

**Porter Drywall, Inc. and International Union of
Painters and Allied Trades Local Union 1275.**
Case 09-RC-064476

January 29, 2015

DECISION ON REVIEW AND ORDER¹

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

The issue in this case is whether crew leaders are employees under Section 2(3) of the Act or independent contractors. The issue arises out of the Union's petition to represent a unit of drywall hangers and finishers (hereafter, drywall installers) who are hired by the crew leaders to perform the Employer's drywall installation work on commercial and residential buildings. On October 26, 2011, the Acting Regional Director issued a Decision and Direction of Election in which she found that the crew leaders are independent contractors and the drywall installers they hire are employees of the crew leaders and not the Employer. Accordingly, the Acting Regional Director excluded the drywall installers from the unit.² Thereafter, the Petitioner filed a timely request for review, contending that the Acting Regional Director erred in her findings of fact and departed from Board precedent in concluding that crew leaders and their crews are independent contractors.³ The Petitioner further asserted that compelling reasons exist for reconsidering Board policy.

We have granted review and we analyze this case under our recently issued decision in *FedEx Home Delivery*, 361 NLRB 610 (2014). In *FedEx*, we restated and refined the Board's analysis for evaluating whether individuals are employees or independent contractors. Specifically, we reaffirmed the longstanding principle, articulated by the Supreme Court in *United Insurance*,⁴ that, "in evaluating independent-contractor status 'in light of the pertinent common-law agency principles,' 'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *FedEx*, supra, at 610 (quoting *United Insurance*, supra, 390 U.S. at 258). We also confirmed, consistent with Supreme Court precedent, that our inquiry remains guided by the

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² The Acting Regional Director further found that the Employer's service technicians, who perform some drywall hanging and finishing work, should be included in any bargaining unit and therefore directed an election in a unit limited to those employees.

³ The Acting Regional Director did not conclude, as the Petitioner appears to argue, that the crew members were independent contractors; rather, she found that the crew members were employees of the crew leaders. For purposes of this analysis, we have considered facts relevant to the status of the crew leaders and the crews they retain.

⁴ *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968).

nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency, Section 220 (1958). We additionally clarified that, in assessing a putative independent contractor's entrepreneurial opportunity for gain and loss, we will give weight to actual, not merely theoretical, entrepreneurial opportunity. Finally, we refined our analytical framework to hold that, 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 1.

Applying the *FedEx* formulation here, we find that the Employer satisfied its burden to show that the crew leaders are independent contractors and that the drywall installers they hire are employees of the crew leaders and not the Employer. Accordingly, we find that the Acting Regional Director properly excluded the drywall installers from the petitioned-for unit.

I. FACTUAL BACKGROUND

The Employer's primary business is drywall installation. The Employer's business consists of approximately 70 percent residential projects and 30-percent commercial developments. The Employer submits bids to general contractors and project managers and, once a bid is accepted, meets with customers to discuss project details, including the schedule.

The Employer's work force consists of managerial and supervisory personnel, approximately 4 truckdrivers, 12 warehouse and delivery employees, a mechanic, an estimator, and 9 service technicians. Service technicians perform some drywall and finishing work as part of "punch-list" work on otherwise completed projects, as well as warranty work and other small jobs.

In addition, the Employer utilizes approximately 34 subcontractors, or crew leaders, on a regular basis to perform various phases of drywall installation. Those crew leaders, in turn, hire drywall installers to assist them in performing the work. A crew can consist of 1 (the crew leader) to about 12 crew members on any given project. The Employer plays no role in the selection, screening, or approval of crew leaders' crews.

The Employer requires crew leaders to execute a standardized written "Independent Contractor Agreement" that sets forth the working relationship between the parties. The agreement stipulates that the parties do not intend to create an employer-employee relationship. Among other things, the agreement specifies that it is "for the purpose of identifying and disclosing the terms of all future projects whereby the [Employer] retains the services of Contractor, strictly on a project to project and as need [sic] basis, for the installation of drywall in either commercial buildings and/or residential structures." The

agreement provides that the “Contractor is not to be considered an agent or employee of the [Employer] for any purpose, and the employees of Contractor are not entitled to any benefits that [the Employer] provides for the [Employer]’s employees” The crew leader is “deemed, for all purposes under [the] Agreement, to be an Independent Contractor, as defined by all applicable employment, tax, or immigration laws.”

Under the terms of the agreement, crew leaders are not guaranteed work, can refuse work offered by the Employer, and are free to work for other contractors.⁵ Depending on the size of their crews and the scope of work, crew leaders can simultaneously work on different jobs—splitting their crews between them. When crew leaders perform work for the Employer, the agreement specifies that the “conduct, manner, means and control of the work will lie solely with the [crew leader],” including whether to subcontract the work to others. Although the crew leaders are responsible for meeting deadlines specified by the Employer, they are free to set their own schedules for performing work.

As specified in the above agreement, all work for which the Employer retains the crew leaders is performed on a project by project basis. Crew leaders periodically call or visit the Employer to inquire about upcoming work or the Employer contacts crew leaders from a list it maintains.⁶ Uncontroverted record testimony establishes that crew leaders solicit and perform work for other contractors.⁷ Crew leaders can and often do visit a jobsite to inspect it before deciding to accept work offered by the Employer.

The Employer’s superintendents, who are statutory supervisors, visit the project sites and meet with the general contractor to obtain information about the work that needs to be conveyed to the crew leaders. For instance, on certain fire-rated assemblies for large residential and commercial jobs, drywall panels must be installed using a particular approved screw pattern dictated by the blueprints provided to the Employer by the general contractor. The superintendent will provide this information to crew leaders. Superintendents perform quality control inspections and also advise crew leaders to make corrections to their work as needed. Superintendents do not discipline crew leaders or their crews. For example, the record shows that when a crew leader failed to appear at

a jobsite to perform work, not only did the Employer not take any disciplinary action, but it retained this crew leader to work on another project the next time he was available. Further, if a crew member were performing work in an unsafe manner, the superintendent would address this with the crew leader.

Crew leaders and their crews are not subject to the Employer’s handbook or other employment policies, including the Employer’s drug testing policy. Unlike the Employer’s admitted employees, crew leaders and crew members are not paid hourly by the Employer, do not submit timesheets, and do not use company tools, equipment, or vehicles (or receive vehicle reimbursement). Instead, crew leaders furnish their own transportation, tools, and certain supplies like nails and tape, and are responsible for maintaining their equipment in working order. The Employer prefers that crew leaders supply their own scaffolding, but permits them to borrow it from the Employer. The actual drywall panels are delivered to the jobsite by the Employer’s delivery employees.

Drywall installation proceeds at a jobsite in discrete phases. Initially, the crew performs prerocking, installing drywall in places that will be difficult to reach after other features such as ventilation units or ductwork are installed. Next, a crew comes to the site to hang most of the drywall, followed by beading and corner work. The final phase is finishing work, which includes applying “mud” between the seams of the drywall to smooth out the finished product. The drywall is then sanded and a clean-up crew completes the job. On a particular job, different crews may perform separate phases of the work, or one crew may perform multiple phases.

The Employer pays crew leaders on a project basis pursuant to an established formula based on the square footage of the work area, the particular phase of drywall work being performed, and whether the structure is commercial or residential. The parties do not enter into written pricing agreements for these standardized rates. Although crew leaders may seek to negotiate for compensation above the standardized rate, the record reflects that they have successfully done so in very limited situations, such as on small residential jobs that would be unprofitable under the standard rate, or where out-of-town travel is required.⁸

⁵ The Employer’s superintendent testified that the Employer has not been able to hire certain crew leaders as its first choice because they were working for other companies.

⁶ In addition, multiple crew leaders (including those beyond the 34 regulars) visit the Employer on a daily basis to see if carryover work is immediately available.

⁷ Indeed, there is record evidence that one of the crew leaders has competed with the Employer for work on some projects.

⁸ Record evidence shows that if a crew leader is unwilling to accept the offered formula rate, the Employer will seek and secure a different crew leader. Only where multiple crew leaders reject offered work as unprofitable will the Employer take a closer look at the job and determine whether additional payment should be offered. Similarly, if a crew leader complains during the performance of a job that he cannot make money performing it, the Employer will typically consider additional payments only if there are unexpected complications in the job.

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The Employer is obligated to pay crew leaders full and final payment within 7 days of project completion. On jobs lasting more than 1 week, the Employer makes weekly “progress billing” payments to crew leaders. Crew leaders pay their crew members, typically \$100 daily for 10 hours of work, and handle the crews’ tax withholdings. Except as discussed below, neither crew leaders nor their crews are carried on the Employer’s payroll, nor does the Employer determine the amount that crew leaders pay their crews. Crew leaders are required to carry workers’ compensation for their crews and liability insurance to cover any damages at the jobsite.⁹

On projects subject to the Davis-Bacon Act,¹⁰ the Employer requires crew leaders to provide it with a list of their crew members, who then receive individual checks from the Employer based on the mandated hourly wage rate. The checks identify the leader of the respective crew. The Employer deducts withholding taxes and Social Security payments from the individual checks, but does not remit the withholdings to the appropriate agencies. Rather, the Employer pays the withheld amount in a lump sum to the crew leader along with the remaining square footage rate for the job. Crew leaders are responsible for remitting withholdings to the appropriate agencies and for all other aspects of their payroll.

II. APPLICATION

Consistent with our analysis in *FedEx*, we now apply the factors set forth in § 220 of the Restatement (Second) of Agency, evaluate whether there are actual, not merely theoretical, entrepreneurial opportunities, and assess the newly articulated independent-business factor in relation to the facts. Again, we follow the well-settled legal principle, reaffirmed in *FedEx*, that “‘all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’” 361 NLRB 10, quoting *United Insurance*, supra, 390 U.S. at 258. We also hew to the long established principle that the burden is on the party asserting that crew leaders are independent contractors—here the Employer—to establish that status. *FedEx*, 361 NLRB 610, 621 fn. 43.

⁹ There was testimony that the Employer filed an insurance claim against a crew leader after his crew set off the sprinkler system at a jobsite, damaging drywall.

¹⁰ The Davis-Bacon Act requires the payment of prevailing wage rates on projects receiving federal government financing. 40 U.S.C. § 3142. An employer must submit a weekly certified payroll report showing that workers are paid at least that prevailing wage. 29 C.F.R. § 3.3, 3.4.

A. *Extent of Control by Employer*

The Petitioner does not contest the authority of the crew leaders to direct and control the performance of installation work assigned them. The Petitioner also does not contest the crew leaders’ ability to set their own hours and those of their crews (within the hours set by the general contractor) or to exercise disciplinary authority over the employees they hire. Although crew leaders are obligated to meet the general project deadlines, they may do so in whatever manner they see fit.¹¹

Crew leaders complete the scope of work awarded to them without any close supervision by the Employer’s superintendents. As the record shows, superintendents limit their direction to explaining the type of installation required, passing on additional information and updates from the general contractor, and performing quality control inspections.

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

B. *Whether Individual is Engaged in a Distinct Occupation or Business*

Crew leaders operate drywall installation businesses. Significantly, they do not work exclusively for the Employer and, on occasion, have even competed with the Employer for work. They have also worked for competitors of the Employer, sometimes at the same time they are working on the Employer’s jobs. They maintain and supply their own equipment, which they use when working for other contractors.

The Employer requires crew leaders to indemnify it against any damage claims that may arise as a result of the work of their crews, and in fact has filed a claim against a crew leader for damage at a jobsite. In contrast, in a customary employer-employee relationship, the Employer would assume liability for such claims. *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998) (owner-operator drivers were independent contractors when required to carry similar insurance).

We find that this factor weighs in favor of independent contractor status.

C. *Whether the Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision*

Crew leaders do not receive assistance from the Employer on the jobsite. The Employer’s superintendent

¹¹ See, e.g., *Operating Engineers Local 701 (Lease Co.)*, 276 NLRB 597, 601 (1985) (independent contractor status found where employer merely set forth the parameters of the work, leaving all details to the contractors, including how the work was to be performed and whether contractors would hire their own employees to perform it).

acts as a liaison between the project developer and the crew leader to make sure the work is proceeding as scheduled and to the customer's satisfaction. If a crew makes a mistake, the Employer advises the crew leader and the crew leader is responsible for correcting it.

Crew leaders alone are responsible for supervising the work of their crews, paying their crews and handling tax withholdings, carrying workers' compensation and liability insurance, setting work hours, communicating with the Employer's superintendents, and returning to fix any large problems with their crews' installation work. Crew leaders and their crews are not subject to the Employer's personnel policies, employee handbook, or disciplinary system. The Employer has no input into whom crew leaders hire and may learn their identities only on projects subject to the Davis-Bacon Act.

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

D. Skill Required in the Occupation

Crew leaders practice a trade. They perform skilled work, as evidenced by the fact that not all crew leaders are able to perform all phases of drywall installation. The types of jobs that a crew leader can take on are often dictated by his or her skill level. For example, only certain crew leaders perform the more difficult prerock work or know how to install fire-rated assemblies.

We find that this factor weighs in favor of independent contractor status.

E. Whether the Employer or Individual Supplies Instrumentalities, Tools, and Place of Work

Apart from drywall panels that the Employer supplies, the crew leaders are responsible for their crews' tools, supplies, and transportation, and insuring that their equipment is in working order. Crew leaders do not maintain offices or workstations at the Employer's facility. Although this factor is mixed, as the sheetrock is provided by the Employer, on balance we find that it favors independent contractor status.

F. Length of Time for which Individual is Employed

Crew leaders work for the Employer on a project basis rather than for an indefinite time period. Crew leaders take on a job for a certain phase or phases of an installation project. Crew leaders may decline work offered by the Employer and may work for other companies.¹² They have in fact declined work offered by the Employer to work for other contractors.

¹² See *Precision Bulk Transport, Inc.*, 279 NLRB 437, 438 (1986) (finding that independent contractors "are neither required to accept, nor are they promised" a minimum or maximum amount of work and are "free to accept or reject" work with "no adverse result").

To the extent the Petitioner argues that the Acting Regional Director erred in finding that crew leaders do not have permanent working relationships with the Employer, a review of the record shows that one of the Employer's superintendents testified he had direct knowledge of two crew leaders concurrently working for other drywall companies. The superintendent further testified that a substantial number of the other crew leaders informed him that they performed drywall installation work for a variety of other firms, sometimes while they were also working for the Employer. Accordingly, the relationship between the crew leaders and the Employer appears to be no different than is customary in the construction industry, where not only do employees work for multiple employers over the course of their careers, but contractors work for multiple general contractors.¹³ This factor weighs in favor of independent contractor status.

G. Method of Payment

The Employer pays crew leaders on a project basis, and the crew leader in turn pays the crew. Crew leaders are also responsible for providing unemployment and workers' compensation insurance for both themselves and their crews.¹⁴ Crew leaders do not receive an hourly rate, but rather are paid pursuant to an established square footage formula. Although the record reveals that some crew leaders have received payments above the standardized rate, the frequency and circumstances are limited. The Employer generally will not negotiate for increased payments, but will instead offer the work to another crew leader willing to work for the standard rate. Exceptions are typically when the crew leader incurs added costs—such as travel expenses or complications on the job—or where it would otherwise be unprofitable for the crew leader to accept the work (e.g., small residential jobs).

The Employer generally pays crew leaders on a weekly basis. Crew leaders are responsible for all aspects of their own payroll and pay crew members daily at the rate of \$10 per hour. The one exception pertains to work on Davis-Bacon Act jobs, where the Employer pays net wages directly to crew members.

Based on the Davis-Bacon exception, the Petitioner argues that this case presents an opportunity to revisit our precedent finding that governmental control exercised through an employer does not constitute direct control by

¹³ See, e.g., *Operating Engineers Local 701 (Lease Co.)*, above, 276 NLRB at 601.

¹⁴ See *The Big East Conference*, 282 NLRB 335, 343–345 (1986) (referees were independent contractors where they carried their own insurance, received lump-sum payments with no deductions, and had ability to choose which dates to work), *enfd. sub nom. Collegiate Basketball Officials Assn. v. NLRB*, 836 F.2d 143 (3d Cir. 1987).

that employer.¹⁵ However, even if we were to reconsider our approach to governmental control as part of the independent contractor test, this case does not present the appropriate vehicle for a revised analysis. Even assuming, arguendo, that the Employer's direct payments to crew members on jobs covered by the Davis-Bacon Act constitute control by the Employer, it adds the crew members to its payroll on only a small minority of projects (5–20 percent). Therefore, the small percentage of affected jobs would not mandate a different result here even if the Employer's payments were considered direct control by the Employer.

While aspects of this factor cut both ways, on balance we find it slightly favors employee status.

H. Whether the Work is Part of the Regular Business of the Employer

Crew leaders and their installers perform the primary service provided by the Employer. Although the Employer's service technicians perform some drywall and finishing work, it is as part of "punch-list" work on projects otherwise completed by crew leaders and their installers. Accordingly, the crew leaders and their installers "perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business." *Roadway Package System, Inc.*, 326 NLRB 842, 851 (1998). The regular business factor thus weighs heavily in favor of employee status.

I. Whether the Parties Believe they are Creating an Independent-Contractor Relationship

Crew leaders are required to execute a standardized written "independent contractor" agreement with the Employer stipulating that the parties do not intend to create an employer-employee relationship. Because the crew leaders do not have the opportunity to bargain over the terms of the Independent Contractor Agreement, the agreement provides "inconclusive evidence" (*FedEx*, 361 NLRB 610, 623), for finding that the crew leaders are independent contractors.¹⁶ However, other evidence supports a finding that the parties believe they were creating an independent contractor relationship. Thus, not only are crew leaders free to reject work, but they in fact do so when they are working for another contractor or determine that they cannot profitably perform work on a project under the standard square footage rate. In those situations, crew leaders either turn down jobs or seek to

negotiate for additional compensation to make the job profitable. We find this factor weighs in favor of independent contractor status.

J. Whether the Principal is or is not in the Business

The Employer's business is drywall installation. Thus, it is engaged in the same business as the crew leaders, and this factor weighs in favor of employee status.

K. Whether the Evidence Shows that the Individual is Rendering Services as an Independent Business

Crew leaders have a financial interest in the work being performed because they are paid a square footage rate for each project rather than being paid based on time. While the mostly standardized rates limit the entrepreneurial risk, crew leaders have opportunities for gain or loss.

Crew leaders must calculate whether to accept work on any particular job and whether to hire other individuals to work for them in order to make a profit. They must decide whether to visit a jobsite to evaluate their risk before taking a project. The Employer does not guarantee the crew leaders any level of income.

Crew leaders have a realistic opportunity to work for other companies and have control over important business decisions. As detailed above, crew leaders do not work exclusively for the employer; they sometimes decline work offered by the Employer and work for other contractors. They make myriad business decisions. They decide which work to accept or decline based on their assessment of the job. They decide how many crew members to employ on a particular job and control the terms and conditions of employment for the crews they hire, set their own hours and the hours of their crew, and are liable for damages arising out of the work of their crews. They may have more than one crew working for them at a time. Crew leaders have a capital outlay in terms of tools, materials, and transportation. The tools and equipment they use for work on jobs for the Employer generally belong to them and there are no restrictions on how or when they can use their own materials to work for other contractors. Overall, this factor supports a finding that the crew leaders' opportunities for gain are more than merely theoretical and weighs in favor of independent contractor status.

III. CONCLUSION

The Employer had the burden of establishing that the crew leaders are independent contractors, and it has carried that burden. The factors favoring employee status—that the work of the crew leaders and their crew is a part of the regular business of the Employer, that the crew

¹⁵ See, e.g., *Air Transit, Inc.*, 271 NLRB 1108, 1110 (1984) ("Government regulations constitute supervision not by the employer but by the state.") (citation omitted).

¹⁶ See *National Freight*, 153 NLRB 1536, 1538 (1965).

leaders and the Employer are in the same business, and the method of payment—do not outweigh the many factors supporting our finding that crew leaders are independent contractors. Crew leaders operate their own drywall installation businesses and accept work on a project basis. Their work is not controlled by the Employer or performed under the direction of the Employer. Crew leaders practice a skilled trade using their own tools and supplies. Crew leaders pay their own crews and carry their own insurance. Further, crew leaders have opportunities for gain by, among other things, turning down work that does not pay enough, setting crew sizes on jobs, splitting crews among jobs, and determining pay for their crews. They thus render services as part of an independent business.

We further find that the Acting Regional Director correctly determined that the crew members, or drywall installers, whom the Petitioner seeks to represent, are employees of the crew leaders rather than the Employer. Crew leaders alone determine who they are going to hire (or whether to hire anyone) and do not report this infor-

mation to the Employer. They set all terms and conditions of employment for their crews, exclusively direct the work of their crews, carry insurance for their crews, and handle all aspects of their own payroll.

Accordingly, for the foregoing reasons, we affirm the Acting Regional Director's findings in her Decision and Direction of Election. This proceeding is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

MEMBER JOHNSON, concurring.

I adhere to my criticism of the majority's independent contractor analysis announced in *FedEx Home Delivery*, 361 NLRB 610 (2014). However, the result in this case would be the same under the majority view or the analysis that I advocate in the *FedEx* dissent. *Id.* at 629–642. Accordingly, I concur in affirming the Acting Regional Director's finding that the crew leaders are independent contractors and that the crew members, or drywall installers, are employees of the crew leaders rather than the Employer.