**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**FIRST REGION**

| | |
|---|---|
| **PEPPERIDGE FARM, INCORPORATED**[1]<br>**Employer**<br>**and**<br>**CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 633 OF NEW HAMPSHIRE**<br>**Petitioner** | **Case 01-RC-155159** |

## DECISION AND ORDER

Petitioner Chauffeurs, Teamsters and Helpers Local 633 of New Hampshire (the Union) seeks to represent a unit of 25 sales development associates (SDAs) who distribute Pepperidge Farm snack products out of a depot operated by Pepperidge Farm, Incorporated (PF) in Woburn, Massachusetts. PF maintains that all of its SDAs are independent contractors who are excluded from the Act's coverage, while the Union asserts that they are statutory employees.

For the reasons set forth below, I find that PF has met its burden of establishing the independent contractor status of the SDAs, and I shall dismiss the petition.

## I. FACTS

PF Organizational Structure

PF manufactures and sells snack, bakery, and frozen food products for sale at various types of retail outlets.[2] Pat Coppola is PF's Customer Vice President for the Northeast Region for both snack and bakery products.[3] Timothy Mulcahey, who reports to Coppola, is PF's Director of Retail Operations for Snacks for the Northeast Region. Nine district sales managers (DSMs), each of whom covers a certain geographic territory, report to Mulcahey. The DSMs are assigned to work with those SDAs who deliver snack products to retail outlets located within their geographic territory.

[1] The name of the Employer appears as amended at the hearing.

[2] PF snack products include items such as cookies and crackers, while its bakery products include items such as bread, stuffing, and croutons. Separate divisions for snacks (also referred to as "biscuit" items) and bakery goods are responsible for the distribution and sale of the two types of product. Nationwide, there are about 3500 SDAs, including "bakery" and "snack" SDAs. Although both snack SDAs and bakery SDAs receive product at the Woburn depot that is the subject of this petition, the Union seeks to represent only the Woburn snack SDAs. All references to SDAs hereafter refer to the "snack" SDAs at issue in this case.

[3] The Northeast Region encompasses the six New England states and all or parts of various other states on the East coast.

Each DSM is responsible for, on average, about 19 SDAs, who may report to several different warehouses, referred to as "depots," to pick up their product. DSM Pamela Serwatka works with 18 SDAs, 14 of whom pick up their product at the Woburn depot. DSM James Furey works with 18 SDAs, 6 of whom receive product at the Woburn depot. In addition to the Woburn SDAs who service stores within their own districts, Serwatka currently works with three Woburn SDAs and Furey with one Woburn SDA who work in an "open" district that currently has no DSM, until such time as a new DSM is hired for that district. DSM Darlene Almeida works with one Woburn SDA whose territory falls within her district.

Consignment Agreements

Each SDA is a party to a Consignment Agreement with PF that grants the SDA an exclusive distributorship in the geographic area described in the agreement.[4] PF has no authority to alter the territory covered by each agreement although, as described below, SDAs may alter their territory by buying or selling entire or partial routes. If a new store opens within an SDA's geographic territory, the SDA has the exclusive right to sell PF products in that store. If a store closes within an SDA's territory, the SDA loses the commissions attributable to that store and is not compensated by PF.

The Consignment Agreement provision entitled "Distribution Efforts" requires the SDAs to use their best efforts to realize the full sales potential of their territory, by actively soliciting retail stores, by maintaining an adequate and fresh supply of product, by providing distribution services on such days of the week and with such frequency as is necessary to realize full sales potential, by making available all varieties of product, and by cooperating with PF in using its sales promotion and space merchandising programs. It states that PF may establish reasonable sales and/or distribution goals, which the SDA shall either meet or exceed.

A provision entitled "Distribution Service and Facilities" requires SDAs, *inter alia*, to provide adequate equipment and facilities for the receipt, handling, and delivery of product and for the accounting, inventory and billing of product; to comply with all motor vehicle, food, drug, health and sanitary laws; to maintain route books and other records as required by PF; and to provide and maintain in good order and appearance a delivery truck, computer, and other equipment needed to operate the distributorship.

A provision entitled "Failure to Service Particular Stores" provides that, if the SDA fails to provide satisfactory service to any retail store and such failure is not remedied within five days notice by PF, PF may make other temporary or permanent arrangements to service the store. If such arrangements are made on a permanent basis, the store shall be deemed to be no longer included in the SDA's territory.

[4] In the Consignment Agreements, the SDA is referred to as "consignee" and PF is referred to as "Bakery."

The Consignment Agreement provides that PF may terminate the agreement for cause. Cause includes, *inter alia*, failure of the SDA to adequately realize the sale potential of the territory and failure to make satisfactory improvement within thirty days of notice; failure to comply with any material term after seven days notice; failure to maintain the general appearance and condition of his/her truck or other equipment or his/her own general appearance or deportment or that of his/her helpers; or any actions or practices that, in the opinion of PF, materially damage the reputation of PF, retail stores, or other SDAs.

The Consignment Agreement gives PF the right to purchase all or any portion of an SDA's distributorship at any time, with 30 days notice, for which it must pay the SDA fair market value plus 25 percent of the fair market value.

The Consignment Agreement specifies that SDAs are self-employed independent contractors, rather than agents or employees of PF and that the independent contractor relationship between PF and the SDA is an essential element of the agreement.[5]

The Role of Account Managers

PF employs national and regional account managers who work with buyers or other representatives of large chain stores that are PF customers. The account managers negotiate with the chain store representatives to secure shelf space for PF products, the amount of which may vary from store to store, and to arrange product promotions. The chain store management approves a "plan-o-gram," i.e., a visual representation of the shelves showing how many "facings," i.e., rows across, will be dedicated to PF products and where the products are to be placed in relation to other products. The account managers relay the plan-o-grams and any "mandatory" displays they have negotiated to the DSMs, who relay them, in turn, to the SDAs.

The Role of DSMs

The DSMs are responsible for maximizing sales of PF snacks within their respective territories.[6] DSMs visit the stores in their territory regularly, particularly the chain stores. They make sure that local store managers comply with any agreements concerning shelf space or displays that were negotiated at the national or regional level and they also try to negotiate additional displays themselves. For some small, regional chain stores, the DSMs rather than account managers negotiate with store management for space and displays.

---

[5] Some of the Woburn SDAs belong to an association of SDA owners called the Pepperidge Owners Association of America (POAA), whose purpose is to help the SDAs improve their businesses. The mission statement on its website states, "POAA is comprised of Biscuit and Bakery Distributors and Franchise Owners….We are independent distributors who have invested much time and effort in Our Business."

[6] DSMs are full-time employees of PF who work out of their homes.

DSMs also serve as middlemen between PF and the SDAs. They notify the SDAs about PF plan-o-grams, product promotions, and displays that have been negotiated by the account managers or DSMs. As further described below, they do store audits and "route rides" with the SDAs to encourage them to maximize sales.

DSMs offer to provide two to three weeks of training and "ride-alongs" for new SDAs. The training is recommended but not required, although most new SDAs take it.

DSMs hold quarterly meetings with their SDAs, in which they discuss sales, promotions, market share, new and discontinued items, and the like. Attendance is not required. The majority of SDAs attend the meetings, but some never attend.

Duties of the SDAs

SDAs are responsible for delivering PF product to individual stores within their geographic territory and for merchandising the product they deliver.[7] SDAs cover, on average, 20 to 25 stores each, although the number of accounts per SDA varies widely. Among the Woburn SDAs, one has five accounts and one has close to 100.

PF manufactures its bakery and snack products at various plants throughout the country. PF truck drivers or other trucking companies transport snack products from a warehouse in Denver, Pennsylvania to various depots across the country, including the Woburn depot, which is leased by PF. The Woburn SDAs place orders for various PF snack products and pick up their orders at the Woburn depot on either Tuesday or Wednesday. The SDAs unload the incoming trucks, pick the product they have ordered, and either load it onto their own trucks or store it at the depot or elsewhere. SDAs determine how much product to order from PF, making sure to order enough product so that their stores will not be out of stock but not so much that they end up with excessive "out-of-code" product.[8] SDAs determine how often they need a delivery at the Woburn depot; some place orders weekly and some every two to three weeks.

PF provides a "best practices" chart to SDAs, which recommends the frequency with which they should service their stores, depending on the store's volume of business. The chart provides only a recommendation, however, and it is up to the SDAs to determine the frequency with which they visit each of the stores in their territory. PF does not dictate the sequence of deliveries on SDA routes or the date or time of day for deliveries.[9] There is no requirement that SDAs work certain days of the week or certain hours, and the DSMs are unaware of the SDAs' work schedules.

---

[7] In the case of certain chains, such as Market Basket, SDAs do not deliver the product to individual stores. PF or one of its subcontractors delivers the product to the customer's centralized warehouse, the customer transports it to its individual stores, and SDAs merchandise the product once it is in the stores.

[8] "Out-of-code" product refers to product that is past its expiration date.

[9] Some large chains, such as Walmart, have established certain windows of time during which vendors may deliver product to their stores. Other stores are more flexible, and SDAs negotiate with them about the time of delivery.

When SDAs arrive at a store, they check the shelves and displays on the selling floor. They pull from the shelves any product that is damaged or out of code. They see how much product has sold and anticipate how much product is needed based on the history of the store. While SDAs must follow the plan-o-grams of those chain stores that have them, they determine how many units of product to place behind each facing. Then the SDAs pull together an order from their truck and bring it into the store's receiving area. The SDA and the store's receiver go over any returns. Then they review the invoice, or "ticket" printed out by the SDA, which lists the delivered product, to make sure everything matches. At chain stores, the ticket is transmitted electronically from the SDA's handheld device to the customer's computer system, and PF uses the ticket to bill the customer.

The SDAs stock the shelves. SDAs also put up any special displays that have been negotiated by account managers or DSMs. Ambitious SDAs develop relationships with local store managers and negotiate for extra permanent or temporary display space themselves, in addition to the space that has been "scripted" by an account manager. Furey testified that SDAs who are not as successful at selling incremental displays will make fewer sales, which reduces their commission and lowers the value of their route. Some SDAs also negotiate with the chain stores for storage space in the store's back room.

SDAs Employ Helpers

SDAs are permitted to and do hire others to assist them in operating their routes. Several Woburn SDAs hire "route runners," some of whom are former SDAs, to cover their routes while they are on vacation or otherwise need time off. In some cases, SDAs arrange for another SDA in a neighboring territory to cover for them while they are on vacation. In addition, several SDAs hire helpers to service their stores on a regular basis, such as on Sundays. One SDA, Suzanne Bone, has her boyfriend operate her route full time; she never makes deliveries herself. SDA Sue Colwell has a helper who services half of her route on a full-time basis. SDA Peter Silvestro has both a bakery route and a snack route and has a helper who operates the bakery route. Approximately 13 of the 25 Woburn SDAs hire route runners/helpers/covering SDAs (collectively, helpers) to assist them.

PF plays no role in the hiring, firing, or discipline of these helpers. PF does not pre-approve helpers and does not require them to undergo a background check or prove that they have a valid driver's license. PF pays any commissions owed to the SDA, regardless of whether the SDA or a helper runs the route. Helpers are paid by the hiring SDA, and the helper's compensation is a matter negotiated between the helper and SDA. The DSMs are not aware of these financial arrangements and may not necessarily be aware that an SDA is using a helper.

Route Rides, Store Audits, and 5-Day Cure Letters

PF requires its DSMs to do one "route ride" per week with one of their SDAs.[10] During a route ride, the DSM rides along with or follows an SDA for the entire day, stopping together at the stores on the SDA's route. During a route ride, the DSM and SDA exchange ideas. The DSM makes suggestions about how to increase business and shares ideas from other SDAs about how to merchandise. DSMs Serwatka and Furey testified that they ride the most with those SDAs who have the largest revenue and with those SDAs who are most open to suggestion, where they can make the most impact. Furey rides about six times a year with SDA Rick Centore, who is ambitious and seeks Furey's opinion. The DSMs may do a route ride one or two times a year with SDAs who are less open to suggestions. The SDAs are not required to permit route rides and are not required to follow the DSM's suggestions.

One purpose of a route ride is for the DMS to build a relationship with the decision-makers in large retail stores so that PF can sell extra space, displays, and programs. Another purpose is for the DSMs to check to see whether SDAs have complied with the terms of their Consignment Agreement by stocking each store with sufficient product that is within code. DSMs also check to see whether the SDAs are following the store's plan-o-gram or the spirit of it, if the store has one. The DSMs then complete a "route ride" form on their iPAD, which includes a place for the DSM to comment on the service level of the SDAs. The DSMs submit the route ride forms electronically. Neither Serwatka nor Furey knew who reviews the forms and no one from PF has ever contacted them about their route ride forms.

In addition to weekly route rides with a particular SDA, DSMs visit about 500-plus stores per year for what is called a store evaluation or store audit.[11] Each audit takes a half-hour to an hour. During the audit, the DSMs confirm that any mandatory displays are in place, that there is sufficient product on the shelves, that the product is set to the store's plan-o-gram, and that the product is not out of code. The DSMs check the competition, noting competitors' sale prices and displays. The DSMs talk to store personnel in an effort to cultivate a relationship, asking the store manager or grocery manager if delivery and service has been frequent enough.

For each store audit, the DSMs complete an electronic evaluation form. The evaluation forms are pre-populated with certain information, such as whether or not the SDA's service frequency for the store meets a "best practice" standard that PF has established,[12] average billed gross amounts, percentage changes in sales over time,

---

[10] The 52 route rides per year for each DSM are divided among all of the SDAs in Serwatka's and Furey's districts, only some of whom are Woburn SDAs.

[11] Serwatka and Furey perform those 500 plus annual store audits for all of the stores in their respective districts, which includes visits to stores other than those covered by the Woburn SDAs. They may visit large chain stores four to ten times per year. They do fewer evaluations of mom-and-pop stores, and there are some stores that they never audit.

[12] PF uses an algorithm to establish the ideal frequency of deliveries to each store, depending on the store's volume of business.

and whether the store is deemed by PF to be one of the top 20 underperforming stores. The DSMs complete sections of the form that indicate whether mandatory displays are present, whether the SDA has complied with the plan-o-gram, whether there is sufficient stock, and whether any stock is out of code. The DSMs also take photos of any shelves or displays that are short of product or have out-of-code product.

DSMs take no action against SDAs if their average weekly billed gross amount is lower than the year before, if the number of tickets or service frequency does not meet PF's best practice standard, or if a display does not conform to a store's plan-o-gram. Furey testified that he may suggest more frequent visits to SDAs, but SDAs are not required to take his suggestion. He rarely gets a negative comment from store management about SDA service; if he did, he would have a conversation with the SDA about it, but it would not go further. Serwatka testified that if sales are down, she tries to help the SDAs turn it around by, for example, getting more displays.

Store evaluations may result in PF issuing what is known as a "five-day cure letter" to SDAs. PF issues five-day cure letters only if 1) an SDA has left shelves out of stock or has left out-of-code product on the shelves, or any combination of those two infractions, on an excessive number of occasions,[13] or 2) an SDA has failed to build a mandatory display. As set forth in the Consignment Agreement, the letter notifies the SDA that he or she has failed to provide satisfactory distribution service to a particular retail store; that if the failure is not remedied within five days, PF may make other temporary or permanent arrangements to service the store; that if the arrangement is permanent, the store will be removed from the SDA's Consignment Agreement without remuneration; and that failure to remedy could constitute grounds for termination of the Consignment Agreement for cause. When DSMs believe a store evaluation warrants a five-day letter, they refer the matter to Mulcahey, who must approve it. Mulcahey refers the matter to PF Customer Vice President Pat Coppola, who issues the letter, if she concurs.

PF issued 13 five-day letters to Woburn SDAs in 2013, 10 five-day letters in 2014, and 8 five-day letters to date in 2015. In all cases but one, the SDA cured the deficiency.[14]

---

[13] Although Mulcahey has told the DSMs that five instances of out-of-stock or out-of-code product warrant a five-day letter, Furey testified that it is his practice to recommend five-day letters only after ten to twelve instances.

[14] In 2015, Woburn SDA John Provost received a five-day cure letter for refusing to service the Goldfish Cracker displays at two Walmarts in his territory, as a form of protest over PF's determination to reduce the commission payable to SDAs for the Goldfish promotions. Provost did not cure the problem but suffered no consequence. In a subsequent letter about the dispute, Provost wrote to DSM Serwatka that he is "an independent business owner" and that her rumors about him had furthered her tortious interference with his business.

Compensation

PF employees, such as Mulcahey and DSMs, are salaried and eligible for benefits such as health, dental, life and disability insurance, Worker's Compensation coverage, a 401(k) plan, company vehicle, fuel card, cell phone, home internet, and paid vacation and sick days. SDAs are not salaried and receive none of these benefits from PF.

PF provides SDAs with a 1099 form rather than a W-2 form for purposes of reporting their incomes to the Internal Revenue Service and state tax authorities. PF pays no FICA taxes on behalf of SDAs and does not withhold any amount for income taxes.

SDAs service two types of stores, chain stores and cash accounts. Chain stores are large retail stores. Cash accounts are "mom and pop" convenience stores with smaller volume, where an owner may own one or a handful of stores. Ambitious SDAs try to solicit convenience stores in their territory to become new cash accounts. SDAs are compensated in a different manner for sales to the two types of stores.

In the case of chain stores, pursuant to the consignment agreement, PF bills the customers and pays the SDAs a 20 percent commission for all sales. The SDAs' commissions are based on wholesale prices established and changed by PF from time to time, referred to as "Bulletin" prices or "Schedule B" prices.[15]

In certain kinds of stores, PF delivers product directly to the customer's own warehouse, the customer transports the product from its warehouse to its retail stores, and the SDAs provide service at the retail stores as though they had delivered the product themselves. Under this arrangement, PF deducts a "pallet fee" of $20 or $35 from the usual 20 percent commission it pays to the SDAs.

In the case of cash accounts, SDAs purchase the product from PF at the rate of 80 percent of the published wholesale price. The SDAs determine the product mix for their cash accounts with input from the customer. PF does not bill the cash accounts or set the price those customers pay; the SDAs set the price they charge their cash customers for the product and retain the incremental amount over the wholesale price. For cash accounts, the SDAs also determine the frequency and method of payment by their customers, i.e., they determine whether to bill their customers or require cash-on-delivery, and whether they accept payment by credit card, check, or cash only.

[15] When PF runs a promotion, a PF account manager and a buyer for the chain store establish the prices for the promotion. Typically, the chain agrees to sell the product to consumers at a lower retail price than usual, and PF lowers the wholesale price that the chain pays PF for the product, but the SDAs' 20 percent commission is still calculated based on the published Schedule B price rather than the lower negotiated wholesale price. Twice in 2015, however, PF ran promotions for Goldfish Crackers at Walmart, under which it paid the SDAs a 20 percent commission that was based on the reduced wholesale price negotiated with Walmart rather than on the published wholesale price.

SDAs receive a weekly settlement statement from PF, which sets forth the amount PF owes the SDAs for commissions and the amount the SDAs owe PF for product they have purchased to sell to cash accounts. Depending on the week's transactions, PF may owe the SDA or vice versa.

Mulcahey estimated that, New England-wide, cash accounts represent only about four percent of SDA business. He estimated that about 85 percent of the stores in Serwatka's district are chain stores and that Furey's district might have a little more cash business than Serwatka. He did not know the percentage of sales attributable to cash versus chain store accounts in the aggregate for the 25 Woburn SDAs, but the amount is variable for each SDA. SDAs in urban areas like Boston, Cambridge, Somerville, Medford, and Watertown tend to have more cash business. With respect to the percentage of SDA revenue that is generated by cash accounts, Furey estimated about 20 to 25 percent for SDAs David Barmashi and Thomas Holmes,15 to 20 percent for SDA Rick Centore, 15 percent for SDA Phil Speros, and less than 10 percent for SDA Lawrence Tennis. Furey testified that a very low percentage of SDA Steve Christo's stores are cash accounts and that, although SDA Rob Centore has more chain stores than cash, he has solicited a lot of new cash customers since he started in January. The record does not reveal the percentage of revenue that comes from cash accounts for any of the other SDAs.

The compensation of the SDAs varies widely both between SDAs and across time for the same SDAs. Thus, in 2014, the three most highly compensated Woburn SDAs earned between $161,759 and $195,223, while the three least compensated Woburn SDAs earned between $36,802 and $67,915. Income may fluctuate due to chain stores opening or closing.[16] Thus, SDA Paul Edry's annual compensation increased by $11,000 when a Market Basket grocery store opened in his territory in 2014. SDA Carlos Crespo's annual compensation dropped by about $37,000 when a Johnny's Food Master grocery store in his area closed in 2011. Income may also fluctuate due to purchases or sales of territory and due to variations in the level of service provided by SDAs. Some SDAs solicit convenience stores in their area for new business, while others are less ambitious. In 2014, some SDAs lost several thousand dollars of income due to a work stoppage at Market Basket.

Stale Policy

PF maintains a "Biscuit Thrift Policy," also referred to as its "Stale Policy." Under the policy, PF assigns each Region and each SDA a quarterly "stale" objective for product that has expired. SDAs may return stale product to PF that does not exceed that percentage and receive partial reimbursement for it, provided they meet certain

[16] If there is an explosion of growth in a territory, PF does not provide extra workers to help out the SDA, who is responsible for figuring out how to service an influx of new stores.

conditions.[17] The stale food is donated to places such as food banks, and the SDAs rather than PF get the tax write-off for the charitable donation.

When SDAs remove out-of-code product from chain stores, they lose the 20 percent commission they earned from the sale. In addition to losing the commission for stale product, SDAs may be liable for an additional charge if they exceed their allotted stale percentage, although they may not be charged if they provide a reason for exceeding their stale number.

CVS

In 2006, CVS decided to switch from having SDAs deliver PF product to individual stores (referred to as Direct Store Delivery, or DSD) to a system-wide "direct" delivery system, under which PF delivers product to a CVS warehouse. At that point, the SDAs still "owned" the CVS stores in their territories, but they were no longer entitled to earn any commissions from them. PF then offered three options to SDAs with CVS stores: 1) They could do nothing, in which case they received no compensation for their CVS stores; 2) They could sell the CVS stores back to PF at a national ratio of 32 to 1; or 3) They could opt to receive a commission at the rate of five percent of the national average of CVS sales, and PF would buy their CVS stores at the ratio of 8 to 1 at the time they sell their routes. Many of the Woburn SDAs chose the third option.[18]

Walmart

Walmart currently allows DSD in all of its stores across the country. By letter dated June 5, 2015, Mark Schreiber, Senior Vice President - Sales and Distribution, notified SDAs that Walmart has confronted him about PF's poor snack service, resulting in significant out of stocks. He wrote that Walmart expects to see PF service two to three times per week depending on sale volume. He warned that if SDAs do not consistently deliver product to these stores, PF runs the risk that Walmart may eventually require warehouse delivery to all of its stores, that SDAs currently average $24,000 per year in Walmart commissions, and that no commissions are payable on warehouse deliveries under the Consignment Agreement.

Route Sales

SDAs purchase their routes from other SDAs rather than from PF.[19] Some SDAs sell because they want to leave the business altogether, while others wish to sell a

---

[17] The conditions include, *inter alia*, maintaining compliance with customers' plan-o-grams, maintaining service frequency standards, maintaining standards for promotional displays, and using proper shelf rotation practices.

[18] At some point, CVS agreed to go back to DSD at certain stores, and some SDAs have begun to service them again and receive the 20 percent commission.

[19] There is no longer any territory in New England that is not already owned by an SDA.

portion of their territory. DSM Furey testified that once an SDA has purchased a territory, PF may not change the configuration of the territory without the approval of the SDA.

Sellers find buyers through word of mouth, and the routes for sale are also posted on PF's website. SDAs who seek to sell routes negotiate the purchase price with potential buyers.[20] PF is generally not involved in negotiating the price of the purchase[21] and receives no proceeds from the sales.

Once an SDA has identified a buyer for his or her route, the DSM meets with the prospective buyer to make sure that the buyer understands what he or she is getting into – the financial terms of the sale, the credit rating that will be required, the down payment that will be required by a lender, the loan rate, the average weekly sales for the route, and the commission rate at that volume. Mulcahey also interviews prospective buyers to make sure they know what they are purchasing. Prospective buyers are also required to complete a package of forms provided by PF that sets forth their financial information. A PF market development manager reviews the forms for completeness and to ensure that the buyer has the necessary down payment and will be financially able to buy the route. The forms are then forwarded to PF's corporate office.

The Consignment Agreement entered into by SDAs provides that distributorships may not be sold without the approval of PF and that PF will grant such approval if*, inter alia*, the purchaser meets the requirements of PF "as to character, ability, financial responsibility, business acumen, adequate facilities, and involvement in the business."[22] Nonetheless, Mulcahey testified that he has never denied a prospective purchaser the right to purchase a territory based out of Woburn and would have no right to veto the sale of a route for such reasons, although some buyers have been unable to complete a purchase due to financial difficulties. DSM Furey testified that he has never rejected a prospective buyer and that there have been some buyers he was not big on, but there was nothing he could do about it.

For those buyers who need a bank loan to finance their purchase, PF has an arrangement with Bank of America under which PF guarantees the loan if the SDA defaults or leaves the business. Mulcahey testified that he is aware of three SDAs who

---

[20] Routes are typically valued by using a ratio that factors in the route's weekly average route sales for the prior year. A typical price requested by a seller is a "40 to 1" ratio, i.e., 40 times the weekly average sales, so that, e.g., a seller seeks $400,000 for a route that averages $10,000 in weekly sales. However, sellers can and do seek to sell their territory at a lower or higher ratio than 40 to 1, based on the history of route sales in the area. For example, SDA Michael Brien bought a small territory a year ago at a ratio of 50 to 1. According to Employer Exhibit 1, the average weekly route sales for the past 52 weeks for the 25 Woburn SDAs ranged from a low of $3,589 to a high of $18,010.

[21] SDA Michael Brien testified about one instance in which he negotiated the purchase price of a route directly with PF, in circumstances where the seller was the estate of a deceased SDA and the estate representatives were not familiar with how to handle the sale.

[22] The Consignment Agreement also gives PF the right of first refusal with respect to any proposed sale.

used banks other than Bank of America to finance their purchase, but he did not know if PF guarantees loans from other banks. Mulcahey was unaware of any instances in which an SDA defaulted on a loan.

A DSM attends the closing when a route changes hands. The DSM provides a document for the seller to sign, indicating that that the seller is voiding his or her Consignment Agreement and selling to the buyer, as well as a Consignment Agreement for the buyer to sign.

Some routes have stayed in families for generations. Six Woburn SDAs purchased their routes from relatives, in some instances for a nominal amount. When SDAs die, their territory becomes part of their estate and does not revert to PF. SDA Richard Centore inherited his route after his father died. In other instances, the estate of a deceased SDA sells the SDA's route to a purchaser.[23]

In some instances, SDAs sell a portion of their territory, either because their route has become too large for them to service or because they wish to take some of the equity out of their route. The Consignment Agreement states that prior written approval of PF is required when a proposed sale involves the division of the territory or sale of only a portion of the distributorship. Nonetheless, Mulcahey described a sale in which SDA Al Pitigliano proposed to split his route into three parts for sale. Mulcahey and DSM Pamela Serwatka proposed to divide it up in a certain way, but Pitigliano changed the way they proposed to divide it up, moving towns from one route to another.

In the case of three "club" store customers – Costco, Sam's Club, and BJ's – PF drivers deliver large quantities of product from the Denver plant directly to large warehouses owned by each club store chain. The club stores distribute the product from their warehouses to their individual stores and do their own merchandising within their stores. SDAs who have a club store in their territory receive a 20 percent commission for club stores sales, even though they never set foot in those stores.

As of March 2015, at the time of any route sale, PF will exercise its right under the Consignment Agreements to "buy back" any club stores located within the territory to be sold. While the sellers will not lose money on this transaction, as PF pays the sellers for the fair market value of the club store plus 25 percent, the new owners will have bought a route without a club store.[24] About eight of the Woburn SDAs have club stores within their territory. Furey estimated that club stores represent about five percent of the revenue of his seven Woburn SDAs.

Mulcahey testified that about 11 to 12 routes are sold each year in the Northeast Region. Several Woburn SDAs have recently bought or sold routes or are in the process of doing so. In June 2015, SDA Al Pitigliano split his route by selling portions to

---

[23] Pursuant to the Consignment Agreement, the estate of a deceased SDA has 90 days to find a buyer.

[24] Two Woburn SDAs who are parties to an older version of the Consignment Agreement may sell their territory to a buyer with any club stores included.

three SDAs, two of whom are Woburn SDAs. John Adams, Theodore Barmashi, and Suzanne Bone are currently in the process of splitting, also referred to as "realigning" their routes, by selling off a portion. Peter Silvestro is selling his entire route in order to buy a route in another area.

Among the 25 current Woburn SDAs, four SDAs have realigned their routes one time since their original purchase, while 8 SDAs have realigned their routes on multiple occasions since their original purchase. For example, SDA Michael Brien, who was previously a bakery SDA, bought his bakery route in 1988 for $105,000. He sold off part of the bakery route in 1990 for $90,000 and sold off another part in 1997 for $95,000. In 2001, Brien sold off the remainder of his bakery route for $165,000 and bought his current snack territory for about $260,000. He paid $58,400 in 2004 to add Melrose to his snack territory and paid $3400 a year ago to add part of Saugus to his snack territory.

Vehicles

SDAs are responsible for purchasing or leasing their own trucks. PF does not approve the SDAs' choice of vehicle, nor does it impose any requirements as to the amount of shelving space inside the truck. PF offers no financing program to SDAs who purchase trucks. SDAs are responsible for the cost of gas, tolls, vehicle maintenance, and insurance on their trucks, and the cost of their driver's license, registration, and parking tickets. PF does not offer a roadside assistance program to SDAs. SDAs are not required to provide proof that their trucks have passed inspection or to report any moving violations to PF.[25]

Although the Consignment Agreement states that SDAs are required to maintain the general appearance and condition of their trucks, both DSMs testified that this provision is not enforced, and there is no consequence if the SDAs' trucks are dirty, damaged, or dented. PF places no restrictions on the SDAs' use of their trucks when they are not servicing their routes, although there is no evidence that any of the Woburn SDAs use their trucks to engage in a side business.[26]

PF does not dictate the color of the SDAs' trucks or the wording of any signs on their trucks. PF provides optional decals with the "Pepperidge Farm" logo, at no cost, for those SDAs who choose to put one on their truck. At least eight of the Woburn SDAs do not have the Pepperidge Farm logo on their trucks. Some SDAs have other signs on their trucks, such as "Mike E. Fritsch," with the Pepperidge Farm logo, "JP Distributors, Middleton, MA," with no Pepperidge Farm logo, "Endicott Distributors", with

[25] Furey testified that someone told him, at some point, that a Woburn SDA had been arrested for driving while intoxicated and is now required to blow into a breathalyzer installed in this truck before it will start. Furey did not notify anyone at PF about the matter, on the ground that it was the SDA's business, not PF's.

[26] There is evidence that three SDAs have a second job, although none of them are related to distribution of food or other goods or involve use of the SDAs' trucks.

a Pepperidge Farm logo, and "A.B. III Distributors, Artie Balser, Danvers, MA," with no Pepperidge Farm logo.

Other Work-Related Equipment

SDAs are required to use a handheld computer system and printer, referred to simply as a "handheld," to place orders with PF, to track their inventory, to generate invoices for their customers, to generate a variety of reports, and to receive messages from PF. PF uses information generated from the handhelds to bill its customers, track sales, and generate various reports. PF identifies which handheld models are compatible with its computer software system, and SDAs buy them from a computer company that is not affiliated with PF. Although not required, SDAs may opt to pay PF a weekly maintenance fee of $12.50 for their handheld, which entitles them to a loaner and a speedy repair if their handheld breaks down.

SDAs are not required to wear a uniform and may wear whatever they wish. Most try to dress professionally but there have been no repercussions to one SDA who does not. SDAs may purchase shirts with a Pepperidge Farm logo from a PF supplier, but they are not required to do so. PF does not provide ID badges for SDAs. One customer, Market Basket, requires its vendors to wear collared shirts, and certain customers require vendors to wear a badge denoting their product in order to gain entrance to their back room.

Some SDAs have their own business cards and letterhead, which they pay for themselves. By letter to the SDAs dated March 17, 2014, PF notified SDAs that no Pepperidge Farm trademark, logo, or image may be used on SDA business cards or letterhead, nor is the Pepperidge Farm name to be used as part of the SDA's business name in a way which tends to confuse the separate identities of the two parties. Pursuant to the letter, SDA business cards may read, for example, "John T. Doe, independent distributor, Pepperidge Farm products." SDA Art Balser has a business card that reads, "Art Balser, Sole Proprietor, AB III Distributors," with the Pepperidge Farm logo on the card.

SDAs pay for their own business licensing fees, legal fees, and business insurance.

Incorporation

Two of the Woburn SDAs, Michael Brien and Peter Silvestro, have incorporated their businesses, and their Consignment Agreements are between PF and the corporation. In the case of corporations, the SDA is the guarantor of the consignee's duties and obligations under the agreement. Brien, who is the president of HSM Enterprises, Inc., testified that, at the time he incorporated his business in 1997, PF would permit him to incorporate only if he was the sole shareholder of all of the stock. Thus, the only way to sell his shares in the company would be to sell his distributorship.

Brien has held himself out as an employee of HSM Enterprises rather than as an employee of PF in his tax returns.

SDAs Market Their Businesses

Some SDAs market their business using social media. SDA Richard Bursaw has a "Linked In" account in which he describes himself as the sole proprietor of Endicott Distributors. SDA Peter Silvestro maintains a Linked In account in which he describes himself as a self-employed proprietor. SDA Robert Centore uses a Twitter account to solicit stores to become his customer and to urge consumers to buy PF products.

Length of the Relationship

The Consignment Agreements remain in effect indefinitely until terminated. As noted above, under the terms of the Consignment Agreement, PF may terminate a Consignment Agreement for cause, but none of the current Woburn SDAs has ever faced termination for cause. Mulcahey was aware of only one termination for cause, involving an SDA in Maine, in his 24 years with PF.

As noted above, PF also has the right under the Consignment Agreement to terminate the agreement without cause, by buying the distributorship from the SDA for fair market value plus 25 percent of fair market value, but there is no evidence that PF has ever done so or offered to do so.

Among the 25 Woburn SDAs, six have been SDAs for 20 to 40 years, six have been SDAs for 10 to 20 years, and others have become SDAs within the last ten years.

## II. ANALYSIS

### A. The Legal Standard

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The determination of whether or not an individual is an independent contractor is quite fact-intensive, and the burden is on the party asserting independent contractor status to show that the classifications in question are independent contractors. *Argix Direct, Inc.,* 343 NLRB 1017, 1020 (2004).

In determining whether an individual is an employee or an independent contractor, the Board applies the common law agency test and considers all the incidents of the individual's relationship with the employing entity. The multifactor analysis set forth in the Restatement (Second) of Agency, § 220 (1958), includes the following factors to be examined:

1) the control that the employing entity exercises over the details of the work;
2) whether the individual is engaged in a distinct occupation or work;

3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision;
4) the skill required in the particular occupation;
5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work;
6) the length of time the individual is employed;
7) the method of payment, whether by the time or by the job;
8) whether the work in question is part of the employer's regular business;
9) whether the parties believe they are creating an employment relationship; and
10) whether the principal is in the business.

*Argix Direct, Inc.,* supra, 1020 at fn. 13.

The Board has rejected the notion that the predominant factor in the analysis is whether an employer has a "right to control" the manner and means of the work performed by an individual. Rather, all factors must be assessed and weighed; no one factor is decisive; other relevant factors may be considered; and the weight to be given a particular factor or group of factors depends on the factual circumstances of each case. *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 1 (2014), reconsideration denied, 362 NLRB No. 29 (2015). In assessing all of the relevant common law factors, the applicable inquiry is whether the putative independent contractor is rendering services as part of an independent business. Id., slip op. at 2.

In addition to the factors set forth in the Restatement § 220, the Board has considered, as one factor among the others, whether the putative contractors have "significant entrepreneurial opportunity for gain or loss" and the related questions of whether the purported contractors have the ability to work for other companies, can hire their own employees, and have a proprietary interest in their work. Id., slip op. at 3. However, the Board does not view entrepreneurial opportunity as the decisive factor in its inquiry and it will give weight to actual, not merely theoretical, entrepreneurial opportunity. Id., slip op. at 1.

### B. Application of the Legal Standard

#### 1. Extent of control by the Employer

PF does exercise a certain amount of control over the performance of the SDAs. Pursuant to the Consignment Agreements, PF requires SDAs to provide an adequate supply of unexpired product for their customers and to put up and maintain any negotiated displays. At some chain stores, a plan-o-gram dictates how the product is to be merchandised. SDAs may receive partial reimbursement for out-of-code product only if they meet the conditions imposed by PF in its Stale Policy.

However, the manner and means by which the SDAs achieve the required result is left to their discretion. SDAs determine how frequently they order product and how

much of each product to order from Denver. They determine the amount of product with which they stock the customers' shelves. SDAs set their own hours, and there is no requirement that they work certain days of the week or any particular hours. While PF has established guidelines for the frequency with which SDAs service their stores, the guidelines are only recommendations, from which SDAs are free to vary. PF does not dictate the order in which SDAs make their stops. Cf. *FedEx Home Delivery*, supra, slip op. at 12-13 (drivers are not independent contractors, where FedEx exercises pervasive control over the essential details of drivers' day-to-day work, requiring them to make their vehicles available Tuesday through Sunday and controlling the number of packages to be delivered and stops to be made). Although the Consignment Agreement requires SDAs to maintain the general appearance and condition of their trucks, this rule is not enforced.

SDAs are free to fulfill their obligations to PF by performing the work themselves or by hiring an employee to perform some or all of the work on a temporary or part-time basis. Several of the Woburn SDAs have hired such helpers. PF exerts no control over whether or whom the SDAs hire and plays no role in determining the compensation they pay to helpers.

I find that the extent of control factor weighs in favor of independent contractor status.

2. Whether or not the individuals are engaged in a distinct occupation or business

SDAs do not do business in the name of PF. In this regard, they are not required to wear PF uniforms or badges. They are not required to place PF logos on their trucks, and many of the Woburn SDAs choose not to. The logos on the trucks of several of the Woburn SDAs identify them as an entity separate from PF, such as "JP Distributors" or "Endicott Distributors." SDAs have their own business cards and letterhead. PF prohibits the SDAs from using the Pepperidge Farm trademark, logo, or image on their business cards or letterhead and also prohibits them from using the Pepperidge Farm name as part of their business name in a way that tends to confuse the separate identities of the two parties. Cf. *FedEx Home Delivery*, supra, slip op. at 13 (drivers are not independent contractors where, by virtue of their uniforms and logos and colors on their vehicles they are, in effect, doing business in the name of FedEx rather than their own and even those drivers who have incorporated do business in the name of FedEx). SDAs are required to obtain their own business insurance, and two of the SDAs have incorporated their businesses as separate entities. Some of the SDAs market their businesses on social media in the name of their business.

On the other hand, it appears that most of the SDAs work exclusively for PF, and there is no evidence that they engage in distribution work for other companies. In operating their businesses, the SDAs are dependent on the infrastructure provided by PF, such as its depot, its computer software system, and PF's relationship with the chain stores at the regional and national level.

I find, on balance, that the distinct occupation factor weighs in favor of independent contractor status.

3. Whether the work is usually done under the direction of the Employer or by a specialist without supervision

In *FedEx Home Delivery*, supra, slip op. at 13, the Board found that, although the FedEx drivers were ostensibly free of continuous supervision, FedEx essentially directed their performance via the enforcement of rules and tracking mechanisms. Drivers were required to adhere to strict company protocols governing dress, appearance, safety, and the details of package delivery. FedEx conducted periodic audits and appraisals of driver performance and had the ability to track all major work activities, including sign in and out times and delivery times, in real time, via scanner. FedEx could also impose disciplinary measures, including suspension or termination, if drivers failed to comply with contractual rules and procedures. Thus, the Board found that the direction factor weighed in favor of employee status.

Here, in contrast, PF does not closely supervise its SDAs. SDAs are free to make their own hours. The authority of the DSMs over SDAs is minimal. SDAs are not required to permit route rides and are not required to follow any suggestions made by a DSM on a route ride. The fact that DSMs tend to perform route rides most often with SDAs who generate the most revenue and who are most open to suggestions underscores that the purpose of the route rides is primarily to share ideas about increasing business rather than to reprimand SDAs. While DSMs do note on route ride forms whether the SDAs are meeting their contractual obligation to stock sufficient, unexpired product, there is no evidence that any of the route ride forms have resulted in any adverse consequence to any SDA.

Similarly, the purpose of the store audits is primarily to evaluate the stores rather than the SDAs. While the PF software does track the sales results of the SDAs, no action is taken against them if their service frequency or billed gross amounts are below expectations. While store evaluations by DSMs may result in a five-day cure letter due to excessive instances of out-of-stock or out-of-code product, the letters are infrequent, the deficiencies have generally been resolved, and there is no evidence that PF has ever followed through with its threat to make other arrangements to service a store.

Finally, while DSMs provide training to new SDAs and hold quarterly meetings for them, neither the training nor the meetings are mandatory, and many SDAs chose not to attend.

There is no evidence that SDAs are subject to any PF disciplinary system. Even serious misconduct, such as driving while intoxicated in a truck used for PF deliveries, has not resulted in any discipline.

I find that the direction factor weighs in favor of independent contractor status.

4. Skill required in the occupation

SDAs are not required to have any special training and receive at most two to three weeks of optional training by a DSM. This factor weighs in favor of employee status. *FedEx Home Delivery*, supra, slip op. at 13.

5. Whether the Employer or individuals supply the instrumentalities, tools, and place of work

SDAs supply their own vehicles and are responsible for related costs, such as maintenance, fuel, tolls, insurance, registration, and the like. SDAs purchase their own handheld computers and printers. They provide their own business cards and letterhead. They buy their own business insurance.

On the other hand, PF provides the depot where the SDAs receive and may store their product, and PF or its subcontractors transport product to the depot for the SDAs. PF provides necessary infrastructure, such as computer software, and provides marketing and billing services in the case of chain stores.

Because aspects of the instrumentalities factor cut both ways, I find this factor to be neutral.

6. Length of time for which individuals are employed

The Consignment Agreements remain in effect indefinitely, and the purchase of a distributorship is typically a long-term investment. There is no evidence that PF has ever terminated a Woburn SDA's Consignment Agreement for cause or exercised its right to buy back a business without cause. Most of the Woburn SDAs have been SDAs for many years and some have been SDAs for decades. I find that the length-of-time factor weighs in favor of employee status.

7. Method of payment

Some aspects of the SDAs' method of compensation favor a finding of employee status. Although SDAs are not paid an hourly wage or a salary for work performed, PF exerts some control over their earnings. With respect to their largest source of revenue, sales to chain customers, SDAs are paid on a commission basis, and their commission is computed based on wholesale prices and pallet fees set unilaterally by PF. PF controls how much SDAs earn from chain stores to some degree, in that its account managers and DSMs negotiate shelf space, displays, and promotions that affect sales and commissions. PF shields its SDAs from loss, to some degree, by virtue of its Stale Policy, under which SDAs may receive credit for a certain percentage of out-of-code product. In the case of certain stores that have switched to or may switch to a delivery model under which PF delivers product to the customer's warehouse, such as CVS and Walmart, PF has unilaterally determined that SDAs will not be entitled to commissions on product sold to those stores within their territory.

Other aspects of the SDAs' method of payment support a finding of independent contractor status. SDAs receive some compensation, albeit a smaller percentage, from their cash accounts. In the case of cash accounts, SDAs control the amount of their earnings themselves by finding their own customers, setting the prices that they charge their customers, and establishing billing procedures.

In the case of club stores such as Costco, PF pays SDAs a commission for sales, although the SDAs perform no work in connection with those sales, based on their distribution rights to stores within their territory rather than on any work performed, which I find to be inconsistent with employee status.

Finally, there is considerable variability in the SDAs' weekly and annual compensation, attributable in part to their efforts and in part to the value of the customers accounts within their respective territories. Thus, the SDAs' compensation may increase when new stores open in their territory or decrease when stores within their territory close. PF does not guarantee any minimum compensation under the Consignment Agreement or shield the SDAs from ebbs and flows of market conditions, nor does it have the right to reconfigure the SDAs' territories in response to market conditions. Cf. *FedEx Home Delivery*, supra, slip op. at 14 (drivers are not independent contractors, where FedEx retains the right to curtail or reconfigure their service areas in response to growing customer bases and to reduce the volume of packages on a driver's route if FedEx determines that it exceeds the volume she can reasonably deliver).

I find, on balance, that the method of payment factor weighs in favor of independent contractor status.

8. Whether or not the work is part of the regular business of the Employer

The central mission of PF is the sale and distribution of PF products, and the SDA's job is to effectuate that purpose. SDAs "perform functions that are not merely a "regular" or "essential" part of the Employer's business, but are the core of its business." *FedEx Home Delivery*, supra, slip op. at 14. Accord, *Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 5. Thus, the regular-business factor weighs in favor of employee status. [27]

[27] PF argues that this factor weighs in favor of independent contractor status on the ground that PF's core mission is to manufacture snack, bakery, and frozen food products, and SDAs play no role in manufacturing. This argument has no merit. While PF is engaged in the manufacture of its products, its core mission clearly also includes the sale and distribution of its products, as evidenced by the work of its account managers and DSMs.

9. Whether or not the parties believe they are creating an independent-contractor relationship

SDAs are required to execute a standard Consignment Agreement that describes the SDAs as self-employed independent contractors. The Board has held that, when the individuals whose independent contractor status is at issue do not have the opportunity to bargain over the terms of such agreements, which appears to be the case here, the agreements provide inconclusive evidence of independent contractor status. *FedEx Home Delivery*, supra, slip op. at 14; *Porter Drywall, Inc.*, supra, slip op. at 5.

However, other evidence may shed light on the intent factor. Here, the POAA, an association of PF SDAs, describes the SDAs in its mission statement as "franchise owners" and "independent distributors who have invested much time and effort in Our Business." SDAs Bursaw and Silvestro describe themselves in their LinkedIn accounts respectively as a "sole proprietor" and a "self-employed proprietor." In a letter to DSM Serwatka, SDA John Provost referred to himself as an "independent business owner" and complained about her "tortious interference with his business." Two SDAs have incorporated their businesses, and SDA Brien treats himself as an employee of his corporation, HSM Enterprises, rather than as an employee of PF, for tax purposes.

I conclude that this factor weighs in favor of independent contractor status.

10. Whether the principal is or is not in the business

PF is engaged in the manufacture, sale, and distribution of PF products. Because the SDAs are engaged in the sale and distribution of PF products, which is the same business as that of PF, this factor weighs in favor of employee status.

11. Whether the evidence tends to show that the individual is, in fact, rendering services as an independent business

PF's control over certain business decisions supports a finding of employee status with respect to this factor. Thus, PF unilaterally drafts and changes the terms of the Consignment Agreements from time to time and unilaterally issues policies, such as the Stale Policy, that affect the SDAs' compensation. PF may terminate a Consignment Agreement for cause and also retains the right to purchase all or any part of an SDA's territory, which it recently exercised by its announcement that it will be buying back the club stores. PF controls the prices charged to chain customers and unilaterally sets the Bulletin prices upon which the SDAs' commissions are based. PF unilaterally determined not to pay SDAs a commission on sales at certain stores that changed to warehouse delivery. The lack of evidence that any of the SDAs use their vehicles to perform work for other employers also supports a finding that they are not rendering services as part of an independent business.

Other evidence, however, demonstrates that the SDAs render their services as independent businesses. The SDAs' right to buy and sell their routes demonstrates the

entrepreneurial nature of their jobs. Unlike the case in *FedEx*, where FedEx did not charge drivers to acquire new or existing routes, the only way a prospective SDA may acquire a PF route is to purchase one from an existing SDA. While PF interviews prospective buyers to ensure that they understand what they are buying, participates in the closing process, and guarantees the loans of those buyers who finance their purchase through the Bank of America, the SDAs themselves select the route buyers and negotiate the purchase price. SDAs may choose to sell their routes to a relative for a nominal amount or to a buyer for whatever price the market will bear. In *FedEx Home Delivery*, supra, slip op. at 15, the Board stated that it will give little weight to drivers' right to sell their routes where that right is more theoretical than actual. Here, however, there is ample evidence of frequent route sales, and SDAs have earned significant sums from the sales.

PF has no right to reconfigure the territory that an SDA owns and wishes to sell, but SDAs have the right to and have frequently opted to reconfigure their territories by buying or selling off a partial route. In *FedEx Home Delivery*, supra, slip op. at 15, the Board noted that, because the sale of a route took the driver out of the unit and ended the drivers' relationship with FedEx, the ability to sell a route had limited bearing on the status of drivers who remained in the unit and was not an incident of their ongoing relationship with FedEx. Here, in contrast, the ability to buy and sell routes is more significant, as SDAs frequently buy and sell partial routes without ending their relationship with PF.

Significantly, the territories of deceased SDAs become part of their estate, which is hardly characteristic of an employer-employee relationship.

SDAs' control over other important business decisions evidences the entrepreneurial nature of their enterprise. SDAs have the right to hire and pay employees to run their routes, and many of them do so, which the Board has held is indicative of independent contractor status. *FedEx Home Delivery*, supra, slip op. at 15. They may choose whether or not to solicit additional cash accounts within their territory and decide how much to charge their cash customers for product. They may influence the amount of their sales and commissions by developing relationships with store managers, by determining how much product to order, and by determining the frequency with which they service their accounts.

Finally, SDAs enjoy the opportunity for entrepreneurial gain and also run the risk of entrepreneurial loss, due to circumstances beyond their control, which is an incident of independent contractor status. Thus, the opening of a large chain store in an SDA's territory will lead to larger commissions and an increase in the value of the SDA's route upon sale, while the closing of a large chain store in the territory will reduce commissions and the concomitant value of the route. Several SDAs lost commissions last year due to a weeks-long work stoppage at the Market Basket chain. PF does not insulate SDAs from such losses or guarantee them a minimum income, and the SDAs reap the benefits of any increase in the value of their routes at the time of sale.

Considering the evidence as a whole, I conclude that this factor weighs in favor of independent contractor status.

## III. CONCLUSION

Weighing all of the incidents of the SDAs' relationship with PF, I find that PF has carried its burden of establishing that the SDAs are independent contractors. Thus, SDAs exercise significant control over the details of their work. They are engaged in an occupation that is distinct from that of PF, in that they do not do business in the name of PF. They perform their work without substantial supervision by PF. They are compensated based on the success or failure of their efforts and based on the value of their routes, rather than by the hour. They refer to themselves as independent businesspersons. They render services as part of an independent business, in that they buy and sell their routes, pass their routes on to their heirs when they die, hire employees, and enjoy the opportunity for entrepreneurial gain and run the risk of entrepreneurial loss.

I note that one of the common law factors, i.e., who supplies the instrumentalities, tools, and place of work, is inconclusive. I also acknowledge that there are some factors that favor a finding of employee status – the lack of special skill required for the job, and the fact that most SDAs have worked as SDAs for many years, that the work of the SDAs is a part of the regular business of PF, and that SDAs and PF are in the same business. However, these factors do not outweigh the many factors supporting my finding that the SDAs are independent contractors.

Accordingly, as it appears the entire petitioned-for unit is composed of independent contractors, I shall dismiss the petition.

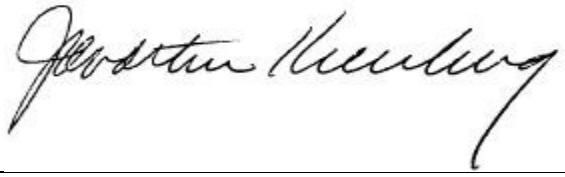
## RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **September 3, 2015**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties

and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: August 20, 2015



JONATHAN B. KREISBERG, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 01
THOMAS P. O'NEILL JR. FEDERAL BUILDING
10 CAUSEWAY ST, SIXTH FLOOR
BOSTON, MA 02222-1001