

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FEDEX HOME DELIVERY, A SEPARATE
OPERATING DIVISION OF FEDEX
GROUND PACKAGE SYSTEM, INC.

Employer

and

Case 1-RC-21966

TRUCK DRIVERS UNION, LOCAL #170,
a/w INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner

ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election raises substantial issues with respect to the Regional Director's decision to affirm the hearing officer's refusal to admit into evidence the transcripts from the hearings in FedEx Ground Package Systems, Inc., 22-RC-12508 and FedEx Home Delivery, 4-RC-20974,¹ the Regional Director's decision to affirm the hearing officer's refusal to allow evidence of new route sales since the closing of the records in those cases, and the supervisory/joint employer status of contractor Matthew Kornn and swing contractor Robert Williams.

We find that the Regional Director properly affirmed the hearing officer's decision to incorporate the recent Region 22 and Region 4 FedEx decisions into the record, and to consider the facts as developed in these cases as facts applicable to the instant case, unless such facts were distinguished through litigation of these matters in the instant case. The Regional Director correctly declined, for purposes of administrative economy, to permit the Employer to relitigate facts applicable to all FedEx facilities, recently established in other cases.

~~Nevertheless, we find that the Regional Director erred by affirming the hearing officer's refusal to admit the transcripts from the prior FedEx cases. The Employer~~

¹ The Board denied review in Case 22-RC-12508 on January 26, 2005. In Case 4-RC-20974, the Board remanded the case solely on the status of the multiple route drivers and denied review in all other respects on August 3, 2005.

merely seeks to include the transcripts that form the factual basis for the Decisions that the Regional Director relied upon in making her Decision, in particular to aid the Board and parties in possible subsequent enforcement proceedings. Accordingly, we reverse the hearing officer's ruling on this matter, and modify the Decision to include the entire records from the hearings in Cases 22-RC-12508 and 4-RC-20974, solely for the purpose of ensuring that the record in the instant case contains the records upon which the Decisions in those cases are based.²

We further find that the Regional Director erred in affirming the hearing officer's ruling refusing to allow evidence of route sales that have occurred in the locations involved in Cases 22-RC-12508 (Fairfield, New Jersey) and 4-RC-20974 (Barrington, New Jersey) since the closing of the records in those cases. Once the hearing officer decided to incorporate these prior FedEx decisions into the record in the instant case and to rely on the facts therein, the parties should have been permitted to litigate any changed circumstances that may have occurred since the closing of the records in those cases. For the reasons discussed below, however, we find that, even considering the proffered evidence of new route sales at these locations, the Regional Director in this case properly found that the contractors are statutory employees. Thus, although the Regional Director erred in making this ruling, we find no basis to remand this case to the Regional Director to re-open the record and reconsider her decision.

In the Region 22 case, the Regional Director concluded that the experiences with route acquisitions, including sales, demonstrated that the overwhelming majority of routes had little or no clear economic value and their sales resulted in little or no significant profit to the seller-driver. In the Region 4 case, the Regional Director similarly found insufficient evidence that the Barrington routes had significant value. As noted, the Board denied review in both of those cases. The Employer now asserts that several contractors at both the Barrington and Fairfield locations have bought and sold routes for significant sums of money since the closing of the records in those cases. The Employer claims that had these contractors been permitted to testify, they would have demonstrated that, contrary to the findings in the Region

² The Employer does not contend that this error requires that this case be remanded to the Regional Director to reconsider her decision, nor do we find such action warranted.

22 and Region 4 cases upon which the Regional Director relies, the routes do have significant economic value.³

Even assuming that this additional evidence of route sales had been admitted into evidence, we do not find that the economic value of the route sales in those facilities to have bearing on the value of route sales in the instant case. In both the Region 22 and Region 4 cases, the Regional Directors limited their consideration of evidence of the route sales and entrepreneurial opportunity to the facilities at issue and rejected the Employer's argument that system-wide testimony about route sales and other entrepreneurial activity at FedEx terminals nationwide should have been admitted, and the Board denied the Employer's requests for review. In the instant case, the Regional Director similarly limited her consideration of evidence to route sales to the Worcester facility, finding that "the evidence suggests that the right to sell a route may be completely illusory, since there is no evidence that any contractor in the Worcester terminal has ever bought or sold a route." We again deny the Employer's request for review of this issue.

Accordingly, we reverse the Regional Director's finding that the hearing officer did not err by refusing to admit the additional evidence of route sales since the closing of the records in Cases 22-RC-12508 and 4-RC-20974.

Finally, regarding the status of Kornn and Williams, the Board finds that this issue may best be resolved through the use of the challenge procedure. Accordingly, the Regional Director's Decision is amended to permit contractor Matthew Kornn and swing contractor Robert Williams to vote by challenged ballot, and the Employer's Request for Review is denied in this and all other respects.

³ A review of the offer of proof in the record relied on by the Employer shows that testimony would have established that there have been six route sales since the close of the record at the Fairfield location. Three of these involved the sale of a route without the accompanying sale of a vehicle (one for \$5,000, one for \$32,500, and one for \$30,000), and three involved both a route and vehicle sale (one for \$60,000, one for \$40,000, and one for \$50,000), with no information about the cost of the vehicle as compared to the route. There have been three route sales at the Barrington location since the closing of the record in the Region 4 case. One sale was valued at \$6,000 and two were valued at \$1,000. None of these involved a vehicle purchase.

WILMA B. LIEBMAN, MEMBER

PETER C. SCHAMBER, MEMBER

PETER N. KIRSANOW, MEMBER

Dated, Washington, D.C., March 23, 2006.