

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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In re FEDEX GROUND PACKAGE)	Cause No. 3:05-MD-527-RM
SYSTEM, INC., EMPLOYMENT)	(MDL 1700)
PRACTICES LITIGATION)	
)	
-----)	
THIS DOCUMENT RELATES TO:)	
)	
<i>Edward Slayman, et al. v. FedEx Ground</i>)	
<i>Package System, Inc., et al.</i>)	
Civil No. 3:05-cv-00596-RLM-CAN (OR))	
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SECOND AMENDED COMPLAINT

Plaintiffs, on behalf of themselves and all others similarly situated, alleges upon their knowledge, information and belief, formed after an inquiry reasonable under the circumstances, as follows:

INTRODUCTION

1. Throughout most of the upper-tier parcel shipping industry, the drivers who actually pick up and deliver packages are the *employees* of the companies for which they drive. This is true, for example, of FedEx, the parent of defendant FedEx Ground Package System, Inc. and of FedEx's largest competitors. This designation makes sense: these shippers have developed a highly regulated set of procedures and protocols that they could not require of drivers if they were independent contractors.

2. Almost unique in the industry, however, are the drivers who deliver for defendant FedEx Ground Package System, Inc. Though these drivers are similarly subject to tightly-regulated control by FedEx Ground, they are nevertheless called independent contractors by FedEx Ground. True independent contractor status would permit Plaintiffs certain freedoms to

operate their business as they see fit, and to run the risks and rewards of owning a business. But there is nothing “independent” about the actual job requirements imposed on drivers by FedEx Ground.

3. Accordingly, if FedEx Ground is going to treat Plaintiffs and Class Members as employees, then it must compensate them as *employees*, as well. Thus, this lawsuit, on behalf of the named Plaintiffs and the Class described below, seeks:

- a declaration that Plaintiffs and the Class are in fact, FedEx Ground employees;
- compensation for all of the business expenses they were illegally required by FEG to bear, for all of the employment taxes, unemployment compensation and workers compensation the FEG should have but did not pay, and Plaintiffs are entitled to the quantum meruit value of their services as employees; and
- the full range of ERISA pension and health benefits available to all other FedEx Ground employees.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over the ERISA claims under 29 U.S.C. §1132 (e)(1). This Court has subject matter jurisdiction over all other claims asserted in this action via 28 U.S.C. §1367.

5. Venue herein is proper pursuant to the order of the Judicial Panel for Multidistrict Litigation transferring this action to this Court.

PARTIES

6. Edward Slayman was, during the relevant period, a driver for FedEx Ground.

7. Dennis McHenry was, during the relevant period, a driver for FedEx Home Delivery.

8. Defendant FedEx Ground Package System, Inc. and FedEx Ground Package System, Inc. d/b/a FedEx Home Delivery, Inc. (hereafter collectively referred to as “Defendant” or “FEG” or “FedEx Ground”) is a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania. FEG is a part of the “family” of corporations controlled by Federal Express Corporation. At all relevant times, and within six years of the filing of this Complaint, FEG was engaged in providing small package information, transportation and delivery services in the United States, including in the State of Oregon.

9. At all relevant times, Defendant FedEx Ground served as the sponsor, within the meaning of ERISA §§ 3(16), 29 U.S.C. §§ 1002(16), and administrator of several employee benefit pension and welfare plans established under ERISA, including, but not limited to, Defendants FEDEX Ground Package System, Inc. and Certain Affiliates Wealth Accumulation 401(k) Plan; Group Life and Supplemental Life Plan For Employees Of FedEx Ground Package System, Inc.; Ground Benefits Plus Short-Term Disability Plan; Group Long Term Disability Plan For The Employees of FedEx Ground Package System, Inc.; FedEx Ground Package System, Inc. Medical, Dental And Vision Care Plan; and the Dependent Care Account Of FedEx Ground Package System, Inc. (collectively, the “Defendant Plans”). FedEx Ground is specifically defined in this complaint to include all successor, predecessor, and subsidiary entities to which these allegations pertain.

COMMON FACTS

10. Defendant employs thousands of drivers to pick up and deliver packages for its customers throughout the United States. As a condition of employment, each FEG and FHD driver (referred to by Defendant as a “P&D contractor”) must sign a “Pick-Up and Delivery Contractor Operating Agreement” and Addenda thereto (referred to hereinafter as combined as

“OA” or the “Operating Agreement” or the “Agreement”) as a mandatory condition of employment. These Operating Agreements were designed to conceal the true nature of the relationship between FEG and its drivers: that of employer and employee. The date, time and place of execution of each driver’s Operating Agreement is within the knowledge of Defendant as each Agreement is maintained in the driver files described above, in the regular course of business. The Operating Agreement between each member of the Plaintiffs Class and Defendant is the same in all material respects. The Operating Agreement between Plaintiffs and FEG and between Plaintiffs and FHD contain all of the same identical material terms with only a few, minor and insubstantial differences.

11. The Operating Agreement contains various statements purporting to classify Plaintiffs and Plaintiffs Class Members as independent contractors. At the same time, the Operating Agreement retains to the company, *inter alia*, the right to approve or disapprove any vehicle used to provide service, the right to approve or disapprove any driver or helper who provides service, the right to approve or disapprove the purchase or sale of any vehicle, the right to assign pickup and delivery stops to each driver, the right to temporarily or permanently transfer portions of any route to another with or without compensation, the right to determine when a driver has “too few” or “too many” packages to deliver on a given day, the right to inspect vehicles and drivers for compliance with company-promulgated appearance standards, the right to terminate the contract upon thirty days notice or whenever the company unilaterally determines that any provision of the contract has been “violated” amounting to the right to terminate at will, the right to require the use of communication equipment and the wearing of company uniforms, the right to take a vehicle out of service, the right to review and evaluate “customer service” and to set and change standards of such service, the right to require drivers to

perform service at “times” requested by customers and determined by Defendant, the right to withhold pay for certain specified expenses, the right to require purchase of specified insurance and numerous other purchases by drivers, the right to require completion of specified paperwork, and other rights reserved to Defendant.

12. The Operating Agreement is and at all relevant times has been a contract of adhesion, drafted exclusively by Defendant and/or its legal counsel, with no negotiation with drivers, who are required to sign the Agreement as a condition of employment. Plaintiffs and Plaintiffs Class Members are required to sign the Agreement as is, without any changes made to the terms contained therein. Each year, drivers are required to sign additional Addenda which are likewise not subject to negotiation and are unilaterally drafted adhesion contract provisions. The Agreement is, and at all material times has been unlawful, unconscionable and fraudulent in form and effect.

13. Defendant has created and regularly updated a large number of written policies and procedures outside of the Operating Agreement that drivers are never given, but nonetheless are required to follow in their work. Defendant's written policies are contained in the FedEx Ground Manual, Operations Management Handbook, Settlement Manual and numerous other written and extra-contractual policies that are actively concealed from drivers and which Defendant fails to disclose and/or provide to drivers that govern the relationship between Defendant and the drivers. The other written handbooks and manuals and additional extra-contractual sources include, but are not limited to, written rules on “contractor” termination, directives and training provided to terminal managers, written rules on driver appearance (with illustrative poster), written and oral complaint procedures, memorandum and directives to terminal management and other rules concealed from and not provided to the drivers. When

drivers do not follow an FEG or FHD rule, whether disclosed or undisclosed, known or unknown, they are subject to various types of punishment, some financial and some disciplinary, up to and including contract termination and/or non-renewal. Defendant documents such so-called violations of such rules on forms referred to as “Business Discussion Notes” and retain these documents in secret driver files called “DOT” files, along with myriad other documents which are likewise concealed from and not disclosed to the drivers.

14. Defendant’s right of control over Plaintiffs Class Members is also retained and/or exercised by Defendant as demonstrated by concealed and/or undisclosed extra- contractual sources such as Company written rules and policies described above and unwritten practices which supplement and fill gaps in the written Agreement.

15. Examples of FedEx Ground control include:

- *Minimum daily hours.* Plaintiffs and Class Members must spend at least seven hours daily on the road, even if they have completed all their assigned deliveries and pickups. Plaintiffs and Class Members are docked if they leave the road early, even if their deliveries are completed.
- *Required insurance.* FedEx Ground requires a certain level of auto, liability and workers’ compensation insurance, and further requires that Plaintiffs and Class Members buy their insurance from FedEx Ground.
- *No substitute drivers.* Plaintiffs and Class Members are not permitted to allow drivers who are not pre-approved by FedEx Ground to assume their job duties even temporarily.
- *Uniforms.* Plaintiffs and Class Members are required to wear FedEx Ground uniforms, without any variance. Their uniform may only be purchased from FedEx Ground.
- *Truck decals.* Plaintiffs and Class Members are required to decorate their trucks with the same standard-issue FedEx Ground decals, which is only available from FedEx Ground.
- *Punching the clock.* Plaintiffs and Class Members are required to carry an electronic scanner. Plaintiffs and Class Members are required to electronically “punch in” at the start of their workday, and “punch out” at

the conclusion. The scanner transmits throughout the day, and records the whereabouts of the Plaintiffs and the Class Members.

- *Controlled departures.* Plaintiffs and Class Members are not permitted to depart from their terminal until after the entire package sort is complete, even where Plaintiffs and Class Members have loaded and readied all of their packages that they are required to deliver. They are required to wait until FedEx Ground completes its paperwork.
- *Bonus tied to FedEx Ground performance.* Plaintiffs' and Class Members' bonuses are tied to the performance of FedEx Ground.
- *Authority over workdays.* FedEx Ground has the right to order the Plaintiffs and Class Members to work holidays and days after holidays (such as the Friday after Thanksgiving). Failure to show up to work on these required days can result in termination.
- *Authority over work assignments.* FedEx Ground assumes complete authority over which geographical area is to be serviced by Plaintiffs and Class Members. Plaintiffs and Class Members are not permitted to exchange those assigned geographical areas among themselves.
- *Authority over work load.* FedEx Ground exercises total control over the workload of Plaintiffs and Class Members.
- *Authority over drop-offs and pickups.* FedEx Ground assumes complete control over the daily drop-off and pickups assignments of Plaintiffs and Class Members. Plaintiffs and Class Members are not permitted to informally exchange work assignments among themselves.
- *Authority over the selling of routes.* Plaintiffs and Class Members cannot buy and sell their FedEx Ground assigned routes without prior approval by FedEx Ground.
- *No potential for entrepreneurial risks and rewards.* Plaintiffs and Class Members are compensated on a highly structured system that gives them no ability to exercise entrepreneurship or otherwise engage in the risks and rewards associated with owning a business. Accordingly, Plaintiffs and Class Members are paid a daily stipend, based on their geographical area assigned by FedEx Ground, and are paid a set amount for each FedEx assigned stop, and separately for each FedEx-assigned delivered package.
- *No opportunity to sell FedEx Ground services.* Plaintiffs and Class Members cannot take orders from customers for FedEx Ground services.

- *No opportunity to compete.* Plaintiffs and Class Members cannot separately offer pickup and/or delivery services independent from FedEx Ground.
- *“Company store.”* Plaintiffs and Class Members receive weekly paychecks from FedEx Ground. From their total owed (assigned route stipend plus assigned stops plus completed deliveries), FedEx Ground deducts various compulsory expenses. These business expenses are for services (such as the leasing of equipment) that Plaintiffs and Class Members cannot shop around to other vendors to seek a better deal.
- *Approval requirements.* FedEx Ground requires that all Plaintiffs and Class Members (and those substitute drivers who Plaintiffs and Class Members want to occasionally assume their job duties) take and pass a FedEx Ground institutional course.
- *Port-to-port control.* Plaintiffs and Class Members are required to begin their workday at their assigned FedEx Ground terminal.

16. Despite Defendant's control over virtually all material aspects of the employment relationship, and despite the unequivocal command of applicable statutes and case law to the effect that workers such as Plaintiffs are entitled to the protections due employees under Oregon law, and despite the finding of the Los Angeles Superior Court in Estrada v. FedEx Ground Package Systems, Inc. (Case # BC 210130) that these drivers are employees, Defendant continues to mis-classify their drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by Oregon state law to employees, and they are deprived of employer-financed workers compensation coverage and unemployment insurance benefits. Furthermore, the terms and conditions of their employment contract require these drivers to purchase, operate and maintain expensive trucks for Defendant's exclusive benefit and to work under other unlawful conditions. Defendant's mis-characterization of their drivers as independent contractors, the concealment and/or non-disclosure of the true nature of the relationship between Defendant and its drivers and the attendant deprivation of substantial rights

and benefits of employment are part of an on-going unlawful and fraudulent business practice by Defendant which this court should enjoin.

CLASS ALLEGATIONS

17. Plaintiffs bring this case on behalf of the following Class:

All single work area pick-up and delivery drivers who (1) are dispatched from a Oregon-based terminal, and (2) performed services for FedEx Ground driving full-time (exclusive of time off for vacation and/or illness) pursuant to the terms of the standardized operating agreements.

18. The named Plaintiffs fit within this description.

19. All Class Members share an interest in ascertaining whether they should be treated as employees, or as independent contractors.

20. The named Plaintiffs will fairly and adequately represent the Class. The named Plaintiffs have no interest antagonistic to the members of the Class, and have retained lawyers experienced in Class action litigation to prosecute their case.

21. The Class is large, numbering into the hundreds. Accordingly, joinder is impracticable.

22. Nevertheless, the Class is not large enough to render Class treatment unmanageable. Nearly all relevant information, e.g., the identity of those Class Members, can be found in written and electronic records of FedEx Ground.

23. Pursuant to Fed. R. Civ. P. 23(a)(2) and (a)(3), there are questions of law or fact common to the Class, including, but not limited to:

- a. Whether Plaintiffs and Class Members have the requisite independence and discretion of independent contractors.
- b. Whether the uniform acts of defendant convert the Plaintiffs and the Class, by law, into “employees.”

- c. Whether Plaintiffs and the Class are entitled to be reimbursed for defendant's business expenses that they covered.
- d. Whether Plaintiffs and the Class are entitled to their pension and health benefits plans because they are, in fact, employees.
- e. Whether the actions of FedEx Ground are applicable to the Class as a whole, entitling Class Members to injunctive relief.

24. The claims of Plaintiffs are typical of the claims of each member of the Class as a whole and are based on and arise out of identical conduct by FedEx Ground.

25. Plaintiffs are committed to pursuing this action and have retained competent counsel experienced in class action litigation. Plaintiffs will fairly and adequately represent the interests of the members of the Class.

26. The prosecution of separate actions by individual members of the Class would create a risk of establishing incompatible standards of conduct for defendant.

27. Defendant's actions are generally applicable to the Class as a whole, and Plaintiffs seek remedies with respect to the Class as a whole.

28. The common questions of law and fact enumerated above predominate over questions affecting only individual members of the Class, and a class action is the superior method for fair and efficient adjudication of the controversy.

**First Claim for Relief
(Plan Enforcement Under ERISA)**

29. Plaintiffs restates and realleges the above paragraphs as if fully set forth.

30. Plaintiffs' first cause of action is a claim for plan enforcement under 29 U.S.C. §1132 (a)(1)(B) of ERISA.

31. This Court has jurisdiction to hear this claim under 29 U.S.C. §1132 (e)(1). In conformity with 29 U.S.C. §1132 (h), Plaintiffs are contemporaneously serving this complaint, by certified mail, on the secretaries of Labor and Treasury.

32. Under 29 U.S.C. §1132 (a)(1)(B), Plaintiffs are authorized to clarify and to enforce their rights to ERISA benefits in whatever plan for which they were eligible.

33. Up to now, Defendant has taken the position that Plaintiffs are not entitled to any ERISA benefits, based on Defendant's legally invalid contention that Plaintiffs and the Class are not employees.

34. Because Plaintiffs and the Class, however, are in fact employees, they are entitled to employee benefits.

35. Accordingly, under 29 U.S.C. §1132 (a)(1)(B), Plaintiffs are entitled to his benefits, declaratory relief, equitable restitution, and injunctive relief. Plaintiffs are further entitled to prejudgment interest, costs, and attorney's fees pursuant to 29 U.S.C. §1132(g).

**Second Claim For Relief
(Illegal Deductions From Wages Under Oregon Rev. Stat. §652.610)**

36. Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

37. Plaintiffs and the Class are "employees" as defined in Oregon Rev. Stat. § 652.310 and are not free from the control and direction of Defendant.

38. Defendant unlawfully withheld monies from the compensation earned by Plaintiffs and Plaintiff Class Members for business expenses of Defendant, including but not limited to vehicle expenses, cargo claims and insurance claims in violation of Oregon Rev. Stat. § 652.610. Plaintiffs and Plaintiff Class Members have not expressly and freely given written consent to such deductions, and these deductions are not made in response to a valid wage assignment or deduction order. Such deductions were not for the Plaintiffs and Plaintiff Class Members employees' benefit.

39. Defendant has withheld said funds unlawfully without providing Plaintiffs and Plaintiff Class Members with advance notice of such amounts, reasons or documentation to justify such deductions, and absent any lawfully sufficient reason for such conduct.

40. As a direct and proximate result of Defendant's conduct, Plaintiffs and Plaintiff Class Members suffered substantial losses and have been deprived of compensation to which they were entitled, including monetary damages, civil penalties, pre-judgment interest, costs and reasonable attorney fees.

**Third Claim for Relief
(Fraud)**

41. Plaintiffs restate and reallege the above paragraphs as if fully set forth.

42. Plaintiffs and the Class they represent were purportedly hired by Defendant to work as "independent contractors" pursuant to the terms of the OA described above. In fact, Defendant knew or should have known, at all times, that the "independent contractor" Classification in the Operating Agreement was improper and that Plaintiffs and all persons similarly situated were "employees" entitled to the benefits and protections of all laws enacted for employees. Plaintiffs are informed, believes and on that basis alleges, that through the OA Defendant intentionally misled Plaintiffs and the Class he represents as to their employment status, or made such representations to Plaintiffs and Plaintiffs Class Members recklessly and/or negligently, and deliberately concealed from and/or failed to disclose to the pick-up and delivery drivers the extra contractual sources (including but not limited to the FedEx Ground Manual, Operation Management Handbook, Settlement Manual, and other policies and secret driver files described above) that defined the employment relationship between Plaintiffs and Defendant, all for the purpose of realizing unjust profits from Plaintiffs' work and/or to avoid paying for its operating costs and payroll taxes to increase its competitiveness.

43. At all material times, Defendant either knew, or should have known, that the material representation made to Plaintiffs and the Class in the OA concerning their employment status, and the concealment and/or non-disclosure of material facts to Plaintiffs and the Class concerning their employment status and Plaintiffs' corresponding obligation to assume responsibility for all of their "own" employment-related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks were false and fraudulent.

44. At all material times, Defendant intended to and did induce Plaintiffs and the Class to reasonably and justifiably rely to their detriment on the false and fraudulent representations made to them by Defendant in the OA concerning their employment status and obligation to assume responsibility for all of employment-related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks and suffered damage as a direct and proximate result.

45. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiffs' rights and protections guaranteed by Oregon state law and other applicable law.

Fourth Claim for Relief
(Rescission of Operating Agreement)

46. Plaintiffs restate and reallege the above paragraphs as if fully set forth.

47. Despite the express terms of the Operating Agreement, Plaintiffs' relationship with FEG satisfies every aspect of the test for employment, and not for independent contractor status.

48. FEG controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations hereof.

49. Despite this control and the actual status of the drivers as employees, FEG mischaracterizes Plaintiffs and the Class as independent contractors. As a result, these drivers must pay substantial sums of their own money for work-related expenses, including but not limited to the purchase or lease of vehicles meeting company specifications, and all costs of operating, insuring and maintaining those vehicles.

50. The Operating Agreement illegally and unfairly advantages FEG, by mischaracterizing the status of Plaintiffs in that FEG evades employment-related obligations, such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation, illegally shifting the expense of workers' compensation coverage and other expenses to Plaintiffs.

51. The Operating Agreement between FEG and Plaintiffs and members of the Class is void as against public policy and therefore unenforceable, as failing to recognize the employment status of the Plaintiffs and the Class Members, and therefore denying them the legally cognizable benefits of employment.

Fifth Claim for Relief
(Declaratory Relief Against Defendant)

52. Plaintiffs hereby incorporate by reference all preceding paragraphs as if fully set forth herein, and further alleges:

53. An actual controversy has arisen between the Plaintiffs and Plaintiff Class Members, on the one hand, and Defendant, on the other hand, relating to the following matters:

- a. Whether Defendant has unlawfully misclassified Plaintiffs and Plaintiff Class Members as independent contractors, and have thus denied Plaintiffs and Plaintiff Class Members of the common benefits of employee status, such as
 - i. wages;
 - ii. holiday pay;

- iii. workers' compensation;
 - iv. unemployment insurance;
 - v. contributions to the Defendant's retirement plan;
 - vi. income tax withholding;
 - vii. meal, break and rest periods.
- b. Whether Defendant has unlawfully failed to pay benefits and compensation owing in a timely manner to Plaintiffs and Plaintiff Class Members whose employment with Defendant ended, as required by Oregon law.
 - c. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive in compensation and benefits.
 - d. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive in interest on unpaid compensation due and owing.
 - e. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive from Defendant in statutory penalties and interest.

54. Plaintiffs and Plaintiff Class Members further seek entry of a declaratory judgment in their favor which declares Defendant's practices as heretofore alleged to be unlawful and which provides for recovery of all sums determined by this Court to be owed by Defendant, and each of them, to the Plaintiffs and Plaintiff Class Members.

JURY DEMAND

Plaintiffs hereby demand a trial by jury for all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs individually, and on behalf of all other similarly situated, pray for the following relief:

- A. An order certifying the Class as described with the named Plaintiffs as Class representatives.
- B. An award to the Plaintiffs and the Class in the amount of their unpaid overtime compensation.

- C. A declaration that Plaintiffs and Class Members are full participants in all ERISA plans otherwise available to FedEx Ground employees.
- D. An order that requires FedEx Ground to pay or otherwise credit Plaintiffs and Class Members for all ERISA benefits to which they are retroactively entitled.
- E. An order that requires FedEx Ground to rescind the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FedEx Ground.
- F. An order requiring FedEx Ground to reimburse and/or indemnify Plaintiffs and Class Members for the FedEx Ground business expenses that they have covered.
- G. An award of attorneys' fees, plus the costs and expenses of this action.
- H. An award of punitive damages in an amount to be determined at trial.
- I. Prejudgment interest, as afforded by law.
- J. All such other legal and equitable relief to which Plaintiffs and Class are entitled.

Dated: April 11, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

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CERTIFICATE OF SERVICE

I, Susan E. Ellingstad, hereby certify that on April 11, 2006, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which sent notification of such filings to the following:

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Dated: April 11, 2006

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