

CASE TO DECIDE WHETHER FEDEX DRIVERS ARE EMPLOYEES BY JANE ROBERTS

August 19, 2007 - Published in Memphis Commercial Appeal

In a federal courtroom in South Bend, Ind., FedEx Ground drivers are preparing for a showdown in a case that will decide if the company's 15,000 drivers are independent contractors or employees owed benefits, overtime and expenses.

What is at stake is the very model that helped FedEx Ground quickly become one of FedEx Corp.'s best performers, accounting for 17 percent of its \$35 billion in revenue in 2007, six years after the division was formed.

But just as critical is the edge it has given FedEx over rival UPS, where drivers and couriers are the Teamsters' single biggest stronghold. Union strife at UPS in 1997 and 2001, for instance, drove thousands of customers to FedEx. Over a decade, UPS has lost 10-12 percent of market share.

"My guess is that the independent contract structure gives FedEx a 15- to 20-percent advantage on total compensation costs on benefits alone," said labor economist David Ciscel, professor emeritus at the University of Memphis.

"But there could be all sorts of advantages we're not seeing."

Since 2001, when the first case was filed in California, some 160 drivers have filed suits in 29 states, including Tennessee, saying they are really full-time employees treated like contractors.

The cases are before a federal judge in Indiana, who will decide with hearings beginning in late November whether the contractors' claims can be combined in a class-action suit.

If the case goes forward as a single suit, a jury will decide if the law makes the jobs full-time positions, with benefits and protections required by law.

More than 80 percent of the plaintiffs no longer work for FedEx.

"If FedEx won, they would win every suit, but if they lose, they lose big-time, too," Ciscel said. "Without knowing for sure, I've always thought the whole relationship was to thwart unionized drivers and not so much about cost considerations."

Under the system, the FedEx "jobbers," as they call themselves, buy their routes, vehicles and fuel. They cover their own maintenance costs, buy FedEx uniforms, scanning equipment and pay insurance and taxes.

FedEx pays them per delivery, but it does not say how much.

For the vast majority of the drivers, the system works fine, FedEx says, providing it a flexible workforce and giving thousands of entrepreneurial-minded people a way to profit from its success.

"We know that defending the independent contractors is the right thing to do," said Maury Lane, FedEx spokesman.

"This is the kind of service our customers have asked for."

Its 15,000 drivers deliver 3 million packages a day in the company's fastest-growing and most-profitable division. In the quarter ended May 31, revenue in FedEx Ground was up 12 percent to \$1.6 billion.

In Tennessee, five plaintiffs are seeking \$50,000 apiece to cover expenses, including fuel, maintenance and lost benefits.

One is Buddy Johnson, 30, who left FedEx in 2005 after trying a year to make a route in fast-growing DeSoto County pay off.

"They told me this was a \$40,000- to \$50,000-a-year job. That was before expenses," said Johnson, now in the U.S. Army at Fort Campbell in Clarksville, Tenn. His annual take-home pay was closer to \$20,000, he said.

"At Christmas 2004, when it snowed in Memphis, some jobbers got stuck and had to get a wrecker. FedEx made the jobbers pay for the wreckers themselves. They also made us pay for our tires, oil changes, transmission flushes," said Johnson.

He paid \$3,500 for the route, plus \$500 or \$600 a month on his truck note.

"One time, when my starter went out, I had to rent a van from Enterprise. It could not be Hertz because Hertz has yellow trucks. FedEx wanted us to have white trucks."

Besides the money woes, FedEx had the right to add packages to Johnson's route, he said, loading him up with South Memphis parcels when it couldn't find drivers to take that route.

"My route was exploding because of the housing boom, and I couldn't keep up. FedEx thought I should buy another truck, but I couldn't because I was barely getting by."

When Johnson quit, his truck, he said, had 100,000 miles and was worth \$9,000 or \$10,000.

"But I still owed \$15,000."

Opponents say the system allows FedEx a hard-working, unified workforce that isn't independent at all.

"It's an ingenious way to pass a lot of their costs onto their workers," said Chris Gilreath, a Memphis attorney representing the Tennessee plaintiffs.

"I don't think it is what the law allows."

However, Tim Hughes, 46, says he's grossed six figures since he added a second truck in 1997. Today, he has nine employees and five trucks working routes on Lamar and Shelby Drive.

"When you're trying to make 150 stops and 30 pickups and do it all in an eight-hour day, you've got to know what you are doing," he said.

"It takes special people. I consider what I do to be the elite part of the trucking industry," said Hughes, who has taken advantage of all opportunities he could, including aligning with FedEx managers and salespeople willing to help him.

He does much of his own maintenance and once worked 28 days without a day off. But he's reluctant to take credit for his success.

"The stuff that I deliver in the morning, other people have picked up on time throughout the country. All those other contractors are expecting me to get those packages delivered on time."

But he's quick to say he worked six years before he could afford to take his family on vacation.

"If I had been an employee for anyone else, I probably could not afford to send my daughter to an SEC school. FedEx offers contractors eight or 10 incentives. A lot of places don't offer anything."

Incentives include monthly bonuses for people who deliver all their packages and show up to work each day. There are also bonuses for safe driving and route growth. Another bonus rewards drivers for longevity, with incremental increases tied to years of service. Drivers who keep a \$1,000 balance in their truck maintenance funds get a "little extra each quarter," Hughes said.

Analysts say the independent contractor model itself isn't flawed. The challenge is making sure midlevel managers apply expectations uniformly across the company.

"The drivers were told they would be given the opportunity, all they had to do was deliver the packages," Gilreath said. "They were discouraged from building their own rapport with customers."

The first of the cases was filed in Los Angeles in 2001. A state court there ruled that FedEx owed 200 drivers \$5.3 million in expenses. FedEx appealed the decision, saying the trial judge erred in claiming the workers should be classified as full time.

Monday, a California appellate court rejected the company's claim, saying the workers indeed qualify as full-time employees.

"We are going to continue to review our legal options," Lane said. "We disagree with the ruling and are considering what our legal options are. It's clear we will be able to give our customers the kind of service they know and have to rely on."

Lawyers say recent rulings by the National Labor Relations Board about the drivers' right to unionize could have some bearing in the Indiana court.

The NLRB found in six consecutive cases in the Northeast that the FedEx Ground drivers are employees. The decisions are important because the National Labor Relations Act does not apply to contractors.

"The Indiana court will see that other judges going through rigorous analysis have come to that conclusion," Gilreath said.

But Bill Sossaman, labor attorney here, says the judge may only consider criteria germane to the suits.

"The Indiana court would have no authority to make any type of ruling based on the NLRB," he said.

On the other hand, he said, "it would be natural for a judge to take into consideration that another agency had found them employees under another law.

"I would say that it makes it only slightly more likely that he would find them to be employees."

As a result of the rulings, Home Delivery drivers in Wilmington, Mass., and Windsor, Conn., have voted for Teamster representation.

The NLRB certified the Teamsters Local 25 in Boston as the collective bargaining agent for the Wilmington drivers. FedEx said its only option will be to refuse to bargain with the group.

--Jane Roberts: 529-2512

© 2007 Scripps Treasure Coast Newspapers