



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

BARBARA D. UNDERWOOD
ATTORNEY GENERAL

DIVISION OF APPEALS & OPINIONS
ALBANY BUREAU

December 13, 2018

Hon. John P. Asiello
Clerk of the Court
New York State Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Re: *Matter of Vega (Postmates)*,
APL-2018-00143

Dear Mr. Asiello:

Please accept this letter as the submission of appellant Commissioner of Labor (the “Commissioner”) under Rule 500.11.

At issue is whether substantial evidence supports the determination of the Unemployment Insurance Appeal Board (the “Board”) that claimant Luis A. Vega was an employee of Postmates Inc. (“Postmates”) for unemployment insurance purposes. The Appellate Division, Third Department, annulled the determination for lack of substantial evidence. Two judges dissented, providing the basis for the Commissioner’s appeal as of right.

This Court should reverse. Substantial evidence supports the Board’s determination that Mr. Vega was an employee rather than an independent contractor operating his own business. In holding otherwise, the Appellate Division majority discounted numerous indicia that Postmates controlled key aspects of Mr. Vega’s work, including

marketing and obtaining customers, the fees that customers were charged, Mr. Vega’s rate of pay, and the assignment and timing of his deliveries. The Appellate Division thus departed from a long line of cases, including several from this Court, recognizing such indicia as sufficient to support a finding by the Board that couriers or other delivery persons were employees. The Appellate Division also misapplied the substantial evidence standard—which this Court has recently reiterated is a minimal standard—by weighing the evidence de novo and substituting its own judgment for that of the Board. Applying the appropriate deference to the Board’s view of the evidence, this Court should reverse the Appellate Division’s judgment and sustain the Board’s finding that Postmates’ couriers were employees entitled to receive unemployment insurance benefits.

STATEMENT OF THE CASE

A. The Work Performed by Postmates’ Couriers

Postmates provides on-demand pickup and delivery services to customers via a proprietary online platform. (A9, 16-18.¹) Customers can access the platform via Postmates’ website or by downloading Postmates’ application (“app”) on a smartphone. (A20.) Once logged on to the platform, customers can request that a Postmates courier pick up items at a local venue—for example, food from a local restaurant or merchandise from a store—and deliver the items to their homes or other designated locations. (A16-18.) The advantage that Postmates offers over other delivery methods is speed. (A18-19.) Postmates markets itself to customers as completing most deliveries within an hour. (A19.)

1. Courier Recruitment and Orientation

Postmates acknowledges that couriers are indispensable to its business. (A69.) Postmates recruits couriers through online

¹ Parenthetical references to “A__” refer to pages in the appendix that Postmates submitted to the Appellate Division. Parenthetical references to “RA__” refer to pages in the respondent’s appendix that the Commissioner included with its brief to the Appellate Division.

advertisements. (A63-64.) It requires prospective couriers to fill out an online form with their name, phone number, driver's license number, date of birth, and social security number. (A14, 37.) Using this information, Postmates engages a third party to conduct a criminal background check on prospective couriers. (A10, 15, 36-37.) Postmates assures its customers via its app that it has conducted a criminal background check on all of its couriers. (A37.)

Postmates has new couriers attend an orientation session where they learn how to use the smartphone app. (A15, 21, 26, 37, 55, 68.) Postmates explains that couriers "would have no way of knowing how to utilize [the] app" without attending the session. (A68.) At the session, Postmates also provides couriers with prepaid-expense ("PEX") cards for those customers who choose to have couriers pay for delivered items initially and then to reimburse them upon delivery, and Postmates advises the courier on the use of these cards. (A52-56.) Postmates also gives couriers a bag bearing Postmates' logo that couriers can use to carry delivery items. (A68, 82.)

Postmates requires couriers to sign a written agreement entitled "Postmates PEX Card Usage and Independent Contractor Acknowledgement Agreement." (A58-59, 117.) Section 1 of the agreement provides that couriers can "only use the Postmates provided PEX card for purchases dispatched or assigned to [them] by Postmates" and that couriers may be suspended or subject to penalties if they "use the PEX card for any reason other than Postmates job related duties." (A117.) Section 2 of the agreement requires couriers to acknowledge that they are "an independent contractor, and not an employee, of Postmates." (A117.) And Section 3 of the agreement requires couriers to select the mode of transportation they will use while performing services for Postmates. (A117.)

2. Courier Assignments

Couriers log in and out of the Postmates platform whenever they wish and are considered available to handle on-demand requests only when logged in. (A21, 26-27, 34, 61, 64-66, 69.) Postmates asks couriers to provide information regarding their expected availability and uses this

information to “maximize [its] software to make sure that resources are appropriate.” (A65-66, 83.) Couriers are not penalized, however, if they do not log in during those times they indicated they would be available. (A66, 83.)

Once a customer submits a delivery request, Postmates uses an algorithm to send the request to nearby couriers currently logged on to the platform. (A21-23.) Postmates provides the couriers selected by the algorithm with some, but not all, of the information provided by the customer regarding the delivery request. (A17, 20, 28.) Based on this information, the selected couriers can accept, reject, or ignore the request. (A17, 20-21, 24.) Postmates assigns the delivery to the first courier to accept the request. (A25, 38-39, 69.)

If none of the originally selected couriers accepts the request within the timeframe set by Postmates, Postmates sends the request to a progressively broader group of couriers. (A24-25, 38, 85.) If a courier accepts a request and then withdraws from the request, Postmates informs the customer and seeks to find another available courier. (A48-49, 69.) If no courier accepts the request, it is considered lost and no revenue is generated. (A24, 85.) Although couriers are not subject to a minimum or maximum number of deliveries (A28, 75), Postmates keeps track of couriers’ responses to delivery requests (A25-26, 28).

3. Logistics of Deliveries

Once Postmates assigns a delivery to a courier, it sends the courier further details regarding the customer’s delivery request, including the pickup and delivery addresses. (A17, 28-30, 64, 76.) It sends the customer a photograph of and contact information for the assigned courier. (A47-48, 73.) And it calculates and sends the customer an estimated time of delivery based on the average completion time for similar past deliveries. (A46-47, 66-67, 82-83.) Postmates then tracks couriers’ locations in real time and permits customers to view those locations on the platform throughout the delivery process. (A19.)

Postmates does not allow couriers to arrange for substitutes or subcontractors to handle deliveries. (A49-50, 73.) Postmates explains

that customers would complain if the person who shows up to make a delivery is different from the person in the photo Postmates provides. (A73.) Postmates also believes that allowing substitutes would “defeat[] the whole purpose of doing a background check” on couriers. (A73.)

Customers can modify requests en route, for example by asking the courier to pick up a soda from a store if none was available at a restaurant. (A70-72.) Couriers cannot charge customers extra for any such added stops. (A72.) *See infra* § 4, at 5.

Couriers must designate in advance the mode of transportation they will use to perform deliveries. (A58-59, 117.) Couriers are permitted to take any route they choose and to stop off en route. (A30-31.) They are also permitted to accept more than one delivery request and to complete the requests in any order they wish. (A75.) Postmates requires couriers to report on the platform when they have picked up a customer’s items and again when they have delivered the items. (A41, 64.)

Postmates allows its couriers to deliver for other companies, including when they are logged on to the Postmates platform. (A28-29, 72-73.) But when couriers deliver an item for Postmates, they are not permitted to accept payment from the customer for any services not requested through the Postmates platform. (A86-87.)

4. Financial Aspects of the Platform

Once the courier reports that a delivery is complete, Postmates charges a delivery fee to the customer’s credit card. (A39-40, 42.) Postmates unilaterally sets the fee based solely on the delivery distance; couriers have no ability to adjust the fee to account for the number of stops or items that the customer requests. (A71-72.) Postmates pays the courier a nonnegotiable commission equal to 80% of the delivery fee by depositing this sum directly into the courier’s bank account within four to seven business days of the delivery. (A10, 39-40, 42-44, 59, 69-70, 84-85, 117.)

As noted above, Postmates offers its customers a payment service whereby customers can choose to have a Postmates courier pay for

delivered items at the pickup locations and then reimburse the courier upon delivery, rather than arrange to pay the vendors directly. (R53-54.) Postmates advises its couriers during their orientation session that they can provide this additional service one of two ways. (A55-56.) First, they can use the PEX card that Postmates provides them. If the courier chooses this method, Postmates loads the purchase amount onto the PEX card, the courier makes the purchase using the card, and Postmates charges the customer's credit card for the purchase amount. (A54-55.) Alternatively, couriers can make customer purchases with their own credit cards. Postmates then reimburses the couriers for the purchase amount after they present Postmates with a sales receipt. (A55-56.) Couriers are not otherwise reimbursed for delivery-related expenses or provided with fringe benefits, uniforms, telephones, or business cards. (A32, 43, 51, 60, 70, 86.)

If Postmates is unable to collect the delivery fee from a customer, Postmates assumes the loss and the courier still earns the fixed commission. (A44-45, 56.) Similarly, when an item is lost or damaged en route, Postmates works directly with customers to resolve the issue and assumes liability in at least certain cases. (A30, 61-62, 74-75.)

5. Termination of Couriers

Customers can rate couriers' services on Postmates' platform. (A32-33, 41.) Postmates monitors customer ratings of couriers and contacts customers who have given their couriers poor ratings. (A36, 41, 50, 67.) Postmates also handles all customer complaints. (A46-47.)

Postmates terminates its relationship with couriers for a variety of reasons, including negative customer feedback, fraudulent activity, or use of the PEX card "for any reason other than Postmates job related duties." (A36, 41, 74, 108, 117.) When it has decided to discontinue a courier's services, Postmates blocks the courier from logging on to the platform. (A36, 74, 117.)

6. Mr. Vega's Work as a Courier

Consistent with the above framework, Postmates engaged Mr. Vega as an on-demand courier. (A12-13, 117.) Mr. Vega indicated on his written agreement with Postmates that his mode of transportation would be walking. (A58, 117.) He logged on to Postmates' platform during the period June 8 through June 15, 2015. (A33-34, 120.) He rejected or ignored about 50% of the assignments offered by Postmates through the platform. (A25-26.) Postmates terminated Mr. Vega's relationship based on negative consumer feedback or fraudulent activity. (A107-109.)

B. Administrative Proceedings and the Board's Decision

Mr. Vega filed an application for unemployment benefits, effective June 15, 2015. (A118-119.) Based on the information that Mr. Vega provided in his application, the Commissioner determined that Postmates exercised sufficient control over Mr. Vega's work to create an employer-employee relationship. The Commissioner thus credited Mr. Vega with remuneration from Postmates in connection with his claim for unemployment benefits and determined that Postmates was liable for additional unemployment insurance contributions, effective the third quarter of 2014, on the remuneration paid to Mr. Vega and other individuals similarly employed. (A118-119.)

Postmates objected that Mr. Vega was an independent contractor and requested a hearing before an ALJ. After a hearing at which all parties had an opportunity to be heard, and Postmates' East Coast Regional Manager Hugo Durand provided the information set forth above, the ALJ sustained Postmates' objections and overruled the Commissioner's determination. (RA9-11.) In finding Mr. Vega to be an independent contractor, the ALJ relied on the fact that Mr. Vega was free to accept or reject delivery assignments, work for other employers, set his own work schedules, and choose his mode of transportation. (RA10.) The ALJ also noted that couriers like Mr. Vega did not have to meet delivery quotas, provide reports or paperwork to the employer, or carry business cards or decals. (RA10.)

The Commissioner appealed to the Board, which reversed the ALJ's decision and sustained the Commissioner's initial determination that Mr. Vega was a Postmates employee. (RA1-4.²) The Board found sufficient evidence that Postmates exercised, or reserved the right to exercise, sufficient supervision, direction, or control over the services of Mr. Vega and other similarly situated couriers to create an employment relationship. In addition to reciting the facts discussed above (RA1-2), the Board relied on the following indicia of employer control:

Postmates advertised for and screened on demand couriers via an online application and criminal background check; it provided and educated the drivers regarding its proprietary software and PEX cards; it controlled the amount of information passed along to its couriers before and after accepting a request; it chose which couriers to offer a request; it kept track of a courier's rate of acceptance; it handled replacement of couriers; it calculated and provided an estimated time of delivery; it procured and sent the courier's photo of the consumer; it deposited the requisite amount of money onto the provided PEX card; it established the delivery fee and the courier's non-negotiable rate of pay; it handled collections and paid couriers on a regular basis even if a delivery fee was uncollected; it provided a monetary referral incentive; it retained liability for incorrect or damaged deliveries; and it fielded complaints and monitored consumer satisfaction ratings. (RA3.)

Acknowledging this Court's mandate to decide like cases in a like manner, *see Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 517 (1985), the Board cited numerous cases involving on-demand couriers or delivery drivers where similar facts were deemed sufficient to create an employment relationship, including this Court's decision in the three appeals consolidated in *Matter of Rivera (State Line Delivery*

² The Board issued its initial determination on September 29, 2016 (A127-130), but issued a resettled decision on October 11, 2016 (RA1-4), correcting a sentence that mistakenly referred to Postmates' couriers as "teaching artists" (A129).

Serv.—Roberts), 69 N.Y.2d 679 (1986), *cert. denied*, 481 U.S. 1049 (1987).³ (RA3-4.) The Board distinguished *Matter of Jennings (American Delivery Solution, Inc.—Commissioner of Labor)*, 125 A.D.3d 1152 (3d Dep’t 2015), on the grounds that the luggage delivery drivers at issue in that case, unlike Postmates’ couriers, negotiated their rate of pay, received no training, and bore responsibility for lost or damaged luggage. (RA8.)

C. The Appellate Division Decision

Over a two-judge dissent, the Appellate Division annulled the Board’s determination for lack of substantial evidence. *Matter of Vega v. Postmates Inc.*, 162 A.D.3d 1337 (3d Dep’t 2018). The court relied on the facts that Postmates’ couriers did not undergo an application or interview process, were not required to report to any supervisor, decided whether and when to log on to the platform and whether to accept delivery requests, had no set work schedule or delivery quota, chose their own route and mode of transportation, were not required to wear a uniform or provide an identification card or logo, were paid only for completed deliveries, and were not reimbursed for delivery-related expenses. *Id.* at 1338-89. The court acknowledged some of the indicia of employer control cited by the Board—including that Postmates determined the customer’s fee and the courier’s rate of pay, tracked the deliveries in real time, and handled customer complaints—but characterized those facts as demonstrating merely “incidental control.” *Id.* at 1339.

The dissenting Justices would have affirmed the Board’s finding of an employment relationship based on evidence that Postmates required its prospective couriers to attend an orientation session and pass a background check, determined which couriers to send delivery requests to and controlled the information sent to couriers regarding those

³ The three appeals consolidated in this Court’s *Matter of Rivera* decision are appeals from the Third Department’s decisions in *Matter of Rivera (State Line Delivery Service, Inc.—Ross)*, 120 A.D.2d 852 (3d Dep’t 1986); *Matter of Ross (Majestic Messenger Service, Inc.—Roberts)*, 119 A.D.2d 857 (3d Dep’t 1986); and *Matter of Fox (Whalen’s Service—Roberts)*, 119 A.D.2d 868 (3d Dep’t 1986).

requests, calculated and sent customers an estimated time of delivery, tracked couriers' locations in real time and allowed customers to do the same, unilaterally determined both its customers' delivery fees and its couriers' commissions, paid those courier commissions even when unable to collect payment from customers, typically retained liability for incorrect or damaged deliveries, handled customer complaints and monitored customer feedback, kept track of couriers' acceptance and rejection of deliveries, and blocked couriers from logging on to the platform for reasons such as fraudulent activity and negative customer reviews. *Id.* at 1339-40. The dissent cited multiple cases relying on similar facts to affirm Board findings that couriers or delivery drivers were employees, even where the record contained evidence that could support a contrary conclusion. *Id.* at 1340.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S DETERMINATION THAT MR. VEGA WAS A POSTMATES EMPLOYEE

As the Appellate Division dissent would have found, substantial evidence supports the Board's determination that Postmates exercised sufficient control over its couriers' delivery work to create an employment relationship. Applying the proper deference to the Board's resolution of this fact-intensive question, this Court should reverse the Appellate Division's judgment and reinstate the Board's determination.

"Whether an employer-employee relationship exists is a question of fact, to be decided on the basis of evidence from which it can be found that the alleged employer 'exercises control over the results produced or the means used to achieve the results.'" *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 521 (quoting *Matter of 12 Cornelia St.*, 56 N.Y.2d 895, 897 [1982]). Although "control over the means is the more important factor to be considered," *Matter of Ted Is Back Corp. (Roberts)*, 64 N.Y.2d 725, 726 (1984), "no one factor is determinative." *Matter of Concourse Ophthalmology Assoc., P.C.*, 60 N.Y.2d 734, 736 (1983); see also *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 521. Rather, "[a]ll aspects of the arrangement must be examined to determine whether

the degree of control and direction reserved to the employer establishes an employment relationship.” *Matter of Villa Maria Inst. of Music v. Ross*, 54 N.Y.2d 691, 692 (1981).

“The [Board]’s determination of this question of fact, if supported by substantial evidence on the record as a whole, is beyond further judicial review even though there is evidence in the record to support a contrary conclusion.” *Matter of Rivera*, 69 N.Y.2d at 682; *see also Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692 (explaining same principle). As this Court recently reiterated, “the substantial evidence standard is a minimal standard. It is less than a preponderance of the evidence, and demands only that a given inference is reasonable and plausible, not necessarily the most probable.” *Matter of Haug v. State Univ. of New York at Potsdam*, __ N.Y. __, 2018 NY Slip Op. 06964, 2018 WL 5046075, *1 (Oct. 18, 2018) (internal quotations marks, citations, and alterations omitted). Where the record contains evidence that rationally supports an agency’s determination, “the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently.” *Id.* That is, “where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the Board.” *In re Electrolux Corp.*, 288 N.Y. 440, 443 (1942).

While acknowledging that the Board’s determination “will be upheld if supported by substantial evidence,” *Matter of Vega*, 162 A.D.3d at 1338, the Appellate Division failed to apply these settled principles. Instead, it reweighed the evidence *de novo* and substituted its own judgment for that of the Board. In so doing, the court departed from a long line of cases upholding Board findings that couriers or other similar delivery persons were employees, not independent contractors, under substantially similar circumstances. In many respects, Postmates exercised even more control than in those cases by virtue of its online platform that allowed it to meticulously track and control the delivery process in ways that are not feasible for a traditional delivery service.

A. The Record Contains Numerous Well-Recognized Indicia of an Employer-Employee Relationship

In the vast majority of cases involving couriers and other delivery persons,⁴ this Court and the Appellate Division have affirmed the Board's finding of an employer-employee relationship based on many of the same indicia of employer control present here.

Indeed, all of the indicia of employer control that this Court found sufficient to support the finding of an employer-employee relationship in the three appeals consolidated in *Matter of Rivera*, 69 N.Y.2d at 679-83, are likewise present here, including these seven:

- Postmates alone solicited and obtained customers for its business, demonstrating that customers obtained were customers of Postmates, not any individual couriers. (A12, 17-19, 21, 97.)
- Postmates unilaterally set the delivery fee that customers paid, leaving no room for couriers to negotiate with customers. (A39-40, 71-72.)
- Postmates unilaterally set the couriers' commissions, leaving no room for couriers to negotiate individual rates of pay. (A43, 69-70.)
- Postmates handled all aspects of customer billing, from collecting customers' credit card information to charging customers following delivery. (A30-31, 39-42, 42, 71-72.)
- Postmates wholly assumed the risk of customer nonpayment. (A45-46.)
- Postmates recruited and advertised for couriers. (A63-64.)

⁴ Because these cases are numerous, they are listed separately in the enclosed addendum.

- Postmates terminated its relationship with couriers based on negative customer feedback, as it did with Mr. Vega. (A36, 74, 108, 117.)

In addition, as in all three appeals consolidated in *Matter of Rivera*, 69 N.Y.2d at 679-82, Postmates exercised significant control over the timing of deliveries. Although couriers were nominally free to deliver items when they wished (A17, 24), Postmates constrained that freedom in a variety of ways. Most obviously, Postmates marketed itself on the basis of its speedy deliveries, typically within an hour, explaining that speed is the primary reason customers choose its platform over traditional delivery methods. (A18-19.) Consistent with this core feature of its business model, Postmates sent customers an estimated time of delivery for each delivery request and allowed customers to track their assigned couriers in real time. (A19, 46-47, 66-67, 82-83.) Postmates then tracked customer feedback and terminated couriers for, among other things, negative customer reviews. (A36, 41, 74, 108.) Postmates thus controlled the timing of deliveries indirectly, imposing a de facto time limitation even more restrictive than that in *Fox*, where the delivery person had to complete delivery within a 24-hour window imposed by the customer. *Matter of Rivera*, 69 N.Y.2d at 680-82; see also *Matter of Kelly (Frank Gallo, Inc.—Commissioner of Labor)*, 28 A.D.3d 1044, 1045 (3d Dep’t 2006) (noting employer control over deliveries required within a “reasonable time on the same day”), *lv. dismissed*, 7 N.Y.3d 844 (2006); *Matter of Webley (Graphic Transmissions, Inc.—Roberts)*, 133 A.D.2d 885, 886 (3d Dep’t 1987) (noting employer control over deliveries expected with “reasonable promptness”).

And as in all three *Rivera* appeals, Postmates couriers received all the details of their assignments from Postmates, and not from customers directly. (A17, 28-30, 64-66, 76.) Indeed, through the algorithms governing its online platform, Postmates exercised still greater control over the assignment process. Rather than making all the details of a delivery request accessible to all available couriers, Postmates sent limited information to a subset of available couriers located within a narrow geographic area, providing the balance of the information needed to make the delivery only after a courier was assigned. (A17, 28-30, 64, 76.) Postmates also unilaterally determined the timeframe in which

couriers had to respond to requests and the rule for assigning deliveries— i.e., “first come, first served,” rather than, say, allowing couriers to bid on delivery jobs, or allowing customers to choose their courier based on past customer ratings. (A25, 38-39, 69.) Moreover, Postmates precluded couriers from delegating assignments to subcontractors (A49-50, 73) or accepting payment from customers for services not requested through Postmates’ platform (A86-87).

Under this Court’s decision in *Matter of Rivera*, the multiple indicia of employer control set forth above are more than sufficient to support the Board’s determination that Mr. Vega was an employee. But the record here contains at least eight additional indicia of employer control that courts have repeatedly cited in sustaining Board findings that delivery persons were employees.

- Postmates tracked customer feedback and handled all customer complaints (A32, 41, 46-47, 50, 67), a fact the Third Department relied on in *Matter of Garbowski (Dynamex Operations East, Inc.—Commissioner of Labor)*, 136 A.D.3d 1079, 1080 (3d Dep’t 2016); *Matter of Voisin (Dynamex Operations East, Inc.—Commissioner of Labor)*, 134 A.D.3d 1186, 1187 (3d Dep’t 2015); *Matter of Mitchum (Medifleet, Inc.—Commissioner of Labor)*, 133 A.D.3d 1156, 1157 (3d Dep’t 2015); and *Matter of Youngman (RB Humphreys Inc.—Commissioner of Labor)*, 126 A.D.3d 1225, 1226 (3d Dep’t 2015).
- Postmates worked with customers to resolve issues relating to lost or damaged items, and assumed liability in at least certain cases. (A30, 61-62, 74-75.) This Court relied on the employer’s liability for damaged items in the *Di Martino* appeal consolidated in *Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross)*, 59 N.Y.2d 638, 641 (1983), as did the Third Department in *Matter of Youngman*, 126 A.D.3d at 1226, and *Matter of Kelly*, 28 A.D.3d at 1045. Conversely, in *Matter of Jennings*, 125 A.D.3d at 1153, the Third Department held that a delivery driver who bore sole responsibility for lost or damaged items was an independent contractor.

- Postmates screened its couriers by conducting a criminal background check on them (A15, 36-37), just as the employer in *Matter of Watson (Partsfleet Inc.—Commissioner of Labor)*, 127 A.D.3d 1461, 1462 (3d Dep’t 2015), screened prospective drivers by checking their motor-vehicle records.
- Postmates held an orientation session where it taught couriers how to use its online platform and instructed them on the use of its PEX card (A55-56, 68), just as the employer in *Matter of Watson*, 127 A.D.3d at 1462, “trained [the delivery driver] on the operation of a scanner used to schedule and track customer deliveries,” and the employer in *Matter of Mitchum*, 133 A.D.3d at 1157, provided “orientation and training” to delivery drivers.
- Postmates sought to find a back-up courier when the originally assigned courier became unavailable (A24-25, 48-49, 69), a fact that the Third Department relied on in *Matter of Mitchum*, 133 A.D.3d at 1157. Conversely, in *Matter of Werner (CBA Industries, Inc.—Hudacs)*, 210 A.D.2d 526, 527 (3d Dep’t 1994), *lv. denied*, 86 N.Y.2d 702 (1995), the Third Department held that a delivery person responsible for finding his own replacement was an independent contractor.
- Postmates prohibited couriers from delegating assignments or arranging for substitutes (A49-50, 73), a fact the Third Department relied on in *Matter of Mitchum*, 133 A.D.3d at 1157, as well as in *Matter of Watson*, 127 A.D.3d at 1462, where the employer had to approve any substitute drivers. Conversely, the ability to delegate was a core factor present in all three cases where the Third Department concluded that delivery persons were independent contractors. *See Matter of Bogart (LaValle Transportation, Inc.—Commissioner of Labor)*, 140 A.D.3d 1217, 1219-20 (3d Dep’t 2016); *Matter of Jennings*, 125 A.D.3d at 1153; *Matter of Werner*, 210 A.D.2d at 526-28.
- Postmates required couriers to report via its online platform when they picked up an item and again when they delivered it. (A41, 64.) The Third Department relied on similar reporting requirements in

Matter of Crystal (Medical Delivery Servs.—Commissioner of Labor), 150 A.D.3d 1595 (3d Dep’t 2017); *Matter of Gill (Strategic Delivery Solutions LLC—Commissioner of Labor)*, 134 A.D.3d 1362, 1363-64 (3d Dep’t 2015); *Matter of Mitchum*, 133 A.D.3d at 1157; *Matter of Watson*, 127 A.D.3d at 1462; *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of Varrecchia (Wade Rusco, Inc.—Sweeney)*, 234 A.D.2d 826, 826 (3d Dep’t 1996); *Matter of McKenna (Can Am Rapid Courier, Inc.—Sweeney)*, 233 A.D.2d 704, 704 (3d Dep’t 1996), *lv. denied*, 89 N.Y.2d 810 (1997); and *Matter of CDK Delivery Service, Inc. (Hartnett)*, 151 A.D.2d 932, 932 (3d Dep’t 1989).

- And Postmates tracked its couriers’ locations in real time. The Third Department relied on a similar tracking system in *Matter of Gill*, 134 A.D.3d at 1362; *Matter of Mitchum*, 133 A.D.3d at 1157; and *Matter of Watson*, 127 A.D.3d at 1462. In all three of these cases, delivery personnel were required to carry scanners that allowed some level of tracking of the delivery persons and/or their delivered items.

Taken together, these indicia provide ample evidence that Postmates exercised predominant control over the key aspects of its couriers’ delivery work, from marketing and customer relations, to delivery fees and couriers’ nonnegotiable rates of pay, to the assignment and timing of deliveries. These indicia also refute Postmates’ disingenuous claim (A11, 13, 20, 51, 98) that it is merely an “online marketplace” that connects “requesters” with “delivery professionals.” A true marketplace would allow couriers to make competing bids on delivery jobs, handle their own marketing and customer relations, negotiate their own fees and commissions, establish their own estimated times of delivery, offer services beyond those marketed by Postmates, accept delivery jobs in any location, and hire local subcontractors to carry out those jobs. Postmates’ couriers can do none of these things. For this and all the other reasons discussed above, substantial evidence supports the Board’s determination that Postmates’ couriers are not independent contractors running their own delivery businesses, but rather employees of Postmates’ delivery business.

B. The Factors Cited by Postmates Do Not Render the Board's Decision Irrational

To be sure, the record also contains some indicia of courier independence. But these indicia do not render irrational the Board's finding of an employer-employee relationship based on all the countervailing evidence. As we explained, where the record as a whole contains evidence from which the Board could reasonably infer an employment relationship, the Board's determination must be upheld even if the record contains evidence that would support a contrary conclusion. *Matter of Rivera*, 69 N.Y.2d at 682; *Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692. Here, the Board's determination was rational given the numerous indicia of employer control cited above, despite evidence that couriers exercised some discretion in performing their job duties.

In the three appeals consolidated in *Matter of Rivera*, 69 N.Y.2d at 682, this Court affirmed the Board's determination that couriers were employees, even though those appeals involved even more indicia of courier independence than are present here. As in this case, in each of the *Rivera* appeals, the couriers could (i) determine their availability for work, (ii) accept or reject assignments at their option, (iii) choose their own delivery method and route, and (iv) work for other companies.

Rivera involved a courier who worked for a package delivery service called State Line. Like Mr. Vega, the courier in *Rivera* "committed himself to no particular amount of services"; rather, "when he wished to make himself available, he telephoned State Line's dispatcher and accepted such work as he desired from that made available by the dispatcher." *Matter of Rivera*, 120 A.D.2d at 853. Moreover, the courier "was free to choose any route to perform the services" and "was not prohibited from carrying on his business with one or more additional companies while performing services for State Line." *Id.* He paid his own expenses and received no fringe benefits. *Id.* And unlike here, he was "free to hire helpers without notification to the company." *Id.*

Despite these facts, this Court annulled the Appellate Division's contrary ruling and affirmed the Board's finding that the *Rivera* courier

was an employee in light of the facts that, like those here, provided indicia of an employment relationship. 69 N.Y.2d at 680-82. As explained in the Appellate Division's two-Justice dissent, the employer unilaterally set the courier's rate of pay, separately billed the customer, assumed the risk of customer nonpayment, and had couriers complete bills of lading on employer letterhead. 120 A.D.2d at 854 (Yesawich, J., dissenting). Moreover, the employer told the courier when and where to make pickups and deliveries, and the courier often had to comply with a time limitation for deliveries. The Court found that this time limitation was probative of an employment relationship, despite the fact that, as the Appellate Division noted, it was "established, not by the [employer], but by the customer." 120 A.D.2d at 853.

In *Ross*, this Court affirmed the Appellate Division's ruling *sustaining* a Board finding that drivers for a similar delivery service were employees based on even less evidence of employer control. The drivers in *Ross* "had no schedule or specific route to follow and no directions were given to them as to method or route of delivery." *Matter of Ross*, 119 A.D.2d at 857-58 (Mikoll, J., dissenting). Moreover, the couriers could turn down assignments at their option, bore their own expenses, carried their own business cards, could engage substitutes, and could work for competitors even when working for the employer. *Id.* Nonetheless, this Court upheld the Board's finding that the delivery drivers were employees based on evidence that (i) the employer unilaterally set the customer's fee and the courier's commission; (ii) couriers received the details of their assignments from the employer's dispatchers upon calling in to seek work; and (iii) the clients were clients of the employer and not the individual driver. *Matter of Rivera*, 69 N.Y.2d at 680-82.

And in *Fox*, this Court reversed the Appellate Division and affirmed the Board's finding that delivery drivers for a photographic film pickup and delivery service were employees, despite evidence that the drivers "set up [their] own schedule of pickups and delivers," "accepted or declined to take [deliveries] at their option," were not required to wear uniforms or other employer insignia, and were free to work for competitors. *Matter of Fox*, 119 A.D.2d at 869. Indeed, in *Fox*, unlike here, drivers could delegate work to substitutes, and they individually negotiated their compensation, received no training, made their own

delivery arrangements directly with customers, and handled customer complaints. *Id.* at 869-870. Despite these facts, this Court held that the Board’s finding of an employment relationship was supported by evidence that (i) the employer provided delivery drivers with the names of customer outlets; (ii) drivers were required to comply with a 24-hour guaranteed delivery window imposed by customer stores; and (iii) the employer named its drivers on its workers’ compensation policy as a precautionary measure. *Matter of Rivera*, 69 N.Y.2d at 680-82

The *Rivera* appeals thus involved all of the key indicia of courier independence that Postmates relied upon below, as well as additional indicia of independence not present here. This Court nonetheless upheld the Board’s determinations that the couriers in those appeals were employees, not independent contractors. For example, unlike here, the couriers in all three appeals could delegate their assignments. Unlike here, the *Ross* couriers had business cards “holding themselves out to the public as self-employed messenger service drivers.” *Matter of Ross*, 119 A.D.2d at 858 (Mikoll, J., dissenting). Unlike here, the couriers in *Fox* could individually negotiate their rates of pay and handled customer complaints directly. And the 24-hour window within which *Fox* couriers had to complete deliveries was far less restrictive than the expectation of nearly immediate delivery on which Postmates’ business model is predicated, as explained *supra* at 13.

Many other cases have affirmed Board findings that delivery persons were employees, notwithstanding evidence that they:

- determined their availability for work, see *Matter of Voisin*, 134 A.D.3d at 1187; *Matter of Scott (CR England Inc.—Commissioner of Labor)*, 133 A.D.3d 935, 938-939 (3d Dep’t 2015); *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of CDK Delivery Service*, 151 A.D.2d at 932; *Matter of Alfisi (BND Messenger Service, Inc.—Hartnett)*, 149 A.D.2d 883, 883 (3d Dep’t 1989);
- could accept or reject assignments at their option, see *Matter of Wilder (RB Humphreys Inc.—Commissioner of Labor)*, 133 A.D.3d 1073 (3d Dep’t 2015); *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of Caballero (Reynolds Transport, Inc.—Hudacs)*, 184 A.D.2d 984, 984

(3d Dep't 1992); *Matter of Alfisi*, 149 A.D.2d at 883; *Matter of CDK Delivery Service*, 151 A.D.2d at 932;

- could choose their own delivery route, see *Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Wells* appeal); *Matter of Scott*, 133 A.D.3d at 938-939; *Matter of Gray (Glens Falls Newspapers—Roberts)*, 134 A.D.2d 791, 791 (3d Dep't 1987);
- were paid on a per-delivery basis, see *Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Wells* appeal); *Matter of Kelly*, 28 A.D.3d at 1045;
- did not receive fringe benefits or expense reimbursements, see *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of CDK Delivery Service*, 151 A.D.2d at 932;
- signed a contract specifying that they were independent contractors, see *Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Di Martino* and *Wells* appeals); *Matter of Scott*, 133 A.D.3d at 938-939; *Matter of Kelly*, 28 A.D.3d at 1045;
- were not required to wear uniforms or bear other employer insignia, see *Matter of CDK Delivery Service*, 151 A.D.2d at 932; and
- were permitted to work for other companies, see *Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Wells* appeal); *Matter of Watson*, 127 A.D.3d at 1462; *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of Gray*, 134 A.D.2d at 791; *Matter of Caballero*, 184 A.D.2d at 984; *Matter of Alfisi*, 149 A.D.2d at 883.

By contrast, there are only three cases in which courts have annulled Board findings that couriers or other delivery persons were employees—namely, the Third Department's decisions in *Bogart*, *Werner*, and *Jennings*. (Addendum at 3.) Even assuming that these cases can be reconciled with this Court's decision in the *Rivera* appeals—and the nearly twenty Appellate Division cases that accord with that decision—all three of these cases are readily distinguishable from the present case. In *Bogart* and *Werner*, the delivery drivers could negotiate

higher rates of pay and were free to delegate jobs to other drivers, and the drivers in *Bogart* also carried their own independent business cards. *Matter of Bogart*, 140 A.D.3d at 1219-20; *Matter of Werner*, 210 A.D.2d at 526-28. In *Jennings*, the drivers could similarly negotiate their own rates of pay, and they also contacted customers directly to establish delivery times and assumed ultimate liability for lost or damaged luggage. See *Matter of Jennings*, 125 A.D.3d at 1153. None of those circumstances are present here.

Finally, contrary to Postmates' contention below, this Court's decisions in *Matter of Yoga Vida NYC, Inc. (Commissioner of Labor)*, 28 N.Y.3d 1013 (2016), and *Matter of Ted is Back Corp.*, 64 N.Y.2d 725 (1984), do not support a contrary result. Those cases involved jobs—yoga teacher and sales agent, respectively—that differ from courier work in ways that significantly alter the analysis. The work of yoga teachers and sales agents, by its very nature, requires far more discretion and independence than the work of couriers. And matters such as fees and scheduling are a much less significant part of the yoga and sales businesses than they are of the delivery business. Thus, while control over fees and/or scheduling may not be sufficient to establish that yoga instructors or sales agents are employees, see *Matter of Yoga Vida NYC*, 28 N.Y.3d at 1015; *Matter of Ted is Back Corp.*, 64 N.Y.2d at 726, such control goes a long way toward establishing that couriers are employees, as the many cases cited above make clear. This is especially true where, as here, the couriers' job consists in the mechanical execution of delivery requests submitted through an online platform over which they have no control.

In sum, the record as a whole contains more than sufficient evidence to support a rational finding that couriers like Mr. Vega were employees of Postmates rather than independent contractors operating their own businesses. Accordingly, the Appellate Division judgment should be reversed and the Board's determination reinstated.

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General
State of New York
Attorney for Appellant

By:



JOSEPH M. SPADOLA
Assistant Solicitor General

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

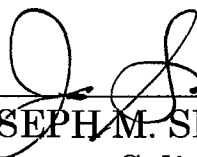
The Capitol
Albany, NY 12224
(518) 776-2043

cc: QUINN EMANUEL URQUHART & SULLIVAN, LLP
David M. Cooper, Esq.
Attorneys for Respondent Postmates Inc.
51 Madison Avenue, 22nd Floor
New York, NY 10010

LUIS A. VEGA


AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals, 22 N.Y.C.R.R. § 500.11(m), 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 6,636 words, which complies with the limitations stated in § 500.11(m).



JOSEPH M. SPADOLA
Assistant Solicitor General

ADDENDUM

A. Cases Affirming Board Findings That Couriers or Delivery Drivers Were Employees

Matter of Rivera (State Line Delivery Serv., Inc.—Roberts), 69 N.Y.2d 679 (1986), *cert. denied*, 481 U.S. 1049 (1987),

reversing Matter of Rivera (State Line Delivery Service, Inc.—Ross), 120 A.D.2d 852 (3d Dep't 1986),

affirming Matter of Ross (Majestic Messenger Service, Inc.—Roberts), 119 A.D.2d 857 (3d Dep't 1986),

reversing Matter of Fox (Whalen's Service—Roberts), 119 A.D.2d 868 (3d Dep't 1986);

Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross), 59 N.Y.2d 638 (1983),

affirming Matter of Di Martino (Buffalo Courier Express Co.—Ross), 89 A.D.2d 829 (3d Dep't 1982),

affirming Matter of Wells (Utica Observer-Dispatch & Utica Daily Press, Inc.—Roberts), 87 A.D.2d 960 (3d Dep't 1982);

Matter of Crystal (Medical Delivery Servs.—Commissioner of Labor), 150 A.D.3d 1595 (3d Dep't 2017);

Matter of Garbowski (Dynamex Operations East, Inc.—Commissioner of Labor), 136 A.D.3d 1079 (3d Dep't 2016);

Matter of Gill (Strategic Delivery Solutions LLC—Commissioner of Labor), 134 A.D.3d 1362 (3d Dep't 2015);

Matter of Voisin (Dynamex Operations East, Inc.—Commissioner of Labor), 134 A.D.3d 1186 (3d Dep't 2015);

Matter of Mitchum (Medifleet, Inc.—Commissioner of Labor), 133 A.D.3d 1156 (3d Dep’t 2015);

Matter of Wilder (RB Humphreys Inc.—Commissioner of Labor), 133 A.D.3d 1073 (3d Dep’t 2015);

Matter of Scott (CR England Inc.—Commissioner of Labor), 133 A.D.3d 935 (3d Dep’t 2015);

Matter of Watson (Partsfleet Inc.—Commissioner of Labor), 127 A.D.3d 1461 (3d Dep’t 2015);

Matter of Youngman (RB Humphreys Inc.—Commissioner of Labor), 126 A.D.3d 1225 (3d Dep’t 2015);

Matter of Kelly (Frank Gallo, Inc.—Commissioner of Labor), 28 A.D.3d 1044 (3d Dep’t 2006), *lv. dismissed*, 7 N.Y.3d 844 (2006);

Matter of Varrecchia (Wade Rusco, Inc.—Sweeney), 234 A.D.2d 826 (3d Dep’t 1996);

Matter of McKenna (Can Am Rapid Courier, Inc.—Sweeney), 233 A.D.2d 704 (3d Dep’t 1996), *lv. denied*, 89 N.Y.2d 810 (1997);

Matter of Caballero (Reynolds Transport, Inc.—Hudacs), 184 A.D.2d 984 (3d Dep’t 1992);

Matter of Alfisi (BND Messenger Service, Inc.—Hartnett), 149 A.D.2d 883 (3d Dep’t 1989);

Matter of CDK Delivery Service, Inc. (Hartnett), 151 A.D.2d 932 (3d Dep’t 1989);

Matter of Gray (Glens Falls Newspapers—Roberts), 134 A.D.2d 791 (3d Dep’t 1987);

Matter of Webley (Graphic Transmissions, Inc.—Roberts), 133 A.D.2d 885 (3d Dep’t 1987).

B. Cases Reversing Board Findings That Couriers or Delivery Drivers Were Employees

Matter of Bogart (LaValle Transportation, Inc.—Commissioner of Labor), 140 A.D.3d 1217 (3d Dep’t 2016);

Matter of Jennings (American Delivery Solution, Inc.—Commissioner of Labor), 125 A.D.3d 1152 (3d Dep’t 2015);

Matter of Werner (CBA Industries, Inc.—Hudacs), 210 A.D.2d 526 (3d Dep’t 1994), *lv. denied*, 86 N.Y.2d 702 (1995).

C. Other Cases

Matter of Charles A. Field Delivery Service, Inc. (Roberts), 66 N.Y.2d 516 (1985) (reversing Board finding that delivery drivers were independent contractors, because facts were similar to cases in which Court affirmed Board finding that delivery drivers were employees).