No. APL-2018-00143

To be argued by:
Joseph M. Spadola
15 minutes requested

State of New York
Court of Appeals

LUIS A. VEGA,

Respondent,

v.

POSTMATES, INC.,

Respondent,

COMMISSIONER OF LABOR,

Appellant.

REPLY BRIEF FOR APPELLANT

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellant
The Capitol
Albany, New York 12224
(518) 776-2043
(518) 915-7723 (*f*)
joseph.spadola@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
JOSEPH M. SPADOLA
Assistant Solicitor General
of Counsel

Dated: November 8, 2019

Third Department No. 525233

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

STATE STATUTES

PRELIMINARY STATEMENT

As the Commissioner demonstrated in her opening brief, the record contains substantial evidence to support the Board's finding that Postmates sufficiently controlled the work of couriers like Mr. Vega to create an employment relationship. Postmates' online platform dictated virtually every aspect of couriers' delivery work, including the timing and assignment of deliveries, the delivery fee and the couriers' non-negotiable rate of pay, the ability to delegate work, and the screening and termination of couriers. While couriers were free to accept delivery jobs at their discretion and to work for competitors, those freedoms do not render the Board's finding of an employment relationship irrational. Several appellate courts have already held as much, including this Court in *Matter of Rivera (State Line Delivery Serv.—Roberts)*, 69 N.Y.2d 679 (1986).

Postmates' response brief does nothing to undermine the rationality of the Board's determination. Despite its heavy reliance on cases involving different kinds of businesses and business models, Postmates ultimately concedes that control over timing *by itself* is sufficient to support the Board's finding that its couriers are

employees. And the record in this case contains ample evidence that Postmates controlled the timing of its deliveries, along with the other aspects of couriers' work listed above, notwithstanding Postmates' contrary arguments.

POINT I

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT POSTMATES' COURIERS ARE EMPLOYEES

A. Postmates Concedes that Control over Timing By Itself Is Sufficient to Support a Rational Finding that Delivery Persons Are Employees.

Postmates acknowledges that control over timing plays a critical role in assessing whether delivery persons are employees. Indeed, Postmates posits (Br. at 30) a "clear line in the case law" whereby courts have upheld Board findings that delivery persons are employees whenever "the business requires taking assignments, prevents work for others, *or* dictates timing" (emphasis added). Postmates' use of the disjunctive is apt because, in delivery cases, control over timing is a crucial form of control "over the results produced or the means used to achieve the results." *Matter of 12 Cornelia St (Ross)*, 56 N.Y.2d 895, 897 (1982).

Such control not only dictates how quickly delivery persons perform their work; it also constrains their freedom as to delivery route, mode of transportation, and order of deliveries.

Despite its concession that control over timing can be dispositive in delivery cases, much of the analysis in Postmates' brief contradicts this basic premise. For instance, Postmates structures its brief around the five factors mentioned in this Court's decision in *Bynog v. Cipriani Grp.*, 1 N.Y.3d 193 (2003), which addressed whether professional banquet waiters were employees entitled to recover gratuities under Labor Law § 196-d. While timing was not among the five factors mentioned in that case, this Court never suggested that timing is not a relevant or critical factor for other businesses, such as delivery businesses. On the contrary, the Court made clear that the five factors it invoked in that case were neither exhaustive nor dispositive when it stated that the relevant factors "include" those five factors. *Id.* at 198.

B. There Is Ample Evidence that Postmates Controlled the Timing of Deliveries.

Here, the record contains more than ample evidence to permit a rational inference that Postmates dictated the timing of deliveries (among many other factors). The Board's finding of an employment relationship must therefore be upheld under Postmates' own interpretation of the case law (Br. at 30).

In arguing that it does not control timing, Postmates relies (Br. at 41) on the hearing testimony of its representative suggesting that its estimated delivery times were "non-binding." Postmates asks the Court to disregard the testimony from the same representative establishing that:

- Postmates marketed itself based on fast deliveries, and customers chose Postmates over other delivery methods for its speed and tracking feature (A. 18-19);
- Postmates unilaterally calculated its estimated delivery times and sent customers those times without input from couriers (A. 46, 66-67, 82-83);
- Postmates tracked couriers' location throughout the delivery process and allowed customers to view that location (A. 19); and
- Postmates terminated couriers who received negative customer reviews (A. 36, 41, 74, 108).

As the Commissioner explained (Opening Br. at 32-35), these undisputed facts establish that Postmates gave customers an expectation of fast delivery—reinforced with one of the most invasive forms of surveillance and control imaginable: continuous GPS tracking—and penalized couriers who failed to meet that expectation by terminating couriers who received negative customer reviews. At a minimum, these facts permit a rational inference that Postmates controlled the timing of its deliveries.

Indeed, it would be irrational to draw the contrary inference advocated by Postmates (Br. at 41): that although Postmates' entire platform is predicated on fast delivery, couriers could deliver items whenever they wished—without customers leaving negative reviews and without Postmates terminating couriers who accumulated enough such reviews. But this Court need not decide whether Postmates' view of the evidence is rational or not. It is sufficient under the substantial evidence standard that an inference of control is "rational and plausible, not necessarily the most probable." *Matter of Haug*, 32 N.Y.3d at 1046 (internal

quotation marks and citation omitted). That standard is amply satisfied here.

To the extent Postmates argues (Br. at 40) that the Board never discussed the *facts* demonstrating Postmates' control over timing, it is mistaken. In fact, the Board expressly found that Postmates "calculated and provided an estimated time of delivery," that "[c]onsumers could track the progress of their request on a map in real time," and that Postmates "terminated its relationship with couriers by prohibiting them from logging onto to the platform for various reasons (including, negative consumer feedback and/or fraudulent activity)." (A. 125-126.) Although the Board did not specifically explain that these factors established control over timing, the connection is so obvious it requires no explanation.

In any event, Postmates is incorrect (Br. at 4, 22, 40) that this Court may not consider any evidence or reasoning not explicitly recited in the Board's decision. Where, as here, the Legislature has entrusted an administrative body with resolving a specific factual question based on evidence presented at a hearing, *see* C.P.L.R. 7804(4), the agency's determination will not be disturbed

so long as "the record as a whole" provides substantial evidence to support the decision. *Matter of Villa Maria Inst. of Music (Ross)*, 54 N.Y.2d 691, 693 (1981). Under this standard, reviewing courts must "search[ ] the record for the presence of substantial evidence," *Matter of Axel v. Duffy-Mott Co., Inc.*, 47 N.Y.2d 1, 6 (1979), considering all the evidence introduced at the hearing as well as "the inferences reasonably to be drawn therefrom." *Vlack v. Ternullo*, 53 N.Y.2d 1003, 1004 (1981); *see also Matter of American Tel. & Tel. Co. v. State Tax Commn.*, 61 N.Y.2d 393, 400 (1984).

Under this settled law, courts applying the substantial evidence test are not limited in their review to the evidence specifically cited by the administrative agency, much less to the explanations articulated by the agency as to why that evidence supports its decision. If "taken as a whole the proof in the record" would permit a rational conclusion that Postmates' couriers were employees, the Board's determination must be upheld. *Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross)*, 59 N.Y.2d 638, 641 (1983); *see also Matter of Mar. Holdings, LLC v. New York City Commn. on Human Rights*, 31 N.Y.3d 1045, 1047 (2018) (judicial

inquiry ends "when *a* rational basis for the conclusion adopted by the [agency] is found") (emphasis added), *rearg. denied*, 32 N.Y.3d 903 (2018).

In this sense, substantial evidence review differs from judicial review of an agency determination resolving an issue of law on a particular ground. As Postmates notes (Br. at 40-41), a court may not uphold such a determination on a ground not invoked by the agency. *See Matter of Trump—Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 593 (1982) (agency determination that tax exemption did not apply on one statutory basis could not be upheld on alternative statutory basis). But even this general principle merely requires the agency to *invoke* the applicable ground, not to recite every fact or articulate every line of reasoning supporting that ground, as Postmates suggests.

In any event, the Board cited (A. 124-126) nearly every piece of evidence on which the Commissioner now relies. To be sure, the Commissioner's brief explains in more detail why this evidence supports the finding of an employment relationship, and cites a few additional portions of the record not specifically cited by the Board.

But such explanations and citations are entirely permissible under the substantial evidence standard requiring review of the "record as a whole." *Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692.

POINT II

THE BOARD'S DECISION IS SUPPORTED BY OVER TWENTY FACTUALLY ANALOGOUS DELIVERY CASES

As the Commissioner explained (Opening Br. at 28 & Addendum), there is a long line of cases in which appellate courts—including this Court—have upheld Board findings that delivery persons are employees based on the same or similar indicia of employer control present here. Postmates cannot distinguish those cases. And Postmates' reliance on cases involving different lines of work, such as banquet waiters or yoga instructors, is misplaced. Given the large number of factually analogous delivery cases, this Court should reject Postmates' context-blind analysis.

A. The Nature of the Work Is Relevant to the Control Analysis.

Postmates mistakenly asserts (Br. at 22-23) that the nature of the work being performed is irrelevant to the control analysis.

This position defies both common sense and this Court's mandate to consider "[a]ll aspects of the arrangement" to assess the level of control reserved to the employer. *Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 693. Without examining in detail the type of work that an employee performs, there is no way to assess the level of control that an employer exercises over the means and results of that work. What constitutes significant control for one job may constitute incidental control for another.

As Postmates acknowledges (Br. at 23), the importance of the nature of the work performed is expressly reflected in the Restatement of Agency § 220, which articulates the canonical "right of control" test. In adopting this test in the unemployment context, this Court expressly cited § 220 for the proposition that "various aspects of the relationship may be considered in arriving at the conclusion in a particular case." *In re Morton*, 284 N.Y. 167, 172-73 (1940). Among the factors that § 220 lists as relevant to the control analysis are "the kind of occupation" and "the skill required in the particular occupation." Restatement (First and Second) of Agency § 220(2)(c), (d). These factors reflect the common-sense idea that

where a job requires little skill and discretion, control over any particular aspect of the work reflects greater control than it would for a job involving broader discretion. That is why unskilled workers like Postmates' couriers are "almost always" considered employees. Restatement (Second) of Agency § 220, cmt. i.[1]

B. Postmates Fails to Distinguish the Commissioner's Delivery Cases.

Postmates's effort (Br. at 26-28) to distinguish this Court's controlling decision in the three appeals consolidated in *Matter of Rivera*, 69 N.Y.2d at 679-82, is unpersuasive. The fact that this Court did not recite the facts of those cases in its opinion in no way diminishes their precedential value. As Postmates' acknowledges (Br. at 28), the relevant facts are set forth in the Appellate Division's majority and dissenting opinions. If the Board's finding

---

[1] The Workers' Compensation Board decision on which Postmates relies also explicitly identified the "relative nature of the work at issue" as a factor relevant to the control analysis. *See Postmates Inc.*, N.Y. Work. Comp. Bd. Case No. G191 7469, 2019 WL 496350, *3 (Jan. 31, 2019) (internal quotation marks and citation omitted). And Postmates itself insists (Br. at 50-51) that the Workers' Compensation Board applied "the *same* legal test for employee status" as the Board did here (emphasis in original).

of an employment relationship was rational under the facts presented in those cases, then it was necessarily rational here, where there is still more evidence of employer control. (*See* Opening Br. at 51-56.)

Postmates attempts to distinguish the first case, *Rivera*, on the basis that "the employer, at its pleasure, daily dispensed delivery assignments—most of which had time deadlines for completion." (Br. at 28, quoting *Matter of Rivera* [*State Line Delivery Serv., Inc.—Roberts*], 120 A.D.2d 852, 853 [3d Dep't] [Yesawich, J., dissenting], *rev'd*, 69 N.Y.2d 679 [1986].) The same is true here: Postmates' algorithm dispensed job assignments and imposed de facto time limitations. Those limitations in fact reflected more employer control than in *Rivera*, where "the time limitation for delivery [was] established, not by State Line [the employer], but by the customer involved." *Id.* Here, it was Postmates, not customers, that set the estimated delivery times. Postmates also relies (Br. at 28) on the fact that the couriers in *Rivera* completed bills of lading on the employer's letterhead. But this practice reflects no more employer control than Postmates'

requirement that couriers report the completion of deliveries on Postmates' proprietary software. (A. 41, 64.)

Postmates seeks to distinguish the second case, *Ross*, on the basis that "[c]laimants were required to call the Majestic dispatcher to find out what work was available." (Br. at 28, quoting *Matter of Ross [Majestic Messenger Service, Inc.—Roberts]*, 119 A.D.2d 857, 857 [3d Dep't] [Mikoll, J., dissenting], *aff'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 [1986].) Postmates omits the crucial fact that the couriers "were not obliged to call but, of course, if they wished to work and profit, the dispatcher was the only source of information as to available delivery work." *Id.* at 857-58. The same is true here: Postmates couriers could not determine what work was available unless they logged onto the platform—and even then, unlike in *Ross*, they were not provided with the key details of a delivery job until after they accepted and were assigned the job. (A. 17, 20, 28.)

And Postmates seeks to distinguish the third case, *Fox*, on the basis that once a delivery driver accepted an assignment, the driver "was required to make pickups and deliveries at certain times." (Br.

at 28, quoting *Matter of Fox [Whalen's Service—Roberts]*, 119 A.D.2d 868, 870 [3d Dep't], *rev'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 [1986].) The same is true here. As the Commissioner explained (Opening Br. at 33), the expectation of fast delivery on which Postmates based its entire business model is far stricter than the 24-hour delivery guarantee at issue in *Fox*. And the delivery drivers in *Fox*, unlike Postmates' couriers, "made their own arrangements and changed them in conjunction with store owners without any control being exercised by" the employer. *Id*. They also individually negotiated their rates of pay and handled customer complaints directly, which Postmates' couriers could not do.

Postmates attempts (Br. at 29-30) to distinguish the many other delivery cases the Commissioner cites on the basis that some of those cases involved couriers who were required to take assignments or, in one case, were precluded from working for competitors. But as Postmates acknowledges (Br. at 30), many cases involved neither of those factors; control over timing was the dispositive factor. In any event, the fact that some cases involved a

few different or additional indicia of employer control does not diminish their recognition of the other indicia present here.

C. Postmates' Non-Delivery Cases Are Inapposite.

Postmates cites no cases involving delivery persons other than the three that the Commissioner distinguished in her opening brief at page 59. Postmates instead cites (Br. at 26-27) a handful of taxi cab and limousine cases.[2] All of those cases are distinguishable because they lack any indication that the employer controlled the key factors Postmates controlled here, including timing. Indeed, limousine and cab drivers, unlike Postmates' couriers, can generally decide timing on their own, or in direct consultation with the customer.

Postmates also cites a few additional cases that involved entirely different lines of work. As noted above, Postmates relies

---

[2] *Chaouni v. Ali*, 105 A.D.3d 424 (1st Dep't 2013); *Zeng Ji Liu v. Bathily*, 145 A.D.3d 558 (1st Dep't 2016); *Alves v. Petik*, 136 A.D.3d 426 (1st Dep't 2016); *Barak v. Chen*, 87 A.D.3d 955 (2d Dep't 2011); *Abouzeid v. Grgas*, 295 A.D.2d 376 (2d Dep't 2002); *Matter of Pavan (UTOG 2-Way Radio Assn.—Hartnett)*, 173 A.D.2d 1036 (3d Dep't 1991).

heavily (Br. at 13-14, 20, 24) on this Court's decision in *Bynog v. Cipriani Grp.*, 1 N.Y.3d 193 (2003). But *Bynog* involved the opposite fact pattern from the one presented here. There, a temporary personnel agency hired professional banquet waiters to provide services to various restaurants and banquet facilities. *Id.* at 197-199. The issue before the Court was whether the waiters were employees of the particular banquet facility they were hired to serve. The Court concluded that they were not, because the banquet facility had little direct contact with or control over the waiters; it was the personnel agency that interviewed them, hired them, paid them, and supervised them. *Id.* at 199-200.

To the extent that *Bynog* has any relevance here, it establishes that Postmates' couriers were not employees of Postmates' individual customers; it says nothing about whether the couriers were employees of Postmates. If anything, *Bynog* refutes Postmates' claim (Br. at 25) that acting as a "matching service" that connects customers with service providers necessarily implies a lack of control over the work performed.

Postmates also relies heavily on this Court's decision in *Matter of Yoga Vida NYC, Inc. (Commissioner of Labor)*, 28 N.Y.3d 1013 (2016). But as the Commissioner explained (Opening Br. at 59-60), that case is distinguishable because factors like timing and fees are far less central to yoga instruction than to delivery work. That is why this Court held that control over such factors *was* sufficient to find an employment relationship in the delivery context, *see Matter of Rivera*, 69 N.Y.2d at 682; *Matter of Di Martino*, 59 N.Y.2d at 641, but insufficient in the yoga context, *Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d at 1016.

Postmates additionally cites (Br. at 25) a handful of cases involving other matching services or on-demand platforms. But in all of those cases, the workers had far greater autonomy and the business exercised far less control than the record shows here. For example, in *Matter of Walsh (TaskRabbit Inc.—Comm'r of Labor)*, 168 A.D.3d 1323 (3d Dep't 2019), the business provided an online platform that connected clients seeking to have certain odd jobs performed with individuals, known as taskers, who possessed "the skills and abilities to perform those jobs." *Id.* at 1324. Taskers could

"bid on jobs posted by clients through the platform," and the client "select[ed] the tasker and communicate[d] directly with him or her regarding the job specifications and scope of work." *Id.* Here, by contrast, Postmates' couriers could not freely bid on jobs; clients could not select couriers based on skills or abilities; and couriers and clients could not negotiate the key parameters of the job, such as fees and timing.

Finally, Postmates' reliance (Br. at 24) on *Ferber v. Waco Trucking, Inc.*, 36 N.Y.2d 693, 694 (1975), is misplaced. That case addressed whether a corporate entity, not an individual, was an employee within the meaning of an insurance contract. None of the relevant facts are discussed in this Court's or the Appellate Division's decisions, and neither decision indicates whether it applied the control test applicable here.

POINT III

THE SUBSEQUENT DECISION OF THE WORKER'S COMPENSATION BOARD DOES NOT REQUIRE VACATUR OF THE BOARD'S DECISION

The Court should reject Postmates' strained argument (Br. at 48-51) that the Board's decision must be vacated because it conflicts

with a subsequent decision of the Workers' Compensation Board. That decision was based on a separate administrative record involving a different Postmates courier. The decision also post-dates the Board's decision here and was never appealed, meaning that the rationality of that decision was never subject to judicial review.[3]

In any event, as the Commissioner explained (Opening Br. at 25-26, 65-66), it is well settled that "[o]ften there is substantial evidence on both sides of an issue." *Matter of Haug*, 32 N.Y.3d at 1046 (internal quotation marks and citations omitted). Accordingly, "the existence of other, alternative rational conclusions does not

---

[3] While stressing the supposed inconsistency between the decisions of these two independent state boards, Postmates simultaneously seeks to minimize the significance of the opinion of the NLRB's Office of General Counsel, which is consistent with the Board's finding that Postmates couriers are employees. Contrary to Postmates' suggestion (Br. at 51-52 n.11), the NRLB opinion was based on the same control test applied here. Postmates asserts that the unfair labor practice charge that gave rise to the NLRB opinion was ultimately withdrawn, but it does not indicate the reason for the withdrawal (e.g., settlement). Nor in any event does the withdrawal undermine the point that another agency rationally found Postmates couriers to be employees based on substantially similar facts.

warrant annulment" of an administrative determination reviewed for substantial evidence. *Matter of Jennings v. New York State Off. of Mental Health*, 90 N.Y.2d 227, 239 (1997).

To be sure, an administrative factfinder must decide cases in a manner consistent with its *own* precedent, or else explain the departure. *See Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 517 (1985). But Postmates cites no authority for its novel argument (Br. at 50) that two independent administrative bodies established within the same agency, as are the Unemployment Insurance Appeal Board and the Workers' Compensation Board, must also follow each other's precedents or explain any departure. As Postmates acknowledges (Br. at 51), the two boards operate independently, apply separate statutory schemes, and are not subject to any control or oversight by the Commissioner of Labor. *See Matter of Simonelli v. Adams Bakery Corp.*, 286 A.D.2d 805, 806 n.1 (3d Dep't 2001), *lv. dismissed*, 98 N.Y.2d 671 (2002).

Ultimately, if Postmates wants its couriers to be classified in the same manner for the purposes of both workers' compensation

and unemployment insurance, its remedy is with the Legislature. The existing framework gives each administrative body authority to make its own determination based on the specific record before it, provided only that the determination has a rational basis in the record.

POINT IV

IT IS POSTMATES, NOT THE COMMISSIONER, THAT SEEKS A "REFERENDUM ON THE GIG ECONOMY"

Postmates distorts the Commissioner's position in suggesting (Br. at 48) that she calls for a "referendum on the gig economy." On the contrary, the Commissioner advocates a narrow ruling that the Board's finding of an employment relationship was rational based on the specific evidentiary record in this case. As explained above, such a ruling does not preclude other factfinders from rationally reaching the opposite conclusion in other similar cases. As the Commissioner candidly acknowledged (Opening Br. at 63-67), whether an employment relationship exists is a difficult and fact-intensive question on which reasonable minds can disagree, especially for novel work arrangements within the gig economy.

This difficulty counsels in favor of judicial deference to the administrative factfinders charged with deciding this question in particular cases.

It is Postmates that advocates a sweeping rule. It argues that no reasonable factfinder could infer an employment relationship where a worker enjoys the handful of nominal freedoms that Postmates' couriers enjoy. Because those freedoms are common to many gig-economy platforms, Postmates' rule would mean that most gig workers would be classified as independent contractors and not employees for purposes of *all* state benefits that depend on employee status. Indeed, Postmates' analysis does not even allow distinctions to be drawn based on the type of services being provided.

In short, Postmates seeks to obtain from this Court the same result that it and its gig-economy counterparts have obtained in other states via legislation classifying all gig workers as independent contractors, regardless of how state agencies or other factfinders might have classified them. (Opening Br. at 8.) This Court should decline to adopt such a sweeping rule and instead

conclude that the Board's finding of an employment relationship was a rational—if not the only rational—interpretation of the evidence presented here.

CONCLUSION

The Third Department's judgment should be reversed and the Board's determination reinstated.

Dated: Albany, New York
November 8, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellant

By: _____
JOSEPH M. SPADOLA
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2043
joseph.spadola@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
JOSEPH M. SPADOLA
Assistant Solicitor General
of Counsel

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Joseph M. Spadola, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,042 words, which complies with the limitations stated in § 500.13(c)(1).

JOSEPH M. SPADOLA
Assistant Solicitor General