United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 22, 2016

TO: Nancy Wilson, Regional Director
Region 6

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Liberty Transportation Group, Inc. and Sears, Roebuck & Co. D/B/A Sears Home Delivery Services, Joint Employers
Case 06-CA-162363

177-2414-0100
177-2414-2200
177-2484-5067-3500
512-5054-6500

The Region submitted this case for advice as to whether: (1) the Employer's delivery truck drivers are independent contractors or employees within the meaning of Section 2(3) of the Act; (2) if the drivers are employees, the Employer violated Section 8(a)(1) when it conditioned the Charging Party's reinstatement on signing a supplemental agreement affirming [redacted] independent contractor status and agreeing not to sue the Employer; and (3) the Employer violated Section 8(a)(1) by maintaining its misclassification of drivers as independent contractors.[1] We conclude that the drivers are employees within the meaning of Section 2(3), that the Employer violated Section 8(a)(1) by requiring an unlawful condition to the Charging Party's reinstatement, and that the Region should allege that the Employer violated Section 8(a)(1) by misclassifying drivers as independent contractors.[2]

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[1] The Region also submitted this case for advice as to whether it should allege Sears Roebuck & Co. ("Sears") is a joint employer of the Employer's drivers. However, the Region has not fully investigated Sears' joint employer status and Sears has not been cooperative. We agree with the Region's recommendation not to pursue Sears as a joint employer as it would not effectuate the policies and purposes of the Act to do so where the Region will be able to obtain an effective and more timely result by limiting the complaint to the Employer, particularly where a number of drivers are also performing deliveries on behalf of the Employer for Boscov's and JCPenny's.

[2] The Region has already determined that, assuming the drivers are employees, the Employer violated Section 8(a)(1) by interrogating drivers about their sympathies for the Charging Party's protected concerted activities and threatening to discharge drivers if they challenged their independent contractor status.

FACTS

I. The Employer's Home-Delivery Drivers

A. The Employer's Business and the Independent Contractor Agreement

Liberty Transportation Group, Inc. ("the Employer") provides full truck load, dedicated freight, and home delivery services, in addition to cross dock warehousing.[3] At issue in the instant case are the Employer's drivers for its home delivery service based out of the Lawrenceville area of Pittsburgh, Pennsylvania.[4] The Employer contracts with Sears, Boscov's Department Store, and JCPenney to deliver large appliances and other home goods to the retailers' customers. The goods are delivered from the Employer's location in Lawrenceville, which is adjacent to a Sears warehouse. Approximately 30 contract drivers, whom the Employer engages by way of an Independent Contractor Agreement ("the Agreement"), deliver home goods for the Employer and its retail customers from the Lawrenceville location to various locations in the Pittsburgh area and in neighboring West Virginia. The Charging Party signed the Agreement in (b) (6), (b) (7)(C) 2009 and drove for the Employer until (b) (6), (b) (termination in (b) (6), (b) (7)(C 2015. Other drivers have worked for the Employer for approximately four to eight years.

The Agreement is a non-negotiable document signed by the Employer and each driver for a one-year term that automatically renews and it delineates the terms under which the drivers serve the Employer's customers. Generally, the Agreement requires that drivers are responsible for all direct costs and expenses associated with the operation of the delivery vehicle, including the vehicle itself, helpers, fuel, repairs, liability insurance, and other expenses incurred.

The Agreement further states that the drivers accept the pay rate established exclusively by the Employer, there is no guarantee of delivery work, and no benefits

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[3] The nature of the Employer's business is somewhat in dispute; however, the Employer's website presents itself to the public as a provider of transportation services. *See* http://libertytran.com/services. Similarly, the Employer's Facebook page also lists that it provides "Transportation Service." *See* https://www.facebook.com/LibertyTransportation. Given that the "Home Delivery Services" section of the Employer's website presents itself as a transportation service, we rely on this public persona to find that the Employer's business is, in fact, transportation services.

[4] The Employer has nine separate home delivery locations in Pennsylvania, Ohio, Maryland, Delaware, Virginia, and New Jersey.

are provided. Drivers are paid by the Employer as outside contractors; thus, no employment deductions are taken from their bi-weekly settlement checks such as federal and state taxes, social security, medicare, etc. The Employer issues drivers an annual IRS-Form 1099.[5]

Section 19 of the Agreement states that the driver and the Employer intend to create an independent contractor relationship and not that of an employer and employee. The section also states that the Employer admits it has a right of control only as to the ultimate end of getting goods to customers, but the means of achieving that end lay with the driver.

B. The Drivers' Vehicles and Other Instrumentalities

The Agreement requires that each driver provide his own vehicle, which must display the Employer's Department of Transportation ("DOT") number at all times while delivering for the Employer. Many of the drivers' vehicles also display the Employer's name. There is no requirement that the vehicle be any particular make or model, but it must be at least a 26-foot box truck. Drivers are free to purchase their trucks from anywhere, but the Employer is partnered with Landmark Leasing to provide drivers with trucks under favorable no-cash-down, lease-to-own terms.[6] Drivers who choose to obtain their vehicle from Landmark Leasing have their lease payments automatically deducted by the Employer from their bi-weekly settlement checks and remitted to Landmark. The Employer holds the vehicle's title at its office while under lease and then transfers it to the driver upon final payment. According to the Employer, 85% of its home delivery drivers obtained their vehicles through Landmark. Drivers, including the Charging Party, have sold their trucks to third parties and kept the proceeds.

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[5] IRS-Form 1099 for miscellaneous and independent contractor income is used to "[r]eport payments made in the course of a trade or business to a person who is not an employee or to an unincorporated business." *See* https://www.irs.gov/help-resources/tools-faqs/faqs-for-individuals/frequently-asked-tax-questions-answers/small-business-self-employed-other-business/form-1099-misc-independent-contractors/form-1099-misc-independent-contractors.

[6] The exact business relationship between the Employer and Landmark Leasing is unknown. Landmark Leasing is owned and operated by the ex-wife of the Employer's President and Owner. She is also a Vice President for the Employer. Further, there is evidence that one of the Employer's management employees has signing authority for Landmark and has executed vehicle lease agreements between Landmark and drivers.

The Agreement explicitly requires that drivers' vehicles will be used exclusively for the Employer on days that the driver is delivering for the Employer. On days when drivers are not hauling for the Employer, the vehicle may be used for any purpose, provided the driver removes or covers the Employer's name and DOT number. There is no evidence that drivers use their vehicles to work for others on days that they are not working for the Employer.[7]

The Employer requires that the drivers' trucks be in a constant state of good mechanical repair and to keep them washed and cleaned. Drivers may use the Employer's maintenance garage for repairs and have the associated costs deducted from their settlement checks; however, drivers are not required to use the Employer's garage and many use other service providers.

In addition to their vehicles, drivers are also required to provide all tools and accessories necessary to perform delivery services, such as dollies, protective pads, and hand-trucks. Drivers must also supply their own liability insurance; the Employer provides its drivers with the option to enroll in group insurance and deducts premium payments from drivers' settlement checks. Drivers may also choose to obtain insurance through third parties.

Further, drivers who deliver Sears products are required to purchase a tablet-computer, per Sears' contract with the Employer. The GPS-enabled tablet contains Sears software that provides the delivery manifest and tracks completion times for deliveries. The Employer typically provides tablets to the drivers and the one-time $225 cost, as well as the $25 monthly wireless service plan, are deducted from drivers' settlement checks.

Drivers delivering for Sears, per Sears' contract with the Employer, must wear uniforms. The uniforms consist of a blue shirt that says "Liberty Transportation," "Authorized Deliveries," or "Liberty for Sears," which are purchased from the Employer. Sears' uniform policy also requires drivers to wear khaki pants and black shoes. No uniforms are required when delivering for JCPenney or Boscov's.

C. Helpers

The Agreement does not affirmatively require drivers to hire helpers, but drivers understand that the Employer requires them to hire at least one helper to accompany

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[7] The Employer claims that one driver uses (b) (6), (b) truck to make deliveries for (b) (6), (b) separate hauling business on days when (b) (6), (b) is not working for the Employer. However, the Region's repeated attempts to contact this driver to substantiate the Employer's claim were unsuccessful.

them during deliveries. Thus, all drivers have at least one helper who is paid, on average, $100 a day.[8] In addition to helpers, the Agreement states that drivers may hire additional drivers to perform driving, loading, unloading, and other services, as direct employees of the primary driver.[9] According to the Agreement, the driver is solely responsible for the hiring, firing, discipline, supervision, direction, and control of (b) (6), (b) employees. The drivers generally consider their helpers to be outside contractors and issue them annual IRS Forms-1099.

Drivers generally have been able to choose their helpers without interference from the Employer. However, on at least three occasions during a six-month period in the fall and winter of 2013-2014, the Employer refused to permit the Charging Party to use (b) (6), (b) (b) (6), (b) (7)(C) to work as (b) (6), (b) helper while making deliveries. According to the Charging Party, the Employer's manager was also (b) (6), (b) (b) (6), (b) (7)(C) s (b) (6), (b) (7)(C) and the manager refused to allow the (b) (6), (b) (7)(C) to work for the Charging Party while the (b) (6), (b) (7)(C) s (b) (6), (b) (7)(was in arrears. Further, the Employer's manager refused to permit another of the Charging Party's helpers to work for (b) (6), (b) (7 because the manager believed that the helper was untrustworthy and did not want (b) (6), (b) (7)(in delivery customers' homes.

D. Drivers' Duties

Many drivers started out as helpers for other drivers and essentially received "on the job training" to become a future driver. The Employer does not appear to have any formal training program, but will pair up new drivers with veteran drivers to help them get up to speed. The Charging Party states that (b) (6), (received on-the-job training by riding along with another driver and (b) (6), (b) helper for three weeks, during which (b) (6), (was paid an hourly rate.[10]

Drivers inform the Employer at the beginning of each week whether they are interested in working and what days they are available. Each evening, the Employer receives manifests for the following day's deliveries and then phones each driver who previously told the Employer (b) (6), (b is available for work the next day. Drivers are called in random order and offered a pre-established collection of manifests for various routes. If a driver does not answer when the Employer calls, the Employer moves to

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[8] Drivers are able to set the pay rate for their respective helpers, but of the record testimony available, the highest per day rate for a helper is $115.

[9] There is no evidence that any of the Employer's drivers have hired alternate drivers.

[10] It is unknown whether the Charging Party was paid by the Employer directly or by the driver (b) (6), (b trained under.

the next driver on the list; the Employer will call a driver again who did not previously answer if, after all drivers have been contacted, there are remaining manifests to be distributed. When called, drivers typically may accept or reject work. Drivers are paid by the number of completed stops (i.e. deliveries) at various rates based on the stops' locations. The per-stop pay rates are set by the Employer and are not negotiable.

The Charging Party delivered exclusively for Sears under its contract with the Employer. This delivery work encompassed approximately 70-80 hours each week and it was the only delivery work (b) (6), (b performed. The Charging Party primarily chose routes, where available, that ended in (b) (6), (b) (7)(C) where (b) (6), (b and (b) (6), (b) helper live, and typically did not return to the Employer's warehouse at the end of the day.

There is conflicting evidence as to whether drivers may reject work with no repercussions. The Employer stated during testimony before the Pennsylvania Unemployment Commission that if a driver consistently rejected work, the Employer would consider not using that driver in the future.[11] When the Charging Party's (b) (6), (b) (7)(C) was diagnosed with (b) (6), (b) (7)(C) (b) (6), (b) requested that (b) (6), (not work Mondays and Fridays so that (b) (6), (b could be available to accompany (b) (6), (b) (7 to (b) (6), (b) (7)(C) (b) (6), (b) (7)(C). However, the Charging Party states that the Employer refused the request, claiming that (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) are the busiest delivery days. The Charging Party also states that the Employer would "punish" drivers for refusing work by not offering work the following day or not offering favorable routes.[12]

Drivers delivering for Sears attend a daily "Stand-Up" meeting, required by Sears and conducted by the Employer, where the Employer's managers speak to the drivers about customer satisfaction ratings and safety issues, and pass along information from Sears about product updates and installation instructions on new

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[11] See note 18, *infra*.

[12] The Charging Party's helper states that, rather than being punished by not receiving work, (b) (6), (b and the Charging Party were punished by being offered less favorable routes or routes that did not end in (b) (6), (b) (7)(C). However, other record evidence appears to call into question the Charging Party's claim that the Employer would directly "punish" drivers by not offering work immediately after they declined a job. Thus, the Employer provided undated "Contractor Stop Counts" showing that the Charging Party and other drivers routinely declined work, including Mondays and Fridays, and were still offered work in the following days and weeks. It is unknown if the stop counts provided by the Employer cover the same days that the Charging Party needed off to care for (b) (6), (b) (7)(C) (b) (6), (b) (7)(C).

appliances.[13] At times, during these meetings, the Employer has singled out drivers for not performing up to expectations or who should have handled particular deliveries a different way. According to the Charging Party, the Employer has previously threatened to "fine" drivers who consistently showed up late to daily Stand-Up meetings.[14]

Drivers who have agreed to work on a particular day arrive at the Lawrenceville warehouse between 6:00 a.m. and 6:30 a.m. to load their respective trucks. If a driver who agreed to work the previous evening becomes unable to work on his scheduled day, the Employer will contact drivers who are not scheduled to work to see who may be able to pick up the "dropped load." The previously scheduled driver with the "dropped load" is assessed a $300 "dropped load fee" that is paid to the driver who agreed to substitute.[15] The substituting driver gets paid the base stop rate for the picked-up manifest and the Employer automatically deducts the dropped load fee from the dropping driver's settlement check and pays it to the substitute driver in his next check. Some drivers attempt to negotiate among themselves for a lesser dropped load fee as a favor to each other.

Following the daily Stand-Up meeting, drivers begin their routes. In some instances, the Employer conducts quality-control "ride-alongs" to gauge customer satisfaction. Indeed, from the end of the Charging Party's training until (b) (6), (b) (termination, the Employer conducted ride-alongs to evaluate the Charging Party's job performance. Each manifest must be delivered within a particular time window, which is determined by the product supplier and delivery customer. Drivers may contact customers directly to rearrange delivery windows, but if the customer does not consent, the driver is required to adhere to the previously set window. When contacting Sears' customers, drivers are expected to use Sears' pre-approved script language provided on a "pre-call sheet." For Sears' deliveries, the GPS tracker in the

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[13] The record is unclear as to whether the daily Stand-Up meetings are required by Sears, the Employer, or both. The Employer claims that it does not consider the meetings mandatory, but then admits that Sears requires the meetings.

[14] The Charging Party's helper heard the Employer's manager make this threat during a Stand-Up meeting. Another driver alleged that, one to two years ago, (b) (6), (b) was late for daily meetings each day for a week and accordingly was fined $35. The money was deducted from (b) (6), (b) (settlement check and (b) (6), (b was told the money would be used to buy coffee for other drivers.

[15] The $300 fee appears to be set by the Employer and is the maximum amount charged. There is no evidence that drivers attempt to find substitutes and instead leave it exclusively up to the Employer.

required computer tablet will alert Sears if a driver has not yet made a scheduled delivery and is approaching the end of the delivery window. In that case, Sears informs the Employer and the Employer contacts the driver to remind him of the window's expiration and determine whether he will be able to complete the delivery on time. Further, if the customer needs additional installation that was not listed on the manifest, the driver must call the Employer for additional instructions.

Although drivers are unable to negotiate their per-stop pay rate, they have called the Employer and requested that a single stop be counted as two or three stops where extra work was requested by the receiving customer or the stop was particularly challenging. For example, the Charging Party assembled a customer's elliptical trainer and, following completion, asked the Employer if it was willing to count the assembly as an additional "stop" because of the extra work. In another instance, the Charging Party assembled a customer's seating set and afterward asked that the Employer pay [redacted] the equivalent of two stops. These instances are ad hoc and are not previously scheduled; drivers are still expected to fulfill their delivery obligations within the allotted time frames.

In instances where deliveries or installations cannot be completed because of safety concerns or problems with utility attachments in customers' homes, drivers will call the Employer (and Sears, if delivering their products) to inform them of the situation. For issues with customers' utility hook-ups, drivers do not attempt to make the repairs and do not face repercussions for refusing to complete such a delivery, but they are not paid for the incomplete stop. Damage to customer merchandise or their homes during delivery is typically borne by the drivers.[16]

II. The Employer Terminates the Charging Party After [redacted] Asserts that Drivers are Employees

In [redacted] 2015, the Charging Party discussed with another driver [redacted] concern that the Employer had made inaccurate deductions from [redacted] settlement check, which led [redacted] to conduct [redacted] own internet research about companies' misclassification of drivers as independent contractors rather than employees. [redacted] printed an article regarding independent contractor misclassifications, gave several copies of the article to a fellow

[16] There are factual disputes about the exact policies regarding customer damage. There is evidence that suggests if a driver calls in to Sears to report a damaged product, then the cost to the driver may be mitigated. The Employer asserts that drivers may negotiate directly with customers to settle damage claims; however, if the customer wishes to file a claim, it does so directly with the Employer, who investigates the matter and then deducts the claim amount from the driver's settlement check.

driver to distribute to other drivers, and asked (b) (6), (b) (7) to speak to those drivers about the need to challenge the Employer's independent contractor classification or to seek unionization.[17] The Charging Party also provided a copy of the article to another driver and discussed with (b) (6), (b) (7) the possibility that drivers were employees rather than independent contractors. When the Charging Party asked that driver if (b) (6), (would be interested in joining in on a lawsuit seeking employee status, the driver responded that (b) (6), (b did not have enough information to take a position but that the Charging Party should contact (b) (6), (b) (7) if (b) (6), (received additional information.

Later in (b) (6), (b) (7)(C, the Employer's manager approached the Charging Party and told (b) (6), (b) (7) that (b) (6), (was aware of the article about the misclassification of independent contractors being circulated. The manager stated that the Employer's owner would terminate the Charging Party if (b) (6), (b learned that (b) (6), (b was trying to unionize drivers and that the owner had previously terminated drivers who discussed seeking unionization. The manager also approached one of the drivers with whom the Charging Party initially discussed (b) (6), (b) (concerns and told that driver that the Employer was aware the Charging Party was planning to contest (b) (6), (b) (7 independent contractor status. The manager also stated (b) (6), (b) wanted to make sure the driver was not on a list that was allegedly circulating, which named drivers who were interested in contesting their status. That driver then contacted the Charging Party to be certain that (b) (6), (b) name was not on any such list.

In (b) (6), (b) (7)(2015, the Employer terminated the Charging Party for alleged "negativity" and for talking to other drivers about getting a lawyer to contest their independent contractor status. The manager told the Charging Party that (b) (6), (b) might be reinstated if (b) (6), (stopped talking to other drivers about getting a lawyer and if (b) (6), (signed a document asserting that (b) (6), (b was an independent contractor and agreeing not to sue the Employer. The Charging Party refused and instead filed for unemployment compensation with the Pennsylvania Unemployment Commission. After a hearing, the commission ultimately found that the Charging Party was an employee under state law and thus eligible for unemployment compensation.[18]

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[17] The Region was unable to successfully contact the other driver to confirm whether he distributed the article or spoke to fellow drivers.

[18] Much of the evidence in this case was gleaned from the transcripts of the Pennsylvania Unemployment Commission's hearings. *See Dirt Digger, Inc.*, 274 NLRB 1024, 1027 (1985) (decisions of state unemployment commissions are admissible as evidence in Board proceedings).

ACTION

We conclude that, under the factors enunciated by the Board in *FedEx Home Delivery*,[19] the drivers are employees under Section 2(3) of the Act. Further, the Employer violated Section 8(a)(1) by requiring the Charging Party to sign another independent contractor agreement and to stop talking to drivers about their status, as a condition to (b) (6), (b) reinstatement. Further, the Region should seek an amended charge that the Employer violated Section 8(a)(1) by misclassifying the drivers as independent contractors under the theory espoused in *Pacific 9 Transportation, Inc.*[20]

I. The Drivers are Statutory Employees

As a threshold matter, we conclude that the drivers are employees within the meaning of Section 2(3) of the Act. In *FedEx Home Delivery,* the Board recently reaffirmed that in determining whether a particular worker is an independent contractor or an employee, the Board will apply the traditional common-law factors enumerated in the Restatement (Second) of Agency § 220, with no single factor being determinative.[21] Thus, the following factors are relevant:

> (a) The extent of control which, by the agreement, the [employer] may exercise over the details of the work.
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> (b) Whether or not the one employed is engaged in a distinct occupation or business.
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> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
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> (d) The skill required in the particular occupation.
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> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing

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[19] 361 NLRB No. 55 (Sept. 30, 2014).

[20] Case 21-CA-150875 (Advice Memorandum, Dec. 18, 2015).

[21] 361 NLRB No. 55, slip op. at 2 (concluding that package delivery drivers were statutory employees rather than independent contractors).

the work.

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

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

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

(i) Whether or not the parties believe they are creating the relation of [employer] and [employee].

(j) Whether the principal is or is not in the business.[22]

The Board also clarified that it will consider "whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*."[23] The "independent-business factor" includes consideration of whether the putative contractor has a significant entrepreneurial opportunity, has a realistic ability to work for others, has a proprietary or ownership interest in his or her work, and has control over important business decisions, such as the scheduling of performance, hiring, selection, and assignment of employees, equipment purchases, and investment of capital.[24] The Board also noted that when applying these common-law agency factors and determining employee status under Section 2(3), it will "construe the independent-contractor exclusion narrowly" so as to not "deny protection to workers the Act was designed to reach."[25] Finally, the burden of proof is on the party asserting independent contractor status which, in this case, is the Employer.[26]

As in *FedEx*, although the factors show that drivers here have flexibility in the manner in which they make deliveries and supply their own instrumentalities, the weight of factors support a finding that the drivers are employees, including that they are not rendering services as part of an independent business. In that regard, they ultimately have no meaningful entrepreneurial opportunity, both with respect to their

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[22] *Id.* (quoting Restatement (Second) of Agency § 220 (1958)).

[23] *Id.*, slip op. at 11 (emphasis in original).

[24] *Id.,* slip op. at 12.

[25] *Id.*, slip op. at 9-10.

[26] *Id.*, slip op. at 12.

relationship with the Employer and because the Employer's constraints foreclose any realistic ability of the drivers to work for other businesses or for themselves.[27] As such, we conclude that the factors, on balance, demonstrate that the drivers here are statutory employees rather than independent contractors.

A. Extent of Control by the Employer Weighs in Favor of Independent Contractor Status

The Employer and its retail customers control the preparation of the manifests from which the drivers may choose. However, the Employer does not exercise a high degree of control over the details of the drivers' duties while they are out making deliveries and drivers have the choice to make deliveries for Sears, JCPenney, or Boscov's. Drivers are able to choose which days they wish to work, determine the best routes to make deliveries, and may re-schedule deliveries with customer consent.[28] There is evidence, based on the Employer's testimony before the Pennsylvania Unemployment Commission, that if a driver consistently rejected work, the Employer would consider not using the driver in the future. Further, the Charging Party alleges that the Employer "punishes" drivers for rejecting work and being late for daily meetings. However, other evidence, such as the Employer's stop counts, indicates that drivers have routinely rejected work without repercussions.[29] On balance, we conclude the weight of evidence on this factor leans in favor of independent contractor status.

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[27] *See id.*

[28] *Compare Argix Direct, Inc.*, 343 NLRB 1017, 1021 (2004) (finding factor weighed in favor of independent contractor status where drivers were not required to follow suggested delivery order and, in fact, deviated from proposed delivery order as long as goods delivered within customer's delivery window), *with Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (Sept. 25, 2015) (finding factor weighed in favor of employee status where canvassers were not required to work on any given day but were subject to significant control when they did work).

[29] *See Argix*, 343 NLRB at 1021 n.18 (alleged discipline for infractions such as failing to wear uniforms, failing to attend safety meeting, or missing delivery window not supported by weight of evidence). The only evidence that a driver was affirmatively disciplined for being habitually late to daily meetings was an unsubstantiated allegation by another driver and, in any event, was a single alleged occurrence one to two years ago. *But see Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (Board finds even occasional instances of discipline indicates significant control by an employer); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 889, 892-93 (1998) (imposition of one-day suspension tended to weigh in favor of employee status).

B. Whether the Individual is Engaged in a Distinct Occupation or Business Weighs in Favor of Employee Status

There is no evidence that any of the Employer's drivers have attempted to incorporate and there is no evidence that drivers perform delivery services for any other business but the Employer. Rather, drivers perform business solely in the name of the Employer where their trucks display the Employer's DOT number, drivers are required to wear uniforms when making certain deliveries, and they are prohibited from working for other businesses or themselves when delivering for the Employer. Thus, the drivers are dependent on the Employer because all work assignments come directly from the Employer making them, in practice, integrated with the Employer's transportation operations.[30] Although the drivers file business taxes as sole proprietorships and deduct their business expenses on their taxes, we do not conclude that this fact alone outweighs the evidence in favor of employee status.[31]

C. Whether Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision Does not Weigh in Either Direction

The Agreement specifically states that the Employer is primarily concerned with getting deliveries to customers within allotted delivery windows, and drivers are free to choose the best delivery routes, and to contact customers to arrange new delivery times, so long as they meet that goal. For example, the Charging Party typically chose routes that ended near [redacted] home in (b) (6), (b) (7)(C) and did not have to return to the Employer's warehouse at the end of the day. On the other hand, drivers delivering for Sears are tracked by GPS and the Employer conducts periodic ride-alongs. Although the Employer asserts that it does this as a quality-control method

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[30] *Compare FedEx*, 361 NLRB No. 55, slip op. at 13 (finding factor in favor of employee status where drivers' uniforms, logos, and colors on vehicles showed that drivers were in effect doing business in name of the employer where they were fully integrated into employer's business), *with Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (Jan. 29, 2015) (finding factor in favor of independent contractor status where crew leaders did not work exclusively for the employer and on occasion competed with employer for work). *See also Roadway Package Systems*, 326 NLRB 842, 851 (1998) (finding drivers to be employees in part where drivers doing business in name of employer).

[31] *See also St. Joseph News-Press*, 345 NLRB 474, 486 (2005) (Member Liebman, dissenting) (discounting fact that carriers provided their own vehicles, where delivery of employer's newspaper was primary employment source that further evinced carriers' dependence on employer).

for ensuring customer satisfaction with delivery times and product installation, the practice tends to impinge on drivers' freedom to direct themselves.[32] Further, drivers are often required to call the Employer or Sears when faced with a customer problem during delivery. Moreover, drivers making deliveries for Sears are provided with a script to use when contacting its customers. Indeed, since detailed oversight and supervision are not practical given the nature of the drivers' daily work, the fact that the Employer does not engage in that type of supervision is not dispositive of this factor.[33] In sum, this factor cuts both ways and we conclude that it is neutral.

D. Skill Required in the Occupation Weighs in Favor of Employee Status

Drivers are not required to obtain a commercial driving license, as the size of the box trucks is sufficiently small to be operated with a standard driving license. Several drivers noted that they received training by working as helpers before obtaining their own trucks and signing independent contractor agreements with the Employer. Although drivers are required to possess the skills necessary to install many of the appliances delivered in customers' homes, the daily Stand-Up meetings often include installation instructions for appliances. Further, if a customer's utility hook ups are in a state of disrepair, the driver may not make the installation and instead instructs the customer to call a specialist to make the necessary repairs before the merchandise can be installed.[34] Given that the few skills necessary to drive for

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[32] *Compare FedEx*, 361 NLRB No. 55, slip op. at 13 (finding factor in favor of employee status where employer essentially directed drivers' performance via enforcement of rules and tracking mechanisms and drivers were required to adhere to strict company protocol), *with Dial-a-Mattress Operating Corp.*, 326 NLRB at 892 (finding factor in favor of independent contractor status where drivers directed themselves by primarily working away from employer's warehouse, were not directly supervised by employer, employer did not instruct drivers which routes to take, and drivers not required to return to employer's warehouse following completion of scheduled deliveries). *Cf. Porter Drywall*, 362 NLRB No. 6, slip op. at 2, 4 (although employer's superintendent performed quality control inspections and advised independent contractor crew leaders to make corrections to work as needed, skilled crew leaders themselves responsible for ensuring crew members made necessary corrections).

[33] *See Sisters Camelot*, 363 NLRB No. 13, slip op. at 3 (fact that canvassers not generally subject to in-person supervision, where nature of work made such oversight impractical, not dispositive in determining weight of factor).

[34] *Compare FedEx*, 361 NLRB No. 55, slip op. at 13 (factor in favor of employee status where drivers not required to have any special training or skills and received all necessary skills via employer-provided two week training course), *with Porter*

the Employer may be learned on the job and with supplemental training from the Employer, we conclude that this factor weighs in favor of employee status.

E. Whether the Employer or Individual Supplies Instrumentalities, Tools, and Place of Work Weighs in Favor of Independent Contractor Status

Drivers lease or own their trucks, which are the primary instrumentality of their work that, save for loading and unloading, takes place away from the Employer's warehouse. The Employer does not dictate the make or model of the truck and requires only that it be a twenty-six foot box truck. Per the Agreement, drivers are required to display the Employer's DOT number on their vehicles and cover it up when using the truck for non-Employer business. Although the Agreement does not specifically require the Employer's name to be displayed on the truck, many drivers display it. Further, drivers provide their own tools, moving blankets, dollies, and other instrumentalities required for safely transporting and installing customer appliances. Although many drivers obtained their vehicles through Landmark Leasing, which appears to have a close business and personal relationship with the Employer, drivers are able to sell their vehicles in a ready market and can keep the proceeds of the sale.[35] We note that, although drivers are able to choose which manifests to take the next day, they do not have a proprietary interest in the routes underlying the manifest as availability changes daily, there is no guarantee of work, and the availability of work flows exclusively from the Employer. Nevertheless, on balance, and especially given the employees' ownership of their trucks, we conclude that this factor leans slightly in favor of independent contractor status.[36]

Drywall, 362 NLRB No. 6, slip op. at 4 (factor in favor of independent contractor status where crew leaders practiced a trade by performing skilled work and crew leaders' skill level dictated types of jobs they would take).

[35] *Compare Dial-a-Mattress*, 326 NLRB at 891 (finding factor in favor of independent contractor status where employer supplied some instrumentalities but trucks, which were most costly piece of equipment, were sole responsibility of drivers and employer had no role in acquisition of vehicle), *with Roadway Package Systems*, 326 NLRB at 851-52 (finding employee status where, inter alia, no ready market for drivers' vehicles where every feature, detail, and internal configuration dictated by employer). *See also FedEx*, 361 NLRB No. 55, slip op. at 13-14 (finding factor "neutral" where aspects cut both ways, but noting that the significance of drivers' vehicle ownership was undercut where employer played primary role in dictating vehicle specifications and facilitated vehicle transfers between drivers).

[36] We also note that drivers' vehicle ownership and cost responsibilities may be an instance of the Employer passing on the cost of doing business to drivers rather than drivers truly having a proprietary interest in their instrumentalities. *See Roadway*

F. Length of Time for which Individual is Employed Weighs in Favor of Employee Status

The Agreement signed by each driver is for a one-year term that automatically renews each year and several drivers have worked for the Employer for four to six years. Therefore, drivers essentially "have a permanent working arrangement with the [Employer] under which they may continue as long as their performance is satisfactory."[37] We conclude that this factor weighs in favor of employee status.

G. Method of Payment Weighs in Favor of Employee Status

Drivers are unable to negotiate pay rates because the Employer unilaterally determines drivers' pay rates and pays drivers according to the number of completed delivery stops and where the stop is within a geographic area. Further, drivers' settlement checks contain deductions for various expenses such as truck lease payments for Landmark Leasing, group insurance premiums, and charges for the use of the Employer's maintenance garage, but no employment taxes are deducted and drivers are issued an annual IRS Form-1099. Although drivers have phoned the Employer to ask if a single stop may be counted as multiple stops because the driver completed additional ad hoc work for a customer or encountered a particularly difficult delivery, we do not characterize this as drivers "negotiating" their pay rate because there is no actual bargaining where the Employer can simply deny the request and the driver is expected to continue his work.[38] Although drivers are not

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Package Systems, 326 NLRB at 851 (employer simply shifted capital costs to drivers without providing them with independence to engage in entrepreneurial opportunities).

[37] *FedEx*, 361 NLRB No. 55, slip op. at 14 (quoting *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 259 (1968)). *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4 (finding canvassers' potential for long-term working relationship with employer weighed in favor of employee status); *Argix*, 343 NLRB at 1022 (notwithstanding finding of overall independent contractor status, factor in favor of employee status where owner-operators had permanent working relationship with employer as long as performance satisfactory).

[38] *See FedEx*, 361 NLRB No. 55, slip op. at 26 (Member Johnson, dissenting) (noting that an asserted business "has an independent value derived from an *arm's-length exchange* between two individuals" (emphasis added)). Here, the "negotiations" between drivers and the Employer to have a single stop paid as multiple stops is not an "arm's-length" negotiation, which requires that disinterested parties bargain to reach a mutually beneficial outcome. Instead, it is merely a request by the driver in

paid by the hour and there is no guaranteed minimum income, because the Employer sets pay rates without any input from drivers, we find this factor weighs in favor of employee status.[39]

H. Whether Work is Part of the Regular Business of the Employer Weighs in Favor of Employee Status

The Employer presents itself to the public via its website and Facebook page as a transportation and delivery service business and has multiple arms that provide home delivery, long-haul, and warehousing services. Because the drivers perform transportation services that are at the core of the Employer's business, we conclude that this factor weighs in favor of employee status.[40]

I. Whether the Parties Believe they are Creating an Independent Contractor Relationship Weighs in Favor of Independent Contractor Status

The Employer's non-negotiable Agreement with the drivers states that the parties intend to create an independent contractor relationship, which, under Board law, provides only "inconclusive evidence" of independent contractor status.[41] Drivers are issued annual IRS Forms-1099, which can indicate independent contractor

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the course of his regular duties that the Employer may summarily dismiss in its sole discretion.

[39] *See Porter Drywall*, 362 NLRB No. 6, slip op. at 4-5 (despite finding overall independent contractor status, finding factor "slightly" in favor of employee status where crew leaders paid pursuant to established square footage formula); *FedEx*, 361 NLRB No. 55, slip op. at 14 (finding factor in favor of employee status where employer "establishes, regulates, and controls the rate of compensation").

[40] *See Porter Drywall*, 362 NLRB No. 6, slip op. at 5 (finding factor heavily in favor of employee status where crew leaders and installers performed primary service provided by employer that was "the very core of [the employer's] business"). *Cf. Dial-a-Mattress*, 326 NLRB at 884-85, 893 (finding drivers to be independent contractors and noting that drivers performed delivery services that were tangential to employer's retail sales business).

[41] *E.g.*, *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4; *Porter Drywall*, 362 NLRB No. 6, slip op. at 5; *FedEx*, 361 NLRB No. 55, slip op. at 14.

status.[42] Additionally, three drivers state that they believe themselves to be independent contractors and do not wish to be employees. Although the available evidence is inconclusive,[43] and the Charging Party asserts (b) (6), (b) (7 employee status, we conclude, on balance, that the drivers generally believe that they have created an independent contractor relationship.

J. Whether the Principal is or is not in the Business Weighs in Favor of Employee Status

The Employer's website and Facebook page state it is a provider of transportation services. Because drivers provide transportation services, which is the same business the Employer advertises to the public, we conclude that this factor weighs in favor of employee status.[44]

K. Whether the Evidence Tends to Show that the Individual is, in Fact, Rendering Services as an Independent Business Weighs in Favor of Employee Status

Although details of the drivers' daily duties tend to show a degree of flexibility that, in isolation, appears to support independent contractor status, the overall evidence shows that the drivers, like those in *FedEx*, are singularly dependent on the Employer for work and do not have significant entrepreneurial opportunities.[45] Thus, the Agreement and the Employer's operational policies have effectively impaired the

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[42] *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4 (finding factor in favor of independent contractor status based on limited evidence that canvassers were issued annual IRS Form-1099 instead of W-2 "tend[ed] to support" such status).

[43] The Charging Party also claims that other drivers were interested in discussing more about challenging their status as independent contractors. However, where many drivers would not cooperate with the investigation, the Region was unable to obtain direct evidence to corroborate the Charging Party's assertion.

[44] *See Porter Drywall*, 362 NLRB No. 6, slip op. at 5 (finding factor in favor of employee status where employer's drywall installation business was the same as the crew leaders' businesses); *FedEx*, 361 NLRB No. 55, slip op. at 15 (finding factor in favor of employee status where employer and drivers both engaged in business of small package delivery).

[45] *See FedEx*, 361 NLRB No. 55, slip op. at 10 (significant entrepreneurial activities must be an actual, and not merely theoretical, opportunity for gain or loss).

drivers' abilities to operate as independent businesses.[46] For example, the drivers are essentially integrated into the Employer's transportation business, where they are not allowed to build an independent customer base by making deliveries for others while driving for the Employer and are unable to cultivate their own relationships with existing customers because those "customers" are derived exclusively from the Employer's business relationship with Sears, Boscov's, and JCPenney.[47] Further, drivers do not have a significant opportunity for gain or loss and it is the Employer who unilaterally sets the rates drivers receive for their deliveries. Despite their ability to request that the Employer credit a single delivery stop as multiple stops, it is in the Employer's sole discretion to approve or deny those ad hoc requests.[48] Moreover, the Employer essentially determines the availability of work through its business relationships with retailers. Thus, the drivers' ability to choose from these predetermined manifests only demonstrates drivers' ability to select routes that are the most convenient rather than the most lucrative.

Drivers do not have a realistic ability to work for others and, indeed, there is no evidence that any drivers work for other companies or engage in other businesses of their own. Here, the "lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice … and more a matter of the obstacles created by [the drivers'] relationship with" the Employer.[49] Although the Agreement states, and the drivers understand that they may use their vehicles for any other purpose as they see fit, the Agreement nonetheless precludes drivers from using their trucks for any other work on days that they are hauling for the Employer.[50] Further, drivers spend

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[46] *See id.*, slip op. at 12 (Board must consider evidence that employer has imposed *constraints* on individual's ability to render services as part of independent business (emphasis in original)).

[47] *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 5 (finding factor in favor of employee status where canvassers limited in opportunity to develop other business relationships because individuals not allowed to solicit donations for other organizations while actively working for employer); *Roadway Package Systems*, 326 NLRB at 857 (finding factor in favor of employee status where drivers not allowed to conduct business for other companies when driving for employer).

[48] *See Roadway Package Systems*, 326 NLRB at 852 (finding little room for drivers to influence their income through their own efforts or ingenuity where employer established, regulated, and controlled major business decisions).

[49] *Id.* at 851.

[50] *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 5 (finding factor in favor of employee status where canvassers limited in opportunity to develop other business relationships because individuals not allowed to solicit donations for other

the vast majority of their work week hauling for the Employer's customers.[51] The drivers have the option to deliver products for Sears, Boscov's, or JCPenney, but construing that option as an "ability" to work for others is illusory as all work flows solely from the Employer who has already established pay rates based on its contracts with those retailers and without any input from drivers.

Nor do the drivers have any real proprietary or ownership interest in the geographic delivery areas. Drivers have no influence over the Employer's selection of geographic delivery areas and cannot increase their earnings by making deliveries for other customers because they are prohibited from doing so on days when they are servicing the Employer's routes.[52] Drivers are also limited in their choice of routes because they are contacted based on a randomized call list each night and simply choose, based on convenience, the next day's work from the list of available manifests. Indeed, drivers who fail to show up on days they have agreed to work have their manifests reassigned by the Employer to another driver and are unilaterally assessed a $300 "dropped-load fee." There is no evidence that drivers attempt to sub-contract deliveries they previously agreed to take and, instead, leave the Employer to deal

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organizations while actively working for employer). *Cf. St. Joseph News-Press*, 345 NLRB at 479 (employer's lack of restriction on carriers' ability to deliver competing newspapers concurrently on their routes supported independent contractor status because carriers had the ability to impact their own compensation).

[51] *See FedEx*, 361 NLRB No. 55, slip op. at 15 (finding factor in favor of employee status where no evidence that drivers used their vehicles for other commercial purposes when not delivering for employer and where work commitment to employer occupied time when most other commercial opportunities available); *Roadway Package Systems*, 326 NLRB at 851 (drivers' lack of pursuing outside business activity stemmed from obstacles created by relationship with employer where drivers prohibited from conducting outside business for other companies during the day, among other prohibitions). *Cf. Porter Drywall*, 362 NLRB No. 6, slip op. at 3, 5 (crew leaders did not work exclusively for employer, declined employer work to take other jobs, and at times competed directly with employer for work).

[52] *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 5 (finding factor in favor of employee status where canvassers limited in opportunity to develop other business relationships because individuals not allowed to solicit donations for other organizations while actively working for employer).

with the reassignment.[53] Although drivers have an ownership interest in their delivery vehicles and can make significant investments in their trucks, the trucks list the Employer's DOT number and often its name, and are used almost exclusively in service of the Employer's customers. Thus, the trucks are more of an extension of the Employer's operations than an instrumentality of an independent business.[54]

Further, drivers are impeded in making important business decisions affecting the Employer or themselves. For instance, drivers are essentially required by the Employer to hire a helper, rather than hire help where they see fit.[55] Although the Agreement also states that drivers *may* hire others as alternate drivers for their vehicles, there is no evidence that any drivers do so. Although drivers are ostensibly able to choose any helper they wish, the Employer has prevented the Charging Party from choosing [redacted] helpers and has inserted its own discretion in the choices. Moreover, the Employer has total control, without any input from the drivers, over its business strategy, customer base, and the prices it charges Sears, Boscov's, and JCPenney to deliver their products.[56] The Employer exerts a high degree of control with respect to damage to products and customer homes where drivers have little or no say in the matter if a delivery customer decides to file a formal complaint with the Employer.[57] There is also no evidence that drivers advertise for business or maintain

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[53] *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 5 (finding support for employee status where canvassers prohibited from subcontracting assigned canvassing territory). *Cf. Dial-a-Mattress*, 326 NLRB at 892 (owner-operators often have multiple trucks and drivers and can arrange substitutions where necessary).

[54] *See FedEx*, 361 NLRB No.55, slip op. at 15 (finding support for employee status where drivers' vehicles tailored for employer's operation and drivers required to mask employer's logo before using vehicle for other purposes). *Cf. Dial-a-Mattress*, 326 NLRB at 887, 891 (independent contractor status supported where owner-operators' trucks listed their companies' name, logo, and DOT number rather than employer's information).

[55] *Cf. Porter Drywall*, 362 NLRB No. 6, slip op. at 5 (finding factor in favor of independent contractor status where crew leaders determine whether to hire workers and how many to hire).

[56] *See FedEx*, 361 NLRB No.55, slip op. at 15 (employee status supported where employer has total control over important business decisions).

[57] In other contexts, the Board has found that requiring individuals to bear the loss of damages rather than having the employer bear the burden is indicative of independent contractor status. *See Argix Direct*, 343 NLRB at 1021. However, in the present case, where the drivers have no control or influence over the Employer's

any type of business operation or presence beyond delivering for the Employer.[58] Moreover, drivers making deliveries for Sears are provided with a script to use when contacting its customers. Finally, although drivers decide where to purchase their trucks, the majority of drivers lease their trucks through Landmark Leasing, which provides favorable lease-to-own terms, while the Employer physically holds the vehicle's title until the truck is paid off.[59] This complete lack of participation in business decisions, while requiring drivers to supply their own tools and instrumentalities, establishes that the Employer essentially passes on certain costs of doing business to the drivers rather than allowing the drivers to participate in the Employer's business or truly make their own entrepreneurial business decisions.[60]

Therefore, we conclude that drivers are not operating as an independent business and the weight of this factor is heavily in favor of employee status.

Applying all the above factors, we conclude that the drivers are employees within the meaning of the Act and the Employer, as the party claiming independent contractor status, has not met its burden of proof. Notwithstanding the drivers' flexibility in completing their duties and the fact that they are required to pay for the instrumentalities of their work, the evidence as a whole weighs strongly in favor of finding employee status. These include that the Employer and drivers are part of the same transportation business, there is no opportunity for meaningful negotiation about terms of work or pay, the skills required are easily learned or provided by the Employer, drivers may work for the Employer indefinitely, and drivers do not have sufficient entrepreneurial opportunity, the true ability to work for others, a proprietary interest in their work, or the ability to make important business decisions.

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business decisions, we view this as another example of the Employer simply passing on the cost of doing business to drivers.

[58] *See FedEx*, 361 NLRB No.55, slip op. at 15 (drivers having no business identity beyond delivering for employer supports employee status).

[59] In fact, the Employer's Facebook page contains a post publically celebrating when a driver makes final payment on [redacted] truck and appears to present [redacted] with a cake. *See* https://www.facebook.com/LibertyTransportation/photos/a.418858694792204.103442.145806552097421/981529941858407/?type=3&theater.

[60] *See Roadway Package Systems*, 326 NLRB at 851 (employer simply shifted capital costs to drivers without providing them with independence to engage in entrepreneurial opportunities).

II. The Employer's Unfair Labor Practices

A. The Employer Violated Section 8(a)(1) by Placing an Unlawful Condition on the Charging Party's Reinstatement

The Region has already determined that the Employer violated Section 8(a)(1) by interrogating drivers about their sympathies for the Charging Party's protected concerted activities. We conclude that the Employer also violated Section 8(a)(1) by "offering" the Charging Party reinstatement on the condition that (b) (6), (b sign a supplemental agreement affirming (b) (6), (b) (independent contractor status and further agreeing that (b) (6), (b will not sue the Employer for misclassifying drivers as independent contractors or talk to other drivers about that issue.

An employer's illegal condition to reinstatement violates 8(a)(1) and it is the employer's burden to show that a reinstatement offer was valid; any ambiguity in the offer is construed against the employer.[61] For example, in *Bon Harbor Nursing & Rehabilitation Center*, the employer terminated several employees for speaking to the media about staffing problems during their lunch break and conditioned their reinstatement on agreeing to refrain from similar protests in the future.[62] The ALJ, as affirmed by the Board, found that the employer violated the Act by unlawfully requiring employees to waive their Section 7 right to engage in future protected concerted activities as a condition to reinstatement.[63]

Here, like in *Bon Harbor*, the Employer unlawfully conditioned the Charging Party's reinstatement on (b) (6), (b) signing a supplemental agreement re-affirming (b) (6), (b) (7 independent contractor status, agreeing not to sue the Employer, and agreeing not to discuss possible employee status with other drivers. Thus, the Employer violated 8(a)(1) by requiring (b) (6), (b) (7)(to waive (b) (6), (b) (Section 7 rights to engage in protected concerted activities in the future by challenging the Employer's treatment of drivers as independent contractors and discussing drivers' employee status with others. The

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[61] *See A.P. Painting & Improvements, Inc.*, 339 NLRB 1206, 1208 (2003) (employer's reinstatement offer that was conditioned on employee not engaging in any organizing activity while at work was unlawfully overbroad and an illegal condition to reinstatement); *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062, 1062, 1078 (2006) (employer may not condition reinstatement on employee waiving future Section 7 activity).

[62] *Bon Harbor*, 348 NLRB at 1062.

[63] *Id.* at 1078.

Region should therefore amend the charge to include the Employer's unlawful reinstatement condition as a separate 8(a)(1) violation.

B. The Region Should Allege That the Employer Separately Violated Section 8(a)(1) by Misclassifying Employees as Independent Contractors

Recently, Advice found in *Pacific 9 Transportation, Inc.*[64] that the employer there violated Section 8(a)(1) by misclassifying its drivers as independent contractors because that misclassification was intended to operate as a restraint on, and interference with, drivers' Section 7 rights.[65] There, Advice determined that the employer's misclassification restrained and interfered with its drivers exercise of their Section 7 rights where the employer insisted drivers were independent contractors while treating them as statutory employees and imparting to its employees that they do not possess Section 7 rights in the first place.[66] Further, the drivers were in the midst of a union organizing drive during which the employer issued a memo stating that unionization was futile because the drivers were independent contractors.[67] Finally, notwithstanding the Region's determination of employee status, the employer continued to insist to its drivers that they were independent contractors, which Advice determined to be a misstatement of law that reasonably insinuated adverse consequences for employees' continued Section 7 activity.[68]

Here, although there is no formal organizing campaign taking place, the Charging Party's conversations with fellow drivers about the Employer's misclassification included discussing the need to unionize or pursue collective action to vindicate their rights as misclassified employees. The Employer responded with threats of reprisals and termination, stating that the owner had previously terminated drivers who discussed unionizing, and recommending to another driver to be sure [(b) (6), (b)] name was not included on a list of drivers interested in challenging their status. By making these statements, while simultaneously treating drivers as statutory employees, the Employer launched a "preemptive strike" against future

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[64] Case 21-CA-150875 (Advice Memorandum, Dec. 18, 2015).

[65] *Id.* at 10.

[66] *Id.* at 3, 11.

[67] *Id.*

[68] *Id.*

Section 7 activity.[69] Indeed, the fact that the Employer, following the Charging Party's termination, conditioned (b) (6), (b) reinstatement on signing a supplemental independent contractor agreement and promising to cease (b) (6), (b) protected activities, confirms that the Employer's goal in misclassifying drivers was to chill their exercise of Section 7 rights. Further, the Employer's statement that the Employer had previously fired drivers for seeking unionization amounts to a statement that any attempts to organize would be futile.[70] Finally, the Employer's insistence to the Charging Party and other drivers that they are independent contractors and should abandon their collective action is akin to a misstatement of law that reasonably insinuates adverse consequences for employees' continued Section 7 activity.[71] Therefore, the Region should solicit an amended charge to include an additional Section 8(a)(1) allegation concerning the Employer's misclassification of employees as independent contractors.

Accordingly, for the foregoing reasons, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by unlawfully conditioning the Charging Party's reinstatement on (b) (6), (b) (7 waiver of Section 7 rights, in addition to violating Section 8(a)(1) by interrogating employees about their sympathies for the Charging Party's protected activities and threatening them with discharge if they challenged their independent contractor status. The Region should also solicit an amended charge to include a Section 8(a)(1) allegation for the Employer's misclassification of employees.

/s/
B.J.K.

H: ADV.06-CA-162363.Response.LibertyTransportation. (b) (6), (b) (7 doc

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[69] *See Parexel International, LLC*, 356 NLRB 516, 518, 519 (2011) (employer violates Section 8(a)(1) when it seeks to prevent protected concerted activity before such activity occurs).

[70] *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 6 (employer's statement that it would never accept a "boss/employee relationship" found violative where it amounted to statement of futility because employer would never bargain with a union).

[71] *See Wal-Mart Stores*, 340 NLRB 220, 225 (2003) (employer's statement to department managers that they could not participate in pro-union activities unlawful as misstatement of law where Board found managers not to be statutory supervisors).