

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION**

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In re FEDEX GROUND PACKAGE )	)	Cause No. 3:05-MD-527-RM
SYSTEM, INC., EMPLOYMENT )	)	(MDL 1700)
PRACTICES LITIGATION )	)	
	)	
----- )	)	
THIS DOCUMENT RELATES TO: )	)	
	)	
<i>Frank Gruhn, et al. v. FedEx Ground</i> )	)	
<i>Package System, Inc., et al.</i> )	)	
Civil No. 3:07-cv-00412-RLM-CAN (VT) )	)	
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**AMENDED CLASS ACTION COMPLAINT**

**I. INTRODUCTION**

1. This is an action brought by Frank Gruhn, Kristi Gruhn, Kevin Draper and Jeremy MacDonald, current and former delivery drivers of FedEx Ground Package System, Inc. or FedEx Home Delivery (collectively “FedEx”), for Defendants’ unlawful misclassification of drivers as independent contractors instead of employees. The above-named Plaintiffs bring this action on behalf of a class of similarly situated persons who have worked as delivery drivers for FedEx in the state of Vermont for Defendants’ statutory and common law violations that stem from this misclassification.

**II. PARTIES**

2. Plaintiff Frank Gruhn is an adult resident of Fairfield, Maine. Plaintiff Frank Gruhn worked as a FedEx Ground driver from January 2004 until April 2007.

3. Plaintiff Kristi Gruhn is an adult resident of Fairfield, Maine. Plaintiff Kristi Gruhn worked as a FedEx Home Delivery driver during the years 2005 and 2006.

4. Plaintiff Kevin Draper is an adult resident of Waterbury Center, Vermont. Plaintiff Kevin Draper worked as a FedEx Home Delivery driver from November 2002 until September 2005.

5. Plaintiff Jeremy MacDonald is an adult resident of Colchester, Vermont. Plaintiff Jeremy MacDonald has worked as a FedEx Home Delivery driver since November 2004.

6. The above-named plaintiffs bring this action on their own behalf and on behalf of a group of all others similarly situated. That group includes all individuals who worked within the state of Vermont for FedEx Ground Package System, Inc. and/or its subsidiary, FedEx Home Delivery, as pickup and delivery drivers and who were improperly classified by Defendants as independent contractors. The class meets all of the requirements of Rule 23 of the Federal Rules of Civil Procedure.

7. Defendant FedEx Ground Package System, Inc., together with its division, FedEx Ground Package System, Inc. d/b/a FedEx Home Delivery, is a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania. At all times relevant, FedEx Ground, an affiliate of FedEx Corporation, engaged in transportation and delivery services in Vermont.

### **III. JURISDICTION AND VENUE**

8. Jurisdiction in this matter is based upon diversity of citizenship, as Defendant is a resident of the states of Delaware and/or Pennsylvania; Plaintiffs are residents of Vermont and Maine; and the amount in controversy is in excess of the statutory minimum. Therefore, jurisdiction is based upon 28 U.S.C. § 1332(d). Jurisdiction in this matter for Count VII (injunctive relief) is also based on 28 U.S.C. § 1331.

9. Venue is proper in this Court because Defendant has violated the laws of the state of Vermont within Vermont, has obligated itself to the Plaintiffs within Vermont, and has

specifically chosen to maintain a corporate presence within, and substantial contacts with, the state of Vermont.

#### **IV. CLASS ALLEGATIONS**

10. Plaintiffs bring a statewide class action on behalf of all persons who are now working or have worked for Defendant as pick-up and delivery drivers within the State of Vermont during the time period covered herein. Plaintiffs bring this class action on behalf of themselves and other similarly situated members of the class who have been similarly deprived of rights under Vermont law by Defendant in the manner described in this Complaint. Plaintiffs seek to certify a class comprising

All individuals who performed pick-up and delivery services for Defendant in Vermont who Defendant misclassified as “independent contractors” and thereby deprived the named and class plaintiffs of their rights under Vermont law.

11. This action may be properly maintained as a class action under Federal Rule of Civil Procedure 23 in that:

- a. The members of the class are so numerous that their individual joinder in a single action is impossible and/or impracticable;
- b. The central questions of law and fact involved in this action are of a common or general interest and those common legal and factual issues predominate over any questions affecting only individual members of the class. Among the common questions of law and fact are the following:
  - i. Whether class members have been misclassified as independent contractors pursuant to Defendants’ application of the terms and conditions set forth in the Operating Agreements;
  - ii. Whether class members are entitled to the protections and various provisions of the Vermont laws as detailed below;
  - iii. Whether Defendant has violated its legal obligations under the various provisions of the Vermont statutes as detailed below;

- iv. Whether Defendant unlawfully failed to provide workers compensation insurance benefits and unemployment insurance benefits to the class members in violation of 21 V.S.A. § 601, et seq., and 21 V.S.A. § 1301, et seq., respectively; and
- v. Whether Plaintiffs are entitled to injunctive and declaratory relief and an equitable accounting.

12. The claims of the named representative plaintiffs are typical of the claims of the members of the class and the subclass. The named plaintiffs share the same interests as other members of the class in this action because, like other class members, they have each been misclassified, have been deprived of their state legal rights, have been subjected to Defendant's unlawful policies and procedures and suffered financial loss due to Defendant's wrongful misclassification. Given the significance of the deprivation of their rights, they have the incentive, and are committed, to vigorously prosecute this action. They have retained competent and experienced counsel who specialize in class action and employment litigation to represent themselves and the proposed class.

13. A class action is the only realistic method available for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation makes it impracticable for members of the class to seek redress individually for the wrongful conduct herein alleged. Were each individual member required to bring a separate lawsuit, the resulting multiplicity of proceedings would cause undue hardship and expense for the litigants and the Court and create the risk of inconsistent rulings which would be contrary to the interest of justice and equity.

**V. STATEMENT OF FACTS COMMON TO ALL CAUSES OF ACTION**

14. FedEx is a national corporation whose business consists of package pick-up and delivery service to customers, using a single integrated nationwide network of transportation,

sorting, and communication facilities and integrating plaintiffs into those existing network of operations. Defendants hired plaintiffs to timely deliver and pick up packages at times, locations and for amounts determined solely by Defendants. Defendants employ numerous drivers in Vermont to pick up and deliver packages to customers of Defendants.

15. Defendants retain and exercise the right to control the manner and means by which Plaintiffs perform their jobs. Pick-up and delivery drivers work out of a FedEx terminal where they are assigned packages for delivery and locations for pick-ups each day. Defendants employ a variety of managerial and supervisory employees at their terminals who have supervisory responsibility over the drivers, their daily assignments and paperwork. Drivers also interact with other FedEx personnel on a daily basis.

16. Defendants unilaterally set the compensation to be paid to the pick-up and delivery drivers. Defendants pay drivers for the number of stops, deliveries and pick-ups made, as well as daily compensation for making themselves available for pick-up and delivery work in geographic areas determined by Defendants. Defendants unilaterally set the prices charged to their customers for the services rendered by Plaintiffs.

17. Plaintiffs provide services which are an integral part of Defendants' business enterprise and they have no separate or distinct occupation or business. By using vehicles with required FedEx colors, logos and advertising, by at least daily reporting to FedEx terminal facilities, by interacting daily with FedEx terminal managers and other employees, by reliably serving Defendants' customers, by following Defendants' controlled delivery routes and delivery and pick-up methods and schedules, by using FedEx scanners which enable Defendants' customers to track their packages, and in other material ways, Plaintiffs have rendered, and continue to render, services to Defendants which are integral to the Defendants' package delivery system.

18. As a condition of employment, each of Defendants' drivers is required to abide by terms and conditions set forth in lengthy form contract entitled the "Standard Contractor Operating Agreement" that mischaracterizes drivers as "independent contractors." These Operating Agreements (hereinafter referred to as the "Operating Agreement," the "Agreement" or "OA") were designed to conceal the true nature of the relationship between FedEx and its drivers: that of employer and employee. The terms and conditions set forth in the Operating Agreement and applied to each Plaintiff by Defendants is the same in all material respects. The terms and conditions set forth in the Operating Agreement applied to the Plaintiffs contains all of the same identical material terms with only a few minor and insubstantial differences.

19. The terms and conditions set forth in the Operating Agreement include, among other things, that:

- a. Subject to Defendants' approval of any vehicle used, drivers must provide and maintain their own vehicle, paying for all costs and expenses incidental to its operation, including maintenance, gas, oil, repairs, tax licenses and tolls. Moreover, drivers must adorn the vehicle with specific colors, logos and marks, identifying it as part of the FedEx system at their own expense;
- b. Drivers must maintain liability and workers' compensation insurance (sometimes referred to as "work accident insurance") for the benefit of Defendants;
- c. Drivers must use communications equipment, i.e., a scanner, which uses Defendants' customized and/or proprietary tracking software and drivers must pay to rent such equipment from Defendants;
- d. Drivers must prepare and submit daily reports and such shipping documents Defendants "may from time to time designate;"
- e. Drivers must wear an approved uniform, and keep their personal appearance consistent with standards unilaterally "promulgated from time to time" by Defendants;
- f. Defendants retain the right to change unilaterally a driver's work area on a daily basis or permanently, notwithstanding statements in the Agreement regarding an alleged "proprietary interest" in the customers the driver serves;

- g. After one month of service, drivers become eligible to participate in the “Contractor Customer” program (“CC”), by which a monetary bonus can be earned for every period in which the driver has no at-fault accidents, no customer complaints and no missed-pickups and during which the entire terminal’s performance meets FedEx-assigned standards of service;
- h. Defendants retain and exercise the right to control the volume of packages to be delivered and/or picked up each day, the locations of such deliveries and pickups, and the delivery and/or pickup times (referred to as “windows”), thus controlling the drivers’ work hours; and
- i. Defendants retain and exercise the right to control when drivers may leave the terminal with the packages for delivery each day and retains and exercises control over the release of scanners each day and thus further control the drivers’ work hours.

20. The Operating Agreement is and at all relevant times has been a contract of adhesion, drafted exclusively by Defendants and/or its legal counsel, with no negotiation with drivers, who are required to agree to work under the terms and conditions of the Agreement as a condition of employment. Each year, Addenda are added to the terms and conditions of employment which are likewise not subject to negotiation and are unilaterally drafted adhesion contract provisions. The Agreement is, and at all material times has been unlawful, unconscionable and fraudulent in form and effect.

21. Though the Agreement labels the drivers as independent contractors, the behavioral and financial control manifested over the drivers by the Defendants demonstrates that the drivers are employees rather than independent contractors. Such control includes, but is not limited to, the following matters:

- a. Defendants employ supervisors and managers who have supervisory responsibility over the drivers and assign and direct their work. These supervisors and managers work in the terminals where the drivers report to retrieve the packages that they deliver for Defendants’ customers in furtherance of Defendants’ business operations.

- b. The drivers are required to comply with Defendants' instructions in terms of written and unwritten procedures, and directives appearing in the Agreement and unilaterally promulgated by Defendants from time to time regarding the completion of the drivers' duties. Drivers suffer financial penalties and/or disciplinary actions for failure to comply with such policies, procedures, and directives.
- c. Upon starting to work for Defendants, the drivers receive training in the Defendants' policies and procedures, in the documentation Defendants requires of drivers, and in the technology Defendants mandate the drivers to use in the performance of their work.
- d. Though the drivers are required to purchase or lease the vehicles they use in working for Defendants and to purchase the uniforms they wear in performing said work, Defendants require that the drivers adorn their vehicles and uniforms with the Defendants' logo and effectively prohibit the drivers from using their vehicles or uniforms for other business while so adorned. Such requirement prevents the drivers from using their vehicles and uniforms to offer services to the general public.
- e. In addition to paying the drivers for each package picked up and/or delivered, the Agreement provides that Defendants will pay the drivers a set amount for each day that the driver provides services to Defendants as well as a premium for the drivers' time when the drivers' route contains a small amount of package deliveries. Such payments are made to the drivers each week. Thus, their pay basis is not simply the job, but by the time spent working.
- f. Though the Agreement purports to give the drivers proprietary control over their routes, Defendants change the drivers' routes from time to time without the drivers' permission or compensation and prohibits the drivers from selling their routes or having other individuals perform in their place without the express prior approval of Defendants.
- g. Defendants exert a high degree of control over the drivers' work. For example, the scanner used by each driver contains a Global Positions System enabling Defendants to track the drivers' whereabouts at all times while working.

22. Though the Agreement labels the drivers as independent contractors, the type of relationship between Defendants and the drivers demonstrates that the drivers are employees rather than independent contractors. Factors showing an employment relationship include, but are not limited to, the following:

- a. The work of the drivers in picking up and delivering packages for Defendants' customers is completely integrated into the business of Defendants such that Defendants' business depends significantly on the performance of the services that the drivers perform.
- b. Though the drivers are required to purchase or lease the vehicles they use in working for Defendants, and to purchase the uniforms they wear in performing said work, Defendants require that the drivers adorn their vehicles and uniforms with Defendants' logo and effectively prohibit the drivers from using their vehicles or uniforms for other business while so adorned. Such requirement prevents the drivers from using their vehicles and uniforms to offer services for other, similar businesses.
- c. Though the Agreement purports to give the drivers proprietary control over their routes, Defendants exert a high degree of control over the drivers' ability to sell their routes or have other individuals perform in their place. Such sales and substitutions require the express prior approval of Defendants, making the services of a type that must be rendered personally by drivers who have effectively been hired by Defendants.
- d. Defendants prevent the drivers from choosing when and how much they care to work for Defendants, instead requiring the drivers to work a minimum number of hours and shifts and prohibiting the drivers from refusing work, such as picking up certain packages.
- e. Many drivers have continued their relationship as drivers for Defendants exclusively over many years.

23. By retaining and exercising behavioral and financial control over the drivers despite the express terms and conditions to the contrary in the Agreement, Defendants have misrepresented to the drivers that they are independent contractors (and thus entrepreneurs with the ability to independently manage and grow their businesses), when in fact they are employees (and thus entitled to a variety of legal benefits that inure from the employment relationship).

24. Defendants' right of control over Plaintiffs is also retained and/or exercised by Defendants as demonstrated by concealed and/or undisclosed extra-contractual sources such as Company written rules and policies described above and unwritten practices which supplement the written terms and conditions of the Agreement.

25. Defendants have created and regularly updated a large number of written policies and procedures outside of the Operating Agreement that drivers are never given, but nonetheless are required to follow in their work. Defendants' written policies are contained in the FedEx Ground Manual, Operations Management Handbook, Settlement Manual and numerous other written and extra-contractual policies that are actively concealed from drivers and which Defendants fail to disclose and/or provide to drivers that govern the relationship between Defendants and the drivers. The other written handbooks and manuals and additional extra-contractual sources include, but are not limited to, written rules on "contractor" termination, directives and training provided to terminal managers, written rules on driver appearance (with illustrative poster), written and oral complaint procedures, memoranda and directives to terminal management and other rules concealed from and not provided to the drivers. When drivers do not follow one of Defendants' rules, whether disclosed or undisclosed, known or unknown, they are subject to various types of punishment, some financial and some disciplinary, up to and including contract termination and/or non-renewal. Defendants document such so-called violations of such rules on forms referred to as "Business Discussion Notes" and retain these documents in secret driver files called "DOT" files, along with myriad other documents which are likewise concealed from and not disclosed to the drivers.

26. Defendants do not contribute to workers' compensation and unemployment insurance programs and do not allow drivers to apply or qualify for workers' compensation or unemployment benefits.

27. Defendants continue to misclassify its drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by Vermont law to employees, and they are deprived of, among other things, employer-financed workers'

compensation coverage and unemployment insurance benefits. Furthermore, the terms and conditions of their employment, as set forth in the Operating Agreement, require these drivers to purchase, operate and maintain expensive trucks for Defendants' exclusive benefit and to work under other unlawful conditions. Defendants' mischaracterization of their drivers as independent contractors, the concealment and/or non-disclosure of the true nature of the relationship between Defendants and their drivers and the attendant deprivation of substantial rights and benefits of employment are part of an ongoing unlawful and fraudulent business practice by Defendants which this court should enjoin.

28. Under the rules established by the Internal Revenue Service ("IRS") regarding classification of employees and independent contractors, FedEx drivers are employees. Defendants are in breach of a 1995 agreement reached between their predecessor company, Roadway Package System, Inc. ("RPS"), and the IRS regarding this classification issue.

**COUNT I**  
**(Declaratory Judgment pursuant to 28 U.S.C. § 2201**  
**and Vermont Statutes § 4711, et seq.)**

29. Plaintiffs hereby incorporate by reference paragraphs 1 through 27 above as if fully set forth herein, and, for a cause of action by Plaintiffs allege as follows:

30. Under the relevant laws of the United States and of Vermont, Defendant has misclassified the Plaintiffs and Class Members as independent contractors rather than as employees; therefore, pursuant to 28 U.S.C. § 2201 and Vermont Statutes § 4711, et seq., this Court should issue a declaratory judgment establishing that the Plaintiffs and Class Members are or were employees of Defendant and that the Plaintiffs and Class Members are or were therefore entitled to all the rights and benefits of employment pursuant to the laws of the United States and of Vermont.

**COUNT II**  
**(Violation of Vermont Independent Contractor Law)**

31. Plaintiffs hereby incorporate by reference paragraphs 1 through 29 above as if fully set forth herein, and, for a cause of action by Plaintiffs allege as follows:

32. By misclassifying Plaintiffs and Class Members as independent contractors instead of employees, Defendants has violated 21 V.S.A. § 341 and 21 V.S.A. § 601(3). Plaintiffs are entitled thereby to the penalties and fees provided in 22 V.S.A. § 347.

**COUNT III**  
**(Violation of Vermont Wage Law)**

33. Plaintiffs hereby incorporate by reference paragraphs 1 through 31 above as if fully set forth herein, and, for a cause of action by Plaintiffs allege as follows:

34. By such conduct in forcing the Plaintiffs and Class Members to bear costs incident to Defendant's business operations, Defendants violated Vt. Code R. 24 090 003 §§ X-XI and 21 V.S.A. § 699 by making unlawful deductions and unlawfully requiring Plaintiffs and Class Members to pay improper set-offs against their wages. Defendant also violated 21 V.S.A. §§ 342 and 384 by not paying Plaintiffs and Class Members for all time worked, including training time, and for withholding other wages owed, such as final paychecks and vacation pay. This claim is also asserted pursuant to 21 V.S.A. § 347.

WHEREFORE, Plaintiffs and the Plaintiff class are entitled to damages in an amount to be ascertained at the trial of the matter according to proof.

**COUNT IV**  
**(Rescission of Operating Agreement)**

35. Plaintiffs hereby incorporate by reference paragraphs 1 through 33 above as if fully set forth herein, and, for a cause of action by Plaintiffs allege as follows:

36. Despite the express terms of the Operating Agreement, Plaintiffs' relationship with Defendant satisfies every aspect of the test for employment, and not for independent contractor status.

37. Defendant controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations above.

38. Despite this control and the actual status of the drivers as employees, Defendant mischaracterizes the Plaintiffs as independent contractors. As a result, these drivers must pay substantial sums of their own money for work-related expenses, including but not limited to the purchase or lease of vehicles meeting company specifications, and all costs of operating, insuring and maintaining those vehicles.

39. The application of the terms and conditions of the Operating Agreement illegally and unfairly advantages Defendant, by mischaracterizing the status of the Plaintiffs in that Defendant evades employment related obligations, such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation, illegally shifting the expense of workers' compensation coverage and other expenses to Plaintiffs.

40. The Operating Agreement between Defendant and each Plaintiff and member of the Class is void as against public policy and therefore unenforceable, as failing to recognize the employment status of the Plaintiffs and the Class Members, and therefore denying them the legally cognizable benefits of employment.

41. The Operating Agreement between Defendant and each Plaintiff is an unconscionable contract of adhesion, which is unenforceable as contrary to the public interest, policy and law.

42. The Operating Agreement illegally shifts the burden of certain costs that an employer must pay.

43. While acting on the direct instruction of Defendant and discharging their duties for Defendant, Plaintiffs and the Class Members incurred expenses for, *inter alia*, the purchase or lease, maintenance, operating costs and adornment of vehicles; insurance; and uniforms. Plaintiffs and the Class Members incurred these substantial expenses as a direct result of performing their job duties.

44. By misclassifying its employees as “independent contractors,” and further by contractually requiring those employees to pay Defendant’s own expenses, Defendant has been unjustly enriched.

45. As a direct and proximate result of Defendant’s conduct, Defendant has received substantial benefits to which it had no entitlement, at Plaintiffs and the Class Members’ expense, including lost profits, self-employment taxes, premiums for insurance to replace workers compensation and disability benefits, business expenses, compensation of replacement workers, and other expenses.

46. Plaintiffs are entitled to compensation for all of the business expenses they were illegally required by Defendant to bear, for all of the employment taxes, unemployment compensation and workers compensation the Defendant should have but did not pay, and Plaintiffs are entitled to the *quantum meruit* value of their services as employees.

WHEREFORE, Plaintiffs and the Plaintiff class are entitled to damages in an amount to be ascertained at the trial of the matter according to proof.

**COUNT V**  
**(Unjust Enrichment)**

47. Plaintiffs hereby incorporate by reference paragraphs 1 through 45 above as if fully set forth herein, and, for a cause of action by Plaintiffs allege as follows:

48. As a result of Defendants' conduct in misclassifying Plaintiffs and Class Members as independent contractors, the Defendants have forced Plaintiffs and Class Members to bear the normal costs and incidents of the Defendants' business and have thus unjustly enriched themselves to the detriment of Plaintiffs and Class Members in violation of the common law of Vermont.

WHEREFORE, Plaintiffs and the Plaintiff class are entitled to damages in an amount to be ascertained at the trial of the matter according to proof.

**COUNT VI**  
**(Quantum Meruit)**

49. Plaintiffs hereby incorporate by reference paragraphs 1 through 47 above as if fully set forth herein, and, for a cause of action by Plaintiffs allege as follows:

50. Plaintiffs and Class Members have been deprived by the Defendants of the fair value of their services and are thus entitled to recovery in *quantum meruit* pursuant to the common law of Vermont.

WHEREFORE, Plaintiffs and the Plaintiff class are entitled to damages in an amount to be ascertained at the trial of the matter according to proof.

**COUNT VII**  
**(Injunctive Relief)**

51. Plaintiffs hereby incorporate by reference paragraphs 1 through 49 above as if fully set forth herein, and, for a cause of action by Plaintiffs allege as follows:

52. Absent injunctive relief enjoining Defendant from engaging in the unlawful practices described above, Plaintiffs, members of the class and the general public will be irreparably injured, the extent, nature and amount of such injury being impossible to ascertain.

53. Plaintiffs have no plain, speedy and adequate remedy at law.

54. As the Defendants have at all times continued to misclassify Plaintiffs and Class Members as independent contractors despite retaining control over them as employees, the Plaintiffs and Class Members seek permanent injunctive relief enjoining Defendants from practicing the unlawful practices alleged herein.

55. For these reasons, preliminary and permanent injunctive relief is appropriate.

WHEREFORE, Plaintiffs and the Plaintiff class are entitled to injunctive relief.

### **JURY DEMAND**

Plaintiffs request a trial by jury on their claims.

WHEREFORE, Plaintiffs request that this Court enter the following relief:

1. Certification of this case as a Vermont class action pursuant to Fed. R. Civ. P. 23;
2. A declaratory judgment that Plaintiffs and other similarly situated persons are employees, not independent contractors;
3. Disgorgement of profits unjustly retained Defendant as a result of the unlawful practice of misclassifying Plaintiffs and other similarly situated persons as independent contractors;
4. All damages to which Plaintiffs and class members may be entitled;
5. Reasonable attorneys' fees and costs;
6. Any other relief to which Plaintiffs and class members may be entitled.

Dated: September 25, 2007

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

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