

Nos. 07-1391 & 07-1436

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX
GROUND PACKAGE SYSTEM, INC.**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 25

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ROBERT J. ENGLEHART
Supervisory Attorney

KELLIE ISBELL
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2482

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) Parties and Amici: FedEx Home Delivery, the petitioner/cross-respondent herein, was a respondent in the case before the National Labor Relations Board (“the Board”). The Board is the respondent/cross-petitioner herein, and the Board’s General Counsel was a party in the case before the Board. The International Brotherhood of Teamsters, Local No. 25, which intervened here on the side of the Board, was the charging party before the Board. American Trucking Associations, Inc. and the U.S. Chamber of Commerce are participating as amicus curiae in support of FedEx. The National Employment Law Project, National Employment Lawyers Association, Washington Legal Foundation, U.S. Business and Industry Council, and Allied Educational Foundation have moved for leave to participate as amici curiae in support of the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board’s Decision and Order issued on September 28, 2007, and reported at 351 NLRB No. 16.

(C) Related Cases: This case has not previously been before this Court or any other court. Board counsel are unaware of any related cases pending before, or about to be presented before, this Court or any other court. However, Counsel is

aware that a class action suit on behalf of FedEx Ground and Home Delivery drivers challenging their designation by FedEx as independent contractors is pending in the U.S. District Court for the Northern District of Indiana: *In re FedEx Ground Package System, Inc., Employment Practices Litigation*, Cause No. 3:05-MD-527 RM (MDL-1700), 2007 WL 3027405, 69 Fed.R.Serv.3d 334, 42 Employee Benefits Cas. 1020 (N.D. Ind. 2007).

GLOSSARY

Act	National Labor Relations Act
ALJ	Administrative Law Judge
ALJR	Administrative Law Judge Report
Board	National Labor Relations Board
DDE	Decision and Direction of Election
D&O	Decision and Order
DOT	Department of Transportation
Exh.	Exhibit
FedEx	FedEx Home Delivery, a Separate Operating Division of FedEx Ground Package System, Inc.
Jt. Exh.	Joint Exhibit
MSJ	Motion for Summary Judgment
MSJ Exh.	Exhibit to the Motion for Summary Judgment
QPDL	Quality Packaging Delivery Learning
RD Exh.	Regional Director Exhibit
RX	Respondent (FedEx) Exhibit
Tr.	Transcript
U. Exh.	Union Exhibit
Union	International Brotherhood of Teamsters, Local No.

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of FedEx Home Delivery, A Separate Operating Division of FedEx Ground Package System, Inc. (“FedEx”) to review, and the cross-application of the National Labor Relations Board to enforce, an order of the Board. In its Order, the Board found that FedEx violated Section

8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. § 158 (a)(5) and (1)), by failing and refusing to bargain with the International Brotherhood of Teamsters, Local Union 25 (“the Union”).

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)). The Board’s Decision and Order, issued on September 28, 2007, is reported at 351 NLRB No. 16. (D&O 1.)¹ The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for

¹ Record references are to the original record. “D&O” refers to the Board’s Decision and Order, in slip opinion form. “Wilmington DDE” refers to the Regional Director’s Decision and Direction of Election in this case; three prior DDEs are further identified by the name of the terminals at issue in those cases – Worcester, Barrington, or Paterson. In addition, there are two transcripts in this case; the first before a hearing officer on the issue of independent contractors (designated “Hearing Tr.”), and the second before an administrative law judge on FedEx’s objections to the election (designated “ALJ Tr.”). “ALJR” refers to the ALJ’s report on FedEx’s objections to the election.

Exhibits introduced by FedEx before the hearing officer are referred to as “RX.” Exhibits introduced before the ALJ are referred to as “RD Exh.” (introduced by the Regional Director), “Jt. Exh.” (introduced by the parties), and “U. Exh.” (introduced by the Union). “MSJ” refers to the General Counsel’s motion for summary judgment. Exhibits to the MSJ are identified as “MSJ Exh.” References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

As the Board's unfair labor practice order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding (Board Case Nos. 1-RC-22034 & 1-RC-22035) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in the representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board." The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court. *See, e.g., Freund Baking Co.*, 330 NLRB 17 (1999).

FedEx filed its petition for review on October 1, 2007, and the Board filed its cross-application for enforcement on October 25, 2007. The filings were timely, as the Act places no time limit on proceedings to enforce or review Board orders. The Union has intervened in support of the Board's cross-application; the U.S. Chamber of Commerce and American Trucking Associations, Inc. are participating as amicus curiae in support of FedEx.

STATEMENT OF THE ISSUES PRESENTED

Does substantial evidence support the Board's finding that FedEx violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified representative of its single-route drivers? That question turns on two subsidiary issues:

1. whether the Board reasonably found that the single-route drivers are statutory employees and not, as FedEx contends, independent contractors; and
2. whether the Board abused its discretion in overruling FedEx's objection to the two representation elections won by the Union.

RELEVANT STATUTORY PROVISIONS

All applicable statutes are contained in the Addendum attached to this brief.

STATEMENT OF THE CASE

The Board found that FedEx violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to meet and bargain with the Union, which was certified as the collective-bargaining representative of its Wilmington, Massachusetts drivers. FedEx does not dispute that it refused to bargain, but rather contests the Board's findings that the single-route drivers are employees covered by the Act and that the Union's pre-election mailing did not taint the election. Relevant portions of the factual and procedural history of the

case before the Board are set forth below, followed by a summary of the Board's Decision and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Procedural Background

In three prior cases, the Board affirmed Regional Directors' decisions that FedEx drivers are employees – not independent contractors.² Those decisions, and the records upon which they are based, have been incorporated into the Regional Director's decision in this case. (Wilmington DDE 5.) The Regional Director here relied on facts developed in the prior cases “solely to the degree that they had general applicability.” (Wilmington DDE 4.) Parties were given the opportunity to litigate any changes to the record, but, for purposes of administrative efficiency, were not allowed to relitigate facts that had already been established in the three prior cases. (Wilmington DDE 4.)

² The three Regional Directors' Decisions and Directions of Election are: 1) FedEx Ground Package Systems, Inc. (Paterson terminal), case no. 22-RC-12508, issued on November 2, 2004; 2) FedEx Home Delivery (Barrington terminal), case no. 4-RC-20974, issued on June 1, 2005; and 3) FedEx Home Delivery (Worcester terminal), case no. 1-RC-21966, issued on January 24, 2006.

B. Factual Background

1. FedEx's business organization; the two bargaining units involved in this case

FedEx Home Delivery was established in about 1998, when FedEx Corporation acquired Roadway Package Systems, Inc. (Wilmington DDE 6.) Home Delivery has 3,300 employees and operates 500 terminals throughout the United States. (Wilmington DDE 6-7.) In addition to these employees, the Home Delivery Division employs 3,826 drivers who deliver packages on 5,049 routes. (Wilmington DDE 7 n.9.)

The two Wilmington, Massachusetts, terminals at issue in this case – Jewel Drive and Ballardvale – are part of the Home Delivery Division. (Wilmington DDE 6.) At the time of the hearing, there were 17 drivers with single routes and 3 drivers with multiple routes operating out of the Jewel Drive terminal. Ballardvale terminal had 16 single-route and no multiple-route drivers. (Wilmington DDE 7, 31; Hearing Tr. 612-13.)

In addition to these drivers, during peak holiday seasons FedEx uses temporary drivers (“temps”) employed by Kelly Services, a temporary agency, to cover contracted drivers’ routes when necessary and to cover areas not assigned to drivers. (Wilmington DDE 8; Hearing Tr. 73, 82-83.) Three temporary drivers

work at the Jewel Drive terminal; the record does not indicate how many work at Ballardvale. (Wilmington DDE 7-8; Hearing Tr. 201.)

Of the 33 single-route drivers in the two bargaining units, 5 have hired helpers and only on an occasional basis, and 2 have hired supplemental drivers to assist during the peak season.³ (Wilmington DDE 32-33; Hearing Tr. 35, 45, 82.) Several drivers have hired temporary replacement drivers when they wanted to take a day off. (Wilmington DDE 32 & n.52; Hearing Tr. 176-77.)

On July 7, 2006, the Union filed two petitions for election with the Board seeking to represent all route and swing drivers at FedEx's Ballardvale and Jewel Drive terminals. (Petitions for election dated 7/20/06.) Following a hearing (described below), the Board's Regional Director issued a decision and direction of election in which she found that the 33 single-route drivers at the 2 terminals were employees, not independent contractors, within the meaning of Section 2(3) of the Act (29 U.S.C. § 152(3)). (Wilmington DDE 3, 31 n.50.)

Finding the three multiple-route drivers to be statutory supervisors, the Regional Director excluded them from the unit. (Wilmington DDE 47.) Neither party contended that the occasional, temporary use of helpers, supplementals, or

³ A helper rides with the driver and runs packages to customers' doors. (Wilmington DDE 32; Hearing Tr. 102.) A supplemental driver helps when the driver needs an extra van to deliver packages, such as during the busy Christmas season. (Wilmington DDE 31; Hearing Tr. 44, 82.)

substitutes made the single-route drivers (hereinafter “drivers”) supervisors.

(Wilmington DDE 48 n.83.) Nor did the Union seek to include the occasional workers or the terminal “temps” employed by Kelly Services in the unit.

(Wilmington DDE 2 n.4, 33 n.54, 46 n.77.) The Regional Director therefore excluded temps, helpers, substitutes, and supplementals from the unit and ordered an election. (Wilmington DDE 49.)

2. FedEx hires unskilled workers and trains them

No prior commercial delivery training or experience is required to become a driver for FedEx Home Delivery. (Wilmington DDE 39; Hearing Tr. 854-55, 990.) FedEx hires both temps (to be employed by Kelly Services) and drivers through advertising and “orientations” at local hotels. (Wilmington DDE 8; Hearing Tr. 697.) All applicants – temps or drivers – complete a computerized application at the FedEx terminal at which they want to work. (Wilmington DDE 8; Hearing Tr. 655, 856, 984.) The application asks for basic information that the terminal uses to perform a criminal background check and a motor vehicle record check. (Wilmington DDE 8-9; Hearing Tr. 985-86.) Both checks are required by the Department of Transportation’s Federal Motor Carrier Safety Regulations (DOT regulations). (Wilmington DDE 9 & n.13; Hearing Tr. 985-87.) If their driving and background records are acceptable to FedEx, candidates are then asked to

undergo a physical examination and a drug screen, as required by the DOT regulations. (Wilmington DDE 9 & n.5; Hearing Tr. 986, 989.)

Because drivers for FedEx Home Delivery typically drive vans weighing less than 26,000 pounds, they are not required to have commercial drivers' licenses. (Hearing Tr. 1000.) They are required, though, to have either one year of commercial driving experience or to complete FedEx's 14-day driver training course called "Quality Packaging Delivery Learning" (QPDL). (Wilmington DDE 9; Hearing Tr. 990, RX 4 Safe Driving Program p.1.) The course includes 8 days of classroom and on-the-road training plus 5 additional days of "customer service rides" with FedEx managers. (Wilmington DDE 10; Hearing Tr. 1019.) In addition to safety training required by the DOT regulations, the course provides an orientation to FedEx procedures, including loading packages, using a scanner to track packages, reading road plans, and proper delivery procedure. (Wilmington DDE 10; Hearing Tr. 991.)

Most drivers begin working for FedEx as temps and are paid by Kelly Services, including during the QPDL course. (Wilmington DDE 8, 9 n.17; Hearing Tr. 858, 892, 1023, 1025, 1030.) Some drivers remain temps; others, once they acquire a van, sign an operating agreement with FedEx to become full-time drivers. (Hearing Tr. 1027.)

3. Drivers must buy vans meeting certain specifications and are required to have certain equipment; FedEx helps pay for expensive repairs and higher priced fuel

Drivers are required to purchase or lease a van before signing an operating agreement, and FedEx must approve each van. (Wilmington DDE 13; Hearing Tr. 1001.) FedEx requires that vans be white, have certain interior shelves, and have backing cameras. (Wilmington DDE 13; Hearing Tr. 1002.) Although FedEx does not specify a particular make or model of van drivers must use, most drivers buy or lease P-350s, P-400s, P-450s, P-500s, or P-550s (the numbers refer to capacity). (Wilmington DDE 13 & n.24; Hearing Tr. 24, 63, 123, 126, 1043.)

Drivers' vans must meet FedEx standards of cleanliness and be free from body damage or other extraneous markings. (Wilmington DDE 12; RX 4 p.10.) Vans must carry the FedEx Home Delivery logo; the logo can be painted on the van, or drivers can use magnetic (and removable) logos. (Wilmington DDE 14; Hearing Tr. 899, RX 4 p.6.) The DOT regulations require that the carrier be identified on leased vehicles. To foster name recognition, FedEx requires drivers to use a larger logo than that required by DOT. (Wilmington DDE 13-14 & n.25, Barrington DDE 9; Hearing Tr. 113, 222-24.)

FedEx offers all drivers a Business Support Package (BSP). (Wilmington DDE 24, Worcester DDE 12; Hearing Tr. 281, RX 4, p.21.) The BSP provides items that drivers are required to have in order to work for FedEx, including

scanners, uniforms, FedEx decals for the vans, random drug tests meeting DOT requirements, an annual DOT vehicle inspection, mapping software, and a vehicle washing service (necessary to comply with both government regulations pertaining to waste water run-off and with contractual appearance standards). (Wilmington DDE 25-26, Worcester DDE 12-13; RX 4 Addendum 6.) Drivers are not required to purchase the BSP from FedEx but would have to find these items from other vendors if they did not. (*Id.*) Drivers pay \$4.25 per day per van for the BSP. (*Id.*) FedEx deducts these costs from the drivers' weekly pay. (Wilmington DDE 25.)

Drivers are responsible for the costs of all fuel and maintenance on their vans. (Wilmington DDE 15; Hearing Tr. 202, RX 4 p.5.) FedEx assists with these costs through its Service Guarantee Program and fuel price supplements. (Wilmington DDE 15.) FedEx establishes and pays interest on a Service Guarantee Account for each driver to encourage them to save for expensive repairs. (Wilmington DDE 15; RX 4 Addendum 3.) For each quarter a driver maintains a \$500 average balance in his Service Guarantee Account, FedEx contributes an additional \$100. (*Id.*) FedEx also has a loan program to help drivers pay for repairs that exceed the balance in their service accounts, up to a maximum of \$5,000. (*Id.*) When gas prices rise above a certain level, FedEx pays drivers a fuel supplement to compensate them for the higher prices. (Wilmington DDE 22; RX 4 Addendum 3.)

FedEx, consistent with the DOT regulations, maintains public liability insurance on the drivers' vans for personal injuries and damages caused in connection with FedEx's business. (Wilmington DDE 27; RX 4 pp.12-13.) FedEx also indemnifies all drivers against liability for those damages, with certain exceptions. For example, drivers are liable for damages resulting from their failure to comply with FedEx's Safe Driving Program standards or their intentional misconduct or willfully negligent behavior. (*Id.*) Drivers who fail to comply with the Safe Driving Program must purchase their own liability insurance in amounts specified by FedEx; drivers must also name FedEx as an "additional insured." (RX 4 p.13.) All drivers, regardless of who carries the liability insurance, are liable for the first \$500 in damages, which is reduced to \$250 after one year of service and is completely eliminated after two years of service with no at-fault accidents. (Wilmington DDE 27; RX 4 p.14.) Furthermore, FedEx requires that all drivers maintain public liability insurance in specified amounts for damages resulting from their personal use of the vans. (Wilmington DDE 27; RX 4 p.12.) Finally, FedEx requires that all drivers maintain work accident or workers' compensation coverage. FedEx further specifies the minimum amounts of that coverage. (Wilmington DDE 27; RX 4 p.15.) Drivers can purchase both the public liability insurance and the work accident/workers' compensation insurance

through a policy negotiated by FedEx or find their own insurance. (Wilmington DDE 27; Hearing Tr. 880, RX 4 p.15.)

4. The drivers' agreements, which the drivers did not negotiate, establish a full-time work arrangement and control their work

After completing the QPDL training (or exempting out of it because of prior driving experience) and acquiring a van, drivers sign a Standard Operating Agreement with FedEx. (Wilmington DDE 10; Hearing Tr. 1025, RX 4.) The operating agreement is the same nationwide. (Wilmington DDE 10.) Except for the route assigned to the driver and one aspect of compensation (see p. 21 below), the operating agreements are non-negotiable and presented to each driver on a take-it-or-leave-it basis. (Wilmington DDE 11, Worcester DDE 8, Barrington DDE 5.)

The operating agreement states that the driver is “strictly an independent contractor, and not an employee of FHD for any purpose.” (Wilmington DDE 11; RX 4 p.4.) The agreement further states that FedEx will not direct drivers as to the “manner and means” of their business, and that FedEx may not prescribe hours of work, breaks, routes, or other details. (Wilmington DDE 11; RX 4 p.10.)

FedEx promises, on the first page of the agreement, to “seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor’s equipment.” (RX 4 p.4.) In return, drivers must provide

daily service (Tuesday through Saturday) and “conduct his/her business so that it can be identified as being a part of the [FedEx] system.” (*Id.*) Under the operating agreement, drivers have the right to use their vans for “outside” business if they first remove or cover the FedEx logos. (Hearing Tr. 1004, RX 4 p.6.) No current drivers at either Wilmington terminal use their vans for outside businesses.

(Wilmington DDE 16, 39; Hearing Tr. 202.) Some drivers use their vans for personal activities – such as picking children up from school or helping family members move; they do not cover the FedEx logo on these occasions.

(Wilmington DDE 16; Hearing Tr. 900, 1053.)

The Operating Agreement requires all drivers to wear a FedEx Home uniform, maintained in good condition, and to keep their personal appearance “consistent with reasonable standards of good order as maintained by competitors and promulgated from time to time by” FedEx. These standards include a prohibition on earrings. (Wilmington DDE 25, Barrington DDE 9; RX 4 p.10.) Drivers can purchase their uniforms from FedEx through the BSP or from other vendors though there is no evidence that any driver does so. (Wilmington DDE 25.)

Drivers can sign the operating agreement for one- or two-year periods; the agreement automatically renews for successive one-year periods thereafter.

(Wilmington DDE 12; RX 4 p.22.) Contracts can be terminated under certain

circumstances: mutual agreement, the driver's intentional misconduct or willfully negligent operation of his van, breach of contract, cessation or reduction of delivery service in the driver's area, or 30 days' written notice by the driver.

(Wilmington DDE 12; RX 4 pp.12-13, 22-23.) Each driver must provide FedEx with \$500 that FedEx places in an interest-bearing escrow account. In the event a driver does not give 30 days' written notice of contract termination, FedEx keeps the \$500 as "liquidated damages." (Wilmington DDE 12, RX 4 pp.7-8, 23.)

Other than termination, FedEx does not otherwise discipline or reprimand drivers although it requires compliance with its Residential Driver Release Program, Safe Driving Program, and Customer Service Program (as discussed more fully below at pp. 42-43). (Wilmington DDE 12, Barrington DDE 8.) For drivers experiencing problems complying with these work rules, FedEx will hold a "business discussion." (Hearing Tr. 66-67.) FedEx then memorializes the discussion, and those written Business Discussion Notes may be used by FedEx to decide whether to terminate a driver's contract for non-performance. (Wilmington DDE 13, 18 n.30, Barrington DDE 8; Hearing Tr. 80.)

To encourage compliance with these work rules, FedEx offers bonuses and reduces liability for losses. As noted above, drivers who do not comply with the Safe Driving Program must obtain their own public liability insurance.

(Wilmington DDE 27; RX 4 p.13.) Drivers who meet customer service goals –

including no at-fault accidents and no verified customer complaints – are eligible for individual and facility group bonuses. (Wilmington DDE 23; RX 4 Addendum 8.) Drivers who do not fail a driver release audit or receive a driver release complaint are eligible for a \$50 per month bonus. (*Id.*) In addition, FedEx will not hold drivers liable for losses resulting from a driver release if the driver is approved to participate in the driver release program and complied with FedEx’s rules. (Wilmington DDE 18 & n.29; RX 4 Residential Driver Release Program.)

5. FedEx assigns “primary service areas” to drivers without charge and can reconfigure those areas at its sole discretion; drivers receive all assignments from FedEx

FedEx assigns each driver who signs an operating agreement a “primary service area” or “proprietary zip code.” (Wilmington DDE 16, Barrington DDE 6; Hearing Tr. 1110-11, RX 4 p.18.) The driver is responsible for providing daily (Tuesday through Saturday) delivery service within that area. (Wilmington DDE 17, 19; RX 4 p.18.) Some towns are not yet included in any driver’s primary service area; FedEx assigns these packages to drivers and may move deliveries in these towns from driver to driver. (Wilmington DDE 16-17; Hearing Tr. 158.) Drivers cannot refuse to deliver any assigned package unless it is damaged or weighs more than 70 pounds. (Barrington DDE 6.)

FedEx may, in its sole discretion, reconfigure a driver's service area for customer service reasons. (Wilmington DDE 17, Barrington DDE 6; Hearing Tr. 1110, RX 4 p.18.) In such a case, FedEx provides 5 working days' written notice, giving the driver the opportunity to demonstrate his ability to provide adequate service. (*Id.*) If FedEx is still unhappy with the level of service, it will reconfigure the area. (*Id.*) The operating agreement sets out a formula under which the driver who receives the additional deliveries compensates the driver who lost them. (Wilmington DDE 17; RX 4 pp. 19-20.)

FedEx may also, in its sole discretion, "flex" or transfer packages between drivers if a manager believes a driver has too many packages to deliver on a given day. (Wilmington DDE 20-21 & n.36, Barrington DDE 6; Hearing Tr. 220-21, 228.) Drivers may flex packages among themselves, without FedEx's permission. (Wilmington DDE 21.) In both cases, the driver who actually delivers the package is paid for the delivery. (Wilmington DDE 21; Hearing Tr. 633-34.)

6. Drivers work full-time for FedEx, on days and schedules convenient to FedEx

Each driver works Tuesday through Saturday and can only make deliveries on Sunday or Monday with FedEx's permission. (Wilmington DDE 19 n.31, Barrington DDE 8.) Drivers do not punch a time clock, but they are required to scan their FedEx badges when they go on and off duty so that FedEx can calculate

the hours they spend on the road. (Wilmington DDE 19-20, Worcester DDE 12.)

FedEx does not establish a set time for drivers to begin deliveries, but drivers cannot leave for their routes until after the packages are delivered and sorted each morning – around 6:30 a.m. (Wilmington DDE 19; Hearing Tr. 213-14, 945.)

FedEx also requires that all deliveries be completed by 8 p.m. (Wilmington DDE 19, Barrington DDE 15; Hearing Tr. 190.)

Each morning, trucks from FedEx's distribution hub bring packages to the Wilmington terminals (at Jewel Drive, the trucks arrive between 4 and 5:30 a.m.). (Wilmington DDE 19; Hearing Tr. 153.) The packages are offloaded via conveyor belt; FedEx's package handlers then sort the packages by route and place them on pallets. (Wilmington DDE 19; Hearing Tr. 628.) A computerized system separates packages and assigns them to drivers. (Wilmington DDE 19; Hearing Tr. 154.)

After the packages are sorted, drivers load the packages onto their vans.

(Wilmington DDE 19; Hearing Tr. 628.) FedEx teaches drivers a preferred method of loading the vans during the QPDL training, but drivers can load their vans as they choose. (Wilmington DDE 10, Barrington DDE 7; Hearing Tr. 272.) FedEx provides each driver with a manifest showing his deliveries for the day and a "turn-by-turn," a map showing each stop and the most efficient route. (Wilmington DDE 19.) Drivers are not required to follow the turn-by-turns and can choose a different route. (Wilmington DDE 19; Hearing Tr. 63, 903-04, 1048.)

FedEx requires drivers to scan each package with a handheld scanner before it is loaded onto the van and upon delivery. (Wilmington DDE 24, 40, Worcester DDE 4, Barrington DDE 7; Hearing Tr. 284, 301, 647, 883, 971, 1012-14, 1085.) Scanning gives FedEx a computerized record of deliveries.⁴ Drivers rent scanners from FedEx as part of the Business Support Package; drivers are allowed under FedEx policy to acquire scanners from other vendors, but the record does not reveal whether any drivers did so. (Wilmington DDE 25-26; RX 4 Addendum 6.)

**7. Driver income depends upon rates set by FedEx;
FedEx provides some benefits**

Shippers place their deliveries directly with FedEx, and FedEx sets the delivery prices. (Wilmington DDE 20; Hearing Tr. 67-68.) Drivers cannot determine when or where delivery will be made. Drivers are not responsible for soliciting shippers and have no power to create new accounts or terminate unsatisfactory ones. (*Id.*) Drivers cannot take orders from shippers for deliveries. (Hearing Tr. 81.)

FedEx unilaterally sets drivers' compensation. (Wilmington DDE 42; RX 4 Addendum 3 & Attachments 3.1-3.4.) Drivers' compensation – paid in a weekly

⁴ All drivers at the Ballardvale or Jewel Drive terminals – who deliver between 90 and 200 packages each day – use scanners; however, in the event of a computer malfunction, drivers handwrite the information from each package onto a form. (Wilmington DDE 20; Hearing Tr. 937.)

“settlement” – comprises several elements, including core zone, van availability, service bonus, and delivery and pickup (including premium service). (Wilmington DDE 21-23; RX 4 Addendum 3 & Attachments 3.1-3.4.)

All drivers receive a core zone payment, which varies depending on the density of packages to be delivered in the drivers’ primary service area.

(Wilmington DDE 22; RX 4 Addendum 3.) The daily core zone payments at the Wilmington terminals range from \$27 to \$129. (*Id.*) Under the operating agreement, FedEx “may” reduce or eliminate the core zone payment, but it will not decrease the payment by more than \$10 per day in any six-month period and will give 30 days’ written notice. (RX 4 p.17.)

FedEx pays each driver a daily fee for each day the driver makes his van and a qualified driver available for deliveries. (Wilmington DDE 22; RX 4 Addendum 3 pp.2-3.) For P-500 step-vans and “Sprinters,” drivers are paid \$35 per day; they receive \$25 per day for other van models. (*Id.*) In addition, FedEx pays drivers \$50 if they make themselves (or another qualified driver) and their van available on the work day before and after certain specified national holidays. (*Id.*) Finally, FedEx pays a quarterly service bonus to drivers with more than one year of service. The amount paid increases with the number of years of service. (Wilmington DDE 23; RX 4 Addendum 3 p.3.)

The core zone settlement and van availability fee, which drivers receive for showing up to work, make up 30 to 40 percent of each driver's compensation. (Wilmington DDE 23, 42; Hearing Tr. 203-04.) With the exception of the core zone density payment, for which only one former driver successfully negotiated an increase, none of the compensation is negotiable. (Wilmington DDE 42 & n.72; Hearing Tr. 40-41.)

The delivery portion of the settlement includes \$1.29 for each stop and \$0.22 for each package delivered. (Wilmington DDE 21-22; RX 4 Addendum 3 p.1.) In addition, drivers are paid for each pick-up (\$1.00 per stop and \$0.13 per package), for each "Call Tag Stop" (\$0.50), for each mile driven daily between 201 and 400 miles (\$0.20 per mile), and for each package they load into their vans. (*Id.*) The delivery settlement also includes additional fees for attempted but unsuccessful deliveries and for premium services such as oversized packages, evening deliveries, signature-required deliveries, and deliveries by appointment. (Wilmington DDE 22; RX 4 Addendum 3 pp.2-3.)

Drivers receive vacation benefits through FedEx's Time-Off Program. (Wilmington DDE 28; Hearing Tr. 624, 642, RX 4 Attachment 6.1.) Drivers have the option to participate; if they do, FedEx subtracts \$3.50 per day from their settlements. (*Id.*) That fee buys 2 weeks of leave per fiscal year, which drivers sign up for before the fiscal year begins. For an additional \$1.75 per day, drivers

can request a third week of leave “if available.” (Wilmington DDE 28; Hearing Tr. 1119-20, RX 4 Attachment 6.1.) FedEx selects drivers for leave based on seniority. (Wilmington DDE 29; RX 4 Attachment 6.1.) FedEx also places other restrictions on the leave: all participating drivers select one week of leave before the second week can be selected. Weeks must be taken in Tuesday through Saturday increments. Drivers who participate in the program must participate for the entire year. (Wilmington DDE 28; Hearing Tr. 1153, RX 4 Attachment 6.1.) FedEx provides a “swing” driver to fill in for those drivers taking leave through the Time-Off Program. (Wilmington DDE 29; Hearing Tr. 51.) The swing driver also signs an operating agreement and may be full- or part-time, depending on how many drivers participate in the program. (Wilmington DDE 29; Hearing Tr. 51, 178-79.)

If a driver is sick or unexpectedly needs a day off, the driver can hire his own temporary replacement driver. (Wilmington DDE 28; Hearing Tr. 689.) He can also call in to the terminal. The terminal manager will then schedule one of the terminal’s temp drivers to cover the route, have management fill in, or disperse that driver’s packages to other drivers. (Wilmington DDE 21 & n.35; Hearing Tr. 73, 645.)

FedEx does not withhold any taxes from the drivers’ paychecks and provides drivers with IRS 1099 forms at the end of the year. (Wilmington DDE 24.) Two

drivers have incorporated as a business. (Wilmington DDE 38 n.66; Hearing Tr. 40.)

8. Drivers can, in theory, sell their routes

When FedEx creates new routes or reassigns routes abandoned by other drivers, it gives them away without charge. (Wilmington DDE 34 & n.57, 43 & n.73; Hearing Tr. 72, 313, 866, 1127.) Under the operating agreement, drivers can assign or sell their contractual rights to a replacement driver, so long as the replacement meets all FedEx requirements and enters into an operating agreement on “substantially the same terms and conditions” as the original driver.

(Wilmington DDE 33; RX 4 p.25.) FedEx, though it is not involved in whatever price is paid, will agree to deduct the consideration from the buyer’s settlement check and remit it to the seller. (Wilmington DDE 34; RX 4 p.25.)

There have been no route sales at the Ballardvale terminal. (Wilmington DDE 35.) Two sales occurred at the Jewel Drive terminal. (Wilmington DDE 40; Hearing Tr. 258.) Both sales included a van, and it does not appear that the parties attached any appreciable value to the route, as opposed to the van. (Wilmington DDE 35; Hearing Tr. 260-63, 312, 320-21.)

Drivers also abandon routes without selling them. Driver Jung abandoned one route without selling it, and Driver Desantis abandoned two routes.

(Wilmington DDE 36; Hearing Tr. 71-72, 310-11.) FedEx reassigned these

abandoned routes to other drivers without charge. (Wilmington DDE 36.) Driver Valasquez, unable to return to the country because of immigration problems, abandoned two routes; his hired drivers took over those routes and bought Valasquez's vans. (Wilmington DDE 36; Hearing Tr. 214-15, 226-27, 862-64.)

C. The Representation Proceedings: The Union Wins Both Elections

1. The Union mailed election materials, clearly identified as being from the Union, to eligible voters

Following the Union's petitions to represent FedEx's drivers in two units at the Jewel Drive and Ballardvale terminals and the Regional Director's Decision and Direction of Election, the Board scheduled elections to take place on October 20, 2006. (ALJR 2.)

Six days before the election, on October 14, FedEx posted the Board's official election notices at both the Ballardvale and Jewel Drive terminals, as required by the Board. (ALJR 8; Jt. Exh. 3, U. Exh. 1.) At Ballardvale, FedEx posted notices near the check-in area and on a wall near the voting area. (ALJR 8; Jt. Exh. 3.) At the Jewel Drive terminal, FedEx posted the notices at the check-in area and in the hallway entrance to the terminal office. (*Id.*) FedEx posted the notices prominently, in areas where all drivers would have had the opportunity to see and read them. (ALJR 9; ALJ Tr. 38-40.)

The Board's official notices are 25½" by 14" and comprise three distinct panels. (ALJR 4; U. Exh. 1.) The first panel explains the purpose of the election, secret ballots, eligibility rules, challenges, and authorized observers. (*Id.*) The second panel sets out the specific unit at issue, gives the particulars of the election, and shows a sample ballot. (*Id.*) The third panel describes the rights of voters, the responsibilities of the Board, and gives examples of objectionable conduct by unions and employers. (*Id.*) At the top of the official notice, extending across its entire length, are "UNITED STATES OF AMERICA * NATIONAL LABOR RELATIONS BOARD" and "NOTICE OF ELECTION." (*Id.*) Likewise, below the three panels and extending across the entire length of the notice is this warning:

WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE. ANY MARKINGS THAT YOU SEE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION.

(*Id.*)

On October 16, the Union mailed a sample ballot to eligible voters. (Board's 6/18/07 Decision & Certification of Representative 2 n.1 (MSJ Exh. P), ALJR 4; Jt. Exh. 1, ALJ Tr. 9-10.) The sample ballot was a photocopy of the middle panel of the Board's official ballot, which described the bargaining unit and the date, time,

and place of the election. (Jt. Exh. 1.) The page also included a sample ballot and instructions stating that the ballot should not be signed, but should be folded and placed in the ballot box. (ALJR 5; Jt. Exh. 1.) The copy mailed to voters showed a handwritten X in the “yes” box (indicating a vote for representation by the Union). (ALJR 4; Jt. Exh. 1.) Like the official Board notice, the copy included the word “sample” written across the face of the ballot. (ALJR 5; Jt. Exh. 1.) In the Union’s mailing, “sample” was not in blue ink, as it is in the official version, but black, and each letter of the word “sample” was highlighted by hand with yellow marker. (*Id.*) The photocopies of the election notice did not include the statements printed at the top (United States of America * National Labor Relations Board and Notice of Election) and bottom (a warning that any markings on any sample ballot were not made by the Board) of the Board’s official notices. (ALJR 4; Jt. Exh. 1, U. Exh. 1.)

The sample ballot was one of three pages in the Union’s mailing. (ALJ Tr. 7-8.) The second page, titled “Special Notice” and written on the Union’s letterhead with the Union’s watermark, stated that the election would be a secret ballot election, that FedEx managers and supervisors would not know how employees voted, and that managers would not be allowed within 150 feet of the polling station during the voting. (ALJR 4; Jt. Exh. 1.) The bottom of the notice asked employees to vote yes. (*Id.*) The third page was a photocopy of the right

panel of the official election notice, which lists the rights of employees under the Act, informs employees of the Board's responsibility to protect employee rights, and provides examples of objectionable conduct by unions or employers. (ALJR 5; Jt. Exh. 1.) That page also included the Board's statement that it did not endorse any choice in the election. (*Id.*) All three pages were mailed in an envelope clearly marked with the Union's name and return address, and all three pages measured 8½" by 11". (ALJR 4, 9; ALJ Tr. 10, 12, Jt. Exh. 2.)

2. The Union prevails in the elections, and the Board certifies it as the bargaining representative, over FedEx's objections

The Union won both elections. At the Ballardvale terminal, the drivers voted 10 to 2 (with 2 non-determinative challenged ballots) to be represented by the Union. At the Jewel Drive terminal, the drivers voted 14 to 6 (with 5 non-determinative challenged ballots) to be represented by the Union. (ALJR 2; RD Exh. 1(A).)

Five days after the ballots were counted, FedEx filed objections to both elections, alleging that the Union engaged in misconduct affecting the elections' results, including mailing the marked sample ballot. The Board's Regional Director consolidated the two cases and ordered a hearing on the objections. (ALJR 2-3; RD Exh. 1(A).)

An administrative law judge took evidence and heard arguments on the objections during a 2-day hearing. (ALJR 3.) Thereafter, the judge issued a report recommending that the objections be overruled and finding, with respect to the only objection that FedEx presses here, that the Union's marked sample ballot "would not have a tendency to mislead employees into believing that the Board supported union representation." (ALJR 10-11, 14, 17.)

FedEx filed objections to the administrative law judge's findings with the Board. After considering those objections, the Board adopted the judge's findings and recommendations and certified the Union as the bargaining representative of all full-time and swing drivers at the Ballardvale and Jewel Drive terminals. (Decisions & Certifications of Representative, 6/18/07.)

D. The Unfair Labor Practice Proceeding

By letters dated June 22, 2007, the Union requested that FedEx meet and bargain with it as the representative of unit employees. (MSJ Exhs. Q & R.) Through its attorneys, FedEx refused to bargain, stating that it intended to test the certification of each unit. (MSJ Exhs. S & V.) Following FedEx's refusal to bargain, the Union filed unfair labor practice charges. (MSJ Exhs. T(1) & U(1).) Following an investigation, the Board's General Counsel issued a complaint, alleging that FedEx's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (MSJ Exhs. W & Z.) In its answer, FedEx

admitted that it had refused to bargain, but challenged the validity of the certification. (MSJ Exh. CC.)

The General Counsel filed a motion for summary judgment. On August 15, 2007, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted, and FedEx filed a response.

II. THE BOARD'S CONCLUSIONS AND ORDER

On September 28, 2007, the Board (Chairman Battista, Members Liebman and Kirsanow) issued a Decision and Order finding that all issues raised by FedEx could have been litigated in the prior representation proceeding. (D&O 1.) The Board also found that FedEx did not offer to adduce at a hearing any newly discovered or previously unavailable evidence or to allege any special circumstances that would require the Board to reconsider its decision in the underlying representation case. (D&O 1.) The Board therefore found that FedEx violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by its undisputed failure to bargain with the Union as the exclusive representative of the unit employees. (D&O 2.)

The Board's Order requires FedEx to cease and desist from refusing to bargain with the Union, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O

2.) Affirmatively, the Board's Order requires FedEx to bargain with the Union on request, embodying any understanding in a signed agreement, and to post copies of a remedial notice. (D&O 2-3.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that FedEx violated the Act by refusing to bargain with the Union as the certified representative of its drivers. FedEx makes two arguments to excuse its failure to bargain. Both fail.

First, FedEx failed to show that its drivers are independent contractors rather than employees under the Act. FedEx maintains strict control over its drivers and uses the drivers to build its own brand identification by requiring drivers, among other things, to wear FedEx's uniforms, have large FedEx logos on their vans, and use scanners so that FedEx can provide customers with an online package tracking system. FedEx requires drivers to comply with a series of work rules, including driving, customer service, and package release rules. To encourage compliance with these work rules, FedEx offers bonuses and reduces liability for losses.

Drivers further lack crucial entrepreneurial opportunities. FedEx unilaterally sets drivers' compensation, and drivers receive 30 to 40 percent of their weekly pay for just showing up to work. Because FedEx endeavors to make "full use" of the drivers' vans, drivers work full-time for FedEx and do not use their vans to deliver for other carriers or to run their own businesses. FedEx also goes beyond DOT

regulations by prohibiting drivers, while making deliveries for FedEx, from using their vans not only for making deliveries for other interstate carriers but for all other purposes.

Drivers' theoretical ability to sell their routes does not represent a true entrepreneurial opportunity. In fact, only two drivers at the Wilmington terminals have ever sold a route, and both sales included a van. The Board reasonably determined that these two sales failed to show that drivers have a proprietary interest in their routes, especially where other drivers abandoned their routes and FedEx itself continued to give out routes for free.

Finally, FedEx failed to show that the Union, by mailing sample ballots marked with a red "X" (indicating a vote for union representation) to eligible voters, tainted the election. By the time employees received the Union's mailing, FedEx had already posted the Board's official notice (containing its disclaimer of any markings on the ballot or preference for any particular outcome) in prominent places in both terminals. The sample ballot was only one of three pages mailed in a union envelope; one page clearly identified the Union as the sender; the other reproduced a page of the Board's official election notice that specifically reiterated that the Board does not endorse any choice in the election. Moreover, the mailing was only 1 of 13 sent by the Union before the election. Under these circumstances, the Board did not abuse its discretion in finding that the Union's marked sample

ballot did not have a tendency to mislead employees into believing that the Board supported union representation.

ARGUMENT

The Act, in Section 7, gives employees the right to choose a representative and to have that representative bargain with the employer on their behalf.

29 U.S.C. § 157. Employers have the corresponding duty to bargain with their employees' chosen representatives, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act. 29 U.S.C. § 158(a)(5) and (1).⁵ FedEx does not dispute that it refused to bargain with the Union. Rather, it challenges the validity of the Board's certification of the Union as the exclusive representative of a bargaining unit of its drivers on two grounds: that the drivers are independent contractors and that the Union tainted the election by mailing marked sample ballots to voters. Unless FedEx prevails in either attack on the Board's certification of the Union, FedEx's admitted refusal to bargain violated Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its order. *See Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004), *cert. denied*, 543

⁵ A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

U.S. 1131 (2005); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988).

Each issue is discussed in turn.

I. THE BOARD REASONABLY DETERMINED THAT FEDEX'S DRIVERS ARE EMPLOYEES WITHIN THE MEANING OF THE ACT, NOT INDEPENDENT CONTRACTORS, AND, THEREFORE, FEDEX VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

A. Applicable Principles and Standard of Review

Section 2(3) of the Act (29 U.S.C. § 152(3)), as amended by the 1947 Labor Management Relations Act, provides, in pertinent part, that the term “employee” shall not include “any individual having the status of an independent contractor.” The burden of proving independent contractor status is on the party asserting it. *Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004) (citing *BKN, Inc.*, 333 NLRB 143, 144 (2001)); *see generally NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-12 (2001) (party urging exclusion from the Act’s protections bears the burden of persuasion).

Longstanding Supreme Court, in-circuit, and Board precedent has established that common-law agency principles apply in distinguishing between employees and independent contractors under the Act. *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968); *Seattle Opera v. NLRB*, 292 F.3d 757, 765 n.11 (D.C. Cir. 2002); *Roadway Package Sys., Inc.*, 326 NLRB 842 (1998). These principles include: (1) the extent of control that the employing entity exercises over

the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is in the business. *Restatement (2d) of Agency* § 220; *BKN*, 333 NLRB at 144. The Board has also cautioned that the Restatement's list of factors "is not exclusive or exhaustive." *The Arizona Republic*, 349 NLRB No. 95 (2007), slip op. at 3, 2007 WL 1378518 at *5 (citations omitted).

As the Supreme Court has recognized, "there is no shorthand formula or magic phrase" that can determine independent contractor status from case to case, and the determination of employee or independent contractor status requires an evaluation of "all of the incidents of the work relationship," with "no one factor being decisive." *United Ins.*, 390 U.S. at 258. Indeed, the common-law agency test is difficult to apply because "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an

employee or an independent contractor.” *Id.* Further, as the Board has observed, “[n]ot only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.” *Roadway*, 326 NLRB at 850 (quoting *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982)).

This Court has observed that a significant factor bearing on an employer’s control over a worker is the extent to which the worker can be said to have an entrepreneurial interest in his business. *See Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002). Thus, this Court has found reasonable the Board’s focus on the existence of “significant entrepreneurial opportunity for gain or loss.” *Id.* (internal quotation and citation omitted). *Accord NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 919-20 (11th Cir. 1983) (the test “takes into account the degree of supervision, the entrepreneurial interests of the agent and any other relevant factors”); *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1097 (9th Cir. 2008) (considering “the entrepreneurial aspects of the individual’s business; risk of loss and opportunity for profit; and the individual’s

proprietary interest in his business”) (quoting *Merchants Home Delivery Serv., Inc. v. NLRB*, 580 F.2d 966, 973 (9th Cir. 1978)).

Concomitantly, where there is little or no ownership or proprietary interest in a business and minimal entrepreneurial prerogatives, the likelihood that an employer-employee relationship will be found to exist increases, particularly where the worker regularly performs work for a single entity and that work comprises the essence of that entity’s business. *Roadway*, 326 NLRB at 843, 846-48, 850-53. *Accord Corporate Express*, 292 F.3d at 780-81.

“Congress empowered the Board [in distinguishing between employees and independent contractors] to assess [the] significance [of the facts] in the first instance, with limited review” by the courts. *City Cab of Orlando, Inc. v. NLRB*, 628 F.2d 261, 265 (D.C. Cir. 1980). Consistent with the standard of review set forth in Section 10(e) of the Act (29 U.S.C. § 160(e)), a reviewing court may not “displace the Board’s choice between two fairly conflicting views [of the facts], even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *United Ins.*, 390 U.S. at 260 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)); *Corporate Express*, 292 F.3d at 779.

B. The Board Reasonably Rejected FedEx's Claim That Its Drivers Are Independent Contractors

As in most cases in which the Board must determine whether individuals are statutory employees or independent contractors, the Board recognized (DDE 43-44) that there is evidence that could support either finding. In the Board's reasoned judgment, however, factors that support a finding of independent contractor status were overshadowed by those showing that the drivers are not free to perform their work in the manner they choose, nor do they have significant entrepreneurial opportunities normally associated with independent businesses.

1. Drivers perform an integral part of FedEx's business

FedEx Home Delivery is in the business of delivering packages to homes. As the Board found (Wilmington DDE 38), "all the FedEx Home [drivers] perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages." FedEx's demand, through the operating agreement, that drivers provide "daily delivery and pickups" in their primary service areas and other areas as assigned, indicates that the drivers are employees, not independent contractors. *See Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990) ("the Board may legitimately consider whether a worker plays an essential role in a company's business, presumably because the company more likely than not would want to exercise control over such important personnel") (citing *United Ins.*, 390

U.S. at 259). *Compare Roadway*, 326 NLRB at 851 (finding that employee drivers “devote a substantial amount of their time, labor, and equipment to performing essential functions” of the employer’s business) *with Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 893 (1998) (finding delivery drivers to be independent contractors where company in the business of selling mattresses outsourced only delivery, not other essential functions of the business).

Drivers need no prior experience or special qualifications to work for FedEx. In practice, most drivers had no delivery experience before being hired. Instead, FedEx trains drivers through the QPDL program, which teaches not only safe driving techniques but also FedEx’s policies and preferred procedures, such as how to load a van and use the required scanner. (Wilmington DDE 10.) Indeed, most drivers begin working for FedEx as temps with Kelly Services. As temps, they were paid to attend the QPDL training and work as replacement drivers while they learned the job. Furthermore, because vans at the Wilmington terminals weigh less than 26,000 pounds, none of the drivers needs a commercial drivers’ license (commonly referred to as a “CDL”). (Hearing Tr. 1000.)

Where individuals bring little or no experience into a job and the employer helps them develop the skills necessary to perform the work, the individuals look more like employees than independent contractors. *See United Ins.*, 390 U.S. at 259-60; *see also NLRB v. Warner*, 587 F.2d 896, 901 (8th Cir. 1978) (the work of

the truck driver “did not require a high degree of skill” and was therefore indicative of employee status). In contrast, as this Court has found, work that “requires elaborate skill and training” supports a finding of independent contractor status. *Aurora Packing*, 904 F.2d at 76 (finding kosher ritual slaughterers to be independent contractors). *See also Dial-A-Mattress*, 326 NLRB at 886 (fact that employer offered no training to drivers weighed in favor of independent contractor status).

2. Drivers have little of the independence and flexibility expected of independent contractors because FedEx supervises and controls their work

As explained earlier, in determining whether an employer-employee relationship exists, the Board must evaluate “all of the incidents of the relationship,” and “there is no shorthand formula or magic phrase” that predetermines the outcome. *United Ins.*, 390 U.S. at 258. Thus, the Board properly examined and relied upon FedEx’s “substantial control over all the [drivers’] performance of their functions.” (Wilmington DDE 40.) In arguing otherwise, FedEx seeks to minimize the control it exercises over the drivers’ work.

FedEx’s relationship with its drivers is governed by the operating agreement. That agreement is a standardized contract used by FedEx Home Delivery nationwide and is presented to drivers on a take-it-or-leave-it basis. Drivers can negotiate only one aspect of the agreement – the core zone payment – and only one

driver at the Wilmington terminal ever did that. (Wilmington DDE 42 n.72.)

Among other things, the agreement prescribes the drivers' compensation, their work requirements, and their service area. Under these circumstances, FedEx's drivers do not "enjoy[] significant freedom," and the Board reasonably determined that this is a strong indicator of employee status. *See St. Joseph News-Press*, 345 NLRB 474, 479 (2005).

The ability to work when they want for how long they want and how they want are hallmarks of independent contractor status. Here, however, FedEx's operating agreement makes its intentions clear: FedEx intends to make "full use" of the drivers' time and equipment. (RX 4 p.1.) The drivers, for their part, must agree to provide daily pickup and delivery service and to conduct their business so that it is "identified as being a part of the [FedEx] system." (RX 4 p.1.) Thus, drivers are required to work for FedEx, Tuesday through Saturday, in their primary service area and other areas, as assigned by FedEx.

Their days are further circumscribed by FedEx rules: Drivers cannot deliver packages on Sunday or Monday without receiving permission from FedEx.

Drivers cannot turn down work or refuse to deliver a package, unless that package is damaged or weighs more than 70 pounds. Drivers are required to provide "premium service," such as after-hours delivery and signature-required delivery.

Drivers cannot leave the terminal to begin delivering packages until all that day's

packages have been unloaded and sorted by FedEx's package handlers and must deliver all non-premium service packages by 8 p.m.

Drivers must scan their packages before loading them on the van and at delivery. While the scanning helps FedEx meet its DOT requirements, it also allows FedEx to provide its customers with a package tracking service and meet its business goals. (Wilmington DDE 40; Hearing Tr. 265-66.) Nor can drivers take a vacation or simply a day off when they like. Even under the Time-Off Program, they must schedule vacations in advance, and weeks are assigned by seniority. These types of control stand in stark contrast to the freedom of drivers this Court has found to be independent contractors. *See North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 600 (D.C. Cir. 1989) (independent contractors could refuse loads and take time off whenever they wanted). *See also NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 385 (3d Cir. 1979) (independent contractors were "free to accept or decline loads"); *St. Joseph News-Press*, 345 NLRB at 478 (independent contractors could "refuse to deliver to customers they deem unlikely to pay or to whom it would not be economically feasible to deliver"); *Argix Direct, Inc.*, 343 NLRB 1017, 1019 (2004) (independent contractors free to work, or not, on any particular day without penalty); *Dial-A-Mattress*, 326 NLRB at 891-92 (independent contractors were free to refuse orders without penalty).

FedEx further controls the drivers' appearance and manner of dress by requiring all drivers to wear FedEx uniforms and identification badges and to comply with FedEx appearance standards – including a prohibition on earrings. (Wilmington DDE 12.) Drivers must also keep their vans clean and free of body damage. As this Court has found, control over a driver's dress and vehicle is indicative of employee status. *C.C. Eastern v. NLRB*, 60 F.3d 855, 585 (D.C. Cir. 1995), *denying enf. and vacating* 313 NLRB 632 (1994).

Another way FedEx controls the “means and manner” of the drivers' work is through its required Residential Driver Release Program, Safe Driving Program, and Customer Service Program. Failure to comply with these programs can result in consequences for the driver. FedEx's quarterly Driver Release Audits ascertain whether drivers follow proper FedEx procedures in leaving packages at customers' homes; if not, drivers can be held liable for customer claims. (Wilmington DDE 18, Barrington DDE 8; Hearing Tr. 56-57, 1131-32.) These procedures include leaving packages in approved locations, out of sight, only at single family homes, in weatherproof bags, and out of the reach of animals. (RX 4 Residential Driver Release Program.) Drivers must also leave a delivery notice and complete the FedEx tracing form within 10 days. A driver's responsibility for customer claims is pro-rated depending on whether the driver had other claims in the previous 12, 18, or 24 months. (*Id.*) Drivers who fully comply with the program, do not fail an

audit, and receive no driver release complaints are eligible for a \$50 per month bonus. (RX 4 Addendum 8.)

The Safe Driving Program includes a list of 25 prohibited behaviors such as carrying unauthorized passengers, failing to inspect the van, or neglecting to report an accident. (Wilmington DDE 12 n.23; RX 4 Safe Driving Program.) FedEx managers conduct safety rides to evaluate safe driving techniques; a driver failing to comply with the Safe Driving Program must obtain additional insurance coverage at his own cost. (Barrington DDE 8; RX 4 p.13.)

During a Customer Service Ride, a FedEx supervisor records the amount of time spent at each stop so that FedEx can evaluate whether a driver has an appropriate workload. (Wilmington DDE 18 n.30, Barrington DDE 8.) At the end of the ride, the supervisor completes an evaluation sheet, rating the driver's performance in package delivery, safe driving, professional appearance, and customer courtesy. (Wilmington DDE 18 n.30, Barrington DDE 8.)

FedEx's control over its drivers is in stark contrast to the lack of control employers exercise over true independent contractors. *Compare NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1093 (9th Cir. 2008) (finding drivers to be employees where employer "exercised considerable control over the means and manner of its drivers' performance") *with North Am. Van Lines*, 869 F.2d at 600 (finding drivers to be independent contractors where they retained "nearly absolute

control” over their own performance), *and A. Duie Pyle*, 606 F.2d at 385 (finding drivers to be independent contractors where employer did not supervise their loading or unloading or discipline them for accidents or traffic violations).

3. Instrumentalities of work

FedEx drivers own or lease their vans. Ownership of the tools or instrumentalities of the work is one factor favoring a finding of independent contractor status. *See Corporate Express*, 292 F.3d at 780. But contrary to FedEx’s claims (Br. 44), FedEx retains substantial control over the drivers’ choice of vans: vans must be white, have interior shelving, and be a certain size. (Hearing Tr. 1002.) FedEx approves each van purchase, and one driver testified that the terminal manager told him the general model van he needed. (Hearing Tr. 1043.) Indeed, according to a FedEx manager, there are only three types of vans at the Ballardvale terminal: bubble tops, P-450s, and P-500s. (Hearing Tr. 638.) In one case FedEx even gave driver Tremblay a \$2,000 bonus to buy a larger van. (Hearing Tr. 897.) Drivers’ inability to choose their vehicle indicates employee status. *Cf. Corporate Express*, 292 F.3d at 780 (drivers’ freedom to choose what type of vehicle they would use weighed in favor of independent contractor status).

FedEx also requires that drivers have the FedEx logo on their vans. While DOT regulations do require that the carrier’s name be on the van, FedEx’s required logos are larger than DOT requires, a requirement to encourage FedEx brand

identification. (Wilmington DDE 13-14, Barrington DDE 9; Hearing Tr. 113, 222-24.) FedEx also paid to have its logos painted on drivers' vans. (Hearing Tr. 899.)

While FedEx suggests it requires only "certain minimum maintenance" (Br. 44), it actually requires specific monthly maintenance on each van. (Hearing Tr. 995.) Drivers are required to submit monthly maintenance reports as well. (Wilmington DDE 15; Hearing Tr. 993.) While DOT requires that vans be maintained, FedEx established the requirements for its van in excess of that required by DOT. (Hearing Tr. 995.) FedEx's maintenance requirements are indicative of employee status. *Cf. North Am. Van Lines*, 869 F.2d at 600 (independent contractors decide when and how the truck must be maintained or repaired).

4. Drivers do not bear the risk of gain or loss; compensation is set by FedEx, and FedEx guarantees a minimum income

Contrary to FedEx's claims (Br. 38-39), drivers have little opportunity to increase their pay. Pay rates are uniform and set by FedEx in the operating agreement. The core zone and van availability payments alone make up 30 to 40 percent of a driver's weekly settlement check. Both are paid to drivers simply for showing up to work. The daily core zone payments range from \$27 to \$129, with the higher rates paid to drivers with less dense routes. (Wilmington DDE 22; RX 4 Addendum 3.) The van availability payment is a daily rate paid for each date the

driver makes a van available for delivery. FedEx further insulates drivers from the vagaries of the marketplace by providing a fuel bonus when fuel prices rise, and by compensating drivers when FedEx transfers packages from one driver to another. The driver who loses the packages – and the revenue from those packages – is compensated by FedEx for that loss. This pay structure is controlled by FedEx; it does not leave room for drivers to make decisions involving “risks taken by the independent businessman which may result in profit or loss.” *Standard Oil Co.*, 230 NLRB 967, 968 (1977). *See also Dial-A-Mattress*, 326 NLRB at 885 & n.11 (drivers were independent contractors where they had the opportunity to, and did, enter individual deals reducing rates in exchange for routes in certain delivery zones).

Unlike the drivers in *St. Joseph News-Press*, FedEx drivers cannot solicit new customers, refuse to deliver to customers who live too far out or are inaccessible, or deliver other products while delivering for FedEx. *See St. Joseph News-Press*, 345 NLRB at 475. FedEx drivers must deliver all assigned packages, including those assigned outside their primary service areas. Furthermore, drivers have no ability to increase the amount of business in their service areas. FedEx sets the rates that shippers pay, not the drivers, and shippers, with whom drivers have no contact, decide whether to use FedEx or a competitor. (Wilmington DDE 20.)

FedEx drivers cannot use their vans for any other reason while delivering packages for FedEx. (RX 4 p.6.) Although FedEx claims this is in response to a DOT regulation, as the Regional Director found, the DOT regulation states only that drivers cannot carry packages for two interstate carriers at the same time. FedEx has expanded on this requirement to exclude all other purposes. (Worcester DDE 7 & n.21; RX 4 p.6.) In any event, none of the drivers at the two Wilmington terminals uses their vans for other business purposes. Some testified that they use the vans for personal reasons – to pick a child up from school, to move family members (without pay), or to shop for comic books. (Hearing Tr. 900, 1047, 1053.) None of those uses shows that drivers are independent contractors. Indeed, one driver testified that he did not know whether he could use his van for business other than FedEx, and in any event, such a proposition made him uncomfortable because it “seemed like a conflict of interest.” (Hearing Tr. 965.)

Drivers can acquire more than one route. Only three of the drivers at the two Wilmington terminals have chosen to do so. (Wilmington DDE 31.) FedEx claims (Br. 39) that having multiple routes is an exercise of entrepreneurial initiative. But the Board and the Court are not presented with the issue of whether having multiple routes makes a driver an independent contractor because the Board excluded these three drivers from the unit as supervisors. (Wilmington DDE 47.)

5. The evidence concerning routes sales in these bargaining units did not show entrepreneurial activity

FedEx fails to establish that route sales represent a meaningful entrepreneurial opportunity for the drivers. Only two sales have occurred at the Wilmington terminals, and both included sales of vans; there is no evidence of what, if any, value the buyer and seller placed on the routes as opposed to the vans. Indeed, although former driver Neal (now a FedEx manager) testified that the bill of sale for his route and van listed his proprietary zip code as part of the sale, FedEx failed to produce this bill of sale at the Hearing Officer's request. (Wilmington DDE 35 n.59; Hearing Tr. 263.) Driver Jung testified that he sold one route for \$10,000. (Hearing Tr. 312.) Not only did that sale include a van, but Jung had purchased the van for \$34,000 to \$35,000 and had \$26,000 in payments to go. (Hearing Tr. 320-21.) In other words, the "route" sale simply reimbursed him for the \$10,000 he had already spent on the van.

The record also shows that more routes (five) have been abandoned than sold – including one route abandoned by Jung. (Wilmington DDE 36; Hearing Tr. 310-11.) In addition, driver Desantis abandoned two routes, and driver Valasquez abandoned two routes to his drivers, who took over payments on his vans. (Wilmington DDE 36; Hearing Tr. 71-72, 214-15, 226-27, 862-64.)

Moreover, when FedEx creates new routes or reassigns abandoned routes, it does so without charge. (Wilmington DDE 34 & n.57, 43 & n.73; Hearing Tr. 72, 313, 866, 1127.) Certainly in this context, any notion that there is an established market for route sales at the two Wilmington terminals remained unsubstantiated. Thus, the Board reasonably found that drivers, unlikely to succeed in selling for a profit what FedEx gives away for free, have no real proprietary interest in their routes. The two sales are “too insubstantial to support a finding of independent contractor status.” (Wilmington DDE 43.)

Furthermore, contrary to FedEx’s claims (Br. 24-25), the Board did not abuse its discretion by limiting the evidence of route sales or by limiting the evidence of the number of multiple-route drivers to the two terminals at issue. Some attributes of the drivers’ employment are a constant and to examine those attributes, the Regional Director drew from evidence that was not confined to the two particular bargaining units involved in this case.⁶ No one disputes the appropriateness of this approach. But other aspects, such as whether a driver’s route has independent value so that the driver can sell it, or whether multiple-route drivers predominate in a given locality, so as to potentially deprive the remaining

⁶ Despite FedEx’s claims (Br. 28), the Regional Director considered evidence from other cases “solely to the degree that they had general applicability to FedEx terminals nationwide.” (Wilmington DDE 4.)

single-route drivers of a viable independent community of interest for collective-bargaining purposes, depend upon the actual practices at the location where a collective-bargaining unit is sought. Accordingly, on these two issues, and on such practices as the rate of incorporation (Wilmington DDE 26, 38 n.66, see p. 23 *supra*), the Regional Director properly deemed relevant only the actual practices of the two bargaining units in question.⁷

6. The Board properly relied upon *Roadway*, while FedEx relies upon inapposite precedent

Notwithstanding FedEx's assertions to the contrary (Br. 41), in determining that the drivers are employees, the Board properly looked to its decision in *Roadway Package Sys., Inc.*, 326 NLRB 842 (1998), as persuasive precedent. *See, e.g., Corporate Express*, 292 F.3d at 780 (expressly approving Board's focus upon entrepreneurial opportunity; Board relied explicitly on *Roadway*). FedEx has, indeed, changed some aspects of its relationship with its drivers since the *Roadway* decision. The Board, however, found that the factors indicating employee status outweighed those showing independent contractor status. (Wilmington DDE 44.)

⁷ Similarly, in each of the prior FedEx cases (Worcester, Barrington, and Paterson), the Board considered evidence of route sales solely for the terminals at issue – not for all terminals nationwide. (Worcester DDE 3 n.7, Barrington DDE 6 n.7, Paterson DDE 2 n.2.) The Regional Director's Decision in 5-RC-14905 was not reviewed by the Board and therefore has no precedential value. *See The Boeing Co.*, 337 NLRB 152, 153 fn.4 (2001).

Given the similarity of this case to both *Corporate Express* and *Roadway*, FedEx's reliance on *Dial-A-Mattress Operating Corp*, 326 NLRB 884 (1998), is, as the Board found, misplaced. (Wilmington DDE 44 & n.76.) FedEx claims (Br. 49) that the relationship between the drivers and FedEx is virtually identical to that between the drivers and the employer in *Dial-A-Mattress*, in which the Board found that the drivers were independent contractors. But even a cursory review of the case reveals that contention to be plainly wrong, for drivers there enjoyed truly entrepreneurial prerogatives.

To be sure, that case and the instant case do share some factors in common, but it does not follow that the Board must view those factors in the same light. As explained above, a given factor may be entitled to more weight in one case than another "because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other." *Roadway*, 326 NLRB at 850. Thus, for example, even though some drivers here established their own businesses for tax purposes – as the drivers in *Dial-A-Mattress* had – that factor need not carry as much weight as might otherwise be the case, given the significant restrictions to their actual entrepreneurial opportunity here. Put another way, when drivers cannot in fact operate as truly independent businesspersons do, the Board may reasonably find that fact more convincing than paperwork suggesting otherwise.

II. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN FINDING THAT THE UNION DID NOT ENGAGE IN IMPROPER ELECTIONEERING

A. This Court Gives Considerable Deference to the Board's Rulings on Election Objections

Congress has entrusted the Board with the task of deciding representation questions under the Act and has given the Board “a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). “The case for [judicial] deference is strong, as Congress has charged the Board, a special and expert body, with the duty of judging the tendency of electoral flaws to distort the employees’ ability to make a free choice.” *Antelope Valley Bus Co., Inc. v. NLRB*, 275 F.3d 1089, 1095 n.9 (D.C. Cir. 2002) (quoting *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 885 (D.C. Cir. 1988)). Consequently, “the party challenging the Board-certified results of an election carries a heavy burden.” *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996).

The Board’s findings of fact are “conclusive” if supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366 (1998); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Antelope Valley*, 275 F.3d at 1093. Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a

conclusion.” *Universal Camera*, 340 U.S. at 477. The Board’s reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*. *Id.* at 488; *C.J. Krehbiel*, 844 F.2d at 884. The Board’s legal determinations under the Act are entitled to deference, and this Court will uphold them so long as they are neither arbitrary nor contrary to law. *Int’l Transp. Servs. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006).

B. A Marked Sample Ballot Is Objectionable Only if It Is Likely To Mislead Employees into Believing that the Board Favors One of the Parties to the Election

The Board applies a two-prong test to determine whether a party’s use of a marked sample ballot in an election campaign affected the employees’ free choice in the election. *SDC Investment, Inc.*, 274 NLRB 556, 557 (1985).⁸ A party’s “distribution of altered ballots should invalidate [an] election only if ‘the document

⁸ The Board formulated the *SDC* standard as an outgrowth of a more general policy, evolving around the same time, of acknowledging that “employees are mature individuals who are capable of recognizing campaign propaganda for what it is and evaluating its claims.” *SDC*, 274 NLRB at 557 (citing *Midland Nat’l Life Ins. Co.*, 263 NLRB 127 (1982)). See also *C.J. Krehbiel*, 844 F.2d at 883; *North Am. Directory Corp. v. NLRB*, 939 F.2d 74, 76-79 (3d Cir. 1991) (discussing evolution of Board regulation of campaign propaganda from adoption of National Labor Relations Act through *SDC*).

had the tendency to mislead employees into believing that the Board favors one party's cause.'" *Kwik Care*, 82 F.3d at 1128 (quoting *SDC*, 274 NLRB at 557).

The Board's first inquiry is whether "an altered ballot . . . on its face clearly identifies the party responsible for its preparation." *SDC*, 274 NLRB at 557. If so, then use of the ballot by a party does not interfere with the election. If, however, "the source of the altered ballot is not clearly identified," the Board will examine, on a "case-by-case basis," "the nature and contents of the material." *Id.* See also *3-Day Blinds, Inc.*, 299 NLRB 110, 111 & n.7 (1990) (recognizing that the *SDC* test did not preclude consideration of extrinsic evidence). Accord *Kwik Care*, 82 F.3d at 1128-29 (describing the "*SDC/3-Day Blinds* test"). Here, the source of the altered ballot was not clearly identified; it is uncontested that the second prong of the *SDC* test applies.

The Board's standard notice of election contains a warning explicitly proclaiming the Board's neutrality in the election process and disclaiming Board involvement in any defacement of the notice. (U. Exh. 1.) As a matter of law, the disclaimer is alone sufficient to overrule an election objection based on an allegation of defacement of a *full* Board notice. *Brookville Health Ctr.*, 312 NLRB 594, 594 (1993). Where, however, a party has altered a sample ballot *detached* from the full Board notice, the Board considers the disclaimer as one factor in the totality of the circumstances in its case-by-case analysis under the *SDC* test. *Kwik*

Care, 82 F.3d at 1130. The Board has consistently found that employees' familiarity with the disclaimer on the full official election notice "bolsters" a finding that an altered sample ballot is unobjectionable. *Id.*

C. The Board Reasonably Found in the Totality of the Circumstances that the Union's Marked Sample Ballot Flyer Was Unobjectionable Because Employees Would Not Have Reasonably Assumed that the Board Endorsed the Union in the Election

As the Board reasonably found, applying the second prong of its often-affirmed *SDC* test, "viewed in its totality, the evidence is compelling that under all the circumstances the Union's marked sample ballot would not have a tendency to mislead employees into believing that the Board supported union representation." (ALJR 10.) Substantial evidence supports the Board's conclusion, reached as a result of critical analysis of both the record evidence and the Board's own precedent.

The Board first examined the physical appearance of the altered sample ballot, finding that the preprinted word "sample," which runs across the middle of the sample ballot, had been "highlighted, obviously by hand, with a yellow marker." (ALJR 7.) In addition, the "X" in the yes box (indicating a vote for union representation) "is the obvious product of someone's hand using a red marker while all other printed material on the sample ballot is black." (ALJR 7; Jt. Exh. 1.) The sample ballots sent to Ballardvale employees also contained

photocopy markings, marks the Board found “unlikely to be part of an official government document.” (*Id.*) *Compare Taylor Cadillac, Inc.*, 310 NLRB 639 (1993) (finding that “large, bold” markings in the yes box “would be sufficiently distinct from the Board’s standard preprinted sample ballots so as to preclude a reasonable impression that the markings emanated from the Board”) *with 3-Day Blinds*, 299 NLRB at 111 (not unreasonable for employees to believe marked sample ballot came from Board where it appeared to be part of a complete handout, had printed messages in similar format to the official notice, and was printed on light green paper similar to that used by the Board). The Board reasonably concluded that “it seems unlikely that an employee would tend to believe that the Board’s official, otherwise entirely printed documents, come with hand scrawled markings suggesting *the Board’s choice* in the election” (emphasis in original). (ALJR 8.)

The Board acknowledged that the marked sample ballots included the Board’s seal and the words “United States of America” and “National Labor Relations Board” but did not include the Board’s warning that “any markings that you see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board....” (ALJR 8.) Nevertheless, the Board found that those factors were outweighed by several extrinsic factors of the sample ballot’s source and distribution, which “provide

strong evidence supporting the rejection of [FedEx's] objection, because they undercut any tendency of the document to mislead employees into believing that the Board is not neutral.” (*Id.*) See *Kwik Care*, 82 F.3d at 1129 (“the Board will examine . . . ‘circumstances of [its] distribution’”) (quoting *3-Day Blinds*, 299 NLRB at 111-12).

First, the Board noted (ALJR 8), the Board’s official notice of election, with its language disavowing any Board role in any markings on any sample ballot, was, as the parties stipulated, properly posted by FedEx in prominent places at each terminal. (Jt. Exh. 3, U. Exh. 1.) Such posting, the Board observed, “directly undercuts the likelihood that an employee would be misled by the Union’s sample ballot.” (ALJR 9.) See *Serv. Corp. Int’l v. NLRB*, 495 F.3d 681, 685 (D.C. Cir. 2007) (marked ballot did not have tendency to coerce where Board’s official notice was prominently posted and employees had “ample opportunity to familiarize themselves with the Board’s declaration of neutrality.”).

Next, the sample ballot was distributed in a manner that would reinforce the conclusion that the Union was the source of the alteration. Although not determinative, it was mailed in an envelope with a pre-printed union logo. (ALJR 9; Jt. Exh. 2.) More importantly, it was only one of the three pages enclosed in that envelope. One of the additional pages was explicitly pro-union propaganda and written on the Union’s letterhead with the Union’s watermark. (ALJR 9; Jt. Exh.

1.) The other additional page was a photocopy of the right panel of the Board's official notice, which expressly states, among other things, that the Board "does not endorse any choice in the election." (ALJR 10 (citation omitted); Jt. Exh. 1.). Finally, this union mailing was just 1 of 13 separate mailings of partisan materials that the Union sent to employees during the election campaign. (ALJR 10; ALJ Tr. 74-75.)

Under all these circumstances, it was reasonable for the Board to conclude that employees would "see the marked sample ballot as one more piece of literature developed by the Union" and not "believe that the same NLRB that declared its neutrality—in posted notices around the worksite and in the same mailing containing the marked sample ballot distributed by the Teamsters—was siding with the Teamsters and suggesting that employees vote for the Union." (ALJR 10-11.)

D. FedEx's Reliance on *Sofitel* is Misplaced

FedEx's reliance (Br. 58-60) on the Board's decision in *Sofitel San Francisco Bay*, 343 NLRB 769 (2004), in arguing that the Court should not enforce the Board's Order, is misplaced. Contrary to FedEx's erroneous claim (Br. 59), *Sofitel* is factually distinguishable.

First, in *Sofitel*, no words or markings indicated that the sample ballot was a photocopy of another document. In contrast, the marked sample ballot here is

printed in black; the “x” in the yes box is handwritten in red marker. Furthermore, the word “sample” across the page is hand colored with yellow highlighter. In addition, the Ballardvale sample ballots showed photocopy marks. None of those features was present on the *Sofitel* sample ballot. The significance of this distinction was recognized by this Court in *Serv. Corp.*, 495 F.3d at 686.

Second, in *Sofitel*, there was no evidence that employees had ever seen the official sample ballots containing the Board’s disclaimer language whereas here, the official notice was concededly posted in prominent places in the terminals. The significance of this distinction also was recognized by this Court in *Serv. Corp.*, 495 F.3d at 686.

Finally, in contrast to the 12 other mailings sent by the Union here, the sample ballot in *Sofitel* was the only piece of union propaganda that was sent or distributed to employees before the election. *See Sofitel*, 343 NLRB at 769. The significance of this distinction too was recognized by this Court in *Serv. Corp.*, 495 F.3d at 686. But of even greater distinction, the sample ballot in this case, unlike the one in *Sofitel*, was distributed with two accompanying pages – one page was clearly pro-union propaganda and the other contained the admonition that the Board “does not endorse any choice in the election.”

Considering all these distinctions, the Board was not unreasonable in concluding that the altered sample ballot in this case did not mislead employees into believing that the Board favored one of the parties to the election.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment enforcing the Board's order in full and denying FedEx's petition for review.

ROBERT J. ENGLEHART
Supervisory Attorney

KELLIE ISBELL
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2482

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
April 2008

ADDENDUM
STATUTES AND REGULATIONS

Section 2(3) of the Act (29 U.S.C. § 152(3)) provides in relevant part:

(3) The term “employee” shall include any employee. . . but shall not include any individual. . . having the status of an independent contractor....

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees

Section 8(e) of the Act (29 U.S.C. 158(e)) provides in relevant part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

Section 9 of the Act (29 U.S.C. 159) provides in relevant part:

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act (29 U.S.C. 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(c) If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in . . . any such unfair labor practice, then the Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act

* * *

(e) The Board shall have power to petition . . . for the enforcement of such order No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

UNITED STATES COURT OF APPEALS
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OPERATING DIVISION OF FEDEX GROUND)
PACKAGE SYSTEM, INC.)
)
Petitioner/Cross-Respondent) Nos. 07-1391 & 07-1436
)
v.) Board Case Nos.
) 1-CA-44037
NATIONAL LABOR RELATIONS BOARD) 1-CA-44038
)
Respondent/Cross-Petitioner)
)
and)
)
INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS, LOCAL NO. 25)
)
Intervenor)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 13,811 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 30th day of April 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's proof brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

Charles I. Cohen, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004

Michael A. Feinberg
Renee Josephine Bushey
Jonathan M. Conti
Feinberg, Campbell & Zack, PC
177 Milk Street, Suite 300
Boston, MA 02109

Robert Diggs, Jr.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4677

Adam Charles Sloane
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006-1101

Robin S. Conrad
National Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062

Harold L. Lichten
Pyle, Rome, Lichten, Ehrenberg & Liss-
Riordan, P.C.
18 Tremond Street, 5th Floor
Boston, MA 02108

Stefano Moscato
National Employment Lawyers
Association
44 Montgomery Street, Suite 2080
San Francisco, CA 94104

Catherine K. Ruckelshaus
National Employment Law Project
80 Maiden Lane, Suite 509
New York, NY 10038

Richard A. Samp
Daniel J. Popeo
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

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this 30th day of April, 2008