



FedEx Home Delivery (“FHD” or “Company”) submits this Answering Brief in Opposition to Teamsters Local 671’s Exceptions to Supplemental Decision on Objections.

Petitioner’s exceptions to the ALJ’s conclusion that Robert Dizinno was ineligible to vote on election day attempt to deflect attention away from the most important factors for determining voter eligibility: the express unit inclusions and exclusions in the Decision and Direction of Election (“DDE”), the facts and circumstances as they existed *on election day*, and the reasons for challenged ballots. Petitioner understandably, albeit erroneously, ignores these factors and focuses exclusively on immaterial portions of a DDE issued one month before the election and based on a record created more than two months earlier.

FHD’s challenges to the ballots cast by Paul Chiappa and Dizinno are based upon all of the facts and circumstances as they existed *on election day* and not solely as they were found to have existed more than two months earlier. As FHD detailed in its exceptions brief, material circumstances as of election day were different than those upon which the DDE was based: FHD had fully conformed its course of dealing with Chiappa and Dizinno to its usual course of dealing with multi-route contractors and drivers hired thereby, including through contract discussions held solely with Chiappa and mailbox designations; the multiple-route Operating Agreement executed by Chiappa renewed; and Chiappa executed various Operating Agreement addenda. (See FHD’s Brief in Support of Exceptions to Supplemental Decision on Objections (“FHD Except. Br.”) at 21-36, 38-46.) As of election day, these and other circumstances culminated to affirm Chiappa’s and Dizinno’s statuses, respectively, as multiple-route contract driver and driver hired thereby - - classifications expressly excluded from voting eligibility -- hence, FHD’s basis for the challenges. (*Id.*)

Perhaps Petitioner's confusion of the issues stems from the ALJ's having looked at and analyzed Chiappa's and Dizinno's respective voting eligibility as if they were mutually exclusive. As FHD has shown, and as is made clear by the DDE and the record, the statuses of Dizinno and Chiappa are inextricably linked, particularly as a matter of the express exclusions from the petitioned-for unit. (FHD Except. Br. at 21-36, 38-46.) Among other things, both indisputably performed service under a single, multiple-route Operating Agreement executed by Chiappa, and, as found in the DDE, "[c]ontract drivers have sole authority to hire and dismiss their drivers." (DDE at 20.)

Tellingly, Petitioner ignores these facts and endeavors to obscure the issue by claiming that FHD seeks to "relitigate issues resolved during the representation hearing through the challenged ballot proceedings". (Petitioner's Brief at 6.) Petitioner's argument is misplaced, and it shows nothing more than a keen insight into the re-litigator's mind. Indeed, it is Petitioner who now asserts in this post-election objections proceeding pre-hearing evidence that contradicts the DDE.

As the ALJ correctly noted in his supplemental decision on objections, the DDE's conclusions regarding Chiappa and Dizinno turned upon the Regional Director's finding that FHD "has *never* discussed any issues related to Dizinno's route with Chiappa". (DDE at 31 (emphasis added.) Yet, at the objections remand hearing Petitioner presented evidence that Chiappa *did* have discussions with FHD about service issues on the route driven by Dizinno. Petitioner's counsel asked Chiappa whether, prior to March 2, 2007, he had ever participated in a contract discussion with the facility manager about the Manchester route driven by Dizinno, and Chiappa responded, "No, not really, you know, I can't." (Tr. 399-401 (Chiappa).) Even though Chiappa did not invoke a lack of memory,

Petitioner's counsel presented him with a document reflecting a December 2006 Contract Discussion between Chiappa and the facility manager about service failures by Dizinno, and proceeded as follows:

*Petitioner:* Now take a moment, Mr. Chiappa, and review this document, and see whether that refreshes your recollection as to whether you may have ever had a contract discussion relative to the Manchester route prior to March 2<sup>nd</sup>, 2007.

*Chiappa:* Yes, this one, this is one that I may have forgotten about, but, right, it jarred my memory a little bit. (*Id.*)

Petitioner cannot have it both ways -- asserting a finding in the DDE as support for Chiappa's and Dizinno's voter eligibility and then offering evidence defeating that finding as support for the same eligibility conclusion. As FHD demonstrates in its brief, this December 2006 contract discussion supports FHD's basis for the at-issue challenged ballots -- that Chiappa's and Dizinno's respective statuses were as multiple-route contractor and driver hired thereby.

In addition, it highlights one of the flaws in Petitioner's misplaced argument that the DDE's community of interest analysis relating to Dizinno somehow precludes an examination of election day circumstances. For example, the immaterial community of interest analysis in the DDE was based on conclusions that Dizinno "perform[ed] the same function", "report[ed] to the same terminal management," and "is subject to the same policies and practices of all other contract drivers". (DDE at 31-32.) But, as FHD has shown, even if those conclusions were sustainable as of the time of the hearing, they were not on election day. (*See* FHD Except. Br. at 21-36, 38-46.) In short, a finding that an individual shares a community of interest with others is altogether different than finding months later that he falls within an express unit exclusion.

Petitioner's exceptions to the ALJ's Supplemental Decision on Objections lack merit and should be denied.

Respectfully submitted,



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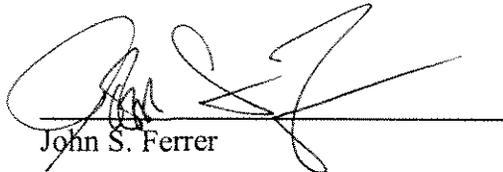
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of FedEx Home Delivery's Answering Brief In Opposition To Teamsters Local 671's Exceptions To Supplemental Decision on Objection, which was electronically filed today using the Board's electronic filing system, was served via electronic mail on:

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this 12th day of June 2009.

  
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