

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD



CHIEF ADMINISTRATIVE LAW JUDGE
2400 Venture Oaks Way, Ste 200
Office of the Chief Administrative Law Judge
SACRAMENTO CA 95833

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FED EX GROUND PACKAGE SYSTEM INC
c/o SUTHERLAND ASBILL & BRENNAN LLP

Petitioner

EMPLOYMENT DEVELOPMENT DEPARTMENT
Respondent

Case No. 1485661 (T)

Issue(s): Note T, REASSES

Date Petition Filed: 11/24/2004

Date and Place of Hearing(s):

- (1) 06/08/2006 San Bruno
- (2) 06/09/2006 San Bruno
- (3) 06/12/2006 Inglewood
- (4) 06/13/2006 Inglewood
- (5) 06/14/2006 Inglewood
- (6) 07/11/2006 San Bruno

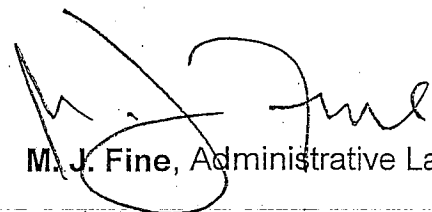
Parties Appearing:

None
None
None
None
None
Petitioner, Department

DECISION

The decision in the above-captioned case appears on the following page(s).

This decision is final unless appealed within 30 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal.



M. J. Fine, Administrative Law Judge

Date Mailed:

NOV 22 2006

Case No.: 1485661

Office of the Chief ALJ

CLT/PET: FedEx Ground Package Sys. Inc.

ALJ: M. J. Fine

Parties Appearing: Petitioner, Department

Parties Appearing by Written Statement: None

ISSUE STATEMENT

The issue in this case is whether the petitioner is liable for an assessment in the amount of \$7,297,065.97. The assessment is based on the department's conclusion that single route drivers for Fed Ex Ground (FXG) and Fed Ex Home Delivery (FHD) are employees rather than independent contractors. FXG is a single corporate entity. FHD is a unit of FXG.

STATEMENT OF FACTS

The department issued an assessment on October 29, 2004, pursuant to Unemployment Insurance Code section 1127. The assessment period is from July 1, 2001, to June 30, 2004. It includes \$510,400.31 for unemployment insurance taxes, \$19,443.59 for employment training tax, \$891,432.07 for disability and personal income tax in the amount of \$5,875,790. There are no penalties. The petitioner timely petitioned for a reassessment by letter dated November 24, 2004. The lengthy petition for reassessment sets forth the petitioner's reasons as to why the department was incorrect in concluding that the drivers in question, all of whom are single route drivers for FXG or FHD, are independent contractors rather than employees.

Fed Ex Ground provides delivery and pickup services to business and residential customers. FedEx Home Delivery provides delivery services only to residential customers. The assessment is limited to single route drivers.

Fed Ex requires drivers to sign an operating agreement. This can be for varying terms, usually one to three years. It is automatically renewable unless either party seeks to terminate the agreement. Although there are some differences between the operating agreement for FXG and FHD, the parties agree that they are in all significant ways the same. The differences result from the slightly different operations of these two parts of Fed Ex. The operating agreement is presented to prospective drivers on a take it or leave it basis. There is no negotiation of any term. There are frequent addendums to the operating agreement and these are also nonnegotiable even though the addendum may modify a previously agreed upon contract term.

FXG drivers leave their vehicles at the Fed Ex terminal every evening. The vehicles are loaded by Fed Ex employee loaders. The drivers come to the terminal, pickup scanners, scan the already loaded packages to ensure that all packages on their manifest are in their trucks, reorder the packing if they wish and then check out and exit the yard. When they return in the evening they turn in their scanners which are then uploaded to Fed Ex headquarters so that packages may be accurately tracked. Drivers are not required to report to the yard at any particular time however, their route may require pick ups or deliveries at particular times.

FHD driver take their vehicles home after work. They drive their trucks to the terminal every morning and park at a predesignated location where a pallet of items to be delivered is deposited. The drivers load their own trucks and check to ensure that the packages they load are listed on the manifest. The FXG and FHD drivers must reconcile the manifest with what they actually load. The FHD drivers have their own scanners which they lease as part of the business service package. The scanners are a required tool. Therefore, all drivers subscribe to the business service package. The cost of the package, which also provides uniforms and weekly truck washing, is not negotiated. When ordering uniforms, drivers are required to use a Fed Ex form and use Fed Ex forms in other instances also.

FHD drivers keep their scanners with them and when they finish delivering they return home where they have equipment to upload the scans from their home. Such uploading must be completed no later then 9:00 p.m. every evening. After loading their vans they must check out of the terminal to begin their deliveries. In some instances however they may have to wait until the terminal gates are open or they may have to wait their turn to exit.

Fed Ex has a complex compensation system. Drivers are paid per stop, per delivery and per pickup where applicable. In addition, there is a "core zone rate" or settlement. The core zone focuses on an area of delivery. The core zone rate may be higher or lower depending on distance from the terminal as well as the nature of the route itself. The idea is that some drivers may have to drive quite a distance from the terminal to their delivery area and their delivery area may be a low density area. The core zone settlement is designed to make it economically possible for drivers to service such areas. In addition, FXG drivers receive a \$45 per day truck or van availability fee. FHD drivers receive a \$25 per day van availability fee. This fee is described as compensation to drivers for making their vehicles available for delivery. It is paid regardless of whether the driver owns the vehicle outright, is leasing the vehicle or is buying it over time. Drivers are required to own their own vehicles.

Drivers are paid a holiday van availability bonus if the driver makes the van and a qualified driver available both the day before and the day immediately after specified holidays. The petitioner reserves the right to name the days preceding and following any holiday or in conjunction with the weekend. Drivers refer to this as holiday pay. The petitioner refers to it as a holiday bonus.

There is a time off program. The driver is free to take time off when he or she wishes but must still provide service to the petitioner. The petitioner's program permits the driver pay a certain amount from the settlement check to the petitioner and the petitioner will take responsibility for servicing the area when the driver takes pre-approved time off. Drivers may sell their "accrued time" to other drivers.

Petitioner provides drivers with a fuel supplement which reimburses drivers when fuel prices exceed a given level. The petitioner decides all aspects of this supplement—it is not negotiated.

Drivers receive "CCS" bonus which is paid monthly, on condition that stated goals are achieved. Individual driver's performance is the main criteria. It includes how many customer complaints the driver may have received and how many times the driver did not attempt delivery. A driver may not attempt delivery if the driver does not have enough time. (Did not attempt to deliver is referred to as DNA.) The driver must note on a Fed Ex form that he or she did not attempt delivery. It further includes whether the driver properly used the scanner or uploaded from the scanner in a timely fashion. The "CCS" bonus is also affected if the terminal does not meet its goals. Each terminal has pickup and delivery goals. Each driver's performance is posted or otherwise made known to all of the other drivers and a failure by one or more drivers to meet individual goals can drag down the terminal goal and affect everyone's bonus. Drivers generally view losing the bonus or receiving a reduced bonus as a penalty. Petitioner characterizes it a failure to meet the performance standards for receiving a bonus. Failure to meet standards on a consistent basis may result in termination.

Drivers receive an annual service bonus of \$500 per year. After 5 years it increases to \$1000 per year and to \$1500 per year after 10 years. Some drivers referred to this as longevity pay.

A driver must own his or her vehicle. Drivers generally purchase vehicle when hired. It is not usually the case that drivers have a vehicle and have used that vehicle for their own courier business. In a number of cases, FedEx steers driver to dealers who have arranged with Fed Ex to provide suitable vehicles. The vehicles already meet petitioner's safety and appearance standards. Drivers are however free to purchase where they wish but they are not free to purchase any type of truck. The truck must be suitable for the route, a determination made by

petitioner. Further, once purchased, the vehicles must be painted diamond white and have Fed Ex logos of a certain size affixed to them. DOT requires visible markings in order to provide notice to the public as to which provider is providing the transportation but the size specified by petitioner exceeds what DOT requires. Often the simplest way to meet Fed Ex requirements is to buy from a dealer who already has some kind of an arrangement with FedEx or to purchase vehicles from other drivers who are ending their relationship with FedEx.

The Department of Transportation regulates vehicles in excess of 10,000 pounds gross weight. (49 C.F.R. Sec. 390.5.) While almost all vehicle assigned to FXG meet this definition, about half the vehicles assigned to FHD meet this requirement.

Department of Transportation rules also require driver inspection reports, driver logs, time sheets and timely maintenance substantiated by documents. Each driver is considered an owner/operator under federal law and personally has the responsibility for periodic maintenance. Fed Ex is also a licensed common carrier, also has such an obligation. To satisfy its obligation, petitioner requires drivers to submit to FXG or FHD the paperwork substantiating such maintenance.

When packages are delivered or picked up, they are scanned. The scanners provide petitioner with the means to measure how long drivers are driving. Hours of driving are subject to DOT regulations. Petitioner points out scanners should not be considered an aspect on control because it facilitates compliance with governmental regulations. Fed Ex requires drivers to obtain necessary state permits. On occasion, drivers have been told to scan at a later or earlier time in order to meet petitioner's time constraints.

In addition to maintenance and safety matters, the drivers are also required by their operating agreement to conform to appearance standards both personally and for their vehicles. Personally, this means drivers must wear Fed Ex uniforms and look professional. Photos are taken of drivers in uniform and their vehicle when they begin working for petitioner and are referred to when necessary to establish a level of appearance. Personal appearance standards vary somewhat from terminal to terminal. As for vehicles, petitioner requires specific logos and a specific color. Dents and dings must be repaired irrespective of whether such damage affects safety. Such appearance standards are not required by the department of transportation. Petitioner may refuse to allow a driver to drive a van that is out of compliance with maintenance, safety or appearance standards. The driver would then have to rent a vehicle in order to service the route.

The business service package (discussed above) which drivers must purchase enables drivers to meet some of the above-listed demands. This package

provides drivers with a scanner, a weekly wash of their vehicles and their uniforms. Fed Ex also has programs to help drivers purchase equipment and tires at a discount price. Fed Ex also has a savings program, the service guarantee program, for drivers so they may save for future costs such as repairs. If a minimum balance is maintained, Fed Ex chips in additional sums. Drivers describe this as free money.

Section 1.10 of the operating agreement (Exhibit 15) is titled "Agreed Standards of Service." In it, the driver acknowledges the benefits to his or her business of participation in the Fed Ex Ground national system and agrees to conduct activities under the terms of this agreement to achieve the results represented to shippers and consignees." In order to achieve these objectives the contractor agrees to provide daily pickup and delivery service within the contractors primary service area, make reasonable efforts to retain and increase the base of shippers and consignees, handle, load, unload and transport packages using methods that are designed to avoid theft, loss, and damage, cooperate with Fed Ex Ground employees, customers and contractors to achieve the goal, foster the professional image and good reputation of Fed Ex, conform to applicable federal, state and local laws, cause the equipment to be operated safely and conduct all business activities with integrity and honesty in a professional manner and with proper decorum at all times.

To ensure that these terms are met, Fed Ex delivery managers or terminal managers, closely monitor the activities of the drivers. Such monitoring includes customer service rides. Managers literally ride with the driver to observe and comment on how the driver is performing. While such ride-alongs may be one way for petitioner to meet safety requirement of DOT, managers do more than comment on safety. They advise the drivers on methods of efficient pickup and delivery, how and where they should conceal packages if a recipient is not at home, whether the driver is ensuring the safety of the packages by locking the delivery vehicle or by turning the delivery vehicle off before performing a pickup or a delivery, and how the driver interacts with customers. In other words, ride-alongs are part of enforcing the operating agreement. Managers may also follow a driver's route and talk to customers about the driver's performance. A booklet entitled the "contractor's companion", reinforces many of these "suggestions" or "tips" and instructs drivers as to delivery guidelines, release tips, status codes, call tags, scanner operation and trouble shooting, vehicle inspection and accident guidelines.

Drivers are responsible for packages in their possession. However, if drivers follow certain prescribed delivery rules, then they do not have to reimburse petitioner for a lost package.

The results of these ride-alongs are discussed with the driver. The ride-along and other discussions are documented and retained in each driver's file. These documents are used to form the basis of a decision to terminate a driver's contract if termination is deemed necessary.

Not all drivers are aware that such documentation is kept. There's no particular opportunity to insert their own version of events if there is a dispute. The business service discussion document is supposed to reflect the driver's point of view but it may not since the manager is the sole author of the document. These documents are reviewed by higher management when there is a question of terminating the relationship. There is no further investigation.

For example, a business discussion may reflect a driver's failure to lock his or her van even when the driver concludes the area is safe and it is not necessary to lock the van. Such behavior would be written up and the document retained. There may be minimal consequences even if the manager's "suggestion" is not taken but continued driver refusal to follow procedures or suggestions coupled with actual loss would likely result in contract termination because it would be a violation of the operating agreement. A business discussion note was entered into evidence. It concerns a driver who signed his name for a signature required package. The driver wanted to deliver it because it was large and he wanted it off his truck. The terminal manager noted that he informed the driver that he must get the signature, that failure to do so could put his contract in jeopardy and if he could not get a signature he must apply a code 07 and reattempt delivery. There was no indication of a customer complaint.

The operating agreement includes termination provisions. The driver can be terminated without notice in the event of intentional misconduct or willfully negligent operation of the equipment or if petitioner has knowledge of or reason to anticipate such intentional misconduct or willfully negligent operation of equipment or the driver breaches or fails to perform the obligations imposed by the agreement. The agreement may also be terminated when Fed Ex ceases to do business in an area and when business declines. Disputes about termination are subject to arbitration. The driver can terminate upon 30 days notice for any reason. The parties may agree to terminate.

Where there is a failure to satisfactorily perform, the senior manager or terminal manager makes a recommendation to the regional manager. That recommendation is backed up by relevant business discussion notes that have been acquired over time. The terminal manager's recommendation needs to be endorsed by the regional manager and if not, the matter ends there. However, if the regional manager concurs in the terminal manager's recommendation, the proposed termination is sent to the company's contract liaison officer whose responsibility is to determine whether there has been a violation of the operating

agreement and whether that violation warrants a termination of the relationship. The contract liaison officer reviews the file presented to him. That file consists of the particular allegations along with the documentation which for the most consists of service discussion notes. This is not an investigation where the driver is invited to present evidence. The contract liaison officer's decision is not final but has to be approved by a more senior manager. The contract liaison officer who testified was careful to say this was not a progressive discipline process that would apply to employees.

There are a number of contract liaison officers each operating in a designated geographical area. The liaison officer trains managers in Fed Ex policies and procedures and in particular to train managers with regard to the operating agreement between drivers and the company. Training about the operating agreement takes about one day. The liaison officer is also available to handle calls from drivers or managers about contract interpretation.

Drivers can only pick and deliver from Fed Ex customers. There is no evidence any of the drivers were in business as couriers or drivers prior to their association with petitioner. Some had driving experience, others did not. Those who did not have experience were trained by petitioner. All drivers are trained in safety matters and Fed Ex procedures.

Drivers are given a primary service area or route which typically is a zip code or contiguous zip codes. Drivers own these routes in the sense that they own all customer accounts with these designated areas. This is specifically set forth in the operating agreement. Fed Ex defines the primary service area. Drivers can sell primary service areas to others so long as the buyer is approved by the petitioner. Routes sales typically include the van and at least one primary service area has sold for about \$50,000 although prices vary wildly.

While recognizing the driver's propriety interest in the primary service area, the operating agreement also cites the mutual interest drivers and Fed Ex have in increasing business and in providing delivery service in the service areas of other contractors who have entered into the agreement since it is only in this way that the goal of providing a national delivery service can be achieved. The petitioner can thus reconfigure a primary service area or reassign deliveries provided the driver is compensated. Reconfiguration can be by mutual agreement or unilaterally by petitioner as long as the driver is compensated. The operating agreement cites a complicated system to calculate compensation based on gain or loss of packages delivered. Reconfiguration typically occurs when a driver cannot satisfactorily service his or her route.

Drivers are urged but not required to join the flex program. The flex program operates to pass off to drivers who are driving contiguous routes some of the

packages that need to be picked up or delivered by the primary route driver. It is necessary to do this if one driver is particularly overloaded and is unlikely to deliver or pick up all the packages assigned. While FedEx tries to gain driver cooperation in delivering or picking up packages of others, and for the most part they are able to do this, Fed Ex retains the authority to order a driver to pick up or deliver a flexed item if need be so long as the driver has signed up for this program. Drivers are paid the stop and package amounts and in some cases lose money. However, the flex program makes it easier for a driver to perform satisfactorily since it reduces the likelihood of DNAs.

While drivers' may sell their routes, the buyer must be approved by Fed Ex. If a driver is planning to sell the vehicle along with the route, Fed Ex must approve the vehicle. In one case petitioner insisted that the seller, at the seller's expense, fix up the vehicle so that it met appearance and safety standards. The seller wanted to sell the vehicle "as is" but the sale would not be approved under these circumstances.

Route ownership is contingent upon being covered by the operating agreement. Therefore, when the relationship is terminated by petitioner the route owner has have a sale in place or negotiate to have time to make a sale. When the driver terminated the agreement, he or she has 30 days to make the sale. If no sale is made, the route reverts to the petitioner. While route sales are becoming more frequent, and brokers are involved in some cases, a route is not a particularly liquid asset given that one must find a willing buyer to assume route responsibilities and that buyer must meet FXG or FHD approval.

Petitioner requires drivers to have liability insurance for vehicular damage, property damage and personal injury. The amounts of coverage required must be "sufficient to meet its (the driver's) legal obligation under 49 CFR Part 387." Although drivers are free to obtain insurance from any source, as a practical matter it is only available from one company and all drivers are referred to this company by Fed Ex. The contract also reduces the deductible after one year based on a safe driving record. Drivers are also required to have worker's accident insurance.

Drivers are not required to personally deliver or pickup. Drivers may employ substitute drivers upon petitioner's approval. Drivers may set their own hours within the limitations of the operating agreement. Fed Ex has a sales force to sign up customers and often negotiates pickup and delivery times with such customers. Drivers have to meet these commitments (usually there is an hour window to meet the specified times) even though they may not be consulted prior to the commitment being made. Meeting such a commitment can affect how a driver orders his or her route or even when a driver must get to the terminal to load. Other than these constraints, the driver may order his or her route as he or

she wishes. Drivers are given route sheets which set out the most efficient route delivery and pick up order as determined by petitioner but drivers are not required to follow this route suggestion. Because drivers may receive adverse consequence of any failure to attempt delivery this too, may be a factor when a driver assesses workload for purposes of taking some time off during the day.

REASONS FOR DECISION

The petitioner has the burden of proof in a tax matter. *Isenberg v. California Employment Stabilization Commission* (1947) 30 Cal.2d 34; *Aladdin Oil Company v. Perluss* (1964) 230 Cal.App.2d 603; *Smith v. California Unemployment Insurance Appeals Board* (1976) 62 Cal.App.3d 206.)

"Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insurance Code, section 621(b).)

In *Empire Star Mines Co., Ltd. v. California Employment Commission* (1946) 28 Cal.2d 33, the Supreme Court of California stated:

"... In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations]"

"... Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee."

In determining whether an individual is an employee, as distinguished from an independent contractor, it is the existence of the right of control, not its use or lack of use, that is critical. (*Robinson v. George* (1949) 16 Cal.2d 238.)

A strong factor tending to show the relationship of employer and employee is the employer's right to terminate the work at will. (*Riskin v. Industrial Accident Commission* (1943) 23 Cal.2d 248.)

A contractual provision that a workman is an independent contractor is persuasive evidence of the intended relationship, but it is not controlling and the legal relationship may be governed by the subsequent conduct of the parties. (*Brown v. Industrial Accident Commission* (1917) 174 Cal. 457.)

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that the individual may nominally contract to do a specified job for a specified price. Even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant. (Rest.2d Agency, section 220, p.489.)

It is the rare case where the various factors regarding employment status will point in one direction or another. (*Merchants Home Delivery Service v. NLRB* (1978) 580 F.2d 966, 973.)

When the person for whom services are performed retains the right to control the manner and means by which those services are to be accomplished and particularly when that person provides supervision as to the detail of the work, the works are considered employees. (*Air Transit, Inc. v. National Labor Relations Board* (1982) 679 F.2d 1095, 1098.)

There is strong evidence that petitioner, Fed Ex, controls the details of performance. This is not surprising given the importance to Fed Ex of its valuable brand and its business of providing international delivery. Pick up and delivery is the first or last step in the delivery chain. It is the critical interface between customer and company.

In simplistic terms, control is exercised by requiring uniforms and driver appearance standards. Such standards are enforced. Continual violation can result to termination of the relationship. The consequences are not merely unemployment but a reasonable likelihood that the route and van, if sold and not forfeited, will be subject to fire sale prices.

Control is exercised by requiring vehicles to conform to appearance standards beyond any standards required by the Department of Transportation. In some cases, DOT regulation is not applicable since some vans are under 10,000 pounds gross weight. To the extent that petitioner scrutinizes driver performance in order to conform to DOT requirements, such scrutiny does not amount to control, since governmental regulations constitute supervision not by the

employer but by the state. *Southwest Research Institute v. UIAB* (2000) 81 CA 4th 705. This reasoning would not apply to those vehicles not regulated by DOT. The uncontradicted testimony is that managers tell drivers to follow certain delivery practices, such as package placement, when making deliveries. DOT does not require uniforms or the specific van appearance standards. Drivers can insure against personal liability for loss of packages if they agree to follow and do follow specific delivery practices. Ride-alongs are the way the petitioner insures these practices are followed. Failure to conform to certain "proper" delivery practices is recorded in the business or contract discussion notes which both document the discussion and create a paper trail which can be and have been used to terminate the relationship between a driver and Fed Ex. It is a method of evaluating the driver and controls the manner and means of performance for the purpose of determining whether the driver is providing satisfactory service.

In *C.C Eastern, Inc, v. National Labor Relations Bd.* (1995) 60 F.3d 855 the court concluded that control to ensure satisfactory performance motivated by concern for customer satisfaction is an example of control over ends or goals, rather than control over manner and means.

Similarly, In *Mission Insurance Company v. Workers' Compensation Appeals Board and Frederick Blankenhorn* (1981) 123 Cal App 3d 211, the court rejected the conclusion that establishing quality standard for the complete work is indicative of an employer-employee relationship based on the view that such standards evidences only an interest in the results rather than the manner and means.

In this case the control that petitioner asserts is designed to ensure customer satisfaction as well as contract compliance. For example, a CCS bonus may be reduced if a driver has a lot of customer complaints and there is thus a disincentive to perform contrary to instructions. Likewise, in order to avoid liability for loss, there is a disincentive to ignore the delivery practices demanded by petitioner. A driver may get written up if he or she leaves the van unlocked or signs in lieu of the recipient, even if there is no customer complaint. It is not unequivocally clear that FedEx is exercising control solely to ensure satisfactory performance motivated by a concern for customer satisfaction since the customer may be quite satisfied even if petitioner is not. The operating agreement binds drivers to perform to petitioner's satisfaction and while this frequently the same a customer satisfaction it is not always so.

The reality is that petitioner attempts to closely integrate drivers into its overall operation and have customers identify drivers as Fed Ex drivers. To protect its brand, it is necessarily intrusive. In this case there is no distinct line between controlling goals by way of ensuring customer satisfaction and controlling means of delivery. The distinction between quality goals and details of the work is not

helpful here because to achieve its goals, which are to protect its brand, maintain an international delivery service and achieve customer satisfaction, petitioner controls the details. If customer satisfaction and the goal of integrating its services include a certain demeanor, a certain appearance, adherence to certain pick up and deliver times and a certain way of delivery, controlling the goal is the same as controlling the details.

The operating agreement itself provides petitioner with the ability to control the details of work. This is a complex agreement that is not negotiated between petitioner and the drivers. Drivers do their best to understand it. Fed Ex trains its managers in its meaning and application. This training, the ambiguity of the meaning of satisfactory performance as well as the real power managers have makes any "suggestion" very persuasive. The agreement requires that drivers perform satisfactorily. Realistically, this translates in safe driving, timely delivery and pick up of packages, limited DNAs and little or no package loss. Fed Ex's has a program to insulate drivers from loss claims if they follow specific procedures when making deliveries. Petitioner exercises control by riding with drivers, counseling them about deliveries and recording such discussions. This is so even though petitioner generally argues that it is only making suggestions or enforcing a voluntary agreement. This argument might have a little more weight if the operating agreement were actually negotiated.

Although the right of control the manner and means is critical, courts look to other secondary factors determine whether an employee or independent contractor relation exists

The ability to terminate at will is evidence of control. The petitioner has limited this right to the extent that it is obliged to have reasons for termination which includes certain business reasons such as a decline in business and terminal closure as well as driver misconduct. The petitioner has a mechanism to determine compliance with the operating agreement which is rather like the procedure for termination used by employers who commits themselves to some form of "due process" when terminating an employee. An interesting aspect of route ownership is exposed when there is a termination because failure to sell the route within the notice period, if one applies, results in loss of the route. This creates a very powerful incentive to conform. The petitioner has pointed out that in one instance, an arbitrator awarded a driver monetary compensation on the theory that the petitioner was wrongfully terminated. Job reinstatement was not possible as the agreement limits awards to monetary damages. In spite of the relative freedom petitioner has to terminate, the evidence shows petitioner has limited its ability to terminate at will by limiting its ability to arbitrarily terminate.

Petitioner argues that the parties knowingly intended to enter into an independent contractor relationship. Courts have concluded this is a factor in deciding

whether there is or is not such a relationship but more important is the subsequent behavior of the parties. In this case, the contract is not negotiated and it cannot be said that drivers really intended such a relationship or simply accepted a fait accompli. Some of the drivers who testified plainly thought of themselves as employees and other as independent contractors.

One of the factors to consider is whether the one performing services is engaged in a distinct occupation or business. Drivers often start their association with Fed Ex as holiday substitutes and "graduate" to full route drivers. They work only for Fed Ex. They do not advertise themselves as in the business of providing courier services. They are not responsible for generating business. They do not own a suitable truck until they begin working for petitioner when they purchase a suitable vehicle. Although some have driving experience others do not. None of the drivers who testified worked previously as an independent contractor driver. Fed Ex single route drivers are not engaged in a distinct business.

Whether work is done under the direction or supervision is another factor. Ride-alongs and business discussion notes are a form of direct supervision. In any case, the nature of the work does not require much direct supervision. Drivers load at the terminal. They do not have to be there at any set time but must be there in time to deliver and pick up as designated by whatever arrangement Fed Ex has made. They are penalized (in the sense that they may be written up or lose a bonus) if they do not attempt deliveries. So drivers must calculate how much time they need to finish their routes. While they can choose how to do it, their decisions are highly structured by circumstances they do not control. Scanners pin point where they are on their route and while this is a tool to track packages, it also tracks them. Absence of direct supervision is not a substantial factor in this case.

The drivers provide the van, and therefore have a substantial investment, but petitioner provides the stream of packages. This investment factor favors finding an independent contractor relationship as does the fact the driver is not personally required to drive may employ another driver upon petitioner's approval.

The length of time for which the services are to be performed and whether the services performed are integral to the petitioner's business are also factors to consider. In the clearest instance, independent contractors are generally hired by the job and the job is ancillary to the petitioner's business. Here, the job is integral to the petitioner's business and the complex compensation system is designed to encourage a long term relationship. Compensation items such as the core zone rate and the fuel supplements act to insulate drivers from risk. This system of compensation supplements is expressive of an intended long term relationship since petitioner needs drivers and can only retain drivers if they are

compensated adequately. The various supplements minimize driver risk. They undercut the entrepreneurial aspect of the relationship. It also is a way to avoid individual negotiations based on a driver's calculation of costs. Petitioner is really making fundamental business decisions for drivers. The petitioner shields the driver and standardizes its relationships with drivers. The standardization of the relationship is necessary because drivers are not hired to perform on a job by job basis, but rather are hired on a permanent basis, subject to the petitioner's needs. They are integral to the petitioner's business.

The petitioner emphasizes the existence of an entrepreneurial relationship because drivers own their own routes. Thus, in addition to the opportunity for profit and loss as a result of being efficient, there opportunity for gain if a route becomes more valuable. But, the opportunity for profit by way of increased value of the route is not linked to driver effort.

Drivers may solicit business, but as the testimony showed, they get no gain for acquiring customers not on their route. Drivers are not free to solicit their own customers independent of Fed Ex or perform pick up or deliveries for themselves or others. Routes expand through petitioner's sales efforts and general residential and business growth in a particular area. A single route drivers' opportunity to make a profit is very dependent on Fed Ex's efforts. This does not mean there is no entrepreneurial element. Drivers stand to gain or lose depending on efficiency and participate in a gain if the route becomes more valuable but the real entrepreneurial element is that driver's can acquire more routes. However, this case is limited to single route drivers.

Ownership of a route is only valuable when a driver is covered by the contract. Sale by a driver is contingent upon Fed Ex approval. This is not to say routes have no value but value varies widely and after the contract lapses may have no value to the driver. At the moment there is only a very limited market for such routes.

The assessment in this case is limited to single route drivers. While there is an entrepreneurial element, it is not so substantial as to find that the single route drivers are independent contractors. Drivers are subject to risk of loss primarily as a result of how efficient they are but this element is not adequate in light of all the factors tending to show employee status and demonstrated control of the details of the work to find independent contractor status.

The petitioner extensively cites Harrison v. Greyvan Lines, Inc. 331 U.S. 704 (1947) to support its position that FedEx drivers should be considered independent contractors. The facts of the Harrison drivers are as follows.

Greyvan operated its trucking business under a permit issued by the Interstate Commerce Commission. The system was based on contracts with the truck men under which the truck men were required to haul exclusively for the respondent and to furnish their own trucks and all equipment and labor necessary to pick up, handle and deliver shipments, to pay all expenses of operation, to furnish all fire, theft, and collision insurance which the respondent might specify, to pay for all loss or damage to shipments and to indemnify the company for any loss caused it by the acts of the truck men, their servants and employees, to paint the designation "Greyvan Lines" on their trucks, to collect all money due the company from shippers or consignees, and to turn in such moneys at the office to which they report after delivering a shipment, to post bonds with the company in the amount of \$ 1,000 and cash deposits of \$250 pending final settlement of accounts, to personally drive their trucks at all times or be present on the truck when a competent relief driver was driving (except in emergencies, when a substitute might be employed with the approval of the company), and to follow all rules, regulations, and instructions of the company. All contracts or bills of lading for the shipment of goods were to be between Greyvan and the shipper. The company's instructions covered directions to the truck men as to where and when to load freight. If freight was tendered the truck men, they were under obligation to notify the company so that it could complete the contract for shipment in its own name. As remuneration, the truck men were to receive from the company a percentage of the tariff charged by the company varying between 50 and 52% and a bonus up to 3% for satisfactory performance of the service. The contract was terminable at any time by either party. These truck men were required to take a short course of instruction in the company's methods of doing business before carrying out their contractual obligations to haul. The company maintained a staff of dispatchers who issued orders for the truck men's movements, although not the routes to be used, and to which the truck men, at intervals, reported their positions. Cargo insurance was carried by the company. All permits, certificates and franchises "necessary to the operation of the vehicle in the service of the Company as a motor carrier under any Federal or State Law" were to be obtained at the company's expense.

A manual of instructions, given by the respondent to the truck men, and a contract between the company and Local No. 711 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America were introduced in evidence. The manual purported to regulate in detail the conduct of the truck men in the performance of their duties, and the agreement with the Union provided that any truck man must first be a member of the union, and that grievances would be referred to representatives of the company and the union. The manual was impractical and no attempt was made to enforce it. The company had some trucks driven by truck men who were admittedly company employees. Operations by the company under the two systems were carried out

in the same manner. The insurance required by the company was carried under a blanket company policy for which the truck men were charged proportionately.

The court stressed that the Social Security act, under which this case arose, should be broadly construed to accomplish the purposed of the legislation which it defined as relieving insecurities of modern life, particularly old age and unemployment. The same social policy requires the Unemployment Insurance Code to be broadly interpreted to achieve the purposes of the legislation.

The court also noted the difficulty of differentiating between employees and independent contractors. That is certainly the case here. The court rejected technical tests and concluded that "the primary consideration in the determination of the applicability of the statute is whether the effectuation of the declared policy and purpose of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act." (at 713.) The court also noted that if the employer-employee relationship exists, the description of the relationship by the parties is immaterial.

With this as preface, the court found that Greyvan did not exercise control over the manner and means as the only evidence of this was the manual which was not prepared until April 1940 and the tax period was from November 1937 through March 1942 and when the manual was in effect, it did not change anything. In fact, one driver testified that he was never instructed to follow the rules, the manual was prepared by individuals no longer employed by the company and it had been impractical and was not adhered to.

Finally the court commented that while many factors in the case indicated such control as to give rise to the employment relationship, "we think the vital one is missing because the complete control of the truck men as to how many, if any, and what helper they make use of in their operations." (at note 11.)

The facts in this matter differ from Greyvan in significant ways although there are many similarities. FXG and FHD drivers are effectively required to conform to a manual which sets out details of work. The provisions are enforced by ride-alongs and business discussion notes. Drivers are given detailed instructions on how to make deliveries, how to scan, how to report problems, what forms to use and how to code various attempts to deliver. They are required to conform to detailed appearance standards. Moreover, there is no evidence of helpers being used in this case. Substitute drivers must be approved by petitioner. These differences lead to a different result.

The entrepreneurial element, limitation on termination at will, intention of the parties to the extent it can be determined, and investment by drivers are all factors in favor of finding an independent contractor relationship. The substantial

control exercised by petitioner as a practical matter, its power to define satisfactory performance, the fact that drivers are not a distinct occupation and their services are integral to the business favor finding an employment relationship. When all factors are considered as well as the evidence of control of details of the work, it is found that drivers are employees under the code and therefore, the petition for reassessment is denied.

DECISION

The petition for reassessment is denied.