

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**FIRST REGION**

In the Matter of

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

Employer<sup>[1]</sup>

and

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL UNION 25

Petitioner

Cases 1-RC-22034

1-RC-22035

---

## **DECISION AND DIRECTION OF ELECTION**<sup>[2]</sup>

In these cases, the Union seeks to represent two separate bargaining units consisting of route drivers and swing drivers, one unit at the FedEx Home Delivery (the Employer, FedEx Home, or FHD) terminal located at 8 Jewel Drive, in Wilmington, Massachusetts, and the other unit at the FedEx Home terminal located at 375 Ballardvale Street, in Wilmington, Massachusetts.<sup>[3]</sup>

FedEx Home, which refers to most of these drivers as “contractors,” contends, as it has previously done in a number of other cases involving various other FedEx Home terminals owned by it, that all of the drivers who are FedEx Home contractors, including the Wilmington drivers at issue here, are independent contractors and, therefore, not employees within the meaning of Section 2(3) of the Act. FedEx Home also contends that those contractors who operate multiple routes rather than single routes should be excluded from the units on the alternative ground that they are statutory supervisors. The Union seeks to include both multiple route and single route contractors in the unit.

Finally, the Union seeks to include in the units “second and third route drivers.” It appears that, by this term, the Union refers to those drivers who are hired by multiple route contractors to operate the multiple route contractors’ routes on an ongoing basis.<sup>[4]</sup> The Employer maintains that such drivers should be excluded from the units on the ground that they are not employees of FedEx Home and, alternatively, that they lack a community of interest with

---

the contractors. At the end of the hearing, however, the parties took the position that drivers hired by multiple route contractors should be permitted to vote subject to challenge.

I find that the FedEx Home contractors at the two Wilmington terminals are statutory employees rather than independent contractors. I further find that those contractors who operate multiple routes and who, therefore, regularly employ drivers to operate routes for them, should be excluded from the units as statutory supervisors. As for the drivers regularly employed by the multiple route contractors, I find, for the reasons set forth below, that they are employees of FedEx Home. Because the record is insufficient to establish whether these drivers share a sufficient community of interest with the contractors to be included in the units, I shall permit them to vote subject to challenge.

### **PROCEDURAL MATTERS**

In three recent cases the Board affirmed the conclusions of Regional Directors that FedEx contractors were statutory employees rather than independent contractors. In *FedEx Ground Package Systems, Inc.*, Case 22-RC-12508, issued on November 2, 2004, the Regional Director for Region 22 found that pickup and delivery and line haul contractors employed by FedEx Ground at its Fairfield, New Jersey Ground facility, also referred to as its “Paterson” terminal, were statutory employees. I take administrative notice of the fact that, on January 26, 2005, the Board denied FedEx Ground Package System’s request for review of that Decision.

In *FedEx Home Delivery*, Case 4-RC-20974, issued on June 1, 2005, the Regional Director for Region 4 determined that contractors who worked at FedEx Home’s Barrington, New Jersey terminal were statutory employees. I take administrative notice of the fact that, on

August 3, 2005, the Board denied FedEx Home's request for review of the Regional Director's determination that the contractors were statutory employees, remanding the case to the Regional Director solely with respect to the joint employer and supervisory status of four multiple-route contractors.<sup>[5]</sup>

*In FedEx Home Delivery, a Separate Operating Division of Fedex Ground Package System, Inc.*, Case 1-RC-21966, issued on January 24, 2006, I found that contractors who worked at a FedEx Home terminal in Northboro, Massachusetts, referred to as the "Worcester" terminal, were statutory employees rather than independent contractors. I take administrative notice of the fact that FedEx Home requested review of my Decision and that, on March 23, 2006, the Board issued its Order affirming my determination that the Worcester contractors were statutory employees.

In the Worcester case, the prior Decisions from Regions 4 and 22 were put into evidence, and the hearing officer notified the parties that I would consider the facts developed in those cases as applicable to the Worcester terminal, unless they were distinguished. In the Worcester Decision, I relied on facts developed in the prior New Jersey cases solely to the degree that they had general applicability to FedEx terminals nationwide, such as facts concerning corporate-wide policies and the "Operating Agreement" signed by FedEx Home contractors, which is identical nationwide. In its order, the Board found that I had correctly declined, for reasons of administrative economy, to permit FedEx Home to relitigate facts applicable to all FedEx Home facilities recently established in other cases. Accordingly, in this matter, I shall similarly rely on the three prior Decisions to establish such facts, except to the degree that the record in this case

---

demonstrates that there have been changes since the prior cases, that they were incorrect, or that there is some other basis for distinguishing them.<sup>[6]</sup> I note that I have relied primarily on the Worcester case and the Barrington, New Jersey case, which both, like this case, involved home delivery operations. I have either paraphrased the facts from those decisions on which I rely or, in some instances, set them forth verbatim as they appear in the prior decisions.

In its March 23, 2006 Order, however, the Board did find that I had erred with respect to certain procedural rulings in the Worcester case. In this regard, the Board found that, having relied on the prior Decisions from Regions 4 and 22, it was error to affirm the hearing officer's refusal to admit the transcripts from those prior FedEx cases, which may be necessary to aid the Board and the parties in subsequent enforcement proceedings. Accordingly, the entire records from the Worcester, Paterson, and Barrington cases are included in and made part of the record in this matter.

Further, the Board found that I had erred in affirming the hearing officer's refusal to allow FedEx Home to present evidence of route sales that had occurred in Barrington and Paterson since the close of the records in those cases, finding that once I had determined to rely on the facts found in those prior cases, the parties should have been permitted to litigate any subsequent changed circumstances. Accordingly, FedEx Home was permitted in the instant case to present evidence concerning route sales and other changed circumstances since the close of the records in the Worcester, Barrington, and Paterson cases. In addition, FedEx Home

---

submitted a proffer concerning evidence of route sales and other types of entrepreneurial activities at Barrington, Paterson, and various other terminals.<sup>[7]</sup>

Notwithstanding the Board's finding that it was error not to permit such evidence to be introduced in the Worcester case,<sup>[8]</sup> the Board agreed in its Order with my determination that evidence of route sales and entrepreneurial activity at other terminals had no bearing on the economic value of route sales at the Worcester terminal, and found that I properly limited my consideration of such evidence to route sales in Worcester. Accordingly, in this matter, I have similarly limited my consideration of such evidence to route sales and other entrepreneurial activity at the Wilmington, Massachusetts facilities at issue in these petitions.

### **INDEPENDENT CONTRACTOR STATUS OF CONTRACTORS**

#### FedEx Home Operations

As noted in the Region 4 Decision, the Employer was established in about 1998, when FedEx Corporation acquired Roadway Package Systems, Inc. FedEx has two operating divisions: the Ground Division and FedEx Home. The Ground Division delivers packages of up to 150 pounds, principally to business customers. FedEx Home delivers packages of up to 75 pounds, mostly to residential customers. The two Wilmington home delivery terminals at issue in this case are part of FedEx Home, which operates 300 stand-alone terminals throughout the United States, as well as 200 terminals that share space with Ground Division facilities. FedEx

---

Home has agreements with about 4000 contractors nationwide who deliver packages on 4400 routes.<sup>[9]</sup>

The Jewel Drive terminal services a geographic area north of the City of Boston up to the New Hampshire border. Senior manager Donald Clark is the highest ranking FedEx Home manager at the Jewel Drive facility. Pickup and Delivery Manager Matthew Drake reports to Clark and oversees 22 contractors who operate 24 routes. The facility also uses about three “temp” drivers from Kelly Services when there is a spike in the volume of work that the contractors cannot handle. Fourteen part-time package handlers at Jewel Drive report to Dock Service Manager Brian Borowski.<sup>[10]</sup>

The Ballardvale terminal, which opened in October 2005, and is sometimes referred to as the Wilmington Annex, services the City of Boston and outlying areas.<sup>[11]</sup> The terminal has both a FedEx Ground and FedEx Home operation on separate sides of the same building. Pickup and Delivery Manager Cal Busby is the highest-ranking representative of FedEx Home at the Ballardvale terminal. Pickup and Delivery Service Manager Tiffany Tropp oversees 16 contractors at Ballardvale who operate 16 routes. The record does not reveal how many, if any, temp drivers work there. Dock Manager Anand Dave oversees eight package handlers.

### Recruitment and Training of Contractors

---

As indicated above, FedEx Home uses “temp” drivers who are paid by a temporary agency called Kelly Services<sup>[12]</sup> to meet a higher demand during the Christmas season and other holidays, to cover for contractors’ routes when necessary, and to cover areas that are not assigned to contractors. It appears that many, if not most, FedEx Home contractors begin their careers with the company as “temp” drivers, and at some later point obtain a vehicle and become contractors. According to the facts developed in the Region 4 Decision, FedEx Home follows the same procedure nationwide in recruiting and training both contractors and temporary employees.

FedEx Home advertises that it is interested in individuals who have “dreamed of running” their own businesses, possess “an entrepreneurial spirit,” and are interested in functioning as an “independent contractor.” At informational meetings, FedEx Home recruiters emphasize that FedEx Home is seeking an independent contractor relationship and explain the terms of the relationship. FedEx Home seeks individuals who want to be more than just delivery drivers and have an “entrepreneurial spirit.”

Candidates who are interested in becoming either a contractor or a temporary driver complete a computerized application at the terminal to which they wish to apply. The terminal checks both the driving and criminal records of applicants, as required by the Federal Motor Carrier Safety Regulations,<sup>[13]</sup> often referred to as Department of Transportation (DOT) regulations, which apply to interstate carriers such as FedEx Home. The New England terminals, including the two at issue in this case, forward the results to Regional Maintenance

---

and Safety Manager Michael Carey for his review.<sup>[14]</sup> Those candidates with driving and criminal records that are acceptable per the DOT regulations are asked to take a physical examination<sup>[15]</sup> and undergo drug screening tests,<sup>[16]</sup> which are also required by the DOT regulations.

All applicants who pass the above requirements must complete a FedEx Home driver-training course, required by DOT, which is called “Quality Packaging Delivery Learning” (QPDL).<sup>[17]</sup> FedEx Home may exempt applicants who have a minimum of one year of commercial driving experience from the training requirement, and FedEx Home will also accept a certificate of training provided by another reputable provider in lieu of QPDL. Carey testified that the QPDL training takes 14 days. There are eight days of classroom and on-the-road training. After that, candidates do five “customer service rides” with FedEx Home managers. The training covers safe driving techniques, which is required by the DOT regulations. QPDL training also includes an orientation that covers the procedures that FedEx Home wants all its contractors to follow in making deliveries, such as how to load packages into a vehicle, tips on use of the scanner,<sup>[18]</sup> how to read road plans, and where to leave packages at a residence if nobody is home. Carey testified that these types of matters are suggestions. Those who pass the training course may choose either to acquire a vehicle and become contractors or to become temporary drivers who work for FedEx Home but are paid by Kelly Services.

### The Operating Agreement

---

Prospective contractors who have completed or been exempt from the training and acquired an appropriate vehicle, as discussed below, may secure a route and sign a Standard Contractor Operating Agreement provided by FedEx Home.<sup>[19]</sup> All potential contractors nationwide are offered the same Agreement, which their terminal manager reviews with them in detail before they sign. Contractors may negotiate with their terminal manager over which particular route is assigned to them and, as described below, over the amount of one aspect of their compensation,<sup>[20]</sup> but there is no evidence that individual contractors have the ability to negotiate any other terms of the Operating Agreement with FedEx Home.<sup>[21]</sup> Rather, the Operating Agreement is presented on a take-it-or-leave-it basis to all contractors. The body of the Operating Agreement has, by and large, remained the same over the years. FedEx Home typically makes annual changes to the addenda in the Agreement, effective in June, updating specifics such as compensation rates. All contractors are given 30 days notice to review the changes and sign the modified Agreement.

The Agreement provides that “Both FHD and Contractor intend that Contractor will provide these services strictly as an independent contractor, and not as an employee of FHD for any purpose” and that the manner and means of reaching mutual business objectives are within the discretion of the contractor. The Operating Agreement provides that FedEx Home does not have authority to direct contractors as to the manner or means employed to achieve their

---

objectives and results. It states that FedEx Home may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance.<sup>[22]</sup>

Under the Operating Agreement, all contractors are responsible, however, for providing service in a manner that meets FedEx Home's nationwide standard of service. The contractors commit to provide daily delivery service in their area and to conduct their business so that they can be identified as part of the FedEx Home nationwide system. The Agreement requires all contractors to wear the FedEx Home-approved uniform, maintained in good condition, and to keep their personal appearance consistent with standards promulgated by FedEx Home. It requires the contractors to keep their vehicles in a clean and presentable fashion free of body damage and extraneous markings. All contractors must comply with specified driver safety standards.<sup>[23]</sup>

### Termination of the Agreement

Contractors may choose to enter into a one- or two-year Operating Agreement. In either event, the Operating Agreement automatically renews for successive one-year terms after expiration of the initial term, unless either party gives 30-days' written notice of non-renewal. An Operating Agreement may be terminated during its term at any time by mutual agreement, by either party if the other party breaches its contractual obligations, by FedEx Home if it ceases to do business or reduces operations in the area serviced by the contractor, or by the contractors if they give 30 days' written notice. All contractors are required to place \$500 in an interest-bearing escrow account controlled by FedEx Home to cover any debts owed by the contractor to

---

FedEx Home at the time the Operating Agreement is terminated, and which FedEx Home may also retain as liquidated damages if the contractor terminates the Operating Agreement without the requisite 30-day notice.

Edmonds testified in the Worcester case that FedEx Home contractors are not subject to reprimands or other discipline. If contractors fail to live up to their contractual obligations, their terminal manager holds a “business discussion” with them to try to resolve the problem. If terminal managers believe a contractor’s Operating Agreement should be terminated, various more senior managers of FedEx Home must approve their recommendation. All contractors are entitled to seek arbitration of disputes over FedEx Home’s decision to terminate their Operating Agreement.

### Vehicles

Prior to becoming contractors, all contractors are required to purchase or lease a van or truck that FedEx Home approves. Regional Maintenance and Safety Manager Michael Carey approves FedEx vehicles for the New England region, including those for the two Wilmington terminals. Carey testified that no particular type of vehicle is required, although all vehicles used by FedEx contractors nationwide must meet certain requirements.<sup>[24]</sup> The vehicles must pass a yearly safety inspection. The vehicles must have a backing camera. They must have shelves running down each side in order to comply with DOT safe loading standards, as well as in order to protect the packages from damage. The vehicles must be white in color. In order to comply with DOT regulations and to foster nationwide brand name recognition, FedEx Home requires all

---

vehicles to carry the FedEx Home logo.<sup>[25]</sup> The logo may be permanent or it may be a removable magnetic logo. The vehicles must meet certain specifications for lights, brake pad thickness, and tire tread. FedEx Home does not specify the size of the trucks, although David Durette, a former senior manager at the Jewel Drive facility, testified that FedEx Home wants to make sure that all contractors can grow based on FedEx Home's projections, and Jewel Drive contractor Paul Tremblay testified that FedEx Home offered him a \$2000 signing bonus if he would get a bigger van, which he did.

FedEx Home may provide contractors with the names of dealers in their area from which the vehicles may be leased or purchased, as well as the names of lenders willing to finance the purchases. Contractors are not obligated to patronize those dealers or lenders, however, and may purchase, lease, or borrow from other sources. FedEx Home does not itself provide financing or guarantee loans obtained by contractors.<sup>[26]</sup> Contractors at the two Wilmington terminals have obtained vehicles from dealers and by purchasing used vehicles from other contractors. Former Wilmington pickup and delivery manager Melnyk estimated that an Econoline van costs \$15,000 to \$18,000, a new P-450 costs about \$23,000 to \$25,000, a new 550 box truck costs \$26,000 to \$28,000, a "Workhorse" P-500 step van costs about \$33,000 to \$35,000, and a "Freightliner" P-500 step van costs from \$36,000 to \$38,000.

All contractors are responsible for all costs associated with operating and maintaining their vehicles, including fuel, tolls, repairs, taxes, registration fees, and licenses. Under the Operating Agreement, all contractors authorize FedEx Home to pay licenses, taxes, and fees on their behalf and to deduct the amount of those payments from their compensation. In order to

---

encourage contractors to accumulate a fund from which they may pay for expenses such as vehicle maintenance and substitute operators, the Operating Agreement provides that FedEx Home will maintain and pay interest on a Service Guarantee Account into which the contractors deposit money. Pursuant to Addendum 3 of the Agreement, for each quarter in which a contractor's average balance in the account is \$500 or more, FedEx Home contributes \$100. Addendum 3 also provides that FedEx Home may, in its discretion, make loans to contractors to fund maintenance costs in excess of the balance in their Service Guarantee Account, up to a maximum of \$5000, depending on the balance in their account.

To comply with DOT regulations, all contractors are required to submit daily driver logs and vehicle inspection reports to FedEx Home. All contractors are also required to submit to FedEx Home a monthly maintenance form to which they attach receipts for maintenance and repair work done and note tire tread depth. Per the DOT regulations, each vehicle must have an annual safety inspection by a qualified inspector, which can be done at the contractor's terminal or elsewhere. All contractors must pay for the cost of any repairs to their vehicle, as well as for the cost of renting a replacement vehicle while their own truck is being repaired.<sup>[27]</sup>

When using their vehicles for FedEx Home work, all contractors must use their vehicles exclusively for the carriage of FedEx Home goods and for no other purpose.<sup>[28]</sup> All contractors may use their vehicles for other commercial or personal purposes when they are not in the service of FedEx Home, so long as they remove or mask all FedEx Home logos and markings. Current Jewel Drive Senior Manager Donald Clark testified that he does not know of any current Jewel Drive contractors who use their FedEx Home vehicles for another business, nor is there

---

any evidence that any Ballardvale contractors have ever done so. Former Jewel Drive Senior Manager David Durette testified that a former Jewel Drive multiple route contractor, Alan Douglass, used his FedEx truck for his “Douglass Delivery” delivery service, in which he delivered items such as lawn mowers for a repair company. Jewel Drive contractors Paul Tremblay and James Downs have used their FedEx trucks for personal purposes, such as helping family members move or personal shopping.

### Primary Service Areas

The terminal managers establish routes, sometimes referred to as “primary service areas,” or “proprietary zip codes,” associated with their terminals and may offer open routes to contractors. Each contractor’s Operating Agreement designates one or more primary service areas in which that contractor is entitled to operate and which he/she is responsible for serving. All contractors may negotiate with their terminal managers over requests to add or delete towns from their route. There are some towns serviced by the two Wilmington terminals that are not yet part of any contractor’s proprietary route. Many Wilmington contractors make deliveries both in their primary service area and in adjacent areas that are not part of the primary service area. FedEx Home may move deliveries in those towns from contractor to contractor as needed.

Under the Operating Agreement, all contractors are responsible for providing daily delivery service in their primary service area. The Operating Agreement sets forth the mutual intention of FedEx Home and the contractors to reduce the geographic size of primary service areas as the customer base and package volume in an area increases. To this end, the Operating Agreement requires all contractors to permit FedEx Home personnel to ride with them from time to time to gather data to evaluate their service areas.

The Operating Agreement permits FedEx Home, with five working days' written notice, to reconfigure any contractor's primary service area to take account of customer service requirements. During this notice period, the contractors may try to demonstrate their ability to provide the level of service called for in the Operating Agreement. If FedEx Home determines that they are unable to do so, FedEx Home may, in its sole discretion, reconfigure the area. In the event a route reconfiguration results in contractors gaining or losing delivery work, the Operating Agreement provides for a formula under which money goes from the contractor who gained the work to the contractor who lost the work. Jewel Drive manager Donald Clark testified, however, that he has never changed a contractor's work area involuntarily.

#### Driver release audits and customer service rides

Contractors will be absolved from liability for loss of packages only if they comply with FedEx Home's Driver Release Program, which is part of the Operating Agreement.<sup>[29]</sup> The Operating Agreement permits FedEx Home to conduct driver release audits four times per year. In a driver release audit, FedEx managers visit customer locations after the delivery has been made to verify that the contractor complied with the Driver Release Program, e.g., by leaving packages outside of public view, in a protective plastic bag, with a delivery notice.

In addition to driver release audits, FedEx conducts two customer service rides per year with every contractor. On a customer service ride, a manager rides along all day with the contractors for the purpose of building relationship with the contractors, obtaining their input

---

regarding their route, and ensuring that they use safe driving methods. Michael Melnyk, a former pickup and delivery manager at both Wilmington terminals, testified that he sometimes changed drivers' routes as a result, by moving an area from one route to another. A contractor may ask to reschedule the day proposed for a customer service ride.<sup>[30]</sup>

### The Contractors' Daily Routine

Tractor trailers from Hartford, Connecticut deliver packages to both Wilmington terminals each day in the early morning hours. A computerized system designates which route each package belongs to. The package handlers at each terminal scan the packages with a scanner and put them on pallets at distinct places on the dock for each route. The contractors load the packages into their vehicles in the order they see fit and leave to make their deliveries. Jewel Drive contractor Paul Tremblay testified that on rare occasions, there are too many packages to fit in his van, in which case he decides which ones to leave behind and tells his terminal manager that he will deliver them the next day. Each day, FedEx Home gives the contractors a "manifest" that provides an order of stops and turn-by-turn directions to each stop on the route, but contractors are free to disregard it and deliver their packages in a different order or by a different route of their choosing, which many of them do.

All contractors must provide service on their routes Tuesday through Saturday.<sup>[31]</sup> The contractors each determine what time to start their work day.<sup>[32]</sup> They may and do take breaks during the day as they wish, to run personal errands, without permission. Contractors finish their day at all different times, although Jewel Drive Senior Manager Clark testified that FedEx Home

---

does not want packages delivered after 8 p.m. According to the prior decisions, contractors do not punch a time clock, but they are all required to scan their FedEx Home-issued badges before they load and when they go off duty, in order to calculate their hours on the road. Contractors at the Jewel Drive facility do not return to the terminal when they have completed their routes, and most of the Ballardvale contractors go directly home after their last stop.

Customers contact FedEx Home rather than contractors to arrange deliveries.

Contractors do not set the prices to be charged for deliveries or determine when and where delivery will be made. Customer complaints about deliveries are usually directed to FedEx Home and investigated by terminal management at the particular terminal involved. Contractors are not responsible for soliciting customers, although they may try to maintain good customer relations to encourage business.<sup>[33]</sup>

### Flexing

In addition to permanent route reconfigurations, there are daily adjustments to the number of packages delivered by each contractor, sometimes referred to as “flexing.” Flexing initiated by terminal managers generally involves packages to be delivered to towns not included in any contractor’s primary service area.<sup>[34]</sup> A terminal manager may redistribute packages from one route to another to ensure that no driver exceeds the maximum hours of driving time permitted by DOT. When a contractor calls to say he is sick or cannot work and has no contingency plan, their terminal managers sometimes disperse the packages among surrounding

---

contractors if they are willing to handle those deliveries.<sup>[35]</sup> Flexing is generally voluntary, although Senior Manager Clark testified that there have been occasions when the Jewel Drive terminal did involuntary flexes, if one contractor had too many stops and a nearby contractor had capacity for more.<sup>[36]</sup> A contractor who delivers a package for another contractor receives the settlement for the delivery.

In addition to flexing initiated by terminal managers, contractors informally flex packages with other contractors serving adjacent areas, for which they do not need FedEx Home's permission. Various witnesses mentioned about 15 contractors at the two Wilmington terminals who flex packages with other contractors. Some do this daily and some on a regular basis, while others do so rarely.<sup>[37]</sup>

### Compensation

All contractors are paid by means of a weekly "settlement" check that includes several components set forth in Addendum 3 of the June 2006 Operating Agreement. The nationwide delivery and pickup settlement includes payments of \$1.29 per stop and 22 cents per package and a premium for oversize packages. All contractors are paid an additional \$6.50 per stop for deliveries by appointment, \$2.75 for evening deliveries, and 50 cents per stop for packages that require a customer's signature. All contractors are paid a daily mileage settlement of 20 cents per mile for miles driven between 201 and 400 miles daily, based on the mileage set forth in their daily manifest (as opposed to the actual miles driven). They receive a per-package fee for sorting and loading packages into their vehicle. In the event of substantial increases in fuel

---

prices, the contractors receive a fuel/mileage settlement of up to 10 cents per mile, depending on fuel prices within a five-mile radius of their terminal. They are paid \$15 to \$30 for each day that the number of stops they complete exceeds a certain threshold.

All contractors are paid a van/vehicle availability settlement for each business day that they make a vehicle and a qualified driver available and provide services under the Operating Agreement. Under the current Agreement, the settlement ranges from \$25 to \$35 per day, depending on the type and age of the vehicle. A holiday van availability bonus of \$50 is paid for making a vehicle available on both the work day before and the work day after six specified holidays.

All contractors receive a temporary core zone density settlement payment in consideration of their agreeing to provide service to an area when the customer density and package volume in the service area is still developing. FedEx Home may reduce or eliminate the temporary core zone density settlement as density and/or package volume increases. According to Addendum 3 of the June 2006 Operating Agreement, the core zone density settlement currently ranges from \$27 to \$127 per day. In the Worcester case, Edmonds testified that a contractor may negotiate with a terminal manager for an increased core zone density payment, and that FedEx Home will do a customer service ride with the contractor to evaluate the appropriateness of an increase. Former Wilmington pickup and delivery manager Melnyk testified that one former Jewel Drive contractor, Loay El Dagany, once requested some customer service rides to gauge if his core zone payment was set properly, and the payment was raised as a result, although Melnyk was not sure by how much. There is no evidence that any other contractors at the Wilmington facilities have negotiated a change in their core zone payment.

No settlement sheets from the Jewel Drive or Ballardvale terminals were introduced into evidence, but Clark testified that the core zone and van availability payments constitute around 30 to 40 percent of the total payment to Jewel Drive contractors. Busby testified that core zone and van availability pay together constitute about 30 percent of take-home pay at Ballardvale.

All contractors receive a service bonus ranging from \$150 to \$625 for each completed fiscal quarter, depending on their number of years as a FedEx Home contractor. All contractors are eligible for an individual safety and customer service bonus of \$120 per accounting period if they have no at-fault accidents, have no verified customer complaints, and meet certain goals for daily scanner up-load compliance and accuracy. All contractors are eligible for a group performance-related bonus ranging from \$10 to \$30 per contractor per period, if the terminal in which they work meets a group “inbound service” goal for the period. All contractors receive a bonus of \$50 per month if they do not fail a driver release audit and receive no driver release complaints.

FedEx Home does not provide the contractors with any fringe benefits and does not withhold taxes from their pay. FedEx Home gives all contractors an Internal Revenue Service “1099” form at the end of each year.<sup>[38]</sup>

According to an exhibit submitted by FedEx Home, three of the contractors at the two Wilmington terminals, each of whom was a multi-route contractor, grossed over \$150,000 in 2005.<sup>[39]</sup> Twenty-one Wilmington contractors grossed between \$60,000 and \$90,000 in 2005, eight grossed between \$30,000 and \$60,000, two grossed between \$20,000 and \$40,000, and six

---

grossed between \$3500 and \$20,000.<sup>[40]</sup> The record does not reveal their net income after expenses.

### Business Support Package

FedEx Home offers to sell all contractors a Business Support Package that provides them with certain necessary items they are required to have in order to work as FedEx Home contractors. Thus, all contractors are required to have scanners. As indicated above, the scanners record the location and delivery of each package during its journey. The information from the scanners is uploaded periodically and transmitted to a nationwide customer service data base so that customers can track the status of their packages. The scanners are also used to meet a regulatory requirement that carriers must know where their shipments are and a regulatory requirement to log the number of hours that contractors have driven.

In addition, the Operating Agreement requires all contractors to wear a FedEx Home uniform, maintained in good condition, and to keep their personal appearance consistent with standards promulgated by FedEx Home from time to time. They are required to wear an identification badge with the FedEx Home logo, a photo, and the word “contractor.”<sup>[41]</sup>

Accordingly, although not required to, contractors may opt to purchase FedEx Home’s Business Support Package to obtain items FedEx Home requires. The package includes company decals for the vehicles, standard uniforms, random drug tests meeting DOT requirements, contractor assistance programs,<sup>[42]</sup> an annual DOT vehicle inspection, lease of a

---

scanner and communications and related equipment, a vehicle washing service necessary to comply with both government regulations pertaining to waste water run-off and with contractual appearance standards, and mapping software. The package cost of \$4.25 per day per van, and an additional \$2.00 per day for scanners used by the contractors' helpers and supplemental drivers, is deducted from the contractors' settlements.

Edmonds testified in the Worcester case that contractors may choose to purchase their uniforms directly from the vendor and that some contractors at other locations do so. He also testified that contractors may choose to purchase scanners directly from the manufacturer and that, from time to time, he has put together a list of vendors from which contractors may purchase them. The record does not reveal how many of the contractors at the Jewel Drive and Ballardvale terminals have opted to purchase the Business Support Package.

About three to four years ago, a camera company offered to make a "backing" camera available to all FedEx Home contractors, nationwide, for a low price. Purchasing the camera was optional, and the cost of about \$185 was deducted from the settlement checks of those contractors who chose to purchase one.

### Incorporation

All contractors have the option of incorporating as a business, in which case their settlement is remitted to the corporation. In the Worcester case, Edmonds testified that, nationwide, 15 to 20 percent of FedEx Home contractors have incorporated. According to the Employer's proffer in this case, he would now testify that 872 out of 3826 contractors are incorporated nationwide, which I calculate as 23 percent. At Jewel Drive, three of the twenty

two current contractors, Wayne Curran, Robert Fonseca, and Ricardo Gely, have incorporated, and three former contractors were also incorporated.<sup>[43]</sup> At the Ballardvale terminal, two of the sixteen contractors, Wayne Curran and Se-Hoon Oh, have incorporated.<sup>[44]</sup>

### Insurance

According to the Region 4 Decision, DOT regulations specify that carriers such as FedEx Home must be primarily responsible for injuries or damage caused by leased vehicles and must purchase insurance to cover the costs of such injuries or damage. The carrier may, however, seek indemnification for any liability from the owner of the vehicle. Consistent with the regulations, the Operating Agreement requires FedEx Home to maintain public liability insurance for vehicular personal injuries, property damage, cargo loss, or damage resulting from the contractor's operation of equipment in connection with FedEx Home's business. FedEx Home also agrees to indemnify all contractors against liability for damages resulting from the operation of the equipment while on FedEx Home business, with certain exceptions. Contractor indemnification does not apply in the event the contractor or the operator of the vehicle engages in intentional misconduct or willfully negligent behavior. It also lapses if contractors fail to comply with FedEx Home's Safe Driving Program standards, in which case contractors are obliged by the Operating Agreement to secure their own liability insurance for damages that occur while on FedEx Home business. Regardless of who is carrying this insurance, all contractors are liable for the first \$500 in damages resulting from the operation of their vehicles, although their liability is reduced to \$250 after one year and eliminated after two years of operation without an at-fault accident.

---

The Operating Agreement requires all contractors to maintain public liability insurance in certain amounts specified by FedEx Home for damages resulting from operation of their vehicles for their personal benefit. It also requires them to maintain work accident and/or workers' compensation coverage, which is required by many states, in specified minimum amounts for both themselves and their employees. The contractor may choose whether to obtain the insurance through a policy negotiated by FedEx Home, through a policy providing comparable benefits, or through an applicable state-sponsored workers' compensation program.

FedEx Home has a relationship with a company called Protective Insurance that will provide all contractors nationwide with any required insurance, and FedEx Home will deduct the premiums from the contractors' settlements. In addition to work accident insurance, Protective offers all contractors optional "dead head bobtail" insurance that provides certain coverage when contractors use their vehicles for personal purposes. Edmonds testified that contractors need not use this company, but that Protective's rates are significantly lower than rates contractors can get on their own. Edmonds testified that it does happen that contractors obtain insurance coverage elsewhere, but some contractors who have investigated doing so realized it makes no sense due to the Protective Insurance discount. The record does not reveal the degree to which the contractors at the Wilmington terminals obtain their insurance through FedEx Home or elsewhere.

Time Off Program and Swing Contractors<sup>[45]</sup>

---

Contractors who wish to take a vacation are responsible for finding a qualified substitute driver to cover their route. Some of them, as further described below, pay another contractor or driver or one of the “terminal temp” drivers from Kelly Services to cover their route. In the alternative, contractors may choose to participate in the Time Off Program, under which FedEx Home will provide a qualified driver to cover their route for a week at a time. Participating contractors must remain in the program for the entire year. Participants pay \$17.50 per week for a year for two weeks of time off, the cost of which is deducted from their settlement as part of their Business Support Package. Participants may purchase additional weeks off for an additional \$1.75 per day. Selections of time off weeks are made in May of each year, with selections made according to length of time as a contractor.

FedEx Home uses “swing” contractors to cover for the contractors who participate in the Time Off Program. Swing contractors receive a settlement from FedEx Home for the deliveries they make in covering the route.<sup>[46]</sup> According to the decision in the Worcester case,<sup>[47]</sup> swing contractors receive a premium per stop over the usual rate and a premium over the standard van availability rate, and they are also paid for participating in a “familiarization ride” with the contractor for whom they are covering. In the event that a swing contractor is covering for a route where the contractor uses a P350 vehicle, FedEx Home may provide the vehicle and pay the rental charges in lieu of paying the van availability premium to the swing contractor.

One full-time swing contractor, Clayton Schwann, and one part-time swing contractor, Cecil Hyre, are the designated swing contractors for both the Jewel Drive and Ballardvale

---

terminals.<sup>[48]</sup> Thirteen of the sixteen Ballardvale contractors participate in the Time Off Program. The record does not reveal how many of the Jewel Drive contractors participate.

### Multiple Route Drivers

Some FedEx Home contractors have Operating Agreements covering more than one route. This requires them to hire one or more drivers to operate their additional routes on a regular basis. Drivers hired by contractors must be pre-approved by FedEx Home. In this regard, according to the Operating Agreement, such drivers must be qualified pursuant to government standards and FedEx Home Safe Driving Program standards. This means that such drivers must have a valid DOT card, which requires passing a physical and a drug test, and they must also have clean driving and criminal records. Drivers hired by contractors must meet the same driver training requirement required of contractors. The drivers hired by contractors wear the FedEx Home uniform, use the same scanners, and must fulfill the same obligations required of the contractors.<sup>[49]</sup>

The multiple route contractors have sole authority to hire and dismiss their drivers and to otherwise determine their tenure of employment. The contractors are responsible for paying their drivers' wages and are responsible for all expenses associated with hiring drivers, such as the cost of training, physical exams, drug screening, employment taxes, and work accident insurance. The amount of the drivers' pay and benefits, and matters such as who is responsible for fuel costs, are matters for negotiation between the contractors and their drivers. If a terminal manager has an issue regarding a delivery by a contractor's driver, he or she takes it up with the

---

contractor rather than with the driver. The contractors set the work hours for their drivers and approve their time off.

There are currently three multiple route contractors at the two Wilmington facilities.<sup>[50]</sup> Contractor Ricardo Gely operates two routes out of Jewel Drive. He drives one route himself and has hired driver George Mbalire to drive the other one on a full-time basis. Contractor Wayne Curran operates two routes out of the Ballardvale terminal. He drives one himself, and his wife, Kathy Curran, drives the other route. Finally, contractor Cecil Hyre operates two routes out of Jewel Drive and one route out of Ballardvale, and he also serves as a part-time swing contractor for both facilities. When Hyre is driving his swing route or covering for other contractors who need a random day off, he needs three drivers for his other routes. When he is not doing swing work himself, he moves around between his own three routes. He employs five different drivers to assist him with his three routes.<sup>[51]</sup>

In addition to the three current multiple route contractors, four former contractors at Jewel Drive operated multiple routes. Former contractor Juan Valasquez had two routes, Diane Desantis had two to three routes, Timothy Jung had two routes, and Alan Douglass had four to five routes. They hired drivers to operate some or all of their routes at various times.

#### Contractors Hiring Drivers and Helpers

In addition to multiple route contractors who employ drivers on an ongoing basis, both multiple route and single route contractors may hire drivers on a temporary basis from time to time. As noted above, contractors who are ill or who wish to take a vacation or other time off

---

apart from the Time Off Program may hire and pay a driver to replace themselves, and several have done so on occasion.<sup>[52]</sup> It appears that many contractors who hire substitute drivers use the FedEx Home “temp” drivers or other contractors, who are already trained and otherwise qualified. As is the case with multiple route contractors who hire drivers, FedEx Home is not involved in a contractor’s decision to hire or terminate a substitute driver, and contractors do not even have to tell FedEx Home that they have hired a replacement driver, as long as the driver is “qualified.” Contractors who occasionally hire a substitute are similarly responsible for determining their pay and hours, and the substitute drivers must fulfill all the obligations that the contractors have to FedEx Home.

If the volume of deliveries on a contractor’s route is beyond the capacity of a single vehicle, the contractor may choose to rent a second vehicle for the route, referred to as a “supplemental” vehicle, and hire an additional driver to operate it. Contractors use supplemental vehicles and drivers primarily during the busy Christmas season, although they can use them at other times as well. Drivers of supplemental vehicles must also meet the DOT requirements. Melnyk testified about four contractors who have hired supplemental drivers at Jewel Drive. The record does not reveal whether any contractors at Ballardvale have ever hired supplemental drivers.<sup>[53]</sup>

Contractors may also choose to hire helpers.<sup>[54]</sup> A helper rides in the vehicle with the contractor, retrieves packages from the vehicle, and delivers them to residences. Since helpers do not drive, they do not need to be DOT-qualified, although Melnyk testified that FedEx Home

---

does a criminal background check on helpers for security reasons. Contractors do not need to notify FedEx Home that they are using a helper, and FedEx Home is not involved in the financial arrangements between contractors and helpers. Melnyk testified that contractors Leandro Baez,<sup>[55]</sup> Jorge Ascensio, and Cecil Hyre at Jewel Drive have employed helpers, and contractors Robson Araujo and Loay El Dagany at Ballardvale have employed helpers. Contractor Jose Aguilar used a helper both when he worked at Jewel Drive and after he moved to Ballardvale. As for the frequency with which contractors hire helpers, Melnyk testified that Hyre used a helper from time to time, but the record does not reveal how often the other contractors have used helpers.

#### Route Sales

The Operating Agreement gives all contractors the ability to assign their contractual rights to a replacement contractor, provided that the new contractor has the necessary driving qualifications and is willing to enter into an Operating Agreement with FedEx Home on “substantially the same terms and conditions” as the original contractor. Managing Director of Contractor Relations Edmonds testified that contractors do not need FedEx Home’s permission to sell their routes, but they must notify FedEx Home so that the buyer may sign a new Operating Agreement.<sup>[56]</sup> The amount of any consideration paid is strictly between the seller and the buyer, but FedEx Home may agree, as an accommodation, to collect the consideration from the replacement contractor by deducting it from his or her weekly settlement and remitting it to the seller.

---

Edmonds testified that there are some zip codes and/or geographic areas within the U.S. that are not “owned” by any FedEx Home contractor. It appears that when FedEx Home determines to create a new route in such areas, it gives those new routes to contractors for free.<sup>[57]</sup> Edmonds testified that if a contractor simply terminates his Operating Agreement without selling his route, the abandoned route becomes an open area, which FedEx Home would give to a new contractor for free.

At the Region 4 hearing, FedEx Home provided an expert witness to testify about the marketability of routes. He testified that, in his view, contractors have characteristics of small businessmen because they make capital investments, have the opportunity to expand, can profit from hiring employees, and can generate profits or losses based on managerial skill. He also testified that there is significant variation between the routes as to how much the contractors can earn. He testified that the ability of contractors to transfer their rights should make their routes marketable, but conceded that route value might decline if FedEx Home added new routes or existing routes were routinely available.

There is no record evidence of any route sales at the Ballardvale facility. With respect to sales of routes at the Jewel Drive facility, former contractor Brian Neal<sup>[58]</sup> testified that he sold his route and truck to contractor Clayton Schwann in early 2005. Neal did not pay for his route when he became a contractor at Jewel Drive in 2003, but he paid about \$28,000 for his truck in 2003, and testified that the market value of his truck at the time of the sale in early 2005 was

---

\$12,000 to \$15,000. He sold the route and truck to Schwann for \$18,000, of which \$1000 went to a broker who handled the transaction.<sup>[59]</sup>

Timothy Jung, a former contractor at Jewel Drive,<sup>[60]</sup> disposed of his two Jewel Drive routes in March 2006. Jung testified that he did not pay for his Gloucester/Manchester/Rockport route when he acquired it, but he paid \$34,000 or \$35,000 for the truck he used to service it, and the “Bluebook” value of the truck when he sold it along with the route was about \$20,000 to \$25,000. Jung sold the truck and route to Aquinaldo Ferreira for \$10,000 cash, and Ferreira also took over Jung’s payments on the truck, on which Jung then owed about \$26,000. As for Jung’s second Jewel Drive route covering Topsfield, Hamilton, Ipswich, and Essex, Jung sold the truck he had used to service this route to another contractor, who used the truck for a different route and did not take over Jung’s route. It appears that Jung abandoned this route without selling it.

Jewel Drive contractor Diane Desantis abandoned her two routes without selling them, apparently sometime in 2004. Melnyk, who was the pickup and delivery manager at Jewel Drive in 2004, testified that Desantis took her vehicles with her and that there was no exchange of money between her and the new contractor who took over her routes. Jewel Drive contractor Paul Tremblay testified that he did not pay for his route, although he hopes to sell it when he retires.

Finally, a contractor named Juan Valasquez, who incorporated as Velpo Delivery Company, had two routes at the Jewel Drive facility, and hired Richard Gely and Armani Kuame to drive them. Valasquez left the country and, about February 2006, he told Gely that he was

---

unable to return due to immigration problems. Gely accepted Valasquez's offer to take over the lease on his truck and the route. Gely signed a new Operating Agreement for the route, but there is no evidence that he paid Valasquez any money for it. Jewel Drive Manager Donald Clark testified that Kuame bought Valasquez's truck and signed a new Operating Agreement for Valasquez's other route in May 2006. Kuame paid Valasquez around \$30,000 for his 2004 truck, which costs around \$32,000 to \$35,000 new, but Clark did not know the specifics of their agreement and did not know if that figure was for the value of the vehicle alone or for the value of the vehicle and route together.

### **ANALYSIS OF INDEPENDENT CONTRACTOR STATUS**

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." In determining whether an individual is an employee or an independent contractor, the Board applies the common law agency test and considers all the incidents of the individual's relationship with the employing entity. The determination of whether or not an individual is an independent contractor is quite fact-intensive. The burden is on the party asserting independent contractor status to show that the classifications in question are independent contractors. *Argix Direct, Inc.*<sup>[61]</sup> and cases cited there.

On three occasions prior to FedEx's acquisition of Roadway in 1998, the Board considered whether contractor drivers employed by Roadway were independent contractors or employees within the meaning of the Act. In each case, the Board found that the drivers were

---

employees. *Roadway Package Systems (Roadway I)*,<sup>[62]</sup> *Roadway Package Systems (Roadway II)*,<sup>[63]</sup> *Roadway Package Systems (Roadway III)*.<sup>[64]</sup> As noted above, on three occasions since FedEx's acquisition of Roadway, two involving FedEx Home terminals and one involving a FedEx Ground terminal, the Board has affirmed Regional Directors' determinations that contractors employed by FedEx were statutory employees.<sup>[65]</sup> The facts adduced in this case are remarkably similar to those in the above cases and, accordingly, do not warrant a departure from the results in those cases.

In finding drivers to be employees in *Roadway III*, the Board relied, *inter alia*, on several factors also present in this case. As in *Roadway III*, all the FedEx Home contractors perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages. Although they have the option to incorporate as a business,<sup>[66]</sup> all contractors must do business in the name of FedEx Home. In this regard, wearing FedEx Home-approved uniforms and badges, all contractors operate vehicles that must meet FedEx Home specifications and uniformly display the FedEx Home name, logo, and colors. As noted in the Region 4 Decision, while the logos, uniforms, and badges are to some extent designed to comply with DOT regulations, they are also an important component of FedEx Home's nationwide effort to market its brand name, and the logos are larger than required by DOT regulations.<sup>[67]</sup> No prior delivery training or experience is required, and FedEx Home will train those with no experience. "Thus

---

the drivers' connection to and integration in [the Company's] operations is highly visible and well publicized." *Roadway III*.<sup>[68]</sup>

As in *Roadway III* and the prior FedEx Home cases, contractors are not permitted to use their vehicles for other purposes while providing service for FedEx Home. The contractors have a contractual right to use their FedEx Home trucks in business activity outside their relationship with FedEx Home during off-hours, provided they remove all FedEx Home markings, but only one former multiple route contractor at Jewel Drive and no current contractors at either Wilmington terminal have ever done so. I find, as did the Board in *Roadway III*, that "[t]his lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice by the ...drivers and more a matter of the obstacles created by their relationship with [the Company.]" Thus, the contractors' contractual right to engage in outside business falls within the category of "entrepreneurial opportunities that they cannot realistically take," because the contractors' work schedules prevent them from taking on additional business during their off-hours during the workweek. *Roadway III*.<sup>[69]</sup>

As in *Roadway III* and the prior FedEx Home cases, Fed Ex Home exercises substantial control over all the contractors' performance of their functions. FedEx Home offers what is essentially a take-it-or-leave-it agreement. While all contractors may negotiate with their terminal manager over what towns will be included in their primary service area, FedEx Home retains the right to reconfigure the service area unilaterally. All contractors must furnish a FedEx Home-approved vehicle and FedEx Home-approved driver daily from Tuesday through Saturday; they do not have the discretion not to provide delivery service on a given day. While

---

all contractors control their starting times and take breaks when they wish, their control over their work schedule is circumscribed by the requirement that all packages be delivered on the day of assignment. FedEx Home requires all contractors to scan all packages at the start of the workday and before delivery. While use of the scanners allows the contractors to comply with DOT regulations requiring that drivers log their hours, it also allows FedEx Home to provide its customers with a package tracking service. FedEx Home also requires all contractors to deliver packages to empty residences in the manner prescribed by the Driver Release Program guidelines. All contractors must follow FedEx Home's guidelines for safe driving. FedEx Home gives bonuses tied to compliance with its guidelines, giving it a further measure of control over contractor performance. The Operating Agreement requires all contractors to buy insurance in types and amounts specified by FedEx Home, including even insurance for damages contractors may incur while operating their vehicles for their personal benefit.

As in *Roadway III* and the prior FedEx Home cases, FedEx Home provides support to all its contractors in various ways that are inconsistent with independent contractor status. FedEx Home refers contractors to dealers from which they may lease or purchase the FedEx Home-approved vehicles and to lenders willing to finance such purchases. It refers contractors to other contractors who may wish to sell their used FedEx Home vehicles, thus "easing a new driver's responsibility for obtaining a qualified vehicle" and "increasing the likelihood that there will be a qualified buyer for a costly specialty vehicle no longer needed" by a contractor. *Roadway III*.<sup>[70]</sup> FedEx Home provides extensive support to contractors by offering the Business Support Package and arranging for the required insurance, thus providing an array of required goods and services that would be far more difficult for contractors to arrange on their own. As in *Roadway III* and

---

the prior FedEx Home cases, contractors are certainly free to purchase these required goods and services elsewhere, but there is no evidence that any Wilmington contractor has purchased these items elsewhere, suggesting that the right is not meaningful. Fed Ex Home also offers to arrange for approved substitute drivers for its contractors by virtue of the Time Off Program.<sup>[71]</sup> FedEx Home provides contractors who maintain sufficient vehicle maintenance accounts with \$100 per accounting period to help defray repair costs. FedEx Home requires contractors to permit FedEx Home to pay certain vehicle-related taxes and fees on their behalf and to have the payments deducted from their settlement.

The contractors' compensation package also supports employee status. With the exception of the right to appeal changes in core zone density payments,<sup>[72]</sup> FedEx Home unilaterally establishes the rates of compensation for all contractors. As in *Roadway III*, there is little room for the contractors to influence their income through their own efforts or ingenuity, as their terminal manager determines, for the most part, how many deliveries they will make each day; there is no evidence that a refusal or willingness to deliver "flexed" packages has significantly altered any contractor's income. A contractor's territory may be unilaterally reconfigured by FedEx Home. FedEx Home tries to insulate its contractors from loss to some degree by means of the vehicle availability payment, which they receive just for showing up, and the temporary core zone density payment, both of which payments guarantee contractors an income level predetermined by FedEx Home, irrespective of the contractors' personal initiative. FedEx Home also shields drivers from loss due to substantial increases in fuel prices by means of the fuel/mileage settlement.

---

As in *Roadway III* and the prior FedEx Home cases, the contractors at the Wilmington terminals have the contractual right to sell their routes, but the contractors may sell only to buyers who are acceptable to FedEx Home as qualified and who are willing to enter into an agreement with FedEx Home on substantially the same terms. In *Roadway III*, the Board found that evidence of a few such sales, some of which were forced by Roadway, were insufficient to support a finding of independent contractor status, particularly since it was unclear from the record whether any driver had profited materially from a sale.

Here, there is no evidence that any Ballardvale contractor has ever sold a route. There have been only two route sales at Jewel Drive, but the sales were combined with the sale of a truck, which makes the portion attributable to the route murky. In one case, contractor Brian Neal sold a route for which he paid nothing, along with a truck whose value he estimated at \$12,000 to \$15,000, for a total of \$18,000, and paid a \$1000 fee to a broker. Thus, Neal's profit on the sale of his route was only \$3000 to \$6000. In the case of the second route sale, Aquinaldo Ferreira paid Timothy Jung \$10,000 cash and agreed to take over the \$26,000 debt on his truck. After deducting the value of the truck, which Jung estimated at between \$20,000 to \$25,000, it appears that, at best, Ferreira paid Jung somewhere between \$11,000 to \$16,000 for the route. There is evidence that FedEx Home gave routes to other contractors at the two Wilmington terminals for free. There is also evidence that Jung abandoned his second route without selling it, that contractor Diane Desantis abandoned two routes without selling them, and it appears that contractor Juan Valasquez abandoned his two routes without selling them, as well. In these

circumstances, I find the evidence of only two route sales too insubstantial to support a finding of independent contractor status.<sup>[73]</sup>

In concluding that the contractors are statutory employees, I acknowledge the existence of several factors that support FedEx Home's contention that the contractors are independent contractors. In this regard, the Operating Agreement signed by the contractors provides that they will provide services "strictly as an independent contractor, and not as an employee." The contractors own their own vehicles, which are costly, and they are responsible for maintenance, repair, and fuel costs. A few contractors own more than one vehicle. Contractors are free to put their own name on their vehicles, and they are free to use their vehicles for other commercial purposes if they remove or cover the FedEx Home logo. Contractors hire helpers and other drivers and determine their wages. Contractors determine when to start and end their day and when to take breaks, and are free to determine what route to take to each stop. Contractors receive no fringe benefits and FedEx Home does not withhold taxes from their pay. Contractors are not subject to discipline and may challenge their termination through binding arbitration. The support that FedEx Home provides by virtue of the Business Support Program and group insurance program is optional for contractors, who are free to purchase these goods and services elsewhere. Contractors have the option to sell their routes. I note, however, that all these factors were present in *Roadway III* and/or the prior FedEx Home cases and that the Board has, therefore, already determined, based on other factors that outweigh them, that they are insufficient to demonstrate independent contractor status.

---

The Board's decisions in *Dial-A-Mattress*<sup>[74]</sup> and *Argix Direct, Inc.*,<sup>[75]</sup> on which FedEx Home relies, are distinguishable.<sup>[76]</sup> In finding the owner-operators to be independent contractors in *Dial-A-Mattress*, the Board noted that they arranged their own training and were not required to provide delivery services each day. Dial-A-Mattress played no part in the selection, acquisition, or inspection of the owner-operators' vehicles. It had no requirement as to the type, model, color, size, or condition of the vehicles, and provided no fuel subsidy or maintenance subsidy. Each vehicle had to display the name of the owner-operators' companies, rather than Dial-A-Mattress's name. Although not required to display Dial-A-Mattress's advertising on their trucks, many owner-operators did so, in exchange for a fee. Owner-operators were not required to wear Dial-A-Mattress uniforms, and many had their own company uniforms. There was no guaranteed minimum compensation to minimize the owner-operators' risks, and there was evidence that some owner-operators had negotiated changes in delivery rates with Dial-A-Mattress.

In *Argix Direct*, unlike this case, the employer did not require that the owner-operator's trucks be of any particular make, model, or color, and required only a small DOT-required sign with Argix's name. Argix placed no restriction on the use of vehicles for other purposes, owner-operators were free to elect not to accept routes on specific days, and some curtailed their services for Argix one day a week in order to work elsewhere. The owner-operators were not assigned specific routes, and Argix did not guarantee that the owner-operators would receive work each day. The number of routes varied from day to day, so that owner-operators drove for Argix fewer than five days a week most of the year. Owner-operators received no guaranteed

---

income. Moreover, in *Argix Direct* it was much more common for contractors to operate multiple routes, as five of the contractors owned 20 of the 63 trucks.

Accordingly, I find that the contractors are employees within the meaning of the Act and are properly included in the units found appropriate.

### **STATUS OF MULTIPLE ROUTE CONTRACTORS AND DRIVERS REGULARLY EMPLOYED BY MULTIPLE ROUTE CONTRACTORS**

As noted above, there are three multiple route contractors at the two Wilmington terminals, Cecil Hyre, Wayne Curran, and Ricardo Gely, all of whom must necessarily employ other drivers to operate their routes on a regular basis. Apart from its contention that multiple route contractors, like all of the contractors, are independent contractors, FedEx Home seeks to exclude the multiple route contractors from the units on the additional ground that they are statutory supervisors. Additionally, FedEx Home seeks to exclude the drivers hired by the multiple route contractors on the ground that they are not employees of FedEx Home and, alternatively, that they lack a community of interest with the FedEx Home contractors. The Union seeks to include both the multiple route contractors and the drivers they employ in the unit.

An analysis of the status of the multiple route contractors must begin with an inquiry into the employee status of the drivers they hire on an ongoing basis.<sup>[77]</sup> I find that FedEx Home exercises sufficient control over the drivers' working conditions to warrant a finding that they are

---

employees of FedEx Home. *International Transfer of Florida, Inc.*<sup>[78]</sup> In this regard, FedEx Home establishes minimum qualifications for any drivers hired by its contractors, all of whom must pass physical and drug tests, submit to checks of their driving and criminal records, and fulfill the FedEx Home training requirement. FedEx Home assigns work to the drivers hired by the multiple route contractors by designating, for the most part, which packages they will deliver. These drivers must drive a truck that meets FedEx Home specifications and has the FedEx Home logo. They must wear a FedEx Home uniform. They perform the exact same work as the contractors, and are required to follow FedEx Home guidelines regarding the scanning of packages, driver release, and the Safe Driving Program.<sup>[79]</sup> Notwithstanding my finding that the drivers regularly employed by the multiple route contractors are employees of FedEx Home, however, I find that the record is insufficient to determine whether, as argued by FedEx Home, they lack a sufficient community of interest with the contractors to warrant their inclusion in the unit. Accordingly, I shall permit them to vote under challenge.

I find that the multiple route contractors should be excluded from the unit as statutory supervisors of FedEx Home employees. Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of

---

any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*<sup>[80]</sup> Isolated or sporadic exercise of authority is insufficient to establish supervisory status. *Byers Engineering Corp.*<sup>[81]</sup> The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care.*<sup>[82]</sup>

The multiple route contractors hire the drivers who operate their routes, determine their pay, benefits, and schedule, grant them time off, and have authority to fire them. They exercise this supervisory authority over these drivers on a daily and ongoing basis.<sup>[83]</sup> I find that this authority is sufficient to demonstrate their supervisory status. Even in the event that the drivers are later excluded from the unit for lack of a sufficient community of interest, the fact that the multiple route contractors exercise this authority over non-unit employees does not preclude the Board from finding them to be statutory supervisors, where the performance of their supervisory functions is part and parcel of their “primary work product” rather than an ancillary part of their duties. *Union Square Theater Management, Inc.*;<sup>[84]</sup> *Pepsi-Cola Co.*<sup>[85]</sup> Here, the contractors’ operating agreements give them the explicit right to hire other drivers to perform FedEx Home work, so that the supervision of these drivers is clearly part of their primary work product. Accordingly, I shall exclude the multiple route contractors from the unit as statutory supervisors.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute separate units appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

---

All full-time and regular part-time contractors and swing contractors employed by the Employer at its 8 Jewel Drive facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

All full-time and regular part-time contractors and swing contractors employed by the Employer at its 375 Ballardvale Street facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

### **DIRECTION OF ELECTIONS**

Elections by secret ballot shall be conducted by the Regional Director among the employees in the units found appropriate at the times and places set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months

before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by International Brotherhood of Teamsters, Local Union 25.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the elections should have access to lists of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*,<sup>[86]</sup> *NLRB v. Wyman-Gordon Co.*<sup>[87]</sup> Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list for each unit containing the full names and addresses of all the eligible voters in that unit, shall be filed by the Employer with the Regional Director, who shall make the lists available to all parties to the election. *North Macon Health Care Facility.*<sup>[88]</sup> In order to be timely filed, such lists must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before September 27, 2006. No extension of time to file these lists may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

---

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Elections may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by October 4, 2006. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: [www.nlr.gov](http://www.nlr.gov).

/s/ Rosemary Pye

---

Rosemary Pye, Regional Director

First Region

National Labor Relations Board

Thomas P. O'Neill, Jr. Federal Building

10 Causeway Street, Sixth Floor

Boston, MA 02222-1072

Dated at Boston, Massachusetts

this 20<sup>th</sup> day of September, 2006.

h:\r01com\decision\dde1-rc22034 1rc-22035.doc

---

---

<sup>[1]</sup> The name of the Employer appears as amended at the hearing.

<sup>[2]</sup> Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before hearing officers of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officers' rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>[3]</sup> I note that the facility at 8 Jewel Drive in Wilmington is sometimes referred to as the "Boston" terminal, and the facility at 375 Ballardvale Street in Wilmington is sometimes referred to as "the Annex." I shall refer to these terminals as the Jewel Drive terminal and the Ballardvale terminal.

<sup>[4]</sup> It appears that the Union does not seek to represent substitute drivers who are occasionally hired by both multiple route and single route contractors to cover for temporary absences. The Union also asserts that it does not seek to represent "supplemental" drivers who are hired by contractors to operate an additional truck on their route during busy seasons such as the Christmas season. Finally, the Union does not seek to represent "terminal temp" drivers who are paid by a company called Kelly Services and used by FedEx Home to drive when FedEx Home determines that the extra volume of work warrants it.

<sup>[5]</sup> I take administrative notice of the fact that, on September 21, 2005, the Regional Director for Region 4 issued a Supplemental Decision in which she found that the multiple-route contractors should be excluded from the unit as joint employers of the drivers they hired and/or as statutory supervisors of FedEx Home, and that no party requested review of her Supplemental Decision.

---

<sup>[6]</sup> In the Worcester case, the Region 4 and 22 decisions were actually made part of the record. In this case, the hearing officer did not put any of the prior decisions into the record, but took administrative notice of the record in the Worcester decision, which itself incorporated the Region 4 and 22 decisions.

<sup>[7]</sup> The record in this matter was left open for the limited purpose of receiving the Employer's proffer into evidence. I hereby receive the Employer's proffer into the record, which is now closed.

<sup>[8]</sup> The Board found that the Region should have taken this evidence, which would create a complete record in the event of future appeals to the Board or the courts.

<sup>[9]</sup> In its proffer, FedEx has updated the figures, asserting that there were 5049 routes and 3826 contractors as of August 2006.

<sup>[10]</sup> It appears that the Union does not seek to represent the package handlers at either Wilmington facility.

<sup>[11]</sup> FedEx Home opened the Ballardvale facility in October 2005, because the Jewel Drive facility had become too small for the number of vans required to handle an increase in volume there. At that time, 14 of the 33 routes then based at Jewel Drive were transferred to Ballardvale, leaving 19 routes at Jewel Drive. A few more routes have been added to each facility since then. It is unclear from the record why the Jewel Drive facility, which is not located in Boston and does not service the City of Boston, is referred to as the "Boston" facility.

---

<sup>[12]</sup> In the prior FedEx Home cases, the Employer used a temporary agency called “Adecco” to supply temp drivers, but the two terminals at issue in this case use Kelly Services.

<sup>[13]</sup> In the Worcester case, it appeared that DOT regulations required FedEx Home to obtain the applicants’ driving records, but did not require a criminal background check. Regional Maintenance and Safety Manager Michael Carey testified at the hearing in this matter that the DOT regulations also require the criminal background check.

<sup>[14]</sup> Carey testified that DOT regulations apply to drivers of vehicles over 10,000 pounds. The regulations state, however, that motor carriers can go beyond DOT requirements, and it is FedEx Home policy to apply these requirements to vehicles under 10,000 pounds as well. Most, but not all, FedEx Home vehicles are over 10,000 pounds.

<sup>[15]</sup> The FedEx Home Safe Driving Program, which is part of the Operating Agreement signed by all contractors, discussed in detail below, states that all contractors must undergo a physical examination completed by a qualified physician approved by FedEx Home at least every two years. Carey testified that a physical is required every three years if there are no medical issues. Managing Director of Contractor Relations Tim Edmonds testified that FedEx Home is responsible for ensuring that the physician is qualified to perform a DOT physical and that not all physicians are qualified. The contractors bear the cost of the physical.

<sup>[16]</sup> The FedEx Home Safe Driving Program requires all FedEx Home contractors to submit to a drug screen administered at such time and place and in such manner as determined by FedEx Home. Carey testified that FedEx Home administers quarterly random drug tests on all its contractors and drivers.

<sup>[17]</sup> FedEx Home’s managing director of contract relations, Timothy Edmonds, testified at the hearing in this matter that individuals who are applying to be seasonal or “temp” drivers for FedEx Home are paid by Kelly Services to take QPDL. Edmonds testified that prospective contractors are not paid to take QPDL, but Carey testified that this scenario would happen

---

infrequently; in most cases, prospective contractors begin their relationship with FedEx Home as temps, because they need to complete QPDL before becoming contractors and/or because they cannot obtain a vehicle immediately, in which case Kelly Services pays for their training period. When a contractor wishes to hire a driver who needs to take QPDL, it is up to the contractor whether to pay the driver for taking the QPDL training.

<sup>[18]</sup> The scanner is a piece of equipment used by all contractors to record the location and delivery of each package during its journey.

<sup>[19]</sup> The current version of the Operating Agreement, dated June 2006, was submitted into evidence in this case.

<sup>[20]</sup> As described below, contractors may attempt to negotiate an increase in a part of their compensation package called the “temporary core zone density settlement.”

<sup>[21]</sup> Edmonds testified that FedEx Home made two improvements in the 2006 nationwide Agreement at the request of the contractors: 1) a provision that the core zone payment would be prorated if contractors worked fewer than a certain number of hours was eliminated; and 2) contractors who service two or more FedEx Ground, FedEx Home, or swing contractor “primary service areas” now receive a quarterly payment in the amount of \$750. Edmonds did not indicate which of FedEx Home’s 500 terminals the contractors’ requests for changes in the Agreement originated from.

<sup>[22]</sup> See the Private Background Statement and Section 1.14 of the Operating Agreement.

<sup>[23]</sup> The Safe Driving Program included in the Operating Agreement lists 25 acts or omissions related to safe driving. FedEx Home may suspend drivers (apparently whether or not they are contractors) for 15 days at its sole discretion based upon reasonable inquiry with respect to any

---

of the 25 acts or omissions that would constitute an offense of law, pending the filing of charges against the driver. If charges are filed, the suspension continues until final determination by a court.

<sup>[24]</sup> The type of vans and trucks most commonly described in the various FedEx cases were referred to as P-350s, P-400s, P-450, P-500s, or P-550, with the numbers referring to capacity.

<sup>[25]</sup> According to the Worcester case, however, the logo used by FedEx Home is larger than required by DOT regulation.

<sup>[26]</sup> In the Worcester decision, I noted at footnote 18 that Addendum 8 of the Operating Agreement made reference to contractors who have an “outstanding start-up loan balance.” Managing Director of Contractor Relations Timothy Edmonds testified in this case that FedEx Home does not provide start-up loans, and I note that the reference to start-up loans no longer appears in Addendum 8 of the current Operating Agreement.

<sup>[27]</sup> Ballardvale Pickup and Delivery Manager Cal Busby testified that the Ballardvale terminal does not have any “terminal” spare or rental vehicles; Ballardvale contractors must rent a spare from a rental agency in case of a breakdown.

<sup>[28]</sup> Edmonds, the managing director of contract relations, testified in the Worcester case that this is because DOT leasing regulations require carriers to have exclusive use and control of their vehicles. I note, however, that the Region 4 Decision stated that DOT regulations in most instances prohibit the operator of a vehicle leased to a regulated carrier from simultaneously transporting the goods of another regulated carrier, and that the Operating Agreement expanded upon this regulation.

---

<sup>[29]</sup> “Driver release” refers to delivering a package when nobody is home. Drivers must leave such packages out of public sight, in places not susceptible to weather damage (or the package must be wrapped in a weatherproof bag), and in places inaccessible to animals. Packages may be left only at residential dwellings with single family entrances. Drivers will be liable for the loss if they fail to obtain a required signature, release packages to a business or apartment or residence with public access or common entryways, or release a package to the wrong address.

<sup>[30]</sup> According to the Region 4 Decision, customer service rides are required if a customer complains about a contractor, but are also conducted without such a complaint having been made. The supervisor spends an entire day riding with the contractor and records the amount of time spent at each stop to determine whether the contractor has an appropriate workload. The supervisor then completes an evaluation form rating contractor performance in areas such as package delivery, safe driving, professional appearance, and customer courtesy. Supervisors speak to contractors, whose performance is viewed as deficient and may memorialize the discussions in “business discussion” notes, which FedEx Home may rely on in deciding whether to terminate a contractor for non-performance. No business discussion notes were submitted into evidence in this case.

<sup>[31]</sup> As further described below, contractors may choose to make the deliveries themselves or arrange for another driver to make the deliveries if they prefer not to work on a given day. Although contractors ordinarily make their deliveries Tuesday through Saturday, they occasionally deliver packages on Sunday or Monday, for example, if they are unable to complete their route on Saturday due to poor weather or a vehicle break-down.

<sup>[32]</sup> Those at the Ballardvale terminal arrive between 6 a.m. and 9 a.m.

<sup>[33]</sup> In this regard, Jewel Drive contractor Paul Tremblay testified that he sometimes gives his business card to customers and tells customers to call or e-mail him directly rather than FedEx customer service if they have a question about a package. He has also asked the retailer L.L. Bean to ship him some catalogs to distribute to his customers to generate more L.L. Bean deliveries.

---

<sup>[34]</sup> As for flexing away packages to be delivered in a contractor's primary service area, the Agreement states in the section on "Agreed Standard of Service" that on any day where the volume of packages in a contractor's primary service area exceeds the volume that a contractor can reasonably be expected to handle, FedEx Home may reassign a portion of such packages to another contractor. Notwithstanding this language, Edmonds testified that contractors must consent to the removal of packages from their proprietary area under most circumstances and that, before flexing away packages, a terminal manager will give contractors an opportunity to explain how they will be able to complete all of the deliveries, e.g., through use of a supplemental vehicle or a helper.

<sup>[35]</sup> Alternatively, the terminal manager may have a temp driver, another contractor, or a manager cover the route.

<sup>[36]</sup> Clark also testified that terminal managers cannot flex packages away from contractors' proprietary zip codes without their consent. It appears, therefore, that the type of involuntary flexing he described would occur as to deliveries to be made outside of proprietary zip codes.

<sup>[37]</sup> Jewel Drive contractor James Downs testified that he has flexed only one or two packages in the last six years.

<sup>[38]</sup> At the hearing in the Worcester case, FedEx Home sought to introduce into evidence two documents from the Internal Revenue Service, referred to as a "letter of assurance," evidencing that agency's 1995 determination, based on the 1994 Operating Agreement, that Roadway Package System's contractors were independent contractors for purposes of the Internal Revenue Code. The Board previously considered the IRS letter of assurance in *Roadway Package Systems*, 326 NLRB 842, 854 fn. 46 (1998), and found it not to be dispositive. Accordingly, I found that the hearing officer in the Worcester case had properly rejected this exhibit.

<sup>[39]</sup> These were Cecil Hyre, Wayne Curran, and Timothy Jung.

---

<sup>[40]</sup> The record does not reveal whether all of these contractors worked a full year at these terminals in 2005.

<sup>[41]</sup> According to the Region 4 Decision, DOT regulations require FedEx Home to have its drivers carry identification.

<sup>[42]</sup> The record does not reveal what the contractor assistance programs are.

<sup>[43]</sup> These were Alan Douglass, Diane Desantis, and Juan Valasquez.

<sup>[44]</sup> Curran has routes at both Wilmington terminals.

<sup>[45]</sup> The Time Off Program is described in Attachment 6.1 to Addendum 6 of the Operating Agreement.

<sup>[46]</sup> The contractor whose route the swing contractor covers does not receive a settlement for the work.

<sup>[47]</sup> The record in the current case does not include updated evidence concerning the payment of swing contractors.

---

<sup>[48]</sup> Schwann has no routes other than his swing routes and currently covers 42 weeks of swing routes per year. Hyre is a contractor for three routes at the Jewel Drive terminal in addition to being a part-time swing contractor for both terminals.

<sup>[49]</sup> The Operating Agreement's provision concerning "Employment of Qualified Persons" states that "Contractor understands and agrees that such persons shall not be considered employees of FHD and that it is the Contractor's responsibility to assure that such persons conform fully to the applicable obligations undertaken by the Contractor pursuant to this Agreement."

<sup>[50]</sup> Because the three multiple route contractors operate between them seven of the 40 routes at the two Wilmington terminals, it appears that there are about 33 single route contractors at the two terminals.

<sup>[51]</sup> Hyre's drivers are Leon Campbell, Damian Jean Baptiste, Angela Allen, Sherry Spence, and Hyre's wife, Kelly Marson-Hyre.

<sup>[52]</sup> For example, several contractors have hired driver Paul Morgan when they want a day off. One hired him to cover for a week-long vacation, and another hired him to cover his route for two to three weeks due to illness.

<sup>[53]</sup> Ballardvale Pickup and Delivery Manager Busby testified that no Ballardvale contractors have run supplementals in his time there, but he has been there only since March 2006.

<sup>[54]</sup> It appears that neither party seeks to include in the unit any of the helpers hired by the contractors.

---

<sup>[55]</sup> It appears from the lists of contractors that Baez is no longer employed at either facility.

<sup>[56]</sup> According to Edmonds, a new Operating Agreement would not be required if an incorporated contractor sells his corporation to someone else. In such cases, the original Operating Agreement, which was made with the corporation, continues to apply to the corporation's new owner.

<sup>[57]</sup> Some Wilmington contractors testified that they did not pay FedEx Home for their routes, and Edmonds testified that FedEx Home does not get involved in "the equity market." He testified that in the case of FedEx Ground, which is a more mature business than FedEx Home, all zip codes are proprietary and, with rare exceptions, no areas are unspoken for. FedEx Home, in contrast, still services areas not owned by any contractor. As noted above, contractors may "own" a proprietary zip code that is defined in their Operating Agreement and, in addition, service an outlying area that is not part of their proprietary area. When the contractor sells his route, the areas beyond the proprietary area typically go along with it, but they do not become proprietary at the time of sale.

<sup>[58]</sup> Neal is currently the Regional Quality Service Manager for FedEx Home in New England.

<sup>[59]</sup> Neal testified that the transaction was memorialized by a bill of sale for the truck and an addendum listing the zip code of his route as part of the package. The hearing officer asked Neal to produce the bill of sale, and he stated that he would try to get it, but the bill of sale was never introduced into evidence.

<sup>[60]</sup> Jung is currently a regional quality service manager for FedEx Home.

<sup>[61]</sup> 343 NLRB No. 108, slip op. at 4 (December 16, 2004). The multifactor analysis set forth in *Restatement (Second) of Agency*, Sec. 220, includes the following factors to be examined: 1) the

---

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. *Id.* at fn. 13.

<sup>[62]</sup> 288 NLRB 196 (1988).

<sup>[63]</sup> 292 NLRB 376 (1989), *enfd.* 902 F.2d 34 (6th Cir. 1990).

<sup>[64]</sup> 326 NLRB 842 (1998).

<sup>[65]</sup> FedEx Home asserts, as it did in the Worcester case, that it is error to rely on the Paterson, New Jersey case, which involved a FedEx Ground operation rather than a FedEx Home operation. For the reasons noted in the Worcester decision at fn. 58, I find that the differences cited by FedEx Home between the two types of operations are not material to a determination of independent contractor status. More important, in both the Worcester case and in this case, I noted that I have relied primarily on prior Board-reviewed cases involving FedEx Home operations, first Barrington and now Worcester. Even discounting any reliance on the Paterson FedEx Ground case, and relying exclusively on the FedEx Home cases, I find that the result would be the same.

FedEx continues to assert in this case that I should rely on an August 3, 2000 DD&E, in which the Regional Director for Region 5 found that drivers employed by FedEx's predecessor at a Maryland ground facility were independent contractors. As I noted in the Worcester decision, there was no request for review of that decision. Since unreviewed regional directors' decisions have no precedential value, I again decline to rely on the Region 5 Decision. *The Boeing Company*, 337 NLRB 152, 153 fn. 4 (2001).

---

<sup>[66]</sup> In *Roadway III*, the Board found employee status, notwithstanding the fact that a few drivers operated as incorporated businesses. I note that only four of the current contractors at the two Wilmington terminals have incorporated as a business. Moreover, two of those Wilmington contractors, Wayne Curran and Ricardo Gely, are multiple route contractors, who, for reasons described below, I have excluded from the unit. The three former Jewel Drive contractors who were incorporated were also multiple route contractors. Thus, only two of the 33 single route contractors in the unit, Robert Fonseca and Se-Hoon Oh, have incorporated as a business.

<sup>[67]</sup> FedEx Home argues that, under current Board law, an employer's conformance to government-imposed regulations does not establish employer control and, therefore, cannot constitute a factor favoring a finding of employee status. *Don Bass Trucking, Inc.*, 275 NLRB 1172 (1985), quoting *Air Transit, Inc.*, 271 NLRB 1108 (1984); *Diamond L. Transportation*, 310 NLRB 630 (1993). In his concurrence in *Roadway III*, Member Gould asserted that he would reverse this precedent, while the majority found it unnecessary to reach the issue because its disposition of the case was not based on factors stemming from governmental regulation or control. 326 NLRB at 848, fn. 28 and 854-855.

<sup>[68]</sup> 326 NLRB at 851.

<sup>[69]</sup> 326 NLRB at 851 and fn. 36. The Board noted in *Roadway III* that the drivers were hindered from using their vehicles for other purposes during off-work hours, in part because they had to return their vehicles to the terminal each night for loading of the next day's packages. In the prior FedEx Home cases, as here, the contractors were not required to return their vehicles to the terminal each night, yet the Board still denied review of the finding of employee status.

<sup>[70]</sup> 326 NLRB at 852.

<sup>[71]</sup> The Time Off Program appears to be a new means by which FedEx Home supports its contractor workforce that did not exist in either *Roadway III* or the Region 4 case.

---

<sup>[72]</sup> There is evidence of only one contractor at the two Wilmington terminals who has ever negotiated an increase in his core zone density payment.

<sup>[73]</sup> It may be difficult for contractors to sell their routes, because FedEx Home apparently gives new or abandoned routes to potential contractors for free.

<sup>[74]</sup> 326 NLRB 884 (1998).

<sup>[75]</sup> *Supra* at 343 NLRB No. 108.

<sup>[76]</sup> I note that FedEx Home's reliance on these same cases in the prior FedEx Home cases has already been rejected by the Board in those cases. Further, the *Dial-A-Mattress* Board expressly found that case to be distinguishable from *Roadway III*, which involved the operations of FedEx Home's predecessor.

<sup>[77]</sup> An individual must exercise supervisory authority over employees of the employer at issue, and not employees of another employer, in order to qualify as a statutory supervisor. *Crenulated Co.*, 308 NLRB 1216 (1992). Thus, if the drivers hired by the multiple route contractors are not employees of FedEx Home, the multiple route contractors cannot be statutory supervisors by virtue of their exercise of supervisory authority over them. For this reason, I conclude that it is necessary for me to decide the employee status of the drivers hired by multiple route contractors despite the fact that the parties took the position that they should be permitted to vote under challenge. In any event, I have concluded that these drivers should be permitted to vote under challenge.

---

Because no party asserts that the drivers are jointly employed by FedEx Home and the multiple route contractors, I do not reach that issue. As noted above, no party seeks to include drivers that are hired by either multiple route or single route contractors on a temporary basis, such as substitute drivers who fill in for absences or supplemental drivers.

<sup>[78]</sup> 305 NLRB 150 (1991).

<sup>[79]</sup> In concluding that the multiple route contractors are employees of FedEx Home, I acknowledge that the Operating Agreement states in a section entitled “Employment of Qualified Persons” that “Contractor understands and agrees that [persons employed or provided by the Contractor] shall not be considered employees of FHD...” I find that this factor is outweighed by the factors described above.

<sup>[80]</sup> 273 NLRB 1677, 1689 (1985).

<sup>[81]</sup> 324 NLRB 740, 741 (1997), citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986).

<sup>[82]</sup> 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

<sup>[83]</sup> No party contends that contractors who occasionally hire drivers or helpers on a temporary basis are statutory supervisors.

<sup>[84]</sup> 326 NLRB 70, 72 (1998).

---

<sup>1851</sup> 327 NLRB 1062, 1063-1064 (1999).

<sup>1861</sup> 156 NLRB 1236 (1966).

<sup>1871</sup> 394 U.S. 759 (1969).

<sup>1881</sup> 315 NLRB 359 (1994).

---