

Dial-A-Mattress Operating Corporation and Local 363, Industrial and Allied Trade Workers, International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 29-RC-8442

August 27, 1998

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN,
AND BRAME

On July 28, 1995, the Regional Director for Region 29 issued a decision (pertinent portions of which are attached as an appendix) finding that certain owner-operators who provide customer delivery services for the Employer, Dial-A-Mattress Operating Corporation (Dial), are not independent contractors. In accord with Section 102.67 of the National Labor Relations Board's Rules and Regulations, Dial filed a timely request for review and a brief, and the Petitioner filed a brief opposing review. By Order dated May 8, 1996, the Board granted review solely with respect to Dial's contention that its owner-operators are independent contractors. Dial and the Petitioner submitted letters renewing their respective positions set forth in their previously submitted briefs.

On December 3, 1996, the Board heard oral argument in this case and *Roadway Package System*, 326 NLRB No. 72 (1998), also issued today. The Board sought, inter alia, the parties' comments relating to (1) the Board's authority to change or modify the common law right-of-control test to determine if an individual is an employee within the meaning of Section 2(3) of the Act; (2) the relative importance of factors indicative of employee or independent contractor status; and (3) the applicability of particular cases raising similar independent contractor issues.¹ The parties as well as a number of amici curiae² filed preargument and postargument briefs and/or participated in the oral argument.³

Dial is engaged in the retail sale and distribution of mattresses and bedding from its office/warehouse in Long Island, New York. Dial has 39 owner-operators who use their own equipment and the assistance of a helper and/or driver to deliver Dial's products throughout the New York Metropolitan area. At issue in this proceeding is the status of these owner-operators since July

¹ These cases are *Roadway Package System*, 288 NLRB 196 (1988); *NLRB v. Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981), enf. 250 NLRB 63 (1980); and *C.C. Eastern v. NLRB*, 60 F.3d 855 (D.C. Cir. 1995), enf. denied and vacating 313 NLRB 632 (1994).

² American Federation of Labor and Congress of Industrial Organizations, et al.; American Trucking Associations; Associated Builders and Contractors; The Chamber of Commerce of the United States; Council on Labor Law Equality; Messenger Courier Association of the Americas; and Newspaper Association of America.

³ Member Hurtgen recused himself and took no part in the consideration of these cases.

20, 1993.⁴ There is no collective-bargaining history involving this classification.⁵

The Petitioner would include the owner-operators in the petitioned-for unit with their helpers and drivers (a total of approximately 103 individuals). Dial, on the other hand, seeks to exclude the owner-operators on the basis that they are independent contractors or, alternatively, supervisors within the meaning of Section 2(11) of the Act. The Regional Director found that the owner-operators are not independent contractors, but he deferred ruling on the supervisory question.⁶ He, however, excluded three owner-operators—doing business as Ish's Trucking, Singh's Express, and TDJ Santiago—from the unit on community-of-interest grounds.⁷

Having carefully considered the record, the parties' briefs, the amici briefs, and the oral argument, the Board has decided to reverse the Regional Director's decision, find that all Dial's owner-operators are independent contractors, and remand the case for further proceedings consistent with its Decision on Review.

I. FACTS

A. Identity

Dial uses a telemarketing campaign aimed at selling its products, via telephone sales, to customers in the New York City metropolitan area. Prior to July 1993, Dial employed drivers to make customer deliveries with trucks owned by the drivers, Dial, or another individual

⁴ Several witnesses testified to events that occurred 2 years or more prior to the hearing. This testimony has not been considered because those events preceded Dial's purported changeover to owner-operator status for its drivers in July 1993.

⁵ Dial employs about 300 employees in its warehouse, sales, accounting, advertising and marketing, telecommunications, computer, and legal departments. In 1995, the Petitioner filed a petition, Case 29-RC-8441, seeking to represent Dial's warehouse employees in a separate unit. In that case, a Board election was held, and a certification of results issued on April 13, 1995.

⁶ The Regional Director also deferred ruling on whether the helpers share a sufficient community of interest with the owner-operators, if the latter are considered employees. He stated that if his determination on the independent contractor issue were upheld by the Board, then he would re-open the record on the additional matters on which he deferred ruling. We note that neither party has objected to this approach.

⁷ The Regional Director found that the owner-operators of Ish's, Singh's, and TDJ should be excluded because the Petitioner did not seek to represent them and they had significantly larger sized operations. Further, the Regional Director found that Dial guaranteed only those owner-operators and all their drivers a regularly scheduled route. We disagree with the Regional Director to the extent that these three owner-operators are treated as a separate grouping for determining the independent contractor status of all of Dial's owner-operators. The record does not support the finding that these owner-operators have a regularly scheduled route. Further, the fact that they may have larger operations, with more trucks and employees, does not necessarily mean that they have a different status from the other owner-operators. Rather, any differences appear to reflect the fact that they have chosen to avail themselves of the opportunities open to all owner-operators. Therefore, we have considered the facts concerning the owner-operators of Ish's, Singh's, and TDJ in determining the issues before us.

working for Dial.⁸ At Dial's behest, approximately 37 of these drivers became owner-operators and hired drivers and helpers to perform deliveries. These owner-operators formed their own trucking companies, filed applications with the New York state transportation department for authority to transport Dial's products, and were granted such authorization on July 20, 1993. Under this system, the owner-operator (or his driver), with the assistance of a helper, loads Dial's products on the owner-operator's truck at the loading dock of Dial's warehouse. The owner-operator (or his driver) then drives the loaded vehicle and makes the scheduled deliveries for Dial.

There are about 65 trucks and 7 vans delivering Dial's products. One owner-operator, doing business as TDJ Santiago, owns 10 trucks. Two owner-operators, doing business as Singh's Express and Ish's Trucking, own six trucks each. Six owner-operators, doing business as LB Trucking, Fast Freight Trucking, War & Betty Trucking, Garcia Trucking, Edward Trucking, and R & G Trucking, own two trucks each and employ one driver and one helper for each truck. Two owner-operators, doing business as Rambo Trucking and JR Service, own three trucks each. Three owner-operators, doing business as LAO Lazo Service, JM Delivery Service, and TNA Trucks, own one truck and one van each. While most owner-operators drive their own vehicles, three owner-operators do not drive at all, but rather employ a driver.

Many of Dial's owner-operators have New York state business certificates for their companies. Several of the companies formed by owner-operators (e.g., Fertasa Trucking, War & Betty, Sky Fox, Garcia, Edward, Ish's, TDJ, and Fast Freight) are organized as corporations. The owner-operators list their home addresses as their companies' business addresses. They maintain business checking accounts, have their own company work uniforms, and file corporate tax returns. They also maintain workers' compensation insurance and have business tax identification numbers.

B. Contracts Between Owner-Operators and Dial

On various dates in late August or early September 1993, each owner-operator executed a contract entitled "Agreement" with Dial.⁹ In exchange for compensation based on rate schedules for geographical zones unilaterally devised by Dial, the owner-operator agreed to furnish delivery services for Dial (secs. 1 & 10).¹⁰ Three of

the owner-operators (the owner operators of Ish's, Singh's, and TDJ) have negotiated reduced delivery rates in exchange for routes in certain geographical zones of delivery.¹¹ There is no guaranteed minimum compensation for owner-operators. They may use their vehicles to make deliveries for other companies (sec. 12), and two owner-operators, doing business as Ish's and Singh's, do so. When performing services for Dial, each owner-operator must display his company's ICC certification number on his truck (sec. 7). The owner-operators may not perform deliveries for any of Dial's competitors in the New York metropolitan area (sec. 18).

The contract, by its terms effective for a 1-year period, reserves to Dial and the owner-operator the right to terminate the agreement with a 24-hour notice (sec. 11). The contract also provides for automatic renewal for successive 1-year periods, unless Dial or the owner-operator gives the other party written notice of its election not to renew prior to the termination of the initial or renewal agreement (sec. 2). In December 1994 or January 1995, Dial and each owner-operator executed an Addendum which automatically extended the 1993 contract from year to year unless it was terminated by either party in accordance with the stated contract terms.

The contract also provides that the owner-operator shall hire his own employees, have sole control over and complete responsibility for them, set all terms and conditions of employment for them, and pay workers' compensation insurance on his helpers or drivers (sec. 3).¹² In this connection, the contract provides that the owner-operator shall direct the operation of his equipment and staff in all respects and shall determine, without instruction from Dial, the method, means, and manner of performance, including the choice of routes, points of service of the equipment, and rest stops (sec. 12). The contract gives the owner-operator the right to decline jobs assigned to him by Dial's dispatch office (sec. 9). Under the contract, Dial provides no job training for the owner-operator or his employees (sec. 15). The owner-operators also agree to indemnify Dial for various losses, injuries, or damages that may arise in connection with their performance of Dial deliveries (sec. 10).

According to the contract, the owner-operator is exclusively responsible for fueling, inspecting, and maintaining his equipment used to deliver Dial's products (sec. 4). He is also required to pay for all fees, maintenance, and taxes related to the operation of his equipment (sec.

⁸ The Regional Director incorrectly stated that 37 former employees of Dial who later became Dial's owner-operators had driven "Dial's" delivery trucks prior to July 1993. The record shows that most of the owner-operators who testified at the hearing drove for Dial using their own trucks before their alleged conversion to independent contractor status in July 1993.

⁹ The owner-operator signed his own name. The contract terms do not refer to the owner-operator by his company's name.

¹⁰ Sections in this portion of our decision refer to provisions in the standard Agreement between Dial and its owner-operators.

¹¹ Other owner-operators have submitted similar proposals or have tried to negotiate special deals for their companies. Dial has rejected these proposals or separate deals.

¹² Mario Zuluaga, the owner-operator of Zutra Trucking, testified that about 3 to 6 months prior to the hearing he was suspended by Luis Barragan, Dial's chief operating officer, for failure to have enough money to pay for workers' compensation insurance. According to Zuluaga, Barragan loaned him \$800 to pay for the workers' compensation insurance.

4). He must also have liability insurance, which names Dial as additionally insured (secs. 5 & 8).

The contract indicates that the owner-operator and his employees are not subject to the work rules that apply to Dial's employees (sec. 15). Likewise, the owner-operator and his employees do not have access to the grievance procedure established for Dial's employees (sec. 15). Disputes involving the owner-operator and Dial are to be submitted to third-party arbitration (sec. 14). Finally, the contract expressly states that the parties intend to create an independent contractor relationship and that neither the owner-operator nor his employees are to be considered employees of Dial in performing delivery services for Dial (sec. 12).

C. Duties

The owner-operators service Dial's delivery zones in the New York metropolitan area. However, Dial does not prevent the owner-operators from working elsewhere.¹³ As part of their duties for Dial, the owner-operators are not expected to cultivate either business or customers for Dial. They also have no input into Dial's pricing for merchandise.

If a customer purchases Dial's merchandise, an invoice is generated with the customer's name, address, item ordered, method of payment, approval of payment method, and date and time range of delivery. The invoices are forwarded to Dial's dispatch department. Dispatch employees batch invoices into a route, known as the "daily driver log," which is arranged based on the customers' requested delivery times. The log, listing seven possible designated stops in numerical order, is then assigned to an owner-operator.

Meanwhile, Dial's warehouse personnel select the purchased merchandise from the warehouse and bring it to the loading dock. There, the owner-operator (or his driver) inspects the merchandise for damage before he (or his driver) and his helper load the merchandise onto the truck. Dial's warehouse employees do not assist in the loading function. The owner-operator never has legal title to Dial's products. Title stays with Dial until the customer accepts the goods.

The owner-operators are responsible for the delivery and set up of the bed frame and the bed, as well as the removal of old bedding and all packing materials from the new purchase. The owner-operator and his employees are permitted to perform additional work, beyond the above-described regular services, for the customer for separate payment to the owner-operator. Any customer who wants additional work performed is required to fill out a "Delivery Service Work Request" form supplied to the owner-operator by Dial. This form refers to the owner-operator as an "independently owned and oper-

¹³ Barragan testified that Raymond Rahmakhan, the owner-operator of Rahmakhan Trucking, works for a computer company when he is not making Dial deliveries.

ated trucking delivery service." The customer, and not Dial, assumes any loss or damage that may result from the performance of any additional work. After completion of all scheduled deliveries, the owner-operator (or his driver) is not required to return to Dial's warehouse, but he may go directly home.

The owner-operator (or his driver) is expected to contact the Dial warehouse to notify one of Dial's dispatchers which deliveries have been made or were attempted. Barragan testified that the call-in rule is for the benefit of the customers to estimate approximate arrival times for their deliveries.

The record contains conflicting testimony as to whether Dial has ever disciplined any owner-operator for not calling in after delivery stops. Owner-operator Zuluaga testified that, on two or three occasions, he was suspended for 1 day by Barragan when he had failed to call Dial from each delivery stop. Zuluaga never specified whether these incidents occurred before or after his alleged conversion to independent contractor status on July 20, 1993. In addition, no written documentation of such suspensions was submitted into evidence. Barragan denied that he ever suspended Zuluaga for not calling in after stops. According to Barragan, Zuluaga never received any suspensions from Dial.

For the scheduled customer deliveries, Dial preauthorizes check or credit card payment from the customer. When a customer payment problem arises, the owner-operator is still paid for the delivery if he has accepted the preapproved payment method from the customer. However, if he has accepted a payment method without Dial's approval, the owner-operator bears the loss. The owner-operator is responsible on a daily basis for depositing in Dial's bank account any cash received from the customers. The owner-operator is also required to submit checks, credit card slips, and bank deposit slips to Dial on the following day.¹⁴ The owner-operator is liable for all receivables. If an owner-operator does not return with the full amount of money as listed on the daily driver log, he is not permitted to load his truck that day.¹⁵

D. Equipment

Dial has no requirement as to the type, model, make, color, size, or condition of the trucks used by the owner-operators. The owner-operators select their own vehicles, and those trucks currently in use represent a variety of models, colors, makes, and sizes.¹⁶ Dial does not have title or any ownership interest in the trucks and vans used

¹⁴ Each owner operator is issued a plastic bank card and deposit slips to deposit cash received from the customers directly into Dial's bank account.

¹⁵ Julio Carabello, the owner-operator of Delivery Express, testified that he was suspended twice by Tony Santano, Dial's finance department manager, for failure to deliver the COD money properly or on time in November and December 1994.

¹⁶ There is no evidence that Dial has ever rejected a truck used by an owner-operator.

by the owner-operators. The owner-operator has exclusive ownership rights and must obtain his own independent financing, if necessary. The owner-operator displays his company's name, address, and Department of Transportation number on his truck. In addition, each truck displays a "recognition code" number provided by Dial for its identification purposes.

Dial does not pay for any of the expenses related to the operation of the owner-operators' trucks, including gasoline, repairs, inspection, permit, license, or registration. Dial does not inspect the owner-operators' vehicles. Dial supplies all owner-operators with plastic credit card charge machines to generate credit card slips if the customers pay by credit cards. Dial also supplies spare bed frames, plastic bags, and two-way radios to the owner-operators.

Pursuant to the terms of a separate advertising agreement with Dial, the owner-operator is compensated \$500 per year for each truck displaying Dial's advertising, and most owner-operators display Dial's advertising on their vehicles.

E. Compensation

Dial employees and the owner operators are paid separately, on alternating Fridays, by Dial. The check is made payable to the owner-operator's company and not the owner-operator himself.

There is a wide range in the owner-operators' annual compensation. The owner-operator is not guaranteed a minimum amount, but he is paid for each delivery—provided it is timely—in accordance with the rates schedule attached to his contract. Sometimes, an owner-operator is not paid for a late delivery if it is his fault. However, if the customer is not home upon the arrival of a timely delivery, the owner-operator is paid for that delivery.

Dial does not provide its owner-operators or their drivers and helpers with any fringe benefits. Dial also does not withhold any Federal, state, or local taxes from the owner-operators' checks. However, Dial deducts \$4 per pay period for use of restroom and lounge facilities at the Dial warehouse reserved for the owner-operators. Dial issues IRS 1099 forms to the owner-operators and maintains a list of the owner-operators' tax identification numbers.

F. Work Schedules

Dial maintains a schedule of starting times ranging from 5 a.m. to 8 p.m. for the owner-operators' trucks. The work schedule identifies each owner-operator's truck recognition number for loading because it is the truck, not the owner-operator, driver, or the helper, that is scheduled. The trucks are generally scheduled for 6 days a week. The drivers' hours range, on an average, between 10 to 14 hours per day. The owner-operators, their drivers, and their helpers are not required by Dial to punch a timeclock or otherwise record their hours of

work. Dial does not schedule lunch and break times or monitor the hours worked by the owner-operators or their drivers and helpers.

An owner-operator whose truck has been scheduled for work on a particular day is not required to make his truck available on that day. If a particular truck is not there at its assigned starting time, the Dial dispatcher assigns the deliveries to the next truck listed on the schedule. According to Barragan, the owner-operator is not suspended, terminated, or penalized in any way for not presenting a truck for deliveries on a given scheduled workday.

Generally, Barragan testified that the same is true for the owner-operator whose truck arrives late or leaves before all the load assignments for the day have been made. However, Hector Mendez, an owner-operator of H & M Express, testified that he was suspended for 1 day in late 1994 by Tony Santano, Dial's finance department manager, because he had refused to stay at the warehouse for a route, as instructed by Santano that day.

The owner-operator arranges for another driver to substitute for him or his driver when he or his driver needs to take a personal day off and during periods of sickness and vacations. Some owner-operators notify Dial that they are going on vacation or will be out sick and there will be a substitute driver. However, the record does not show that such notification is required by Dial. Dial has no policy of refusing to load a truck to be driven by a substitute driver and/or substitute helper even if the owner-operator gave no advance notice of the substitution.

The owner-operators may inspect the Dial merchandise prior to loading it onto their trucks, and they may refuse to load any damaged items. Barragan also testified that an owner-operator may refuse, for any reason and without any penalty imposed, a load assigned to his vehicle. In support of Barragan's testimony, Hernando Ramirez, an owner-operator of Fast Freight Trucking, testified that he has, on a few occasions, told a Dial dispatcher, that he was not going to make one of the stops on the route sheet; and that the dispatcher simply directed that he remove the merchandise from the truck. Ramirez stated that he was not disciplined. However, John Beltran, the owner-operator of JB Services, testified that on one occasion when he refused a route he was told by Scott Lanceford, who heads the dispatching department, to unload his truck, go home, and return the next day. Beltran's testimony does not reflect if this incident occurred before or after his alleged conversion to independent contractor status on July 20, 1993. Bennett Straker, the owner-operator of BS Trucking, testified that he was suspended by Barragan because he had refused to make a delivery about 1-1/2 years prior to the hearing. According to Straker, he refused to deliver a mattress for a customer up eight flights of stairs.

Complaints by owner-operators concerning the loading schedule are directed to Dial's dispatch department, where a log of these grievances are kept. The record does not give any further detail about how these complaints are handled. There is no suggestion from the record that any established grievance procedure between Dial and the owner-operators exists for resolving such complaints.

Dial does not tell an owner-operator (or his driver) which traffic pattern or route to take to make the assigned deliveries. The owner-operators receive different routes every day and usually deliver to different geographical areas. In exchange for a reduced delivery fee, Dial accepted proposals from the owner operators of Ish's, Singh's, and TDJ for "guaranteed routes." For example, Ish's trucks deliver in the Long Island zone and TDJ's trucks make Philadelphia deliveries, while Westchester County and Connecticut zone deliveries go to Singh's trucks. This does not mean that the owner-operators of Ish's, Singh's, and TDJ, as opposed to the other owner-operators, have a regularly scheduled route each day. Rather, the record shows that they have negotiated a minimum number of stops when making deliveries to these more distant locations. The trucks owned and operated by Ish's, Singh's, and TDJ can still be assigned to deliver in any zone.

The record contains conflicting testimony on whether an owner operator (or his driver) may deviate from the route schedules. Barragan testified that the order of deliveries on the driver log given to the owner-operator (or his driver) represents a "suggested efficient sequence" based on the time requirements dictated by the customer's wishes. Barragan testified that the owner-operators (or their drivers) may deviate from the driver log order, without Dial's permission, as long as each delivery is made on time. Dial advertises guaranteed delivery within a time frame designated by the customer. Owner-operator Ramirez testified that he and his driver do not always follow the sequence set forth in the driver daily log and that they do not notify Dial in advance or seek Dial's permission to deviate. He further testified that neither he nor his employees have been warned, suspended, or disciplined by Dial. Owner-operator Mendez testified that Finance Department Manager Santano suspended him for 1 day in late 1994 because he failed to follow the delivery order on the daily driver log. However, Mendez' change in the order of deliveries on that occasion had resulted in his being late for a New Jersey delivery which was subsequently canceled by the customer. Owner-operator Straker testified that Santano threatened to suspend him for failure to follow the route sheet.¹⁷

¹⁷ Whether the threat of suspension attributed to Santano was in response to late deliveries is not indicated by the record.

G. Drivers/Helpers

The owner-operators interview, select, hire, retain, and compensate their own drivers and helpers and solve all problems relating to them. There is no uniform pay rate and fringe benefit program for the drivers and helpers. Dial does not maintain a list of the drivers and helpers used by the owner-operators. Dial has requested, but not required, the owner-operators to furnish certain employment information about the drivers and helpers. Many owner-operators who have not submitted such information to Dial continue to receive delivery orders for their trucks from Dial.

In several ways, the drivers and helpers of the owner-operators are treated differently from Dial's employees. The owner-operators and their drivers and helpers are not directly paid by Dial. They do not receive Dial employee fringe benefits. They do not punch Dial's time-clock. They do not use the bathrooms and locker rooms that Dial makes available to its employees. The owner-operators instead are charged a \$4 fee for the use of separate restroom and lounge facilities at Dial. The drivers and the helpers report to the owner-operators and often wear uniforms bearing the owner-operators' company names. Like the owner-operators, the drivers and helpers do not have access to any grievance procedure available to Dial employees.

H. Rules/Personnel Policies

Dial's human resource department has no responsibility with respect to the owner-operators or their drivers and helpers. Dial does not maintain personnel files, immigration I-9 forms, or IRS W-4 forms for any of these individuals. Dial also does not keep a record of the hours worked by the owner-operators, drivers, or helpers. Dial does not provide these individuals with job applications or issue employee identification cards to them.

The owner-operators and their drivers and helpers are not subject to the work rules established for Dial's employees. However, they are expected to comply with certain procedures contained in company memoranda which have been posted in the dispatch office or distributed to the owner-operators at periodic driver meetings held by Dial. These memoranda list various procedures pertaining to loading; call-in; dress code; drugs; alcohol and gambling; and damage to merchandise or to a customer's home.

The memorandum pertaining to loading procedures states that an owner-operator's failure to provide his schedule of availability to Dial at least 24 hours in advance will result in a 2-day suspension. The loading procedures memorandum also indicates that late drivers are to load after drivers who arrive as scheduled, and that consistent or patterned lateness will result in a lost position on the delivery schedule. However, the record contains no evidence that this policy is actually followed by the owner-operators or has been enforced by Dial. As

noted above, according to Barragan, with or without advance notice, the owner-operator is not penalized in any way for not presenting a truck for deliveries on a given scheduled workday.

According to the memorandum on call-in procedures, the owner-operator (or his driver) must call Dial's dispatch department at every stop to report certain information about the delivery. According to the memorandum, failure to call in can result in Dial's termination of the owner-operator's services. There is no evidence that this has occurred.

Pursuant to its dress code procedures, Dial requires that the owner-operators maintain a "clean attire" while delivering its goods. Dial also specifies that the owner-operators must refrain from wearing sleeveless tee-shirts of a certain length. Many owner-operators have gone beyond these minimal requirements and supply their own company work uniforms to their drivers and helpers.

Dial has also distributed a memorandum regarding use of drugs and alcohol and gambling on or near Dial property. The memorandum states that because such activities expose Dial to certain liability, such conduct will not be tolerated, and that Dial will take all "necessary steps to terminate these activities and prevent future occurrences." In a May 8, 1995 letter, Dial warned Arcadio Bautista, an owner-operator of A. B. Services, about his alleged drinking of alcohol near Dial's facility. The letter stated that Dial would consider termination of Bautista's contract if further complaints involving Bautista or his "employees" were received.

Finally, Dial has several policies concerning damage to merchandise and/or customers' homes during deliveries by the owner-operator. If damage occurs, the owner-operator gives the customer a form stating, inter alia, that Dial uses "independently owned and operated" contractors to deliver Dial's products. If the owner-operator is the apparent cause of damage to Dial's merchandise, he assumes 100-percent liability for the merchandise, pays for it, and receives the damaged merchandise. If the customer's home is damaged by the owner-operator during delivery, Dial and the owner-operator split the repair costs 50-50 percent. If there are more than three incidents of customer's home damage per year, Dial requires that 75 percent of the repair costs shift to the owner-operator and 25 percent remain with Dial.

I. Termination and Suspensions

There is no progressive disciplinary system applicable to Dial's owner-operators. Dial has terminated the contract of one owner-operator, for violent behavior in April 1995, and has threatened termination of another owner-operator's contract for alcohol use near Dial's facility on May 8, 1995. The first incident involved Noe Garcia, an owner-operator of Garcia Trucking, who allegedly threw a cup of coffee in the face of another driver at a diner near Dial's facility. The other incident pertained to the

warning that Dial gave owner-operator Bautista that it would consider termination of his contract if further complaints about his drinking were received.

As described above, owner-operators Beltran, Carabello, Mendez, Straker, and Zuluaga testified that Dial gave each 1-day suspensions for one of the following infractions: refusing to stay at the warehouse after his scheduled loading time; failing to call Dial from each delivery stop; failing to follow the assigned route schedule; refusing a route assignment; refusing to deliver a mattress up eight flights of stairs; and failing to properly and timely deposit money. None of these suspensions has resulted in more serious penalties from Dial. Dial has not terminated the services of these owner-operators, but has renewed their contracts.

J. Entrepreneurial Activities

The owner-operators do not cultivate business or customers for Dial, and they have no input into pricing of Dial's merchandise. They do not and cannot service Dial's competitors. The owner-operators have no proprietary interest in their routes, which may change from day to day. The owner-operators are required to receive Dial's authorization for all methods of customer payment, unless they want to assume the potential risk of nonpayment.

As previously indicated, the owner-operators of Ish's, Singh's, and TDJ have negotiated reduced delivery rates in exchange for routes in certain geographical zones of delivery. Although other owner-operators have submitted similar proposals or have tried to negotiate other special deals for their companies, Dial has rejected these arrangements.

The owner-operators are permitted to perform additional work, beyond their regular services for Dial, for the customer for separate payment to the owner-operator. They may also use their trucks to cultivate business separate and apart from Dial's operations.¹⁸ However, several owner-operators testified that their time commitment to Dial prevents them from servicing other customers or cultivating other business interests with their trucks.

II. REGIONAL DIRECTOR'S DECISION

Citing *NLRB v. United Insurance Co.*¹⁹ and *Roadway Package System*,²⁰ the Regional Director applied the common law "right of control" test to determine whether Dial's owner-operators are employees or independent contractors. In applying this test, the Regional Director relied on the Board's decision in *C.C. Eastern, Inc.*,²¹

¹⁸ The owner-operators of Singh's and Easy Save testified that while they use their trucks 90-95 percent of the time to service Dial's customers, the remaining percentage of time is spent on other business projects or jobs.

¹⁹ 390 U.S. 254, 256 (1968).

²⁰ 288 NLRB 196 (1988).

²¹ 309 NLRB 1070 (1992). This decision was vacated by the United States Court of Appeals for the District of Columbia in *C.C. Eastern v. NLRB*, 60 F.3d 855 on August 1, 1995, 3 days after the Regional Direc-

and focused primarily on (1) Dial's control of the manner and means of deliveries by the owner-operators and (2) the owner-operators' level of entrepreneurial activity.

As to the first item, critical in the Regional Director's view was evidence showing that Dial has devised the loading schedules for the owner-operators and arranged deliveries by geographical areas; any complaint about the loading schedule was directed to Dial's dispatch department; Dial had issued company policies for its owner-operators pertaining to loading, call-in, dress code, drugs, alcohol, gambling, and damage to merchandise or customers' homes; and Dial had disciplined owner-operators for various infractions. Regarding the second part of his inquiry, the Regional Director found insignificant entrepreneurial activity because the owner-operators do not cultivate business or customers for Dial; they have no input into Dial's pricing for the merchandise; they must receive Dial's authorization for all methods of payment; they do not service Dial's competitors; most owner-operators only service Dial's delivery areas; they have no proprietary interest in their routes; and they work solely for Dial. In these circumstances, the Regional Director concluded that Dial's owner-operators are not independent contractors and found factually distinguishable those cases cited by Dial in support of the contrary result.²²

III. POSITIONS OF THE PARTIES

The parties and the amici agree that the Board should not, and has no authority to, change the legal standard, based on common-law agency principles, for determining whether the owner-operators are employees or independent contractors. As more fully set forth in our *Roadway* decision issued today, however, they differ as to the proper interpretation and application of these principles. The Petitioner and amicus AFL-CIO contend that the common law test should be broadly applied and that "no single factor may be given primacy," while Dial and the other amici assert that the right to control the manner and means to accomplish the end result is the "most important" factor in determining the individual's status.

Dial contends that it exercises only minimal control over the owner-operators, who have significant entrepreneurial opportunities and risks. Dial emphasizes that (1) several owner-operators use more than one delivery vehicle and employ at least one driver or helper; (2) all owner-operators are paid a flat fee for each completed delivery; (3) they have significant freedom with respect to the hiring, firing, supervision, and payment of their drivers and helpers; and (4) they are free to work for

other companies and use their trucks for personal business.

Dial further asserts that the owner-operators perform their delivery services virtually free of supervision, monitoring, evaluation, or discipline by Dial. Regarding its "disciplinary" authority, Dial asserts that any suspension it has imposed on owner-operators are not true examples of discipline. Dial notes, *inter alia*, that none of these suspensions led to a termination or further discipline of the owner-operator involved and that the termination of owner-operator Garcia cited by the Regional Director was based on an unusual set of circumstances.

Dial also argues that its dealings with the excluded owner-operators of Ish's, Singh's, and TDJ are not anomalous but rather that these relationships illustrate what the other Dial owner-operators potentially could become, given sufficient entrepreneurial efforts and negotiating skill on their part. Thus, Dial maintains that the evidence concerning the owner-operators of Ish's, Singh's, and TDJ provides compelling support for finding that *all* its owner-operators are independent contractors.

The Petitioner asserts that the Regional Director properly found that the Dial owner-operators, except the owner-operators of Ish's, Singh's, and TDJ, are not independent contractors under the common-law agency test. The Petitioner agrees that the owner-operators of Ish's, Singh's, and TDJ are independent contractors because they have more vehicles and employees performing Dial deliveries; they have different work schedules and delivery rates; and they are guaranteed daily loading to certain geographical areas.²³

The Petitioner cites, *inter alia*, the following facts to support a finding of employee status here: (1) the owner-operators do not set prices for Dial's merchandise, cultivate business for Dial, work for Dial competitors, or have any proprietary interest in the delivery routes which are devised by Dial; (2) they have no time to drive for other business concerns and have no opportunity to develop their own customers because they are committed to having their trucks available to Dial 10–15 hours per day, 6 days a week, 52 weeks a year; (3) Dial, the sole source of the owner-operators' income, unilaterally determines their income level; (4) Dial imposes uniform costs on all of its owner-operators (e.g., costs involving truck maintenance, business expenses, insurance, uniforms, and the retention of a helper); (5) Dial controls the deliveries made by the owner-operators by setting their workweek schedules, daily routes, and delivery sequences; (6) Dial supervises the owner-operators by having them follow

tor issued his decision in the instant case. The court disagreed with the Board's determination that the Eastern drivers were employees.

²² *Central Transport, Inc.*, 299 NLRB 5 (1990); *North American Van Lines*, 869 F.2d 596 (D.C. Cir. 1989); and *Associated General Contractors*, 290 NLRB 552 (1988).

²³ The Petitioner and the AFL-CIO further seek the determination of employee vs. independent contractor status in light of the employer controls imposed by certain Department of Transportation (DOT) regulations. The record reveals that Dial, as a mattress retailer, and its owner-operators are not subject to such regulations. Therefore, we find it unnecessary to pass on this issue at this time.

certain work rules or policies, including Dial’s “call-in” requirement and customer payment approval system; (7) Dial imposes discipline on owner-operators for noncompliance with such work rules or policies; (8) Dial furnishes all tools and supplies for the owner-operators; (9) Dial treats the owner-operators as employees in their dealings with the general public; and (10) the owner-operators have no opportunity for economic profit because they have no control over their revenues and costs and no ability to increase profits through productivity improvements.

IV. DISCUSSION

A. Analysis of Factors

Section 2(3) of the Act excludes “any individual having the status of an independent contractor” from the definition of “employee.” The Board’s analysis of the common-law agency test used in determining whether an individual is an employee or an independent contractor is set forth in detail in today’s *Roadway* decision. See 326 NLRB No. 72, slip op. at 7–9. As we discuss in *Roadway*, the list of factors differentiating “employee” from “independent contractor” status under the common-law agency test is nonexhaustive, with no one factor being decisive.

Applying the common-law agency test to the facts of this case, we find that the factors weigh more strongly in favor of independent contractor status for Dial’s owner-operators. In the process of outsourcing its delivery functions, Dial has structured its relationship with the owner-operators to allow them (with very little external controls) to make an entrepreneurial profit beyond a return on their labor and their capital investment. The owner-operators arrange their own training, hire their own employees, and have sole control over and complete responsibility for their employees, including setting their terms and conditions of employment. Dial also plays no part in the selection, acquisition, ownership, financing, inspection, or maintenance of the vehicles used by the owner-operators. There is no minimum compensation guaranteed the owner-operators to minimize their risk of performing deliveries for Dial, and they can decline orders without penalty. The owner-operators are not required to provide delivery services each scheduled workday. In short, their separateness from Dial is manifested in many ways, including significant entrepreneurial opportunity for gain or loss.

The owner-operators have a separate identity from Dial that suggests independent contractor status. They have formed their own trucking companies and have filed applications with the state to transport Dial’s products. Many have state business certificates for their companies, while several of them function in the corporate form. The owner-operators maintain business checking accounts, often have their own company work uniforms, and file corporate tax returns. They also main-

tain workers’ compensation insurance and have business tax identification numbers. Contrary to the Petitioner’s contention, Dial treats its owner-operators as independent contractors in its dealings with the public. For example, Dial refers to its owner-operators as “independently owned and operated” or as an “independently owned and operated trucking delivery service” in forms supplied to its customers.

The contracts executed by the owner-operators contain several provisions that reflect the owner-operators’ independence from Dial. The contracts provide that the owner-operators shall hire their own employees, have sole control over and complete responsibility for them, set all terms and conditions of employment for them, and pay workers’ compensation for them. Under the contracts, neither the owner-operators nor their employees are subject to the work rules applicable to Dial’s employees. The contracts further obligate the owner-operators to pay for all fees, maintenance, and taxes related to the operation of their vehicles. They are directed by the contracts to have liability insurance naming Dial as additionally insured, and they must also indemnify Dial for various losses, injuries, or damages that may arise in connection with their performance of Dial deliveries. In contrast, in employer-employee relationships, employers generally assume the risk of these third-party damages, and do not require indemnification from their employees. Finally, the contracts express an intention on the part of the contracting parties to create an independent contractor relationship. The contracts declare that the owner-operators are not to be considered Dial’s employees.

Although Dial supplies its owner-operators with a few items such as credit card charge machines, spare bed frames, and two-way radios, the most costly piece of equipment used in making deliveries for Dial—the truck or van—is the owner-operators’ sole responsibility. Regarding their vehicles, the owner-operators have considerable freedom and flexibility indicating independent contractor status. Dial plays no role in the selection, acquisition, ownership, financing, inspection, or maintenance of the vehicles used by its owner-operators. Dial has no requirement as to the type, model, color, size, or condition of the owner-operators’ vehicles, and there is no fuel subsidy or maintenance services support package for the owner-operators. Each vehicle must display the name, address, and Department of Transportation number of the owner-operator’s company, not Dial’s name. In fact, the owner-operators are not required to display any Dial advertising on their vehicles, but almost all do so in exchange for an annual \$500 fee. The owner-operators may also use their vehicles for other purposes. For instance, two owner-operators have used their vehicles to make deliveries for other companies.

Several features of the owner-operators’ compensation plan provide support for independent contractor status.

Contrary to the Petitioner's contention, Dial does not unilaterally determine the owner-operators' income levels. The owner-operators may and do have more than one vehicle performing deliveries for Dial, and they may submit contract proposals or try to negotiate special pay deals for their individual companies. For example, three owner-operators have successfully negotiated reduced delivery rates in exchange for routes in certain geographical areas. Other potential indicators of independent contractor status are the fact that the owner-operators are paid solely for deliveries made or attempted and not by the hour or for reporting; they have no guaranteed minimum compensation; and they may not be paid for late deliveries, if the lateness is their fault. Dial also does not provide its owner-operators with any fringe benefits. It does not withhold any Federal, state, or local taxes from the owner-operators' checks, which are made payable to their companies. Dial issues IRS 1099 forms to the owner-operators, and it maintains a list of their tax identification numbers. In addition, the owner-operators are charged a fee, which is regularly deducted from their checks, for their use of restroom and lounge facilities at Dial's warehouse. The cost of similar privileges is not passed on to Dial's warehouse employees.

Another indicator of independent contractor status is the owner-operators' extensive control over their drivers and helpers. Every owner-operator has at least one employee, and without input from Dial, the owner-operators interview, select, hire, retain, compensate, and supervise their own drivers and helpers and solve all problems relating to them. The owner-operators follow no uniform pay rate and/or fringe benefit program for the drivers and helpers. Dial does not necessarily know the identity of these drivers and helpers because it does not maintain a list of drivers and helpers who are working for the owner-operators.

Several aspects of the owner-operators' daily work routine and schedule support an independent contractor finding as well. The owner-operators primarily work away from Dial's warehouse, and they are not directly supervised by Dial personnel. Indeed, the owner-operators need not be present at the warehouse or involved at all in the actual performance of services for Dial because Dial schedules the trucks, not the owner-operators, for work, and the owner-operators are free to hire others to actually load and drive their trucks if they so choose. Dial does not instruct them on which traffic pattern or route to take to make their assigned deliveries. After completion of all their scheduled deliveries, the owner-operators (or their drivers) are not required to return to Dial's warehouse.

The Petitioner, in arguing that other features of the owner-operators' working relationship more strongly weigh in favor of employee status, claims that the owner-operators may not refuse load assignments and may not deviate from preassigned route schedules. We find that

the record, as a whole, does not support either point. Regarding the Petitioner's first point, the testimony by owner-operators Straker and Beltran, relied on by the Petitioner, does not establish that owner-operators may not refuse loads. Straker refused to deliver a mattress at the customer's home because the delivery involved climbing eight flights of stairs. His refusal came well after he had already accepted the load assignment back at Dial's warehouse. Beltran testified that he was sent home one time by Dial when he refused a load assignment, but because Beltran never identified the period when this incident occurred, the Petitioner did not establish that this occurred after July 20, 1993, when it is alleged that the owner-operators became independent contractors.

With respect to the Petitioner's second point, the record shows that Dial allows the owner-operators to change the order of their deliveries, although the incentive to do so is small. Dial's dispatchers provide the owner-operators with a "suggested efficient sequence" of delivery assignments. These sequences order deliveries taking into account the customer's location and the customer's requested delivery time. If the owner-operators handle the orders according to Dial's schedule, they are less at risk of making late deliveries and Dial will not penalize them if they are late with some deliveries. If an owner-operator deviates from the "suggested efficient sequence," on the other hand, he may be penalized by Dial for late deliveries. Of critical importance to Dial is delivery at the time scheduled with the customers, a concern that supports its customer service strategy. Beyond that, Dial does not care if the owner-operator changes the delivery order, as evidenced by testimony by Barragan and Ramirez.

The Petitioner argues that Dial requires its owner-operators to comply with various policies. We find, however, that there is no evidence that the loading policy cited by the Petitioner has been followed by the owner-operators or enforced by Dial. We also find that the other policies referred to by the Petitioner are not at odds with an independent contractor relationship. Dial minimally requires that its owner-operators maintain a "clean attire" and avoid short sleeveless tee-shirts. This leaves the owner-operators with wide discretion in what they and their drivers and helpers wear. Many owner-operators have decided to supply their own company uniforms, while others dress more casually. Dial's policy of no drugs, alcohol, and gambling represents an effort to reduce potential liability if such activity occurs on or near its property. There is nothing in the record to indicate that Dial is interested in regulating such conduct if the activity occurs elsewhere or that it concerns itself with any other aspect of driver performance.

The Petitioner further argues that Dial imposes "discipline" on its owner-operators. Dial has imposed 1-day suspensions on owner-operators for various infractions as

described earlier in our decision, and we agree that this discipline tends to weigh in favor of finding employee status. However, the record shows that the owner-operators enjoy certain freedoms and bear certain risks that are more consistent with the operation of an independent business. The owner-operators are paid a flat fee for each completed delivery, and the record shows that the amounts have been changed by negotiation. In addition, they have no guaranteed minimum compensation. Dial has no mechanisms or programs that guarantee a certain level of income for the owner-operators, that provide maintenance of their vehicles, or that facilitate the acquisition or transfer for their vehicles.

Significantly, several owner-operators use more than one delivery vehicle and employ at least one driver as well as helpers, and at least three owner-operators do not even drive but operate solely as entrepreneurs. All owner-operators have complete authority regarding the hiring, firing, supervision, and payment of their drivers and helpers. In addition, the owner-operators bear the risk of loss when damage to Dial's merchandise or the customer's home is attributed to them (or their drivers) or their helpers. The owner-operators may perform additional work for customers for separate payment. They are also free to work for other companies and use their trucks for personal business. Some have taken on delivery work for other business concerns.

The Petitioner argues that the owner-operators cannot be found to be independent contractors unless they set prices for Dial's merchandise, cultivate business for Dial, work for Dial competitors, and have a proprietary interest in their routes. Such factors, if present, might enhance the owner-operators' opportunity and ability to increase their profits and decrease their losses, but the absence of these factors is not incompatible with a finding of independent contractor status since Dial chose to outsource only its delivery—and not its sales or marketing—functions. Had Dial contracted with a single national parcel delivery company to handle all its deliveries, it could not be seriously argued that the company performing the delivery service was not an independent contractor because it did not sell or price Dial's merchandise. The issue is the owner-operators' control over the functions which it contracted to perform.

Dial's owner-operators have the freedom to negotiate special deals like those obtained by the owner-operators of Ish's, Singh's, and TDJ. Contrary to our dissenting colleague, this demonstrated freedom does not become illusory simply because Dial rejected offers from other owner-operators under different circumstances. There is no indication from the record that Dial will not entertain proposals from other owner-operators in the future which Dial considers more favorable than its existing arrangements for the territory in question. It is plain that all owner-operators remain free to propose a better business deal for them and Dial in the future, and the multiple

truck ownership of several owner-operators suggests that the standard arrangement offered sufficient incentives for them to want to expand their businesses.

B. Roadway Distinguishable

Contrary to our dissenting colleague, our finding of independent contractor status for the Dial owner-operators is consistent with today's decision in the companion *Roadway* cases. In several significant respects, the Dial owner-operators differ from the *Roadway* drivers.

Unlike here, *Roadway* provides its drivers with a vast array of support plans to reduce risk in the performance of their deliveries and pickups for *Roadway*. The amount of income for the *Roadway* drivers is based, inter alia, on a "guaranteed" van availability settlement and a temporary core zone settlement determined by *Roadway's* estimate of what is a "normal" level of packages and pickup and deliveries for the drivers. The *Roadway* drivers' pay is also curtailed by the operation of *Roadway's* "flex" program where overflow work in a driver's service area is transferred to other drivers. Thus, the elements of *Roadway's* compensation plan, in effect, result in both minimum guarantees and effective ceilings for its drivers.

In contrast to Dial's indifference about the size, color, or type of vehicles used by the owner-operators, *Roadway* provides its drivers with assistance in acquiring new or leased custom designed specialty vans through its arrangement and promotion of the Navistar vans distributed by Bush Leasing. *Roadway* also eases its drivers' burden of obtaining a used vehicle from former *Roadway* drivers. To meet these initial vehicle costs, *Roadway* offers a startup loan to its new drivers. The *Roadway* drivers also have a "business support package" to help ensure that their vehicles are properly maintained and covered by specific warranties.

Roadway also exercises more control over its drivers' manner and means of accomplishing their work than Dial does here. The *Roadway* drivers are required to provide delivery services each scheduled workday. They cannot refuse to deliver or pick up packages in their primary service area without being subject to possible termination of their operating agreement with *Roadway*. *Roadway* also controls the appearance of its drivers and their vehicles. For instance, *Roadway* drivers are required to wear a specified uniform of a certain type and color, displaying the *Roadway* logo. Furthermore, the *Roadway* drivers do not have the attributes of entrepreneurship possessed by the Dial owner-operators. The *Roadway* drivers do not use multiple trucks or hire helpers or drivers to allow them to pursue other business ventures and opportunities. There is no evidence that the *Roadway* drivers can negotiate the type of special deals acquired by the three owner-operators of Ish's, Singh's, and TDJ here.

V. CONCLUSION

For the foregoing reasons, the Dial owner-operators are independent contractors rather than employees within the meaning of Section 2(3) of the Act. Accordingly, we shall reverse the Regional Director's Decision and remand the case to him for further proceedings consistent with our Decision on Review.

ORDER

The case is remanded to the Regional Director for further proceedings consistent with our Decision on Review.

CHAIRMAN GOULD, dissenting.

Dial-A-Mattress' arrangement with its owner-operators at issue here presents a stronger case against finding independent contractor status than in the companion *Roadway*¹ cases, decided today, where my colleagues and I agree employee status has been established. I am, therefore, baffled by their decision to reverse the Regional Director's determination in the instant case that the owner-operators are not independent contractors. In my view, they reach this decision only by overemphasizing certain factual differences between Dial's owner-operators and Roadway's drivers and ignoring or unduly limiting the significance of other important indicators of employer control. And they fail to take into account the "powerful incentives" that some employers have not to characterize individuals as employees in order to evade the strictures of employment laws like the National Labor Relations Act.² We must be ever mindful to avoid the exaltation of the form of what appears to be an independent contractor relationship over the substance of employer-employee reality.

Regarding the question whether individuals are independent contractors or employees within the meaning of Section 2(3) of the Act, the Supreme Court stated "there is no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no one factor being decisive."³ After assessing all the factors involved in a relationship according to the principles of the common law of agency, the scales will weigh toward a

¹ See my separate concurrence in *Roadway Package System*, 326 NLRB No. 72, slip op. at 14.

² Cf. Peter J. Keith, *Contracts—Independent Contractor Agreements—Ninth Circuit Finds That Misclassified Employees Are Eligible For Federally Regulated Employee Benefits—Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (en banc), 111 Harvard L. Rev. 609 (1997):

Federal employment law protects employees. Corporations recognize this fact as more than just a truism: employers have powerful incentives to call workers anything but "employees" in order to avoid the panoply of federal laws regulating the employment relationship. The independent contractor agreement is a popular, if not always successful, way to avoid the "employee" label. [Footnotes omitted.]

³ *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 260 (1968).

relationship between two businesses or one between employer and employee. Here, I find, in agreement with the Regional Director, that the scales conclusively weigh toward a finding of employee status.⁴

There are a number of areas where Dial has exerted significant control over the manner and means used by the owner-operators in timely delivering mattresses. Such control traditionally points toward an employer-employee relationship.

Dial assigns geographic areas in which the owner-operators make deliveries. These areas are completely within Dial's discretion and are subject to change on a daily basis. Dial prepares a schedule for the owner-operators' arrival for loading. Those who arrive after their scheduled loading time must wait until the end of the day and risk receiving no work. In one case, Dial suspended an owner-operator who failed to report for loading at his scheduled time.

Dial also prepares a route sheet for each owner-operator which lists the order in which deliveries are to be made for the day. The record shows that Dial issued verbal warnings to owner-operators concerning their failure to follow the order of deliveries. Dial also requires that the owner-operators call in to the dispatch office after each delivery. It has suspended owner-operators who failed to follow the call-in policy. Dial has also suspended an owner-operator who refused to make one scheduled delivery.

Dial has disciplined owner-operators in other ways. It suspended owner-operators who failed to deposit COD money in the bank and to return certain merchandise to the Employer's facility. In addition, it terminated the contract of an owner-operator who had a physical confrontation with another owner-operator in a diner off Dial's premises.

It is, therefore, apparent that Dial makes considerable demands concerning the manner in which the owner-operators perform their work. Further, it assures these demands are met by imposing suspensions for failure to meet its demands. In my judgment, this interaction between Dial and the owner-operators weighs heavily toward a finding of employee status.

The owner-operators are not only subject to the above-described controls, they also have little opportunity to engage in entrepreneurial activities which could increase their opportunity for profit. They have no input into Dial's pricing for merchandise. They do not cultivate customers for Dial. Indeed, they have no choice of customers at all. Dial's dispatch department exclusively controls the number and location of customers assigned to the owner-operators. Further, the owner-operators do not have a particular route they service and cannot bid on

⁴ While I recognize that the supervisory status of Dial's owner-operators has not been determined, I will refer, for ease of discussion, to the "employee status" of the owner-operators to reflect my view that they are not independent contractors.

any customer deliveries. Instead, they may be assigned to any route within Dial's entire New York metropolitan territory and service a different route from day to day.⁵

Although the owner-operators own their trucks and do not have to display Dial insignia, the record shows that virtually all of them use their trucks solely to service the Employer. The Regional Director found that the probative evidence shows that only Singh's⁶ and Easy Save service other employers. Even so, they service Dial 90–95 percent of their time. There is, therefore, little or no opportunity to increase profits by performing services for Dial's competitors or for other businesses. In my opinion, this factor strongly favors a finding of employee status.

Based on the above factors, I find a striking similarity between *Roadway* and *Dial*. Both *Roadway* and *Dial* have considerable control over their delivery personnel's work schedules, compensation, and customers. Both have owner-operators who primarily work for them and service customers and delivery areas that are assigned by them.

While these features resulted in a finding of employee status in *Roadway*, my colleagues appear to view the same factors in a different light here. They cite other factors which distinguish *Dial* from *Roadway*. For the reasons stated below, I do not agree that *Dial* is distinguishable. Further, I find that many of the factors cited by my colleagues actually favor a finding that the owner-operators in the instant case are employees rather than independent contractors.

My colleagues find that the owner-operators have a separate identity from Dial that suggests independent contractor status. They emphasize that owner-operators have formed their own trucking companies and have filed applications with the state to transport Dial's products. The record shows, however, that Dial was involved in each of these actions by the owner-operators.

In 1993, Dial used a telemarketing campaign requiring a fleet of owner-operators to act as its authorized carriers. At this time, drivers employed by Dial formed their own companies and filed applications with the New York State Department of Transportation for authority to transport passengers or property. The Employer filed public statements in support of each application. In a decision issued by a New York State Department of Transportation Administrative Law Judge, the 37 companies formed by former drivers of Dial were authorized

to transport commodities dealt in and used by Dial. The judge's decision states that prior to the 1993 telemarketing campaign, authorized carriers were not necessary.

From these facts, it is clear that the decisions to form companies and to file applications to transport Dial's products were prompted by Dial and its telemarketing campaign. If the drivers wanted to continue to work for Dial, they had to take these necessary steps. These actions by the owner-operators, therefore, show a connection to and dependence on Dial rather than an independent identity.

My colleagues also make much of the fact that the owner-operators hire their own helpers for whom they alone pay benefits, workers' compensation insurance, and the like. Yet once again, Dial is involved in a way that suggests an employment relationship. First, Dial imposed the requirement that owner-operators hire helpers. Second, there is evidence that in one case Dial did not like the helper an owner-operator had hired as a substitute for his regular helper. Dial told the owner-operator that he could not work if he failed to replace the substitute. Finally, there is evidence that an owner-operator was suspended for one day because he did not have enough money to pay for workers' compensation insurance. Dial then loaned the owner-operator \$800 to pay for the insurance. Thus, it appears that Dial and the owner-operators in truth do not have an arm's-length relationship with regard to the owner-operator's helpers.

My colleagues point to aspects of the daily work routine which they find supportive of independent contractor status. They assert that the record as a whole shows that the owner-operators may refuse load assignments and may deviate from the route schedules assigned by Dial. While it is true that owner-operators have refused load assignments and have deviated from the assigned route schedules, it is also true that they have been penalized for doing so by receiving suspensions. Suspension is a serious penalty; it entails loss of income. That the suspensions are not part of a progressive discipline program and do not affect the renewal of contracts with the owner-operators does not mean that they show no control over the manner in which the owner-operators deliver mattresses. To the contrary, imposing a loss of income for 1 day or more is a powerful means of controlling the way work gets done.

My colleagues note that the owner-operators primarily work away from Dial's warehouse and are not directly supervised by Dial personnel. However, drivers always primarily work away from warehouses regardless of their status. While the owner-operators may not be supervised directly by Dial, they must call in to Dial at each delivery. This frequent contact with Dial during the workday is essentially required by Dial. The owner-operators face suspension if they do not comply. Such frequent, required interaction with Dial clearly favors a finding of employee status.

⁵ See *NLRB v. Amber Delivery Service*, 651 F.2d 57, 62 (1st Cir. 1981), enfg. 250 NLRB 63 (1980) (The fact that distribution drivers retain "no proprietary interest in their respective delivery routes" also indicates an employer-employee relationship, as does the evidence that the customers are Amber's and that the drivers do not participate in the negotiation of rates for new clients.)

⁶ As discussed more fully below, Singh's is one of three companies excluded from the unit by the Regional Director on community of interests grounds and conceded by the Petitioner to be independent contractors.

My colleagues also stress that the owner-operators are not required to return to the warehouse at the end of the day of deliveries. They find this to be a factor favoring independent contractor status. I hold a different view. The owner-operators do not have to return to the warehouse because Dial issues them a bank card and deposit slips bearing Dial's name and bank account number so that the owner-operators may deposit cash into Dial's account on a daily basis. They must submit the deposit slips the following morning. Failure to return to Dial's facility the next day with the total amount listed on the daily driver log results in withdrawal of permission to load for the day. Consequently, the freedom not to return to the warehouse at the end of the day does not constitute freedom from end-of-the-day responsibilities toward Dial.

Regarding the subject of vehicle ownership, my colleagues place great significance on the fact that Dial, unlike Roadway, plays no role in the acquisition, selection, and financing of the owner-operators' vehicles. However, in the absence of other indicia of the operation of an independent business, truck ownership alone does not automatically turn the truckdriver into an entrepreneur.⁷ I find that Dial's lack of a role in financing or selecting the vehicles does not change the nature of the truck ownership at issue here. I see no reason to distinguish this case from those, cited above, finding employee status for drivers who owned their vehicles.

With respect to entrepreneurial activities, my colleagues assert that the Dial owner-operators have more opportunities than the Roadway drivers. They argue that the owner-operators have the potential to negotiate special deals for their companies and to work for other companies. This argument relies heavily on the actions of Ish's, Singh's, and TDJ. However, these companies, in contrast to others at issue here, involve significantly larger operations. Each owns 7 to 10 trucks and employs some 12 employees. Each negotiated a guaranteed route⁸ with Dial in exchange for reduced delivery fees. Dial posts a separate work schedule reserved only for these three companies. Because of these differences between Ish's, Singh's, and TDJ and the other owner-operators, the Regional Director excluded the three companies from the unit on community of interests grounds. I agree with the Regional Director's analysis and, therefore, find that my colleagues err in considering facts concerning Ish's, Singh's, and TDJ in determining the status of the owner-operators.

Nor can I agree with my colleague's finding that other owner-operators have the freedom to negotiate the type

of special deals obtained by Ish's, Singh's, and TDJ. This so-called freedom is more illusory than real. The record shows that around November 1993 owner-operators Hector Mendez, Herberto Melo, and Hernan Moreno, each of whom had their own companies, formed another company called Sky Fox, Inc. (Sky Fox) for the purpose of attempting to secure a route agreement like those obtained by Ish's, Singh's, and TDJ. Sky Fox was not able to get a route agreement. Around the same time period, Dial also rejected proposals for guaranteed routes from AB Services, FE Services, LaMirage Trucking, and Seven Wheels Express. Thus, when owner-operators tried to increase their opportunities for profit by seeking special arrangements with Dial, they were not successful. In fact, other owner-operators do not have the same opportunities afforded Ish's, Singh's, and TDJ.

In terms of the ability to increase profits, this is a much weaker case for finding independent contractor status than *Roadway*. The Roadway drivers had some choice, albeit marginal, in their customers because they were assigned to a specific geographical service area and these areas could, theoretically, be bought and sold by drivers. In contrast, Dial owner-operators have no assigned routes and no choice of customers. Their compensation is controlled essentially by Dial which has total discretion over which route they drive and how many customers they service each day. To the extent that my colleagues assert that the owner-operators have the opportunity to negotiate separate deals, or the freedom to service other customers because of the size of their operations, they principally rely on the activities of Ish's, Singh's, and TDJ, the three companies properly excluded from the unit by the Regional Director.

Finally, the ability to hire helpers has no significant impact on the owner-operators' opportunity to increase profits or reduce business expenses. The work performed by the helpers is not complicated and the compensation paid to them falls within a limited wage range that is essentially dictated by Dial's exclusive control over the customer prices. The owner-operators are paid a fee unilaterally determined by Dial. They are compensated even if Dial loses money on the owner-operators' routes for that day because, for example, none of the customers are home to accept delivery. On the other hand, the owner-operators have no way to increase their compensation by charging the customers a higher delivery rate or any additional fee for quicker service. Helper assistance, therefore, does not significantly increase entrepreneurial opportunities.

Reviewing all the factors, I find that they decisively favor a finding of employee status. Thus, Dial's control of the route schedules, call-in requirements, demand that owner-operators be present when scheduled for loading and not refuse to make any deliveries, discipline through suspension of owner-operators who fail to meet its demands or follow its policies, involvement with the selec-

⁷ See, e.g., *Adderley Industries*, 322 NLRB 1016 (1997); *R.W. Bozel Transfer*, 304 NLRB 200 (1991), and *Exhibition Film Delivery & Film Delivery*, 247 NLRB 495 (1980) (cases where the Board found employee status for drivers who owned their own trucks).

⁸ For example, all Long Island deliveries go to Ish's and all Westchester County and Connecticut deliveries to Singh's.

tion of helpers and payment of workers' compensation insurance, and the absence of genuine opportunities to engage in entrepreneurial activities vastly outweigh any factors which might suggest independent contractor status. In my view, there is simply no meaningful difference between the owner-operators here and those in *Roadway*. In neither case can it be said that the essential nature of the relationship between the owner-operators and the Employers is that of business to business rather than employer to employee. I would not find independent contractor status in either case. In the instant case, I would remand the proceeding to the Regional Director to determine the supervisory status of the owner-operators and the unit composition and scope among the petitioned-for employees.

APPENDIX

REGIONAL DIRECTOR'S DECISION

....

The Petitioner seeks to represent all owner drivers, drivers, and drivers helpers' employed by the Employer at its Long Island City facility. The Employer contends that the petitioned-for owner drivers, also known as owner-operators, are independent contractors and not employees of the Employer. In its brief, the Employer argues that the owner-operators purchase and bear all costs incidental to their ownership of their trucks, hire drivers and helpers to assist them, and are responsible for their employees' training, wages, benefits, and workers' compensation insurance. The Employer also asserts that even if the owner-operators are employed by the Employer, they are supervisors within the meaning of the Act inasmuch as they supervise their drivers and helpers. The Employer asserts that it does not employ either the owner-operators or their drivers and helpers, thus, an election should not be directed in the petitioned-for unit.

In its brief, the Petitioner argues that the Employer controls the manner and means by which the owner-operators deliver the Employer's product. The Petitioner contends that the Employer sets the schedule of starting times, assigns the daily routes, specifies the order of the routes, and resolves all problems arising from the owner-operators' deliveries. The Petitioner also contends that the owner-operators drive exclusively for the Employer and remain in frequent contact with the Employer during the day. With respect to the Employer's contention that the owner-operators may be supervisors, the Petitioner argues that the independent contractor relationship "is a sham, and . . . the owner-operator's exercise of supervisory functions is mandated by the Employer to maintain the charade that owner-operators" are independent.³

Based on the record as a whole, I find, for the reasons set forth below, that the owner-operators are not independent contractors. I note, however, that the Employer, in its brief, argues, in the alternative, that the owner-operators are supervisors within the meaning of Section 2(11) and, therefore, an election in a unit including such individuals is unwarranted.⁴ My review

³ See Petitioner's brief.

⁴ The Employer's Sec. 2(11) argument presumes that the owner-operators are employed by the Employer as supervisors, and that the owner-operators supervise the Employer's employees, namely, the

of the record indicates that there is insufficient evidence to resolve this issue and a related inquiry, that is, if the owner-operators are employees and not supervisors, do their helpers share the requisite community of interest with them to warrant the inclusion of these employees in the unit sought? While the continued pendency of such issues ordinarily mandates the reopening of the record to adduce evidence with respect to these matters, I have decided to defer that action at this time. If any party to this proceeding seeks review of my determination that the owner-operators are not independent contractors and the Board were to disagree with that finding, then additional record evidence regarding their 2(11) status would be unnecessary. Accordingly, before I order the re-opening of the record, I will await either of two events: (1) no party files a request for review, or (2) in the event review is sought, the Board affirms my determination that the owner-operators are not independent contractors. By proceeding in this fashion, the Board and the parties will be spared the cost and inconvenience of reopening the record if such action proves to be unnecessary.⁵

Notwithstanding their differences concerning the status of the owner-operators, the parties agreed that there are about 103 individuals in the petitioned-for unit, and that the following employees should be excluded from the unit: all warehouse employees, warehouse clerical employees, customer sales consultants, dispatchers, managers, confidential employees, guards and supervisors as defined in the Act.⁶ There is no collective-bargaining history in the petitioned-for unit.

The Employer has been in business since 1976 and currently leases a two story building in Long Island City, New York. The ground level is a 50,000 square foot warehouse and the second floor consists of 12,000 square feet of office space. The Employer employs about 300 employees in its warehouse, sales, accounting, advertising and marketing, telecommunications, computer, and legal departments.

The Employer's Chief Operating Officer Luis Barragan testified about the Employer's operations. Barragan reports to General Manager Joe Vincens. The Operations Division, comprised of seven departments, reports directly to Barragan. The seven departments comprising the Operations Division are: inventory control, merchandising, purchasing, driver operations, dispatching, distribution center management, and maintenance. Maricio Farigua heads the driver operations department, Nelson Pagan heads the distribution center management department, and Scott Lanceford heads the dispatching department.

In addition to the Operations Division, there are 10 divisions in the following areas: finance, marketing, advertising and public relations, external markets, new business development, sales and customer service, information services, information tech-

helpers. The corollary to that argument is that the owner-operators and helpers are all employed by the Employer.

⁵ *The President and Fellows of Harvard College*, 229 NLRB 586 (1977).

⁶ The day that the instant petition was filed, the Petitioner also filed a petition in Case 29-RC-8441, seeking to represent employees employed by the Employer in the warehouse. The parties entered into a Stipulated Election Agreement and on April 7, 1995, an election was held in the following unit: all full-time and regular part-time warehouse employees, warehouse clerical employees and warehouse team leaders employed by the Employer, excluding office clerical employees, customer sales consultants, dispatchers, owner-operators, drivers, helpers, managers, confidential employees, guards and supervisors as defined in the Act. On April 13, 1995, in the absence of objections to the conduct of the election, I issued a Certification of Results.

nologies, human resources, and training and development. Tony Santano heads the finance department and Zoraida Cook heads the human resources department. It is undisputed that the human resource department does not maintain personnel files for the owner-operators or issue Immigration I-9 or IRS W-4 forms thereto, as it does with its undisputed employees.

The evidence showed that some time in 1993, the Employer commenced a telemarketing campaign aimed at selling its products, via telephone sales, to customers primarily in the New York City metropolitan area. According to Barragan, the advertising and public relations departments are responsible for conveying information about the Employer's product to the public. The Employer's bedding consultants answer telephone calls from customers inquiring about certain product types, sizes, availability, and price range. If the customer purchases the Employer's merchandise, the bedding consultant generates an invoice through the Employer's computer system. The invoice contains the customer's name, address, home and business phone, item ordered, method of payment, i.e., credit card, cash or check, the name of the employee approving the method of payment, and date and time of delivery.⁷ The Employer guarantees delivery within a time frame designated by the customer. The time of delivery is conveyed on the invoice by an "alpha code" system: letter codes "M," "A," "E," and "L" denote morning, afternoon, evening, and late evening, respectively. The letter codes are followed by a time range, i.e., L10-2, informing the driver that the customer requested a late evening delivery between 10 p.m. and 2 a.m.

Barragan testified that all invoices are forwarded to the dispatch department and the warehouse. The employees in the dispatch department review the invoices and "batch" them into a route known as a daily driver log.⁸ The daily driver log is compiled from information on the invoices. According to Barragan, the daily driver log is arranged based on the customers' requested delivery times. The daily driver log lists seven "stops" which are the scheduled deliveries for that day. The daily driver log contains seven customer names, their phone numbers, addresses, item description and number, number of pieces, payment type, and amount due. A "final total" is computed by adding all of the amounts due for all the customers listed on the daily driver log. The stops on the daily driver log are listed in numerical order from one through seven; the first customer on the daily log is stop number one, the second customer is stop number two, and so on. Adjacent to the stop number is the time of delivery alpha code, which comes from the invoice. When the daily driver log is complete, the invoices related thereto are attached and the daily driver log is assigned to an owner-operator.

While the dispatch department composes the daily driver log, the Employer's warehouse personnel select the purchased merchandise from the warehouse and bring it to the loading dock. At the loading dock, the owner-operator inspects the merchandise for damage. The owner-operator's helper⁹ assists in loading the merchandise onto the truck. Each truck has a "recognition code," a two or three digit number, on the back panel of the

truck.¹⁰ When the merchandise is loaded onto a truck, the truck number is written on the daily driver log so that an order may be traced to the truck carrying the customer's merchandise. After the truck is loaded with the merchandise for all the deliveries listed on the daily driver log, the owner-operator or his driver commences the deliveries for the day.

Barragan also testified that sometime in 1993, around the same time that the Employer's telemarketing campaign began, the drivers employed by the Employer formed their own companies. Due to the commencement of its 1993 telemarketing campaign, the Employer required a fleet of owner-operators to act as its authorized carriers to meet its special delivery needs.¹¹ In or about July 1993, about 37 former employees of the Employer who had driven its delivery trucks filed applications with the New York State Department of Transportation for authority to transport passengers or property. The Employer filed public statements in support of each company's application.¹² On or about July 20, 1993, the 37 companies were authorized by the New York State Department of Transportation to transport commodities dealt in and used by the Employer.

Currently, there are 39 owner-operator companies delivering the Employer's products to its customers. Each owner-operator executed a contract with the Employer.¹³ Annexed to each contract is a map of the Employer's geographical zones and its rate schedule. The Employer admits that the contracts, including the geographical zones and rate schedules, are identical with the exception of the rate schedules and zones for Ish's Trucking, Inc., Singh's Express, Inc., and TDJ Santiago Corp. The contracts among the owner-operators and the Employer were executed on various dates in late August or early September 1993. The contracts were effective for 1 year, although "[t]he Employer and the owner-operator each retain the right to terminate the agreement on twenty-four hours notice." The contract also provides for automatic renewal for successive 1 year periods "unless either the Employer or the owner-operator gives the other written notice of its election not to renew prior to the termination of the initial or any renewal agreement." Although each owner-operator signs his personal name on the signature page of the contract, the owner-operator's company name or personal name is not typed anywhere on the signature page of the contract. Rather, each owner-operator signed the contract under a heading entitled "OWNER-OPERATOR." Barragan's name and title are typed below his signature.

In late December 1994 or early January 1995, each owner operator executed an addendum to the above-noted contract.¹⁴ The addendum automatically extended the contract terms from year to year unless terminated by either the Employer or the owner-operator in accordance with the terms of the contract. Each owner-operator signed his personal name, but neither his

¹⁰ According to Barragan, the recognition code is placed on the truck by the owner-operator, or by the Employer's dispatcher at the owner-operator's request.

¹¹ See P. Exh. 33, a New York State Department of Transportation Administrative Law Judge's decision authorizing the owner-operators as "carriers." The Employer stipulated that the document is an official document. The ALJ's decision states that prior to the commencement of the 1993 widespread telemarketing campaign, authorized carriers were not necessary. The decision does not make any finding concerning the authorized carriers' prior employee status.

¹² See P. Exh. 39 and E. Exh. 45.

¹³ See E. Exh. 26.

¹⁴ Id.

⁷ See P. Exh. 22.

⁸ See P. Exh. 12.

⁹ The Employer's warehouse employees do not assist in loading the merchandise onto the owner-operator's truck.

name, nor the name of his company, are typed on the signature page. Barragan's name and title are typed below his signature.

The Employer's brief relies heavily on the contractual language as evidence of the parties' intention to create an independent contractor relationship. In this regard, the Employer points to sections 3, 4, 5, 8, 10, 12, and 15 of the contract which state, *inter alia*, that each owner-operator hires its own employees; sets all terms and conditions of employment therefor; pays for fees, maintenance, and taxes related to its equipment; bears all general selling costs, including insurance, naming the Employer as additionally insured; receives no guarantee of minimum compensation; directs its operation and staff; determines the method, means and manner of performance; and acknowledges an independent contractor relationship.

The contract states, and it is undisputed, that the Employer does not hold the title to the owner-operators' trucks and does not pay for certain expenses related to the operation of the trucks, including gasoline, repairs, inspection, permit, license, or registration. The Employer has supplied all owner-operators with plastic credit card charge machines to generate credit card slips, spare bed frames, plastic bags, and two-way radios, without cost to the owner-operator. Barragan testified that the owner-operators do not pay for the two-way radios or the bed frames unless they are lost or damaged. The record evidence also showed that the Employer posts a "driver checklist," in the warehouse requiring that the owner-operators, drivers and helpers carry certain items supplied thereto at no cost by the Employer, including a center bar support, clamps, door hangers, bolts, screws, and an extra bag of wheels.¹⁵

The contract between the Employer and the owner-operators states that the "owner-operator shall display the Employer's insignia on its truck only when performing services under this Agreement." Despite the foregoing language, Barragan testified that owner-operators may deliver and transport the goods of other enterprises while displaying the Employer's advertising. With the exception of seven vehicles,¹⁶ all other vehicles delivering the Employer's goods display the Employer's advertising. The Employer pays each owner-operator \$500 per year for each truck displaying its advertising. The check for advertising is made payable to the owner-operator company. The record evidence showed that about four owner-operators executed advertising contracts with the Employer.¹⁷

As noted above, in or about July 1993, each owner-operator received a New York State Department of Transportation permit number authorizing them to carry the Employer's goods. The record evidence established that each owner-operator owns his own trucks. It is undisputed that the Employer does not inspect the trucks or choose the truck type. Each owner-operator displays his company's name, address, and Department of Transportation number on the truck's cab doors as the Employer has informed the owner-operators in writing that they may not load their trucks with the Employer's merchandise unless they do so.¹⁸

Barragan testified that the Employer pays its employees and the owner-operators on alternating Fridays. The owner-operator

is paid for each delivery made in accordance with the schedule of rates attached to the contract. The Employer's check is made payable to the owner-operator's company and not the owner-operator himself. The Employer does not withhold Federal, state, or local taxes from the check issued to the owner-operator. The Employer issues IRS 1099 forms to each owner-operator and maintains a list of the owner-operator's tax identification numbers.¹⁹ As per the contract between the owner-operators and the Employer, each owner-operator maintains liability and workers' compensation insurance policies with the State Insurance Fund, which company also insures the Employer's warehouse employees.²⁰ The Employer maintains a list of the owner-operator's insurance policy numbers.²¹

As noted above, there are currently about 39 owner-operator companies performing delivery services on the Employer's behalf. In total, there are about 65 trucks and 7 vans delivering the Employer's products.²² Most owner-operators own only one truck, drive their own truck and employ one helper to assist them. Singh's Express, Inc., (Singh's), and Ish's Trucking Inc., (Ish's), own 6 trucks each, and TDJ Santiago, Corp., (TDJ), owns 10 trucks.²³ The record evidence showed that LB Trucking, Fast Freight Trucking, War Betty Trucking, Garcia Trucking, Edward Trucking and R & G Trucking own two trucks each and employ one driver and one helper for each truck.²⁴ Although the Petitioner's brief states that no owner-operator owns more than two trucks, Petitioner's Exhibit 7 shows that two owner-operators own three trucks each (Rambo Trucking and JR Service) and three owner-operators own one truck and one van each (LAO Lazo Service, JM Delivery Service and TNA Trucks). While most owner-operators act as the driver for their own trucks, the evidence showed that three owner-operators, AB Services, LB Services, and Easy Save Trucking, do not drive their trucks. Rather, each employs a driver for his truck. It is unknown which owner-operators employ additional drivers.

Barragan testified that the Employer maintains a schedule of starting times ranging from 5 a.m. to 8 p.m.²⁵ The work schedule identifies each company's truck number, the time each truck is scheduled to arrive at the Employer's facility for loading, and the days that each truck is not scheduled to work. According to Barragan, each owner-operator has agreed to arrive at the scheduled times and each has the opportunity to refuse to load their trucks at any time. Barragan testified that failure to appear as per the scheduled arrival time does not result in any penalty or preclude the owner-operator from working the following day. If an owner-operator does not appear with his truck as scheduled, the Employer offers the day's work to the next owner-operator listed on the schedule. If an owner-operator

¹⁹ E. Exh. 8.

²⁰ See testimony of General Counsel Michael Stern.

²¹ E. Exh. 5. In-house counsel Michael Stern testified that owner-operator Zuluaga of Zutra Trucking protested that he had to pay workers' compensation insurance for his helper as he asserted that his helper is an "independent contractor."

²² This figure is calculated by comparing E. Exh. 13B, an updated advertising list with P. Exh. 7, a January 1995 schedule showing the number of trucks and vans.

²³ The Petitioner asserts that Ish's, Singh's, and TDJ are independent contractors.

²⁴ See P. Exh. 7, E. Exh. 8, and the testimony of owner-operator Ramirez and helper Cano.

²⁵ See P. Exh. 7.

¹⁵ See P. Exh. 34 and owner-operator Ramirez' testimony.

¹⁶ From E. Exh. 13B. Although the Petitioner's brief states that all but three vehicles display the Employer's advertising, the exhibit does not confirm that figure.

¹⁷ See E. Exh.s 9 to 12. The testimony of the owner-operators suggests that more than four of them executed advertising agreements.

¹⁸ P. Exh. 20.

uses another driver to drive his truck, the Employer requires that it be notified in advance for "security reasons."²⁶

With regard to the Employer's rules and regulations for loading the Employer's products, it is undisputed that the Employer has a "Loading Procedures" form located near the window of the dispatcher's office. The form states, *inter alia*, that: failure to provide a schedule of availability at least 24 hours in advance will result in a 2-day suspension; rotation for loading is based on seniority; late drivers load after the drivers who arrived as scheduled; consistent or pattern lateness will result in a lost position on the schedule; and drivers with disagreements about loading direct their grievances to the dispatching department, which maintains a log of the grievances.²⁶

As noted above, the dispatch department batches the invoices into daily driver logs, also referred to as the route sheet. Thereafter, the route sheets are assigned to the owner-operators. With the exception of Ish's, Singh's, and TDJ, the owner operators receive different routes every day and deliver to different areas of the metropolitan area. Barragan testified that the owner-operators have an opportunity to review the route sheet and may refuse to deliver to certain areas listed thereon without penalty. With regard to the chronology of the daily driver log, Barragan testified that the order of deliveries are a "suggested efficient sequence" of deliveries based on the customers' requested delivery times; most owner-operators do not follow the order of deliveries listed on the daily driver log; the owner-operators need not seek permission from the Employer to deviate from the route; and the owner-operators may deviate from the order of the route sheet without penalty, provided that each delivery is made on time. According to the Employer, its only requirement is that the owner-operator telephone the Employer when a problem arises with a delivery.

According to Barragan, the owner-operators have been instructed to call the Employer at every stop so that the Employer may convey to an inquiring customer the location and estimated time of arrival of a delivery. When calling the Employer's facility, the owner-operators communicate with the driver operations department, headed by Maricio Farigua. The record evidence showed that the Employer notified the owner-operators, in writing, that failure to follow the call-in procedure could result in termination of the owner-operator's services.²⁷ The driver operations department maintains contact between the Employer's customers and the owner-operators. This department maintains handwritten logs of calls of incoming calls from the owner-operators.²⁸ This log is called the Driver Operations Log which records the time an owner-operator telephoned with a problem, the invoice number involved, a description of the problem, and the truck number. Such problems listed on the Driver Operations Log include incidents where a customer refused the merchandise because it was the wrong size, the customer is not home or the customer canceled the order. When the owner-operator indicates that the merchandise will be returned to the Employer's warehouse, the Driver Operations Log states "MCB": merchandise is coming back. When a driver calls for approval of a check or credit card, the driver operations department provides the approval, records the approval code in the log, and initials the approval code.

²⁶ See P. Exh. 35.

²⁷ See P. Exh. 29. Owner-operator John Beltran testified that Employer representative Jorge Toro gave him P. Exh. 29 and he saw it posted near the loading area.

²⁸ See P. Exh. 37.

In support of its contention that the owner-operators are not required to follow the numerical sequence of the daily driver log, the Employer produced a document dated April 22, 1995, which it printed from its computer program.²⁹ The document looks very similar to the daily driver log in that it numerically lists the deliveries, the invoice number, the customer's name and home phone number, time of delivery alpha code, and city. Employer's Exhibit 46 shows that truck number 39 was assigned that route and has a column entitled "complete," which notes the time that the owner-operator reported the delivery to the Employer as complete. By reviewing the completion times on Employer's Exhibit 46, it can be seen that truck number 39 did not deliver in the numerical order listed by the dispatch department on the route sheet. Barragan testified that the Employer does not retain these documents as a business record and the document is rarely generated or used.³⁰ In order to discern whether there was any explanation for the out-of-sequence delivery, the previously described Driver Operations Log from April 22, 1995, was produced.³¹ Although Employer's Exhibit 46 shows that the last completed delivery for truck number 39 occurred at 8 p.m., the Driver Operations Log shows that truck number 39 telephoned the Employer at 9:47 p.m. to indicate that his truck broke down while in transit to deliver the merchandise for invoice number 547921. Employer's Exhibit 46, however, does not contain said invoice number and there is no record explanation as to why it was missing. In these circumstances, it is questionable whether Employer's Exhibit 46 verifies the Employer's contention that the owner-operators can deviate from the route sheet order without penalty. Moreover, the owner or driver of truck number 39 was not called to testify about what occurred on that day.³²

Barragan testified that prior to loading merchandise onto their trucks, the owner-operators inspect the purchased items and can refuse to load damaged items. If the owner-operator encounters customer complaints about the merchandise, the owner-operator returns the merchandise to the Employer's facility to be inspected by a warehouse employee. If the customer complains to the Employer after the delivery, the Employer sends an inspector to review the damage. Either way, if the damage can be attributed to the manufacturer, the owner-operator is not penalized. If the owner-operator is the apparent cause of the damage, he assumes 100-percent liability for the merchandise, pays for it, and the merchandise is given to the owner-operator.

If an owner-operator has caused damage to a customer's property, the owner-operator gives the customer an Employer "Customer Home Damage Form."³³ The form states that the Employer uses "independently owned and operated" contractors to deliver the customer's merchandise and "as such, these drivers are responsible for any damage" caused. The form provides a space for the date, the invoice number, and the driver's

²⁹ See E. Exh. 46.

³⁰ Once the Employer posts all of its receivables in the computer document is eliminated from the computer program. Barragan testified that he requested that E. Exh. 46 be generated for the purpose of the hearing and that he would only request that such a document be generated when a driver insists on payment for a delivery which the Employer believed was not timely.

³¹ See P. Exh. 41.

³² According to E. Exh. 28, truck number 39 belongs to Heriberto Melo.

³³ See E. Exh. 22.

and customer's description of the event. Despite the language on the "Customer Home Damage" form, the record evidence showed that the Employer notified the owner-operators, in writing, that if a customer's home has been damaged by an owner-operator during delivery, the Employer and owner-operator split the repair costs 50–50 percent; if there are more than three incidents of damage per year, the Employer requires that 75 percent of the repair costs shift to the owner-operator and 25 percent to the Employer.³⁴

The owner-operators are paid for each delivery provided it is timely. If a delivery is late, the Employer's customer service representatives determine if a customer discount is warranted. Barragan testified that "sometimes" the discount is charged to the owner-operator, although he did not know when this occurs as these matters are handled by the customer service and finance departments. The Employer did not call anyone from these departments to testify. According to Barragan, an owner-operator will not be paid for a late delivery if the Employer can determine that the lateness was the owner-operator's fault. However, if an owner-operator, upon the Employer's instruction, waited for a customer to arrive home, causing other deliveries to be late, the owner-operator is paid for the late deliveries.

If a customer is not home upon the arrival of a timely delivery, the owner-operator is paid for that timely delivery. When a customer is not home, the owner-operator fills out a "sorry we missed you card" provided by the Employer's dispatch department.³⁵ The owner-operator, and/or the driver, fills out the card indicating the scheduled time of delivery, time of the driver's arrival, time of the driver's departure, the invoice number, and a description of the customer's house. The card is left at the customer's house and a carbon copy is forwarded to the finance department. The finance department determines whether the owner-operator should be paid for that stop. The "sorry we missed you" card has the Employer's name and logo on top but does not contain the name of the owner-operator's company.³⁶

The owner-operators are responsible for delivery and set-up of the bed frame and the bed, as well as the removal of old bedding and all packing materials from the new purchase. If the customer asks the owner-operator to perform work beyond their regular services, the customer fills out a "Delivery Service Work Request" form provided by the Employer.³⁷ The form notifies the customer that the "independently owned and operated trucking delivery service" is only required to deliver and set-up the Employer's products, and that requests for any additional work must be specified by the customer in writing, who accepts full responsibility for any loss or damage caused in the performance of the additional work.

On completion of the delivery, the owner-operators collect the amount of money listed on the daily driver log and invoice. The daily driver log and invoice both indicate the method of payment. As indicated above, a customer's check or credit card number are approved by the Employer's bedding consultants at the time of purchase. When completing the delivery, the owner-

operator collects the previously approved check, obtains the appropriate signature on the credit card slip, or collects cash. If a customer's check or credit card does not bear resemblance to the customer name, address, or account number on the invoice, or there are other unusual discrepancies, the owner-operator telephones the Employer's customer service department to obtain authorization for the check or credit card.³⁸ Barragan testified that if the Employer authorizes the owner-operator to accept the check or credit card, but the check does not clear or the credit card company rejects the payment, the owner-operator is paid for that delivery. However, if the owner-operator accepts the method of payment without the Employer's authorization, and the method of payment is rejected, the owner-operator must pay the Employer for that delivery.

After the owner-operator completes all the deliveries on the daily driver log, he is permitted to return home; he does not have to return to the warehouse. Each owner-operator was issued a plastic NatWest bank card and deposit slips, with the Employer's name and bank account number thereon, in order to deposit cash into the Employer's account on a daily basis. Barragan testified that the Employer provided the owner-operators with the bank cards to protect them from carrying around too much cash. When arriving at the Employer's facility the following morning, the owner-operator must submit to the Employer's finance department the credit card slips, checks,³⁹ and the deposit slips from the cash deposits. The owner-operator is liable for all receivables and failure to return to the Employer's facility with the total amount listed on the daily driver log requires the owner-operator to pay the Employer for the difference. If an owner-operator does not return with the full amount of money as listed on the daily driver log, he is not permitted to load his truck that day.⁴⁰

With respect to the legal title to the Employer's merchandise while in the owner-operator's possession, the Employer's General Counsel Michael Stern testified that legal title to the Employer's goods stays with the Employer after an owner-operator's truck leaves the Employer's loading dock. Legal title changes when the customer accepts the goods.

The Employer contends that the owner-operators select, hire, retain, compensate, and solve all problems relating to their own drivers and helpers. The Employer asserts that it does not control the employment of the owner-operators' employees nor does it retain a list of said employees. The Employer also contends that the drivers and helpers: do not punch the Employer's timeclock; do not use the Employer's employee bathrooms and locker rooms; report only to the owner-operators; and wear the owner-operator's uniform. Barragan testified that the owner-operators are not required to furnish the Employer with any information concerning their drivers and helpers. The record evidence established that the Employer circulated documents entitled "Driver and Helper Information Requirements" to the owner-operators requesting the name, address, phone number, beeper number, date of birth, social security number, license

³⁴ P. Exh. 14. See also P. Exh. 27.

³⁵ P. Exh. 16.

³⁶ The record evidence established that the Employer has a detailed written policy concerning the "Not Home Policy and Procedure," which explains how long a driver should wait for a customer, and when the driver operations or customer service departments can release him from waiting. See P. Exh. 15.

³⁷ See E. Exh. 23.

³⁸ See P. Exh. 18, a document from National City Check Processing Division, indicating how to approve a check. The document lists 12 items which should be reviewed prior to accepting a check. Although it is not clear whether this exhibit was distributed to the owner-operators, Barragan testified that the policies listed thereon were made known to them.

³⁹ The record does not show that the checks are deposited by the owner-operators along with the CODs.

⁴⁰ See P. Exh. 35.

number, alien resident card, and nationality of their drivers and/or helpers.⁴¹ Barragan testified that a little more than 50 percent of the owner-operators completed 20 percent of the information requested. The parties stipulated that those owner-operators who submitted the driver and helper information forms list the owner-operator as the “employer.” Those owner-operators who did not submit the information were not penalized. However, the record evidence established that on or about January 5, 1995, the Employer notified the owner-operators, in writing, that it would schedule appointments for each owner-operator to meet with an Employer representative to provide certain information on their respective companies including, the driver’s licenses of their drivers and helpers, their social security card/alien resident cards, the certificate of insurance, insurance card, and registration card.⁴² Barragan testified that the above-noted information was not required but was considered helpful for “security reasons.”

According to Barragan, the owner-operators are not subject to any of the Employer’s rules and regulations for its employees and that it has not taken any disciplinary action against the owner-operators or the owner-operators’ employees. In this regard, Barragan testified that all owner-operators’ contracts were renewed despite any disciplinary problems. The Employer’s General Counsel Michael Stern testified that in or about early April 1995, he was involved in a decision to terminate the contract of owner-operator Noe Garcia. Stern testified that Garcia was called to his office for a meeting with him and Barragan. According to Stern, there were reports that Garcia threw a cup of coffee in the face of another driver while eating at a diner a block away from the Employer’s facility. Stern testified that Garcia admitted to the alleged incident but claimed that he did not intend to hit the driver in the face. Barragan and Stern discussed the matter, decided to terminate Garcia’s contract, and notified him of said decision orally and in writing. The written notification was not submitted into evidence. However, Stern testified that the written notification did not indicate the basis for the Employer’s termination of the contract.

With regard to the Employer’s other rules and regulations, the record evidence established that the Employer has required that owner-operators maintain “clean attire” while delivering the Employer’s goods and that they must refrain from wearing sleeveless tee-shirts or shorts that are two inches above the knee.⁴³

The record also showed that on or about November 1, 1994, Employer warehouse manager Jorge Toro⁴⁴ distributed a memo to some of the owner-operators from General Counsel Stern regarding their alleged use of drugs and alcohol, and their alleged gambling. According to the memo, Stern became aware that some of the owner-operator drivers may have engaged in these improper and/or illegal activities “while on the Employer’s premises, or in the adjacent streets, or on the owner-operators’ trucks.” The memo states that such activities expose the Employer to certain liability, such conduct would not be

tolerated, and the Employer would take all “necessary steps to terminate these activities and prevent future occurrences.”⁴⁵ In a May 8, 1995 letter signed by Barragan, the Employer notified an owner-operator that he engaged in the consumption of alcohol across the street, on another employer’s property. Barragan’s letter states that if he continues to receive complaints regarding the owner-operator and his employees, Barragan will consider termination of the owner-operator’s contract.⁴⁶

During the hearing, the Employer maintained that all 39 owner-operators are independent contractors regardless of the number of employees employed thereby or the number of trucks and/or vans owned. In its brief, the Employer argues that the Petitioner’s attempt to distinguish Singh’s, Ish’s, and TDJ from the remaining owner-operators is to no avail because these three companies operate like the other owner-operators. The Petitioner contends that all of the owner-operators, except for Ish’s, Singh’s, and TDJ, are employees of the Employer. In its brief, the Petitioner argues that these three companies are different because they own a greater number of trucks; employ a large number of employees; have their own loading schedule; receive different delivery rates; and are guaranteed a route every day. The Petitioner concedes that Ish’s, Singh’s, and TDJ are independent contractors and should be excluded from the petitioned-for unit.

In support of its position, the Employer relies on the testimony of owner-operators Ishmael Guevara, Seeram Singh, Carlos Bora, and Hernando Ramirez.⁴⁷

Ishmael Guevara was employed by the Employer as a part-time driver for about 10 years. During that time, the Employer issued paychecks directly to Guevara. Guevara purchased his second truck in 1991, and two more in 1993. Guevara testified that in 1993, he formed Ish’s because the Employer “ordered” all of its drivers to form companies. However, according to Guevara, the Employer did not threaten to refuse to assign him work if he refused to form a company. In 1994, Guevara incorporated Ish’s under the laws of the State of New York.

Seeram Singh commenced employment for the Employer in 1985. From 1985 to 1987, he was employed by the Employer as a driver delivering the Employer’s merchandise in his own van. Simultaneously, Singh made deliveries for other furniture stores located on the same block as the Employer. As of 1988, Singh owned two trucks and began to deliver exclusively for the Employer. In 1990, Singh formed a company called Singh Trucking, which was dissolved sometime in 1993. According to Singh, the Employer was not involved in his decision to create or dissolve that company. Sometime thereafter, Singh incorporated Singh’s under the laws of the State of New York. Singh testified that the Employer did not instruct him to form that company either.

In or about September 1993, Ish’s and Singh’s separately negotiated and executed agreements with the Employer for “guaranteed routes.”⁴⁸ Although the record evidence showed that Barragan received similar proposals from the owner-

⁴¹ See P. Exh. 5.

⁴² See P. Exh. 6.

⁴³ See E. Exh. 21. The Employer argues that such a requirement constitutes a minimal degree of control and has little impact on the details of performance.

⁴⁴ Barragan testified that Toro is the warehouse manager. The Human Resource manager testified that Toro is the driver relations manager.

⁴⁵ See P. Exh. 28. Owner-operator Julio Carabello, who testified on the Petitioner’s behalf, testified that warehouse manager Jorge Toro gave him Stern’s memo.

⁴⁶ See P. Exh. 42.

⁴⁷ Although the Employer also called owner-operator Arcadio Bautista to testify on rebuttal, his testimony is described, *infra*.

⁴⁸ The record evidence showed that on or about September 9, 1993, Singh’s proposed to purchase additional trucks in order to accommodate the Employer’s needs. See E. Exh. 27.

operators of Sky Fox Inc., AB Services, FE Services, LaMirage Trucking, and Seven Wheels Express,⁴⁹ the Employer rejected their proposals. Instead, the Employer awarded all Long Island deliveries to Ish's, and all Westchester County and Connecticut deliveries to Singh's. In exchange therefor, Ish's and Singh's accepted a reduced delivery fee. Ish's and Singh's owned four trucks each prior to their guaranteed route agreement. However, after reaching said agreements with the Employer, Ish's, and Singh's purchased additional trucks.

Ish's and Singh's each hold the title to their respective trucks. Both Guevara and Singh testified that the Employer did not financially assist them in the purchases of the trucks. Rather, both Guevara and Singh took out loans to pay for the trucks. All of Ish's trucks display the Employer's advertising; six of the seven Singh's trucks do so. The Employer pays Singh's and Ish's \$500 per annum per truck for the advertising. Ish's and Singh's pay for all expenses related to their trucks including gasoline, repairs, title, license, registration, inspections, and motor vehicle violations.

Ish's and Singh's each employ 12 employees. Guevara testified that he hired his employees without the Employer's approval, although he furnishes the Employer with the drivers' licenses, resident alien identification cards, social security numbers, and addresses for all his employees. Singh testified that the Employer has not required that he furnish such information regarding his employees. Both Ish's and Singh's pay their employees on a biweekly basis. The drivers employed by Ish's and Singh's are paid about \$450 a week. Ish's helpers are paid \$325 a week, and Singh's helpers are paid between \$350 and \$375 a week. According to Guevara, taxes are withheld from his employees' pay. According to Singh, his employees are either paid in cash or by check, although the record evidence does not reflect whether taxes are withheld from their pay. The employees of Ish's and Singh's receive between 1 to 2 weeks of paid vacation per year. Although Ish's provides medical insurance for some of its employees, the record does not reflect which employees receive the benefits. None of Singh's employees receive medical benefits therefrom. With respect to uniforms, Singh testified that he purchased blue "Singh's Express" shirts as a uniform and those employees who have the shirt wear it daily. Guevara testified that "sometimes" his employees wear uniforms consisting of blue pants and a light blue "Ish's Trucking" shirt. According to Guevara, the uniforms are cleaned by CINTAS and it was the Employer's idea to have all the owner-operators use CINTAS to cut costs.⁵⁰

Guevara testified that Ish's delivers only the Employer's goods; Singh testified that 95 percent of Singh's work is derived from delivery of the Employer's goods; Singh's remaining work involves general moving services. Singh drives one of his trucks on a daily basis, whereas Guervara drives one of his trucks about 3 days a week. When Guervara is not driving his truck, he stays in the Employer's warehouse and remains in contact with his employees who are on the road. In order to maintain contact with their drivers, Ish's and Singh's provide beepers to each driver and helper employed by them. According to Singh and Guevara, the Employer provided two-way radios for all of Singh's trucks and five of six of Ish's trucks.

On a daily basis, both Guervara and Singh collect all moneys for the previous day's deliveries from their drivers.

The record evidence established that the Employer posts a separate work schedule reserved only for Ish's, Singh's, and TDJ. The work schedule identifies the company truck number, scheduled time that each truck is to arrive at the Employer's facility for loading, and the days that each truck is not scheduled for work.⁵¹ The schedule shows that the trucks belonging to Ish's, Singh's, and TDJ's load their trucks at various times between 5 a.m. and 5 p.m. Guevara testified that some of his trucks report to the Employer's facility for loading at 5 a.m., as per the loading schedule. The remaining trucks arrive for loading at about 9:30 a.m., although there are occasions when they wait until 12 noon for deliveries.

Both Singh and Guevara testified that they have refused to deliver the Employer's damaged items about 10 to 15 percent of the time. Guevara testified that upon a customer's rejection of a damaged product, he returns the item to the Employer's warehouse. If the damage is caused by the manufacturer, Guevara is paid for the stop. If Guevara or one of his employees damaged a customer's home, Guevara arranges for the repair, although the cost thereof is split 50-50 between Ish's and the Employer. Both Guevara and Singh testified that if a customer telephones the Employer with a complaint about their delivery service, the Employer mentions the incident to them. In sum, Guevara and Singh discuss the incident with the employee involved.

With respect to the order of the daily driver log, Guevara testified that he and his drivers decide the order of delivery without regard to the numerical order prepared by the Employer. Guevara also testified that if he or one of his drivers are unable to make a timely delivery and have failed to secure an extension of time from the Employer in which to make a timely delivery, he is not paid for the late delivery. According to Guevara, a late delivery is permitted provided the Employer and the customer approve it. Singh testified that he rarely refuses to deliver in the order set forth on the route sheet. Both Guevara and Singh testified that if a customer is unable to pay the bill for the delivered merchandise, they do not leave the merchandise at the customer's home without the Employer's consent. They do not extend credit to the customer without the Employer's authorization.

No representative of TDJ was called to testify. However, the record evidence established that TDJ owns ten trucks, most of its trucks are scheduled to deliver the Employer's goods 7 days a week,⁵² and all 10 display the Employer's advertising.⁵³ Guevara testified that TDJ also has a guaranteed route. Singh testified that TDJ operates in the same fashion as Ish's and Singh's.

The Employer also called Carlos Bora and Hernando Ramirez, brothers-in-law, who testified that they were partners in Fast Freight Trucking, (Fast Freight). According to Ramirez, Fast Freight was formed in 1991 and operated as a delivery and moving service for about 10 different companies. Sometime in 1993, Ramirez and Bora parted ways and each took one truck from Fast Freight to start his own business. Ramirez remained the owner of Fast Freight, whereas Bora formed his own company, Easy Save Trucking, (Easy Save). Neither Bora nor Ra-

⁴⁹ See E. Exh.s 28, 34, 42, and 43.

⁵⁰ The uniforms are picked up and delivered by CINTAS at the employer's facility.

⁵¹ See P. Exh. 8.

⁵² See P. Exh. 8.

⁵³ See E. Exh. 13B.

mirez performed any delivery services for the Employer until sometime in 1993. Easy Save and Fast Freight have business cards, although the business address and telephone numbers printed thereon are Bora's and Ramirez' home addresses and telephone numbers respectively.

Although Bora and Ramirez testified that they filled out employment applications at the time they commenced work with the Employer, the record did not contain the applications. The record evidence established that on or about August 28, 1993, Easy Save and Fast Freight separately executed contracts with the Employer. Both Ramirez and Bora recall meeting with Employer safety officer Luis Cornejo regarding the contract.⁵⁴ In this regard, Bora testified that Cornejo orally translated the contract into Spanish. Ramirez testified that Cornejo said that Ramirez had to form a "company" in order to deliver the Employer's merchandise, although Fast Freight was formed by Ramirez prior thereto. Ramirez testified that he did not ask for any changes to be made in the contract and recalled that during the meeting with Cornejo he signed two things: the contract and an agreement regarding advertising on his truck.

Bora of Easy Save owns only one truck and Ramirez of Fast Freight now owns two trucks. Bora and Ramirez each hold the title to their own trucks and pay for expenses related thereto, including insurance, registration, gasoline, and other items. Until recently, Bora drove his truck and employed only one helper, whom he pays \$250 per week. In or about March 1995, Bora hired a driver, who is paid \$350 per week. Bora's driver and helper are paid in cash and taxes are not withheld therefrom. Ramirez drives one of his two trucks, employs another driver for the second truck, and employs two helpers, one for each truck. Ramirez pays his drivers and helpers \$60 and \$50 per day, respectively. His employees are paid for the number of days worked per week. Ramirez testified that taxes are withheld from his employees' pay.

According to Ramirez, Fast Freight employees receive 1 week's paid vacation, paid sick leave, and medical benefits. According to Bora, Easy Save employees receive 1 week's paid vacation per year. Easy Save employees do not wear uniforms whereas Fast Freight employees have been wearing uniforms since April 1993. The uniform consists of dark blue pants and a light blue "Fast Freight" shirt. According to Ramirez, he saw a representative of CINTAS, a uniform cleaning service at the Employer's facility, and asked whether CINTAS could clean his uniforms. CINTAS bills the Employer for the uniform cleaning and the Employer deducts the monies from Ramirez' check.⁵⁵

With respect to their drivers and helpers, Bora testified that he has provided the Employer with his helper's name, address, social security number, and alien registration card. Bora vaguely recollected that during a meeting with Barragan, he asked Bora to provide the green card, social security number and driver's license for his recently hired driver. Bora has not yet provided that information. Ramirez testified that he must submit certain information to the Employer about his employees because they handle, and are responsible for, the Employer's goods. Upon recently hiring his third employee, Ramirez submitted that employee's driver's license to the Employer.

⁵⁴ According to Human Resource Manager Cook, Cornejo went on a leave of absence in July 1993, and has not returned to the Employer's employ.

⁵⁵ Ramirez testified that he signed "a paper" with CINTAS, although the record does not contain that document.

Ramirez testified that should this employee successfully complete his "trial period," he intends to submit the employee's resident alien card and social security number to the Employer.

With respect to the scheduled loading times for Easy Save and Fast Freight, both Bora and Ramirez testified that they have seen the Employer's loading schedule posted at the Employer's facility.⁵⁶ Ramirez testified that he was not consulted by the Employer regarding his availability prior to the posting of the schedule. Bora testified that he is scheduled to appear at the Employer's facility for loading at 6 p.m. Bora's truck contains a two-way radio provided by the Employer and displays the Employer's advertising. Bora initially testified that an unidentified Employer representative told him that his truck must display the Employer's advertising. Later, he testified that he agreed to have the ad placed on his truck because he saw the advertising, liked the way it looked, and was offered \$500 therefor. Bora testified that 90 percent of his work involves delivery for the Employer and the remainder of his work involves delivery for private furniture companies.⁵⁷ Bora did not inform the Employer that he uses his truck, which displays the Employer's advertising, to deliver goods for other companies. Ramirez testified that he drives truck number 108 and is scheduled to arrive at the Employer's facility for loading on Thursday through Sunday at 6 p.m. Ramirez' truck number 108 has a two way radio and displays the Employer's advertising, for which Fast Freight is paid \$500 per annum. Ramirez employs another driver to drive his second truck, truck number 149, which is scheduled to arrive at the Employer's facility for loading on Saturday and Sundays at 8 p.m. Truck number 149 does not have the Employer's advertising or a two-way radio. Ramirez testified that he has not used truck number 108 for any purpose other than delivery of the Employer's products, although he has used truck number 149 for deliveries for other enterprises.

With respect to the daily driver log or route sheet, Bora testified that upon receipt thereof he inspects the merchandise and he can refuse to accept damaged merchandise. Bora will only deliver damaged goods if the Employer's "checker" signs on the route sheet that Bora has taken damaged goods for delivery. According to Ramirez, on a few occasions, he has refused to deliver to particular stops listed on the daily driver log, i.e., when the delivery area is dangerous or when the merchandise for delivery is damaged. When refusing to make a delivery, the Employer's dispatcher asks that Ramirez remove from the truck the merchandise he does not wish to deliver.

With respect to the method of delivery, Ramirez testified that he is not required to notify the Employer if he does not follow the order on the daily driver log. However, Ramirez testified that he will not "skip around" the daily driver log if he suspects it will cause a late delivery. Ramirez also testified that while out on the road, he has never informed the Employer that he was unable to make a delivery. Bora testified that after each delivery he telephones the Employer and the next customer on the daily driver log to see if the customer is at home. If the customer is not home, Bora finds the next customer listed on the route sheet who is at home. However, Bora testified that he must inform the Employer if he intends to change the sequence

⁵⁶ See P. Exh. 7.

⁵⁷ Although Bora initially testified that he used his truck, with the Employer's advertising, to remove some garbage from a restaurant he is constructing, he later testified that the truck he used belonged to his brother-in-law and did not display the Employer's advertising.

of deliveries on the driver log. Although Bora can request permission to deliver out of sequence, the Employer can "prevent" him from changing the route.

In support of its position that the owner-operators are employees of the Employer, the Petitioner called five owner-operators to testify: John Beltran of JB Services, Mario Zuluaga of Zutra Trucking, Bennet Straker of BS Trucking, Hector Mendez of H & M Express,⁵⁸ and Julio Carabello of Delivery Express. Although Arcadio Bautista of AB Services was called by the Employer, his testimony is discussed here as his testimony is similar to the testimony of these owner-operators. The Petitioner also called Carlos Luzano and Enrique Cano, a driver and helper, respectively, for LB Trucking. The owner-operator of LB Trucking, Luis Bocanegra, was not called to testify.

All the owner-operators called by the Petitioner testified that they were employed by the Employer prior to their forming their own companies. During their employment by the Employer, they were issued paychecks directly in their name.⁵⁹ All the owner-operators testified that they were told by Employer representatives Juan Vergas or safety officer Luis Cornejo⁶⁰ that in order to continue working for the Employer delivering its goods, they each must form a company.⁶¹ Owner-operators Beltran, Straker, and Mendez were told that they must have business cards printed.⁶² According to all the owner-operators

⁵⁸ The record evidence established that in or about November 1993, owner-operators Hector Mendez of H & M Express, Heriberto Melo of Seven Wheels Express, Jorge Melo, and Heman Moreno of Heman R Moreno Services, formed another company called Sky Fox, Inc., (Sky Fox). Although each of these owner-operators executed individual contracts with the Employer in August 1993, Hector Mendez testified that he and the other owner-operators elected to form a corporation in an attempt to secure a route agreement similar to those obtained by Ish's and Singh's. Hector Mendez and the other owner-operators were shareholders of Sky Fox (see E. Exh. 7) and the parties stipulated that Sky Fox issued W-2 forms to its employees, including Mendez (see E. Exh. 30), and maintained workers' compensation and liability insurance for its employees. Mendez was employed by Sky Fox as a driver. By October 1993, Sky Fox had not secured a route agreement leading Hector Mendez to resign as an officer and employee of Sky Fox (see E. Exh. 29). According to Mendez, after he "resigned" from Sky Fox, he returned to his prior operations as H & M Express. The Employer's loading schedule shows that Mendez' truck, #104, is operated by Sky Fox. The Employer implies that because Sky Fox was not properly dissolved as a corporate entity, Mendez remains employed by it. However, the record shows that in December 1994, H & M Express executed a renewal agreement with the Employer, evidencing H & M Express' existence as a separate entity, which was signed by Hector Mendez

⁵⁹ There was some testimony from John Beltran and Bennet Straker that, during their employment by the Employer, their checks were issued by a company called Galaxy. According to Straker and Beltran, taxes were not withheld from their Galaxy paychecks. There is no record evidence explaining Galaxy, other than some inference there was a New York State Tax Authority investigation into Galaxy. It appears that Galaxy may have been a payroll company.

⁶⁰ According to Employer Human Resource Manager Zoriada Cook, Luis Cornejo was hired by the Employer in August 1992 as a safety officer. In July 1993, Cornejo requested a leave of absence and has not returned since that time. According to Cook, Juan Vergas was hired by the Employer in October 1991 and was terminated during the first quarter of 1993.

⁶¹ Hector Mendez of H & M Express testified that Luis Cornejo assisted him in selecting a name for his company.

⁶² Owner-operator Zuluaga testified that the Employer did not ask him to print business cards and he does not have any. The record did not establish whether owner-operators Carabello of Delivery Express or

called by the Petitioner, certain Employer representatives presented them with a contract to sign.⁶³ Some did not understand the contract, but all owner-operators were told that they either sign the contract or they could no longer work for the Employer. The record evidence showed that JB Services, Zutra Trucking, BS Trucking, H & M Express, and Delivery Express each executed contracts with the Employer in late August or early September 1993. The record evidence also established that they executed renewal agreements between December 16 and 22, 1994. All these owner-operators derive 100 percent of their income from their deliveries for the Employer.

All these owner-operators own only one truck. John Beltran of JB Services, Mario Zuluaga of Zutra Trucking, Bennet Straker of BS Trucking, Hector Mendez of H & M Express, and Julio Carabello of Delivery Express, drive that one truck, and employ one helper. Arcadio Bautista of AB Services owns one truck but does not drive it. About 8 months ago, Arcadio Bautista ceased driving his own truck and hired a driver to drive his truck; he also employs one helper. The owner-operator of LB Trucking, Luis Bocanegra, did not testify although the record evidence showed that he owns two trucks, numbers 19 and 101, and that he hired a driver and helper to work on truck number 19, as discussed more fully below.⁶⁴

The trucks owned by JB Services, Zutra Trucking, BS Trucking, and AB Services display the Employer's advertising, whereas the trucks owned by H & M Express and Delivery Express do not.⁶⁵ Each owner-operator displaying the Employer's advertising is paid by the Employer \$500 per annum per truck therefor. Beltran of JB Services testified that about 2-1/2 years ago Employer safety officer Sylvia Paredes instructed him that his truck could not carry the Employer's products if the truck did not display the Employer's ads.⁶⁶ Thereafter, Beltran had the ads placed on his truck. Although owner-operators Mendez and Carabello were told by Employer representatives or dispatch employees that they could not deliver the Employer's products without advertising on their trucks, both continue to do so without penalty.

The testimony regarding the uniforms of the owner-operators varied. Owner-operator Beltran testified that about 1 year ago, he bought 12 tee-shirts, 6 for him and 6 for his helper, with the Employer's name on it. According to Beltran, Employer safety officer Sylvia Paredes instructed him to wear a uniform. Owner-operators Straker and Bautista testified that about 2 years ago, they stopped wearing the Employer's uniform and started to wear their own tee-shirts with their company names printed thereon. Owner-operator Zuluaga wears a tee-shirt with his company name printed thereon when it is cold outside. The record established that CINTAS cleans the uniforms and bills

Arcadio Bautista of AB Services have business cards. Although the owner operator for LB Trucking did not testify, the record evidence showed that LB Trucking has business cards. See E. Exh. 3.

⁶³ The Employer representatives mentioned were former Security Officer Luis Cornejo, Chief Operating Officer Luis Barragan, or Finance Department Manager Tony Santano.

⁶⁴ See P. Exh. 7. Also see driver Luzano's testimony.

⁶⁵ Although owner-operator Straker testified that he was suspended for refusing to have his truck display the Employer's advertising, this incident occurred in 1989, long before Straker signed the independent contractor contract with the Employer. In 1990, Straker had the Employer's advertising placed on his truck.

⁶⁶ According to Employer Human Resource Manager Zoriada Cook, Paredes was hired by the Employer in September 1993.

the Employer, who deducts the cost thereof from the owner-operators' paychecks.⁶⁷

Owner-operators Mendez and Straker testified that about 1 year ago, dispatch employee Raul Forbes instructed each of them to remove old mattresses from inside their trucks because their trucks are required to be empty prior to loading the Employer's deliveries. Mendez testified that Dispatch Manager Scott Lanceford told him that there was a "regulation" requiring that the trucks be completely empty before loading. Owner-operators Zuluaga and Beltran were instructed by Employer Representative Juan Vergas⁶⁸ and dispatch employee Raul Forbes that they may not carry goods for any other employer. It is unclear from the record the supervisory status, if any, of Raul Forbes.

Owner-operators Beltran, Zuluaga, Straker, and Carabello testified that in the past, the Employer held meetings with the owner-operators once a week or every 2 weeks. According to Beltran, the meetings were conducted by Barragan, Lanceford, Driver Operations Department Manager Mauricio Farigua, dispatch employee Raul, and certain salesmen. Currently, the Employer calls these meetings at random and has held only one or two meetings in the last 8 months. According to Straker, the meetings were held for the purpose of discussing customer complaints and general marketing information. Straker testified that during one of the meetings, the Employer distributed a marketing survey and asked that the owner-operators fill out the information requested, i.e., the size of the customer's house, the number of bedrooms, type of car owned, and the presence of new or old furniture.⁶⁹ The marketing survey was also translated into Spanish. Straker testified that he never filled out the marketing survey.

The record evidence established that during an early meeting, the owner-operators received a document entitled "Requirements from Independent Contractors" stating that: the owner-operators' trucks must be in good mechanical condition; truck drivers are 100 percent responsible for accidents, thefts and damages while making deliveries; drivers should be properly dressed to make a good impression with the customers; delivery assignments to each driver must be completed 100 percent; drivers must complete radio checks after each completed delivery; trucks will not carry anyone other than the driver and helper; and trucks will not be loaded until CODs are settled with the cashier.⁷⁰

With respect to the schedule for loading, BS Trucking, AB Services, Zutra Trucking, Delivery Express, JB Services, and H & M Express are scheduled to arrive at the Employer's facility for loading at 5, 7, and 11 a.m., and 2, 3, and 5 p.m., respectively. Owner-operators Zuluaga and Straker testified that if they do not arrive at the time listed on the Employer's schedule, they are the last to receive a route.⁷¹ All of the owner-operators testified that if the Employer does not have a route available at

the time of loading, they wait until the Employer has enough orders to comprise a route.⁷² In this regard, Beltran of JB Services, who arrives at 11 a.m., Zuluaga of Zutra Trucking, who arrives at 3 p.m., and Mendez of H & M Express, who arrives at 5 p.m., all testified that if there are no routes available when they arrive, they are required to wait at the Employer's facility until 10 or 11 p.m. just in case they are needed for a route. Owner-operator Straker of BS Trucking, who arrives at 5 a.m., testified that he must wait until 2 p.m. for a route, although he was not instructed against leaving before 2 p.m. Both Beltran and Zuluaga testified that dispatch department employees Omar Bishundat and Raul Forbes threatened to suspend them if they left the Employer's facility and refused to stay as instructed. It is unclear from the record whether dispatch employees Omar or Raul are supervisors or managers. Owner-operator Mendez testified that on an unknown date in late 1994, he was suspended by finance department manager Tony Santano for refusing to stay at the Employer's facility as instructed. Mendez testified that on that date he waited for a route until 8 p.m. At that time, he questioned the dispatch office as to when he would be assigned a route. Upon notification that four trucks were waiting for a route assignment, Mendez left. When a route became available later that evening, Mendez was not at the Employer's facility. Thus, Santano suspended Mendez for 1 day.

With regard to the Employer's contention that the owner-operators may refuse a route, owner-operator Beltran of JB Services testified that on one occasion he refused a route and was told by Lanceford that he should unload his truck, go home, and return the next day. According to owner-operator Straker of BS Trucking, about 2 years ago he refused to deliver an assigned route because it was "not feasible." Straker testified that dispatch employee Raul Forbes "made it clear" that Straker must accept the route. As indicated above, Raul's supervisory status is unknown.

With regard to the Employer's contention that the owner-operators are free to change the order of deliveries on the daily driver log or route sheet, all of these owner-operators testified that they were instructed to deliver to the customers in the numerical order listed on the daily driver log or route sheet. The uncontroverted testimony showed that Tony Santano suspended owner-operators Beltran, Zuluaga, and Mendez for their failure to follow the order on the route sheet. According to Beltran, years ago, upon submission of his COD sheet to Santano, Santano was able to tell from the COD payment list that he did not follow the order on the route sheet. Santano suspended Beltran for 1 day. Owner-operator Zuluaga testified that about 2 years ago, he was suspended five or six times for refusal to follow the order on the route sheet. In this regard, Zuluaga recalled one incident when he changed the order on a route sheet, he telephoned the Employer from one of his stops on the route, and was told by Santano that the driver operations department complained about his failure to follow the route. Zuluaga was suspended for one day. Owner-operator Mendez testified that sometime in late 1994, he chose to change the order of deliveries on a route sheet and delivered to a Staten Island customer before two New Jersey customers. Because Mendez was late

⁶⁷ See E. Exh. 33, which is a contract between AB Services and CINTAS. Also see P. Exh. 38.

⁶⁸ As previously indicated, Vergas was terminated from the Employer's employ in the first quarter of 1993.

⁶⁹ See P. Exh. 36.

⁷⁰ See P. Exh. 13. Based on Barragan's testimony, it appears that the owner-operators no longer submit the cash they collect to Santano. Rather, the owner-operators are given ATM cards to deposit the cash and they return a copy of the deposit slip to Santano.

⁷¹ This is confirmed by statements made in the Employer's Loading Procedures form. See P. Exh. 35.

⁷² Carabello's and Bautista's testimony was silent in this regard. However, Carabello testified that if he arrived after his scheduled loading time, and the Employer had a busy day, the Employer would question him as to why he was late.

for his second New Jersey customer, the customer canceled the order and Santano suspended him for 1 day. Owner-operator Straker testified that during the last year Santano became aware that he did not follow the route sheet. Santano threatened Straker that if the incident occurred again, he would be suspended. Owner-operator Carabello testified that certain unnamed dispatch department employees and Employer representative "David" (whose last name is unknown), instructed him that failure to follow the route sheet sequence will result in suspension. Owner-operator Bautista, who employs a driver to drive his truck, testified that he always instructs his driver to follow the route sheet because there have been numerous employees who were suspended for failure to do so. According to Bautista, any driver who wishes to change the delivery sequence on the route sheet must secure the Employer's permission to do so. LB Trucking's driver Carlos Luzano also testified that the dispatch department employees instructed him to follow the order of deliveries on the route sheet.

Although the Employer in its brief relies on Employer's Exhibit 46⁷³ as evidence that the owner-operators are not required to follow the order of delivery on the route sheet, this single document reflecting one day's deliveries by one driver does not serve to discredit the foregoing testimony. Moreover, despite numerous references to Santano as the Employer representative responsible for disciplinary action, Santano was not called to refute the owner-operators' testimony or testify at all with respect to these matters. The testimony showed that there have been additional incidents when the Employer disciplined the owner-operators. Owner-operator Beltran testified that about 2 years ago, he failed to report for loading at his scheduled 11 a.m. time because he fell asleep in his truck which broke down on the highway. Santano suspended Beltran for one day. About 1-1/2 years ago, Beltran used a different helper to substitute for his regularly scheduled vacationing helper. The Employer did not like Beltran's substitute helper and he was instructed that he could not work if he failed to replace the substitute. Owner-operator Zuluaga testified that about 3 to 6 months ago, Barrigan suspended him from delivering the Employer's goods for 1 day because he did not have enough money to pay for workers' compensation insurance. According to Zuluaga, Barrigan loaned him the \$800 to pay for the workers' compensation insurance. Zuluaga also testified that on two or three occasions, he was suspended for 1 day when he failed to call the Employer from each delivery stop. Owner-operator Straker testified that about 1-1/2 years ago, he was suspended by Barrigan for his refusal to deliver a mattress up eight flights of stairs.⁷⁴ Owner-operator Carabello testified that prior to December 1994, he was suspended by Santano for failure to deposit his COD money in the bank. He also was suspended in November 1994, when he was unable to return certain merchandise to the Employer because his truck was at the mechanic's shop. In its brief, the Employer asserts that any disciplinary action taken against any of the owner-operators "had no effect" as each of their contracts were renewed after the alleged discipline.

⁷³ Discussed in detail at p. 17.

⁷⁴ Although Straker testified that he was also suspended in 1989 and 1992, those incidents occurred prior to his alleged independent contractor status. Owner-operator Mendez also testified that he was suspended on a few occasions in 1991, when he worked for another owner-operator as a driver, before his alleged conversion to an independent contractor. Mendez also provided hearsay testimony concerning the Employer's suspension of other owner-operators' employees.

Although the record evidence showed that there are about 39 companies, some of which own more than one truck, the record does not establish how many drivers or helpers each owner-operator employs, or their rates of pay, hours, and other terms and conditions of employment. With respect to the owner-operators' helpers, the record evidence discloses the manner in which the helpers are referred to, or allegedly hired by, the owner-operators. In this regard, the record evidence showed that owner-operator Guevara's helpers come to the Employer's warehouse looking for work, or Guevara gets them "through recommendations." Similarly, owner-operator Singh's helpers are referred by other drivers and some come to the Employer's warehouse looking for work. The record evidence also showed that up until 10 months ago, owner-operator Straker used his cousin as a helper. Owner-operator Bautista, an employee of the Employer from 1989 to 1993, testified that he has had his helper since 1990. Thus, it appears that this helper was employed directly by the Employer from 1990 to 1993. Another helper used by Bautista, Fransico Espinal, became the owner-operator of FE Services. Owner-operator Bora had his helper long before he commenced his services for the Employer. Owner-operator Beltran worked as a helper for various other drivers employed by the Employer prior to his becoming an owner-operator.

With regard to the Employer's relationship with the owner-operators' helpers, the record evidence showed that the Employer suspended owner-operator Beltran because it did not approve of his helper. According to Beltran, Santano once informed him that Beltran's replacement for a vacationing helper was not satisfactory and must be replaced. On another occasion, Beltran submitted certain information regarding his helper for the Employer's approval. The record also showed that owner-operator Singh and one of his former employees met with an Employer customer representative to discuss some damage caused to a customer's telephone. The record also established that Enrique Cano and Carlos Luzano, the helper and driver of LB Trucking, were suspended by Dispatch Manager Scott Lanceford for parking in the wrong place at the Employer's facility. With regard to helpers' hours of work, the record evidence showed that owner-operator Mendez' helper works only 3 days a week and that owner-operator Zuluaga's helper is only called to work when Zuluaga is sure that his truck will be loaded for deliveries.

In its brief and during the hearing, the Employer argued that all the owner-operators, regardless of the size of their fleet, "operate in a corporate style requiring effort and financial outlay, buy their own trucks, bear all costs incidental to their ownership of their trucks, and hire drivers and helpers to assist them." In its brief, the Employer raised an alternate theory not presented during the hearing; if the owner-operators are not independent contractors, they are supervisors within the meaning of the Act. The Employer's brief relies heavily on the owner-operators' contracts with the Employer as evidence of their independent contractor status. Such reliance is misplaced as it is well established that the Board does not regard as determinative the fact that written contracts define the relationship as "independent."⁷⁵ In its brief, the Employer also asks that I recognize IRS Ruling 76-226, which facts allegedly mirror the facts herein. Although there was testimony alluding to

⁷⁵ See *National Freight, Inc.*, 153 NLRB 1536 (1965); *Big East Conference*, 282 NLRB 335, 345 (1986).

an alleged IRS investigation and ruling, the Employer never produced the documentation, despite the Petitioner's repeated requests therefor. The Employer also failed to provide documents from an alleged New York State Tax Authority investigation, which was mentioned by one of the Employer's witnesses during the hearing. Thus, I am unable to consider any governmental rulings without record documentation thereof.⁷⁶ I also reject the Employer's assertion in its brief that the owner-operators' business cards stating that they offer a "wide variety of services" evidences the owner-operators' intention to seek other prospective business. The above-quoted statement does not necessarily mean they are interested in working for other businesses. Moreover, the evidence tends to show that the business cards were made at the behest of the Employer and were to be submitted with each owner-operator's Department of Transportation application. Finally, with respect to the Employer's assertion in its brief that the owner-operators work for other employers, this is not supported by first hand record evidence. For example, although the Employer contends that owner-operator Raymond Ramiakan works for another corporation, this information came through the testimony of another owner-operator, Ramiakan did not testify.

In its brief, the Petitioner argues that the Employer controls the manner and means by which the owner-operators deliver the Employer's product by setting the schedule of starting times, assigning the daily routes, specifying the order of the routes, and resolving all problems arising from the owner-operators' deliveries. The Petitioner also contends that the owner-operators drive exclusively for the Employer and remain in frequent contact with the Employer during the day. With respect to the Employer's contention that the owner-operators may be supervisors, the Petitioner in its brief argues that the independent contractor relationship "is a sham, and . . . the owner-operator's exercise of supervisory functions is mandated by the Employer to maintain the charade that owner-operators" are independent.

The Board applies the common law right-of-control test to determine whether individuals are independent contractors or employees within the meaning of Section 2(3) of the Act. Under this test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. On the other hand, where control is reserved only as to the result sought, an independent contractor relationship exists. The resolution of this question depends on the facts of each case, and no one factor is determinative.⁷⁷ Additionally, for an independent contractor relationship to exist, the arrangement most typically should exhibit entrepreneurial or proprietary characteristics.⁷⁸ Thus, the question of whether the owner-operators herein are independent contractors or the Employer's employees hinges on the outcome of a two prong analysis: (1) whether the Employer herein has the right to control not only the results but the manner and the means by which the desired result is to be obtained; and (2) whether the owner-operators

are entrepreneurs assuming the risk of loss and opportunity for profit.⁷⁹

The Board in *C.C. Eastern Inc.*, 309 NLRB 1070 (1992), found that owner-operators were employees within the meaning of Section 2(3) of the Act notwithstanding certain facts strikingly similar to those in the instant case. Common to the owner-operators in *C.C. Eastern*, and here are that the owner-operators own their own trucks, for which they pay all expenses and are responsible for their own costs such as insurance, maintenance, repairs, and gasoline; sign a contract with the employer that designates them as independent contractors; and are provided no fringe benefits, and no taxes or other payments are withheld from their compensation, which is based on each timely delivery made in accordance with the schedule of rates attached to each contract.

The record evidence here established that the owner-operators arrive for loading based on an Employer-prepared schedule, and those who arrive after their scheduled loading time are loaded at the very end of the day. The record also shows that the owner-operators service Employer-assigned geographic areas in which they are to make deliveries and, with the exception of Ish's, Singh's, and TDJ, the delivery service areas are subject to change on a daily basis by the dispatch office, depending on the Employer's needs. Any grievances arising from the loading schedules are brought to the dispatch department, where the Employer maintains a log of grievances. The Employer has issued certain memoranda with respect to certain policies including its call-in procedure, the timeliness of arrival for loading, the dress code during delivery, and the handling of damage to a customer's home or property. The Employer has also issued verbal warnings to owner-operators concerning their failure to follow the order of deliveries listed on the route sheet and has suspended an owner-operator who failed to report, for loading at his scheduled time. The Employer also has suspended owner-operators who failed to: call the Employer from each delivery stop; deposit COD money in the bank; and return certain merchandise to the Employer's facility. The Employer has suspended an owner-operator who refused to deliver a mattress up eight flights of stairs. A driver and helper were suspended by the Employer for parking their truck in the wrong place. Further evidence of the Employer's control can be seen from the recent termination of the contract of an owner-operator who had a lunchtime physical confrontation with another owner-operator in a diner off the Employer's premises. On the above-described facts, it appears that the Employer has reserved not only the right to control the end result, i.e., the timely delivery of mattresses, but has also exhibited control over the manner and means used by the owner-drivers in achieving the final result.

With respect to entrepreneurial indicia, it is difficult to envision significant entrepreneurial activities when the record evidence established that: the owner-drivers do not cultivate business or customers for the Employer; they have no input into the Employer's pricing for the merchandise; they must receive Employer authorization for all methods of payment; they do not service the Employer's competitors, they only service the Employer's delivery areas; they have no proprietary interest in

⁷⁶ I find the Employer's reliance on *Lorenz Schneider Co.*, 209 NLRB 190 fn. 5 (1974), is inapposite and the case does not alter my ruling.

⁷⁷ See *Roadway Package System, Inc.*, 288 NLRB 196 (1988); *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968).

⁷⁸ *Id.* Also see *Mission Foods Corp.*, 280 NLRB 251 (1986).

⁷⁹ See *Capital Parcel Delivery Co.*, 269 NLRB 52 (1984), cited by the Employer in its brief.

their routes; and they work solely for the Employer.⁸⁰ Thus, there is insufficient record evidence that any owner-drivers engage in significant entrepreneurial endeavors outside of their regular employment with the Employer. In sum, the Employer's exertion of control over the manner and the means by which the owner-drivers perform their work, which includes the disciplining of individuals for various work rules or practices established by the Employer, coupled with the absence of entrepreneurial activity, favors a finding that the owner-operators are not independent contractors.

The cases cited by the Employer which are factually distinguishable from the facts of this case were distinguished by the Board in *C.C. Eastern Central Transport*, 299 NLRB 5 (1990), concerned the status of owner-operator drivers at a corporate affiliate of the employer, who were found by the Board to be independent contractors because they engaged in greater entrepreneurial activity than those in the instant case. In that case, unlike here, owner-operators were permitted to work for competitor companies, and one of the three owner-operators at issue regularly hauled for other firms, including competitors, and regularly hired his own drivers to drive for other companies as well as Central Transport. The Board found that the size and scope of this latter person's operations tended to indicate that he was in the hauling business. By contrast, in the instant case, there is no evidence that any of the owner-operators work for other companies, or hire drivers to do so. Also, the drivers in the instant case are subject to disciplinary action if they fail to appear for loading as scheduled, if they fail to follow the route sheet, or engage in physical altercations off the Employer's property. By contrast, the drivers in *Central Transport* were not subject to any kind of disciplinary system. Instead, the employer there threatened to find another driver to work on a particular run, or to cancel the driver's contract if displeased with the driver's work. The extent to which the Employer herein disciplines the owner-operators goes beyond the threat to cancel their contract.

The Employer also cites *North American Van Lines v. NLRB*, 869 F.2d 596 (1989), in support of its position that the owner-operators herein are independent contractors. I find that case similarly distinguishable. There, unlike here, the owner-operators had complete discretion to turn down assignments and the incentive system employed by North American Van Lines was designed to motivate drivers to accept assignments by rewarding those who took undesirable loads and by disciplining those who did not have a sufficient number of loads.

⁸⁰ The probative record evidence shows that all of the owner-operators, except for Singh's and Easy Save, use their trucks solely to service the Employer. The aforementioned exceptions use their trucks 90-95 percent of time to service the Employer. The Petitioner does not seek to represent Ish's, Singh's, and TDJ, or any of their drivers or helpers.

plining those who did not have a sufficient number of loads. The court found that the "drivers' ability to decline particular loads is manifest and the exercise of that ability leads to significant independence in practice." In this regard, the Employer also points to *Associated General Contractors*, 290 NLRB 522 (1988), where the drivers were found to be independent contractors as they were free to reject a job when offered, drive off the job after they arrived, or leave abruptly in the middle of the day if the job involved hauling of material other than the kind which was represented to them. In contrast to the facts in the cases cited by the Employer, the owner-operators herein are not permitted to turn down assignments and the record is devoid of any evidence that any owner-operator did so without penalty. To the contrary, the record shows that the Employer's owner-operators' frequently risk discipline for a variety of different reasons previously discussed.

Despite the Employer's contention that there is no difference between the operations of the owner-drivers and that of Ish's, Singh's, and TDJ, the record indicates otherwise. The Employer guarantees these owner-operators, and all of their drivers, a regularly scheduled route, whereas the remaining owner-operators do not have any such guarantee. In fact, when there are no deliveries waiting for loading at the scheduled arrival time, the owner-operator is forced to stay at the Employer's facility until there is a load available. Ish's, Singh's, and TDJ also involve significantly larger sized operations. They own large fleets of trucks, and employ a substantial number of employees, who clearly earn more than the drivers and helpers of other owner-operators. As the employees of these three companies have different working conditions than the remaining owner-operators, they do not share a community of interest with other owner-operators, or their helpers. More importantly, the Petitioner does not seek to represent these three owner-operators or the employees employed by them. Based on the foregoing, Ish's, Singh's, and TDJ, and all of the employees employed by them, would not be included in any unit found appropriate.

Having resolved the independent contractor issue, two other issues remain unresolved: the supervisory status of the owner-operators and the unit composition and scope among the petitioned-for employees. As indicated above, I am of the opinion that neither issue can be decided without re-opening the record to provide the parties with the opportunity to present additional evidence related thereto. If the Board disagrees with my findings regarding the independent contractor issue, the record need not be re-opened as the matter will be moot. In the absence of requests for review of this decision, or should the Board affirm this decision after review, I will issue an order reopening the record specifying the evidence to be adduced at the hearing.

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