

R.D. # 0016-04  
Fairfield, NJ

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22

**FEDEX GROUND PACKAGE SYSTEM, INC.,**

**Employer,**

**and**

**Case 22-RC-12508**

**LOCAL 177, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AFL-CIO,**

**Petitioner.**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,<sup>1</sup> the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>2</sup>

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<sup>1</sup> Briefs filed by the parties have been fully considered.

2. FedEx Ground Package System, Inc., herein the Employer or FedEx Ground, is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>3</sup>
3. Local 177, International Brotherhood of Teamsters, AFL-CIO, herein the Petitioner, the labor organization involved, claims to represent certain employees of the Employer.<sup>4</sup>
4. A question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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<sup>2</sup> This case involves certain drivers at the Fairfield, New Jersey facility of FedEx Ground System, Inc. (“FedEx Ground” or “the Employer”). The Hearing Officer barred the Employer from presenting evidence concerning the entrepreneurial activities of drivers at its terminals other than at the petitioned-for facility. On August 18, 2004, Counsel for the Employer filed a written Request for Special Permission to Appeal the Hearing Officer’s ruling. On August 20, 2004, the Acting Regional Director sustained the Hearing Officer’s ruling. The Acting Regional Director determined that the evidence the Employer sought to introduce was not directly relevant to its Fairfield location, which the parties stipulated is the only location involved herein. In addition, as stated in the Order, it is appropriate to take administrative notice of the Decision and Order in *RPS, Inc.*, Case 5-RC-14905, issued on August 3, 2000, and the factual findings contained therein, which concern in part, the system-wide entrepreneurial activities of drivers under contract with Roadway Package Systems, Inc., the predecessor of the Employer here. By letter dated September 24, 2004, the Employer requested that the hearing be reopened and that it be permitted an opportunity to file a reply brief regarding an unreported California Superior Court decision attached to the Union’s post-hearing brief, *Anthony Estrada v. RPS, Inc.*, No. BC210130 (Cal. Unrep., July 26, 2004). I denied both requests by letter dated September 29, 2004, stating that the decision from the California Court was not relevant to the case at hand, as it binds neither the Board nor me, and does not reference facts developed at the hearing herein.

<sup>3</sup> The Petition was amended at the hearing to reflect the correct name of the Employer as “FedEx Ground Package System, Inc.” The parties stipulated that FedEx Ground, a Delaware corporation, is engaged in the business of small package pickup and delivery at its Fairfield, New Jersey facility (“the Fairfield terminal”), the only facility involved in this matter. (During the hearing the Fairfield facility was also sometimes referred to as the Paterson terminal, as it is located close to Paterson, New Jersey. In this Decision, it will be described solely as the Fairfield facility.) During the past twelve months, a representative period, FedEx Ground derived gross revenues in excess of \$500,000 from the conduct of its business and during the same period provided services in excess of \$10,000 directly to customers located outside the State of New Jersey.

<sup>4</sup> The Petition was amended at the hearing to reflect the affiliation of the Petitioner with the AFL-CIO. The parties stipulated that Local 177, International Brotherhood of Teamsters, AFL-CIO (“the Petitioner” or “the Union”) is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of FedEx Ground constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

All full-time and part-time P & D contractors, Linehaul contractors, temporary drivers and swing drivers employed by FedEx Ground at its Fairfield, New Jersey facility, excluding all absentee contractors, supplemental drivers, helpers or loaders employed by contractors, package handlers, office clerical employees, mechanics, dispatchers, sales employees, managerial employees, professional employees, guards and supervisors as defined in the Act and all other employees.

## I. INTRODUCTION

Petitioner seeks to represent a unit of all ground drivers employed by the Employer at its Fairfield, New Jersey facility, excluding all other employees. The Employer refers to these ground drivers as Pick-Up and Delivery (“P & D”) Contractors and Linehaul Contractors.<sup>5</sup> There is no history of collective bargaining. Following the filing of the petition by Petitioner, on July 27, 2004, a hearing opened on August 10, 2004 and after 12 days of hearing, closed on August 27, 2004.

The sole issues decided here are whether the P & D drivers and the Linehaul drivers at the Employer’s Fairfield<sup>6</sup> terminal are employees under Section 2(3) of the Act or independent contractors not subject to the Board’s jurisdiction; if P & D drivers and Linehaul drivers are employees, whether the P & D and Linehaul drivers share a

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<sup>5</sup> During the hearing the parties stipulated that no particular legal significance would be given to the use of the terms “employee,” “driver,” “contractor,” or “independent contractor” when used in connection with the individuals at issue. In this decision, the term “driver” will generally be used to refer to the P & D Contractors and the Linehaul Contractors.

<sup>6</sup> All locations mentioned hereinafter in this Decision are in New Jersey, unless otherwise noted.

sufficient community of interest; and, whether the swing, temporary and supplemental drivers should be included in the unit of P & D drivers or of P & D and Linehaul drivers.

On three occasions, the Board has addressed the question of whether P & D drivers employed by Roadway Package Systems, (“Roadway” or “RPS”), the predecessor of the Employer, are employees or independent contractors: *Roadway Package Systems (“Roadway I”)*, 288 NLRB 196 (1988)(concerning RPS’s Louisville, Kentucky terminal); *Roadway Package Systems (“Roadway II”)*, 292 NLRB 376 (1989), enf’d, 902 F. 2d 34 (6<sup>th</sup> Cir. 1990)(involving RPS’s Redford, Michigan terminal); and most recently, in *Roadway Package Systems (“Roadway III”)*, 326 NLRB 842 (1998)(concerning RPS’s Ontario and Pomona, California terminals). In each case, the Board found RPS’ P & D drivers to be employees rather than independent contractors.

The Employer argues that it has made a number of significant changes in its relationship with its P & D and Linehaul drivers and that those changes justify a determination that these drivers are independent contractors. The Employer also argues that this Region should reach the same result as that reached by the Regional Director of NLRB Region 5 in *RPS, Inc.*, Case 5-RC-14905 (decided August 3, 2000),<sup>7</sup> that the P & D drivers at the Employer’s Bridgeville, Delaware facility were independent contractors and not employees.<sup>8</sup> The Employer asserts that all of the drivers are independent contractors. The Employer also contends that the Linehaul drivers, the temporary drivers

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<sup>7</sup> During the hearing in *RPS, Inc.*, *supra*, the name of the Employer changed from RPS Inc. to FedEx Ground Package System, Inc., reflecting the acquisition of RPS by the FedEx Corporation.

<sup>8</sup> A number of facts recited in the Region 5 Decision in Case 5-RC-14905 are similar to the facts developed in the record herein. As a result, some facts recited in this Decision are similar or identical to those recited in Case 5-RC-14905. Nevertheless, all facts recited in this Decision are based solely on the record made herein.

and the supplemental drivers should be included in a unit with P & D drivers if such a unit is found appropriate.

The Petitioner contends that P & D drivers remain employees as found by the Board in its three previous *Roadway* decisions and that the Linehaul drivers are also employees. The Union stated that it is not seeking to represent the temporary drivers or the supplemental drivers because these drivers are not employed by the Employer.

Having considered the record of testimony and documentary evidence and the post-hearing briefs submitted by the parties, I find: that the P & D drivers and swing drivers are employees within the meaning of Section 2(3) of the Act; that P & D Driver James Profanato and Linehaul Driver Anthony Addison, the two “absentee” drivers who have hired driver-employees to drive their routes, should be excluded from the unit; that the remaining Linehaul driver, George Dupree, is an employee within the meaning of the Act; and that there is sufficient evidence that Dupree shares a community of interest with the P & D drivers to accept both parties’ positions that Linehaul drivers should be combined with P & D drivers in one unit. I also find that the temporary drivers, whom the Employer states work for a temporary agency, are jointly employed by the Employer; since they are employed for periods of indefinite duration and share a community of interests with the P & D and Linehaul drivers, I shall include them in the unit. I further find that the supplemental drivers, who are not employed by the Employer, should be excluded from the unit.

FedEx Ground was established in about 1998, when the FedEx Corporation acquired Roadway Package Systems Inc. The Employer operates a nationwide pickup and delivery system for small packages throughout the United States. Its system is currently comprised of approximately 560 terminal and hub facilities. The Employer generally has a hub satellite operating configuration. Hubs are larger facilities from which packages are sent to other hubs or to terminals for local delivery.

The Employer's business of picking up and delivering small packages is highly competitive. The goal of the Employer is to deliver at least 98% of the packages on the day that they arrive at the terminal or the hub for local delivery.<sup>9</sup> This rate is consistent with the industry standard.

System-wide, FedEx Ground has agreements with approximately 8,600 P & D drivers and 1,300 Linehaul drivers. P & D drivers generally perform the local pickup and delivery of packages, while Linehaul drivers generally handle over-the-road runs between hubs or between hubs and terminals. P & D drivers usually operate delivery vans, while Linehaul drivers operate tractor-trailer rigs. Additionally, FedEx Ground employs at least 22,000 employees nationwide<sup>10</sup> in positions including package handlers and office clericals, none of whom are at issue in this matter.

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<sup>9</sup> Some local routes are run out of hubs, including the Woodbridge, New Jersey hub, the nearest hub to the Fairfield terminal involved in this case.

<sup>10</sup> This number does not include the P&D and Linehaul drivers.

## II. FACTS

### A. THE FAIRFIELD TERMINAL

At the time of the hearing, the Employer's Fairfield terminal had 31 P & D drivers, two Linehaul drivers and two swing drivers. The Employer has assigned to the Fairfield terminal 35 "contractor primary customer service areas," referred to herein as "routes," comprised of one or more postal zip codes or other identifiable geographic boundaries. The Employer has assigned 30 P & D drivers to these routes. Two of the routes are serviced by two temporary drivers, Douglas Dow and Gabor Selmecci.

The Employer has assigned two other routes on a temporary basis to two "supplemental P & D drivers," Mike Selmecci and Mike Rivitz, who are employed by P & D drivers, not by the Employer. There are approximately five other supplemental drivers who work for P & D drivers.<sup>11</sup> One full-time loader and two part-time loaders work for a Linehaul driver.<sup>12</sup> There was no evidence that any driver currently employs a helper, i.e., an employee of a driver who rides along with and assists the driver.

The Employer employs two swing drivers to cover routes serviced by P & D drivers when the latter are unable to provide service. An additional P & D driver, James Profanato, has no "contractor primary customer service area," as the Employer uses that term. Profanato moves trailers of packages from the facility of AstraZeneca, a pharmaceutical company and one of the Employer's customers, to the Fairfield terminal.

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<sup>11</sup> Richard Henry works for Mike Chelmeki; Jorge Barrera works for James Profanato; Saso Ristarski works for Rob Ristarski. A supplemental driver works for Mike Chelmeki.

<sup>12</sup> James Profanato employs Irwin Garcia, a full-time loader, and two part-time loaders.

Profanato also performs linehaul work. He is an absentee driver in that he has hired other employees to perform his driving work.<sup>13</sup>

There are two Linehaul drivers, Anthony Addison and George Dupree. Addison also provides pickup and delivery services in addition to performing linehaul work. He is an absentee driver who employs four employee drivers to perform his work.<sup>14</sup>

Approximately 55 package handlers also work at the Fairfield terminal. Package handlers work either on the pre-load shift for four to five hours or on the outbound shift for six hours. On the pre-load shift, package handlers unload packages from linehaul trucks, sort packages and load them onto delivery vehicles. On the outbound shift, they unload packages from delivery vans and sort and load them onto linehaul trucks. Package handlers work either four or five days a week.

At the terminal, the Employer also employs two quality assurance clerks, one in the morning and one in the evening, an administrative clerk and two secretaries. There is no dispute that the package handlers and the clerical employees should be excluded from any unit found appropriate.

Senior Manager Stephen Gall is responsible for the entire terminal. P & D Service Manager Brian Ascala is responsible for the administrative functions of pickup and delivery, customer contact, coordinating pickup times in conjunction with the sales force and performing “customer service rides” with the drivers. “Customer service rides,” i.e.,

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<sup>13</sup> As discussed further in “Section H. Entrepreneurial Opportunities, 2. Holding Multiple Agreements,” Profanato also occasionally assists his employee loader.

<sup>14</sup> These supplemental drivers are Milton Delgado, Rasheen Gibbs, Rafael Santos and Cesar Santos.

a supervisor riding along with a driver to give him or her advice on performing duties, are described further in this Decision in “Section D. Duties and Responsibilities of Drivers, 2. P & D Drivers.” The Employer also has a Pre-Load Manager, a Sort Manager and a P & D Manager who oversees the P & D Service Managers.

## B. THE OPERATING AGREEMENTS

Each Fairfield P & D driver, as throughout the Employer’s system, has signed a “Pick-Up and Delivery Contractor Operating Agreement” with the Employer. The Fairfield Linehaul drivers have each signed a similar “Linehaul Contractor Operating Agreement.” In this Decision, “the Agreements” or collectively, “the Agreement,” is generally used to refer to the Operating Agreements, unless otherwise specified.

The Employer’s predecessor drafted the original Agreement in 1984. The last major revision to the Agreement occurred in 1994, although there have been minor changes in the Agreement since that date. Each of the Fairfield drivers has signed an Agreement in the form revised in 1994. There was no evidence that drivers can negotiate any of the terms of the Agreement.

Federal regulations require that vehicles not owned by the carrier company be operated pursuant to a written lease. Thus, the Employer drafted the Agreement to serve as an equipment lease, in addition to serving as an operating agreement.

The Agreement begins as follows:

**BACKGROUND STATEMENT.** FedEx Ground is a duly licensed motor carrier engaged in providing a small package information, transportation and delivery service throughout the United States, with connecting international service. The Contractor is an owner-operator of one or more

pieces of trucking equipment suitable for use in such a service. Contractor wants to make this equipment available, together with a qualified operator for each piece of equipment, to provide daily pick-up and delivery service on behalf of FedEx Ground. FedEx Ground wants to provide for package pick-up and delivery services through a network of independent contractors, and, subject to the number of packages tendered to FedEx Ground for shipment, will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment. Contractor wants the advantage of operating within a system that will provide access to national accounts and the benefits of added revenues associated with shipments picked up and delivered by other contractors throughout the FedEx Ground system. In order to get that advantage, Contractor is willing to commit to provide daily pick-up and delivery service, and to conduct his/her business so that it can be identified as being a part of the FedEx Ground system. Both FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contractor and not as an employee of FedEx Ground for any purpose. Therefore, this Agreement will set forth the mutual business objectives of the two parties intended to be served by this Agreement – which are the results the Contractor agrees to seek to achieve – but the manner and means of reaching these results are within the discretion of the Contractor, and no officer or employee of FedEx Ground shall have the authority to impose any term or condition on Contractor or on Contractor's continued operation which is contrary to this understanding.

FedEx Ground asserts that each P & D driver's route is identified through a separate, individualized addendum to each driver's Agreement or, if not, by a "load chart," not part of the Agreement, used by a package handler to load a delivery van at the terminal. However, testimony during the hearing established that, at present, at the Fairfield terminal, the addendum to each P & D driver's Agreement or the load chart used to load his or her truck does not in all cases accurately reflect the route served by the driver. Thus, changes in routes are not typically recorded in the addenda. One P & D driver's Agreement describes the work to be performed by a P & D driver as "tractor

related work.” Additionally, a P & D driver may have a linehaul addendum and a Linehaul driver may have a P & D addendum.

Section 11 of the P & D Agreement and Section 8 of the Linehaul Agreement,<sup>15</sup> “Term of Agreement,” allow the driver to elect a one, two, or three year term for the Agreement. Section 11.2 of the P & D Agreement and Section 8.2 of the Linehaul Agreement, “Renewal Terms,” provide for automatic renewal for successive terms of one year each after expiration of the initial term, unless either party provides the other party of 30-days notice of non-renewal.

Breach of the Agreement results in its termination pursuant to Section 12 of the P & D Agreement and Section 9 of the Linehaul Agreement, “Termination Provisions,” which list a number of eventualities causing termination. These contingencies include misconduct, reckless or willful negligent operation of equipment, failure to perform contractual obligation by either party, terminal closing or decline in business. The Employer’s “Contractor Termination Guidelines” require an internal review by the Employer’s managers of a termination decision. System-wide Manager of Contract Relations Timothy Edmonds testified that the Employer’s practice is to give written notice of termination, but not to give a written statement of the reason for a termination. The Employer’s Termination Guidelines instruct that its senior terminal managers inform drivers of the reason for termination. While Edmonds testified that in practice, a terminated driver is given a verbal reason for the Employer’s action at the time of the

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<sup>15</sup> In this Decision, when two sections are referred to together, one in the P & D Agreement and one in the Linehaul Agreement, the terms of that Section are identical in both Agreements.

action, former Driver Rudy Trbovich testified that the Employer terminated him in April 2004 without giving him a reason. Former Driver Angel Bueno testified that despite requesting a letter concerning his July 2004 termination, he has not received any writing, although he was orally informed of his termination and the reason for it.

Edmonds also testified that a driver could appeal a termination decision to various managers. Section 12.3 of the P & D Agreement and Section 9.3 of the Linehaul Agreement provide for arbitration by the American Arbitration Association of a dispute over a termination decision.

Other pertinent sections of the Agreement are discussed below in this Decision.

### C. DUTIES AND RESPONSIBILITIES OF DRIVERS

#### 1. General

Of substantial concern to the Employer is its “image,” which Edmonds testified is “part of [its] product.” Section 1.10 of the P & D Agreement and Section 1.11 of the Linehaul Agreement, “Agreed Standard of Service,” require a driver to “[f]oster the professional image and good reputation of FedEx Ground and [the] Contractor” with the Employer’s customers. Pursuant to the Agreement, this image expressly includes appearance standards monitored by the Employer. Section 1.12 of both Agreements, “Operator and Equipment Appearance Standard,” referenced by the “Agreed Standard of Service” sections, states, “Contractor acknowledges that the presentation of a consistent image . . . is essential in order to be competitive . . . and to permit recognition and prompt access to customers’ places of business.” Section 1.12 requires all drivers and anyone

driving for or assisting them to wear approved uniforms and have a personal appearance “consistent with reasonable standards of good order as maintained by competitors and promulgated from time to time by FedEx Ground.” Drivers must, while in the Employer’s service, wear a FedEx Ground uniform maintained in “good condition.” The standard FedEx Ground uniform consists of a uniform pullover shirt; uniform pants or shorts; uniform jackets, available as lined, unlined or a rain jacket; dark shoes and socks provided by the driver; and an Employer-approved FedEx cap. The FedEx uniform garments are purple and green with the FedEx logo. Drivers can obtain uniforms by subscribing to a uniform service or by purchasing uniforms from an approved manufacturer, although required pants, shoes and socks can be purchased from most retail dealers. The contractual personal appearance requirements include cleanliness and prohibit visible tattoos, earrings, hair falling below the middle of the ear, moustaches beyond the corners of the mouth and sloppiness.

The “Operator and Equipment Appearance Standard” also requires that trucks and other equipment be clean and free from body damage and extraneous markings. According to Edmonds, the intent of the personal and vehicle appearance requirements is to promote public identification of FedEx Ground personnel and equipment with the Employer’s enterprise. In this way, according to the Employer’s witness, its appearance standards are intended to encourage customer comfort with a familiar product. Also, according to the Employer, such identification increases a driver’s efficiency by facilitating access by the driver to a customer’s premises. The Employer may prohibit a

driver from driving on a particular day if he or she is in violation of its appearance standards.

Section 1.15 of both Agreements, “Discretion of Contractor to Determine Method and Means of Meeting Business Objectives,” states that the Employer does not prescribe hours or work, breaks, routes or details of performance. Section 1.15 also specifies that drivers “shall be responsible for exercising independent discretion and judgment to achieve the business objectives . . .” and that the Employer shall have no authority as to the “manner and means” employed to obtain objectives and results.

As discussed below in this Decision in connection with the specific responsibilities of P & D and Linehaul drivers, the Employer’s practical constraints and policies limit the hours and details of a driver’s performance and his or her discretion and judgment. In addition, the Employer has policies applicable to all drivers that generally impose constraints upon them. Section 1.10 of the P & D Agreement and Section 1.11 of the Linehaul Agreement, “Agreed Standard of Service” require drivers to perform services “using methods that are designed to avoid theft, loss and damage,” so that, according to the Employer’s witness, the driver promotes customer confidence in the Employer’s product. The “Agreed Standard of Service” Sections of both Agreements require drivers to transmit electronic information concerning his or her services so that a customer can track a particular shipment.

The Employer’s Contractor Termination Guidelines require management to inform a driver of “a record of poor performance, evidenced by repeated customer complaints,

failure to service his route, integrity issues, failure to follow contractual obligations and procedures, unsafe driving, DOT and/or maintenance violations or other such problems.” This procedure is called a “Contract Discussion” and should result in “a plan” that accomplishes the Employer’s “goal,” to which the driver makes a “commitment.” One Fairfield driver, Angel Bueno, testified that he was not given any notice or an opportunity to put together a plan before the Employer terminated his contract in July 2004. The Employer’s Managing Director for the New York Metro Region, Darryl Sherman, testified that within days after Bueno received a letter and was orally informed by Sherman that his contract was in jeopardy of termination, Sherman decided to terminate him. Bueno worked for two more weeks without notice of his termination while the Employer reviewed and approved Sherman’s decision.

## 2. P & D Drivers

The Fairfield P & D drivers are responsible for daily pickup and delivery service within their assigned routes. A P & D driver cannot refuse to pick up, to deliver or to arrange for pickup and delivery of packages in his or her route. The Employer determines the size and configuration of a route when the route is first established.

The Employer requires the P & D drivers to leave from and return to the terminal each day. P & D drivers must have their trucks at the terminal by a designated time to be loaded by the package handlers. Usually, drivers must have their trucks at the terminal before 5 AM in time to be loaded, but at times must have them there as early as 2 AM. Most of the P & D drivers leave their delivery vehicles at the terminal overnight, to be

available for loading by the handlers. While the P & D driver may load the van him or herself, the evidence shows that this option is not practical because it takes approximately two to three hours to load a vehicle. All of the Fairfield P & D drivers use the Employer's loading operation. The P & D drivers can create a load chart to instruct package handlers how the driver wants his or her van to be loaded. For example, P & D Driver Mark Galliano has instructed that his truck be loaded with the first stops in the front. A Service Manager advises drivers of any new stops on his or her route.

After loading is complete, P & D drivers obtain their scanners from terminal management. Drivers use scanners to track the movement of packages and to communicate such movement to the Employer. Prior to leaving the terminal, the Employer also gives each P & D driver a pouch with paperwork listing the stops to be made on the driver's route. A P & D driver testified that drivers wait in a line for, on average, about 25 minutes to obtain their scanners and pouches.<sup>16</sup> Most Fairfield P & D drivers leave the terminal between 7 AM and 8:15 AM.

P & D drivers exercise discretion in selecting how to travel on their assigned routes and in the sequence and timing of pickups and deliveries. However, such discretion is circumscribed by certain of the Employer's policies and practices, as well as Department of Transportation ("DOT") Federal Motor Carrier Safety Regulations, which

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<sup>16</sup> The Employer does not delay distributing scanners in order to control the drivers' time of departure from the terminal. One driver testified that such delays have been caused by a breakdown of an inbound linehaul truck. On other occasions, delays were caused by managers' involvement in assisting the unloading of trailers prior to distributing scanners.

restrict drivers to working 12 hours a day or 60 hours a week. P & D drivers generally work approximately 60-hour weeks.

Section 1.10 of the P & D Agreement, "Agreed Standard of Service," requires drivers to make daily pickups and deliveries in their assigned routes on days and at times that are compatible with the schedules and requirements of the customer.<sup>17</sup> A P & D driver's discretion in determining his or her route is further limited by the Employer's pre-scheduling specific times for pickups and deliveries with its customers. As examples, the Employer has agreed with major retailer accounts in the Fairfield area, such as Wal-Mart, K-Mart and Bed, Bath and Beyond, that their packages will be delivered in the morning. In addition, a driver may be required to get to a customer for a pickup within a "window" of between one and one and a half hours. Testimony by different Employer managers varied as to whether a driver can negotiate with a customer as to the hours of service required by the customer. Manager of Contractor Relations Edmonds asserted that the driver must accommodate the customer. Fairfield Terminal Senior Manager Gall testified that the "pickup window" is negotiated between the customer and the driver, with the involvement of an account representative.

When delivering a package, the P & D driver scans its bar code. Occasionally, drivers collect funds for COD packages. Drivers also pick up packages on their routes based on arrangements made in advance with shipping customers. If a driver is unable to pick up packages at the time designated by the customer, he or she calls the P & D

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<sup>17</sup> An Employer representative testified that in an emergency a driver may leave a route without coverage.

manager to arrange for another driver to perform the pickup. In certain instances involving large volume customers, a driver drops off a trailer, referred to as a “spotted” trailer, at a customer’s facility, for loading and or unloading, and picks it up later, usually leaving an empty trailer there.

Section 1.10 further provides that “on any day where the volume of packages available for pick-up or delivery in the driver’s route exceeds the volume that Contractor can reasonably be expected to handle on such day, FedEx Ground may reassign a portion of such packages to another contractor.” The Employer has a “Flex Program,” described in Section 9 of the Agreement, in which it reassigns or “flexes” packages to another P & D driver if he or she has elected to participate in the Flex Program. Participation in the Flex Program is voluntary, although there was testimony by a driver that drivers believe they are under pressure to enroll in the program. Under the Flex Program, participating drivers agree to accept packages from outside their route for delivery and/or pickup. The Fairfield managers place flexed packages on a driver’s truck. The flexed packages come from drivers who are reportedly temporarily over capacity. However, Terminal Manager Gall testified that the Employer flexed packages to P & D driver Bueno from East Hanover to Bueno’s route, off and on, for seven or eight months. The Program sets forth fees for flexing, discussed below in this Decision, in “Section G. Compensation and Other Support.” The Employer’s Manual advises managers that drivers should not make their own flex decisions. However, testimony revealed that drivers arrange informal

flexes on a daily basis. P & D Driver Dave Cutrona testified that he and another driver regularly flex packages to each other without charging each other for the flex.

Section 1.11 of the P & D Agreement, “Refused or Returned Shipments,” provides that packages that the P & D driver cannot deliver or which are refused must be returned to the terminal that day with electronic or manual documentation.

The Employer requires P & D drivers to return their vehicles to the terminal by 8 PM each day to return picked-up packages, along with “check-in materials,” consisting of paperwork which must be completed, cash received and scanners. A computer at the terminal collects information from the scanners. Drivers must record their hours. Most Fairfield P & D drivers return to the terminal between 5 and 8 PM. Package handlers load these packages onto trailers driven by Linehaul drivers to various hubs, including the Woodbridge hub. The first Linehaul driver leaves the Fairfield terminal with a trailer at 8:30 PM. Package handlers at the hubs sort packages, after which packages are sent to other hubs and terminals, including the Fairfield terminal.

The Employer’s customers typically call the Employer if they are dissatisfied with a P & D driver’s service.<sup>18</sup> Terminal managers investigate customer complaints, including discussing the complaint with the driver involved. The manager will get back to the customer. The driver may contact the customer as well. If the manager determines that the complaint is valid, he or she will report it to the Employer’s Customer Service Department, which processes the report to the Contractor Relations Department.

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<sup>18</sup> As discussed herein in “Section H. Proprietary Interest, 1. P & D Drivers, a. Customer Accounts,” customer accounts are the property of the Employer, not the drivers.

Complaints reports are part of a driver's record. The Employer has a program for P & D drivers called "Customers Are Really Everything (C.A.R.E.) Program" which is "a method of promoting and reinforcing the behaviors among contractors and their employees that are necessary to fulfill Fed Ex's service culture commitment through customer contact." The Employer describes the program as a method for a contractor to expunge a complaint from his or her record and to become eligible for bonuses called "Contractor Customer Service" payments, discussed below in "Section G. Compensation and Other Support." The C.A.R.E. Program consists of a video and manual which "outline the desired behaviors in preventing the six most common complaints received from customers regarding contractors," and a "quick reference guide that can be used in conjunction with a business discussion to instruct and test drivers on customer service and problem-solving." The program includes an exam. By participating in the program, a P & D driver can expunge a customer complaint for one rolling year for purposes of determining bonuses.

The Employer's Engineering Department monitors the number of packages or stops in a P & D driver's route, based on the information obtained from the driver's scanner. The Employer instructs its managers to review the P & D driver's route based on the number of stops and packages handled, stating as a guideline, "Most importantly a contractor's work area should provide a full day's work." Section 1.14 of the P & D Agreement permits Employer supervisors or managers to conduct "customer service rides" along with the driver four times annually "to verify that [the] Contractor is meeting

the standards of customer service provided in th[e] Agreement.” The rides may result in suggestions to the driver, such as alternate routes or package handling procedures. The driver may choose to ignore any or all of a manager’s suggestions.

The Employer may determine that, based on the volume of packages handled by a P & D driver, the driver is underutilized. Manager of Contract Relations Edmonds testified that the authority for such a determination is the Background Statement to the Agreement, which obligates the driver “to make full use of [the] Contractor’s equipment,” and Section 1.10 of the P & D Agreement, “Agreed Standards of Service,” which requires the driver to “[m]ake reasonable efforts to retain and increase the base of shippers and consignees served and the number of packages handled per shipper within Contractor’s Primary Service Area.”

If the Employer determines through its analysis and/or observation that a P & D driver is below “capacity,” the Employer may “reconfigure” the driver’s route, a process discussed below in this Decision at “Section H. Proprietary Interest.” By operation of Section 5.3 of the P & D Agreement, “Recognition of Contractor’s Proprietary Interest in Customers Served,” the driver who gains territory is obligated to pay the driver from whose route the work was taken; if the two drivers are not able to agree upon a payment, they use calculations set forth in standard Addendum 5 to the P & D Agreement.

In 1999, after the Employer determined that the Fairfield P & D drivers were performing below standard, it assigned Nunzio DiSavino to the terminal as Terminal Manager to improve customer satisfaction. DiSavino, who held the position of Fairfield

Terminal Manager through June 2002, testified that “under capacity” means “a service area that has available DOT hours and/or available space on the [...] van.” In making this assessment, the manager may determine that a driver is not working hard enough. DiSavino stated that he would consider a driver “underutilized” if he wanted to attend his child’s softball game in the afternoon or wanted to use part of the day for a business other than that of the Employer. However, P & D Driver Mark Galliano testified that he watched all 35 of his daughter’s softball games in 2004, taking two hours to commute to and from and watch each game.

DiSavino also testified that after spending time at the terminal, he determined that a number of routes were “over capacity.” He testified that many of the P & D drivers did not want to utilize an option used elsewhere in the Employer’s system of arranging for another driver to drive a “supplemental” van to assist the P & D driver in servicing his or her route. Therefore, DiSavino arranged for a number of the Fairfield routes to be reconfigured to remove portions of those routes, resulting in a net gain of one route. To further improve “customer satisfaction,” he instituted a “daily interaction” between the P & D drivers and terminal management, during which management would review with each driver all customer messages he or she received. After the discussion, terminal management would communicate directly with the customer or another driver to resolve the issue, instead of the previous practice of leaving this function to the driver who received the message.

The P & D Agreement includes the “FedEx Ground Safe Driving Program.” This program requires the driver to conform to all applicable federal, state and local laws when operating his or her vehicle. Breach of that obligation is grounds for termination of the Agreement. The Safe Driving Program includes “FedEx Ground Driver Safety Standards” consisting of a list of 25 prohibited acts or omissions by a driver related to safe driving. Safety standard violations can cause a driver to be disqualified from the free insurance program, discussed below in this Decision in “Section F. Insurance and Liability,” although the Employer may permit him or her to continue to drive.

### 3. Linehaul Drivers

The Employer requires linehaul vehicles to be at its facility by 7:30 PM. Linehaul drivers drive from about 9 PM to 6 AM. The Linehaul Agreement lists in Section 1.14, “Contractor’s Primary Safety Obligation,” nineteen “acts and omissions” that result in contract termination, indemnity termination or driver disqualification, as set forth in the Section, including driving under the influence, refusing to submit to a drug or alcohol test administered by a law enforcement official, etc. This list is similar to the FedEx Ground Safety Standards set forth in the P & D Agreement.

## D. RECRUITMENT, QUALIFICATIONS AND TRAINING OF DRIVERS

### 1. P & D Drivers

FedEx Ground recruits some of its P & D drivers through newspaper advertisements for owner-operators and by participating in job fairs. Some P& D drivers

have been referred to the Employer by other P & D drivers or by terminal management. Some drivers begin as temporary or supplemental drivers.

The Employer has a promotional brochure that it distributes to potential drivers; the brochure states that “[e]stablishing a proprietary interest as a contractor requires a minimal investment with limited risk” and that the “company has several assistance programs available to help make the process even easier.”<sup>19</sup> P & D driver candidates submit an application to FedEx Ground. Some of the candidates spend a day riding along with a P & D driver, who volunteers to take the candidate along with him or her.

The required qualifications for P & D drivers go beyond those imposed by the DOT. FedEx Ground and the DOT require the candidate to pass a physical, drug and alcohol test and to be 21 years old or older. Although not required by the DOT, the Employer performs a criminal background check and verifies the candidate’s employment record for the previous five to ten years. The parties disputed whether the Employer requires the candidate to pass a credit check. Two drivers testified they were told that they had to pass a credit check. The Employer denies this requirement. Its “Contractor Leasing and Driver Qualifications Policy,” according to Manager of Contract Relations Edmonds, requires an authorization under the Fair Credit Reporting Act in order for the Employer to conduct a background check, not an actual credit check.

The Employer prefers, but does not require, one year of commercial driving experience. The Employer offers driver-training courses to interested P & D candidates

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<sup>19</sup> The Employer’s assistance programs are discussed herein in “Section G. Compensation and Other Support.”

and temporary drivers who lack driving experience. The training course runs 15 days and includes classroom and behind-the-wheel instruction. Drivers testified at the hearing that they were required to start as temporary drivers and undergo training, without receiving pay for time spent in training.

Driver training includes how to provide services, including use of the scanner to track package shipment and safety procedures. During training, the Employer tells the driver the specific expectations of customers in the driver's route. This includes where to leave a package, whether to obtain a customer's signature and whether to collect funds from the customer. The Employer uses certain codes to designate its packages and explains these to the driver. The Employer instructs the driver on the required reports of stops made and packages picked-up and delivered during the day, as well as required DOT forms and logs showing the number of miles driven per day. During training, the Employer advises its drivers to keep their van doors locked, not to leave their engines running and not to leave their keys in the delivery truck.

According to Manager of Contractor Relations Edmonds, FedEx Ground spends "a considerable amount of time going over the agreement with [the contractors]" so that the driver is instructed as to the services expected of him or her. However, at the Fairfield terminal, some drivers testified that they had signed Agreements after receiving little or no input from the Employer concerning the terms of the Agreement.

Most of the P & D drivers who testified at the hearing and who started at the Fairfield terminal were hired by the Employer to begin as temporary drivers.<sup>20</sup> When P & D Driver Daniel Trajanoski applied to FedEx Ground in 1991, Terminal Manager DiSavino told him that he would have to prove himself as a temporary driver before being given the opportunity to be a P & D driver. An Employer witness testified that temporary drivers worked for employment agencies, although the Employer hired the temporary drivers and required them to undergo training. Temporary drivers had no contact with the temporary agency other than to receive their payment and file their paperwork. Temporary drivers are paid by the hour or weekly. Training has included riding along with an Employer Service Manager for two weeks to receive instruction in how to make pickups and deliveries. Such instruction has included, according to one driver's testimony, being courteous to customers, e.g., say good morning, afternoon or night and thank customers for signing the scanner. The manager also instructed the driver on completing required paperwork and gave hints on locating addresses. Training for some of the temporary drivers included a five-day training program in driving and safety called "the Smith System" conducted by an Employer Ground Safety Manager at the Employer's Woodbridge hub.

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<sup>20</sup> Fourteen current and former drivers who worked at the Fairfield terminal testified at the hearing. The Employer called Anthony Addison, Dennis Boyko, Dave Cutrona, Dan Drummond, Mark Galliano, Vijay Gampat, Mark Josephin, Zoran Lazaroski, David Penicaro, Daniel Trajanoski and James Profanato as witnesses. (Galliano appeared pursuant to a subpoena.) The Union called Angel Bueno, Carl Fulco and Rudy Trbovich. Of the drivers who testified, Boyko, Bueno, Cutrona, Fulco, Lazaroski, Trajanoski, and Trbovich started as temporary drivers. Drummond and Galliano started as supplemental drivers. Josephin, Profanato and Penicaro bought their routes at the outset. Vijay Gampat started at the Newark terminal. Anthony Addison, a Linehaul driver, started as a supplemental driver.

## 2. All Drivers

The “FedEx Ground Safe Driving Program” in the P & D Agreement lists 19 “Driver Eligibility Requirements.”<sup>21</sup> These requirements are similar to those set forth in Section 2.3, “Driver Eligibility Requirements,” in the Linehaul Agreement and concern driving experience, licenses, accident record, criminal record and other related topics. Non-compliance with a Driver Eligibility Requirement completely disqualifies an individual from driving in the Employer’s system.

The Employer requires a Terminal Manager or his or her designated coordinator to hold formal and informal periodic safety meetings at a terminal. The DOT and the Occupational Safety and Health Administration require periodic formal safety meetings. The Employer also holds informal, weekly five-minute safety meetings. Its goal is to have 90% of its drivers present at safety meetings. The Employer records attendance at safety meetings on a sign-in sheet. Manager of Contract Relations Edmonds testified that attendance at safety meetings is not mandatory.

## E. VEHICLES AND OTHER EQUIPMENT

### 1. All Drivers

Drivers lease or own their vehicles, new or used, at their own expense. Section 1.1, “Power Equipment,” provides that the drivers must certify that their equipment meets all applicable government regulations. It states further that the selection and replacement

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<sup>21</sup> The Driver Eligibility Requirements and the Driver Safety Standards, discussed *supra* in connection with P & D driver responsibilities, overlap in many respects but are not co-extensive.

of the equipment is within the driver's discretion, "subject to the determination" of the Employer of its "suitability for the service called for in this Agreement."

Under Section 1.2 of the Agreement, "Equipment Maintenance," the driver agrees to maintain the equipment in accordance with applicable government regulations. The driver is required to provide "proof of timely maintenance" to the Employer. The periodic maintenance schedule recommended by the equipment manufacturer is deemed to meet the Employer's maintenance requirements, absent specific regulations.

Some drivers perform some or all of their equipment maintenance, but most take their equipment to local dealers or service companies. Independent mechanics have made arrangements to come to some terminals to perform maintenance and repairs. Further, under this section, if the equipment is defective, the driver must, at his or her expense, provide suitable alternative equipment. Generally, this means that when a truck is out of service for repairs, the driver rents a replacement at his or her own cost, usually from a national firm such as Ryder.

Section 1.3, "Operating Expenses," requires the driver to bear all equipment costs and all expenses of operating the vehicle including maintenance, fuel, oil, taxes, tires, repairs, insurance coverage, license fees, depreciation and tolls.

Under Section 1.4, "Operation of the Equipment," the driver agrees to operate the equipment and to determine "the methods, manner and means" of performing his or her obligations under the Agreement. The Employer, however, is considered to have "exclusive possession, use and control" of the equipment when it is used to perform

services under the Agreement, but has no right to operate the equipment without express permission of the owner, except for moving the equipment around the Employer's yard. The Employer included this provision to be consistent with the regulations of the former Interstate Commerce Commission requiring the carrier to retain exclusive possession, use and control of its vehicles being used to perform services for the carrier and to make clear that the Employer is liable for damage or injury caused by its vehicles. This section also holds the Employer harmless for any liability if the equipment is used for non-Employer purposes, including any separate business of the driver.

Federal Motor Carrier Safety Regulations require equipment to be identified with the carrier's name and DOT number, in this case that of the Employer. Section 1.5 of the P & D Agreement and Section 1.6 of the Linehaul Agreement, "Equipment Identification While in FedEx Ground's Service," provide that the equipment will be marked with specified colors, logos, insignia, etc., to identify it as a FedEx Ground vehicle while in the Employer's service. The Employer conceded in testimony that its "identification scheme" includes requirements beyond those imposed by the DOT. The Employer sends drivers to a service to apply decals with its logo to the vans. Each truck has logos of the same size, pursuant to government regulation. A driver may state his or her name on his or her truck and designate that he or she is the owner operator. Several Fairfield drivers state on their trucks that they are owner-operators. DOT regulations bar the driver from placing on the vehicle any other logo or marking identifying any business other than that of the Employer.

Section 1.6 of the P & D Agreement and Section 1.7 of the Linehaul Agreement, “Licensing,” require the driver to comply with state registration and licensing regulations. Section 1.7 of the P & D Agreement and Section 1.8 of the Linehaul Agreement, “Logs and Reports,” require drivers to prepare logs and inspection reports required by law and to file the originals with the Employer. Under Section 1.8 of the P & D Agreement and Section 1.9 of the Linehaul Agreement, “Shipping Documents and Collections,” drivers agree to prepare various shipping documents.

## 2. P & D Drivers

While the Employer does not specify the size of a P & D driver’s van, it does require that the vehicle be of sufficient size, as determined by the Employer, to service the driver’s route. The Employer expects a vehicle to have interior shelving. Drivers have, at their option, installed fans or stereo systems in their vans.

Most drivers acquire their equipment from other drivers. Vans are also available for sale, but not by lease, from the Employer. A typical van, an International P1000, currently costs about \$42,000. The Employer is a licensed dealership in Pennsylvania, where it provides pickup and delivery vans for lease. Former P & D driver Angel Bueno testified that when he started, the Employer arranged for a new van to be delivered to the Fairfield terminal for his purchase. Former P & D Driver Carl Fulco purchased a straight truck from the Employer for \$36,404 in 2001, rather than purchase the truck from a truck dealer at about \$52,000.

The Employer refers drivers to finance companies should they need financing. However, a driver may obtain financing from any source available to him or her. The Employer plays no other role in the financing of a vehicle. The Employer also maintains a fleet of vehicles available for rent or provides access to vehicles provided by rental agencies for use by drivers in the event of a mechanical breakdown or when the driver's vehicle is otherwise out of service. Drivers are responsible for the cost of replacement vehicles in these circumstances. P & D Driver Mark Galliano testified that he has rented vans from other drivers for \$50 a day plus fuel when his vehicle was out of service.

Lease-purchase arrangements are common. Drivers who are selling their routes frequently sell their vehicles to the route purchaser. Other drivers buy new equipment from various manufacturers. The driver is responsible for any financing, which typically comes from banks, family or individual owners selling the equipment. A common source of lease or lease-purchase vehicles is Bush Leasing. There are pamphlets for Bush Leasing at the Fairfield Terminal. Bush Leasing has vans available that meet all of the Employer's specifications.

Section 1.13, "Communications Equipment," requires drivers to purchase or lease necessary electronic equipment. Currently, the only equipment needed is the scanner. While there is the theoretical possibility that the equipment can be purchased outright, there is no ready market for its sale and no service available on purchased equipment. Drivers invariably secure the equipment through the Employer's "Business Support Package" described below "in Section G. Compensation and Other Support."

### 3. Linehaul Drivers

James Profanato testified that the purchase price for a Freightliner tractor, which he obtained in June 2004, was about \$60,000. The Linehaul Agreement obligates the Employer to provide any trailers or dollies used by the driver.

### F. INSURANCE AND LIABILITY

Section 3 of the Agreement, “Insurance and Indemnities,” includes provisions regarding different types of insurance. Section 3.1, “Non-trucking Liability Coverage- Contractor Responsibility,” requires drivers to purchase public liability and property damage coverage for use of the vehicle when not in the service of the Employer. The driver may obtain this insurance from any source, but it must be approved by the Employer. The Employer directs its drivers to an insurance company, Protective Insurance, in Indianapolis, Indiana. The Employer is not connected to Protective Insurance in any other way. Types and minimum coverage are listed in the section and in an addendum to the agreement.

Section 3.2, “Public Liability—FedEx Ground’s Responsibility,” generally obligates the Employer to maintain insurance coverage for public liability. However, pursuant to Section 3.3, “Public Liability—Contractor Responsibility,” the driver must generally cover the first \$1,000 of an accident and is required to obtain insurance for such liability consistent with standards specified by the Employer in the Agreement. A driver may reduce his or her liability by maintaining an accident-free driving record. Conversely, a driver may increase his or her liability. Section 3.1 provides that the

Employer “in its sole discretion” may determine that the driver has not met its Safe Driving Standards and discontinue coverage. In such an event, short of terminating the Agreement, the Employer may require that the driver indemnify it for the entire public liability associated with an accident. Drivers whom the Employer unilaterally decides do not meet its standards have no choice but to go to the open market for coverage demanded by the Employer. In 2001, P & D Driver Anthony Profanato lost his Employer-provided insurance because of a traffic violation; as a result, he had to purchase his own general liability insurance for a year for \$14,000. At the end of the year, the Employer permitted him to resume use of its fleet insurance.

Section 3.4, “FedEx Ground’s Non-Liability for Equipment,” exempts the Employer from all liability for damage to the driver’s equipment including collision and depreciation, except that caused by the Employer. Section 3.5, “Contractor’s Responsibility for Certain Losses,” has a number of provisions which, in effect, create deductibles for various types of losses, including losses due to accidents, package damage or package losses and a variety of other types of losses under its “self-coverage.” The accident loss deductible is on a sliding scale based on the driver’s accident record. A driver can be held liable for up to \$1,000 for the loss of each package.

In Section 3.6, “Work Accident and Workers Compensation,” the Employer requires the driver to obtain either work accident or workers compensation insurance that meets with the Employer’s approval. Minimums are specified in the section and in an

addendum. The Agreement provides the option of obtaining the insurance through coverage negotiated by the Employer.

In Section 1.9 of the P & D Agreement and Section 1.10 of the Linehaul Agreement, "Contractor Performance Escrow Account," the Employer requires each driver to deposit with it \$1,000 in an interest-bearing escrow account. Each week, the Employer deducts \$50 from each Linehaul driver and \$25 from each P & D driver until the driver's deposit is obtained. The escrowed amount is used by the Employer to cover any liabilities of the driver, such as repair to a vehicle, that are imposed upon the Employer if the driver leaves without satisfying such obligation. The escrow account functions like a security deposit. The escrowed amount is returned upon fulfillment by the driver of his or her obligation following termination of his or her contract.

## G. COMPENSATION AND OTHER SUPPORT

### 1. P & D Drivers

Section 4 of the P & D Agreement, "Settlement With Contractor," describes how P & D drivers are paid. Section 4.1, "Settlement for Services Performed," provides for a weekly "settlement" or payment and describes its components. An Employer witness estimated that at the Fairfield terminal, typical annual gross receipts for a driver range from \$70,000 to \$90,000. An addendum to the Agreement with attachments details the amounts of various payments. Each driver completes a daily settlement record; this record functions as a bill for services from the P & D driver to the Employer. The Employer guarantees a \$750 weekly settlement for drivers who work five days a week.

The P & D drivers' compensation has five basic components. The first, "Package Pick-Up and Delivery Settlement," is a non-negotiable amount paid per stop and per package handled. The rate per stop, either pickup or delivery, is \$1.23 per stop. The rate for each package picked up is on a sliding scale, depending on the number of packages picked up per stop, beginning at 17 cents and ranging downward as volume increases. The Employer pays 25 cents for each package delivered by a driver in a van, with a higher rate for straight truck and tractor-trailer deliveries. There are also additional payments for oversized packages, CODs and a variety of special pickups and deliveries, including payments for spotted trailers. The spotted trailer payments vary from driver to driver. P & D Driver James Profanato testified that he negotiated for a rate of 6 cents a package for spotted trailer work.

Van mileage over 200 miles per day is compensated beginning at 25 cents per mile and increasing to 35 cents per mile for mileage over 300 miles per day. Tractor-trailers and spotted trailers have a separate mileage schedule.

The second component, "Contractor and Van Availability Settlement," is the uniform and non-negotiable daily payment for making a delivery truck and driver available, with enhanced payments on days before and after holidays. A "van availability" payment of \$45 a day is paid for the principal vehicle in each route, regardless of stops, pickups or deliveries. Bonus "van availability" payments are made for days before and after certain designated holidays.

The third component, “Temporary Core Zone Density Settlement,” is, according to Contract Relations Manager Edmonds, an inducement to drivers to work in less densely populated areas. The Employer determines this payment based on the density of the route area. The core zone settlement decreases as the number of customers within the zone increases. It is called “temporary,” according to Edmonds, because it fluctuates. The Employer’s Engineering Department calculates this component of compensation. Fairfield Terminal Senior Manager Gall was unable to explain the calculation and testified that he knew of no document explaining it. The core zone payment may be between 20 and 25 per cent of a driver’s daily settlement. P & D Driver Dave Cutrona testified that his daily settlement, including the core zone settlement, averaged around \$280 per day, of which his core zone settlement was approximately \$65 per day. Cutrona testified that the Employer increased his core zone payment after he presented figures to management showing that the volume in his route had increased.

The fourth component is a “Flex Fee” under the Flex Program described in Section 9 of the Agreement. Drivers who complete package pickups and deliveries for their route may be assigned additional packages under the Flex Program. A “flex fee” of \$7.50 per day is paid to P & D drivers who have elected to participate in the Flex Program, whether or not they are actually assigned any deliveries under the Flex Program. If they are “flexed” packages, they receive the regular stop and package rate for the packages, in addition to the flex payment. The driver who actually picks up or

delivers a package receives the package and stop settlement payment, regardless of to whose route the packages belong.

The fifth component is the “Quarterly Performance Settlement,” under which P & D drivers with more than one year of service can receive additional payment if they have performed their contract obligations. The payment is set at 2.25% of the driver’s quarterly gross payment, not to exceed \$2,000 per year. The quarterly payment can be taken in cash or put into an HR10 retirement plan<sup>22</sup> or into a Service Guarantee Account, a type of savings account. Both funds are discussed below.

The Employer makes supplemental payments to drivers who use “approved” helpers. The payment is made after an individually established threshold of stops is reached, with different thresholds calling for payments of \$15, \$20, or \$30.

Section 6, “Contractor Customer Service (CCS) Payments,” provides for bonuses. The Employer pays bonuses to P & D drivers who achieve individual customer service and safety goals and whose terminals achieve service goals “all as determined by FedEx Ground.” CCS payments range from \$205 to \$260 per Employer accounting period,<sup>23</sup> depending on length of service. Payments in the driver’s weekly settlement can be made into the driver’s HR-10 retirement account or put into a Service Guarantee Account.

Section 7, “Business Support Package,” provides for a theoretically elective package of goods and services. All P & D drivers, however, subscribe to the Business Support Package because it includes a lease of the required scanner, making it easier to

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<sup>22</sup> “HR 10” stands for “House Resolution 10” and refers to a retirement plan for owners of small businesses.

<sup>23</sup> The term of this period was not evident from the record.

obtain the equipment and service of the scanner than to otherwise secure the equipment and service. The Package also includes a clean uniform provided daily, vehicle washing at the facility once or twice a week, an annual DOT inspection, drug testing to meet DOT requirements and discounts on tires, batteries and bumpers. The charge for the package, \$8 a day, is deducted from a driver's weekly settlement check

The Employer does not provide P & D drivers with paid holidays or vacations; rather, it has an optional "Time-Off Program." For an additional \$3 per day, FedEx Ground will supply a replacement driver and vehicle to cover the P & D driver's route for up to two weeks per year. If a driver does not participate in the Program, he or she is responsible for providing a replacement driver and vehicle in the event of illness, injury, vacation or other leave. The absent driver receives no settlement for his or her route. The replacement drivers are known as the "swing" drivers. The settlement for swing drivers is the same as for route drivers, except that swing drivers are paid an additional 25 cents premium per stop and may receive an additional weekly service bonus in the Employer's discretion of \$99.

The Employer provides P & D drivers with a "Start-Up Loan Program," extending an interest-free loan to new P & D drivers for the first 13 weeks of their contract. The loan is paid back by a \$50 maximum deduction from a driver's weekly settlement if the settlement exceeds \$750, which, as noted above, is the weekly guaranteed settlement for drivers who work five days a week. The Employer automatically enrolls all of its drivers in the Start-Up Loan Program unless they specifically decline to participate.

The Employer also offers P & D drivers additional programs including: “FedEx Ground Spare/Rental,” allowing a driver to rent a spare vehicle if his or her vehicle cannot be used due to mechanical problems; a “Uniform Rental Program,” providing seven shirts, five pairs of pants and one jacket; a “Bumper Program,” allowing drivers to order bumpers from the Employer’s warehouse at “a reasonable cost;” a “Hand Truck Program,” under which drivers can select a hand truck for purchase from among three models; a “Rear Door Program,” through which P & D drivers can purchase replacement rear doors; and a “Back Up-Camera Program,” through which the Employer contributes \$100 toward the purchase price of a rear vision camera. Payments to the Hand Truck and Rear Door Programs are made through settlement or deduction from the driver’s Service Guarantee Account.

## 2. Linehaul Drivers

The weekly settlement for Linehaul drivers includes mileage, drop and hook payments,<sup>24</sup> P & D work, fuel and mileage supplement, railhead, airport, staging, shuttle payments and package handling. The basic mileage rate is 92 cents per mile. Drivers receive 5 cents per package for loading or unloading packages. Linehaul drivers are entitled to mileage rate increases based on their safety record. James Profanato receives a flat rate of \$124 each way for the linehaul route he drives between Fairfield and Woodbridge. He testified that his flat rate is greater than the usual mileage rate the Employer pays for linehaul work. Linehaul drivers receive a Quarterly Performance

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<sup>24</sup> “Drop and hook” refers to the assembly and disassembly of tractors and trailers at various locations.

Settlement after one year of service at the rate of 2% of the driver's quarterly gross payment, not to exceed \$2,000 per year.

Pursuant to Section 5 of the Linehaul Agreement, "Contractor Safety Compliance (CSC) Payments," Linehaul drivers who complete one year of service are eligible to receive a quarterly bonus based on their individual safe driving record and an additional amount if their hub meets its accident frequency goal, all as determined by the Employer. If Linehaul drivers break the Employer's record for hub mileage without an accident, they are eligible to split a bonus of at least \$35,000 with other Linehaul drivers at their hub.

Linehaul drivers are eligible for "T-checks," which provide emergency cash for en route breakdowns; the "Linehaul Contractor Rental Replacement Program," permitting Linehaul drivers to obtain replacement tractors through the Employer's national account with Penske Truck Leasing and Ryder at a preferred rate; and "Toll Reimbursement" for road and bridge tolls.

### 3. All Drivers

Section 4.2 of both Agreements, "Settlement Statements," provides for the weekly issuance of checks based on settlement statements, which include an itemized listing of all deductions. The deductions can be numerous, as the Employer makes arrangements to deduct monies from the monies paid to drivers to cover a wide variety of payments, from bills for tires to licenses fees. Section 4.2 states that the Employer:

. . . shall have no responsibility to make deductions for, or to pay wages, benefits, health, welfare and pension costs, withholding for income taxes,

unemployment insurance premiums, payroll taxes, disability insurance premiums, social security taxes, or any other similar charges with respect to Contractor or Contractor's employees.

Section 8, "Service Guarantee Program," allows drivers to accumulate funds in an interest-bearing account, called the Service Guarantee Account, used to offset the costs of maintenance and substitute drivers. The Program is expressly intended to encourage drivers to accumulate funds for operating costs. Drivers may make contributions to their accounts at their discretion. The Employer makes additional contributions to accounts, based on account balances. For P& D drivers and Linehaul drivers with one unit, the quarterly guidelines are: \$200 payments for balances of \$1,000 or more, \$300 for balances of \$1,500 or more and \$400 for balances of \$2,000 or more. For Linehaul drivers with more than one unit, the guidelines are \$100 for balances of \$500 or more, \$150 for balances of \$750 or more and \$200 for balances of \$1,000 or more. After a driver has driven for the Employer for one year, his or her Service Bonuses, discussed above, are credited to the Service Guarantee Account. The driver may withdraw funds from the account at any time for any purpose. The Service Guarantee Program also provides, at the Employer's discretion, loans of up to \$5,000 at a discounted interest rate to participating drivers to fund maintenance and repairs on the driver's vehicle. The amount of the loan is tied to the balance in a driver's Service Guarantee Account. The loans must be repaid with interest within one year.

The Employer also provides to all of its drivers: a "Body Repair Program," under which minor body repairs are made for a maximum charge of \$750; a "Paint Program,"

through which drivers can have their vehicles painted, and, at the Employer's cost, obtain replacement decals with the Employer's logo; a "Preventive Maintenance Program," using a standardized FedEx Ground inspection check-list; and a "Tire Program," allowing a driver to obtain fleet pricing from certain tire manufacturers or tires at a reduced cost through the Employer's Purchasing Department website. Payment for these programs is by settlement deduction or through the Service Guarantee Program. The Employer also has a "Battery Program," allowing drivers to purchase batteries locally through the Contractor Assistance Program. The Employer provides state "fuel and operating authority permits" for all drivers at no cost and pays all state fuel and mileage taxes. The Employer makes supplemental payments to drivers for increases to the price of fuel above \$1.25 per gallon.

The Employer provides "Contractor Referrals," which are payments to reward drivers who refer new drivers. Section 10 of the P & D Agreement and Section 8 of the Linehaul Agreement provide for an "HR-10 Plan," a driver-funded defined contribution elective retirement plan, administered by an outside firm. The Employer also provides access to health insurance through an outside firm.

Drivers with more than one year of service are eligible for a separate Service Bonus paid on the anniversary date of their first contract. The bonuses range from \$500 for up to five years service to \$2,000 for fifteen or more years. The Service Bonus is credited to the driver's Service Guarantee Account. A P & D driver using supplemental equipment is eligible for additional Service Bonuses.

The Employer issues its drivers IRS Form 1099s. It does not deduct withholding taxes. The Internal Revenue Service has determined that the Employer's P & D drivers are independent contractors.

## H. PROPRIETARY INTEREST

### 1. P & D drivers

#### a. Customer Accounts

The Employer presented extensive documentary evidence and testimony in support of its contention that its drivers have a proprietary interest in their routes. Section 5.3 of the P & D Agreement, "Recognition of Contractors' Proprietary Interest in Customers Served,"<sup>25</sup> states:

. . . this Agreement contemplates the recognition by both the parties hereto and by other contractors in the FedEx Ground system of a proprietary interest by Contractor in the customer accounts in his/her Primary Service Area as that area is configured from time to time, and a consequent right to Contractor to receive payment in the event his/her Primary Service area is reconfigured with the result that customers previously served by the Contractor are reassigned.

It is undisputed that the 'customer accounts' referred to in the Agreement are formed by contracts between the customers and the Employer. Customers must have accounts with FedEx Ground to utilize its pickup and delivery services. Prospective customers may contact FedEx Ground directly, through the Internet or a toll-free phone number, for example. The Employer determines the fee paid by the customer for its services and determines the route to which the customer is assigned.

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<sup>25</sup> The Employer modified this section in 1994 to recognize a driver's proprietary interest by permitting him or her to sell all or part of a route and to receive compensation for customer accounts involuntarily transferred from the driver.

Drivers may solicit customers on behalf of the Employer, but have no authority to establish new accounts. Section 1.10 obligates drivers to “[m]ake reasonable efforts to retain and increase the base of shippers and consignees served and the number of packages handled per shipper within Contractor’s Primary Service Area.” In practice, drivers refer sales leads to the Employer’s sales representatives. Manager of Contractor Relations Edmonds conceded that drivers might fail to provide such information if they do not want to deliver to the location involved. Only the FedEx Ground Sales Department can set up a customer account. When a new customer is solicited by a driver, the Employer may assign the customer to the route of another driver, if that best suits the Employer’s operating needs.

Drivers receive no payment for referring new customers, although if the customer be added to their route, drivers may obtain an increase in their package pickup and delivery settlement as a result of increased volume in the route area. Daniel Trajanoski testified that he increased his daily volume of packages five fold at a store on his route after helping a pregnant employee move packages that had been left by United Parcel Service. Former P & D Driver Vijay Gampat testified that he solicited two customers on one of his routes, which he calculated resulted in a combined additional annual gross settlement of \$8,000. P & D Driver Mark Galliano testified that after he solicited a customer, it added 100 to 200 packages per week to his route, resulting in an additional gross weekly settlement for him of \$25 to \$50. However, increased volume also adversely affects the driver’s core zone payment, since the core zone payment increases

as density decreases. Drivers cannot refuse to service customers on their assigned routes, and therefore cannot prevent the adverse impact of increased volume on their core zone payments.

b. Route Acquisitions

A P & D driver, in order to begin service with the Employer, must obtain a route. As described in detail below, some drivers obtained their routes at no cost from another driver or from the Employer; otherwise, a driver must buy a route from another driver. The Employer neither buys nor sells routes. “Swing” and temporary drivers do not have routes to sell.

If the Employer has a vacant route, it provides the route to a driver at no cost. Vacant routes are available if the Employer has terminated a driver, a driver has resigned or the Employer creates a new route. At the time of the hearing, there were four vacant routes at the Fairfield terminal, due to the termination of two drivers and the voluntary resignation of two other drivers. All four drivers relinquished their routes without receiving compensation and all were available to prospective drivers without payment.

Several P & D drivers who testified at the hearing obtained routes at no cost. Dave Cutrona obtained a vacant route from the Employer in 2000. A year later, he gave that route, which he reported had about \$65,000 in annual compensation, to a friend. He then received a newly-created route at no cost from the Employer. Zoran Lazoroski obtained a vacant route in July 2002 because the Employer had terminated the driver of that route. Lazoroski abandoned the route in May 2003 without trying to sell it. Angel

Bueno obtained his first route from the Employer in September 2002 at no cost when the Employer created a new route, part of which came from a driver who had part of the route and who had more work than he could handle. Bueno did not pay anything to the driver for the portion of the route that he took over. Carl Fulco obtained a newly created route for no cost in 2002, consisting of bulk stops. He resigned in April 2004 without selling his route.

A driver may sell all or, in theory, part of a route, without permission from the Employer. However, there was no evidence of any driver selling part of a route.

The Employer requires notice of all route transfers. It must keep a DOT file on each driver servicing its customers.

The Employer controls whether a driver may sell his or her route. Section 18 of the P & D Agreement, "Assignment," provides that a driver may assign his or her rights and obligations under the Agreement, if he or she is "in good standing." The Employer views a driver's "good standing" as not being in breach of the Agreement, as determined by the Employer. Thus, a driver loses the right to sell a route in the event of termination or non-renewal of the Agreement. In addition, the Employer retains the right to approve the buyer of the route: Section 18 further provides that the assignment must be to a replacement driver "acceptable to FedEx Ground as being qualified to provide the services under this Agreement."<sup>26</sup>

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<sup>26</sup> In contrast, Section 15 of the Linehaul Agreement prohibits assignment by either party without the written consent of the other party.

### c. Route Purchases

The Employer is not involved in setting the price of a route. The P & D Agreement states in Section 5.3:

As Contractor's settlement and density increase in the Primary Service Area, the potential value of Contractor's customers may increase. Contractor may offer more than the minimum amounts prescribed above for packages being relinquished by another contractor, in order to gain additional customers and increase profitability, or the Contractor may sell to the highest bidder when Contractor's customers are being reassigned. FedEx Ground makes no guarantee of such increases, nor will FedEx Ground interfere in such transactions between Contractor and other persons who have the capability and qualifications to perform the services by this Agreement.

Examples of route transfers by purchase are described below. In each of these transactions, the purchasers and sellers struck their own bargain. In most route sales on which there was testimony, the driver sold a vehicle along with the route. Where the seller had a lease-purchase agreement for his or her van, the route buyer usually took over the payment and the lease. In none of the sales did the parties, at the time of the sale, differentiate between what part of the price was attributable to the route and what part to the vehicle. When drivers attempted to testify post facto as to what portion of the sales price was for the route and what portion was for the vehicle in these package sales, they could only estimate these values. Only one of the sales discussed at the hearing was memorialized in a document. Typically, sales were described as "done on a handshake." One driver obtained a valuation of his route by a financial institution. Recently, Dave Cutrona obtained a Small Business Administration loan to buy a new vehicle. He

testified that the SBA loan officer, after reviewing his profit and loss statement, valued his route at \$100,000 and extended him a loan based on that valuation of the route.

Testimony Involving Route Sales:

In 1994, former P & D Driver Rudy Trbovich obtained a route and a 1993 van by paying a driver \$6,000 and assuming the three-year lease of the driver's van. Trbovich believed he was paying the driver for his equity in the van. He valued the van if it had been new at about \$35,000.

In December 2001, after working as a temporary driver, Daniel Trajanoski bought a route along with a 1999 International 466E in excellent shape, according to Trajanoski, from another driver, Ralph Pagluco, for \$38,000. He valued the truck at \$40,000. In October 2003, Trajanoski decided to sell the route because he thought he was working too hard. He sold the route to Aymaan Elsaka, another driver, for \$10,000 cash and Elsaka's assumption of the \$36,000 balance of the truck's lease. He estimates that the value of the truck was about \$35,000 to \$36,000 and the route was about \$15,000. After working several months as a supplemental driver for the Employer, Trajanoski bought a 2002 International straight truck and a route for \$28,500 from another driver, Carl Fulco. He believes that the two-year old truck was worth about \$24,000, although he also testified that a new straight truck costs about \$38,000. Subsequently, he added to his route, taking over some "bulk" stops at no cost, from another driver, Kevin Eschelman. He recently agreed to buy a P & D route, without a truck, from Linehaul Driver Anthony Addison for \$15,000.

In 1995, P & D Driver Dan Drummond bought a route from another driver, Greg Little, for \$6,000, along with an International P1000 van that Drummond valued at \$2,500. The vehicle was several years old with about 140,000 miles. Drummond testified that he believes that the van would have cost about \$35,000 if bought new in 1995. He had to spend \$2,000 to make the van operational. He estimates that the route was worth more than \$8,000.

In about 1997, Drummond wanted to obtain a different route, which had become vacant because the Employer had terminated the agreement of a driver who had lost his license. Drummond transferred the route he had purchased, without a vehicle, to a temporary driver. He testified that he gave up the route for no money due to the “time constraint” of needing to be available to take the route he preferred, which he acquired for no cost because it was vacant. He used the vehicle that he had acquired in 1995 to drive the route. Shortly thereafter, he purchased a new International P1000, getting a purchase lease agreement from Bush Leasing, paying \$2249 a month for five years.

In 1998, Drummond acquired another route and another International P1000 for \$8,000 from Andrew Hudnick, a driver who had an opportunity on short notice for other unrelated employment. Drummond reports he believed that the other route was worth \$65,000. The International P1000 was from the early 1990’s and was driven about 120,000 miles. Drummond believes that the van was worth \$8,000 to \$10,000. He believes the vehicle would have cost about \$36,500 if bought new then.

In 2000, the Employer moved the Livingston route, which was then driven by Drummond's brother working as his supplemental driver, to the Woodbridge hub. Drummond, who drove out of the Fairfield terminal on the second route he had acquired, determined that it was no longer feasible to have two routes operating out of two different hubs. He testified that he determined that it was not feasible to hold contracts for two routes out of two different terminals because his brother did not have transportation to the terminal and he believed it was necessary to be available if the vehicle driven by his brother broke down or his brother was unable to work due to illness. Drummond lives closer to the Woodbridge hub, so he sold the route from the Fairfield hub. Drummond reported that he feared getting stuck with the route; therefore, when another driver approached him stating he knew a buyer, he sold it and the International P1000 that he bought in 1998 for \$20,000, a price he believed to be less than their value. He stated that he believed that the value of the van in 2000 was between \$6,000 and \$8,000. He estimated that the van had about 90,000 miles. In 2000, Drummond had received an average gross weekly settlement of approximately \$1,300 from the route he sold.

James Profanato is a P & D driver with a Linehaul addendum. In May 2000, Profanato purchased a route, consisting of Linehaul and P & D work, and a 1994 Ford tractor, from Tom Kays, a FedEx Ground driver, for \$55,000. He was told that the P & D work consisted of spotted trailers located throughout New Jersey. He valued the Ford tractor at about \$10,000. Profanato made a \$5,000 cash down payment and gave the

seller a promissory note, agreeing to make 50 monthly payments of \$1,000 until the note was paid. The note did not indicate the relative value of the route and the vehicle.

During the first six months that he drove the tractor, he spent \$8,000 on repairs. Profanato had to rent a tractor when it was not usable, costing him an additional \$2,000 to \$2,500. In November 2002, Profanato discussed his maintenance problems with the seller, who agreed to release him from the note and to give him title to the vehicle. At that point, Profanato had paid the seller \$12,000. In December 2002, he traded in the truck, receiving \$3,000 from a dealership.

Prior to the summer of 2002, the majority of Profanato's P & D work consisted of spotted work for one account, a book distribution company, which thereafter went out of business. Profanato valued that account at \$100,000 a year. In 2002, the Employer obtained an account for spotted trailer work with a large customer and offered it to Profanato, who accepted.

Vijay Gampat started as a P & D driver at the Employer's Newark facility in about 1990. He acquired two routes there, one in the Bloomfield area in about 1990 and one in the Watchung-Warren area in about 1992. He acquired each at no cost, as each was vacant at the time. In about 1995, the Employer moved the Bloomfield route from the Newark hub to Fairfield. Gampat decided that it was too difficult to manage two routes out of two different terminals. He moved to the Fairfield terminal with his Bloomfield route and traded the Watchung-Warren route for a route in the Oranges out of the Fairfield terminal, without making or receiving a payment.

In 2000, Gampat decided to pursue a different business opportunity. During the previous year, he had received approximately \$120,000 annually in combined gross settlements for his two routes. For two months, he tried to sell his routes by talking with his customers, but found no one to buy either route. At the time, there were vacant routes available from the Employer at the Fairfield facility at no cost, as well as routes for sale by other drivers. He testified that one reason he was unable to sell his two routes was the availability of routes at no cost.<sup>27</sup> He donated his trucks because he was too occupied in his new business to take the time to sell them.

In October 2000, Mark Josephin paid \$35,000 to another driver, Allan Hyman, for the Fairfield route and an International P1000 van. He did not remember the model year of the van. He believed, citing no particular basis, that the route was worth \$10,000 and that the van was worth \$25,000. Josephin decided to sell his route and van a year later. He advertised his route in the Bergen Record. Josephin sold the route and van to Nelson Luipersbeck for \$35,000. Josephin believed that his van was worth \$8,000 at the time of the sale. Josephin and Luipersbeck agreed that Luipersbeck would make a \$10,000 down payment, which he did, and that at a later closing date, Luipersbeck would pay the balance of \$25,000. When it came time for Luipersbeck to pay the \$25,000 balance due, he only paid \$10,000 and offered to pay the remaining \$15,000 at a later date.

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<sup>27</sup> Gampat was a witness called by the Employer. After his testimony, the Employer attempted to rebut a portion of his testimony by seeking to introduce evidence that drivers in Fairfield had also sold routes when there were routes available at no cost. The Hearing Officer rejected the Employer's proffer as an improper attempt to rebut its own testimony. I conclude that such testimony would have been relevant to this proceeding; accordingly, I shall assume, for purposes of the discussion and analysis that follows, that examples of such sales are part of the record herein.

However, Luipersbeck never followed through, so Josephin retained a lawyer and sued Luipersbeck for breach of contract. With the assistance of a mediator, the parties agreed that Luipersbeck would pay Josephin \$9,000 of the remaining \$15,000.

In September 2000, former P & D Driver David Penicaro bought the Newton-Lafayette route and a 1995 International P1000 van from driver Charlie Yusansky for \$35,000. He estimates that the van was worth \$22,000. In October 2003, he sold the route and the vehicle for \$40,000 to Dennis Boyco, a temporary driver. He “guesses” that the value of the vehicle, which had about 320,000 miles at the time of the sale to Boyco, was between \$10,000 and \$15,000. Boyco estimated that the value of the vehicle was \$10,000.

In April 2004, Zoran Lazoroski bought the West Caldwell route, with no vehicle, from another driver, Trevor Spencer, for \$20,000, using a form contract.

#### d. Route Configuration

In Section 5.2, “Mutual Intention to Reduce Geographic Size of Primary Service Area,” both parties to the Agreement acknowledge that as package volume in a route increases, the size of a route should decrease, allowing for more efficient deliveries at less expense. This section also gives the Employer the right, with five days notice, to reconfigure a route “to take account of customer service requirements.” This language comes into play when the Employer decides that a driver cannot or is not fully servicing his route, either because of growth of the route or other reasons. The evidence showed that a driver could lose part of his or her route if the Employer decided to reconfigure

routes, even if the customer service problem was not caused by the driver failing to work to capacity.

Section 5.2 states:

During such notice period, FedEx Ground shall give Contractor the opportunity, using means satisfactory to FedEx Ground, to continue to provide in such Primary Service Area the level of service called for in this Agreement. In event Contractor is not able to provide reasonable means to continue to service the Primary Service Area, FedEx Ground may in its sole discretion, reconfigure such area.

According to the Employer, typically, well before the five-day notice is given, various management officials and the driver involved discuss the issue and try a number of alternative solutions without reaching mutual agreement. However, the evidence showed that routes are configured for reasons other than the efforts of a driver. Former Fairfield Terminal Manager DiSavino testified that he decided that Fairfield routes needed to be reconfigured in 1999 because some drivers were under-capacity. He conceded that his reconfiguration included drivers who were not under-capacity, but was necessitated to improve the overall functioning of drivers in the terminal. He testified that even as to a driver who was not under-capacity, if the driver disagreed with a proposed reconfiguration, FedEx Ground would have sent the driver a five-day notice and unilaterally reconfigured the route. In theory, drivers who wish to avoid reconfiguration may hire helpers, put on supplemental vehicles, use supplemental personnel, buy trailers or a larger van, change the order they run their routes, flex informally to other drivers or work harder or longer. However, some of these options, such as using supplemental vehicles, equipment and personnel, increase the driver's

expenses. Carl Fulco testified that he hired a helper when the volume of his route increased, but ended up paying the driver the same weekly amount that his settlement had increased. Other options, such as flexing work, decrease a driver's gross payments.

There was evidence that route configuration was frequent and had, on at least one occasion, been communicated by management as a fait accompli. Former P & D Driver Rudy Trbovich testified that in 1997, the Employer decided to reassign malls from route drivers to drivers with straight trucks. At that time, Trbovich's route was in Wayne and Lincoln Park. He states he was given five days notice that a mall would be eliminated from his route, which left him no time to try to sell the mall portion of his route or to find a supplemental vehicle and driver. In 1999, the Employer proposed to take away Lincoln Park and give him part of Totowa. After he objected and suggested alternatives, the Employer reconfigured his route to give him Lincoln Park, Pompton Plains, Pequannock and Riverdale. Trbovich described his new route as involving a change of 85% of his former route. Two years later, the Employer reconfigured his route again so that he ended up with Pompton Lakes, Wanaque, Ringwood and Oakland. He described that change also as involving 85% of his former route. A couple of months later, the Employer took Oakland and Ringwood away from his route and assigned those areas to another terminal. Trbovich and Mark Galliano agreed that Trbovich would take a portion of Galliano's route consisting of Butler, Bloomingdale, and Kinnelon. He again described that change as involving 85% of his route. A short time later, the Employer removed Pompton Lakes from his route. In April 2004, the Employer proposed giving

him back Pompton Lakes. P & D Manager Brian Ascala told Trbovich that the Employer's Engineering Department had looked at the terminal as a whole and determined its drivers were underutilized. Trbovich resigned, according to his testimony, out of frustration with the repeated reconfiguration of his route.

The Employer makes no payment to the driver if reconfiguration results in the driver losing part of his or her route. Section 5.3, "Recognition of Contractor's Proprietary Interest in Customers Served," provides that in the event of reconfiguration, the Employer may deduct from the settlement of the driver gaining accounts and credit to the relinquishing driver amounts based on a seven-part formula.<sup>28</sup> There was no evidence that the formula has ever been invoked or that payments have ever been made at the Fairfield terminal.

## 2. Linehaul Drivers

The record contains one instance of a transfer of linehaul work at the Fairfield terminal. In about 2002, James Profanato, who has a P & D Agreement with a Linehaul Addendum, transferred his linehaul work, consisting of a nightly round trip route between the Fairfield terminal and the Hartford, Connecticut hub, to George Dupree, the supplemental driver who drove the route for him. Profanato did not ask for anything from Dupree for the route. Profanato testified that at the time of the transfer, he wanted to devote his time to his P & D work.

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<sup>28</sup> The formula requires the calculation of the average number of daily pickups and deliveries gained or relinquished, based on a three-month average, and the application of a dollar multiplier set out in the addendum. The addendum provides multiplier figures of \$1.00 per package delivery and \$2.00 per package pickup. For example, if a driver loses an average of twenty pickups under the formula he is entitled to a one-time payment of \$40 from the gaining driver. A \$100 payment by the Employer is provided in the case of the loss of a spotted trailer assignment.

## I. ENTREPRENEURIAL OPPORTUNITIES

### 1. Using Supplemental Vehicles and Personnel

#### a. P & D Drivers

Drivers may use supplemental vehicles and employ supplemental drivers and/or helpers to service their routes.<sup>29</sup> Under Section 2, “Vehicle Operations,” 2.1, “Additional Vehicles: Safe Operation Required,” a driver, “with the consent” of the Employer, may operate more than one vehicle. The additional vehicles must be driven by “qualified operators employed by Contractor.” The Employer has to approve any supplemental driver used by a driver. Under Section 1.14, “Contractor’s Obligation to Meet Standards of Service,” the Employer holds drivers responsible for themselves and anyone authorized by them to use their equipment. Further, the driver is required “to assure that all persons who operate the Equipment are fully trained and capable of meeting the customer service standards set forth in this Agreement.”

Section 2.2, “Employment of Qualified Persons,” states that all persons employed by the driver must be qualified under government and Employer safety standards. The same qualifications requirements apply to supplemental drivers as to drivers. In May 2004, one month after former P & D Driver Carl Fulco had resigned; he attempted to work as a substitute driver for P & D Driver Bobby Stephannion. Fairfield Terminal Senior Manager Gall refused to let Fulco drive for Stephannion because Fulco had driven for two days in January 2004 while his DOT card had expired.

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<sup>29</sup> The Employer distinguishes use of a supplemental vehicle to service a single route along with a primary vehicle, from using multiple vehicles to service multiple routes.

The Employer conceded that while its policy is to run background checks on helpers, this has not been followed at the Fairfield terminal. Section 2.2 also specifically requires that the driver “bear all expenses associated with the employment of such persons, including without limitation, wages, salaries, employment taxes, workers compensation coverage, health care, retirement benefits and insurance coverage.” One former driver testified that when he served as a supplemental driver, he did not receive workers’ compensation insurance coverage. Another driver testified that he did obtain workers compensation insurance for his supplemental driver

It is not always profitable to use supplemental equipment and personnel. Terminal Manager Gall testified that a driver runs a risk by hiring additional help, due to potential problems with the quality of the help and the “volatility” of volume in the driver’s routes. In addition, use of a supplemental vehicle results in additional costs to the driver, such as vehicle rental or purchase, maintenance, fuel, insurance and other expenses.

It is not unusual for P & D drivers to use supplemental drivers on a one-time basis to cover absences lasting days or weeks for vacation or due to injury. Gall testified that current P & D drivers have used helpers on a short-term basis: Aymaan Elsaka during the six-week peak season at the end of the year; Mike Chelmeki for several weeks when he dislocated his shoulder; Krys Miochuszewski when he was recovering from knee surgery; Craig Carmody on a couple of occasions when he has had back injuries or eye pain; Martin Kenny for two or three weeks when he was recovering from hernia surgery.

Four of the current P & D drivers use supplemental vehicles and/or personnel on a regular basis. Mark Galliano uses a supplemental vehicle, a supplemental driver and a helper on a short-term, temporary basis during the Employer's busiest season, for about six weeks from mid-November through the end of the year. He has operated a supplemental vehicle and used a supplemental driver since 1998. He has used a helper since 1992. He rents the supplemental truck from Ryder. He has hired FedEx Ground temporary drivers to serve as his supplemental drivers. He described the training he gives drivers as "safety and common sense." His helper rides along with the driver and carries packages from the truck to the customer. Galliano pays the supplemental driver \$100 to \$125 a day and the helper \$8 to \$10 per hour, using an IRS Form 1099 if earnings exceed \$600 in a year.

Gall also testified that other drivers, Mike Chelmeki and Rob Ristarski, use supplemental vehicles and personnel on a regular basis.<sup>30</sup> Mike Chelmeki uses a supplemental vehicle and a supplemental driver daily. He rents his supplemental van and has hired a supplemental driver named Richard Henry to drive it. Rob Ristarski uses a supplemental vehicle and a supplemental driver, his brother, Saso Ristarski, daily during the mornings.

James Profanato, who performs P & D and linehaul work, uses supplemental vehicles and employees daily. At present, Profanato is an "absentee" driver, meaning that he has hired employees to perform the services for which he has contracted with the

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<sup>30</sup> Gall testified that Mike Rivitz employs a supplemental vehicle and driver. However, Gall also testified that Rivitz works as a supplemental driver.

Employer. His P & D work consists entirely of spotted work for one customer, AstraZeneca. He has a Linehaul addendum describing his linehaul work as “everything related to AstraZeneca,” a pharmaceutical company that has an account with the Employer. Profanato currently has two tractors; he employs one full-time driver, one full-time package handler and two part-time loaders, depending on the day’s volume.

Profanato and his full-time employees wear FedEx uniforms when working. Profanato spends an hour and a half each day at the terminal in the morning. He comes in between 8 and 8:30 AM and leaves at 10 AM. Each day, Profanato is in contact with AstraZeneca to determine the volume of packages they will be loading. If he does not assist his handler, his time is free except for keeping in touch with his driver and package handler.

Profanato hired his current supplemental driver, Jorge Barrera, in May 2004. He found Barrera by placing an advertisement for a driver in a local newspaper. Profanato interviewed several drivers before hiring Barrera. He trained Barrera by driving with him. Profanato paid for Barrera to get a DOT physical and to take a drug test.

When Barrera started working for Profanato, Barrera drove linehaul routes from Fairfield to the Woodbridge and Hartford hubs. At present, he moves spotted trailers from the AstraZeneca facility to the Woodbridge hub. On average, Barrera makes three round trips a day. Profanato pays Barrera \$1,000 to \$1,200 a week, depending on the volume of packages he handles. He pays him a Christmas bonus of a week’s salary.

Profanato speaks with Barrera every couple of hours by cell phone. Profanato purchased the cell phone for Barrera and pays the monthly bill.

Profanato has employed a loader, Irwin Garcia, since 2002 when Profanato started performing work for AstraZeneca. Terminal Manager Gall described the AstraZeneca work as involving "extra handling." Profanato met Garcia when Garcia worked for the Employer as a loader on the pre-load shift.

Based on the volume of packages at AstraZeneca, Profanato determines whether to rely on just Garcia for the work or to also assist him. Profanato pays Garcia \$500 a week and a Christmas bonus of a week's salary. Profanato meets Garcia each morning. Garcia uses Profanato's vehicle to get back and forth from AstraZeneca's facility to the terminal. Profanato communicates with Garcia about hourly by cell phone, which he purchased for Garcia and for which he pays the bills. If Garcia needs assistance and Profanato is not available, he asks Garcia to contact one or both of the part-time loaders. Profanato pays the part-time loaders \$10 an hour.

Profanato expects to gross approximately \$260,000 this year. At the time of the hearing, he had received gross settlements totaling about \$170,000. In 2003, he grossed approximately \$180,000. He estimates that his costs are 40 percent of his gross. In addition to salaries and bonuses to his employees, he pays insurance, maintenance, fuel and repair on his vehicles. He pays for the FedEx Ground Business Support Package and accountant fees. He has bought lunch trays and doughnuts for the AstraZeneca managers.

One P & D Driver found that it was not profitable to use supplemental help. Daniel Trajanoski hired a helper in July 2002 when volume on his route increased dramatically, which Trajanoski attributed to concern by stores that United Parcel Service, a competitor of the Employer, was going to engage in a work stoppage. Trajanoski employed his brother, Jason Trajanoski, as a part-time helper for about a year. Trajanoski paid his brother between \$350 and \$450 a week, and two weeks time off. In 2003, Trajanoski sold his route and worked as a supplemental driver.

Two former P & D drivers testified that they used supplemental vehicles and drivers on a regular basis. Former P & D Driver Carl Fulco used a supplemental vehicle and driver for about ten weeks at the beginning of 2003, at the suggestion of the Terminal P & D manager who told him that he had some extra work he could assign to him. Fulco hired a former Employer driver, Danny Trajanoski, to drive the supplemental vehicle, paying him \$150 a day at the outset. After three weeks, Fulco determined that he was losing money using the supplemental vehicle and driver, so he and the driver agreed that the driver would take a pay cut to \$110 a day. After about seven more weeks, Fulco decided that the arrangement was not profitable and stopped using the supplemental van and driver.

Between approximately 1995 and 2000, former P & D driver Vijay Gampat drove a route in Bloomfield and used a supplemental driver to drive a route in the Oranges, paying him \$500 a week and \$400 a week when the supplemental driver took vacation. Gampat leased a used International P700 van and purchased another used vehicle for

\$5,000. He and his supplemental driver, Godnot Singh, maintained the vehicles. He used a temporary driver employed by the Employer to substitute for the supplemental driver when he took time off. Gampat trained Singh by taking him along on his route and instructing him how to service the route. He stayed in touch with him by cell phone. He and Singh met in the morning to review the routes. Gampat regularly took some of the packages from Singh's route and delivered them himself. He frequently met him in the afternoon to assist him. Gampat used the services of an accountant to compensate his employees.

#### b. Linehaul Drivers

One Fairfield Linehaul driver, Anthony Addison, operates as an "absentee" driver. Addison has had a one-year Linehaul Agreement with the Employer each year since December 1997. His linehaul work consists of a nightly round trip from the Fairfield terminal to the Harrisburg, Pennsylvania hub, four daily round trips between the Fairfield terminal and the Woodbridge hub and other unspecified trips.

He currently has a P & D addendum. His pickup and delivery work consists of "call-in p & d" when any of approximately twelve customers calls in needing a trailer to be loaded and other pick up & delivery work. He obtained all of his bulk customers from the Employer, except one that he obtained from another P & D driver who wanted to eliminate his bulk work. His payments under the P & D addendum for the bulk work are by package volume. His P & D addendum does not describe his work or list his customers.

His corporation employs, in addition to Addison, who is the president of the corporation, four driver employees. He owns three trucks and rents two trucks. He pays his employees weekly, using a payroll service costing approximately \$115 per month. He pays three employees, Milton Delgado, Rafael Santos and Cesar Santos, each \$900 a week. He pays one employee, Rasheen Gibbs, \$600 a week. He issues W-2's to his employees. He provides his employees with bonuses and days off. He testified that he gave all three employees road tests before hiring them.

Addison has employed Delgado since January 2001. He found him through a newspaper advertisement. Delgado performs some P & D work at the end of the business day, moving spotted trailers from the customer's facility to the terminal. During the evenings, he runs a linehaul route to Harrisburg, Pennsylvania and back.

Addison has employed Rafael Santos since September 2003. Prior to working for Addison, Rafael Santos was an employee of another FedEx Ground driver at another facility. Rafael Santos moves a few spotted trailers in the afternoons and runs a minimum of four linehaul routes at night back and forth to Woodbridge. Addison has employed Cesar Santos since May 2004 to perform mainly spotted work in the afternoon and a lesser amount of linehaul work in the evening.

Addison has employed Rasheen Gibbs since June 2004. Prior to working for Addison, Gibbs was a temporary driver at the Fairfield terminal. Gibbs performs only P & D work, making deliveries. Addison testified that he pays Gibbs less than the other drivers because Gibbs' route produces less.

Addison owns three Freightliner tractors, two with sleeping cabs. He acquired his first vehicle by taking over a lease from a FedEx Ground driver for whom he worked as a driver. He bought his second vehicle from another driver for \$30,000, financing the vehicle through a bank. He purchased a third vehicle, financing it with the manufacturer, after making a down payment of \$3500. In addition, he rents a tractor, which he rotates among the drivers, for about \$550 a week. Since April 2004, he has also rented a "straight truck" or "box truck," meaning a truck without a tractor, for \$50 a day. This truck has been used by Gibbs.

On most mornings, Addison goes to the terminal for an hour or two to check the available work and speak with Gibbs. Addison spends the rest of the day at his home office. He uses a computer, laptop and electronic personal data assistant to perform his work. He keeps in touch with the drivers through two-way radios and cell phones, at the option of the driver. He speaks with the drivers daily. His corporation has retained an accountant.

For the first seven and one-half months of this year, Addison has grossed approximately \$250,000. He projects a \$300,000 gross for 2004. He grossed about \$265,000 during 2003, when he had two employee drivers and about \$230,000 in 2002. He estimates that his costs and his expenses are half of his gross receipts. He is responsible for maintenance, insurance, fuel, parts, communications equipment and uniforms for his employees.

## 2. Holding Multiple Agreements

Drivers with a business plan approved by the Employer may enter into multiple agreements. At present and for the last three years, none of the Fairfield P & D drivers has had a multiple agreement. Former P & D Driver Rudy Trbovich testified that in September 2003, Terminal Manager Gall told him that a P & D driver could not operate two routes in two different terminals. Gall denied telling Trbovich this or that he knew of a prohibition on drivers operating two routes in two different terminals.

During the past six years, there have been two drivers holding multiple agreements. As described above, P & D Driver Dan Drummond had agreements to service two routes out of the Fairfield terminal for about one and a half years, from 1998 through 2000, until the Employer moved one of the routes to the Woodbridge hub and Drummond gave up one of his routes. During the period that Drummond owned two routes, he hired his brother to drive the Fairfield route, paying him \$600 a week and a \$2,000 Christmas bonus. Drummond managed the daily responsibilities of his brother. The routes were contiguous. As discussed above, Drummond gave up his Fairfield route because his brother lacked transportation to Fairfield and Drummond found servicing two routes feasible only if he worked out of the same terminal as his brother, in order to be able to assist him.

Also as described above, former P & D Driver Vijay Gampat operated a route in Bloomfield between 1995 and 2000 while a driver operated Gampat's route in the Oranges. Gampat obtained his routes at no cost, leased one used vehicle and purchased

another used vehicle. He paid his driver \$500 a week and \$400 a week when the supplemental driver took vacation. He and his supplemental driver maintained the vehicles.

Terminal Manager Gall named several other drivers who had multiple agreements: Scott Conner, who operated the Basking Ridge/Bernardsville/Bedminster route and the Ringwood route; Tom Kays, who operated the Willowbrook Mall and Wayne routes; and Tony Martinez who spotted a tractor at a customer's facility and also drove a straight truck in the Wayne area.

### 3. Performing Other Commercial Work

Section 1.5 specifically provides that a driver's equipment "may be used for other commercial or personal purposes," but when not in FedEx Ground service, the FedEx logos, insignia, etc., must be removed or covered. The driver may not carry other commercial items while carrying packages for the Employer. While performing outside commercial work, the driver is prohibited from wearing the FedEx uniform. He or she must have his or her own liability insurance for other commercial or personal use. The DOT limitations on daily and weekly hours of work apply to the driver using the vehicle for any commercial purpose. Terminal Manager Gall conceded in testimony that Fairfield P & D drivers do not use their vans for any significant commercial purpose during the workday other than to perform services for the Employer.

Daniel Trajanoski used his truck to pick up a washing machine for his mother and to pick up windows for his uncle. Dave Cutrona testified that he once used his pickup

and delivery truck on a weekend to deliver kayaks, for which he was paid \$400. Cutrona has used his truck for the last few years, about twice a month during the summers, when he works as a landscaper, to carry large items. In none of these enterprises did the drivers cover the FedEx insignia on their trucks.

Mark Galliano sells machines for Radiant Telecom, a business that specializes in providing cell phone minutes to people with poor credit. The machines enable stores to sell cell phone minutes. He has obtained three or four customers by soliciting customers on his FedEx Ground route. While driving his route, he has carried the machines that he sells to stores on his FedEx Ground truck and has made service calls to his Radiant Telecom customers. He also invests in the stock market. While driving his route, he reports, he checks his stocks on his cell phone and returns home several times a week while driving his route to sell or buy stocks. He testified that he was not aware that he could not use his vehicle for other commercial purposes while driving his route. He has not covered up the FedEx Ground decals on his truck when using his truck to perform other services. Outside of work hours, he used his FedEx Ground truck last summer to carry tables, chairs, a tent and soda for his daughter's graduation party. He obtained flooring for his home from one of his FedEx Ground customers, Mohawk/Aladdin Mills at no cost. During 1994 through 1998, former Driver Rudy Trbovich occasionally solicited persons he encountered driving his route to distribute Amway products. His annual gross earnings from his Amway business was about \$1,000 per year.

### 3. Incorporating

Contract Relations Manager Edmonds testified that a third of the Fairfield drivers have incorporated. Of the current and former drivers who testified at the hearing, Addison, Cutrona, Galliano, Josephin, Lazoroski, Profanato, Trajanoski, and Trbovich have formed corporations. Former Driver David Penicaro formed a limited liability company.

Mark Galliano testified that he incorporated as MASM, Incorporated in 1994 in order to receive tax advantages. He testified that having a corporation enables him to receive better rates on insurance for the cars driven by his family and for his home. He is the president of his corporation. His wife is the vice-president. His eighteen-year old daughter is the treasurer.

## III. ANALYSIS

### The Independent Contractor Issues

#### 1. P & D Drivers

In *Roadway III, supra*, 326 NLRB 842, 849-50, the Board applied the common-law agency analysis used by the United States Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968) to determine whether individuals were employees or independent contractors. In *NLRB v. United Insurance*, the Court upheld the Board's determination of employee status for the debit agents of the respondent insurance company. In doing so, the Court emphasized the following "decisive factors" present in that case:

[T]he agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission plan" that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

390 U.S. at 259-260.

The *Roadway III* Board declared that in making its determination, *United Insurance* required it to consider all aspects of the individual's relationship to the employing entity with no one factor being decisive. The *Roadway III* Board applied *United Insurance* to the RPS P & D drivers:

As in *United Insurance*, the drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. All these factors weigh heavily in favor of employee status....

As noted above, the findings in *Roadway III* applied to the Employer's predecessor.<sup>31</sup> These findings remain valid with regard to the Fairfield P & D drivers. The *Roadway III* Board relied first on the fact that the RPS drivers "perform[ed]

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<sup>31</sup> See n. 6, *supra*.

functions that are an essential part of one company's normal operations," and "constitute[d] an integral part of the company's business."<sup>32</sup> This has not changed. The work of the FedEx Ground drivers who deliver packages is the essence of the business of a package delivery company. The *Roadway III* Board found that the RPS drivers “devoted a substantial amount of their time, labor, and equipment to performing essential functions that allow Roadway to compete in the small package delivery market.” Similarly, the P & D drivers here work full time and use their equipment to perform essential functions for FedEx Ground. There was no evidence that they use their labor or equipment for any other significant commercial activity.

On the same day as the Board decided *Roadway III*, it decided *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998), finding that the owner-operators therein were independent contractors. In contrast to the facts at hand, in *Dial-a-Mattress*, the individuals found to be owner-operators did not perform work that was the core of Dial’s business of marketing and selling mattresses. There, the owner-operators contracted only to deliver Dial’s product.

The next fact relied on by the Board in *Roadway III* was that RPS provided training to the drivers. This is also true in the instant case. As in *Roadway III*, “[n]one of the drivers are required to have prior delivery training or experience.” Most of the P & D drivers who testified at the hearing were assigned to start as temporary drivers and were required to undergo several weeks of ride-along instruction and to take a driving course.

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<sup>32</sup> This factor was also primary in the Board’s analysis in *Corporate Express Delivery Systems*, 332 NLRB 1532 (2000), finding drivers to be employees.

The Employer trained potential P & D drivers in the most fundamental aspects of their job, such as courteous treatment of the Employer's customers, where to leave a package and whether to obtain a customer's signature on the package. Additionally, the Employer also provided ongoing safety training, apart from what is required by the DOT.

There is no question that the Fairfield drivers do business in the Employer's name. The Employer presented testimony that its system was designed to create and cultivate a consistent corporate identity. The Employer requires the drivers to wear FedEx Ground uniforms, drive vehicles displaying the name, logo and colors of FedEx Ground and to meet grooming and physical appearance standards, all in furtherance of maintaining its national corporate identity and image. While some drivers have formed corporations, all of the drivers do business in the name of FedEx Ground. While one driver displays the designation "owner-operator" on his vehicle and two drivers testified that they have advised customers that they are independent contractors, "the drivers' connection to and integration in [FedEx Ground]'s operations is highly visible and well publicized." *Roadway III*, 326 NLRB at 851.

The Fairfield drivers operate with assistance and guidance from the Employer. As stated above, the Employer has trained most of the drivers in the details of their duties. The Employer determines the customers on the drivers' routes and is the final arbiter of the times that a driver picks-up and delivers its customers' packages. The Employer provides loading, sales and customer service operations. The Employer remains "a ready source for replacement vans when the drivers' vehicles are unavailable because of needed

maintenance or repair.” *Roadway III*, 326 NLRB at 852. The Employer maintains spare vehicles for rent and arranges for the rental of vehicles from rental agencies. The Employer provides its Business Support Package to defray the cost and service of the required scanner, to assist in the maintenance of drivers’ vehicles and to facilitate their compliance with its appearance standards. The Employer has numerous other programs to support the drivers by decreasing the costs of obtaining, maintaining and insuring their vehicles: the Service Guarantee Program; the interest-free “Start-Up Loan;” the Bumper Program; the Hand Truck Program; the Rear Door Program; the Back-Up Camera Program; the Body Repair Program; the Paint Program; the Preventative Maintenance Program; the Tire Program; the Battery Program; fuel subsidies and discount rates on collision insurance. The Employer assists drivers in obtaining pension and health insurance benefits. The Employer assists drivers in taking time off from work through its Time-Off Program and has hired swing drivers to substitute for drivers who take time off.

None of the Fairfield P & D drivers engages in any significant outside business. As found in *Roadway III*, “[f]or all practical purposes the ... drivers abide by work schedules that prevent them from taking on additional hauling business during their off-hours during the workweek.” 326 NLRB at 854, n. 36. Their FedEx Ground schedules consume the entire amount of weekly hours allowed by the DOT to a driver for commercial driving. Only one current driver, Mark Galliano, has performed outside business during the workday, but did so incidentally, in apparent violation of FedEx Ground rules. His business did not involve trucking, but the distribution of devices

selling cell phone minutes. Moreover, his use of his van to carry these machines while driving his route, wearing his FedEx Ground uniform and without covering the Employer's logo, appeared to violate the Employer's policies. The only instance of a driver using his vehicle for commercial purposes, other than in service to the Employer, outside of his FedEx Ground workweek, was that testified to by Dave Cutrona, who occasionally used his truck in his seasonal landscaping business. One driver performed non-driving work while servicing his route. Former Driver Rudy Trbovich occasionally solicited people he encountered on his route to distribute products for Amway. All of this work amounts, in sum, to de minimis commercial activity.

As stated above, the drivers are an integral part of the Employer's delivery service. Their discretion is circumscribed by a number of factors, including the workload assigned to them by the Employer, their integration with the linehaul network and the Employer's policy of accommodating the pick up and delivery requirements of its customers. The Employer assigns P & D drivers routes requiring 60 hours of work each week, the DOT limit on weekly commercial driving. The Employer requires drivers to leave from and return to the terminal each day. While the Employer does not dictate start times, the drivers' hours of work are substantially determined by the Employer's loading and linehaul operations. The timing of their stops is dictated to a significant extent by the demands of the customers. *Standard Oil, Co.*, 230 NLRB 967, 972 ((1977) ("[F]or a rational driver, these decisions are mainly dictated by the location of customers who need delivery that day and the amounts needed. Such 'decisions' are made every day by

deliverymen whose employment status is never questioned and involve little if any independent judgment.”) The Employer argues that during the drivers’ workdays, they can attend to personal errands, including shopping and watching school sports games. Yet, former Terminal Manager DiSavino, who was assigned to the Fairfield Terminal in 1999 specifically to raise its operational standards to a level acceptable to the Employer, testified that the Employer views engaging in such activity as a sign that a driver is working under capacity. The monitoring of the drivers’ workloads through the Employer’s observation and quantitative analysis of their deliveries and the consequent reconfiguring of their routes are additional and important indicia that the P & D drivers operate under the Employer’s control.

The Employer asserts that the Board has routinely held that drivers who essentially set their own work schedules and the numbers of their work hours are independent contractors and not employees. I find that the P & D drivers do not set their own work schedules and number of working hours. However, even if they did so, I would not find independent contractor status solely on this basis, for as the *Roadway III* Board stated, no one factor in the required analysis is decisive. Indeed, in each of the cases cited by the Employer for its proposition that this factor defines independent contractor status, other factors weighed in favor of the Board’s conclusion that the drivers in question were independent contractors. Moreover, each of these cases is factually distinguishable: *Precision Bulk Transport*, 279 NLRB 437, 438 (1986) (drivers were free to reject loads);

*Don Bass Trucking*, 275 NLRB 1174, 1175 (1985) (drivers were free to reject assignments).

### Purchases/Sales of Proprietary Interest

A driver's proprietary interest and the buying and selling of that interest are major foundations upon which the Employer bases its argument that the drivers are independent contractors. In *Roadway III*, the Board noted that in the 1994 Agreement, the Employer declared that P & D drivers had a proprietary interest in their service areas and had also given the driver the right to sell all or part of his or her area to the highest bidder. The *Roadway III* Board concluded however, that the Employer "has imposed substantial limitations and conditions on both new features of the driver's relationship such that neither one retains any significant entrepreneurial characteristics." 326 NLRB at 853. Following below is a discussion and analysis of first the proprietary interest relationship and second the transactions among the drivers herein involving the ownership of those proprietary interests under the Agreement.

### Nature of Proprietary Interest Relationship

The following language appears in Section 5.3 of the Agreement:

. . . this Agreement contemplates the recognition by both the parties hereto and by other contractors in the FedEx Ground system of a proprietary interest by Contractor in the customer accounts *in his/her Primary Service Area as that area is configured from time to time, and a consequent right to Contractor to receive payment in the event his/her Primary Service area is reconfigured with the result that customers previously served by the Contractor are reassigned.* (Emphasis added.)

It is clear from the qualifications contained in the Agreement and from the facts developed in the record that, in reality, the customer accounts described in Section 5.3 remain essentially the property of the Employer, notwithstanding the language of the Agreement that states that drivers have a proprietary interest in customer accounts. The proprietary interest in these customer accounts under the Agreement is not based upon contracts or arrangements between drivers and customers; rather, the customer accounts are based upon contracts between the Employer and its customers. Customers must establish their accounts directly with the Employer in order to utilize its pickup and delivery service. The Employer also determines the fees paid by the customer for its services, as well as the driver's route to which the customer is assigned.

In the context of these facts, the language in the Agreement qualifying the driver's proprietary interest in customer accounts reinforces the conclusion that the Employer has actual control of the customer accounts. The Agreement's language makes clear that the drivers' proprietary interest in the Employer's customers' accounts exists only insofar as the Employer, in its discretion, has assigned - and continues to assign - customer accounts in the Primary Service Area in which the driver has acquired his proprietary interest; that area, in turn, is subject to being 'configured from time to time' by the Employer. Evidence in the record makes clear that the Employer can and does regularly reconfigure routes. For example, the route of P & D Driver Rudy Trbovich was reconfigured four times and the Employer proposed a fifth reconfiguration, all during Trbovich's seven years of service with the Employer. As a result of the second reconfiguration in 1999,

Trbovich's route changed entirely from the one he drove in 1997. His route was then reconfigured two more times; in each of these reconfigurations, he testified, 85% of his route changed. He did not receive payments (which would have come from other drivers) for such reconfigurations. In addition, as another example, former Terminal Manager DiSavino testified that, because of overcapacity at the Fairfield Terminal, he decided to reconfigure a number of routes to remove portions of routes. The result, he testified, was a net gain of one route. The stops on the new route came from customer accounts that were removed from the reconfigured routes of other drivers. Therefore, I conclude that the evidence developed in the record amply demonstrates that the Employer, in pursuit of its valid operational needs, regularly exercised its right under Section 5.3 to unilaterally reassign customer accounts from one driver route to another.

When an area or route is reconfigured, then also under Section 5.3, the affected drivers have a right to receive payments from other drivers who receive the benefit of the reconfiguration. However, as also noted in the facts above, in practice, there was no evidence that at the Fairfield terminal the formula to compensate drivers for reconfiguration has ever been invoked or that payments have ever been made.

I conclude, therefore, that the proprietary interest to which the Agreement refers, in reality, is an interest (1) in an area or route that contains customer accounts, (2) which area or route has regularly been subject at any time to the Employer's reconfiguration of the route, i.e., the removal of some or many of those accounts, at the Employer's discretion, (3) whereupon a right to a payment - from another driver - arises, (4) but

where, in practice, at the Fairfield Terminal there is no evidence that (a) such rights have ever been invoked or (b) that such payments have ever been made. Under these circumstances, I conclude that the proprietary interest available to drivers under Section 5.3 of the Agreement is severely limited by the Employer's retention of the ability to reconfigure the routes, which has in fact regularly resulted in the unilateral removal of customer accounts. The proprietary interest is further limited by the additional fact that, in practice, reconfigurations have resulted in no compensation for the affected drivers, notwithstanding the drivers' ownership of the route and the removal of customer accounts from their routes.

I further note that the evidence also demonstrates that the Employer itself has not chosen to involve itself in selling proprietary interests in its routes to drivers at the Fairfield Terminal. Rather, all routes that drivers have obtained from the Employer were received by them at no cost. In addition, the Employer does not purchase routes from drivers who resign or are terminated. As a result, I conclude that the meaningfulness of the proprietary interest that a driver has in his or her route is additionally constantly compromised by the Employer's ongoing contemporaneous choices not to also buy or sell any of the routes that come into its possession. Such compromised meaningfulness imposes a further limitation on the proprietary interest that a driver has in his or her route.

#### Transactions Involving Proprietary Interest

When transactions occur, involving drivers' proprietary interests in their routes, limitations on the transactions noted by the Board in *Roadway III* remain in effect, giving

the Employer “considerable control over whether the driver may sell at all, to whom and under what circumstances.” *Id.* For example, the Employer controls whether the driver can sell at all. The Employer requires drivers to be in good standing in order to sell a route. Good standing is determined solely by the Employer and is lost in the event of termination or non-renewal of a driver’s contract. The Employer’s policy is not to give a written reason for termination. While its witness testified that in practice, a terminated driver is orally given a reason for the Employer’s action at the time of the action, there was evidence that in the case of one terminated driver, no reason was given. Drivers’ contracts are for a maximum of three years and can be non-renewed by the Employer for any reason, thereby depriving the driver of the right to sell his or her route.

The record reveals additional limitations on the right to sell not discussed by the Board in *Roadway III*. As discussed above, routes are not fixed, but are subject to regular reconfiguration. The Employer has not provided all of its drivers with a document that defines the driver’s route. The Employer retains an additional means of changing a driver’s route by flexing packages. The Employer has changed routes of P & D drivers by flexing portions of their routes for sizeable periods of time. In addition, the Employer controls who can buy a route and retains the right to approve the purchaser of a route.

#### Route Acquisitions

The *Roadway III* Board observed that the record in that case provided insufficient detail concerning route sales to determine whether drivers realized any gain or profit

from the sale of their service areas (routes). Here, there was record evidence of such sales. An analysis of those sales, as well as of other route acquisitions, follows.

Since 1994, six routes have been given away or given up by drivers for no consideration: Dan Drummond gave up a route in 1997; Dave Cutrona gave away a route in 2000; Vijay Gampat gave up two routes in 2000; Zoran Lazoroski gave up a route, which reverted to the Employer, in May 2003; and Carl Fulco resigned in April 2004 without selling his route. One driver, Rudy Trbovich, recently lost his route due to his termination. The Employer testified that four drivers have recently lost their routes due to contract terminations. There was also record evidence of six routes that have been available and that were obtained by P & D drivers from the Employer, at no cost: Dan Drummond obtained a vacant route in 1997; Dave Cutrona obtained vacant routes in 2000 and 2001; Zoran Lazoroski obtained a vacant route in 2002; Carl Fulco obtained a newly created route at no cost in 2002; and Angel Bueno obtained a newly created route from the Employer at no cost in 2003. In addition, there are currently four vacant routes at the Fairfield terminal.

As to sales,<sup>33</sup> in 1994, Rudy Trbovich bought a route and a 1993 van by paying a driver \$6,000 and assuming the three year lease of the van. Trbovich testified that the van would have been worth \$35,000 if new and that he believed he was paying the driver for his equity in the van. There was no objective evidence of the value of the van.

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<sup>33</sup> As noted above, for purposes of this discussion and analysis, I assume that some route sales took place at times that routes were also otherwise available at no cost.

Dan Drummond bought a route and a several year old vehicle in 1995 for \$6,000. He testified that the vehicle, if new, would have cost about \$35,000. In 1997, he gave up the route without selling it and obtained a vacant route at no cost from the Employer. He did not realize any gain from that transaction. In 1998, he bought a route and a vehicle that was about six years old for \$8,000. He believes that the van was worth \$8,000 to \$10,000, and would have cost \$36,500 if bought new at that time. He sold his second route in 2000, along with the vehicle he had bought in 1998, for \$20,000. He believes that the van, which he estimated had about 90,000 miles, was worth \$6,000 to \$8,000, citing no particular basis. I am unable to determine the extent of his gains on these sales, without objective evidence of the values of the vehicles involved. Accordingly, I am unable to conclude whether the routes he sold had any value.

Mark Josephin bought a route and a van in 2000 for \$35,000. There was no evidence as to the value of either the route or the van. He sold the route and van in 2001 for \$35,000, although, ultimately, he accepted \$29,000 from the seller for the package. Whether the transaction was a loss depends on the value of the use of the truck for the year, a fact that cannot be ascertained from the record.

Tom Kays sold a 1994 Ford tractor and a route to James Profanato<sup>34</sup> in 2000 for \$55,000. Profanato believed that the tractor was worth \$10,000. In 2002, the parties renegotiated the deal and adjusted the sale price to \$12,000. Shortly thereafter, Profanato

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<sup>34</sup> For reasons stated *infra*, I find that Profanato is not an employee under the Act.

sold the truck to a dealership for \$3,000. There was no record evidence of the market value of the tractor in 2000. Therefore, any valuation of the route is speculative.

In September 2000, former P & D Driver David Penicaro bought a route and a 1995 International P1000 van from Charlie Yusansky for \$35,000. He estimates that the van was worth \$22,000. In October 2003, he sold the route and the vehicle for \$40,000. He “guessed” that the value of the vehicle, which had about 320,000 miles in 2003, was between \$10,000 and \$15,000. The buyer estimated that the value of the vehicle was \$10,000. While I conclude that Penicaro may have realized a profit on the sale, based on this evidence I am unable to determine the precise amount, if any, of his gain.

Dan Trajanoski bought a route and a 1999 vehicle in 2001 for \$38,000. He valued the truck at \$40,000. Thus, in that transaction, the route had less than no value, based on Trajanoski’s assessment. He sold the route and the truck two years later to a driver for \$10,000 and the driver’s assumption of the \$36,000 balance of the truck’s lease. While he valued the route at \$15,000, he had equity in the truck, leaving in question the valuation of the route. In any event, he did not gain any meaningful profit in that sale. In about early 2004, he bought a two-year old truck and a route for \$28,500, a considerably smaller amount than he paid for a similar package in 2001. He values the truck at \$24,000; it was two years old and worth \$38,000, according to his testimony, if new. Without a more objective method of valuing the vehicle, the putative route value of \$4500 is uncertain. In these transactions, the routes did not have significant economic value and he realized no material profit. Trajanoski has recently agreed to buy an

additional P & D route from Linehaul Driver Anthony Addison for \$15,000. There was no evidence as to what Addison had paid for the route.<sup>35</sup>

In 2004, Zoran Lazoroski paid \$20,000 to a driver for a route, without a vehicle.

In sum, there were six transactions where the sale price included a vehicle and in which the price approximated the estimated value of the vehicle: Trbovich's purchase of a route and van for \$6,000 in 1994; Drummond's purchase of a route and vehicle for \$6,000 in 1995; Drummond's purchase of a route and a vehicle for \$8,000 in 1998; Profanato's purchase of a vehicle and route for \$12,000 in 2002; Trajanoski's purchase of a route and vehicle for \$38,00 in 2002; Trajanoski's purchase of a truck and route for \$28,500 in 2004. There was also evidence of four transactions where the route had value: Josephin's purchase of a route and van in 2000 for \$35,000; Penicaro's purchase of a route and van in 2000 for \$35,000; Trajanoski's purchase of a route in 2004 for \$15,000; and Lazoroski's purchase of a route in 2004 for \$20,000.

I conclude that there was very limited evidence, over the ten year period since 1994, that drivers have realized significant gain or profit from route sales. In three sales, drivers received little or no material gain from their sale: Drummond giving up a route in 1997 he had bought in 1995 along with a vehicle; Trajanoski's sale of a route and vehicle for \$46,000 in 2003 which he bought for \$38,000 in 2001; and Josephin's purchase in 2000 and sale in 2001 of a route and vehicle for \$35,000. In two sales, there was an indeterminate gain: Drummond's sale of his route and vehicle in 2000 for \$20,000 and

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<sup>35</sup> For reasons stated *infra*, I find that Addison is not an employee under the Act.

for which he had paid \$8,000 in 1998; Penicaro's sale of a route and vehicle in 2003 for \$40,000 which he had bought in 2003 for \$35,000. During that same period, many routes were acquired at no cost, including all those obtained from the Employer. When routes were sold, in most instances, a vehicle was sold along with the route, making it infeasible on this record to determine the value of a route, or even whether a route had any value, without speculation and guesswork.

I conclude from the foregoing that, in the overwhelming majority of the route acquisitions reported in the record, a route had little or no clear economic value. Further, in none of the transactions was there evidence that a driver profited from a sale directly because of his entrepreneurial contribution to the value of the route.

### Conclusion

Under Section 5.3 of the Agreement, drivers receive a proprietary interest in their routes. However, the Employer has imposed numerous limitations upon the proprietary interest. These limitations arise from the terms of the non-negotiable Section itself and from the Employer's practices under that Section. First, the interest is subject to regular Employer reconfiguration and removal of customer accounts, for which drivers in practice receive no compensation. Next, the interest is constantly compromised by the Employer's practices of not buying or selling routes itself; rather, the Employer takes back routes that become available without compensating drivers for the routes and provides routes in its possession to drivers at no cost. In addition, the Employer restricts by whom and to whom sales can be made; terminated drivers cannot sell routes and

drivers can only sell routes to Employer approved buyers. Also, the Employer does not always specifically describe routes in documentary form and of course, in any event, routes are subject at any time to reconfiguration and flexing, regardless of prior documentary memorialization. Moreover, the experience with route acquisitions, including sales, demonstrates that the overwhelming majority had little or no clear economic value and resulted in little or no significant profit to the seller-driver. For the above-described reasons, I find, taking all these considerations into account, that the P & D drivers do not have sufficient proprietary interests in their routes to conclude that they possess significant entrepreneurial characteristics.

#### Other Entrepreneurial Opportunities

The Employer also argues that the P & D drivers have significant and substantial entrepreneurial opportunities by hiring personnel, operating within multiple service areas and soliciting customers. Apart from James Profanato, who functions as an absentee driver and who below I find should be excluded from the unit, only three Fairfield P & D drivers employed supplemental personnel on a regular basis. There was no evidence that any of these three drivers profited from hiring additional personnel. On the contrary, two drivers, Carl Fulco and Daniel Trajanoski, testified that they discontinued using supplemental employees because the associations were unprofitable. The mere fact that a driver may employ an employee is not determinative of independent contractor status. *Mission Foods Corporation*, 280 NLRB 251 (1996). I also note that unlike *Dial-A-Mattress*, the Employer here imposes qualification requirements on supplemental

personnel employed by drivers. Similarly, a driver can provide a replacement employee and be an employee. See *Corporate Express Delivery Systems*, *supra*, 322 NLRB No. 144 (2000); *Exhibition Film Delivery & Film Delivery*, 247 NLRB 495 (1980).

Although the Employer presented testimony that there have been three drivers with multiple agreements in the past, there are no current P & D drivers with multiple agreements.

The Employer cited two instances - Galliano and Trajanoski -- in which a driver solicited customers that could influence income. In addition, Vijay Gampat testified that he solicited two customers on one of his routes, which he calculated resulted in a combined additional annual gross settlement of \$8,000. However, in none of these instances was there testimony of solicitation. In each case, the driver attributed additional business to being friendly or going out of his way. Accordingly, this testimony is not persuasive that drivers have significantly increased their compensation through soliciting customers.

I find therefore that the Employer did not adduce evidence concerning entrepreneurial opportunity that would change the balancing of factors performed in *Roadway III*.

In addition, I find that there is record support for other factors relied on by the Board in *Roadway III* that weigh in favor of employee status. The P & D Agreement, which contains the terms and conditions under which the P & D drivers operate, is promulgated and changed unilaterally by the company. *Standard Oil Co.*, *supra*, 230

NLRB at 972. Drivers account to the Employer for the funds they collect under a regular reporting procedure prescribed by the Employer. *Id.* The Employer guarantees the drivers minimum compensation. *Dial-A-Mattress Operating Corp., supra*, 326 NLRB 884 at 892. They are required by the Employer to provide delivery services each scheduled workday. *Id.* at 891. The Employer has detailed specifications as to the vehicles that they drive. *Id.* The Employer assumes the risk of third-party damages, although drivers must cover the first \$1,000 of any accident. *Id.* In *Dial-A-Mattress*, the Board pointed out that the owner-operators were required to have liability insurance naming Dial as additionally insured and were required to indemnify Dial for all losses, injuries or damages that may arise in connection with the performance of Dial Deliveries. *Id.* The Board observed, “In contrast, in employer-employee relationships, employers generally assume the risk of these third-party damages, and do not require indemnification from their employees.” *Id.* The drivers’ income is not incentive based. *Roadway III* at 853. The Employer’s “elaborate support programs continue to present drivers with minimal risks,” a fact that the Employer emphasizes in its promotional brochure for prospective drivers. *Id.*

In addition, there are some facts present herein which support employee status and which are different from and in addition to those found by the Board in *Roadway III*. Whereas the *Roadway III* Board found no evidence of driver admonishment, a grievance procedure or termination of drivers without cause, there was evidence of these controls herein. The Employer uses its “Contract Discussion” to inform drivers of performance

problems. While there is not a formal grievance procedure, the Employer provides a procedure for drivers to appeal a disputed termination decision. There was evidence from one driver, Rudy Trbovich, that his contract was terminated this year without a stated reason. Also, the Employer is involved in adjusting complaints by its customers concerning the drivers, reflecting control over the manner and means, as well as the result, of their work. *Land O'Lakes*, 204 NLRB 519, 522 (1973).

To be sure, there are characteristics of the relationship between the Employer and the P & D drivers that are more typical of independent contractors. Drivers have control and responsibility for their own employees and the decision whether it is economically feasible to have such employees, although few P & D drivers function as employers. *Dial-A-Mattress Operating Corp.*, *supra*, at 892. By contrast, in *Dial-A-Mattress*, every owner-operator had at least one employee. Within constraints imposed by the Employer, drivers select and acquire their vehicles and are responsible for the financing, inspection and maintenance of the vehicles. *Id.* However, here, the Employer has provided numerous support programs to assist the drivers with their vehicles. There is no discipline system, although as stated above, the Employer can admonish drivers. See *Roadway III* at 854. The Employer no longer provides the vehicles required by the Agreement. See *id.* at 853. However, the Employer does routinely make start-up loans to new drivers to enable them to purchase or lease vehicles.

## Conclusion

I conclude that, on balance, there is insufficient evidence justifying a different conclusion than that reached by the Board in *Roadway III*. See also *C.C. Eastern*, 309 NLRB 1070 (1992); *R. W. Bozel Transfer, Inc.*, 304 NLRB 200 (1991). The indicia of employee status that the *Roadway III* Board found most significant remain intact: the drivers perform an essential part of the Employer's normal operations - deliveries; they are an integral part of the Employer's business; they are trained by the Employer; they do business in the Employer's name; they operate with the Employer's extensive assistance and guidance; their work schedules preclude other commercial activity; they possess numerous indicia of employee status, including Employer promulgation of their terms and conditions, accountability for funds, receipt of a minimum compensation level, required adherence to a daily work schedule, Employer responsibility for third party damages, minimal risk, etc.

The most significant change in the evidence developed in the record herein is that there now is a history of experience with the proprietary interest granted in Section 5.3 and with specific route transactions under that Section. I find in this respect, nonetheless, that the conclusion the Board reached in *Roadway III* continues to apply: “[The Employer] has simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities.” *Id.* at 851.

The evidence developed with regard to experience with the proprietary interest demonstrates that it confers little entrepreneurial opportunities upon the drivers in that the

interest is limited by the Employer's unlimited ability to reconfigure routes without drivers receiving payments and by the Employer itself regularly obtaining and providing routes at no cost. Experience with route transactions demonstrates examples of the routes not being delineated in writing; even where documented, the routes were still subject to frequent reconfigurations by the Employer, based on its assessment of customer service requirements. Further, the Employer allows routes to be sold only by drivers in good standing and only to Employer-approved purchasers. Moreover, the history of transactions recited in the record demonstrates that the routes involved in the overwhelming majority of transactions had little or no clear economic value and resulted in little or no significant profit to the seller-driver. In these circumstances, I conclude that route ownership does not embody a significant proprietary interest.

Since the Employer has the burden of proving independent contractor status, any shortfall in the evidence weighs in favor of employee status. Accordingly, I conclude that the P & D drivers, with the exception of the one absentee driver, are employees and not independent contractors.

#### Swing and Supplemental Drivers

I further find that the swing drivers, who function as P & D drivers without a route assignment and also with no proprietary interest, are also employees. I shall exclude the supplemental drivers from the unit, because they are not employed by the Employer, but by other drivers.

### Temporary Drivers

The Employer contends that the temporary drivers should be included in a unit of drivers, notwithstanding the fact that they receive their paychecks from a temporary agency. The Employer hired many of the current and former P & D drivers to work as temporary drivers before approving them to obtain routes. The Employer determines whether and when temporary drivers may acquire a P & D route in order to become a P & D driver. At present, the Employer has assigned two temporary drivers to service P & D routes. Under Board precedent, to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. *M.B. Sturgis*, 331 NLRB 1298 (2000) (citing *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982) and *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995)). The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *Id.* (citing *Riverdale Nursing Home, supra*, 317 NLRB at 882). Although temporary drivers receive paychecks from a temporary agency, the Employer hires, trains and assigns them work and determines their ability to become drivers. I find therefore, that the Employer is a joint employer of the temporary drivers.

The test for determining the eligibility of individuals designated as temporary is whether they have employment of indefinite duration. *United States Aluminum Corp.*, 305 NLRB 719 (1991). Here, the Employer determines if and when temporary drivers become P & D drivers. There was no evidence that the Employer hires temporary drivers

for a finite period of time. I find that the temporary drivers are employed for periods of indefinite duration and therefore are eligible to vote in a representation election.

*M.B. Sturgis*, 331 NLRB 1298 (2000), requires that there be a community of interest between the temporary drivers and the drivers. Temporary drivers perform all of the same functions performed by P & D drivers and use similar equipment. Their functions, skills, and work situs are similar to the Linehaul drivers. They are functionally integrated with the Linehaul drivers to the same extent as P & D drivers, whom I find below to share a community of interest with the Linehaul drivers. Accordingly, I include the temporary drivers in the unit. *Outokumper Copper Franklin, Inc.*, 334 NLRB No. 39 (2001).

#### Absentee Driver James Profanato

Currently, James Profanato employs one full-time loader and two part-time loaders to assist him in his P & D work, which does not involve a route, but rather spotted work for a single customer. He also has a Linehaul addendum and has hired a full-time driver to perform his linehaul work. He works as necessary assisting his full-time loader when volume requires. Most of his time is spent supervising his employees. Profanato owns two tractors, used by two full-time employees. In effect, therefore, he has been assigned multiple work areas. In *Dial-A Mattress, supra*, 326 NLRB at 893, the Board gave significant weight to the fact that drivers used more than one delivery vehicle, employed more than one employee and did not drive, but operated solely as entrepreneurs. I find that Profanato, as an absentee driver, has entrepreneurial

opportunities beyond those typically available to an employee and operates with independent judgment and discretion, without supervisory control, to a degree that is inconsistent with employee status. *Rediehs Interstate, Inc.*, 255 NLRB 1073 (1980).

## 2. Linehaul Drivers

The Employer asserts the Linehaul drivers are also independent contractors. The Employer asserts that if the Linehaul drivers are found to be employees, they should be included in any unit of P & D drivers. The Employer points out that the P & D and Linehaul Agreements are substantially similar and the P & D Linehaul drivers wear the same uniforms.<sup>36</sup> The Employer cites *Tri-State Transportation Co, Inc.*, 289 NLRB 356 (1988); *Archie's Motor Freight, Inc.*, 135 NLRB 321, 322-23(1962); *Overnite Transportation Co.*, 128 NLRB 723 (1960); and *Mead Atlanta Paper Co.*, 123 NLRB 306, 309 (1959), where the Board found a unit of linehaul and local drivers appropriate, as precedent for a single unit. The Union also seeks to include the Linehaul drivers with the P & D drivers.

The Employer presented limited evidence as to the duties and responsibilities of the Linehaul drivers in support of its contention that they were independent contractors, apart from the Linehaul Agreement and the testimony of Anthony Addison. I note that there is no provision in the Linehaul Agreement giving the Linehaul Drivers a proprietary interest in their linehaul routes. Assignment of their routes is prohibited without the

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<sup>36</sup> The Employer asserts that Linehaul drivers “interface” with terminal managers and interact with P & D drivers at the terminal. As to the remaining Linehaul driver, George Dupree, there was no evidence as to these facts.

written consent of the Employer. Accordingly, I find that the Employer has failed to provide sufficient evidence that the Linehaul drivers are independent contractors.

Linehaul drivers are not away from the terminal overnight on their trips. They start and return to the terminal daily. The Linehaul schedules determine the P & D drivers' start and return times. There is one remaining Linehaul driver at present and no other union desires to represent him.<sup>37</sup> The parties agree that if the drivers are employees, they should be represented in a single unit. Given the agreement of the parties,<sup>38</sup> the similarity between the Linehaul and P & D drivers' skills and functions,<sup>39</sup> work situs,<sup>40</sup> detailed terms and conditions of employment set forth in the Agreement<sup>41</sup> and their functional integration,<sup>42</sup> I find that the agreement of the parties as to their inclusion with the P & D drivers is consistent with community of interest standards. *Transerv Systems, Inc.; supra; Carpenter Trucking, supra; Land O'Lakes, Inc, supra.; Sidney Blumenthal, Inc., supra;*

#### Absentee Driver Anthony Addison

I also find that Anthony Addison, who owns three tractors and employs four driver employees and functions entirely as an absentee driver and truly as an entrepreneur, should be excluded from the unit as an independent contractor, for the same reasons as I excluded James Profanato.

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<sup>37</sup> The Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope. *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999).

<sup>38</sup> *Sidney Blumenthal, Inc.*, 113 NLRB 791 (1953).

<sup>39</sup> *Transerv Systems, Inc.*, 311 NLRB 766 (1993); *Carpenter Trucking*, 266 NLRB 907 (1983).

<sup>40</sup> *Transerv Systems, Inc, supra; Carpenter Trucking, supra.*

<sup>41</sup> *Land O' Lakes, Inc.*, 204 NLRB 519 (1973); *Sidney Blumenthal, Inc, supra.*

<sup>42</sup> *Transerv Systems, Inc., supra; Carpenter Trucking, supra.*

#### IV. DIRECTION OF ELECTION:

An election by secret ballot shall be conducted among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **Local 177, International Brotherhood of Teamsters, AFL-CIO.**

#### V. LIST OF VOTERS:

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the voting groups found appropriate above shall be filed by the Employer with the Regional Director in Region 22, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Newark, New Jersey on or before **November 9, 2004**. No extension of time to file this list shall be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### VI. RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **November 16, 2004**.

Signed at Newark, New Jersey this 2nd day of November 2004.

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Gary T. Kendellen  
Director, NLRB Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, New Jersey 07102