	:	
	:	
AND	:	Case No. 15-CA-184006
	:	
JEANNIE EDGE	:	

BRIEF OF *AMICI CURIAE* MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA AND THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

John McNerney, Esq.
1385 Piccard Drive
Rockville, MD 20850
(301) 869-5800

Counsel for Mechanical Contractors Association of America

Gerard M. Waites, Esq.
Diana R. Cohn, Esq.
O'Donoghue & O'Donoghue LLP
5301 Wisconsin Avenue N.W. Suite 800
Washington, D.C. 20015
(202) 362-0041

Counsel for United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO

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I. STATEMENT OF INTEREST

The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("UA") represents 346,000 employees who work in the plumbing, pipefitting, sprinkler fitting and related trades across the United States and Canada. The Mechanical Contractors Association of America ("MCAA") represents 2,600 employers in the mechanical contracting industry, which are signatory to collective bargaining agreements with the UA or its affiliated Local Unions. The UA and MCAA regularly cooperate in activities to promote their common interests and have elected to offer this joint submission in the instant proceeding to address the growing problem of unlawful employee misclassification because it causes substantial harm to UA members, workers generally, and legitimate, law-abiding employers, including those represented by the MCAA.

II. INTRODUCTION

The UA and MCAA respectfully submit this *amici curiae* brief in response to the National Labor Relations Board ("NLRB" or "Board") Executive Secretary's Notice and Invitation to File Briefs in this matter, which requested that interested parties address the following question: "Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?"

III. SUMMARY OF ARGUMENT

The UA and MCAA submit that a plain reading of the National Labor Relations Act ("Act" or "NLRA") leads to the inescapable conclusion that an employer who engages in misclassification commits an independent violation of Section 8(a)(1) of the Act by instantly depriving its workers of all rights afforded to them under the Act. The practical reality of this issue is that it will only come to light in Board proceedings when an employer improperly raises the "independent contractor" defense in response to other unfair labor charges ("ULPs"). Nevertheless, Board

precedent strongly supports the notion that such conduct itself is unlawful under Section 8(a)(1) because it effectively strips employees of every Section 7 right they have under the Act. Simply stated, *but for* misclassification, such workers would be free to organize or engage in various other protected concerted activities. This single unlawful act, however, slams the door shut on virtually every right workers have under the NLRA.

In cases where other ULPs are alleged and misclassification is found, there are compelling reasons for finding an independent Section 8(a)(1) violation, including the need to address the unlawful conduct at hand and deter such conduct in the future. Moreover, such a finding is supported by important public policy considerations. The reality is that in cases where employees are wrongly classified as independent contractors, everyone—except the bad actor—loses. This includes federal, state and local governments, which are wrongfully denied various taxes, workers, who are stripped of every type of employment law protection, and law-abiding employers, whose ability to operate in any market is severely undermined, if not crippled, by one of the worst forms of illegal, unfair competition.

In addition, it should be recognized that the Board is uniquely suited and empowered by the Act to help combat this rampant, fast-growing epidemic in our nation's economy, which is causing untold harm on workers, law abiding companies and government at every level. Thus, in consideration of the fundamental goals of the Act, as well as crucial public policy issues at stake, the Board should take the opportunity in this case to determine, clearly and categorically, that misclassification constitutes a stand-alone, independent Section 8(a)(1) violation.

IV. BACKGROUND

In *Velox Express, Inc.*, Case No. 15-CA-184006 (NLRB Div. of Judges Sept. 25, 2017), the General Counsel alleged that Velox Express, Inc. ("Velox") violated the Act by discharging Charging Party Jeannie Edge and by misclassifying its courier/drivers as independent contractors

instead of employees. After reviewing the Board's test for whether a worker is an employee or independent contractor, Administrative Law Judge (ALJ) Arthur Amchan determined that Velox misclassified its courier/drivers.

Judge Amchan further concluded that such misclassification, in and of itself, violates Section 8(a)(1) of the Act. In this regard he held that in misclassifying its drivers, Velox restrained and interfered with its workers' ability to engage in protected activity "by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection," in violation of Section 8(a)(1). The UA and MCAA fully support this conclusion.

V. ARGUMENT

A. Employee Misclassification Violates Section 8(a)(1) by Automatically and Completely Stripping Workers of Section 7 Rights

The decision of the Administrative Law Judge in the instant case found that the employer's act of misclassification constituted an independent violation of Section 8(a)(1) of the Act. *Velox Express, Inc.*, slip op. at 14. This finding is supported by the plain language of the Act and applicable Board precedent. Section 7 of the Act, 29 U.S.C. § 157, provides, in relevant part:

> *Employees* shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

(emphasis added). Because so-called "independent contractors," by definition, are not "employees," under the Act, they are completely excluded from the law's protections and precluded from exercising Section 7 rights. 29 U.S.C. § 152(3). Thus, when workers are

improperly classified as independent contractors they are unlawfully denied any and all of the Act's protections.

Board precedent supports the conclusion that misclassifying workers, in and of itself, violates the Act for precisely these reasons. In *First Legal Support Services LLC*, 342 NLRB 350 (2004), the employer required all of its employees to become independent contractors during a unionization drive and stated that workers could not keep their jobs unless they signed independent contractor agreements. In affirming the ALJ's decision, the Board found this conduct violated Sections 8(a)(3) and (1). In this case, the ALJ concluded and the Board agreed that converting employees to independent contractors removed them from the definition of "employee" under the Act, therefore depriving them of Section 7 rights. *Id.* at 362. Further, requiring employees to sign independent contractor agreements prevented employees from engaging in organizing activity. This conduct constituted discrimination, interference and restraint in violation of the Act. *Id.*

Other Board precedent likewise supports the proposition that the misclassification of statutory employees as independent contractors violates Section 8(a)(1). For example, the Board has found that an employer's statement that its employees' Section 7 activity would be futile violates Section 8(a)(1). In *Sisters' Camelot*, 363 NLRB No. 13 (2015), the employer violated Section 8(a)(1) when it told its canvassers, who were misclassified as independent contractors, that the employer would never accept an employer-employee relationship with canvassers, indicating organizing would be futile. *Id.* at slip op.*8 Under such circumstances, there is no denying that the act of misclassification effectively conveys to workers that engaging in concerted activity or seeking union representation is futile.

Similarly, in *Parexel International*, 356 NLRB 516 (2011), the Board held an employer's preemptive actions to curtail or prevent employees from exercising their rights under the Act violates Section 8(a)(1). In that case, the Board found that the discharge of an employee violates

Section 8(a)(1) where it suppresses future protected activity. Specifically, the Board held that "if an employer acts to prevent concerted protected activity—to 'nip it in the bud'—*that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more*." *Id.* at 519 (emphasis added).

The act of misclassification—which automatically strips employees of the ability to exercise any rights under the Act—preemptively prevents employees from exercising Section 7 rights in the future. "Misclassification not only serves to chill future concerted activity . . . but essentially deprives and conceals available protections . . . under the Act." *Intermodal Bridge Transport*, 21-CA-157647, 21-CA-177303 (NLRB Div. of Judges Nov. 28, 2017). Thus, misclassification operates as a restraint on workers' exercise of their Section 7 rights, and suppresses future Section 7 activity by telling employees that they have no Section 7 rights in the first place.

The reasoning applied in the precedent cited above strongly supports a finding that an employer's act of misclassifying an employee, standing alone, is sufficient to find a violation of Section 8(a)(1). While the decision in *First Legal* focused on misclassification as a Section 8(a)(3) violation (because the employer's attempt to force workers to sign independent contractor agreements was a direct response to unionization efforts), the analysis also supports the notion that misclassification is an independent violation of Section 8(a)(1). As stated in that case, acts of misclassification have the "*necessary impact of stripping [employees] of their Section 7 right to form, join, or assist a labor union*," as well as all other rights to engage in protected concerted activity guaranteed by the Act. *First Legal Support Services, LLC*, 342 NLRB at 362 (emphasis added). Moreover, this impact exists, regardless of an employer's subjective intent. The reality is that when employers misclassify their workers, they are, as a practical matter, telling their employees that they have no "employee" rights whatsoever, including exercising protected

activities under the NLRA. *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6. For these reasons, the Board should find that an employer's act of misclassifying workers as independent contractor, regardless of motive or intent, violates Section 8(a)(1) of the Act.

B. Finding That Misclassification Constitutes an Independent Violation of Section 8(a)(1) is Further Supported by Important Public Policy Considerations

Compelling public policy reasons exist for the Board to find that misclassification, standing alone, violates the Act. Worker misclassification is a widespread practice affecting nearly every industry in the U.S. economy. The Department of Labor estimates that between ten and thirty percent of employers engage in some form of worker misclassification.[1] Recent state investigations have found that between twenty-five and thirty-nine percent of so called independent contractors are employees who have been misclassified.[2]

1. Misclassification Harms Law Abiding Employers and Burdens State and Local Governments

Unscrupulous employers across all industries have incorporated misclassification into their business models to artificially reduce payroll costs, strip employees of important legal rights and obtain unlawful competitive advantages over law-abiding competitors. This is especially prevalent in market sectors with high labor costs, such as construction.[3] As a result, misclassification imposes substantial burdens on responsible employers, who are unable to compete with companies taking advantage of extremely lower labor costs derived strictly from unlawful activity.[4]

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[1] Lalith de Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, U.S. DEP'T OF LABOR, EMP'T & TRAINING DIV. (2000).

[2] Franciose Carre, *(In)dependent Contractor Misclassification*, ECON. POLICY INST. (2015).

[3] Leberstein, Sarah and Ruckelshaus, Catherine, *Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It,* National Employment Law Project (May 2016).

[4] *Id.*

The UA and MCAA are particularly concerned about misclassification in the construction industry, where this practice has become rampant and continues to expand.[5] For example, one report by the U.S. Department of Labor found that in southern states such as North Carolina and Texas, more than a third of construction workers were treated improperly as independent contractors instead of employees.[6] It cannot be disputed that employers that misclassify workers, including construction contractors, gain tremendous unfair advantages over law-abiding firms. Because labor costs are factored into bids for construction work, contractors who misclassify workers are able to submit drastically lower bids on projects to undercut law-abiding competitors. In fact, employers that engage in misclassification *reduce their operating costs in a myriad of ways that give them a huge illegal and unfair advantage over law-abiding businesses.*

Not only do unscrupulous employers evade payment of *all federal, state and local employment related taxes*—they *escape payment of overtime, unemployment and workers compensation*—not to mention other benefits employees typically receive, such as healthcare, pension and training. Reducing operating cost by *any one of these areas* can give such employers a decisive advantage over law abiding companies. Exploiting all these unfair advantages, which is the more typical practice, has a devastating effect and imposes incalculable harm on responsible firms, none of which would occur *but for* the unlawful use of misclassification. Employers who play by the rules also pay substantially higher unemployment insurance taxes and workers'

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[5] Yvonne Yen Liu et al., *Sinking Underground: The Growing Informal Economy in California Construction*, ECON. ROUNDTABLE (2014); Negin Kazemi & Nasim Zahraeipoor, *Worker Misclassification in the U.S. Construction Industry*, 4 INT'L JOURNAL OF SCI. RESEARCH IN SCI., ENG'G & TECH.1 (2018); David Bensman, *Misclassification: Workers in the Borderland*, 2 JOURNAL OF SELF GOVERNANCE AND ECON. MGMT 2 (2014).

[6] Locke, Mandy and Ordonez, Franco, *Once Solid, Job Safety Net Frays for Construction Work*, McClatchy Washington Bureau (Sept. 4, 2014), available at http://media.mcclatchydc.com/static/features/Contract-to-cheat/Job-safety-net-frays-for-construction-work.html?brand=nao.

compensation premiums that are ultimately shifted to them as the result of unlawful activity of cheating firms. What's more, for unscrupulous firms, this system incentivizes misclassification and causes the problem to spread, further disadvantaging law-abiding employers.

In addition to the harm inflicted on responsible contractors, all levels of government incur tremendous losses from this practice, losses which ultimately negatively impact taxpayers. This is because employers who misclassify workers as independent contractors deprive Social Security, Medicare, unemployment insurance, and workers' compensation funds of billions of dollars, thereby significantly reducing federal, state and local tax revenues.[7] One report found that the federal government alone loses billions in tax revenue each year due to misclassification just in the construction industry.[8] As a result, misclassification cheats the federal and state and local governments out of much needed revenue to provide services to the citizens they serve.

Such public policy considerations provide *additional compelling grounds* for the Board to find that misclassification constitutes an independent violation of Section 8(a)(1) of the Act. Moreover, because the plain language of the Act provides grounds for this finding, it should be recognized that the Board is uniquely suited to effectively address this fast-growing and highly destabilizing socio economic problem. While tax agencies can collect back taxes and federal and state labor departments can collect overtime pay, *no other government agency—except the Board—can compel an employer to cease misclassification with respect to all aspects of its operations*, thereby forcing it to comply not only with the Act, but also with numerous other

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[7] *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success*, Treasury Inspector General for Tax Administration, Ref. No. 2018-IE-R002.

[8] Locke, Mandy and Ordonez, Franco, Taxpayers and Workers Gouged by Labor-Law Dodge, McClatchy Washington Bureau (Sept. 4, 2014), *available at* http://media.mcclatchydc.com/static/features/Contract-to-cheat/Labor-law-dodge-hurts-taxpayers-and-workers.html?brand=nao.

important laws that it otherwise evades as a result of its illegal scheme. Such considerations provide important public policy grounds for establishing clear and binding precedent on this issue. What's more, to do so, the Board need not take any action beyond what it is already charged to do. It needs only to look at the plain language of the Act and its clear intent since the unlawful act of misclassifying workers as independent contractors indisputably strips employees of all fundamental rights afforded to them under the Act.

Finally, a determination by the Board that improper misclassification of employees as independent contractors constitutes a stand-alone Section 8(a)(1) violation *does not in any way restrict or interfere with an employer's legitimate use of entities that are actual, bona fide contractors*. In other words—except for situations such as the instant case, where an ALJ correctly finds improper employee misclassification—an *employer's proper classification and use of firms or individuals (i.e., sole proprietorships) that are legitimate independent contractors* will not be deterred or affected in any way.

2. Misclassification Causes Substantial and Irreparable Harm to Workers.

Of course, the employees who are subject to unlawful misclassification themselves suffer egregious harm and face significant financial burdens on a day-to-day basis by being effectively stripped of all legal protections established under important federal, state and local laws. What's more, workers who are denied these rights often suffer irreparable economic harm because at the same time they are denied vital protections, they are essentially tricked into believing that they have no rights as "employees" due to blatant misrepresentations by their employer.

So-called "independent contractors" are automatically and completely denied basic minimum wage and overtime protections, fundamental rights under multiple anti-discrimination

laws, vital protections under worker health and safety laws, all benefits provided through unemployment and workers compensation, as well as all rights guaranteed under the Act.[9]

For the reasons set forth above, while the plain language of the Act provides ample grounds for the Board to conclude that misclassification standing alone is a violation of Section 8(a)(1) of the Act, there are also important, compelling public policy reasons that support such a finding.

VI. CONCLUSION

Misclassification of statutory employees is inimical to the Board's mandate to protect workers, because it *ipso facto* removes workers from all protections provided by the Act, protections the Board is obliged to uphold. For the foregoing reasons, the UA and MCAA respectfully request that the Board find that an employer violates Section 8(a)(1) of the Act whenever it finds that the employer misclassified an employee as an independent contractor.

Respectfully submitted,

John McNerny, Esq.
1385 Piccard Drive
Rockville, MD 20850
(301) 869-5800
Counsel for Mechanical Contractors Association of America

Gerard M. Waites
Diana R. Cohn
O'Donoghue & O'Donoghue LLP
5301 Wisconsin Avenue N.W., Suite 800
Washington, D.C. 20015
(202) 362-0041

Counsel for United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO

[9] *Id.*