

**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>Robert Gennell, Jr., et al. v. FedEx Ground</i>)	
<i>Package System, Inc.,</i>)	
Civil No. 3:05-cv-00534-RLM-CAN (NH))	
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AMENDED COMPLAINT

Plaintiffs, invoking the diversity jurisdiction of this Court, jointly and severally complain of Defendant FedEx Ground Package System, Inc. and demand a trial by jury of all issues, and allege that the Defendant has violated and conspired to violate the rights of Plaintiffs and the laws of the United States and the State of New Hampshire, and have damaged Plaintiffs by such violations.

JURISDICTION AND VENUE

1. Jurisdiction in this matter is based upon diversity of citizenship, as Defendant is a resident of the State of Delaware, and all Plaintiffs are residents of the State of New Hampshire, the amount in controversy is in excess of the statutory minimum, thus jurisdiction is based upon 28 U.S.C. 1332.

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

INTRODUCTION

3. The United States of America, and several States, have enacted laws and promulgated regulations intended to protect workers, employees and other persons from predatory, abusive and unfair business practices to which they may be exposed by their employers. Among these laws is the New Hampshire Workers Compensation Act, RSA §§281-A:1 et seq., which requires that employers provide workers compensation insurance (or that employers be permitted to self insure) for industrially-injured or ill employees. Additionally, the New Hampshire Unemployment Insurance Act, RSA §§282-A: et seq., provides certain safety net benefits for “persons unemployed through no fault of their own.” Other laws, regulations and practices regulate the payment of wages and compensation, and the re-imbusement of business expenses by employees.

4. Employers may not avoid these obligations by pretending that their employees are “independent contractors,” and misclassifying them as such when, in fact, their workers are not independent contractors because they do not have the right to control the means and manner in which they perform their so-called “independent” contract, but, rather, are directed by their employer, in this case, the Defendant.

5. Defendant FedEx Ground Package System, Inc. (“FEG”), and its division, FedEx Home Delivery (“FHD”) (hereinafter together referred to as “Defendant” or “FEG” or “FedEx Ground”), is a Delaware corporation doing business as two national companies, affiliated with the Federal Express Corporation. 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 is required to sign a lengthy form contract entitled the “Pick-up And Delivery Contractor Operating Agreement” that mischaracterizes each driver as an “independent

contractor.” These operating agreements were designed to conceal the true nature of the relationship between Defendant and its drivers: that of employer and employee.

6. 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 New Hampshire 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 misclassify its drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by New Hampshire 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 mischaracterization 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.

PARTIES

7. The Plaintiffs, Robert Gennell, Jr., Donald Swazey, Gary Terrio, Kenneth M. Ries, Craig Batley, Ralph Beaulieu, Donald Bumford, Dennis Burns, Ted Blaisdell, Joseph Condi, Michael Detrimont, Mark Gagnon, Paul Gendron, Richard N. Gioiosa, David Glidden, Robert Grunditz, James Hall, Jr., William Hurley, Michelle Jones, Marie, LaRoche, Gary Lucier, Kenneth Parnell, Keith Repack, Mario Russo, Jay Trachim, Christopher Van Lenten, David Foss,

Glenn Poland and Kimball P. Rice jointly and severally, pursuant to FRCP 20, seek relief for the causes of action complained of herein which arise out of the same series of transactions and involve common questions of law and fact.

8. Plaintiffs are, or have been employed by the Defendant and have, as a result of the acts of Defendant complained of herein, been economically damaged by Defendant.

9. Plaintiffs are informed and believe on that basis allege that at all times herein mentioned Defendant has been and is authorized to do business and is doing business in the State of New Hampshire at various locations throughout the state.

10. In its national television advertising campaigns Defendant presents itself as one business, a solution for all of its customers' package delivery needs.

FACTS COMMON TO ALL CAUSES OF ACTION

11. Defendant is a national corporation whose businesses consists of offering package delivery and pick-up service to its customers using a single integrated nationwide network of transportation, sorting and communication facilities and integrating Plaintiff into those existing network operations. Defendant hired Plaintiffs to timely deliver and pick up packages based at times, locations and for amounts determined solely by Defendant.

12. Each pick-up and delivery 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 "OA" or the "Operating Agreement" or the "Agreement") as a mandatory condition of employment. 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 Plaintiff 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.

13. The Operating Agreement contains various statements purporting to classify Plaintiffs 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.

14. 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 are required to sign the form contract 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.

15. Defendant's right of control over Plaintiffs 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 contract.

16. 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 retains

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.

17. Defendant retains the right to control the manner and means by which Plaintiffs perform their jobs. Drivers work from a terminal, where they are assigned packages for delivery and locations for pickups each day. Defendant employs a variety of managers at its terminals who have supervisory responsibility over the drivers, their daily assignments and paperwork. Drivers also interact with other personnel of Defendant on a daily basis.

18. Defendant unilaterally sets the compensation to be paid to the drivers. Defendant pays drivers for the number of stops, deliveries and pickups made, as well as daily compensation for making themselves available for pickup and delivery work in a geographic areas solely determined by Defendant. Defendant pays its drivers for the number of stops, deliveries and pick-ups made. If a driver fails to check out with a terminal supervisor, he or she does not get paid for that day’s work.

19. Defendant unilaterally sets the prices charged to its customers for the services rendered by Plaintiffs. Defendant has a wide array of written and unwritten policies and procedures that drivers are trained in and required to follow in their work. When drivers do not follow Defendant’s rules, they suffer various types of punishment, some financial, and some disciplinary including loss of their route.

20. Plaintiffs provide service which is an integral part of Defendant’s business enterprise and they have no separate or distinct occupation or business. By providing vehicles with required Defendant colors, logos and advertising, by reliably serving Defendant’s customers, by following Defendant’s controlled delivery routes and delivery and pick up methods, by providing Defendant with customer leads, by using Defendant’s scanners which

enable Defendant's customers to track their packages, and in other material ways, Plaintiffs have rendered and continue to render services to Defendant which are integral to the Defendant's nationwide package delivery system.

21. Defendant through the representations contained in the Agreement and other documents given to Plaintiffs, induced Plaintiffs to enter into the Agreements in the belief that each Plaintiff would own his own business as an independent contractor. In reliance on those representations Plaintiff incurred substantial debt to purchase trucks and made to spend large sums of money for uniforms, insurance and expenses of owning, operating and maintaining their trucks. Defendant's representations to Plaintiffs in the Agreement were and are fraudulent and intended to mislead Plaintiffs into believing that Plaintiffs were independent businessman when the reality was that the Defendant retained such control over the Plaintiffs' work that they own virtually nothing except the obligation to continue to incur expenses for which they receive no reimbursement.

FIRST CAUSE OF ACTION
Failure to Pay Overtime and to Provide Meal Breaks

Plaintiffs incorporate by reference Paragraphs 1 through 21 of this complaint as if fully set forth, and for a cause of action, allege as follows:

22. Plaintiffs operate vehicles with a gross vehicle weight rating of less than 10,001 pounds, including but not limited to P350 and P400 package van. Persons who operate such vehicles are not subject to the maximum hours regulations promulgated pursuant to the Federal Motor Carrier Safety Act and are therefore not exempt from the overtime requirements established by NH RSA 279:29VIII.

23. Defendant required Plaintiffs to work without any thirty minute unpaid meal period for every 5 hours worked as required by NH RSA 275:30a.

24. Defendant has not paid Plaintiffs at the rate of time and a half for hours worked by Plaintiffs in excess of 40 hours per week as required by NH RSA 279:21VIII. The failure by Defendant to make such payments to Plaintiffs is also a violation of the employer's obligation under NH RSA 275:43, to pay employees on a weekly basis.

25. As a direct and proximate result of Defendant's conduct as alleged, Plaintiffs have suffered substantial monetary losses, according to proof, plus interest, costs and reasonable attorney fees as provided for under NH RSA 279:29.

SECOND CAUSE OF ACTION
Conversion;
Unauthorized Deductions from Compensation

Plaintiffs incorporate by reference Paragraphs 1 through 25 of this complaint as if fully set forth, and for a cause of action, allege as follows:

26. Defendant has unlawfully withheld monies from the compensation earned by Plaintiffs for business expenses of Defendant, including but not limited to cargo claims and insurance claims in violation of NH RSA 275:48.

27. Defendant has withheld said funds unlawfully without even providing Plaintiffs with advance notice of the amounts, reasons or documentation of any justification for such deductions and absent any lawfully sufficient reason for such conduct in violation of NH RSA 275:49.

28. As a direct and proximate result of Defendant's conduct as alleged, Plaintiffs have suffered substantial monetary losses, according to proof, plus interest, costs and reasonable attorney fees as provided for under NH RSA 275:53.

THIRD CAUSE OF ACTION
Fraud

Plaintiffs incorporate by reference Paragraphs 1 through 28 of this complaint as if fully

set forth, and for a cause of action, allege as follows:

29. Plaintiffs 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, believe and on that basis allege, that through the OA Defendant intentionally misled Plaintiffs as to their employment status, or made such representations to Plaintiffs 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 and Settlement Manual, 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.

30. At all material times, Defendant either knew, or should have known, that the material representation made to Plaintiffs in the OA concerning their employment status, and the concealment and/or non-disclosure of material facts to Plaintiffs 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.

31. At all material times, Defendant intended to and did induce Plaintiffs 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.

32. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiff rights and protections guaranteed by New Hampshire law and other applicable law.

FOURTH CAUSE OF ACTION
Unfair Business Practices
in Violation of New Hampshire RSA §§358-A, et. seq.

Plaintiffs incorporate by reference Paragraphs 1 through 32 of this complaint as if fully set forth, and for a cause of action, allege as follows:

33. The New Hampshire Consumer Protection Act RSA §358-A *et. seq.*, prohibits any legal entity, including corporations and natural persons from using “any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within” New Hampshire. By failing and refusing to provide Plaintiffs with workers compensation insurance in violation of RSA §§281-A:1 *et seq.* and unemployment insurance benefits in violation of RSA §§282-A:1 *et seq.*, and by engaging in the other acts and conduct alleged above, Defendant has committed, and are continuing to commit, ongoing unfair business practices within the meaning of RSA 358A:2

34. The unfair business practices described above have proximately resulted in damages to Plaintiffs.

35. Pursuant to RSA 358-A:10, Plaintiffs, are entitled to: (a) damages in amounts not yet ascertained but to be ascertained at trial; and equitable relief including: (i) injunctive relief

against Defendant's continuation of their unfair business practices, and (ii) a declaration that Defendant's business practices are unfair within the meaning of the statute.

FIFTH CAUSE OF ACTION
Rescission of Contract

Plaintiffs hereby incorporate by reference paragraphs 1 through 35 of this complaint as if fully set forth herein, and, for a cause of action allege as follows:

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

37. Defendant controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations hereof at paragraphs 1 through 21.

38. Despite this control and the actual status of the drivers as employees, Defendant mischaracterizes the Plaintiffs 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.

39. The Operating Agreement illegally and unfairly advantages Defendant, by mischaracterizing the status of the Plaintiffs in that Defendant 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.

40. The Operating Agreement between Defendant and each Plaintiff is void as against public policy and therefore unenforceable, as failing to recognize the employment status of the Plaintiffs, and therefore denying them the legally cognizable benefits of employment.

41. The Operating Agreement between Defendant and each Plaintiff is an unconscionable contract of adhesion, which is unenforceable as contrary to the public interest, policy and law.

42. The Operating Agreement illegally shifts the burden of certain costs that an employer must pay.

43. While acting on the direct instruction of Defendant and discharging their duties for Defendant, Plaintiffs incurred expenses for, *inter alia*, the purchase or lease, maintenance, operating costs and adornment of vehicles; insurance; and uniforms. Plaintiffs incurred these substantial expenses as a direct result of performing their job duties.

44. By misclassifying its employees as “independent contractors,” and further by contractually requiring those employees to pay Defendant’s own expenses, Defendant has been unjustly enriched.

45. As a direct and proximate result of Defendant’s conduct, Defendant has received substantial benefits to which it had no entitlement, at Plaintiffs’ expense, including lost profits, self-employment taxes, premiums for insurance to replace workers compensation and disability benefits, business expenses, compensation of replacement workers, and other expenses.

46. Plaintiffs are entitled to compensation for all of the business expenses they were illegally required by Defendant to bear, for all of the employment taxes, unemployment compensation and workers compensation the Defendant should have but did not pay, and Plaintiffs are entitled to the quantum meruit value of their services as employees.

SIXTH CAUSE OF ACTION
For an Accounting

Plaintiffs incorporate Paragraphs 1 through 46 of this complaint as though fully set forth herein, and for a cause of action, allege as follows:

47. Plaintiffs are owed unpaid overtime compensation and unauthorized deductions from their compensation as detailed above.

48. Plaintiffs do not know the precise amount of compensation due them. Upon information and belief, Defendant possesses business records from which the amount of compensation due and owing to Plaintiffs can be determined.

SEVENTH CAUSE OF ACTION

Declaratory Judgment

Plaintiffs incorporate Paragraphs 1 through 48 of this complaint as though fully set forth herein, and for a cause of action, allege as follows:

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

- a. Whether Defendant has unlawfully misclassified Plaintiffs as independent contractors, and have thus denied Plaintiffs 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; and
 - vii. meal, break and rest periods.
- b. What amounts Plaintiffs are entitled to receive in compensation and benefits.
- c. What amounts Plaintiffs are entitled to receive in interest on unpaid compensation due and owing.
- d. What amounts Plaintiffs are entitled to receive from Defendant in statutory penalties and interest.

50. Plaintiffs 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 to the Plaintiffs.

EIGHTH CAUSE OF ACTION
Failure to Reimburse Employee Expenses Under New Hampshire Rev. Stat.
§ 275:57

Plaintiffs incorporate Paragraphs 1 through 50 of this complaint as though fully set forth herein, and for a cause of action, allege as follows:

51. Plaintiffs are "employees" as defined in New Hampshire Rev. Stat. § 275:42 and are not free from the control and direction of Defendant.

52. Defendant unlawfully has failed to reimburse Plaintiffs for expenses incurred at the request of Defendant, and which were not expenses normally borne as a precondition for employment.

53. Defendant has willfully violated New Hampshire Rev. State § 275:57.

54. As a direct and proximate result of Defendant's conduct, Plaintiffs 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.

PRAYER FOR RELIEF

Plaintiffs, jointly and severally pray for judgment as follows:

A. For an order by the Court restoring and/or returning to Plaintiffs all of the Defendant's unfairly or illegally gotten profits measured by un-reimbursed expenses, workers compensation premiums, and/or unpaid unemployment insurance benefits incurred, together with interest thereon, as well as any other monetary damages caused by Defendant;

- B. For an order by the Court enjoining Defendant from continuing its unfair and/or unlawful conduct;
- C. For a declaration that Defendant's conduct is unfair and/or unlawful;
- D. For and order by the Court rescinding the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to Defendant;
- E. For punitive damages in an amount to be determined at trial;
- F. For an accounting;
- G. For an award to Plaintiffs of their costs and expenses incurred in this action, including reasonable attorneys' and experts' fees pursuant to applicable New Hampshire law; and,
- H. For such other and further relief as this Court deems just and proper.

Dated: January 9, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Susan E. Ellingstad

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CERTIFICATE OF SERVICE

I, Susan E. Ellingstad, hereby certify that on January 9, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants::

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Dated: January 9, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

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