UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FEDEX HOME DELIVERY, AN OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC. Charged Party/Respondent, and **INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 671,** Charging Party/Petitioner.	:	CASES 34-CA-12735, 34-RC-2205

FEDEX'S MOTION FOR RECONSIDERATION OF THE BOARD'S SEPTEMBER 30, 2014 DECISION AND ORDER

Pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations, Charged Party/Respondent FedEx Home Delivery ("FedEx" or "Company") moves for reconsideration by the Board of its September 30, 2014 Decision and Order in the above referenced matter (hereafter the "9/30/14 Decision"). As further explained below, the Board's 9/30/14 Decision fails to adhere to controlling judicial and statutory authority, departs from longstanding Board precedent without rational explanation, and is not supported by substantial evidence in the record as a whole. The Board's decision also violates FedEx's due process rights by imposing a new evidentiary and substantive standard of proof of independent contractor status on a retroactive basis, with severely prejudicial impact on the Company.

I. PROCEDURAL HISTORY

The procedural history of this case is set forth in the Board's 9/30/14 Decision, but certain points pertinent to FedEx's current motion are worthy of additional note:

On February 2, 2007, Teamsters Local 671 ("Petitioner") filed a petition seeking an election for a unit of "single route contract drivers" operating out of the Company's facility in Windsor, Connecticut ("Hartford facility"). A hearing was held in which FedEx submitted substantial evidence of the drivers' entrepreneurial opportunities, which the Regional Director found to be "significant." *See* Regional Director's Hartford Decision and Direction of Election ("DDE"), slip op. at 9, 21, 28-30 (April 11, 2007).[1] Of particular significance to the present Motion, the parties and the Regional Director incorporated into the record of the hearing in this case the entire record of *FedEx Home Delivery (Wilmington, MA),* Case Nos. 1-RC-22034 and 22035, along with the records of several other representation hearings presenting similar facts at other FedEx facilities. DDE, slip op. at 3; *see also* 9/30/14 Board Decision, Dissenting Opinion of Member Johnson, slip op. at 32, n.49.

On April 11, 2007, the Regional Director held that the Hartford drivers were not independent contractors and directed that an election be held in the following described unit:

> All contract drivers employed by the Employer at its Hartford Terminal; but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees and supervisors as defined in the Act. [2]

At the time of the Hartford election there were 20 single route contractors in the

[1] FedEx specifically submitted evidence of drivers' ability to hire other drivers; drivers' ability to sell routes, and drivers' ability to operate multiple routes. *Id*., *see also* the Board's 9/30/14 Decision, slip op. at 7. As noted therein, the Hearing Officer, upheld by the Regional Director, refused to allow FedEx to introduce evidence of FedEx's system-wide entrepreneurial opportunities for drivers. *Id*.

[2] The Regional Director expressly cited and relied on the Boston Regional Director's decision in the "related case" involving FedEx's Wilmington, MA drivers, referenced above, including the Board's denial of FedEx's Request for Review in that case. Slip op. at 3, 24.

petitioned-for unit. There were 12 "yes" votes, 9 "no" votes, and 2 unopened challenged ballots – one by the Petitioner and one by the Company. FedEx filed objections to the election. On September 29, 2008, the Board sustained FedEx's objections, found error in the conduct of the election, and remanded for further proceedings.

Meanwhile, on April 21, 2009, in the factually indistinguishable Massachusetts case that had been made part of the record in this case, the United States Court of Appeals for the D.C. Circuit ruled that single route contractors for FedEx Home Delivery operating at two Boston facilities were "independent contractors and not employees." *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (hereafter the "Boston Decision"). Among other holdings pertinent to this Motion, the D.C. Circuit in that case held that drivers' "ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor independent contractor status." *Id.* at 504. Among the entrepreneurial opportunities present in FedEx's Boston operations that were likewise present in Hartford were the facts that drivers were able to sell their routes, and two drivers had done so. *Id*. at 500. The court also found it significant that drivers were permitted to operate multiple routes, and that drivers could use their self-owned trucks to conduct independent business. *Id*. at 499. Finally, the D.C. Circuit unanimously held in the Boston case that the Board was required to admit and assess system-wide evidence of the number of route sales and the amount of profit, if any, on such sales. *Id*.[3]

The Board and the Teamsters filed petitions for rehearing *en banc* from the D.C. Circuit's

[3] Even Judge Garland, who dissented in part from the court's Boston Decision, agreed with the majority that the exclusion of FedEx's proffered system-wide data was "particularly arbitrary" and compelled granting FedEx's petition for review. *Id.* at 518.

Boston Decision, which the D.C. Circuit denied on Sept. 4, 2009. The Board and the Teamsters then chose not to petition for certiorari at the Supreme Court. Accepting the D.C. Circuit's Boston Decision as the law of the case, the Boston Regional Director dismissed all pending charges, and the General Counsel's Office of Appeals denied a driver's appeal from the Regional Director's dismissal. *See* General Counsel's letter dated Jan. 20, 2010, attached to FedEx's 2010 Motion to Dismiss the current proceedings. *See also* FedEx's Aug. 26, 2010 Response to Notice to Show Cause, at 8.

It is undisputed that FedEx's Boston and Hartford facilities were operationally indistinguishable with regard to the contract drivers. Indeed, as noted above, the record of the Boston NLRB representation hearing was incorporated by agreement of the parties into the record of the present case. DDE, slip op. at 3. Accordingly, on March 17, 2010, FedEx filed with the Board a Motion to Dismiss the representation petition in this matter based on the D.C. Circuit's Boston holding.[4] The Motion to Dismiss to the Board also proffered additional evidence supporting the entrepreneurial opportunities of the Hartford drivers, as follows:

(1) Between the 2007 hearing and the 2010 Motion, five more single route drivers at Hartford had exercised their options to operate multiple routes. Motion at 4, citing Finch Affidavit.

(2) As a result, by 2010, a majority of the drivers operating the 30 contracted routes at Hartford were multiple route contractors, who by that time operated 26 of the 30 routes. *Id*.

(3) Also, the number of route sales by Hartford drivers had grown from two at the time of the 2007 hearing to more than 20 by 2010. *Id*. at 4-5.

(4) The number of Hartford drivers who had incorporated their businesses had doubled

[4] An earlier motion to dismiss filed with the Regional Director was not addressed either by that official or by the Administrative Law Judge who issued a supplemental decision on FedEx's election objections.

between 2007 and 2010, increasing from three to six. *Id*. at 5.

(5) As of January 1, 2010, 65.5% percent of all routes nationwide were serviced by multiple route contractors. *Id*.

On May 27, 2010, however, the Board issued a Decision and Certification of Representative, without acknowledging or ruling on FedEx's Motion to Dismiss. After FedEx refused to bargain with the Union (in order to challenge the Board's Certification), the Board on October 29, 2010 issued a Decision and Order finding FedEx violated Section 8(a)(5) of the Act.[5] FedEx filed a Petition for Review of the Board's Decision and Order in the D.C. Circuit and further filed a Motion for Summary Disposition with the D.C. Circuit based on the Court's "controlling" finding in the Boston FedEx case. In its Motion, FedEx again pointed out that the Boston record had been made part of the record in the present case, that the Board had acquiesced to the appeals court's Boston Decision by failing to appeal from it and dismissing all charges relating to it, and that the contract status of the Hartford drivers was indistinguishable in every material respect from the Boston contract drivers.

On January 7, 2011 the Board vacated and set aside its October 29, 2010 Decision and Order based on Section 10(d) of the Act. After the D.C. Circuit granted the Board's motion to dismiss FedEx's petition for review, the Board retained the case on its docket for nearly four years, until finally issuing the 9/30/14 Decision and Order that is the subject of this Motion. As discussed in greater detail below, the Board's 9/30/14 Decision has refused to adhere to the D.C. Circuit's controlling decision in the Boston case. In taking this action, the Board has purported to

[5] The Board's Decision failed meaningfully to address FedEx's Response to Notice to Show Cause filed on Aug. 26, 2010, incorporating and attaching FedEx's July 2, 2010 Proffer of entrepreneurial evidence at both Hartford and system-wide. (Exhibit 9 to FedEx's Response). The 2010 proffer highlighted among other things, the increased number of drivers owning and operating multiple service areas; incorporating their businesses; hiring others to service their areas and operate additional vehicles; buying and selling routes and vehicles; generating wide ranges of gross income; and other activities influencing income based on contractors' efforts, ingenuity and business judgment. *Id*.

"refine" its standard for determining whether drivers are independent contractors, in effect creating a new standard that departs without rational explanation from the Board's own precedent and directly controlling D.C. Circuit authority. Even worse, the Board has applied its new standard retroactively and unfairly to FedEx, depriving the Employer of its due process right to a fair hearing on the independent contractor issue and changing the evidentiary standard of proof that FedEx was required to submit. The 9/30/14 Decision improperly discounted or rejected both the entrepreneurial evidence submitted by FedEx at the 2007 hearing and the post-2007 information that accompanied FedEx's 2010 Motion to Dismiss and subsequent Response to Notice to Show Cause, in direct violation of the D.C. Circuit's Boston Decision.

On October 8, 2014, FedEx filed a Petition for Review with the D.C. Circuit from the Board's 9/30/14 Decision and Order. *FedEx Home Delivery v. NLRB*, C.A. No. 14-1196 (D.C. Cir.) (appeal pending). As of the present time, however, the transcript of the record in this case has not yet been filed with the Court, and the Board retains jurisdiction to address timely filed Motions. *See* 29 U.S.C. 160(d) and (e). The present Motion for Reconsideration is being filed well within the 28-day time period specified in Section 102.48 of the Board's Rules.

II. ARGUMENT

A. Legal Standard.

Section 102.48(d)(1) of the Board's Rules and Regulations provides that "a party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." Further pursuant to this Rule, "A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on." 29 C.F.R. § 102.48(d)(1).

Pursuant to 29 C.F.R. § 102.49 of the Board's Rules and Regulations, "until a transcript of the record in a case shall have been filed in a court, within the meaning of Section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it." *See also* 29 U.S.C. § 160.

B. Statement of Material Errors That Should Be Reconsidered By The Board

As detailed below, the Board's 9/30/14 Decision has improperly redefined the standard of proof of independent contractor status, particularly with regard to the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss. The Board's new standard conflicts with the D.C. Circuit's controlling Boston decision, with the Board's own precedents, with decisions of the U.S. Supreme Court, and with the Taft Hartley Act. Even if the new standard were somehow to be found lawful under the Act, the Board has misapplied the new standard to FedEx's drivers, who should still have been found to be independent contractors under the facts of this case. Finally, the Board has departed from its own precedent without explanation by improperly applying the new standard retroactively to FedEx, without considering the manifest injustice resulting from such retroactive application.

1. The Board's Stated Reasons For Failing To Adhere To The D.C. Circuit's Controlling Boston Decision And The Board's Own Precedents Are Irrational, Arbitrary and Capricious.

At the outset, the Board has improperly refused to follow the D.C. Circuit's controlling Boston Decision with regard to the correct standard for determining independent contractor status, and that standard's application to the facts of this case, particularly as to the weight that should be given to entrepreneurial opportunity. As noted above, the record on which the Boston Decision was based was made part of the record in the present case, so the Board's 9/30/14 Decision is based upon the *same facts* (along with facts relating specifically to the Hartford drivers that are indistinguishable from the facts in the Boston case); in addition, the Board acquiesced to the appeals court's Boston Decision by failing to appeal from it and dismissing all charges relating to it; finally, it is undisputed that the contract status of the Hartford drivers was indistinguishable in every material respect from the Boston contract drivers.

Under these circumstances, the Board was required to adhere to the D.C. Circuit's Boston Decision as the "law of the case." The 9/30/14 Decision, however, improperly failed to acknowledge this legal requirement, and thereby exceeded the Board's authority under the Administrative Procedure Act and the NLRA. *See, e.g., NLRB v. Goodless Bros. Elec. Co., Inc.*, 285 F. 3d 102, 107 (1st Cir. 2002) (reversing Board decision that failed to adhere to appeals court's previous holding); *NLRB v. Indianapolis Power & Light*, 898 F. 2d 524 (7th Cir. 1990) (same); *Ithaca College v. NLRB*, 623 F. 2d 224 (2d Cir. 1983) (reversing Board failure to adhere to appeals court's holding in related case).

Even if it were somehow free to depart from the D.C. Circuit's controlling decision on the same facts, the Board's criticism of the D.C. Circuit's Boston Decision was entirely unjustified. First, the Board took issue with the court for "treat[ing] the existence of 'significant

entrepreneurial opportunity' as the overriding consideration in all but the clearest cases posing the independent-contractor issue under the Act." Slip op. at 3, 9. To the contrary, the D.C. Circuit held only that entrepreneurial opportunity is an important factor "where some factors cut one way and some the other," based on a fair reading of the Board's own decisions and settled judicial authority. The D.C. Circuit's Decision was fully consistent with the Supreme Court's holding in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), though that case is entirely distinguishable on its facts.

Based on the foregoing straw man mischaracterization of the D.C. Circuit's decision, the Board's 9/30/14 Decision incorrectly summarized extant Board law since the Board's "seminal" decision in *Roadway Package System,* 326 NLRB 842 (1998) *(Roadway III)*. In particular, the Board unfairly minimized its own previous cases such as *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000, *enfd*. 292 F. 3d 777 (D.C. Cir. 2002), and *Arizona Republic*, 349 NLRB 1040 (2007), in which the Board gave prominence to entrepreneurial opportunity as an important factor in independent contractor determinations. *Id*.[6] The Board likewise erred in its comparison of the D.C. Circuit's decision with past Board rulings where employee status was found based upon the absence of "any" significant entrepreneurial characteristics. *Id*. at 10. *Compare Roadway III, supra*, 326 NLRB at 853, and *Slay Transportation*, 331 NLRB at 1294. Indeed, it is the Board's new standard that fails to adhere to the agency's own decision in *Roadway III*, which held that a significant factor in an independent contractor determination under the NLRA is whether putative contractors have "significant entrepreneurial opportunity for gain or loss."

[6] The Board further erred in disclaiming its own focus on entrepreneurial opportunity in *Corporate Express*. *See* 9/30/14 Decision at 9, n.22. As the D.C. Circuit properly found in the Boston Decision: "In [*Corporate Express*], both this court and the Board, while retaining all of the common law factors, shifted the emphasis away from the unwieldy control inquiry in favor of a more accurate proxy: whether the "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss'." 292 F. 3d 777, 780, *quoting Corp. Express Delivery Sys*., 332 NLRB No. 144, at 6 (Dec. 19, 2000).

Id. at 851.

The Board's 9/30/14 Decision further erred in finding that the D.C. Circuit accepted FedEx's assertions of entrepreneurial opportunity with little weight given to "countervailing considerations." To the contrary, the D.C. Circuit's Boston Decision properly relied on the undisputed evidence that drivers were able to sell their routes for a profit. The Board has exaggerated the supposed constraints on such opportunities in this case and has ignored evidence that the number of route sales has increased substantially since 2007. 9/30/14 Decision, slip op. at 10. Significantly, the Board did not cite any *actual* imposition of constraints by FedEx on driver entrepreneurship, meaning that in this instance it is the Board that is relying on "theoretical" activity. The Board likewise improperly discounted evidence that numerous drivers have bought and sold multiple routes, which is itself evidence of actual entrepreneurial opportunity, and that the number of such multiple route drivers has increased substantially since 2007. *Id*.

Finally, contrary to the Board's 9/30/14 Decision, at 8, the Board is not entitled to any greater judicial deference than the D.C. Circuit gave it in defining independent contractor status. In this regard, the Board improperly relied on the inapposite Supreme Court holding in *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1971 (2013). Unlike that case, in this instance, Congress has spoken directly to the issue of independent contractors, and the Board had no authority to depart from past practice in contravention of Congressional intent by narrowing the class of independent contractors who are jurisdictionally exempt from the Act's coverage.[7]

Equally misguided was the Board's reliance on an inapposite decision of the Ninth

[7] The Board also ignored the holding by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 260 (1968), that because the application of the law in this context "involve[s] no special administrative expertise that a court does not possess," [the court] therefore "need not accord the Board's decision that special credence which we normally show merely because it represents the agency's considered judgment."

Circuit in *Alexander v. FedEx Ground Package System, Inc*., __ F. 3d __, 2014 WL 4211107 (9th Cir. 2014), in which that court decided that drivers should be considered employees of FedEx under the California Labor Code. *See* 9/30/14 Decision slip op. at 16, n.77. That issue was governed by state law under a multi-factor test that the California Supreme Court has described as being "different" from the common law principles that control determinations under the NLRA. *S.G.Borello & Sons v. Department of Industrial Relations*, 48 Cal.3d 341, 352 (1989). *See* 9/30/14 Decision, Dissenting op. at 22. For the same reason, the Board improperly relied on the case of *Slayman v. FedEx Ground Package System, Inc.,* __ F. 3d __, 2014 WL 4211422 (9th Cir. 2014). Compare *Merchants Home Delivery, Inc. v. NLRB*, 580 F.2d 966, 974-75 (9th Cir. 1978) (holding "entrepreneurial characteristics … tip decidedly in favor of independent contractor under the NLRA.").

Even if the Board somehow was permitted to refuse to abide by the D.C. Circuit's Boston Decision with regard to FedEx's evidence of entrepreneurial opportunities for its drivers, the Board has acted arbitrarily in departing from its own precedents by establishing a new and unlawful "independent business" test for independent contractor status. *Id*. at 11.[8] Contrary to the 9/30/14 Decision, the new standard is inconsistent with the Board's seminal decision in *Roadway III*, *supra*, 326 NLRB at 851, where the Board deemed system-wide entrepreneurial activities to be an important factor without requiring proof of any independent business to qualify as independent contractors. The cases relied on by the Board in the 9/30/14 Decision, slip op. at 12, do not support the creation of a new "independent business test" and are factually distinguishable from the present case. The Board further erred here in confining entrepreneurial

[8] Under the Board's newly announced test, the independent business factor encompasses whether the drivers: (a) have a "realistic ability to work for other companies;" (b) have "proprietary or ownership interest" in their work; and (c) have "control over important business decisions." *Id*. at 12. Contrary to the 9/30/14 Decision, substantial evidence in the record establishes that each of these criteria apply to the drivers at issue here, as further discussed below.

opportunity to those workers who are found to operate independent businesses and even then giving such evidence weight only when the employer has imposed no "constraints" on an individual's ability to render services as part of an independent business. *Id*. at 12. In this regard, the Board gave no rational explanation for its departure from and overruling of past precedent in *Arizona Republic, supra*, 349 NLRB at 1045, and *St. Joseph News-Press, supra*, 345 NLRB at 481-482.

2. The Board's Newly Announced Standard In This Case Conflicts With Congressional Intent And Settled Judicial Authority.

For the reasons convincingly argued by dissenting Member Johnson and incorporated herein by reference, the Board's 9/30/14 decision revives the discredited economic realities test of *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) and *U.S. v. Silk*, 331 U.S. 704 (1947). The Board's decision improperly reformulates the entrepreneurial activity factor as a minor aspect of a new, non-determinative "independent business" test. The Board's decision impermissibly discounts the historical significance of evidence pertaining to entrepreneurial opportunity under the traditional common-law agency test. Contrary to the Board's holding, the legislative history of the exemption for independent contractors shows that Congress clearly and specifically intended that the exemption should not be so narrowly construed. *See, e.g*., H.Rep. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947). As Member Johnson further explained, dissenting opinion at 22, the Board here has articulated another form of the economic dependency test that was rejected by Congress in 1947.

3. Even If The Board Were Permitted To Impose Its New "Independent Business" Test For Independent Contractor Status, The Board Erred In Failing to Find That The Drivers Here Met The New Standard.

The Board incorrectly posited that FedEx is asking that system-wide evidence of entrepreneurial opportunity "substitute for the absence of similar evidence relating to employees in the petitioned-for unit;" when in reality FedEx's system-wide evidence confirms the existence of "actual" opportunities in the unit that the Board has improperly discounted. *Id*. at 11. The entrepreneurial opportunity that was available to the petitioned-for unit was not limited to the Hartford station. FedEx did not impose any constraints on Hartford-based contractors' ability to acquire and operate routes outside of Hartford which is another reason why system-wide evidence of entrepreneurial evidence is relevant and should have been admitted. The Board committed reversible error by upholding the Regional Director's decision to exclude FedEx's system-wide evidence and by finding that such exclusion was "harmless error." *Id*.

Beyond the issue of system-wide entrepreneurial activity, the Board also erred repeatedly in applying its arbitrary new "independent business" test to the facts found by the Regional Director's DDE. Thus, the Board incorrectly held that FedEx exercises "pervasive control over the essential details of drivers' day-to-day work." *Id*. at 13. To the contrary, the Regional Director found that drivers enjoy considerable discretion over important facets of their work, including the order in which to deliver packages, the specific routes they travel, and when and where to start deliveries and take breaks. DDE at 11, 12, 28. The Board also ignored the extent to which drivers are engaged in a distinct occupation, DDE at 8, 12-13, giving excessive weight to stylistic issues such as clothes and insignia, and exaggerating the drivers' acceptance of guidance and assistance from FedEx. *Id*. The Board also erred in finding that FedEx "essentially directs" drivers' performance, notwithstanding clear evidence that drivers are free of supervision in their

work duties. *Id*. at 13; *compare* DDE at 28; *see also C.C. Eastern, Inc*., 309 NLRB 1070 (1992), *enf. denied*, 60 F. 3d 855 (D.C. Cir. 1995).

The Board further erred in finding that the significance of the drivers' undisputed ownership of their vehicles is "undercut considerably" by the Employer's "primary role in dictating vehicle specifications and facilitating vehicle transfers." *Id*. at 13-14. To the contrary, as the D.C. Circuit properly held, FedEx is a motor carrier subject to Department of Transportation regulations, and FedEx's effort to insure that drivers meet such standards is not evidence of an employee relationship. 563 F. 3d at 500. *See also Central Transport, Inc*., 299 NLRB 5 (1990). The Board also improperly found vehicle ownership to be a "neutral" factor when in reality it strongly augurs in favor of independent contractor status. *Id*. at 503; *see also C.C. Eastern, supra*, 60 F. 3d at 859.

The Board similarly erred in finding that 1-year or 2-year agreements signed by the drivers were somehow a "permanent working arrangement with the company…." *Id*. at 14. This finding is impossible to square with the evidence showing that numerous drivers negotiated new agreements and/or left the unit by purchasing multiple routes. *See* FedEx 2010 Response to Notice to Show Cause. Likewise, the Board unfairly discounted drivers' incentives in compensation and the absence of fringe benefits or accident insurance, while incorrectly asserting that FedEx "establishes and controls drivers' rates of compensation." *Id*. Lastly, the Board erred in finding "inconclusive" the obvious belief of the parties that they were creating an independent-contractor relationship. *Id*.

The Board further erred in giving "little weight" to the drivers' right to sell their routes and in characterizing such sales as "more theoretical than actual." *Id*. at 15. The fact that someone actually took an entrepreneurial opportunity is proof that the opportunity "actually"

existed. If "actual" entrepreneurial opportunity did not exist at the Hartford station, one would expect there would have been no drivers with more than one route or none who utilized a helper or supplemental driver. Yet, all of the foregoing facts are present here. The Board nevertheless has declared that the drivers' actual taking of their entrepreneurial opportunities amounted to nothing, because "not enough" people in the proposed unit took the opportunity and/or because by taking the opportunity of buying or selling their routes, the purchasing or selling drivers removed themselves from the unit. As Member Johnson accurately stated: "A sale is a realized opportunity. It is thus evidence of opportunity, not evidence of the absence or termination of opportunity." Dissent at 27.

At every stage of this proceeding, FedEx has produced evidence of route sales by drivers, including two such sales prior to 2007, and 20 more sales between 2007 and 2010. The Board's claim that FedEx retains too much control over such sales is itself based upon theoretical speculation rather than any evidence of actual impact on the sales themselves. *Id*. at 15. In this regard, the Board faults FedEx for failing to include evidence of the "circumstances of each sale or whether any profit was realized by the drivers." *Id*. at 15. There has never previously been such a proof requirement, and it is a violation of FedEx's due process rights for the Board to impose such a requirement retroactively in this case. In any event, FedEx did provide proof of driver profits from route sales, both system wide and at Hartford, which the Board's 9/30/14 Decision erroneously ignores. *See* FedEx 2020 Response to Notice to Show Cause. It is also undeniable, as Member Johnson observed, that there is a market for route sales among drivers, indicating that these are businesses of independent value that are being evaluated and sold by business owners, and are not "controlled" by FedEx. Dissent at 31. *See also* the D.C. Circuit's Boston Decision, 563 F. 3d at 502 ("[N]ot only do these contractors have the ability to hire

others without FedEx's participation, only here do they own their routes – as in they can sell them, trade them, or just plain give them away.").

The Board's refusal to consider the ability of drivers to acquire multiple routes is utterly circular, arbitrary and capricious. There is no rational basis for the Board to declare that buying and selling multiple routes cannot be counted as "entrepreneurial" because such sales "remove" single route drivers from the unit. *Id*. at 15. Contrary to the Board's Decision, acquisition of multiple routes does not constitute "severance" of an ongoing relationship with FedEx, but an entrepreneurial *expansion* of that relationship on the part of truly independent contractors. This is particularly significant in light of the post-hearing evidence submitted by FedEx with its 2010 Motion to Dismiss and Response to Notice to Show Cause, *i.e.,* that the number of single route drivers that went on to become multiple route drivers by purchasing other drivers' routes increased from three such drivers in 2007 to six drivers in 2010, which by that time was a majority of the drivers in the bargaining unit. *See* Finch Affidavit attached to FedEx March 2010 Motion to Dismiss. Accordingly, the Board erred by concluding that the evidence was insufficient to establish the members of the petitioned-for unit were rendering services to FedEx as part of their independent businesses, as newly defined by the Board.

4. The Board Erroneously Failed To Consider Whether The Retroactive Application Of Its Decision To The Drivers In This Seven-Year-Old Case Causes Manifest Injustice, As It Manifestly Does.

The present case presents the extraordinary situation in which the Board has acted in defiance of a controlling D.C. Circuit decision and has retroactively imposed a new evidentiary standard for proof of independent contractor status, seven years after a hearing was conducted under a previous standard. Under such circumstances, the Board's own precedent required the agency to consider whether a retroactive application of a change in the Board's standard of proof

of independent contractor status would cause manifest injustice. *Allied Mechanical Services, Inc*., 352 NLRB No. 83 (2008); *SNE Enterprises*, 344 NLRB 673 (2005). In determining whether retroactive application of a new Board standard will cause manifest injustice, the Board is supposed to balance three factors: "[1] the reliance of the parties on preexisting law; [2] the effect of retroactivity on accomplishment of the purposes of the Act; and [3] any particular injustice arising from retroactive application." *Id*. The Board engaged in no such analysis in this case.

It is clear that FedEx relied on preexisting standards in structuring its driver contracting program, and that such standards fully supported FedEx's contention that its drivers were (and are) independent contractors, as the D.C. Circuit found in its Boston decision. Far from accomplishing the purposes of the Act, the Board's change in its independent contractor test defies Congressional intent in the Taft Hartley amendments as interpreted by controlling judicial authority. Finally, it is manifestly unjust to fault FedEx for the manner in which the Company submitted its evidence of entrepreneurial opportunity in 2007 and 2010, and to discount that evidence, when FedEx's submissions complied with the Board's own evidentiary standards at the time, along with those of the courts.

Thus, the Board has committed reversible error by failing even to consider whether retroactive application of its new independent contractor standard causes a manifest injustice, and for failing to find that it does. The Board must reconsider this aspect of its Decision as well.

III. CONCLUSION

For the reasons stated above, and in FedEx's previous filings in these proceedings, which are incorporated herein by reference, the Board should grant FedEx's Motion, should reconsider its 9/30/14 Decision, and should vacate the certification of the Petitioner and the unfair labor practice findings against FedEx.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Reconsideration have been served electronically on the following, this 14th day of October, 2014:

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