

drivers” and excluding “multiple-route contract drivers” and “drivers and helpers hired by contract drivers”. (2007 DDE at 32.) At the time of the election, there were 20 single route contractors falling within the unit. There were 12 “yes” votes, 9 “no” votes, and 2 unopened challenged ballots – one by Petitioner and one by FedEx Home.¹

4. FedEx Home filed objections based upon the Board Agent’s conduct in opening two other challenged ballots without following Board procedure and upon Petitioner’s conduct in arranging for voters to receive free legal services during the critical period. *See* ¶ 5, *infra*.

5. In 2008, the Board sustained FedEx Home’s exceptions, reversed the Administrative Law Judge’s (ALJ) rulings, found error in the conduct of the election, and remanded for further proceedings. *See* Decision and Order Remanding dated Sept. 29, 2008.

6. In May 2009, the ALJ sustained in part and overruled in part FedEx Home’s objections. *See* Supplemental Decision on Objections dated May 22, 2009.² In June 2009, both Petitioner and FedEx Home filed exceptions, which are pending before the Board.

B. Materially Similar Boston Home Delivery NLRB and D.C. Circuit Proceedings Yielded an “Independent Contractor” Status Holding and Final Mandate.

7. On April 21, 2009, the U.S. Court of Appeals for the D.C. Circuit ruled that contractors for FedEx Home operating at two Boston facilities are “independent contractors and not employees” as defined by the Act. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009), rehearing en banc denied (Sep. 4, 2009).

8. The court held that contractors’ “ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes

¹ There were four challenged ballots in all. Over FedEx Home’s objections, the Board Agent opened, commingled, and counted two of them. *See* Decision and Order Remanding dated Sept. 29, 2008.

² In light of his finding that the Board Agent improperly opened and counted at least one ballot with a 12-9 tally and two unopened challenged ballots, the ALJ recommended that the Regional Director determine the eligibility of the remaining two challenged ballots.

without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor of independent contractor status.” *Id.*

9. The Board decision subject to review was the Boston Regional Director’s September 20, 2006 DDE, which is similar to the 2007 DDE and involves similarly situated contractors at nearby Boston FedEx Home. *Id.* Contractors at Hartford operate under similar conditions and contracting terms -- the base operating agreements are the same -- as contractors operating out of Boston FedEx Home. (2007 DDE and 2006 DDE; Affidavit of Raymond H. Finch (“Finch Aff.”) at ¶ 13, attached as **Exhibit A.**)

10. On September 4, 2009, the court denied the NLRB’s petition for rehearing en banc, and it entered a final mandate on September 18, 2009. *See* Per Curiam Orders dated September 4, 2009 and September 18, 2009 at Case: 07-1391.

11. Neither the NLRB nor the Intervenor Teamsters Union filed a petition for certiorari in the Supreme Court.

12. The Boston Regional Director dismissed all pending charges, and the NLRB General Counsel’s office denied a contractor’s appeal, stating as follows: "Inasmuch as the Court of Appeals for the District of Columbia found that certain FedEx drivers ... were not employees under the National Labor Relations Act, and the Board has decided not to challenge its determination, this Agency does not have jurisdiction to issue complaint". *See* General Counsel’s letter dated January 20, 2010 in Case No. 1-CA-45007, attached as **Exhibit B.**

13. On January 4, 2010, FedEx Home made a request to the Hartford NLRB Region to dismiss the Petition in this case, citing the Board’s non-appeal of the D.C. Circuit’s mandate and dismissal of the materially similar Boston FedEx Home case.

14. On February 5, 2010, the Hartford Region informed FedEx Home that it was not

in a position to act on the request to dismiss because the case is pending before the Board on Petitioner's and FedEx Home's exceptions in the objections proceeding.

C. Contractors' Businesses and the Contractor Complement Have Continued to Evolve Since 2007.

15. The Company's home delivery business began less than seven years before this matter started, and it was created to handle the increasing number of residential deliveries emanating from mail-order and Internet commerce. (Finch Aff. at ¶ 4; 2007 DDE at 4.) Prior to 2000, FedEx Ground handled predominantly business-to-business ground deliveries. (*Id.*)

16. At the time of the election in May 2007, there were 20 contractors at Hartford falling within the unit, and today there are three. (*See supra.* at ¶ 5; 2007 DDE; Finch Aff. at ¶ 5.) Since 2007, five single route contractors have exercised their options to operate multiple routes. (*Id.* at ¶ 7.)

17. At present, 10 contractors in total operate 30 contracted routes at Hartford. (Finch Aff. at ¶ 5.)³ Six are excluded multiple route contractors, and they operate 26 of the 30 contracted routes. (*Id.*) At the time of the hearing in 2007, there were 28 contracted routes and approximately 21 contractors, three of which operated multiple routes for a total of eight of the 28 routes. (2007 DDE at 4, n.5, 21.)

18. In 2007, contractors used approximately 28 vehicles at Hartford, and approximately eight of them were operated by two or three multiple route contractors. (2007 DDE at 2, n.4, 14, 21-22.) Three years later, contractors use approximately 32 vehicles at Hartford, and 29 of them are operated by six multiple route contractors. (Finch Aff. at ¶ 6.)

19. As of the March 2007 hearing, there were two route sales by contractors at

³ One of the 10 contractors is a multiple route contractor operating out of the Ground Operating Division with an excluded driver who provides delivery service on the Home Delivery Operating Division route. (Finch Aff. at ¶ 5.)

Hartford. (2007 DDE at 9, 29.) Since then, there have been more than 20. (Finch Aff. at ¶ 10.)

20. Each of the multiple route contractors has exercised the right to hire drivers to perform some or all of the contracted delivery work on terms negotiated exclusively between them. (Finch Aff. at ¶ 8-9; 2007 DDE at 2, n.4, 21.) Most of the contractors have hired others to operate their vehicles and perform delivery services, in some instances exclusively. (*Id.*)

21. At the time of the March 2007 hearing, three contractors had incorporated their businesses. (2007 DDE at 28.) Today, that number is six. (Finch Aff. at ¶ 11.)

II. STATEMENT OF POSITION⁴

There are circumstances where the Board has acknowledged that the course it originally charted is no longer practicable or prudent owing to inevitable changes and the passage of time. *See, e.g., Charlotte Amphitheater Corp.*, 331 N.L.R.B. 1274, 1274-75 (2000) (on remand from court to consider effect of changed circumstances on Gissel bargaining order, Board held that the substantial passage of time - six years - likely made bargaining order unenforceable); *Wallace International de Puerto Rico*, 328 N.L.R.B. 29 (1999) (Board recognized four year delay likely rendered bargaining order unenforceable); *Regal Recycling, Inc.*, 329 N.L.R.B. 355 (1999) (Board reversed Gissel bargaining order based on "excessively long delay" of over five years since ALJ recommendation). The Board took these actions in the cited cases even though the employers had, in the Board's judgment, committed serious unfair labor practices warranting Gissel bargaining orders -- obviously among the most serious unfair labor practice cases. By contrast, this representation case raises no such unfair labor practices. But, it requires the same type of pragmatic treatment.

⁴ References to the Statement of Facts are "SOF ¶ ___". For ease of reference, statements of fact made in Section II refer to the applicable numbered paragraph(s) of the Statement of Facts where appropriate.

This matter started more than three years ago, and it is now before the Board on election objections. And, for reasons outside of any involved party's control, there is a real prospect for significantly more time to pass before this matter fully plays itself out. In addition, there have been significant developments during this time that have caused the ground to move beneath this case in material ways that further support "independent contractor" status. At the same time, all of the 2007 DDE's findings in support of "independent contractor" status continue in full force.

A. This Case is Virtually Identical to the Boston Home Delivery Case For Which the NLRB Recently Declined Jurisdiction.

Most recently and significantly, the D.C. Circuit ruled in a materially similar matter involving contractors at nearby Boston FedEx Home that contractors are "independent contractors and not employees". *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009), rehearing en banc denied (Sep. 4, 2009). The Hartford 2007 DDE is materially the same as the Boston 2006 DDE reviewed by the court. *Id.*; 2007 DDE. The 2007 DDE cites to the 2006 Boston DDE, and it employs a like legal analysis based on similar material facts that the court found were "strongly in favor of" "independent contractor" status and that "clearly outweighed" evidence of "employee" status. *Id.* at 504; 2007 DDE. Contractors at Hartford Home Delivery operate under materially similar conditions and contracting terms -- the operating agreements are the same -- as contractors operating at nearby Boston FedEx Home. (SOF ¶ 9.)

After the court denied the NLRB's request for rehearing en banc, no party sought Supreme Court review, and the NLRB General Counsel's office dismissed an appeal, yielding jurisdiction. (SOF ¶¶ 10-12.) For the same reasons that the Board dismissed the Boston Home Delivery proceedings, FedEx Home respectfully requests the Board to dismiss this materially identical case.

B. The Unit Complement and Contractor Activities Have Continued to Evolve In Significant Ways Since 2007.

In addition, the current contractor complement no longer reflects the contractor complement as of 2007. At the time of the disputed election there were 20 contractors within the petitioned-for unit and three excluded multiple route contractors. (SOF ¶ 16.) Three years later, there are three single route contractors and six multiple route contractors. (*Id.*) Notably, the three single route contractors remaining can at any time assign their routes to others and exit the business, transact with other contractors for their routes and become multiple route contractors, or hire others to perform all of the contracted work and operate solely as entrepreneurs. (2007 DDE). In any of these scenarios, the “unit” would cease to exist. That three single route contractors remain in that status is by their own choosing.

In this same vein, the D.C. Circuit held, in accord with Board precedent, that the right and potential to buy, sell, and operate multiple routes and to hire drivers to perform some or all of the work provide significant entrepreneurial opportunities and that one or more examples establish the right.⁵ *FedEx Home Delivery v. NLRB*, 563 F.3d at 503. Here, as in the Boston Home Delivery case, there were one or more examples of entrepreneurial activities at the outset. (2007 DDE.) But, the former Regional Director concluded they were not sufficient. (2007 DDE at 9, 21, 28-30.) In the years since, however, there have been extensive contractor entrepreneurial activities such that material conclusions in the 2007 DDE found to support “employee” status no longer hold.

The 2007 DDE noted that “only three” of the twenty-plus contractors contracted for multiple routes “[a]t the time of the hearing”. *See* 2007 DDE at 21, 29. Since then, and

⁵ The court also relied upon a host of additional undisputed factors supporting independent contractor status that are likewise indisputably present here. *See* § II. C. *infra*.

consistent with a nationwide trend, the number of contractors at Hartford Home Delivery exercising their “right under the Agreement to obtain and operate multiple routes” more than doubled – at present, seven multiple route contractors operate 27 of the 30 routes at Hartford.⁶ (2007 DDE at 20; SOF ¶¶ 17-18.)

In response to FedEx Home’s citation to the Board’s decision in *Argix Direct, Inc.*, 343 N.L.R.B. 1017 (2004), the 2007 DDE found that in *Argix* “it was common for contractors to operate multiple routes, as five of the contractors owned 20 of the 63 trucks”. (2007 DDE at 30.) Since then, it is more common than not for contractors to operate multiple routes at Hartford -- seven of 10 contractors operate multiple routes, and six contractors operate 29 of 32 vehicles. (SOF ¶¶ 17-18.)

The 2007 DDE found significant that “none of the [contractors] in the petitioned-for unit have exercised their option to operate multiple routes.” (2007 DDE at 29.) While the petitioned-for unit expressly excluded multiple route contractors, since April 2007 five single route contractors “exercised their option to operate multiple routes”. (2007 DDE at 21, 29; SOF ¶ 16.)

One single route contractor, for example, acquired multiple Home Delivery routes and multiple Ground operating division routes, operated approximately 10 vehicles, and employed approximately 11 drivers. (Finch Aff. at ¶ 9.) That contractor later sold his routes and vehicles to further invest in his restaurant businesses. (*Id.*)

The 2007 DDE acknowledged that contractors have the right to “sell” and the “right to convey their current route[s]”, but noted that there were “only two” route sales at Hartford. (*Id.* at 9, 29) (“evidence of only a few route sales is insufficient”).) Since then, and consistent with a larger trend, there have been more than 20 route sales at Hartford. (SOF ¶ 19.)

⁶ As of January 1, 2010, 65.5% percent of all routes are serviced by multiple route contractors. (Finch Aff. at ¶ 14.)

The 2007 DDE found that all contractors “have the right to incorporate”, but it found significant that “only three current Hartford-based [contractors] . . . have done so.” (2007 DDE at 28.) Since 2007, and consistent with a larger trend, that number expanded to seven, and, at present, four of the 10 contractors operating out of Hartford have exercised their right to incorporate. (Finch Aff. at ¶ 11; 2007 DDE at 8 (up to 23 percent of contractors nationwide incorporated as of 2006).)

Also, the 2007 DDE acknowledged that contractors “need not personally perform the contracted delivery service” and “can hire” others of their choosing to perform some or all of the work on “terms negotiated exclusively between” contractor and their hires. (2007 DDE at 12-13.) Since 2007, more and more contractors have exercised their rights to hire drivers to perform some or all of the contracted work. (SOF ¶¶ 17-18, 20.) In accord with Board precedent, the D.C. Circuit held that the “ability to hire ‘others to do the Company's work’ is no small thing in evaluating ‘entrepreneurial opportunity.’” *Id.* at 499 (citing *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780-81 (D.C. Cir. 2002) and *St. Joseph News Press*, 345 N.L.R.B. 474, 479 (2005) (“Most importantly, carriers can hire full-time substitutes...”).)

Quantity aside, the contractors’ activities above are further indicia that the quality of the petitioned-for unit is not what it was considered by the 2007 DDE to be three years ago. The nascent entrepreneurial activities by contractors operating out of Hartford have continued to emerge since then.⁷

⁷ All of this is without consideration of the national data of entrepreneurial activity, which all three judges on the D.C. Circuit panel agreed was erroneously excluded in the similar Boston FedEx Home matter. *FedEx Home Delivery v. NLRB*, 563 F.3d at 504, 505, 518. The NLRB has itself recognized problems with its approach in that matter. See NLRB Rehearing Petition at 2 n.1 (“the Board has relied on system-wide evidence to confirm the lack of entrepreneurial opportunity in a petitioned-for unit”). The 2007 Hartford DDE is also based upon the same exclusion.

C. **All of the Findings Supporting “Independent Contractor” Status Continue to Hold.**

In addition to the developments since 2007, all findings in the 2007 DDE supporting “independent contractor” status, quoted below, continue in full force or have grown stronger:

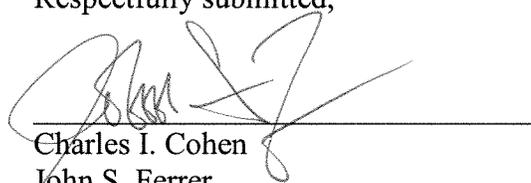
- “contractors own or lease their own vehicles, which are costly, and they are responsible for their vehicle’s maintenance, repair, and fuel costs” (2007 DDE at 27);
- contractors “need not personally perform the contracted delivery service” and “can hire” others of their choosing “at employment terms negotiated exclusively between” them (*id.* at 12-13);
- contractors “may choose” to acquire additional vehicles and have “sole authority to hire” additional workers to perform some or all of the work (*id.* at 12, 20);
- “[a]t least half of [contractors] use supplemental vehicles and drivers,” usually during peak periods (*id.* at 12-13);
- contractors “generally have the discretion to operate their routes and perform deliveries in the sequence and in the manner they see fit” (*id.* at 11 (contractors “can and do deliver packages in any order and by any route of their choosing”), 12, 28);
- contractors “may also [transfer] packages amongst each other” and “do not need [FedEx Home’s] permission” (*id.* at 13);
- contractors “may use their vehicles for other commercial purposes or personal purposes, provided they remove or mask [FedEx Ground] logos” (*id.* at 8, 12);
- contractors are “free to determine when to begin and end their work day” and “take breaks at their discretion” (*id.* at 28);
- contractor settlement is not based on an hourly wage but rather upon a by-the-result and by-the-job basis (*id.* at 16);
- the parties express their mutual intentions that contractors operate “strictly as an independent contractor and not as an employee” (*id.* at 28);
- contractors “do not receive traditional fringe benefits” and “do not have taxes withheld from their settlement” (*id.* at 28);
- contractors “are not subject to ordinary discipline and may challenge the termination of their Agreement through binding arbitration” (*id.* at 28-29).

In sum, the NLRB has accepted a result of independent contractor status in a virtually identical case. (SOF ¶ 12.) In addition, prudence dictates the same result. Over the more than three years since this matter began, material findings in the 2007 DDE no longer hold insofar as the unit has evolved in significant ways. Contractors have increasingly continued to exercise the opportunities to contract for and operate multiple routes, to buy and sell routes, to hire others to perform the work, to incorporate their businesses, to acquire and use additional vehicles and new equipment, and to make decisions to optimize their business success. (SOF ¶¶ 16-20; Finch Aff. at ¶ 12.) And, all of the factors supporting “independent contractor” continue in full force.

Accordingly, FedEx Home respectfully requests the Board to dismiss the above-referenced case.

Respectfully submitted,

Of Counsel:



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Direct: 202.739.5710/5317

Richard J. Hughes
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Moon Township, PA 15108
412.859.5806

DATED: March 17, 2010

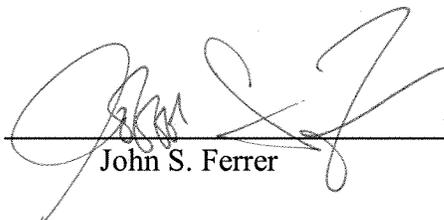
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of FedEx Home Delivery's Motion to Dismiss Petition, which was electronically filed today using the Board's electronic filing system, was served via electronic mail on:

Jonathan Kreisberg, Regional Director
Rick Concepcion, Attorney
National Labor Relations Board, Region 34
280 Trumbull Street - 21st Floor
Hartford, CT 06103
jonathan.kreisberg@nlrb.gov
rick.concepcion@nlrb.gov

Gabriel O. Dumont, Esq.
Dumont, Morris & Burke, P.C.
14 Beacon Street, Suite 300
Boston, MA 02108
gdumont@dmbpc.net

this 17th day of March 2010.



John S. Ferrer

EXHIBIT A

BEFORE THE NATIONAL LABOR RELATIONS BOARD

**FEDEX HOME DELIVERY, A SEPARATE :
OPERATING DIVISION OF FEDEX :
GROUND PACKAGE SYSTEM, INC. :**

Respondent, :

And :

CASE NO. 34-RC-2205

**TEAMSTERS UNION LOCAL 671 :
AFFILIATED WITH IBT, :**

Petitioner. :

AFFIDAVIT OF RAYMOND H. FINCH

I, Raymond H. Finch, state and declare as follows based on my personal knowledge:

1. I serve as Senior Manager of Contractor Relations for FedEx Ground Package System, Inc. with responsibilities for the Home Delivery operations ("FedEx Home"). I have served as Senior Manager since about March 2007. My office is located at the FedEx Home facility located in Windsor, Connecticut ("Hartford"). As Senior Manager, I serve as a liaison between FedEx Home and the owner-operators who contract with FedEx Home to deliver packages tendered to them ("contractors") on all aspects of the contractual relationship. I am responsible for, among other things, ensuring that the FedEx Home Contractor Operating Agreement ("Operating Agreement") is administered in accordance with its terms, dealing with contractors, and advising managers about contractor relations.

2. In my role as Senior Manager, I have become familiar with the management and general operations of the Hartford facility, as well as the contractors who contract with FedEx Home out of that facility. I also have personal knowledge of the Operating Agreement, which defines the contracting relationship between FedEx Home and contractors, and other documents related to contractors maintained by FedEx Home in the ordinary course of business.

3. Based on my dealings with the management and contractors at Hartford, and my review of information maintained by FedEx Home in the ordinary course of business, I have knowledge of certain aspects of contractors' businesses, including, among other things, the number of service areas they have contracted with FedEx Home to service, their use of drivers and helpers to service their service areas, their vehicles and other equipment, and their business transactions, including to buy or sell service areas, vehicles, and equipment.

4. The Company's home delivery business began in 2000, and it was created to handle the increasing number of residential deliveries emanating from mail-order and Internet commerce. Prior to 2000, FedEx Ground handled predominantly business-to-business ground deliveries.

5. At present, there are 30 contracted routes at Hartford operated by 10 contractors. Seven of the 10 contractors operate multiple routes, having exercised their opportunity to acquire more than one route. One of the seven multiple route contractors operates out of the Ground Operating Division and has a hired driver who provides delivery service on the Home Delivery Operating Division route at Hartford. At present, there are three single route contractors.

6. At present, contractors use approximately 32 vehicles at Hartford, and 29 of them are operated by six multiple route contractors.

7. Since April 2007, five single route contractors exercised their option to operate multiple routes.

8. Each of the multiple route contractors has exercised the right to hire drivers to perform some or all of the contracted delivery work on terms negotiated exclusively between them. Some contractors have hired others to operate their vehicles and perform delivery services exclusively. Roger Jones, principal of multiple route contractor Hummingbird Hill Enterprises

LLC, uses hired drivers to perform pick-up and delivery services. Ewen, principal of multiple route contractor Ewen Enterprises, usually chooses not to drive and relies solely on hired drivers to provide contracted delivery services. Former multiple route contractor Piatti rarely operated his vehicles, assigning that function to his hired drivers.

9. After March 2007, former contractor Piatti owned and operated nine service areas out of Hartford and the separate Windsor (Connecticut) Ground operating division (which involves both pick-up and delivery to businesses, as opposed to primarily delivery to homes). Piatti hired approximately 11 drivers to service his routes. Piatti later sold his routes and vehicles, and it is my understanding that he did this to further invest in his restaurant businesses.

10. Since about March 2007, through my dealings with contractors and based on my review of information maintained by FedEx Home in the ordinary course of business, I have become aware of a number of business transactions by them. FedEx Home is not involved in negotiating the terms of these transactions. I have knowledge of more than 20 route sale business transactions since March 2007, mostly on undisclosed terms. Contractors have no obligation to disclose information to FedEx Home about certain terms of their transactions with others or their business activities, and FedEx Home has no right to require such disclosures.

11. Since March 2007, the following contractors at Hartford have operated as corporations: Meadows Delivery LLC; Scoville Hill Associates LLC; Hummingbird Hill Enterprises LLC; Ewen Enterprises, LLC; Sky Limit Enterprise; and S.I.A.M. LLC.

12. Contractors have invested in various types of equipment for use in performing delivery service, including hand-carts, map books, and telephones. A number of contractors operating out of Hartford have purchased Global Position Systems (GPS), which can cost up to \$400.00. And, others have acquired and use Blackberry-type devices to gain internet access for

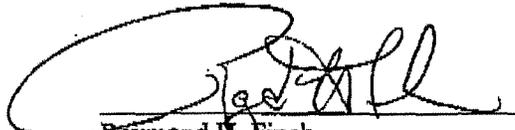
maps and other information. Contractors also have purchased and use hands-free cellular communications devices.

13. Contractors operating at Hartford Home Delivery operate under similar conditions and contracting terms as contractors operating at FedEx Home's facilities serving the greater Boston, Massachusetts area. The base operating agreements are the same.

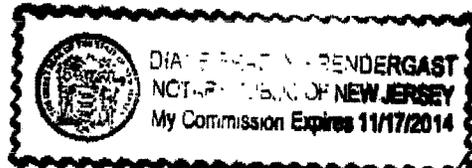
14. As of January 1, 2010, 65.5% percent of all routes nationwide are serviced by multiple route contractors.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 17, 2010


Raymond H. Finch

Sworn and subscribed to me this 17th day of March 2010.



Diane Bendergast

EXHIBIT B



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

January 20, 2010

Re: FedEx Home Delivery, a Separate
Operating Division of FedEx
Ground Package Systems, Inc.
Case No.1-CA-45007

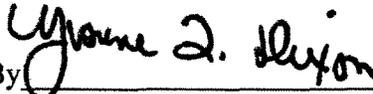
Clayton Schwan
P.O. Box 382
Peabody, MA 01960

Dear Mr. Schwan:

Your appeal has been carefully considered. The appeal is denied substantially for the reasons set forth in the Regional Director's letter of November 30, 2009. Inasmuch as the Court of Appeals for the District of Columbia found that certain FedEx drivers, including you, were not employees under the National Labor Relations Act, and the Board has decided not to challenge its determination, this Agency does not have jurisdiction to issue complaint in this matter. Accordingly, further proceedings are unwarranted.

Sincerely,

Ronald Meisburg
General Counsel

By 
Yvonne T. Dixon, Director
Office of Appeals

cc: Rosemary Pye, Regional Director
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mab