

**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^{1[1]}

and

TRUCK DRIVERS UNION, LOCAL #170,
a/w INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner^{2[2]}

Case 1-RC-21966

DECISION AND DIRECTION OF ELECTION^{3[3]}

The Union seeks to represent a bargaining unit of certain drivers employed by

^{1[1]} The name of the Employer appears as amended at the hearing.

^{2[2]} The name of the Petitioner appears as amended at the hearing.

^{3[3]} Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. 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 officer's 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.

FedEx Home Delivery (FHD) at its terminal in Northboro, Massachusetts.^{4[4]} FHD, which refers to these drivers as “contractors,” contends that they are independent contractors and are, therefore, not employees within the meaning of Section 2(3) of the Act. I find that the contractors are statutory employees and shall direct an election in the requested unit. In addition, the Union seeks to exclude contractor Matthew Kornn from the unit as a supervisor and/or joint employer. I find that Kornn is a supervisor within the meaning of the Act and I will exclude him from the unit on that basis.^{5[5]}

PROCEDURAL MATTERS

In two recent Decisions, the Regional Directors from Regions 4 and 22 determined that FedEx contractors are 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 facility 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’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 Delivery’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.^{6[6]}

At the hearing in this case, the Decisions from Regions 4 and 22 were put into evidence, and the hearing officer notified the parties that the Regional Director would consider the facts as developed in the Region 4 and 22 Decisions as facts applicable in the instant case, unless they were distinguished. Accordingly, I have relied throughout this Decision on facts developed in these prior cases to the degree those facts have general applicability to FedEx terminals nationwide. I note that I have relied primarily on the Region 4 case, which, like this case, involved a home delivery operation of the Employer. I have either paraphrased those facts from the Region

^{4[4]} Although the terminal at issue is located in Northboro, Massachusetts, it is commonly referred to as the “Worcester terminal” and shall be so referred to here.

^{5[5]} As discussed in detail below, I further find that swing contractors Robert Williams and Celso Dos Anjos are not statutory supervisors and, whether or not they are joint employers with FHD, that they should be included in the unit.

^{6[6]} 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 supervisors of FHD, and that no party requested review of her Supplemental Decision.

4 Decision on which I rely or, in some instances, set them forth verbatim as they appear in the Region 4 Decision.^{7[7]}

^{7[7]} At the hearing, and in its post-hearing brief, FHD objected that the hearing officer erred both by limiting FHD to demonstrating how the facts in this case differ from those developed in the Region 4 and 22 cases, and by refusing to incorporate in this case the underlying records from the Region 4 and 22 cases. I affirm the hearing officer's rulings with respect to these matters, inasmuch as I conclude that the record in this case adequately presents the facts and issues in this case. Allstate Insurance Co., 191 NLRB 339 (1971). I also note that I have relied on the prior Decisions solely insofar as they establish facts, such as corporate policies, that are generally applicable to all FHD facilities, including the Worcester terminal. For reasons of administrative economy, I decline to permit FHD to relitigate such facts recently established in another case. I also decline to consider the underlying records in the prior Decisions. Any assertions by FHD that the Regional Directors made factual errors in the prior cases should have been raised in its requests for review of those Decisions. To the degree that FHD, in its requests for review, did object to any asserted factual errors, the Board has already ruled on such objections by denying FHD's requests for review in both cases.

FHD has also objected that the hearing office erred by barring FHD from presenting evidence of entrepreneurial activity such as route sales that have taken place at the facilities involved in the Regions 4 and 22 Decisions since the close of the records in those cases, and by excluding as irrelevant the testimony of system-wide contractors, who would have testified about route sales and other evidence of entrepreneurial activity at FHD terminals nation-wide. I affirm the hearing officer's rulings, on the ground that the only probative evidence of independent contractor status involving entrepreneurial activity that is relevant to this case is evidence of entrepreneurial activity at the location at issue. I take administrative notice of the fact that in its requests for review of both the Region 4 and Region 22 Decisions, FHD made the same objection to the exclusion of system-wide evidence, and both requests for review were denied.

At the hearing, FHD sought to introduce into the record the Decision in RPS, Inc., 5-RC-14907, issued on August 3, 2000, in which the Regional Director for Region 5 found that pickup and delivery drivers and swing drivers employed by FedEx's predecessor at its Bridgeville, Maryland facility were independent contractors. I take administrative notice of the fact that there was no request for review of the Regional Director's Decision in that case. Since unreviewed regional directors' decisions have no precedential value, I decline to rely on the Region 5 Decision, and find that the hearing officer correctly rejected the exhibit. The Boeing Company, 337 NLRB 152, 153 fn. 4 (2001).

I note that Burke Court Reporting LLC, the reporting service that produced the transcript in this case, in error, failed to place several FHD exhibits in a rejected exhibit file, as ordered by the hearing officer, and placed them, instead, with other FHD exhibits that were received into evidence. These are FHD Exhibit 1(a), a disk containing electronic versions of the transcripts of the Region 4 and Region 22 hearings, as well as of the Decision in the Region 5 case; FHD Exhibit 1(b), certain 1995 documents from the U.S. Internal Revenue Service concerning a case involving FHD's predecessor, Roadway Package Systems; and FHD Exhibit 1(c), Federal Motor Carrier Safety Regulations issued by the U.S. Department of Transportation (DOT).

STATUS OF CONTRACTORS

FHD Operations

According to the Region 4 Decision, the Employer was established in about 1998, when FedEx Corporation (FedEx) acquired Roadway Package Systems, Inc. FedEx has two operating divisions: the Ground Division and FHD. The Ground Division delivers packages of up to 150 pounds, principally to business customers. FHD delivers packages of up to 75 pounds, mostly to residential customers. The Worcester home delivery terminal at issue in this case is part of FHD, which operates 300 stand-alone terminals throughout the United States, as well as 200 terminals that share space with Ground Division facilities. FHD has 3300 employees. In addition to these employees, FHD has agreements with about 4000 contractors who deliver packages on 4400 routes.

John Ciappi has been the terminal manager of the Worcester terminal since September 2005. Lauren Bushey is the service manager for pickup and delivery. The terminal has 21 contractors who are responsible for delivering packages in 21 service areas/routes. The facility also uses eight to ten temporary drivers who are paid by a different company called Adecco Associates, used seasonally at peak times such as Christmas and Valentine's Day to supplement the regular force of contractors. Jason Walker, the service manager for the Worcester terminal dock, supervises the ten package handlers who work at the facility.^{8[8]}

The Worcester terminal operates Tuesday through Saturday. Approximately 2500 packages pass through the Worcester terminal each day. Each morning, two trailers from a FedEx hub in Hartford, Connecticut arrive at around 3:30 or 4 a.m., and a third arrives around 6 a.m. Package handlers scan the packages as they are unloaded from the trailers. The scanners sort the packages to the appropriate route number and stop. The packages are sent down a conveyor belt and left in a pile for each contractor. The contractors scan the packages in their pile and load them into their trucks in sequence, with the highest number toward the back of the truck. Each morning, the contractors are given a vehicle route plan which shows the order of stops and generates a suggested route to each stop, but contractors are free to and do change both the order of stops as well as their route to each stop. The contractors make the deliveries and can opt either to return to the terminal or go directly home after their work is completed.^{9[9]}

^{8[8]} Neither party asserts that the temporary drivers employed by Adecco or the package handlers should be included in the unit.

^{9[9]} Contractors have the option to leave their delivery vehicles at the terminal overnight, in which case they would travel to and from the terminal in a different vehicle, such as a personal automobile.

Recruitment of Contractors

According to the facts developed in the Region 4 Decision, FHD follows the same procedure in recruiting and training both contractors and temporary employees. FHD 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.” The advertisements and recruiting brochures indicate that potential contractors must be 21 years old, have a good driving record, pass physical and drug tests mandated by DOT, be able to work Tuesday through Saturday, and have the ability to purchase the vehicle to be used in making deliveries.

At informational meetings, FHD representatives again emphasize that FHD is seeking an independent contractor relationship, and they review the potential compensation, expenses, and profit from a typical route. FHD then checks the driving and criminal records of applicants,^{10[10]} and those with acceptable records are asked to take physical and drug tests.^{11[11]}

Applicants must complete an FHD-approved driver-training course, unless they have a minimum of one year of recent commercial driving experience. According to the Region 4 Decision, the training includes eight days of classroom work, one day of driving with a current contractor, and five days of driving with FHD managers.^{12[12]} According to the Region 4 Decision, FHD pays applicants for the time spent in training, although FHD’s managing director of contract relations, Timothy Edmonds,^{13[13]} testified at the hearing in this matter that FHD does not pay individuals to qualify to become a contractor.^{14[14]} The training covers safe driving techniques, which is required by DOT regulations, as well as the procedures to be followed in making deliveries, such as how to load packages into a vehicle, the most efficient method for

^{10[10]} DOT regulations require FHD to obtain the driving records, but do not require the criminal background check.

^{11[11]} Ciappi testified that DOT requires a physical every two years and that contractors can go to any doctor for a physical, although the Operating Agreement signed by the contractors, discussed in detail below, states that they must go to a physician approved by FHD.

^{12[12]} Ciappi testified that only 13 of the 21 contractors at the Worcester terminal had “QDPL” training, which involves safety issues. It is unclear whether “QDPL” training is the same as the above-described required eight-day training. Assuming it is a reference to the same initial training requirement, the record does not reveal why the others were not required to take it, e.g., whether it was because they had sufficient previous commercial driving experience. Contractor Matthew Kornn testified that he initially attended a six-hour mandatory driver safety program. The record does not reveal whether FHD has expanded its mandatory training program from six hours to eight days since Kornn took it, or whether he was exempted from parts of it based on prior commercial driving experience.

^{13[13]} Edmonds oversees contractor relations for both FHD and FedEx Ground Delivery throughout the United States and Canada.

^{14[14]} It is not clear from the record whether this is due to a change in FHD policy; there is no explanation in the record for this apparent discrepancy.

making deliveries, and where to leave packages at a residence if nobody is home.^{15[15]} Those who pass the training course may choose either to acquire a vehicle and become contractors or to become temporary drivers who work for FHD, but are paid by a different company, Adecco Associates.

Vehicles

Contractors are required to purchase or rent a certain type of van or truck that FHD deems appropriate. The required vans and trucks come in various sizes, referred to as P-350, P-400, P-450, P-500, and P-550, with P-550 being the largest capacity vehicle.^{16[16]} The vehicles must be white in color with no blemishes. In order to comply with DOT regulations and foster brand name recognition, FHD requires all vehicles to carry the FHD logo. The logo used by FHD is larger than required by DOT regulation, however. The logo may be permanent or it may be a removable magnetic logo.^{17[17]} The vehicles must meet certain specifications for lights, brake pad thickness, and tire tread, have a backing camera, and have some shelving inside.

FHD provides contractors with the names of dealers 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 and may purchase, lease, or borrow from other sources. FHD does not itself provide financing^{18[18]} or guarantee loans obtained by contractors. Contractors in Worcester have obtained vehicles by leasing from one of the dealers suggested by FHD,^{19[19]} by purchasing vehicles from used car dealers, and by

^{15[15]} According to the Region 4 Decision, FHD witnesses maintained that the delivery procedures reviewed during the training were merely suggestions, but a manual and training video given to the trainees does not make that point clear.

^{16[16]} Worcester terminal contractor Robert Williams testified that, in 2003, the terminal manager told him that from then on all contractors upgrading to a new vehicle had to buy a P-500; Ciappi testified that contractors may choose any size vehicle, although Stephanie Dumont, who was the service manager for pickup and delivery at the Worcester terminal until October 2005, testified that when a contractor buys a new vehicle, it must have at least the same capacity as their prior vehicle.

^{17[17]} Ciappi testified that contractors are free to advertise that the vehicle is owned and operated by the contractor. Some contractors have additional markings on their vehicles, such as a symbol for a sports team or a magnetic ribbon for a charitable cause.

^{18[18]} Contractors are required to sign an Operating Agreement, which will be discussed below. Addendum 8 of the Operating Agreement provides that contract customer service bonuses will first be applied to any outstanding “start-up loan” balance owed by the contractor that exceeds \$250, but there was no other record evidence regarding such loans.

^{19[19]} Contractor Williams testified that he leased one of his trucks through the “FedEx program,” that FHD did the paperwork and ran the credit check, and that it was the avenue of least resistance to lease through FHD. Based on other testimony, it does not appear that contractors may lease vehicles directly from FHD. Rather, it appears that FHD may assist contractors in finding dealers and lenders and facilitate the process.

purchasing used vehicles from other contractors. Ciappi estimated that a new P-350 costs about \$20,000, a new P-450 costs about \$20,000 to \$35,000, and a new P-500 costs about \$34,000 to \$37,000. Williams testified that he paid \$9000 to \$10,000 for a used P-350 and over \$23,000 for a P-400.

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, contractors authorize FHD to pay licenses, taxes, and fees on their behalf and to deduct the amount of those payments from the contractors' compensation. In order to encourage contractors to accumulate a fund from which they may pay for expenses such as vehicle maintenance and substitute operators, FHD agrees to maintain and pay interest on a Service Guarantee Account into which the contractors deposit money. Pursuant to Addendum 3 of the Operating Agreement, for each quarter in which the contractors' average balance in the account is \$500 or more, FHD contributes \$100. Addendum 3 also provides that FHD 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, contractors are required to submit daily driver logs and daily vehicle inspection reports to FHD.^{20[20]} When contractors' vehicles break down, they sometimes call the Worcester terminal for assistance. Stephanie Dumont, the former service manager for pickup and delivery at the Worcester terminal, testified that she might then call a tow truck for them or drive a substitute rental vehicle out to the contractors as a service; the contractors must pay for the truck rental and the cost of repairing their own vehicle.

When using their vehicles for FHD work, contractors must use their vehicles exclusively for the carriage of FHD goods and for no other purpose.^{21[21]} Contractors may use their vehicles for other commercial or personal purposes when they are not in the service of FHD, so long as they remove or mask all FHD logos and markings. Contractor Matthew Kornn has used his vehicles for a magazine distribution business since 2000. There is no evidence that any other contractors at the Worcester terminal have used their vehicles for any commercial purpose other than FHD work. Contractors do use their trucks for personal purposes, however, such as helping people move or running personal errands.

Contractors Robert Williams, Celso Dos Anjos, and John Shinnick each own two vehicles,^{22[22]} and Matthew Kornn owns three vehicles. Williams and Dos Anjos have each

^{20[20]} DOT requires safety inspections at the beginning and end of each day as well as an annual safety inspection.

^{21[21]} Edmonds, the managing director of contract relations, testified 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.

^{22[22]} Shinnick's second vehicle is not registered; he is in the process of selling it to another contractor.

rented one of their extra vehicles to other contractors from time to time, for \$50 a day, when the renting contractors' vehicles were in the shop for repairs.^{23[23]}

The Operating Agreement

Contractors who have passed the training and acquired an appropriate vehicle may secure a route and sign a Standard Contractor Operating Agreement provided by FHD.^{24[24]} All potential contractors are offered the same agreement. Contractors may negotiate with the terminal manager over which particular route is assigned to them and, as described below, over the amount of one aspect of their compensation,^{25[25]} but there is no evidence that they have the ability to negotiate any other terms of the Operating Agreement with FHD. Rather, the Operating Agreement is presented on a take-it-or-leave-it basis. FHD periodically has contractors sign addenda modifying the agreement.

The Operating Agreement provides that contractors are willing to commit to provide daily delivery service^{26[26]} and to conduct their business so that they can be identified as part of the FHD system. It 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.

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 FHD 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. Contractors are required to place \$500 in an interest-bearing escrow account controlled by FHD to cover any debts owed by the contractor to FHD at the time

^{23[23]} Ciappi testified that the Worcester terminal does not have spare trucks to rent to contractors when their trucks break down. As noted above, Dumont testified that she sometimes drove rental vehicles out to contractors whose own vehicles had broken down on the road, but she did not explain from where she obtained the rental vehicles.

^{24[24]} The current version of the Operating Agreement, dated June 2005, was submitted into evidence. Edmonds testified that the body of the Operating Agreement has, by and large, remained the same since FHD began operating, but the addenda, which contain specifics such as compensation rates, have been changed from time to time.

^{25[25]} As described below, contractors may attempt to negotiate an increase in a part of their compensation package called the "temporary core zone density settlement."

^{26[26]} The Agreement makes several references to pick-up as well as delivery service, but it does not appear from the record that the contractors at issue pick up packages.

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

Discipline

Edmonds testified that contractors are not subject to reprimands or other discipline.^{27[27]} If contractors fail to live up to their contractual obligations, the 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 FHD must approve their recommendation. Contractors are entitled to seek arbitration of disputes over FHD’s decision to terminate their Operating Agreement.

Primary Service Areas

The terminal manager establishes the service areas/routes associated with the terminal and may offer open routes to contractors. At the Worcester terminal, there are 21 contractors and 21 routes. A route is composed of two to eight towns or zip codes.^{28[28]} The contractors’ Operating Agreements give them primary service areas, also referred to as “proprietary zip codes,” in which they are entitled to operate. Contractors may negotiate with the terminal manager over requests to add or delete towns from their route.^{29[29]} Ciappi testified that if two contractors want to switch routes in whole or in part, they may do so without FHD’s permission.

Under the Operating Agreement, contractors are responsible for providing daily delivery service in their primary service area. The Operating Agreement sets forth the mutual intention of FHD 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 the contractors to permit FHD personnel to ride with them from time to time to gather data to evaluate their service areas.

The Operating Agreement permits FHD, with five work days’ written notice, to reconfigure the 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 they are unable to do so, FHD may, in its sole discretion, reconfigure the area. In the event a route reconfiguration results

^{27[27]} The Safe Driving Program included in the Operating Agreement lists 25 acts or omissions related to safe driving. FHD 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.

^{28[28]} There are some towns serviced by the Worcester terminal that are not part of any contractor’s proprietary route. Deliveries in those towns may be moved from contractor to contractor as needed.

^{29[29]} Contractor Robert Williams testified that certain additions and deletions were made to his route and that he was given no choice over the matter. Ciappi testified that whatever changes were made to Williams’ route were made at Williams’ request.

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.^{30[30]}

Flexing

In addition to permanent route reconfigurations, there are daily adjustments to the number of packages delivered by each contractor, referred to as “flexing.” Each day, the terminal manager may redistribute packages from one route to another to equalize the workload and ensure that no driver exceeds the maximum hours of driving time permitted by DOT. The flexing generally involves packages to be delivered to towns not included in any contractor’s primary service area.^{31[31]} When a contractor is absent, sometimes the Worcester terminal manager has divided up the work of the absent contractor among all the other contractors. Contractors may refuse to accept flexes,^{32[32]} although contractor Williams testified that sometimes the terminal manager told him he had no one else, that Williams had to take the extra packages and do the best he could. In addition to flexing initiated by the terminal manager, contractors do informal flexing with other contractors serving adjacent areas, for which they do not need FHD’s permission. The donating contractor deletes the package from his scanner and the receiving contractor scans it in as loaded onto his truck.

The Operating Agreement provides that FHD does not have authority to direct contractors as to the manner or means employed to achieve their objectives and results. For example, FHD may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance. Contractors are responsible, however, for providing service in a manner that meets FHD’s standard of service. They must comply with specified driver safety standards and will be absolved from liability for loss of packages only if they comply with FHD’s Driver Release Program.^{33[33]} The Operating Agreement provides that

^{30[30]} It is not clear from the record how long this redistribution of money lasts.

^{31[31]} As noted above, there are some towns that are not assigned to any contractor’s primary service area. As for flexing packages to be delivered in a contractor’s primary service area, the Agreement states 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, FHD may reassign a portion of such packages to another contractor. Notwithstanding this language, the FHD witnesses testified that contractors may reject management’s decision to flex away packages from their proprietary zip code, and management will flex packages away from a proprietary zip code without the contractor’s consent only if the contractor proves unable to handle the volume of packages.

^{32[32]} Dumont testified that maybe twice a month contractors left packages behind at the terminal that they did not wish to deliver. She stated that sometimes contractors admitted to her they had scanned a package as “Code 7,” meaning they unsuccessfully attempted to make a delivery, when they had not, in fact, made such an attempt, because the delivery was too far out of their way.

^{33[33]} “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

FHD personnel may, at their option, visit customer locations with the contractors four times annually to verify that the contractors are complying with the Driver Release guidelines.^{34[34]}

Customers contact FHD 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 FHD and investigated by terminal management. Contractors are not responsible for soliciting customers, although Ciappi testified that contractor Richard Lacina told him that one customer who was happy with his services told Lacina that she would recommend to her friends and family that they use FHD.

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.

^{34[34]} 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 FHD may rely on in deciding whether to terminate a contractor for non-performance. No business discussion notes were submitted into evidence in this case.

Stephanie Dumont, who was the service manager for pickup and delivery at the Worcester terminal until October 2005, testified that the terminal manager previous to Ciappi never actually performed customer service rides or “driver release audits.” He told her to do the paperwork without necessarily doing the actual ride, i.e., falsify the documentation. The record does not reveal whether Ciappi, who became the manager in September 2005, has done or intends to do customer service rides or driver release audits.

Schedule

The contractors must provide service on their routes Tuesday through Saturday.^{35[35]} The contractors each determine what time to start their work day. Those at the Worcester terminal start anywhere from 5 a.m. to 7:45 a.m. They may take breaks during the day to run personal errands, go to a doctor's appointment, watch a child's soccer game, and the like, without permission. They do not punch a time clock, but they are required to scan their FHD-issued badges, discussed below, before they load and when they go off duty to calculate their hours on the road. As noted above, they may choose to end their day at the terminal or drive directly home after completing their deliveries. Although contractors ordinarily make their deliveries Tuesday through Sunday, 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.

Business Support Package

FHD offers to sell contractors a Business Support Package that provides them with certain necessary items they are required to have in order to work as FHD contractors. Thus, contractors are required to have scanners. 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 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 contractors to wear an FHD-approved uniform, maintained in good condition, and to keep their personal appearance consistent with standards promulgated by FHD from time to time.^{36[36]} They are required to wear an identification badge with the FHD logo, a photo, and the word "contractor."^{37[37]}

Accordingly, although not required to, contractors may opt to purchase FHD's Business Support Package to obtain items they require. The package includes company decals for the vehicles, business cards and identification badges, standard uniforms, random drug tests meeting DOT requirements, contractor assistance programs,^{38[38]} an annual DOT vehicle inspection,

^{35[35]} 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.

^{36[36]} The uniform available includes short or long-sleeved shirts, sweaters, and dark blue pants or shorts. Dumont acknowledged the requirement to purchase an FHD uniform, but testified that, on occasion, contractors wear blue cargo pants rather than the normal uniform pants, that most wear sneakers rather than the suggested shoes or boots, and that three contractors wore earrings and a necklace notwithstanding FHD's no-jewelry policy.

^{37[37]} According to the Region 4 Decision, DOT regulations require FHD to have its drivers carry identification.

^{38[38]} The record does not reveal what the contractor assistance programs are.

mapping software, lease of an FHD scanner and communications and related equipment, and a vehicle washing service necessary to comply with both government regulations pertaining to waste water run-off and with contractual appearance standards. The package cost of \$4.25 per day is deducted from the contractors' settlements.^{39[39]}

Edmonds testified 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. Nonetheless, all the contractors at the Worcester terminal have opted to purchase the Business Support Package.

Compensation

Of sixteen contractors who worked a full year at the Worcester terminal in 2004, 14 earned between \$69,270 and \$81,649 that year, while one earned \$11,892 and another earned \$21,414.

Contractors are paid by means of a weekly "settlement" check that includes several components set forth in Addendum 3 of the Operating Agreement. The delivery and pickup settlement includes payments of \$1.24 per stop and \$.22 per package and a premium for oversized packages. Contractors are paid an additional \$6.50 per stop for deliveries by appointment, \$2.75 for evening deliveries, and \$.50 per stop for packages that require a customer's signature. Contractors are paid a daily mileage settlement of \$.15-\$.20 per mile for miles driven in excess of 200 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 an additional number of cents per mile, depending on fuel prices within a five-mile radius of the Worcester terminal.

The 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. The settlement ranges from \$8 to \$32.50 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 holidays.

A temporary core zone density settlement is paid in consideration of the contractor agreeing to provide service to an area when the customer density and package volume in the service area is still developing. FHD may reduce or eliminate the temporary core zone density settlement as density and/or package volume increases. The core zone density settlement ranges from \$53 to \$119 per day. If a contractor works fewer than seven hours in one day, the core zone density payment is prorated based on hours actually worked. Edmonds testified that a contractor may negotiate with a terminal manager for an increased core zone density payment, and that FHD will do a customer service ride with the contractor to evaluate the appropriateness

^{39[39]} As described below, the settlements are the payments made by FHD to the contractors for the deliveries they perform.

of an increase. He testified that this happens on a regular basis at FHD, and the Region 4 Decision indicated that contractors had done so successfully, although there is no evidence that any contractor at the Worcester terminal has ever negotiated an increase in a core zone density payment.

No settlement sheets from the Worcester terminal were introduced into evidence, but Ciappi testified that the core zone and van availability payments constitute around 30 percent of the total payment to Worcester terminal contractors.^{40[40]}

After a year of service, contractors receive a service bonus of \$150 for each completed fiscal quarter. After three years of service, the service bonus is increased to \$200 per quarter. Contractors are eligible for an individual safety and customer service bonus of \$100 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. Contractors are eligible for a group performance-related bonus ranging from \$10 to \$30 per contractor per period, if the facility in which they work meets its “inbound service” goal for the period. Contractors receive a bonus of \$50 per period if they do not fail a driver release audit and receive no driver release complaints.^{41[41]}

FHD does not provide the contractors with fringe benefits and does not withhold taxes from their pay. FHD gives contractors an Internal Revenue Service “1099” form at the end of each year.^{42[42]}

Incorporation

Contractors have the option of incorporating as a business, in which case their settlement is remitted to the corporation. Edmonds testified that perhaps 15 to 20 percent of FedEx contractors have incorporated nation-wide. There is no evidence that any of the contractors at the Worcester terminal have incorporated, although contractor Matthew Kornn testified that he is considering it.

Insurance

^{40[40]} Settlement sheets introduced in the Region 4 hearing indicated that as much as 40 percent to 50 percent of the contractors’ weekly income at the Barrington terminal may have come from the guaranteed core zone and vehicle availability payments.

^{41[41]} These bonuses are described in Addendums 3 and 8 to the Operating Agreement.

^{42[42]} At the hearing, FHD 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, the hearing officer properly rejected this exhibit.

According to the Region 4 Decision, DOT regulations specify that carriers such as FHD 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 FHD to maintain insurance for property damage, personal injuries, cargo loss, or damage resulting from the contractor's operation of equipment in connection with FHD business. FHD also agrees to indemnify the contractors against liability for damages resulting from the operation of the equipment while on FHD 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 FHD's Safe Driving Program, in which case contractors are obliged by the Operating Agreement to secure their own liability insurance for damages that occur while on FHD business. Regardless of who is carrying this insurance, 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.

Contractors are responsible for up to \$500 on each claim of loss or damage to packages given to them for delivery, but contractors can avoid such liability if the package was handled in accordance with FHD's Driver Release Program guidelines. Customer complaints about package damage are investigated by FHD, which determines whether the contractor should be charged. The Operating Agreement absolves FHD of responsibility for claims resulting from contractors' relationships with their employees, for liability stemming from their failure to comply with laws or regulations applicable to the contractors' business, and for cases where the contractors fail to assist FHD in the litigation of a claim.

The Operating Agreement requires contractors to maintain liability insurance in specified minimum amounts 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.

FHD has a relationship with a company that will provide contractors with any required insurance, and FHD will deduct the premiums from the contractors' settlements. Contractors need not use this company, however, and Edmonds testified that he is aware of contractors who have obtained insurance coverage elsewhere. Contractor Williams testified that he obtains his insurance through FHD, but the record does not reveal whether the other contractors at the Worcester terminal obtain their insurance through FHD or elsewhere.

Time Off Program and Swing Contractors^{43[43]}

Contractors who wish to take time off are responsible for finding a qualified substitute driver to cover their route. Some of them pay one of the "temp" drivers from Adecco Associates

^{43[43]} These programs are set forth in Addenda 7 and 9 to the Operating Agreement.

to cover for them. In the alternative, contractors may choose to participate in the FHD Time Off Program, under which FHD will provide a qualified driver to cover their route. 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 added to their Business Support Package settlement deduction. 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.

FHD uses “swing” contractors to cover for the contractors who participate in the Time Off Program. Swing contractors receive a settlement for the stops they make in covering the route. They receive a \$.25 premium per stop in addition to the usual rate and a premium of \$15 over the standard van availability rate, and as well as \$125 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, FHD may provide the vehicle and pay the rental charges, and the swing contractor will not receive the \$15 van availability premium. At the Worcester terminal, contractors Robert Williams and Celso Dos Anjos have signed agreements to be the designated swing contractors.^{44[44]}

Contractors Hiring Drivers and Helpers

As noted above, contractors who wish to take time off may hire and pay a driver to replace themselves, and several have done so.^{45[45]} FHD is not involved in the decision to hire or terminate a replacement driver. According to the Operating Agreement, persons hired by contractors, whether driving or nondriving, must be qualified pursuant to government standards and FHD Safe Driving Program standards. Drivers must have a valid DOT card, which requires passing a physical and drug test, and they must also have a clean driving record and criminal record. Drivers must be fully trained, at the contractors’ expense, to operate their vehicle. The contractor does not have to tell Ciappi that he is hiring a replacement driver, so long as the driver is DOT-approved.^{46[46]} The amount of pay is negotiated between the contractor and the replacement driver.

^{44[44]} Because Williams and Dos Anjos each have their own routes as well, this requires them to have an extra vehicle and to hire another driver to cover either the swing route or their own route. Williams testified that he employed driver Handrey Figueira to drive his regular route for two to three weeks in October 2005, while he worked as a “supplemental” driver. It is unclear whether Williams’ hiring of Figueira was related to his swing work. There is no other record evidence regarding the frequency with which the swing drivers employ other drivers or the length of such assignments.

^{45[45]} It appears that these are contractors who either do not participate in the FHD Time Off Program or wish to take time off in addition to that provided by the FHD Time Off Program.

^{46[46]} Contractor Robert Williams testified that when he takes time off, he can only use a driver who has passed all the requirements and who has been approved, trained, and qualified by FHD, so he tries to find substitute drivers from the pool of temporary FHD drivers. Ciappi testified that most contractors use one driver who they know as a replacement driver and that it has never happened that Ciappi did not know the replacement driver.

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 and hire another driver to operate the second vehicle, referred to as a "supplemental" vehicle. Eleven contractors at the Worcester terminal used supplemental vehicles in 2004. It appears that this happens primarily during the busy Christmas season and lasts a little over a month. Drivers of supplemental vehicles must also meet the DOT requirements.

Contractors may also choose to hire helpers, and seven contractors at the Worcester terminal have done so at various times, particularly during the peak season. 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. Contractors do not need to notify FHD that they are using a helper, and FHD is not involved in the financial arrangements between contractors and helpers.^{47[47]}

Sales of Routes

The Operating Agreement gives contractors the ability to assign their contractual rights to a replacement contractor, provided that the replacement is acceptable to FHD as being qualified to provide services and is willing to enter into an Operating Agreement with FHD on "substantially the same terms and conditions" as the original contractor.^{48[48]} The amount of any consideration paid is strictly between the seller and the buyer, but FHD 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.

At the Region 4 hearing, FHD provided an expert witness to testify about the marketability of the routes. He testified that, in his view, the 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 FHD added new routes or existing routes were routinely available.

No contractor at the Worcester terminal has ever bought or sold a route. FHD has always had new routes available at the Worcester terminal through expansion and appears to give them to new contractors for free. Ciappi testified that three contractors, Robert Williams, Louis Jardim, and Matthew Kornn, tried to sell their routes, but none were sold. Williams testified that FHD managers sent him two individuals who were trained and acceptable to FHD and might be interested in buying his route, but he was, in fact, simply looking for someone to take over the lease payments on his truck, not to sell his route and, in any event, one of these individuals was

^{47[47]} Neither party seeks to include in the unit any of the drivers or helpers hired by the contractors.

^{48[48]} Edmonds testified that a new Operating Agreement would not be required if an incorporated contractor sells the corporation to someone else. In such cases, the original Operating Agreement with the corporation presumably continues to apply.

unable to do the job and the other said he was not interested in the work. Kornn testified that he went from two routes to one without selling his route. He did not know its value, no one had bought or sold a route before at this terminal, and he just wanted to get out of it.

Analysis

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.^{49[49]} 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, 288 NLRB 196 (1988) (Roadway I); Roadway Package Systems, 292 NLRB 376 (1989), enfd. 902 F.2d 34 (6th Cir. 1990); (Roadway II); Roadway Package Systems, 326 NLRB 842 (1998) (Roadway III). As noted above, on two occasions since FedEx’s acquisition of Roadway, the Board has denied review of Regional Directors’ determinations that contractors employed by FedEx Ground and FHD were statutory employees. The facts adduced in this case are remarkably similar to those in the above cases and do not warrant a departure from that result.

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, the FHD contractors perform a function that is a regular and essential part of FHD’s normal operations, the delivery of packages. Although they have the option to incorporate as a business,^{50[50]} all contractors must do business in the name of FHD. In this regard, wearing FHD-approved uniforms and badges, the contractors operate vehicles that must meet FHD specifications and which uniformly display the FHD name, logo, and colors. As noted in the Region 4 Decision, while the logos, uniforms, and badges are

^{49[49]} 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.

^{50[50]} In Roadway III, the Board found employee status, notwithstanding the fact that a few drivers operated as incorporated businesses. I note that, although 15 to 20 percent of FHD contractors nationwide have incorporated, no contractors at the Worcester terminal have incorporated as a business.

to some extent designed to comply with DOT regulations, they are also an important component of FHD's effort to market its brand name, and the logos are larger than required by DOT regulations.^{51[51]} No prior delivery training or experience is required, and FHD 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.^{52[52]}

As in Roadway III, contractors are not permitted to use their vehicles for other purposes while providing service for FHD. The contractors have a contractual right to use their FHD truck in business activity outside their relationship with FHD during off-hours, provided they remove all FHD markings, but only one of the 21 contractors has 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.^{53[53]}

As in Roadway III and the Region 4 case, FHD exercises substantial control over the contractors' performance of their functions. FHD offers what is essentially a take-it-or-leave-it

^{51[51]} At the hearing and in its post-hearing brief, FHD objected that the hearing officer erred by barring FHD from calling two DOT experts to testify about how FHD operates in a highly regulated industry and to explain how the Operating Agreement and other aspects of FHD's relationship to its contractors are driven by DOT regulations, including, for example, regulations concerning limitations on use of FHD vehicles for other purposes while performing FHD business, and regulations concerning safe driving, vehicle maintenance, insurance, uniforms, and use of a scanner. The hearing officer also declined to receive a copy of the DOT regulations into evidence. FHD argues that it should have been permitted to present this evidence because, 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); Air Transit, Inc., 271 NLRB 1108 (1984). (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.)

I affirm the hearing officer's rulings. The two experts whom FHD proposed to call testified to their expert opinions on the same matters at the hearing in the Region 4 case. While, FHD asserts that the Region 4 Decision inaccurately and incompletely addressed this issue, FHD made much the same argument about the impact of the DOT regulations to the Board in its request for review of the Region 4 Decision, which was denied.

^{52[52]} 326 NLRB at 851.

^{53[53]} 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 Region 4 Decision, 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.

agreement. While contractors may negotiate with the terminal manager over what towns will be included in their primary service area, FHD retains the right to reconfigure the service area unilaterally. Contractors must furnish a vehicle and driver daily from Tuesday through Saturday; they do not have the discretion not to provide delivery service on a given day. While 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. FHD requires 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 FHD to provide its customers with a package tracking service. FHD also requires contractors to deliver packages to empty residences in the manner prescribed by the Driver Release Program guidelines. Contractors must follow FHD's guidelines for safe driving. FHD gives bonuses tied to compliance with its guidelines, giving it a further measure of control over contractor performance. The Operating Agreement requires contractors to buy insurance in types and amounts specified by FHD, including insurance for damages contractors may incur while operating their vehicles for their personal benefit.

As in Roadway III and the Region 4 case, FHD provides support to its contractors in various ways that are inconsistent with independent contractor status. FHD refers contractors to dealers from which they may lease or purchase the FHD-approved vehicles and to lenders willing to finance such purchases. It refers contractors to other contractors who may wish to sell their used FHD 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.^{54[54]} FHD 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 Region 4 case, contractors are certainly free to purchase these required goods and services elsewhere, but the fact that every contractor at the Worcester terminal pays for the Business Support Package suggests that the right to purchase these items elsewhere is illusory. FHD also offers to arrange for approved substitute drivers for its contractors by virtue of the Time Off Program.^{55[55]} It provides contractors who maintain sufficient vehicle maintenance accounts with \$100 per accounting period to help defray repair costs. FHD requires contractors to permit FHD 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,^{56[56]} FHD unilaterally establishes the contractors’ rates of compensation. As in Roadway III, there is little room for the

^{54[54]} 326 NLRB at 852.

^{55[55]} The Time Off Program appears to be a new means by which FHD supports its contractor workforce that did not exist in either Roadway III or the Region 4 case.

^{56[56]} There is no evidence that any Worcester terminal contractor has ever negotiated an increase in his core zone density payment.

contractors to influence their income through their own efforts or ingenuity, as the 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 FHD. FHD 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 FHD, irrespective of the contractors’ personal initiative. FHD 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 Region 4 case, the contractors at the Worcester terminal have the contractual right to sell their routes, but the contractors may sell only to buyers who are acceptable to FHD as qualified and who are willing to enter into an agreement with FHD 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, the evidence suggests that the right to sell a route may be completely illusory, since there is no evidence that any contractor at the Worcester terminal has ever bought or sold a route.^{57[57]}

In concluding that the contractors are statutory employees, I acknowledge the existence of several factors that support FHD’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, they are free to use their vehicles for other commercial purposes if they remove or cover the FHD logo, and one contractor uses his vehicle for a magazine distribution business. 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 FHD does not withhold taxes from their pay. Contractors are not subject to discipline and may challenge their termination through binding arbitration. The support that FHD 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 that all of these factors were present in Roadway III and/or the Region 4 case and that the Board has, therefore, already determined, based on other factors that outweigh them, that they are insufficient to demonstrate independent contractor status.

FHD asserts that this matter should not be controlled by the Region 4 Decision because of certain factual distinctions between the Worcester and Barrington, New Jersey Home Delivery

^{57[57]} Although FHD asserts that three contractors tried to sell their routes, none were actually able to do so. It may be difficult or impossible for Worcester contractors to sell their routes, since the Worcester terminal apparently gives routes to potential contractors for free.

contractors.^{58[58]} Specifically, FHD argues that this case is different because 1) a majority of the Worcester contractors did not go through the “QDPL” program before becoming a contractor; 2) Worcester contractors control what stops they make, routinely refusing to deliver packages by choosing to leave them behind at the Worcester terminal or coding packages as “customer not home” when the contractors, in fact, never attempted to make the delivery; 3) Worcester managers have never performed customer service rides or driver release audits; 4) on average, only 30 percent of the Worcester contractors’ weekly settlement is derived from core zone and van availability payments; and 5) Worcester contractors wear clothing and jewelry of their own choosing. I conclude that these differences are not material and, in any event, are insufficient to outweigh the evidence described above that supports a finding of employee status in this case.^{59[59]}

The Board’s decisions in Dial-A-Mattress^{60[60]} and Argix Direct, Inc.,^{61[61]} on which FHD relies, are distinguishable.^{62[62]} 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,

^{58[58]} FHD also asserts that this matter is not controlled by the Regional Director’s Decision in Region 22, because it involved a FedEx Ground rather than a Home Delivery terminal. I noted at the outset that I have relied primarily on the Region 4 Decision, which, like this case, involved a Home Delivery operation. In any event, I find that most of the cited differences between the two operations – e.g., that Ground terminals deliver to businesses rather than residences; that the Ground Division has different managers, logos, uniforms, and computer systems; that Ground contractors work different days, do pick-ups, drive larger trucks, deliver larger packages, receive different amounts of compensation, obtain customer signatures, and have a larger exposure for damaged packages, are not material to a determination of employee versus independent contractor status. While it is true that Ground contractors, unlike the FHD contractors, return to their terminal at the end of each work day, I do not find that one difference to be sufficient to distinguish the Region 22 Decision. Finally, FHD’s argument that the Region 22 case is distinguishable has already been considered and rejected by the Board by virtue of its denial of the request for review of the Region 4 Decision, in which the same argument was made by FHD and rejected.

^{59[59]} With respect to FHD’s assertion that the contractors wear clothing of their own choosing, I note that the fact that some contractors “on occasion” wear blue cargo pants instead of the regular dark blue uniform pants does not negate the fact that all FHD contractors are required to purchase and generally wear an FHD uniform. I also note that pants are only one part of the FHD uniform, and there is no evidence that contractors who wear non-uniform pants fail to wear other parts of the uniform that identify them as FHD workers.

^{60[60]} 326 NLRB 884 (1998).

^{61[61]} *Supra*.

^{62[62]} I note that FHD’s reliance on these same cases in the Region 4 case has already been rejected by the Board by virtue of its denial of the request for review in the Region 4 matter. Further, the Dial-A-Mattress Board expressly found that case to be distinguishable from Roadway III, which involved the operations of FHD’s predecessor.

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 unit found appropriate.

STATUS OF CONTRACTOR MATTHEW KORNN AND THE SWING CONTRACTORS

Matthew Kornn

There are currently no contractors at the Worcester terminal with multiple routes. Contractor Matthew Kornn had two routes for a period of time, during which he and his wife each drove one of them. Kornn testified that he wanted two routes for the opportunity to make more money and that he feels he could grow his business if he wanted. At some point, he gave up the second route. In March 2004, Kornn accepted a full-time job elsewhere, but he decided to keep his remaining route. He employs driver Daniel Cargill to run his route on Tuesday through Friday.^{63[63]} On Saturday mornings, Cargill loads the truck and then Kornn runs the route. During the peak season, or on other days when there is heavy volume, Kornn operates a second vehicle as a supplemental vehicle on the route, and he also runs the route when Cargill asks for time off. Kornn pays Cargill about \$1 per stop and \$10 to load the truck. Kornn earns about \$1.37 per stop from FHD.

At the outset of the hearing, FHD took the position that contractors such as Kornn, who hire a driver to cover their route on an ongoing basis, as well as other contractors who have hired drivers to operate supplemental vehicles, should be excluded from the unit on the alternative

^{63[63]} Cargill had already been trained by FHD and had been working as a temporary driver. He was recommended to Kornn by the prior terminal manager, Norm Hall.

ground that they are joint employers and/or supervisors of those drivers. The Union thereafter agreed to exclude Kornn from the unit as a joint employer and/or supervisor. In its post-hearing brief, FHD withdrew from its earlier position and now relies solely on its principal argument that all of the contractors are independent contractors. FHD argues, however, that if Kornn is excluded as a joint employer and/or supervisor, the swing contractors, such as Williams, who hire drivers to enable them to service both their primary route and swing route, should be excluded on the same basis.

An analysis of Kornn's status must begin with an inquiry into the status of Cargill as an employee of FHD^{64[64]}. I find that FHD exercises sufficient control over Cargill's working conditions to warrant a finding that Cargill is an employee of FHD. International Transfer of Florida, Inc.^{65[65]} In this regard, FHD establishes minimum qualifications for any drivers hired by its contractors, who must pass physical and drug tests and submit to checks of their driving and criminal records. Cargill, as a former temporary driver, would have gone through FHD's training program. FHD assigns work to Cargill by designating, for the most part, which packages he will deliver. Cargill must drive a truck that meets FHD specifications and has an FHD logo. He apparently performs the exact same work as the contractors, which would require him to follow FHD procedures regarding the scanning of packages and to make deliveries in accordance with guidelines established by FHD.^{66[66]} Since no party seeks to include Cargill in the unit, I find that he is a non-unit employee of FHD.^{67[67]}

While Cargill may or may not be jointly employed by both FHD and Kornn, I need not reach the issue of Kornn's status as a joint employer because I find that Kornn should be excluded from the unit, in any event, as a statutory supervisor. 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

^{64[64]} 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 Company, Ltd., 308 NLRB 1216 (1992). Thus, if Cargill is not an employee of FHD, Kornn cannot be a statutory supervisor by virtue of his exercise of supervisory authority over Cargill.

^{65[65]} 305 NLRB 150 (1991).

^{66[66]} In concluding that Cargill is an employee of FHD, 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.

^{67[67]} I find that all the other drivers and helpers hired by the contractors are, similarly, non-unit employees of FHD. Since no party seeks to include them in the unit, their inclusion is not at issue. Thus, even if Kornn or any other contractors were found to be joint employers with FHD, this case does not raise the issue of the joint employers' consent as described in Oakwood Care Center, 343 NLRB No. 76 (2004).

any one of them is sufficient to confer supervisory status. Chicago Metallic Corp.^{68[68]} Isolated or sporadic exercise of authority is insufficient to establish supervisory status. Byers Engineering Corp.,^{69[69]} The burden of proving supervisory status rests on the party alleging that such status exists. NLRB v. Kentucky River Community Care.^{70[70]}

Kornn hired Cargill, determines his pay, grants him time off, and has authority to fire him. Kornn exercises this supervisory authority over Kornn on a regular and permanent basis, four to five days a week. I find that this authority is sufficient to demonstrate his supervisory status. The fact that Kornn exercises this authority over an employee who is not included in the bargaining unit does not preclude the Board from finding Kornn to be a statutory supervisor, where the performance of his supervisory functions is part and parcel of his “primary work product” rather than an ancillary part of his duties. Union Square Theater Management, Inc.,^{71[71]} Pepsi-Cola Co.^{72[72]} Here, the contractors are hired with the specific understanding that they have the right to hire other drivers to perform FHD work, so that the supervision of these drivers is clearly part of their primary work product. Accordingly, I shall exclude Kornn from the unit as a statutory supervisor.

Swing Contractors

As noted above, FHD asserts that, if Kornn is excluded from the unit as a joint employer or statutory supervisor, the two swing contractors, Robert Williams and Celso Dos Anjos, who must hire and pay another driver to cover either their own route or the swing route while they are engaged in swing work, must likewise be excluded on that basis. I find, first, that FHD has failed to meet its burden of proving that the swing contractors are statutory supervisors. To the degree that Williams and Dos Anjos employ other drivers due to their role in the swing program, it appears that they do so only on a temporary and sporadic basis.^{73[73]} There is no record evidence as to the frequency with which Williams and Dos Anjos have actually hired drivers in order to fulfill their swing obligation, or the general duration of such temporary work when they do hire drivers.^{74[74]} The record does not even reveal how many of the contractors participate in

^{68[68]} 273 NLRB 1677, 1689 (1985).

^{69[69]} 324 NLRB 740, 741 (1997), citing Bowne of Houston, 280 NLRB 1222, 1223 (1986).

^{70[70]} 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

^{71[71]} 326 NLRB 70, 72 (1998).

^{72[72]} 327 NLRB 1062, 1063-1064 (1999).

^{73[73]} For the same reason, I find that the other contractors, who may occasionally hire drivers or helpers on a temporary basis to substitute for themselves or to operate a supplemental vehicle or to act as helpers during the peak season, do not exercise supervisory authority with sufficient regularity to transform them into statutory supervisors.

^{74[74]} The record reveals only that on one occasion Williams employed a driver to operate his route for two to three weeks, although it is not clear that that was due to his role as the swing contractor.

the Time Off Program, which triggers the need for Williams and Dos Anjos to hire a second driver. In the absence of evidence that Williams and Dos Anjos employ and supervise drivers on a regular basis or for a substantial period of time, I decline to exclude them from the unit as statutory supervisors.

I need not reach the issue of whether or not the swing contractors are joint employers with FHD of the drivers that they occasionally hire on a temporary basis. Assuming, without deciding, that they are joint employers with FHD, I would still include them in the unit as employees in their own right. In this regard, Williams and Dos Anjos are themselves employees of FHD who operate their own routes five days a week on a permanent basis. The fact that they are occasionally also joint employers of other employees should not disqualify them from their status as unit employees, and neither party has cited any case authority for such a proposition.

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

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

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit 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 Truck Drivers Union, Local #170, a/w International Brotherhood of Teamsters.

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 election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc.;^{75[75]} NLRB v. Wyman-Gordon Co.^{76[76]} Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility.^{77[77]} In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before January 31, 2006 . No extension of time to file this list 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 this Decision and Direction of Election 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 February 7, 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.

/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 24th day of January, 2006.

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^{75[75]} 156 NLRB 1236 (1966).

^{76[76]} 394 U.S. 759 (1969).

^{77[77]} 315 NLRB 359 (1994).