

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

DATE: March 22, 2017

TO: Paula Sawyer, Regional Director
Region 27

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

SUBJECT: Western Logistics, Inc. & Central States 177-2484-5000
Logistics 177-2484-5067-3500
Cases 27-CA-179230 & 27-CA-179229

The Region submitted these cases for advice as to whether the Charging Party, a delivery driver for a nationwide delivery and logistics provider, is an independent contractor or an employee within the meaning of Section 2(3) of the Act.¹ We conclude, based on the evidence presented, that the Charging Party is an independent contractor.

FACTS

Western Logistics, Inc., and Central States Logistics, Inc., are two separate companies that both do business as “Diligent Delivery Systems” (“Diligent”). Diligent characterizes itself on its website as a nationwide “transportation and logistics service provider” that offers eight distinct services, six of which involve some form of delivery service. Diligent explains that its business also consists of consulting with clients about how to improve their logistics operations, including by performing the clients’ delivery services. Diligent thus characterizes itself as a “broker” that maintains a nationwide pool of approximately 3,800 independent owner-operators willing to provide delivery services for its clients. Broadly, these delivery services fall under two categories: hot-shot deliveries and dedicated deliveries. Hot-shot deliveries are for clients who need sporadic or infrequent delivery services, while dedicated delivery services are for clients who need such services on a daily basis.

¹ The Region also requested advice as to whether—if the Charging Party is indeed an employee—the provider attempted to enforce an unlawful class action waiver within the Section 10(b) period and, if so, whether it would effectuate the purposes of the Act to issue complaint. Because we conclude that the Charging Party is an independent contractor, we need not address the Region’s questions concerning the class-action waiver.

On April 1, 2013 the Charging Party signed an Owner Operator Agreement with Diligent to perform dedicated delivery services and on June 28, 2013, (b) (6), (b) (7)(C) signed an Owner Operator Agreement to perform hot-shot delivery services. The Charging Party signed the agreements under (b) (6), (b) (7)(C) company's name, (b) (6), (b) (7)(C), which is a (b) (6), (b) (7)(C) business (b) (6), (b) (7)(C) runs with (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) signed the agreements under (b) (6), (b) (7)(C) company's name because the insurance benefits for (b) (6), (b) (7)(C) truck, which (b) (6), (b) (7)(C) used both to sell and deliver (b) (6), (b) (7)(C) as well as deliver items for Diligent's clients, were greater under (b) (6), (b) (7)(C) company's policy than if (b) (6), (b) (7)(C) had procured a personal policy. The Charging Party was based in Colorado Springs, and performed all of (b) (6), (b) (7)(C) duties by driving directly to Diligent's clients' facilities, rather than Diligent's facility, which is in Denver. Initially, the Charging Party trained for two days at (b) (6), (b) (7)(C) (b) (6), (b) (7)(C), one of Diligent's clients. Diligent claims that it did not require this training, but that (b) (6), (b) (7)(C) required the training in order to allow the Charging Party to deliver for it. After that training, the Charging Party worked for a (b) (6), (b) (7)(C) for approximately a (b) (6), (b) (7)(C) as a dedicated delivery driver. (b) (6), (b) (7)(C) then took a hot-shot job delivering (b) (6), (b) (7)(C) twice daily for a local (b) (6), (b) (7)(C) store. Diligent offered the Charging Party the opportunity to perform the same (b) (6), (b) (7)(C) hot-shot route three times a day, but that schedule conflicted with (b) (6), (b) (7)(C) business, so (b) (6), (b) (7)(C) turned it down. Diligent then offered the Charging Party a dedicated delivery job at (b) (6), (b) (7)(C) where (b) (6), (b) (7)(C) worked until approximately (b) (6), (b) (7)(C) or (b) (6), (b) (7)(C), 2015.²

As noted above, the Charging Party provided (b) (6), (b) (7)(C) own pick-up truck and insurance and paid for (b) (6), (b) (7)(C) gas. The Charging Party's truck was not required to bear Diligent's name or any other markers. The Charging Party states that (b) (6), (b) (7)(C) had an established start time and established routes at each of (b) (6), (b) (7)(C) jobs. Moreover, (b) (6), (b) (7)(C) claims that (b) (6), (b) (7)(C) was required to install an "app" on (b) (6), (b) (7)(C) phone through which (b) (6), (b) (7)(C) was monitored at all times. The parties' agreements, however, state that Diligent has no right to determine drivers' routes or times. Diligent asserts that any direction or monitoring the Charging Party may have received was provided by Diligent's clients and not Diligent.

The Charging Party was compensated on a one-time basis for hot-shot jobs and on a monthly basis (regardless of the number of hours worked) for dedicated delivery services. Diligent did not make deductions from these payments. Although the Charging Party states that compensation was non-negotiable, the parties' agreements state that payment for each job will be negotiated by the parties, and there is evidence that, on at least one occasion, Diligent solicited a proposal from the Charging Party regarding compensation.

² All remaining dates are in 2015, unless otherwise noted.

The parties' agreements also state that the Charging Party is free to hire other individuals to perform delivery services for Diligent's clients, and that Diligent has no right to hire, fire, discipline, or set compensation rates for anyone the Charging Party hires in this manner. Indeed, the evidence demonstrates that other owner-operators in Colorado hired several additional drivers in order to serve multiple clients simultaneously. While working for (b) (6), (b) (7)(C), the Charging Party was required to wear a shirt that said "(b) (6), (b) (7)(C)" on it; while working for (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), the Charging Party wore a shirt that bore Diligent's name.

The Charging Party's agreements with Diligent lasted one year and were scheduled to renew each year unless one party gave the other party notice. Under the terms of the agreements, the Charging Party was not guaranteed work, could decline work offered by Diligent, and was free to work for others. The agreements also unambiguously state that the Charging Party is an independent contractor, and that the parties do not intend to create an employment relationship. The Charging Party claims that Diligent frequently told owner-operators that they did not "work for" Diligent.

In early March, (b) (6), (b) (7)(C) notified Diligent that it no longer wished to use the Charging Party's services. Thereafter, Diligent offered the Charging Party additional jobs, which the Charging Party turned down on the advice of (b) (6), (b) (7)(C) attorney. On March 23, the Charging Party filed a class-action lawsuit in the United States District Court for the District of Colorado alleging that (b) (6), (b) (7)(C) had been misclassified as an independent contractor. (b) (6), (b) (7)(C) filed the instant charge on June 27, 2016, alleging that Diligent had attempted to enforce an arbitration clause with an unlawful class-action waiver against (b) (6), (b) (7)(C).

ACTION

We conclude that the Charging Party is an independent contractor and not an employee within the meaning of Section 2(3) of the Act.³ Accordingly, the Region should dismiss the charge, absent withdrawal.

In *FedEx Home Delivery*, the Board recently reaffirmed that in determining whether a particular worker is an independent contractor or an employee, the Board

³ Most of the evidence obtained by the Region involves the relationship between Diligent and the Charging Party. Based on the evidence establishing that the Charging Party is an independent contractor, and in the absence of evidence that other owner-operators are treated differently, there is insufficient basis to conclude that the other owner-operators are employees.

will apply the traditional common-law factors enumerated in the Restatement (Second) of Agency § 220, with no single factor being determinative.⁴ 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.
- (b) Whether or not the one employed is engaged in a distinct occupation or business.
- (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.
- (d) The skill required in the particular occupation.
- (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing 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.⁵

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*

⁴ 361 NLRB No. 55, slip op. at 2 (Sept. 30, 2014) (concluding that package delivery drivers were statutory employees rather than independent contractors), *enforcement denied*, –F.3d –, 2017 WL 836596 (D.C. Cir. March 3, 2017).

⁵ *Id.* (quoting Restatement (Second) of Agency § 220 (1958)).

business.”⁶ 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.⁷ The Board also noted that it will construe the independent contractor exclusion narrowly, and that the burden of proof is on the party asserting independent contractor status.⁸

Unlike in *FedEx Home Delivery*, we conclude that the evidence here demonstrates that the Charging Party is indeed rendering services to Diligent as part of an independent business. Thus, Diligent imposes almost no restrictions on how the owner-operators operate their delivery businesses—including whether they hire their own employees and, if so, whom. The agreements allow owner-operators to negotiate compensation for offered jobs and there is evidence that Diligent solicited a compensation proposal from the Charging Party. Owner-operators also have the contractual right and practical ability to deliver for other businesses while also delivering for Diligent. In fact, the Charging Party used (b) (6), (b) (7)(C) business, including its truck, to make deliveries for Diligent’s clients. This evidence demonstrates that the Charging Party had actual, and not merely theoretical, entrepreneurial opportunity. We conclude, therefore, that the factors, on balance, demonstrate that the Charging Party is an independent contractor.

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

Diligent asserts that it controlled virtually no aspect of the Charging Party’s duties.⁹ Although the Charging Party alleges that (b) (6) had established start times and routes and that (b) (6) was subject to monitoring by Diligent through an app on (b) (6), (b) (7)(C) phone, Diligent vigorously disputes the Charging Party’s characterization and asserts that

⁶ *Id.*, slip op. at 11 (emphasis in original).

⁷ *Id.*, slip op. at 12.

⁸ *Id.*, slip op. at 9-10, 12.

⁹ We rely heavily on the Owner Operator Agreements for evidence regarding the working relationship between Diligent and the Charging Party. Diligent maintains that the terms contained within the agreements are followed in practice, and the Charging Party has not offered any evidence to rebut Diligent’s claim.

any such control was exercised by Diligent's clients, not Diligent itself.¹⁰ Diligent's position is supported by the parties' Owner Operator Agreements, which prohibit Diligent from instructing owner-operators about how to perform their deliveries, including by establishing routes or hours of work.¹¹ Further, Diligent did not provide the Charging Party with any sort of handbook or guidance on how to complete [REDACTED] jobs. [REDACTED] was also unaware of any disciplinary policy or procedures.¹²

Additionally, the Charging Party suffered no adverse consequences for declining work from Diligent. For example, the Charging Party declined an additional route while working the hot-shot job for [REDACTED] because the additional time would have conflicted with [REDACTED] own (b) (6), (b) (7)(C) business, and Diligent nevertheless continued to offer [REDACTED] delivery jobs. For these reasons, we conclude that this factor favors independent contractor status.

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

The Charging Party signed the Owner Operator Agreements with Diligent in [REDACTED] company's name and used that company, including its insured delivery truck, to deliver concurrently for [REDACTED] own business as well as for Diligent's clients.¹³ Indeed, [REDACTED]

¹⁰ To the extent that Diligent's clients, such as [REDACTED] exercised control over the Charging Party, we could find no case law that would support imputing that control to Diligent, and there is no evidence that Diligent was the source of any such control.

¹¹ *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 Sister's 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).

¹² *See Argix Direct, Inc.*, 343 NLRB at 1021 (lack of applicable employee handbook and disciplinary procedures support a finding of independent contractor status).

¹³ *See Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (Jan. 29, 2015) (finding factor weighed in favor of independent contractor status where crew leaders provided own insurance and supplied and maintained own equipment that they used both for putative employer and other contractors); *Dial-a-Mattress Operating Corp.*, 326

turned down work offered through Diligent because it conflicted with (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) business.¹⁴

Moreover, the Charging Party did not display Diligent's logo or any other markings on (b) (6), (b) (7)(C) vehicle. Although (b) (6), (b) (7)(C) was required to wear a shirt with Diligent's name on it while working for (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), the Charging Party wore a shirt that said "(b) (6), (b) (7)(C)" while working for that client, which is also where (b) (6), (b) (7)(C) worked the longest.¹⁵ On balance, we find that this factor weighs in favor of independent contractor status.

C. Whether Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision Weighs in Favor of Independent Contractor Status

The Charging Party received no personal supervision while performing deliveries for Diligent. (b) (6), (b) (7)(C) did not operate out of Diligent's Denver location but instead worked directly out of clients' facilities. Although the Charging Party claims that (b) (6), (b) (7)(C) was monitored through an app on (b) (6), (b) (7)(C) phone, Diligent explains that a client required installation of the app and monitored the Charging Party, not Diligent itself. Diligent's assertion that it did not monitor the Charging Party is supported by the parties' agreements that prohibited Diligent from providing any instruction on how the Charging Party completed (b) (6), (b) (7)(C) assignments.¹⁶ We conclude that this factor favors independent contractor status.

NLRB 884, 891 (1998) (same; owner-operators used own vehicles when delivering for putative employer and other companies).

¹⁴ See *Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (finding factor weighed in favor of independent contractor status where crew leaders did not work exclusively for the putative employer).

¹⁵ See *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13 (finding factor weighed in favor of employee status where drivers' uniforms, logos, and colors on vehicles indicated they worked for the employer).

¹⁶ See *Dial-a-Mattress Operating Corp.*, 326 NLRB at 892 (finding factor favors independent contractor status where drivers directed themselves by primarily working away from putative 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).

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

The Charging Party was not required to have any specialized training or skills. The only training ^{(b) (6), (b) (7)(C)} received was two days of training at ^{(b) (6), (b) (7)(C)} which was required by ^{(b) (6), (b) (7)(C)}, not Diligent itself. Indeed, the parties' agreements forbid Diligent from providing any training to owner-operators. In any event, it is unlikely that the Board would consider two days of training sufficient to find independent contractor status, given that the Board in *FedEx Home Delivery* concluded that two weeks' worth of training was not sufficient to weight this factor towards independent contractor status absent any other required skills or training.¹⁷ Accordingly, we conclude that this factor weighs in favor of employee status.

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

Owner-operators provide their own trucks, which are the primary instrumentality of their work, and there is no evidence that Diligent facilitated drivers' purchase of their vehicles. Owner-operators' trucks are not required to display Diligent's name or any other markings. Additionally, pursuant to the parties' agreements, owner-operators are solely responsible for purchasing any fuel, equipment, or accessories needed to complete assignments for the clients. Further, the Charging Party was based in Colorado Springs and operated out of clients' facilities, rather than reporting to Diligent's office in Denver. We conclude that this factor weighs in favor of independent contractor status.¹⁸

¹⁷ 361 NLRB No. 55, slip op. at 13.

¹⁸ See *Argix Direct, Inc.*, 343 NLRB at 1020 (finding drivers had significant proprietary interest in the instrumentalities of their work where the drivers were solely responsible for obtaining their vehicles); *Dial-a-Mattress Operating Corp.*, 326 NLRB at 892 (finding fact that drivers primarily work away from putative employer's warehouse and need not return to warehouse at the end of the day weighs in favor of independent contractor status). See also *FedEx Home Delivery*, 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 role in facilitating vehicle acquisition and drivers worked out of the employer's warehouse facility).

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

The parties' agreements last for one year and automatically renew at the end of the year, thus facially resembling the agreements in *FedEx Home Delivery* that the Board found effectively created a permanent working relationship indicative of employee status.¹⁹ However, the parties' actual working relationship more closely resembles the one in *Porter Drywall, Incorporated*,²⁰ in which crew leaders were assigned "project-based" jobs. There, the putative employer was a drywall installation company that maintained a list of crew leaders to aid it in various phases of installation.²¹ The crew leaders, in turn, could hire drywall installers to aid them on specific projects.²² In rejecting the petitioner union's contention that the crew leaders had more or less a permanent working relationship with the putative employer, the Board placed special emphasis on the fact that the crew leaders could work for other drywall companies and that some crew leaders, in fact, worked for multiple drywall companies at the same time as working for the putative employer.²³

The same is true here. The parties' agreements specify that the Charging Party is free to accept or decline work referred by Diligent and may work for any other company at the same time. This opportunity was not merely theoretical, as the Charging Party concurrently delivered for [REDACTED] own [REDACTED] business while delivering for Diligent. In fact, the Charging Party declined work offered by Diligent to accommodate [REDACTED] business. Rather than delivering exclusively and continuously for Diligent, the Charging Party delivered for [REDACTED] own business and, at [REDACTED] convenience, worked for three separate clients in three different locations over the course of [REDACTED] working relationship with Diligent. For these reasons, we find that this factor is more akin to the "project-based" employment at issue in *Porter Drywall* rather than the permanent relationship at issue in *FedEx*, and thus supports a finding of independent contractor status.

¹⁹ *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14. See also *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).

²⁰ 362 NLRB No. 6.

²¹ 362 NLRB No. 6, slip op. at 1.

²² *Id.*

²³ *Id.*, slip op. at 4.

G. Method of Payment Weighs in Favor of Independent Contractor Status

The Charging Party was paid by the job for (b) (6), (b) (7)(C) hot-shot deliveries and by the month for (b) (6), (b) (7)(C) dedicated delivery work, and the monthly salary for dedicated delivery work did not vary depending on the number of hours (b) (6), (b) (7)(C) worked. The Charging Party's contention that pay rates were nonnegotiable is contradicted by the parties' agreements that explicitly state that all job rates are negotiable, as well as evidence that Diligent invited the Charging Party to negotiate compensation for an offered job. Additionally, Diligent does not make any deductions or withholdings from owner-operators' pay. Thus, we conclude that this factor supports independent contractor status.²⁴

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

Diligent presents itself to the public via its website as a “nationwide *transportation* and logistics service provider” (emphasis added). Of the eight distinct services offered on Diligent's website, six involve some sort of delivery service, including hot-shot deliveries and dedicated deliveries. Thus, because the Charging Party performed delivery services that are at the core of Diligent's business, we conclude that this factor weighs in favor of employee status.²⁵

²⁴ See *Dial-a-Mattress Operating Corp.*, 326 NLRB at 893 (finding fact that pay was negotiable and owner-operators were paid flat fee to weigh in favor of independent contractor status). Compare *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14 (although employer's failure to make deductions suggested independent contractor status, the nonnegotiable nature of drivers' pay, combined with a payment methodology that insulated drivers from loss and prevented meaningful gain, supported a finding of employee status).

²⁵ 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 putative employer that was “the very core of [the putative employer's] business”).

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

The parties' agreements state that drivers are "owner-operators" who "shall [not] in any way or for any purpose be considered an agent, servant, employee, partner, or co-venturer of [Diligent]." But the Board has held that such language in a nonnegotiable contract is not dispositive of independent contractor status.²⁶ Thus, we conclude that this factor is neutral.

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

Diligent advertises itself, in part, as a transportation and delivery services provider. Because the Charging Party provided delivery services, which is the same business Diligent advertises to the public, we conclude that this factor weighs in favor of employee status.²⁷

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

In *FedEx Home Delivery*, the Board clarified that this factor actually encompasses four subfactors: actual entrepreneurial opportunity for gain or loss, a realistic ability to work for other companies, a proprietary or ownership interest in the work, and control over important business decisions, such as scheduling, hiring, equipment purchases, and capital commitments.²⁸

²⁶ See *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14; *Porter Drywall*, 362 NLRB No. 6, slip op. at 5.

²⁷ See *FedEx Home Delivery*, 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); *Porter Drywall*, 362 NLRB No. 6, slip op. at 5 (finding factor in favor of employee status where putative employer's drywall installation business was the same as the crew leaders' businesses).

²⁸ 361 NLRB No. 55, slip op. at 12.

i. Actual entrepreneurial opportunity for gain or loss

The Charging Party was paid a flat rate for all jobs, regardless of the time needed for completion, and the evidence indicates that those rates were negotiable. In addition, owner-operators were permitted to hire drivers to assist them, and several owner-operators increased their entrepreneurial opportunities by taking on multiple jobs simultaneously and having these drivers perform deliveries for those clients.²⁹ Thus, unlike the delivery drivers in *FedEx Home Delivery*, the evidence here demonstrates that the Charging Party had actual—and not merely theoretical—entrepreneurial opportunity. Therefore, we conclude this subfactor weighs in favor of independent contractor status.

ii. A realistic ability to work for other companies

The parties' agreements explicitly allowed the Charging Party to perform delivery services for other companies, and indeed the Charging Party performed deliveries for ^{(b) (6), (b) (7)(C)} own company—**(b) (6), (b) (7)(C)**—while concurrently delivering for Diligent's clients.³⁰ Indeed, in order to accommodate ^{(b) (6), (b) (7)(C)} business, the Charging Party declined additional work offered by Diligent, with no repercussions.³¹ Thus, we find this subfactor weighs in favor of independent contractor status.

iii. Proprietary or ownership interest in the work

The Charging Party did not possess any proprietary interest in Diligent's clients or routes. Rather, Diligent offered jobs to the Charging Party as they became available. This subfactor thus weighs in favor of employee status.

²⁹ See *Argix Direct, Inc.*, 343 NLRB at 1020-21 (fact that five of the owner-operators were entrepreneurs who owned 20 of the 63 trucks under their own companies supported independent contractor status).

³⁰ Compare *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 15 (fact that drivers were effectively prevented from working for others because of work hours and commitment to employer "highly significant" and indicated employee status).

³¹ Cf. *Roadway Package Systems*, 326 NLRB 842, 851 (1998) (fact that drivers are prohibited from using trucks during working hours for outside businesses, combined with incentive to keep trucks overnight at employer's facility, effectively undercut any entrepreneurial ability).

iv. Control over important business decisions

The Charging Party had the ability to make important decisions affecting (b) (6), (b) business. Thus, the evidence demonstrates that the owner-operators have an unfettered right to hire and fire their own employees.³² Moreover, the Charging Party was free to accept or decline any work offered to (b) (6), (b), and in fact turned down work to accommodate (b) (6), (b) own business.³³ Finally, the Charging Party alone was responsible for acquiring and maintaining (b) (6), (b) truck, insurance, and any related equipment. Thus, we conclude that this subfactor also weighs in favor of independent contractor status.

Overall, the “Independent Business” factor weighs in favor of independent contractor status.

Conclusion

We conclude that the evidence establishes that the Charging Party is an independent contractor. Although there are certain indicia that lean toward finding employee status—e.g., the skill involved and the fact that drivers perform an integral aspect of Diligent’s business—we find that these factors are outweighed by the other indicia of independent contractor status. Thus, Diligent exercises almost no control over how the Charging Party performed deliveries for clients, the Charging Party supplied (b) (6), (b) own truck and insurance that (b) (6), (b) used while delivering both for Diligent and (b) (6), (b) own business, (b) (6), (b) was able and invited to negotiate pay rates, and (b) (6), (b) rendered (b) (6), (b) services to Diligent as part of a genuinely independent business, with the ability to hire and fire (b) (6), (b) own employees and with opportunities for entrepreneurial gain and loss.

³² See *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 15 (finding the right to hire and fire employees indicative of independent contractor status, notwithstanding that other factors—such as effectively being prevented from working for others because of working arrangement with employer—meant that the drivers did not have meaningful entrepreneurial opportunity and were employees).

³³ See *Porter Drywall*, 362 NLRB No. 6, slip op. at 5 (deciding whether to take a particular job and hire others for it, combined with ability to work for others, presents real opportunity for economic gain or loss).

For these reasons, we conclude that the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

ADV.27-CA-179230.Response.WesternLogistics. (b) (6), (b) (7)(C)