Roadway Package System, Inc., a wholly owned subsidiary of Roadway Services, Inc. *and* Wholesale and Retail Food, Distribution, Teamsters Local 63, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Cases 31–RC–7267 and 31–RC–7277

August 27, 1998

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, AND BRAME

On March 9, 1995, the Regional Director for Region 31 issued a Decision and Direction of Election in Case 31–RC–7267 (pertinent portions of which are attached as an appendix) in which he found that the pickup and delivery drivers, "Temp A" drivers, and "contractor employees" at Roadway's Ontario, California terminal are employees within the meaning of Section 2(3) of the Act. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer (Roadway) filed a timely request for review of the decision, contending that the pickup and delivery drivers are independent contractors.[1] On April 11, 1995, the Board granted the request for review. In Case 31–RC–7277, a petition seeking a unit of all the pickup and delivery drivers at Roadway's Pomona, California terminal was filed under Section 9(c) of the Act. Following the hearing held on various dates between March 28 and April 25, 1995, this case was transferred to the Board for decision on May 17, 1995, pursuant to Section 102.67(h) of the Board's Rules.[2] Thereafter, the parties filed posthearing briefs. As the Ontario and Pomona cases raise common questions of law and fact concerning the status of Roadway's pickup and delivery drivers,[3] the Board has decided to consolidate them for consideration and decision on review.[4]

On December 3, 1996, the Board held oral argument in these cases together with *Dial-A-Mattress Operating Corp.*, 326 NLRB No. 75 (1998), also issued today. At the oral argument, the Board heard comments regarding the following: (1) the Board's authority to change or modify the common law right-of-control test to determine if an individual is an employee under Section 2(3) of the Act; (2) the relative importance of factors indicative of employee or independent contractor status; (3) the applicability of three specific cases,[5] and (4) evidence of financial gains or losses by the drivers in the Roadway cases. The parties, as well as a number of amici curiae,[6] participated in the oral argument and/or filed preargument and postargument briefs.[7]

After careful consideration of the entire record in each case, the oral argument, and the briefs of the parties and amici, we find that the Ontario and Pomona drivers are employees within Section 2(3) of the Act. We, thus, affirm the Regional Director's findings and direction of election in the Ontario case, and we direct an election in the petitioned-for unit in the Pomona case.[8]

[1] Review of the Regional Director's findings of employee status for the Ontario Temp A drivers and contractor employees was not requested.

[2] By stipulation of the parties, substantial portions of the record in the Ontario case were included in the Pomona case record.

[3] At times, Roadway refers to the drivers at issue in these cases as "P&D contractors" or simply "contractors." To avoid any possible confusion with the term "independent contractors," we will refer to the pickup and delivery drivers as "drivers" in our decision unless otherwise noted.

[4] In its postoral argument brief, Roadway renews its prior motion requesting that the Board consolidate additional pending cases involving the same parties and identical issues in Cases 21–RC–19485 and 5–RC–14313, or, in the alternative, take administrative notice of the records therein. The Board denied that prior motion on November 5, 1996. We find that Roadway has not raised any new or different arguments to warrant our reconsideration of the November 5 denial.

[5] *Roadway Package System*, 288 NLRB 196 (1988*); NLRB v. Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981), enfg. 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).

[6] American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); American Trucking Associations; Associated Builders and Contractors, Inc.; Chamber of Commerce of the United States of America; Council on Labor Law Equality; Messenger Courier Association of the Americas; and Newspaper Association of Americas.

[7] On January 20, 1998, Roadway moved for reargument of these cases. The Petitioner and amicus AFL–CIO filed opposition statements to the motion, while amicus Chamber of Commerce filed a memorandum in support of the motion. The motion is denied as the record, briefs, and December 3 oral argument adequately present the issues and positions of the parties and amici.

[8] Member Hurtgen recused himself and took no part in the consideration of these cases.

Because the Pomona petition was transferred to the Board for decision, we have reviewed the hearing officer's rulings made at the Pomona hearing. We find that these rulings are free from prejudicial error and are affirmed. Based on the parties' stipulation, we find that Roadway is engaged in commerce within the meaning of the Act. We also find that it will effectuate the purposes of the Act to assert jurisdiction over Roadway. We further find, based on the parties' stipulation, that the Petitioner is a labor organization within the meaning of Sec. 2(5) of the Act and that it claims to represent certain employees of Roadway. As discussed more fully below, we find that a question affecting commerce exists concerning the representation of certain employees of Roadway at its Pomona terminal within the meaning of Sec. 9(c)(1) and Sec. 2(6) and (7) of the Act.

In addition, we shall permit the two temp A drivers and drivers Jaime Calderon and Roberto Gonzales, who allegedly supervise nonunit employees, to vote under challenge in the Pomona election because there is insufficient evidence to determine their unit placement. The Petitioner would exclude all four individuals from the Pomona unit, whereas Roadway would include them. Yet, in the Ontario case, the parties took different positions regarding the unit placement of similar drivers. We further note that the parties' posthearing briefs in the Pomona case provide us with no clear explanation for these differences in positions.

The parties agreed to exclude David Martinez and Juan Orozko, the drivers of Calderon's and Gonzales' vehicles, respectively, on community of interest grounds. We, therefore, exclude Martinez and Orozko from the Pomona unit.

I. INTRODUCTION

Roadway, a Delaware corporation, operates a nationwide pickup and delivery system for small packages throughout the United States. This system currently is comprised of approximately 317 terminals and hub facilities. The sole issue to be decided here is whether the drivers at Roadway's Ontario and Pomona terminals are employees under Section 2(3) of the Act or independent contractors not subject to the Board's jurisdiction.[9]

Almost a decade ago, the Board addressed a similar issue for the pickup and delivery drivers at Roadway's terminals located at Louisville, Kentucky, and Redford, Michigan. See *Roadway Package System (Roadway I)*, 288 NLRB 196 (1988), and *Roadway Package System (Roadway II),* 292 NLRB 376 (1989), enfd. 902 F.2d 34 (6th Cir. 1990). The Board found employee status for the drivers in those cases. Specifically, in *Roadway I*, 288 NLRB at 198, the Board stated that the drivers "bear few of the risks and enjoy little of the opportunities for gain associated with an entrepreneurial enterprise" and Roadway had "substantial control over the manner and means" of performance by their drivers.

In *Roadway I*, Roadway controlled, inter alia, the customer service areas and the number of packages and stops that were assigned to the Louisville drivers. The drivers had no proprietary interest in their customer service areas, and their compensation was controlled by Roadway. Roadway also maintained a "core zone supplement rate" to balance the Louisville drivers' income across various zones and thus minimize their risk and opportunity for gain. In addition, Roadway had a "flex" program to allow for the temporary transfer of packages or areas among the Louisville drivers to equalize their workload. The drivers received no commission for any customer sales leads, but they were eligible for a startup loan of $650 in gross income per week for the first 13 weeks of delivery for Roadway. Most of the Louisville drivers purchased or leased their vehicles from a source sponsored by Roadway. On the termination of their service to Roadway, the drivers were simultaneously released from their financial obligations to that source. Finally, Roadway had significant control over the daily work schedule of the Louisville drivers, and it required that drivers wear a uniform and use the Roadway color and logo on their vehicles.

At oral argument in the instant cases, counsel for Roadway argued that, commencing in 1994, Roadway made nationwide changes in its driver operations. He argued that those particular changes support a finding of independent contractor status for the Ontario and Pomona drivers. In this connection, counsel emphasized, inter alia, that Roadway no longer: (1) requires a uniform starting time; (2) maintains a fleet of vehicles for its drivers' use; (3) maintains forms for the drivers to lease or purchase vehicles; (4) releases terminated drivers from their financial obligations; (5) terminates drivers' agreements at will and without cause; and (6) assigns customer service areas without giving the drivers a proprietary interest in these areas.

As fully described below, we find that these 1994 changes do not require a different result from *Roadway I*.[10] Applying the common-law agency test as interpreted by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), we have considered all the incidents of Roadway's relationship with its Ontario and Pomona drivers, including the 1994 changes cited by Roadway, and we find that the factors, as a whole, weigh in favor of finding employee status for these drivers.

II. FACTS[11]

A. Duties and Responsibilities

Over 5000 drivers, including the Ontario and Pomona drivers (approximately 22 each), are part of Roadway's nationwide distribution system. Six percent (or about 300 drivers) operate as incorporated businesses, but none of the Ontario drivers do so. The drivers pick up and deliver packages under an identical "Roadway Package System, Inc. Pick-up and Delivery Contractor Operating Agreement" (the 1994 Agreement). The 1994 Agreement is a revision of an earlier contract used by Roadway and its drivers prior to 1994. Shortly before the 1994 Agreement took effect in January 1994, the drivers were told by Roadway that a failure to accept the new contract would result in the nonrenewal of their working relationship with Roadway. As a consequence, virtually all the drivers have signed this new contract.

The 1994 Agreement runs from 1 to 5 years depending on the duration date selected by the individual driver. Under this contract, the drivers are required to deposit with Roadway $1000 in an escrow account ostensibly to

[9] For the first time in its postoral argument brief, Roadway untimely argues that all the drivers are supervisors within the meaning of Sec. 2(11) of the Act. Roadway's request for review in the Ontario case included no argument that the Ontario drivers are supervisors. In fact, Roadway's stated ground for review there was that the Ontario drivers are independent contractors. In its posthearing brief in the Pomona case, Roadway also failed to raise any supervisory claim regarding the Pomona drivers. The fact that the Regional Director excluded Ontario driver Albin as a supervisor and no party requested review of that finding does not cure Roadway's untimeliness in raising a supervisory claim regarding the Pomona drivers and the other Ontario drivers.

[10] The factual pattern presented in *Roadway II* closely resembled that in *Roadway I*. The Board likewise found the drivers in *Roadway II* to be statutory employees, concluding that "entrepreneurial decisions affecting the drivers' profit-and-loss picture are not made by the drivers, and that the Respondent tells the drivers how to perform their work tasks well beyond the point of simply dictating the result[.]" 292 NLRB at 378.

[11] Our recitation of the facts summarizes the records in both cases and the information set forth at pp. 9 through 21 of the Regional Director's decision in the Ontario case (see appendix). Our factual findings apply to both the Ontario and Pomona drivers unless otherwise indicated.

be applied to any indebtedness owing to Roadway on contract termination.[12] During its term, the 1994 Agreement may be terminated by mutual agreement of the driver and Roadway, by either the driver or Roadway alone if the latter ceases to do business or reduces operations in all or part of the terminal service area, or by the driver alone upon 30 days notice with a $1000 liquidated damages payment. Roadway has terminated a few drivers' contracts for various reasons, including a driver's failure to pass a drug test, thefts, repeated accidents, safety violations, or customer complaints. Under the 1994 Agreement, a driver may pursue arbitration of any "wrongful termination" of his contract.[13]

Like the drivers in *Roadway I* and *II*, the Ontario and Pomona drivers transport, pick up, and deliver packages between their respective terminals and Roadway's customers. They provide daily service in a "primary service area," which is comprised of several postal "zip codes" or other comparable geographic boundaries. The drivers cannot refuse to accept merchandise for pickup and delivery in their primary service area. However, Roadway can transfer any overflow work from one driver's primary service area to other drivers to pick up and deliver as part of Roadway's "flex program." The drivers may select their own routes for making deliveries that are not already pre-scheduled for any specified time. However, the package pickups that are performed by the drivers normally occur during the latter part of the day, and several of the pickups may have specific time periods which have been arranged by Roadway at the customer's request. While on their routes, the drivers must use a scanner to feed tracking data about their work into an onboard computer that electronically transmits the information to Roadway's central computer. On their return to the terminal at the end of the day, the drivers must also transfer additional data from their equipment into Roadway's computer.

The Ontario and Pomona drivers average between 9 and 9-1/2 hours of work per day, Monday through Friday. Their daily deliveries and pickups, like those performed by the drivers at Roadway's other terminals, must interface with a "line haul" operation by which Roadway transports overnight packages to and from its terminals.[14] This line-haul operation requires the drivers to return to the terminals to have their vehicles unloaded by Roadway's package handlers, during the late afternoon or evening hours, prior to the scheduled line haul departures. The drivers have no particular starting time for work, but their vehicles must be present for loading in the early morning hours after the terminal's line-haul interface process is done if they wish to have Roadway's package handlers load their vehicles with that particular day's deliveries. As Roadway points out, the drivers now have the option of loading their vehicles themselves. Most of the drivers, however, still choose to leave their vehicles at the terminals overnight for the early morning loading by Roadway's package handlers.

As in *Roadway I* and *II*, the drivers must wear a Roadway-approved uniform. The drivers wear either shorts or long pants and short sleeve or long sleeve uniform shirts. The basic design for the uniform is a tan, khaki-type shirt and a navy blue bottom. The uniform displays Roadway's RPS emblem and may have the name of the driver if the latter so desires. The 1994 Agreement states that the driver must wear a uniform "maintained in good condition" and consistent with standards "as promulgated from time to time by RPS."

B. Vehicles

The Ontario and Pomona drivers own or lease vans to perform their work for Roadway. Under the 1994 Agreement, the drivers may operate their vehicles for other commercial or personal purposes when it is not in the service of Roadway if they remove or mask all numbers, marks, logos, and insignia identifying Roadway. There is no evidence that the drivers use their vehicles for any commercial purpose other than hauling for Roadway.[15] The drivers' vehicles must meet precise specifications set by Roadway. A brochure entitled "Becoming a Roadway Package System Pick-up and Delivery Contractor" (new driver brochure) illustrates the "RPS Package Vans" that are to be used by the drivers, and indicates that the vehicles are "custom designed for RPS." The brochure describes the required make, model, chassis, payload (weight and number of packages), shelving, and rear door of vehicles.[16] This document further indicates that Roadway provides the drivers with "warranty recovery assistance" and various "P&D Contractor Assistance," including a reference to "Assistance in Arranging Financing of Vehicle Lease or Purchase."

Nearly all the drivers obtain either new vehicles through Bush Leasing or used vehicles from former drivers of Roadway.[17] During the "focus groups" conducted by its recruiting department, Roadway advises prospective drivers that "we have a van that meets our specifica-

[12] Prior to 1994, the escrow deposit contractually required was only $500. Under the 1994 Agreement, this amount continued to be the requirement for those drivers who had worked for Roadway prior to 1994, because they were "grandfathered in."

[13] There is no contractual provision for arbitration of any other dispute between the driver and Roadway. There is no evidence that Roadway has a formal disciplinary system for its Ontario and Pomona drivers.

[14] The drivers do not operate the line-haul vehicles.

[15] At the Pomona hearing, the parties stipulated that three drivers at terminals other than Ontario and Pomona have used their vans for commercial purposes on weekends.

[16] The new driver brochure lists three sizes of package vans—P-400, P-600, and P-1000—used for Roadway deliveries with payloads of 3200, 4500, and 10,000 pounds, respectively.

[17] At the oral argument, counsel for Roadway conceded that while some drivers obtain their vehicles elsewhere, "[t]here's no question that Bush Leasing provides the vehicles for most of the people." There is no evidence that Roadway has any financial interest in Bush Leasing.

tions, it's brand spanking new and you can buy it. You can go to your credit union and buy it . . . and we have recommended Bush Leasing." In addition to recommendations of this sort, Roadway makes sure that Bush Leasing has a sufficient number of vans that are available to the drivers. Based on its own estimates of how many new drivers may need vans, Roadway purchases the vans from the manufacturer, Navistar, Inc., which builds the vehicles to Roadway's specifications. Then, the Navistar vehicles are re-sold to Bush Leasing for later acquisition by the prospective drivers referred by Roadway. Negotiations for the vehicles take place between the drivers and Bush Leasing, without Roadway's participation.

What proportion of the drivers purchase, rather than lease, the Bush vehicles is not clearly indicated by the record. The actual investment needed to purchase or lease a vehicle is also not clear because no documentation for an actual purchase or lease was introduced into the record. The estimated purchase price of these vehicles ranges from $22,000 for the smallest-sized van to $39,000 for the largest-sized van. William E. Breese, Roadway's director of contract relations, estimated that a vehicle lease would require a $4000 down payment, and payments between $300 to $400 monthly for 4 to 5 years with a "balloon" payment at the end of the lease. But, the new driver brochure suggests that vehicle financing over a 5- to 6-year term is available with an $800 security deposit, plus 1 month's vehicle payment (amount unspecified) and an $88 filing fee from the driver. In any event, Breese further testified that there had been "many" terminated drivers whose vans had been repossessed by Bush for failure to make their monthly payments. Breese revealed that he could not identify any of the drivers involved in these repossessions or, for that matter, any specific example of a former driver actually incurring financial loss for this reason.

Regarding used vehicles, Breese testified at the Ontario hearing that "normally" when a driver has no use for a van, Roadway attempts to put the prospective buyer/driver and seller/driver in touch with each other. Ontario driver James Jeffries testified that "[t]here's always been contractors [drivers] waiting to come on that were more than happy to purchase the vehicles" from other drivers.

Roadway assists in providing replacement vehicles to the drivers whose vehicles are temporarily out of service. It has negotiated a nationwide contract with national commercial rental companies so that, according to Breese, "good" rates and other favorable terms are provided to its drivers. Roadway has also purchased in excess of 200 vans per year from former drivers for the current drivers to use as spare vehicles at terminals around the country.

Under the 1994 Agreement, the drivers may operate additional vehicles with Roadway's consent and may use additional "qualified persons" to operate the additional vehicles, pursuant to applicable laws and Roadway's "safe driving standards" that are attached to the Agreement. According to this Agreement, these extra drivers shall "not be considered employees of RPS." The drivers are responsible for all expenses associated with using this extra personnel. The drivers, without prior approval from Roadway, may also use helpers or replacement drivers on their routes. Ontario driver Albin and Pomona drivers Calderon and Gonzales own or lease a second vehicle and use additional drivers to service a second primary service area assigned to each of them.[18] Approximately 7 percent of Roadway's drivers nationwide have a second vehicle, but the record does not indicate whether they have more than one primary service area like Albin, Calderon, and Gonzales.

The 1994 Agreement also requires the drivers to be responsible for maintaining their own delivery vehicles[19] and insuring that Roadway's colors and logo are displayed on the vehicles "as part of the RPS system." Because rental vehicles are not identifiable "as part of the RPS system," Roadway limits the use of such vehicles by its drivers. Roadway's vehicle appearance requirements go beyond the minimal regulatory standards set forth by the U.S. Department of Transportation.

C. "Business Support Package"

The "business support package" assists the drivers in meeting their responsibilities under the 1994 Agreement. For a daily $8 fee, the package includes a clean uniform each day, the lease of the required scanner and computer, an annual Department of Transportation (DOT) inspection, and a vehicle washing service. The package also provides the drivers with the opportunity to purchase from outside vendors, at "RPS-negotiated prices," an array of vehicular maintenance services and parts.[20]

The record shows that virtually all of Roadway's 5000 drivers use the business support package. Breese testified that the number of drivers nationwide who do not have the package is "very, very low, maybe less than 1%." All the Ontario and Pomona drivers use the package, and, as confirmed by driver Roberto Gonzales, the package is "convenient" and includes "things that would be hard . . . to get on my own."

D. Compensation and Financial Support

To use Roadway's pickup and delivery services, the customers must have an account with Roadway. Roadway has customer sales representatives at each terminal, and it maintains a toll free telephone number for customer service and orders. Although Roadway argues that

[18] As previously noted above in fns. 8 and 9, Albin is excluded from the unit, and the status of Calderon and Gonzales has not yet been resolved.

[19] Roadway also posts charts on vehicles to remind the drivers about necessary warranty maintenance.

[20] These include preventive maintenance services, tires, batteries, bumpers, package-handling equipment, body repairs, and paint.

the drivers have a proprietary interest in their service areas, the customer accounts are considered the exclusive domain of Roadway. Drivers who refer new customers to Roadway receive no commission for these referrals.

Roadway pays the drivers and they are responsible for the withholding and the payment of their own Federal, state, and local taxes. Roadway provides no paid holidays, vacations, disability, or retirement benefits to the drivers. The record does not indicate a typical or an average annual income for the drivers.

Under the 1994 Agreement, Roadway provides the drivers with eight distinct compensation mechanisms: (1) a "van availability settlement" of $40 per day for "each business day" that a driver provides services under the agreement;[21] (2) one rate for each package delivered and picked up, and one rate for each stop;[22] (3) a "temporary core zone density settlement" to supplement the piece rates based on a rate for a driver's particular primary service area which may contain one or more core zones; (4) a voluntary "flex program" to compensate participating drivers $5 per day (in addition to the standard package pickup rates) for agreeing to pick up and deliver any overflow work from fellow drivers; (5) a "quarterly performance settlement" of 2.25 percent of the quarterly gross settlement for drivers with at least 1 year of service; (6) a "service bonus" of $500 per year for each of the first 4 years a driver is under the agreement, and $1000 per year after being under the agreement for 5 years or more; (7) a "customer service program" that provides a bonus paid for no at-fault accidents and no verified customer complaints based on driver and terminal performance; and (8) a "service guarantee program" under which the drivers are eligible for loans from Roadway of up to $5000, depending on the amount maintained in the driver's "service guarantee account," which is an interest-bearing savings account to which Roadway makes matching contributions of 20 percent each quarter, or 80 percent annually.

Roadway furnishes other financial support to the drivers. In the event of a substantial increase in the fuel prices in a driver's terminal area, the driver is entitled to additional compensation from Roadway. Roadway also makes available group rates for the insurance that the driver is contractually obligated to obtain. The new driver brochure describes Roadway's 13-week "start-up loan" program for drivers. Breese testified that loans are "good" for 6 months. If a new driver's settlement does not reach a "certain" level, then Roadway "makes up the difference" and the driver must pay back this loan to Roadway, with interest, when the driver's settlement reaches that certain level. Breese did not state the amount of the loans or the size of the settlements involved.

Roadway establishes all of the above elements of compensation to the drivers as well as the service fees charged to its customers. Based on the submitted weekly driver settlement sheets, the largest proportion of a driver's income derives from the piece rates (deliveries/stops and pickups), the daily van availability settlement, and the temporary core zone density supplement. According to the testimony of Ronald Long, Roadway's regional manager, the purpose of the temporary core zone density settlement is to supplement a driver's income until such time as the package and stop density in the driver's area is within the "normal" range that is derived for that area. The record does not show that a driver's participation in the "flex program" significantly increases his weekly earnings. Whether to "flex" to a participating driver, and the extent of that "flex," is a decision which is controlled by Roadway. Each driver's service area has a designated minimum and maximum range of delivery stops that have been established by Roadway with minimal input from the drivers. If the delivery stops exceed the maximum level, they are "flexed off" by Roadway to other drivers who are under the maximum level of stops in their own service areas.

E. Proprietary Interest

Prior to 1994, Roadway's practice was to assign the service areas unilaterally to its drivers. When the drivers signed the 1994 Agreement, they were granted a "proprietary interest" in their existing service areas. According to Roadway, this proprietary interest is manifested in the driver's contractual right to sell his service area or portions thereof, or to receive minimum compensation for customer accounts that are reassigned or removed from his service area.

According to Roadway, the concept of proprietary interest and the contractual right to sell service areas afford entrepreneurial opportunity for the drivers. As reflected by the 1994 Agreement, the driver and Roadway have a "mutual intention to reduce the geographic size of the (driver's) primary service area." Under this plan, the driver will sell off portions and reduce the geographic size of his service area as business grows in his primary service area if the driver cannot "reasonably service" all or part of that area. In this way, the driver can use his proprietary interest and his right to sell customer accounts to maintain a serviceable area. The 1994 Agreement proclaims this to be in the driver's interest because, purportedly, his income will rise and his expenses will lessen in a smaller and more manageable, but more lucrative, service area. In theory, the driver will also profit by receiving compensation for the sale of these accounts.

How such sales are to occur is not clearly delineated in the 1994 Agreement. On this subject, the agreement

[21] The drivers also receive up to a $100 for making their vehicles available on business days before and after major holidays.

[22] The 1994 Agreement also entitles the drivers to certain additional compensation if the package is, inter alia, C.O.D., requires a "call tag," is a one-time as opposed to regular pickup, or weighs 100 or more pounds.

states that as the settlement and density of the driver's primary service area increase, the "potential value" of the driver's customers also "may" increase and the driver may "sell to the highest bidder." The agreement further states that Roadway will not "interfere" with transactions between the driver and other persons "who have the capability and qualifications to perform the services in this Agreement." According to the agreement, any transfer and consideration paid "is strictly . . . between the Contractor [driver] and any . . . Replacement Contractor [driver]," but Roadway agrees to deduct any such consideration from the purchasing driver's weekly settlement for up to 1 year and to remit it to the selling driver. The agreement further states that Roadway shall have no obligation to secure a replacement for a driver or to assure payment for assignment.

Two other factors which are contained in the 1994 Agreement limit the scope of the driver's proprietary interest and right to sell. First, the drivers must be "in good standing" before any interest in a service area can be sold or transferred. Second, Roadway may reconfigure a driver's service area, on 5 days notice, "to take account of customer service requirements." During the notice period, the driver has the opportunity, "using means satisfactory to RPS," to restore service to the level called for in the agreement. If the driver cannot provide "reasonable means to continue to service the Primary Service Area," or he does not sell to another driver, Roadway may reconfigure the driver's area at its "sole discretion."

On the subject of reconfiguration, the record reveals that some drivers who have participated in such sales sold their service areas after Roadway's management warned that their areas would be involuntarily reconfigured because of the driver's inability to service certain areas or accounts. Other drivers who have had their areas reconfigured engaged in such sales after having been told that their overall contract would be "in jeopardy" if the level of service in their areas did not improve.[23] Driver Katts testified that he gave away a portion of his area to maintain his overall standard of service and to avoid endangering his entire contract with Roadway.

To avoid reconfiguration, a driver theoretically has several alternatives which constitute "means satisfactory to RPS." According to Roadway, the drivers can hire additional helpers or drivers, purchase or lease a second vehicle, or obtain a supplemental vehicle (a trailer attached to the vehicle). The record establishes that none of the Ontario and Pomona drivers have used these options to avoid reconfiguration. A supplemental vehicle is often too costly and does not result in additional compensation because the drivers' customer accounts have not increased.[24] For all practical purposes, the driver who is faced with reconfiguration must either sell or give away the affected area or he must submit to Roadway's involuntary reconfiguration.

If he cannot sell an area or Roadway takes over or reassigns his accounts, the driver is entitled to a minimum form of compensation for the loss of customer accounts. The 1994 Agreement provides that the driver has the "right . . . to receive payment in the event his/her Primary Service Area is reconfigured with the result that customers previously served by Contractor are reassigned." The driver to whom the accounts are transferred or Roadway (if it takes over the accounts) must pay the driver who relinquished the accounts specific dollar amounts based on a formula described in the 1994 Agreement.

The evidence regarding the sales of service areas, or portions thereof, is limited. At the Ontario hearing, Roadway submitted documents attempting to show the existence of such sales and whether the sales also included the drivers' vehicles. Roadway provided lists of so-called "equity transfers" for approximately one-third of Roadway's total number of terminals for calendar year 1994. These lists were generated in response to Breese's electronic message (e-mail) which was sent to all of Roadway's terminals managers. Breese requested "any information [the terminal managers] might have on transfer of equity between drivers." With a few exceptions, most terminal managers who responded to Breese's request listed no more than one or two transactions. Several of these listed transactions indicated that a van was included in the sale. Many of the listed transactions described the dollar amounts involved as simply "unknown."

In several of these situations listed for Breese, the terminal managers indicated that they had no first-hand information about the sales, but had merely "heard of" these sales. Pomona Manager Richard Jean testified that he knew only "through rumors" about the seven transactions that he had listed for Breese. Likewise, Ontario Manager Rich Brager testified that he was aware that drivers have sold stops and entire work areas, but he could not provide the specific dollar amounts because he was not involved in the transactions. In fact, Brager's reply to Breese's e-mail inquiry gave no transactions for Ontario at all. Ontario driver Pruitt testified that he took over the route and van of driver Vanderslius as "a package thing" by making Vanderslius' vehicle lease payments and promising to pay Vanderslius $3000 at the end of the vehicle lease. In a written summary of the transactions compiled from the various terminals, Breese ac-

[23] The record shows that a contract "being in jeopardy" means to the drivers that Roadway may resort to an involuntary reconfiguration of their service areas or it may completely terminate their contracts.

[24] As previously indicated, Ontario driver Albin and Pomona drivers Calderon and Gonzales own or lease a second vehicle and use additional drivers, but the record shows that they did not take such action to stave off reconfiguration. Rather, they wanted to service additional primary service areas with distinctly separate routes and core zones. In doing so, they receive additional compensation.

knowledged that "there has been no attempt . . . to confirm either the details or the dollar amounts of transactions."

Regarding the Pomona transactions which were listed by Manager Jean, none included the sale of a van. According to Jean's testimony, he listed a transaction between drivers Vella and Steenburgen because he had received an undated, signed agreement between Vella and Steenburgen indicating a sale of a portion of the latter's area for $1000.[25] Drivers Gonzales, Irions, Hemsley, and Johnson participated in four of the listed transactions and their testimony is summarized as follows. In November 1994, Gonzales sold about 15 percent of his route to Johnson, a new Pomona driver, for $1500, payable $100 per week by personal check. Also, in November 1994, Irions sold a portion of his route to Johnson. Irions received two checks of $1000 and $2800 directly from Roadway for the sale. Irions believed that Roadway lent Johnson the entire $3800 purchase price after receiving his complaints about Johnson's failure to pay the agreed-upon amount. Irions was sure that Johnson had borrowed the money from Roadway because it was being deducted from Johnson's check each week.[26] Similar details for a third sale to Johnson from another driver, Harkins, were not provided.[27] Finally, Hemsley purchased a portion of his route from driver Steenburgen for $4000, and he paid $1000 "up front" to Steenburgen. Hemsley agreed to pay the remaining amount due by monthly check installments of $200.

III. CONTENTIONS OF THE PARTIES

The parties and the amici agree that under Section 2(3) of the Act the Board must apply a multifactor test developed under the common law of agency to decide whether an individual is an employee or an independent contractor. They uniformly argue that the Board has no authority to apply a standard that departs from the common law of agency principles, but they debate the relative importance of the factors to be applied under this multifactor test. 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 Roadway and other amici assert that the right to control the manner and means of accomplishing the end result is the "most important" factor or "predominant" consideration in determining the individual's status.[28]

Under its articulation of the common law test, Roadway argues that the drivers are independent contractors. In support of its argument, Roadway emphasizes, inter alia, that the drivers control their own work schedules and other details of job performance; they are not subject to a disciplinary policy; and their compensation package is based on performance-related components. Roadway further asserts that the drivers are independent entrepreneurs because they have a significant proprietary interest in their service areas and they have experienced gains and losses in their businesses. Roadway notes that the drivers, like independent businessmen, receive no fringe benefits from it, and they are responsible for their own tax withholdings.

Relying on the Board's decision in *Standard Oil Co*., 230 NLRB 967 (1976), the Petitioner takes the position that the drivers are employees within the meaning of Section 2(3) of the Act. In support of its view, the Petitioner contends that the drivers have no genuine or significant opportunity to realize financial gains or losses through the exercise of entrepreneurial initiative. The Petitioner asserts that Roadway controls the customer rates and business volume, which are the main determinants of the drivers' revenue. It further asserts that the drivers' proprietary interest is not a true indicator of ownership but more like a rental arrangement with a deposit, some of which is to be returned upon the termination of the driver's services to Roadway. The Petitioner also argues that the drivers' alleged ability to expand the volume of packages by growing Roadway's business in their service areas is largely illusory. According to the Petitioner, the drivers have only a theoretical opportunity to haul for others, and Roadway's various support programs "cushion" the drivers' risk of loss in servicing Roadway's customer accounts.

IV. LEGAL PRINCIPLES

Section 2(3) of the Act, as amended by the 1947 Labor Management Relations Act (the Taft-Hartley Act), provides that the term "employee" shall not include "any individual having the status of independent contractor."[29]

[25] Neither Vella nor Steenburgen testified, and Jean's testimony did not otherwise confirm this transaction.

[26] A "contractor equity settlement deduction" form in the Ontario case record states that Johnson authorized deductions of $25 weekly from his settlement check until $1000 was reached for direct transfer to Irions.

[27] Harkins did not testify, and Johnson's testimony does not elaborate on this sale.

[28] The parties and amici also disagree about whether controls mandated by Governmental regulations should be considered probative of an employee-employer relationship. Unlike our concurring colleague, we find it unnecessary to reach this issue because our disposition of the case is not based on factors stemming from Governmental regulations or control.

[29] Sec. 2(3) [29 U.S.C. §152(3)] provides in full:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. §151 et seq.] as amended from time to time, or by any other person who is not an employer as herein defined.

The meaning and ramifications of this 1947 amendment were first considered by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968).[30] In that case, the Court declared that

> [t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. [Footnote omitted.] And both petitioners and respondents agree that the proper standard here is the law of agency. Thus there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor. [390 U.S. at 256.]

The Court, however, recognized that the application of the common-law agency test may be challenging at times because "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." The Court further stated that there is no "shorthand formula" or "magic phrase" associated with the common-law test. Instead, the Court specifically instructed that under the common-law agency test "all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law principles." 390 U.S. at 258.

In *United Insurance*, the Court upheld the Board's determination of employee status for the debit agents of the respondent insurance company. In doing so, the Court emphasized the following "decisive factors" present in that case:

> [T]he agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission plan" that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory. [390 U.S. at 259–260.]

For a long time, *United Insurance* has been the preeminent guidance to the lower courts and the Board on what standard should be applied in differentiating employee status from independent contractor status in the NLRA context. Recent Supreme Court precedent reinforces *United Insurance*'s observations about the appropriateness of using the common law of agency as the test for determining employee status. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992); and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). Furthermore, these cases teach us not only that the common law of agency is the standard to measure employee status but also that we have no authority to change it.

In *Town & Country Electric*, supra, the Court upheld the Board's position that paid union organizers are not excluded from the term "employee" as defined in Section 2(3) of the Act. In reaching its unanimous holding, the Court specifically observed that

> [i]n the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by "common-law agency doctrine." *Nationwide Mutual Insurance Co. v. Darden*, supra, at 322–323 (quoting *Community for Creative Non-Violence v. Reid*, supra, at 739–740).

Both *Darden* and *Reid* address similar employee definition issues arising under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq., and the Copyright Act of 1976, 17 U.S.C. §101 et seq., respectively.[31] In each situation, the Court turned, as it had previously done in *United Insurance*, to traditional common-law agency criteria to identify whether an employer-employee relationship existed. In this connection, the Court in *Reid*, supra at 752 fn. 31, further highlighted the importance of the multifactor analysis of the Restatement (Second) of Agency, Section 220 (dealing with the definition of a servant).[32]

[30] This amendment was added in response to Congressional disagreement with the standard applied by the Board to determine employee status in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

[31] In *Reid*, an artist had been commissioned to produce a sculpture by a Washington, D.C. nonprofit organization dedicated to eliminating homelessness in America. The Court determined that the artist in question was not an employee of the organization but an independent contractor. In *Darden*, an insurance company had denied retirement benefits to a former agent on the ground that he was an independent contractor. The Court rejected the insurance company's defense to the extent that it remanded the case for a determination of whether the agent qualified as an employee under common-law agency criteria for identifying master-servant relationships.

[32] This section provides, in pertinent part:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

The parties and amici in the instant case rely on the Restatement, but they debate whether any of the factors listed in Section 220 are more or less indicative of employee status. Citing the language contained in Subsections (1) and 2(a), Roadway and several amici argue that the "most important" or "predominant" factor to be considered is whether an employer has a "right to control" the manner and means of the work. In contrast, the Petitioner and the AFL–CIO assert that all the factors should be weighed in the equation, as evidenced by the opening paragraph of Subsection 2 of Section 220.

The Supreme Court has clearly stated that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." See *United Insurance,* 390 U.S. at 258; *Reid,* 490 U.S. at 752; and *Darden*, 503 U.S. at 324. While we recognize that the common-law agency test described by the Restatement ultimately assesses the amount or degree of control exercised by an employing entity over an individual, we find insufficient basis for the proposition that those factors which do not include the concept of "control" are insignificant when compared to those that do. Section 220(2) of the Restatement refers to 10 pertinent factors as "among others," thereby specifically permitting the consideration of other relevant factors as well, depending on the factual circumstances presented. In addition, Comment c to Section 220(1) of the Restatement states that "[t]he factors in Subsection (2) are *all* considered in determining the question [of employee status], and it is for the triers of fact to determine whether or not there is *a sufficient group of favorable factors* to establish the employee relationship." (Emphasis added.) Thus, the common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control. See *NLRB v. Amber Delivery Service,* 651 F.2d 57, 61 (1st Cir. 1981) ("The determination of 'independence' . . . ultimately depends upon an assessment of 'all of the incidents of the relationship . . . with no one factor being decisive.' *NLRB v. United Ins. Co*., 390 U.S. at 258; . . . see also Restatement (Second) of Agency §220 (1958).") As the Board stated in *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982): "Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other."

In *Standard Oil Co*., 230 NLRB 967, 968 (1977), the Board rejected any

> so-called "right to control" test which mistakenly emphasizes minor details of the day-to-day performance of the Company's work by the commission drivers and minimizes important aspects of the arrangement between the Company and drivers which, although not too obviously encompassed by the "right to control" language, have, nevertheless, always been regarded as important factors in determining whether an employment relationship exists. It should be noted that, although the Supreme Court acknowledged in *N.L.R.B. v. United Insurance Co. of America*, 390 U.S. 254 (1968), that amending legislation after *N.L.R.B. v. Hearst Publications*, *Incorporated,* 322 U.S. 111 (1944), requires application of the common law agency test in determining who are employees under the National Labor Relations Act, it nowhere mentions the "right to control" test, apparently preferring to rely on specific considerations frequently mentioned with the "right to control" test in determining whether an employment or an independent contractor relationship exists.

The factors discussed by the Board in *Standard Oil* are consistent with those relied on by the Court in *United Insurance*, 390 U.S. at 259.

To summarize, in determining the distinction between an employee and an independent contractor under Section 2(3) of the Act, we shall apply the common-law agency test and consider all the incidents of the individual's relationship to the employing entity.

V. APPLICATION OF THE COMMON-LAW AGENCY TEST

Guided by the legal principles set forth above in Section IV, we now apply the common-law agency test to the present situation involving the Ontario and Pomona drivers. We find that the dealings and arrangements between these drivers and Roadway, including those reflective of the changes made by the 1994 Agreement, have many of the same characteristics of the employee-employer relationship presented in *United Insurance*. Reviewing the factors relied on by the Board in *Roadway I*, we see insignificant change pointing to independent contractor status.[33]

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.

(b) Whether or not the one employed is engaged in a distinct occupation or business.

(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

(d) The skill required in the particular occupation.

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.

(h) Whether or not the work is part of the regular business of the employer.

(i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in the business.

[33] In response to the Chairman's concurrence, we disagree that the owner-operators in *Dial-A-Mattress*, like the drivers here, do not have independent contractor status. Contrary to the Chairman, we find that Roadway's Ontario and Pomona drivers are distinguishable from Dial's

A. Analysis of Factors

As in *United Insurance*, the drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. All these factors weigh heavily in favor of employee status, and are fully supported by the following facts.

The Ontario and Pomona drivers devote a substantial amount of their time, labor, and equipment to performing essential functions that allow Roadway to compete in the small package delivery market. "[T]he functions performed by the drivers . . . constitute a regular and essential part of the company's business operations." *NLRB v. Amber Delivery*, supra, 651 F.2d at 63 (citing Restatement (Second) of Agency, Section 220(h)). None of the drivers are required to have prior delivery training or experience. Those unfamiliar with Roadway's system can gain assistance and guidance from the new driver orientation meetings that are conducted by Roadway's personnel. While a few operate as incorporated businesses, all the Ontario and Pomona drivers do business in the name of Roadway. Wearing an "RPS-approved uniform," the drivers operate uniformly marked vehicles. In fact, the vehicles are custom designed by Roadway and produced to its specifications by Navistar. The vehicles are identical as to make, model, internal shelving, and rear door, differing only as to chassis and payload (three choices depending on the size of the driver's primary service area). All the vehicles clearly display Roadway's name, logo, and colors.[34] Thus, the drivers' connection to and integration in Roadway's operations is highly visible and well publicized.

The drivers have a contractual right to use this customized truck in business activity outside their relationship with Roadway,[35] though none of the Ontario and Pomona drivers (and only 3 out of Roadway's 5000 drivers nationwide) have used their vehicles for other commercial purposes. This lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice by the Ontario and Pomona drivers and more a matter of the obstacles created by their relationship with Roadway.[36]

Roadway's drivers are prohibited under the 1994 Agreement from conducting outside business for other companies throughout the day. The drivers' commitment to Roadway continues through the evening hours when they must return their vehicles to the terminal to interface with Roadway's evening line-haul operations. Typically, most drivers then take their vehicles out of circulation. They leave their vehicles overnight at the terminal to take advantage of loading of the next day's assignments by Roadway's package handlers. As a consequence, their vehicles remain out of service during these off-work hours. Even if the drivers want to use their vehicles for other purposes during their off-work hours, there are several obvious built-in hindrances. First, the vehicles are not readily available. Second, before the driver can use his vehicle for other purposes, he must mask any marking reflecting Roadway's name or business. Every vehicle utilized by the driver has been dictated in detail—color, size, internal configuration including the internal shelving and door—by Roadway's operations. The vehicles are also not easily flexible or susceptible to modifications or adaptations to other types of use. Thus, these constraints on the drivers' use of their vehicles during their off-work hours "provide minimal play for entrepreneurial initiative and minimize the extent to which ownership of a truck gives its driver entrepreneurial independence." *Amber Delivery Service*, supra at 63. Roadway has simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities.

Truck ownership can suggest independent contractor status where, for example, an entrepreneur with a truck puts it to use in serving his or another business' customers.[37] But, the form of truck ownership, here, does not eliminate the Ontario and Pomona drivers' dependence on Roadway in acquiring their vehicles. Roadway's indirect control is further seen in that it requires the drivers

owner-operators in several important respects. See our discussion in today's decision in *Dial-A-Mattress Operating Corp*., 326 NLRB No. 75.

[34] See *Amber Delivery Service*, supra, 651 F.2d at 62, and *C.C. Eastern*, supra, 60 F.3d at 858 (control exercised over the appearance of the driver's dress and vehicle suggests employee status).

[35] The drivers have had permission to use their vehicles for personal and other commercial purposes for many years. See *Roadway I*, supra, 288 NLRB at 197.

[36] In *C.C. Eastern*, supra, 60 F.3d at 860, the court agreed with the principle that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the Company's claim that the workers are independent contractors." We view the Ontario and Pomona drivers' contractual right to engage in outside business as falling within the category of those "entrepreneurial opportunities that they cannot realistically take." For all practical purposes, the Ontario and Pomona drivers abide by work schedules that prevent them from taking on additional hauling business during their off-hours during the workweek. None of them and less than 1 percent of Roadway's total fleet of drivers have ever used their vehicles outside their relationship with Roadway. These small figures are particularly telling since the drivers have been permitted to use their vehicles for other commercial purposes for many years.

[37] See *Amber Delivery Service*, supra at 61. But see, e.g., *Adderly Industries*, 322 NLRB 1016, 1022–1023 (1997); *R.W. Bozell Transfer*, 304 NLRB 200, 201 (1991) (truck ownership unsupported by other factors does not suggest independent contractor status).

to acquire and maintain their own specialty vans, and Roadway eases the drivers' burden through its arrangement and promotion of Navistar vans sold or leased through Bush Leasing.[38] Although it does not directly participate in these van transfers, Roadway's involvement in these deals undoubtedly facilitates and ensures that a fleet of vehicles, built and maintained according to its specifications, is always readily available and recyclable among the drivers.

Roadway also encourages the sale of used vehicles from former to new drivers. In this way, Roadway eases the new driver's responsibility for obtaining a qualified vehicle. It further decreases the former driver's risk of repossession by Bush Leasing[39] and increases the likelihood that there will be a qualified buyer for a costly specialty van no longer needed by the former driver. There is simply no ready market for these vehicles. Every feature, detail, and internal configuration has been dictated by Roadway's specifications. In short, Roadway has created a system which makes the necessary, custom vehicles readily available to prospective drivers, and enables drivers who want to end their relationship with it to easily transfer their vehicles to incoming drivers. By the same token, the specialized vehicles required by Roadway are of no further use to former drivers who naturally sell the vehicles to incoming Roadway drivers when their relationship with Roadway is over.

Roadway is also a ready source for replacement vans when the drivers' vehicles are unavailable because of needed maintenance or repair. Roadway arranges for the rental of vehicles from national rental companies and negotiates rental prices favorable to its drivers. At most terminals, Roadway also maintains spare vehicles purchased from former drivers that can be used by current drivers on a short-term basis when their vehicles break down.

In addition to this vehicle assistance, the "business support package" helps ensure that the drivers' vehicles are properly maintained and covered by specific warranties. Roadway reminds the drivers that certain essential maintenance is needed by placing charts on the windows of the drivers' vehicles. The brochure to prospective drivers also advertises Roadway's maintenance "assistance" and further notes that "RPS provides warranty recovery assistance" to its drivers. The "business support package" also gives the drivers easy access to clean work uniforms. This assistance by Roadway points in the direction of finding employee status for the Ontario and Pomona drivers.[40]

Other support for employee status can be found in Roadway's compensation package for the drivers.[41] Here, Roadway establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers. Generally speaking, there is little room for the drivers to influence their income through their own efforts or ingenuity. Whatever potential for entrepreneurial profit does exist, Roadway suppresses through a system of minimum and maximum number of packages and customer stops assigned to the drivers. For example, when a driver becomes busier and the number of packages or customer stops grows, his territory may be unilaterally reconfigured, and the extra packages or stops are reassigned if the driver has already attained the maximum level for his primary service area that has been already determined by Roadway. "[I]t is clear that, unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits." *Standard Oil Co*., supra, 230 NLRB at 972.

The weekly settlement sheets supplied by Roadway show that the main components of the drivers' income are the van availability settlement, the temporary core zone settlement, and the piece-rate payments for packages delivered and picked up.[42] The daily van availability settlement is virtually guaranteed income of $40 per day for the life of the driver's contract with Roadway. Because the 1994 Agreement requires the driver to make his vehicle available each weekday over a period ranging from 1 to 5 years, the driver must show up for work each day to fulfill his contract obligations. This is not a situation where "[e]ach driver can decide not to work on any particular day—a freedom that further links his compensation to his personal initiative and effort." *Amber Delivery Service*, supra at 61.

[38] The number of vehicles sold to Bush Leasing is based on Roadway's own internal estimates, inter alia, of how many new drivers Roadway intends to add.

[39] Roadway claims that the drivers, on termination of their services, are no longer released from their financial obligations pertaining to their vehicles. We find insufficient evidence in the record to support this claim. Director Breese testified that Bush Leasing has repossessed vans and has held terminated drivers accountable for outstanding loan balances. However, he was unable to identify specific examples of the use of such tactics by Bush Leasing. There was further no attempt to have Bush Leasing corroborate Breese's general testimony. In contrast, driver Jeffries testified that, based on his observation and experience, drivers are always available to purchase vehicles from former drivers. Breese did not respond to this testimony, nor did he refute Jeffries' implication that repossessions simply do not occur.

[40] We also note that while the drivers are responsible for obtaining various types of insurance, Roadway offers them the opportunity to participate in group insurance rates that are negotiated by it. The new driver brochure advertises such insurance as "[a]vailable through RPS." Even "optional" insurance such as medical, dental, life, and disability insurance, is available through Roadway and based on group rates.

[41] Notwithstanding its assertion to the contrary, Roadway maintains a "start-up loan program" for new drivers whose incomes are insufficient to meet their expenses.

[42] We note that the Agreement provides for a minimum payment by Roadway to any driver who is forced to relinquish customer stops to Roadway. In this way, Roadway minimizes the driver's loss of income due to the unilateral reduction of his customer base. The Board in *Frito-Lay, Inc*., 178 NLRB 611, 612 (1969), found that a similar arrangement was suggestive of employee status.

In a similar fashion, the temporary core zone settlement subsidizes the driver's income. With the 1994 Agreement, the driver receives this supplement until he reaches the "normal" range of pickups and deliveries for his service area. In this way, the temporary core zone settlement serves as an important safety net for the fledging driver to shield him from loss, and it guarantees an income level predetermined by Roadway, irrespective of the driver's personal initiative and effort in his service area.

Income from each delivery and pickup, the last major compensation component, may vary among the drivers. This variance stems not from the drivers' entrepreneurial efforts but from the differences in customer bases that were assigned to the drivers. When it established the geographic boundaries of the service areas prior to 1994, Roadway did not assign equal customer bases to the service areas. Because these service areas largely remain the same today, these built-in differences directly affect the drivers' compensation. Although Roadway states that drivers can, and have, secured new customers, there is no evidence that such additional customers have significantly affected the earnings of any driver.[43]

Roadway stresses that two items in the 1994 Agreement—the driver's proprietary interest in his service area and his right to sell all or part of his area to the "highest bidder"—allow the drivers to influence their profits like entrepreneurs. We disagree because Roadway has imposed substantial limitations and conditions on both new features of the driver's relationship such that neither one retains any significant entrepreneurial characteristics.

Under the terms of the Agreement, Roadway has considerable control over whether the driver may sell at all, to whom, and under what circumstances. Roadway can and has influenced, if not forced, complete or partial sales of service areas. Regarding the few sales to which participants testified, it appears that the drivers had little choice, entrepreneurial or otherwise, but to sell. The evidence establishes that these drivers were pressured to sell by Roadway's warning or threat that their service areas would be reconfigured and customer accounts reassigned, or worse, that their entire relationship with Roadway would be terminated.

Pursuant to the 1994 Agreement, Roadway can unilaterally reconfigure a driver's primary service area if he cannot demonstrate, "using means satisfactory to RPS," his ability to satisfy the customer service requirements in his area. To illustrate the meaning of "using means satisfactory," Roadway asserts that a driver facing a forced reconfiguration has options, other than selling, from which to choose, including acquiring a second van, adding an attached trailer or hiring a helper or second driver to handle the customer requirements in his service areas. There is no evidence that any driver confronting the possibility of reconfiguration by Roadway has made use of these alternatives.

Furthermore, it is unclear whether any driver has gained or profited materially from the sale of his service area. For the most part, the evidence consists of unverified and incomplete information contained in e-mail messages between Director Breese and some other managers, none of which were parties to these transactions. It fails to provide important details about the sales identified.[44] For instance, there is no indication if the reported sales figures include the cost of the driver's delivery vehicle (estimated to be from $22,000 to $39,000), in addition to the value of the service area, or portion thereof, sold. Without this kind of detail, there is no way for us to determine whether the drivers realized any gain or profit from the sale of their service areas.

The testimonial evidence shows that the sales by drivers Gonzales, Irions, Hawkins, and Steenburgen took place at Roadway's behest, if not direction to the drivers, to sell or risk having their entire contract terminated. No gain was shown. In a system of over 5000 drivers assigned to over 300 terminals, we find that these few forced sales, given their circumstances, are insufficient to support a finding of independent contractor status.

B. Comparison with Roadway I

Roadway makes much of the fact that it has effectuated some changes in its relationship with the drivers since *Roadway I*. None of these changes require a finding of independent contractor status in these cases. While Roadway has created a proprietary interest and the right to sell service areas, the evidence falls short of demonstrating any real or tangible benefit from these new rights. In addition, Roadway's elaborate support programs continue to present drivers with minimal risks. Other indicators of entrepreneurship, such as performing outside work, business incorporation, use of additional drivers or helpers, or incentive-based income, continue to be absent.

Roadway also continues as before to control the manner and means of performing deliveries and pickups. The daily regimen of drivers has not changed significantly. Other controls from the prior case remain the same, such as mandated uniforms, appearance standards, and vehicle specifications, logos, and color schemes. Roadway provides the source for equipment required by the agreement, albeit using third parties, under a system which it created and controls.

[43] See *Amber Delivery Service*, supra at 62 (where "[a]ll customers 'belong' not to the drivers but to Amber" is a factor supporting employee status).

[44] Roadway explains that it chose not to have other witnesses (who apparently had knowledge of these sales transactions described in Roadway's Exh. 5) testify at the hearing because the Petitioner stipulated to this exhibit. Because there is no such stipulation by the Petitioner in the record, we reject Roadway's explanation.

Although there is no evidence of a discipline system, admonishment of drivers, a grievance procedure, or termination of drivers without cause, the elimination of these controls from the prior case does not outweigh the other strong factors indicating employee status.[45] Similarly, as before, evidence that no benefits are received by drivers and that for tax purposes they are treated as independent contractors does not outweigh the various indicia of employee status.[46]

VI. CONCLUSION

Weighing all the incidents of their relationship with Roadway, we conclude that the Ontario and Pomona drivers are employees and not independent contractors. Accordingly, the Decision and Direction of Election in Case 31–RC–7267 is affirmed. In Case 31–RC–7277, we find that the following employees[47] of Roadway constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All pickup and delivery drivers employed by the Employer at its facility located at 1235 Grand Avenue, Pomona, California 91766.

Excluded: All other employees, including Temporary B drivers, office clerical employees, guards, and supervisors as defined in the Act.

We remand both cases to the Regional Director for further processing consistent with our decision.

[Direction of Election omitted from publication.]

[45] Under the 1994 Agreement, there are, however, bonuses for fault-free driving and long service.

[46] We reject Roadway's assertion that the Regional Director in the Ontario case erred by allegedly discounting an Internal Revenue Service "letter of assurance." That letter indicated that operations conducted in accordance with the 1994 Agreement would not be inconsistent with the treatment of the drivers as independent contractors. We find that the Regional Director appropriately considered the letter, and correctly concluded that it is not dispositive of the issue under consideration here. The Regional Director pointed out that the letter of assurance made clear that the IRS' position was based on "a series of conferences" and other letters between the IRS and Roadway. He further noted that while such determinations can be considered by the Board, they are not controlling factors.

Our determination of the status of the Ontario and Pomona drivers is based on the lengthy record in the two cases before us. In contrast, the 1995 IRS ruling appears to be based only on the terms of the 1994 Agreement "and consideration of all the representations made by you [Roadway] and your counsel."

Similarly, we do not find controlling the individual IRS determinations regarding three drivers that were submitted by Roadway after the oral argument was held. Except for a reference to the 1994 Agreement, these letters fail to describe the evidence on which these determinations were based.

[47] The two Temp A drivers and drivers Jaime Calderon and Roberto Gonzales are permitted to vote under challenge. Drivers David Martinez and Juan Orozko are excluded from the unit.

CHAIRMAN GOULD, concurring.

I join my colleagues in the articulation and application of the common-law agency test to find that the petitioned-for drivers are employees within the meaning of Section 2(3) of the Act. I write separately because I disagree with my colleagues' finding that the drivers here differ from the owner-operators found by my colleagues to be independent contractors in *Dial-A-Mattress Operating Corp.*, 326 NLRB No. 75 (1998). For the reasons stated in my dissenting opinion in that case, I would find that the owner-operators in *Dial-A-Mattress*, like the drivers here, are not independent contractors.

I also write separately to address an issue not reached by my colleagues. I would reverse current Board precedent and find that controls mandated by Governmental regulations should be considered probative of an employer-employee relationship.

Current Board precedent holds that Government-imposed regulations do not show company control and, therefore, cannot constitute a factor favoring a finding of employee status. See, e.g., *Don Bass Trucking, Inc*., 275 NLRB 1172 (1985), and *Air Transit, Inc*., 271 NLRB 1108 (1984). The central rationale for this holding is that "Government regulations constitute supervision not by the employer but by the state." *Air Transit, Inc*., supra at 1110, citing *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978). I do not subscribe to this rationale and would return to the Board's earlier position, expressed in *Mitchell Bros. Truck Lines*, 249 NLRB 476 (1975), that controls placed by the employer upon workers are indicative of an employment relationship, regardless of whether the employer imposes the controls because of Government regulation or for independent business reasons.

In *Mitchell,* the Board held that the important aspect of regulations imposed by the Government is the relationship between the carrier and the drivers, not the reasons for the relationship. The Board stated:

> [I]t matters not whether the controls placed on the driver emanate from Mitchell Bros. independently, or whether these controls are imposed on Mitchell Bros. which in turn, imposes them on the drivers. Either way, these controls define the carrier's employment relationship with its drivers. Id. at 480–481.[1]

In my judgment, this is the proper means of analyzing the impact of Governmental regulation on the relationship between drivers or owner-operators and carriers.[2]

[1] The Board thereby departed from a line of decisions holding, often over dissents by Members Fanning and Jenkins, that regulations imposed by Governmental fiat are not alone sufficient to establish employee status. See, e.g., *Portage Transfer Co*., 204 NLRB 787 (1973); *George Transfer & Rigging Co*., 208 NLRB 494 (1974); and *Reisch Trucking & Transportation Co*., 143 NLRB 953 (1963).

[2] See also *Rediehs Interstate, Inc*. 255 NLRB 1073 (1980), and *Robbins Motor Transportation, Inc*., 225 NLRB 761 (1975).

It is true that the Government is the source of the regulations and that the carriers have no choice but to impose the regulations if they wish to do business. However, it is also true that the Government does not directly interact with the drivers or owner-operators. As the dissenting opinion stated in *George Transfer & Rigging Co*., supra, 208 NLRB at 498, cited with approval in *Mitchell*:

> It is irrelevant . . . that some of the rules enforced by George emanate from the Interstate Commerce Commission, the Department of Transportation, or other Government agencies. For, surely, as this record shows, the drivers controlled by George are not under the aegis of those agencies, but under the complete and operative authority of George, subject to losing their employment at the will of George.

And that, in my view, is the heart of the matter. To the extent that the Government sets regulations, it relies on the carriers to impose and enforce them. The only "face" the drivers see is that of the carrier, not the Government. The reality of such a situation is that of an employment relationship where the carrier has significant control over the drivers' job performance.

This view also is more in keeping with the Supreme Court's rulings in this area. In *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), and *NLRB v.* Town *& Country Electric*, 516 U.S. 85 (1995), the Court held that the common law of agency must be applied in determining whether employee status exists. The source or motivation for imposing control is not a factor in the common law of agency. Instead, the law focuses solely on the objective presence of control. See Restatement (Second) of Agency (1958), section 220. Under this analytical approach, it matters not *why* the master exerts control; it matter only *that* the master exerts control.

Accordingly, when assessing factors to determine whether an employment relationship exits, I would find that the factor of Government-mandated controls imposed by the employer weighs heavily toward a finding of employee status.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

. . . .

The record in this matter indicates that contractors' jobs may be simply stated as the transportation, delivery, and pickup of small packages between the Ontario Terminal and RPS customers, using vans contractors own or lease. The manner and means of how these ends are accomplished are the sum and substance of this case.

The process of becoming a contractor may begin by responding to a newspaper advertisement, or by a current driver (such as a current contractor's "employee," or a "Temp A") signing the Agreement, and acquiring a van and an area to service. The initial contractor process to become an eligible driver (including a Temp), includes four steps: the applicant completes an "information sheet," attends a "focus group," goes on a "ride along" with an existing contractor or temp, and completes a DOT file.

RPS asserts that the contractor "information sheet" form and not an employee "job application" form is filled out by prospective contractors and temps. The "information sheet" differs from a "job application" form completed by prospective RPS employees in that a "job application" form would not have similar license-request information, the applicant's driving record portion would not be present, and there would be no vehicle information portion or particular equipment experience, while RPS' "job application" includes the potential applicant's qualifications for the position sought, as well as other general information found on the "information sheet," such as name, address, and social security information, and possibly the same information regarding convictions for criminal conduct. Both "job application" and "information sheet" forms require some type of personal references, and both contain an education section. As RPS testimony indicated, "Are there parallels between the application and the information sheet? Absolutely. Is it job specific? Absolutely." After completion of the "information sheet" (and apparently the "job application" forms) at the terminal, the received data for both contractors and RPS employees is transmitted to an appropriate office in RPS' corporate headquarters in Pittsburgh for approval.

In a focus group, which is a formal orientation conducted by RPS' Recruiting Department for a group of 4 to 12 potential contractors, RPS' "independent contractor concept" with all of its specifics and details, is discussed. Among the items explained are how "settlement" (remuneration) figures are determined, and what the expected costs of operation and projected revenues are based on hypotheticals. Also, the Agreement itself is explained: how much is paid by RPS for a package; a stop and a pickup; and the "Core zones" concept. RPS tells prospective contractors that there is a risk of depreciation of the van they must purchase or lease, and of their proprietary interest in their service area.

In addition to the formal "focus groups," managers at the Ontario Terminal have given information on a more spontaneous one-on-one type basis with some potential contractors who were "walk-ins." These people usually appear after having a conversation with a current RPS contractor. They will complete an "information sheet," and a management official will give them a "mini focus group on a one-to-one basis" to introduce RPS' "independent contractor concept" and give the person "an opportunity to say it's not for me before they go and spend two or three hours perhaps in Los Angeles 60 miles from our location and waste their time."

After the potential contractor fills out the contractor "information sheet," he does a "ride along" with a contractor and, if still interested in becoming a contractor, completes a DOT file. If necessary, he takes a DOT medical exam and a drug test. The responsibility for taking and paying for the physical is the applicant's.

After having successfully completed an "information sheet" the DOT file requirements, the focus group and the ride along, the applicant is eligible to be a driver in the capacity of a temp or a contractor. The only difference between a "temp A" and a "temp B" is that a "temp A" is someone who wants to be a contractor.

At some point during the initial orientation process for drivers, RPS informs them that the Agreement establishes standards of appearance—both for themselves and for their vans. For example, the "Agreed Standard of Service" part of the Agreement, §1.10(e), requires contractors to:

> Foster the professional image and good reputation of RPS and Contractor with shippers and consignees, including adhering to the vehicle identification and operator appearance standards specified in Paragraphs 1.5 and 1.12 of this Agreement.

The Agreement, at §1.5, provides for the vans' identification with logos, colors, and other marks.[8] The Agreement, at §1.12, in addition to requiring that the contractors' vans be "maintained in a clean and presentable fashion free of body damage and extraneous markings," requires contractors (and their employee-drivers or helpers if there are any) to wear:

> An RPS-approved uniform, maintained in good condition, and will otherwise keep his/her personal appearance consistent with reasonable standards of good order as maintained by competitors and promulgated from time to time by RPS.

Testimonial evidence indicated that at least some RPS standards are not uniformly applied throughout the system. For example, one contractor testified that he had a beard, mustache, and long hair when he first became a contractor. The Ontario Terminal manager informed him that it was RPS policy for contractors to have a shorter haircut and no beard or mustache. Shortly after the contractor had his hair shortened and his beard and mustache removed he saw, in RPS' national magazine photos of contractors with long hair and beards. He then grew back his beard, mustache, and hair.

In the first 30 days after a person becomes a new contractor he goes through an orientation program where he is shown how to fill out forms and use the on-van scanner and computer. Four times during the course of a year, an RPS coordinator may ride with the contractor to see if the standards of customer service that the Agreement requires are being met.

RPS management has the right, under §1.14 of the Agreement, to engage in four "Customer Service Rides" or, as they are also known "ride-alongs."[9] Section 5.2 of the Agreement also provides, in part, that:

> Contractor agrees to cooperate with the reasonable efforts of RPS in gathering data necessary to evaluate Contractor's Primary Service Area, including permitting, RPS personnel to ride with Contractor from time to time in connection with these efforts.

While RPS testified that "if the customer service ride is initiated solely [by] RPS . . . [the number of such rides is] limited to the number that's specified in the contract." Section 5.2 of the Agreement establishes no limitation on the number of "Customer Service Rides." There is also evidence that on more than one occasion RPS has requested a "Customer Service Rides" with a particular contractor, and the contractor has refused for that particular day.

Evidence was adduced at the hearing reflecting a particular Customer Service Ride that took place on September 21, 1994. Testimony disclosed that all the comments on the "Customer Service Ride Recommendations" form were written by the coordinator who was conducting the ride. Comments included "Time spent at each [customer] stop should be shortened—less 'chit-chat' and faster pace." Oral comments by the coordinator to the contractor during the ride indicted that the "less 'chit-chat' and faster pace" comments were general, not in reference to any particular customer or stop. One contractor testified that, after he had asked for his service area to be reconfigured because he felt unable to adequately service the entire area without adding equipment, RPS conducted several "Customer Service Rides." Nevertheless, after a point in time this contractor felt that RPS had sufficient information to make a determination, yet RPS continued to request additional Customer Service Rides, which the contractor refused to permit. As he testified, the Ontario Terminal manager:

> had initiated what I felt [was] a policy of sending [supervisors] out with me on customer service rides . . . as a matter of discipline. [The Ontario Terminal manager] told [a particular supervisor] . . . you ride with him and you make sure he gets it all done.

The evidence reflected a strong desire of this particular contractor to have his area reconfigured, to reduce his workload; yet absent RPS' consent, his only option would have been to terminate his Agreement. Nonetheless, when RPS desires to reconfigure a route after providing the affected contractor a few days notice of its intent it can do so unilaterally (albeit paying the contractor an RPS-determined fee for lost stops).

If RPS attempts to terminate a contract, including a constructive termination based on any asserted infraction by the contractor, the Agreement, at §12.3, provides for an arbitration of the dispute in "accordance with the Commercial Arbitration Rules of the American Arbitration Association." Recommendations for termination are made by the terminal manager to RPS' regional manager. If he disagrees with the recommendation, it is returned to the terminal manager; if he agrees that the contract should be terminated, he passes his recommendation to RPS' Contractor Relations Department and RPS' in-house legal consultant. Some bases for the termination of a contract include a contractor's failure to pass a drug test, thefts, having repeated accidents, safety violations, customer complaints, assaults, not showing up, failing to service a work area, and falsification of RPS records. These bases often show up in notes made and kept by RPS management.

If anyone in RPS management—including the regional manager, the Ontario Terminal manager, the P & D coordinator, or the account reps—believes that a contractor is failing to provide adequate customer support, he may engage the contractor in what RPS terms a "business discussion," which may, generate a "business discussion document." The name for this document was at some point supplanted by a "contract discussion notes" form. Contractors do not have access to these documents, which are maintained by the P & D manager in his own office. RPS testified that these forms represent:

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[8] The Agreement, at §1.5, provides in part:

> Contractor agrees to mark Equipment while in RPS's service with such identifying colors, logos, numbers, marks and insignia as may be required either under applicable regulations . . . or to identify the Equipment as apart of the RPS system.

[9] The Agreement, at §1.14, provides in part:

> Qualified RPS terminal personnel may, at their option, visit customer locations with Contractor four times annually to verify that Contractor is meeting the standards of customer service provided in this Agreement.

> A record of business activity of the contractor. [W]ould we consider those forms when considering not to renew [a contractor's relationship with RPS?] Yes, we probably would.
>
> Q. Do you consider those forms when you consider termination of a contract for cause?
>
> A. Yes.

Specifically, RPS' P & D manager agreed that some of his "business discussion notes [had] been used to support the termination of a contract."

An item that might be included in a "business discussion," or a "business discussion document," is where a contractor erroneously or frequently marks a package with an incorrect information code. Another example provided by RPS:

> If, for instance, a contractor returned 10 packages upon his arrival back to the terminal and indicated . . . that a business was closed when in fact that business was open, then there may be discussion notes made. Discussions would be held with the contractor that would be referenced to the particular articles of the contract that were in violation of ICC rules or what have you. And repeated instances of that same type of situation would be addressed in the same way.

All the Ontario Terminal contractors, but none of the other Ontario Terminal drivers, use vans which they personally own or lease. In *Roadway I*, the Board found that "RPS maintains vehicles onsite that drivers can purchase or lease," that 12 of 14 drivers obtained their vans from this source, and that 11 of these 12 financed their purchase through the same credit company (not RPS). Forms used for the credit purchases were obtained from RPS, and on termination of their relationship with RPS, drivers indicated that they were released from their finance obligations on transfer of their van to RPS. The transfers were almost simultaneous with their terminations.

The record in this case reflects that RPS has no ownership interest in the contractors' vans, and does not *directly* sell or lease vans to contractors. It does appear, however, that the arrangement for obtaining an appropriate van is lubricated by RPS. First, each year RPS purchases a substantial number of vans that meet its specifications from Navistar, its primary van supplier. The annual number of vans purchased on a nationwide basis was estimated at the hearing to be 200 P-1000s, 100 P-600s, and perhaps some others.[10] RPS then sells these vans to Bush Leasing, in which RPS assertedly has no financial or other ownershp interest, and which it has used since about the late 1980s. RPS will tell new contractors, when they begin the contractor relationship, which size van to obtain on the size of the contractor's designated work area and amount of business in it. According to RPS testimony, "we will set the minimun size requirement that's needed for a particular work area. . . . We have minimun specifications that we'll give them." These specifications may include, in addition to Department of Transportation (DOT) requirements, size, color, possibly heavy-duty springs, heavy-duty transmission, shelves on the inside or a well door in the back. While RPS will not sell a van directly to a contractor, it will tell him, frequently during the "focus groups" held for new contractors, that "we have a van that meets our specifications, it's brand spanking new and you can buy it. You can go to your credit union and buy it . . . and we have recommended Bush Leasing."

Drivers are under no obligation to buy or lease from Bush Leasing, RPS does not participate in the negotiations between the contractor and Bush Leasing, and RPS does not guarantee loans to drivers if they finance their van purchases, whether or not they lease/purchase from Bush Leasing. RPS will not, however, permit a contractor to use a van purchased or leased from any source, other than another contractor (which is frequently done) or Bush Leasing, if it is more than 3 years old. RPS' explanation for this policy is:

> If . . . it's an RPS van that's been in service, that's all right because we know that it's been maintained, we have the maintenance records on every piece of equipment, we know that the van meets our specifications. We can track the maintenance history.
>
> Q. What if the contractor had records for a vehicle showing maintenance for a vehicle that was more than three years old?
>
> A. If it's a non-RPS spec'ed vehicle and it's older than three years, they are not allowed to be brought on.

In addition, RPS inspects vans before contractors are permitted to put them in service. While this inspection is, in part, to guarantee compliance with DOT regulations and to confirm that the vans are safe to operate, RPS testimony indicated it is also to insure that the vans meet RPS' specifications, and "to make certain that the van reflects on a good professional appearance. That is, it's not too old, it doesn't have big windows cut in the side. . . . We want to make certain that it presents a good professional appearance."

Even though van maintenance is primarily the contractor's responsibility, RPS has a contractual concern regarding the appearance of vans.[11] If a terminal manager believes a van has body damage or needs paint, he and the contractor "would discuss it . . . and they would work out some reasonable means and time to get it repaired." There have been disagreements between a contractor and a terminal manager regarding the need for repair or paint on numerous occasions at the Ontario Terminal. Higher cooperate authority—"contractor relations"—is then involved; the denouement has been that "the contractor is allowed to continue in operation until such time as he has the funds to get the necessary repairs." As RPS asserts, "the ultimate responsibility would be their terminal manager['s] to determine whether or not the vehicle was cosmetically and appearance-wise maintained."

Under the terms of the Agreement, the contractor is directly responsible for maintaining the safe operating condition of his van although DOT regulations hold the carrier—here, RPS—jointly accountable. Contractors are personally responsible for all costs associated with owning/leasing and operating a van, including insurance, licenses, taxes, fuel, oil, maintenance, and replacement of broken or worn parts such as tires and batteries. When "mutually convenient," however, RPS will pay the contractors' licenses, taxes, and fees, then charge the contractors for any such payments made on their behalf.[12]

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[10] The Record indicated that the approximate cost of vans ranges from $22,000 for the smallest through $39,000 for the largest. The estimated cost of a tractor owned by one Ontario Terminal contractor was about $44,000.

[11] The Agreement, at §1.12, provides in part:

> The Equipment shall be maintained in a clean and presentable fashion, free of body damage and extraneous markings, in accordance with the standards of the industry.

[12] The Agreement, at §1.3, provides in part:

RPS provides no onsite maintenance service for contractors' vans at the Ontario Terminal. While contractors may choose where and when maintenance is performed, and are directly responsible for paying for such work. RPS posts charts on van windows to remind contractors when certain maintenance is necessary. The information on these charts includes when a contractor should perform oil and fluid changes, filter changes, tire rotation, and when he should check tread depth, brake linings, and clutch-free play.

When a van is out of operation for maintenance or repair, it is the contractor's responsibility to rent another van to insure that the packages in his service area are delivered and picked up. Some RPS terminals, not including the Ontario Terminal, keep a spare van that contractors may rent from RPS on days that their equipment is out of service. If a terminal's spare van is not available, as at the Ontario Terminal, the contractor must rent a suitable van from a commercial rental agency such as Ryder, Rollings, or Penske. Although RPS is not *directly* involved when a contractor rents a van, RPS has negotiated a national contract with Ryder, Penske, and perhaps also Rollins "so that a good rate is provided to contractors."

While there is no established buy-back arrangement of vans between RPS and contractors, RPS testimony reflected that:

> From time to time . . . if a contractor was upgrading, moving from a smaller van to a bigger van or from an older van to a newer van and his van that he was going to sell or get rid of was in pretty good shape, we would inspect it. We did buy some of those at fair market value to use as company spares. But there is no arrangement [that] if he leaves, we buy his van back.

RPS testimony also disclosed that if a contractor leaves, RPS:

> would . . . help another contractor or put another contractor in touch with that former contractor to buy his van . . . when a contractor leaves the company, he has no further use for the van and we help another contractor get in it.

The evidence indicated that since the Agreement went into effect, RPS has not purchased the van of any contractor whose contract has terminated.

In addition to compensating contractors based on the number of packages they pick up and deliver, as discussed below, RPS also pays contractors a "contractor and van availability settlement." As explained by RPS, the purpose of this payment is:

> To compensate a contractor for his fixed costs in operating that van. It's something he can count on every day. Regardless of the number of packages and stops he's going to make, he knows he's going to get at least $40 that may help pay for his fixed costs, his fuel or whatever.

The "contractor and van availability settlement" provides an additional daily bonus, up to $100, for working on business days falling immediately before and after national holidays.

RPS requires that contractors purchase and maintain a scanner and handheld computer in their vans. While contractors are free to purchase this equipment anyplace, in practice all Ontario Terminal contractors have acquired it directly through RPS. Training on the use of this equipment may be by other contractors, but RPS assumes the ultimate responsibility of insuring that drivers are trained and know how to use this electronic equipment. The scanner is used by a contractor when he delivers packages—he scans the packages' bar codes, then uploads that information into the on-van computer, which transmits the information to RPS customer service in Pittsburgh, Pennsylvania. RPS customers can call an 800 number to find out where, en route, a package is.

Contractors assertedly *may* use their vans for any personal use they desire, including other commercial purposes, and testimony indicated that at locations other than the Ontario Terminal, contractors have used their van for moving furniture on a weekend. If a driver desires to use a van for such purpose, the Agreement requires him to cover all the RPS identification on the van; it also specifies *how* to effectuate this masking.[13] There was, however, no evidence that any Ontario Terminal contractor has used his van for any commercial purpose other than the transport, delivery, and pickup of packages for RPS.

There is no restriction on the number of vans a contractor can own/lease. Nationally, approximately 7 percent of RPS' contractors have more than one van; at the Ontario Terminal, only one contractor, at this time, has more than one van. If a contractor wishes to add a van, however, he must ask RPS for authorization to add a specific piece of equipment. Such request is made by the contractor, on a RPS form, to the terminal manager, who forwards the request to the Regional Manager, and eventually to corporate headquarters in Pittsburgh, Pennsylvania, for final approval.

To assist contractors in the execution of their jobs to meet RPS' standards, RPS provides, at paragraph 7 of the Agreement, a voluntary "Business Support Package," which costs contractors $40/week. This package includes:

> Supply of a clean uniform each business day [which drivers are *required* to wear]; lease of RPS-owned scanners, printers (where applicable), and communications equipment necessary for customer service; annual D.O.T. inspection; wash service [[14]] for the Equipment . . . at sufficient frequency to keep the Equipment in compliance with the Appearance Standard of [the Agreement] and the opportunity for Contractor, solely at Contractor's discretion, to purchase from vendors, at RPS-negotiated prices, tires, batteries, bumpers, package-handling equipment, body repairs, preventive maintenance services, and paint.

As RPS testimony notes:

> The Business Support Package is not mandatory. *What is mandatory is that the equipment that's provided in the business support package must be used by the contractor.* The scanner, the on-van communications device, and the other parts of the business support package are required but to buy

> To facilitate payment of licenses, taxes and fees, where mutually convenient or otherwise require by statute or regulation, Contractor hereby authorizes RPS to pay these charges on Contractor's behalf and to charge Contractor for any such payments, together with any direct expenses incurred by RPS in connection with their payment.

[13] The Agreement, at §1.5, provides in part:

> Contractor may use the Equipment for other commercial or personal purposes when it is not in the service of RPS, with the understanding that all such identifying numbers, marks, logos and insignia will be removed or masked (by paper or plastic overlay) when the Equipment is so used.

[14] For example, RPS arranges for an independent-service vendor to come to the Ontario Terminal with a generator, long hose, brooms, and soap to wash vans on Mondays and Wednesdays in the very early morning hours before the vans leave the terminal.

> the business support package is not required. The contractor has the option of going out and purchasing those items on his own. [Emphasis added.]

If a contractor does not participate in the Business Support Package, as noted above he must purchase the required on-board electronic equipment (the scanner or computer) at his own expense. If RPS upgrades or changes this equipment (at its unilateral discretion), the contractor is obligated to similarly upgrade and/or change his personally-purchased equipment. If the contractor participates in the Business Support Package, this equipment is upgraded/changed automatically at no additional cost to him. The record indicates that all Ontario Terminal contractors participate in the Business Support Package.

For the convenience of, and as a service to contractors, RPS maintains a "service guarantee program." This program's purpose is to encourage contractors "to put some money aside for these rainy days when their engine blows or the clutch fails or they have flat tires or something." As explained by Company testimony:

> We established an interest bearing fund and we said if you will put some money in this fund and keep some money in this fund we will on a quarterly basis make a contribution to this fund for your use, any way you want to use it, for any purpose. And we established . . . that if a contractor keeps an average balance of $500 or more in this service guarantee account, we will contribute an additional $100. If he keeps between $750 and $1000 or more, we will contribute $200 every quarter to a maximum of $800 a year. And that is 80 percent interest. That ain't bad. And most of our contractors do participate in that program.

A contractor may also borrow money from this fund if the loan is covered by the amount of money in his account.

Contractors' compensation may come from the following sources, as set forth in the Agreement:

1. Package Pick-Up and Delivery Settlement, which includes a specified fee for every delivery van stop and package delivered, a different fee for each pickup stop with a sliding scale for the number of picked-up packages, and other specified fees for other types of packages, pickups, and deliveries.
2. Contractor and Van Availability Settlement, discussed above.
3. Temporary Core Zone Density Settlement, as detailed in §4.1(c) of the Agreement. This payment represents a supplement given to a contractor for servicing a particular area. As explained at the hearing, if a particular core zone in a contractor's area is a substantial distance from the terminal, and/or it has an unusually low population density (which results in fewer packages being picked up and delivered), a formula is devised—and adjusted each August by RPS headquarters in Pittsburgh—designating a supplemental amount to be paid to the contractor for servicing this particular core zone. Contractors have no control over this formula, and since they can do nothing about the distance of a core zone, from the terminal or the population or package-delivery density of a core zone, there appears to be no direct input or control contractors have regarding this core zone rate. Contractors can and have asked RPS to reevaluate the formula's rate based on transitory events. An example noted at the hearing was of additional delivery problems in the core zone encompassing the part of downtown Los Angeles that was impacted by metro rail construction for many months.
4. Flex Program, which provides a supplemental daily $5 fee for contractors who choose to participate. Under the Flex program, drivers agree to accept overflow packages from another driver's load (and of course be paid for the delivery of such packages). The daily fee is received whether or not the driver receives any "flex" on a particular day. If a driver does not participate in this program, he cannot be forced to pick up or deliver packages in another driver's primary service area. While voluntary, all Ontario Terminal contractors participate in this program. Determinations to "flex" may be made directly between drivers or by the preload coordinator in charge of the package handlers while they are loading the vans prior to the driver's arrival. The coordinator's decision is based on a preexisting "flex matrix" that has been standardized for a group of work areas by consultation between contractors and the coordinator. When a contractor is not present when a coordinator determines that a "flex" is necessary, the coordinator uses "min/max numbers" as guides to determine whether the number of packages to be delivered within one service area exceeds the contractor's delivery capabilities and should be handled by another contractor. "Min/max numbers" represent the minimum and maximum number of delivery stops for a service area. It is computed by a formula based on information gathered during customer service rides, stem miles (*i.e.*, distance from the terminal before an area is reached), particular customer-related delays (such as checking in with a guard service for area access, and normal traffic conditions on route.) When that min\max number is exceeded, the coordinator "flexes off" the excess packages to another driver.
5. Quarterly Performance Settlement, which is a 2.25 percent payment to contractors by RPS of a contractor's gross settlement for a quarter. The only requirements are that the contractor must have been a contractor for 1 full year, and the contractor must still be an active contractor—his contract may not have terminated.
6. Service Bonus, which provides for a payment of $500 per year for each of a contractor's first 4 years under contract, and $1000 per year for each succeeding year. If a contractor has additional vans operated by his "employees," a service bonus is similarly computed for each such van.
7. Contractor Customer Service (CCS) Payments, which are bonuses paid every 4 weeks based on an absence of customer complaints both with regard to the particular contractor, and for all contractors at a particular terminal.

On most days, most of the contractors' vans are left in their terminal at the end of the driver's workday for unloading, and to be available for the next day's packages. From about 1:30 a.m. to about 6 or 8 a.m., package handlers (also termed loaders) sort and place the packages that have just been delivered to the terminal by the line-haul drivers onto the contractors' vans. A load chart, prepared by each van's driver, designates where, within the van, packages should be placed; this direction may be supplemented by oral instructions given either directly to

loaders, or to the loaders through the loaders' supervisor. Drivers usually arrive at the terminal, and leave to make their deliveries, between about 6 to 8 a.m., depending when the loaders finish with their vans. There is no required start time for contractors. If a driver has not left his van in the terminal the prior evening, and fails to bring it in before the loaders finish their procedures, the driver must load the van himself.

After leaving the terminal, the driver delivers the just-loaded packages in his primary service area. The entire geographic area in which a contractor picks up and delivers packages is termed his "primary service area." A "core zone" is defined as a geographic package delivery area identified by one or more five-digit postal zip codes. A delivery area may, in practice, also be defined by physical boundaries (roads or highways), or other descriptive terms, such as Moreno Valley, March Air Force Base, or a particular mall.

When the Ontario Terminal first came into existence, vast primary service areas of San Bernardino and Riverside Counties were simply distributed among the available contractors. There is no evidence that any contractor paid anything for his area. As time passed, the available work—which means the number of stops, and packages to be picked up and delivered—increased beyond the ability of a single driver to successfully handle without either adding a helper, or another driver and van. RPS, therefore, made primary service areas progressively smaller from a geographic perspective, but increased the density within areas for stops, pickups, and deliveries. After the contractors signed the Agreement, a propriety interest was established for each contractor's primary service area. . . .

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