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CONFIRMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

OCT 07 2005

John A. Clarke, Executive Officer/Clerk
By _____, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ANTHONY ESTRADA, JEFFREY MORGAN and HARVEY ROBERTS,)
on behalf of themselves and all persons)
similarly situated,)

Plaintiffs,)

vs.)

FED EX GROUND PACKAGE)
SYSTEMS, INC.)

Defendants.)

No. BC 210130

CLASS ACTION

**(PROPOSED) ORDER GRANTING
EQUITABLE RELIEF**

DECLARATORY RELIEF

Pursuant to California Code of Civil Procedure Section 1060, and based on previous Memoranda of Decision issued herein, the Court grants Plaintiffs declaratory relief as follow:

1. Plaintiffs Anthony Estrada and Jeffrey Morgan and all California single work area pick-up and delivery drivers (hereinafter SWAs) who at any time since May 11, 1996 worked or currently work or in the future are employed to work under the Defendant's "Pick-Up and

1 Delivery Contractor Operating Agreement” are hereby declared to be the Defendant’s employees
2 and not independent contractors as long as the employment model is the same or substantially
3 similar to that as described in the July 26, 2004 Statement of Decision of the Court, attached
4 hereto as Attachment “A” and hereinafter referred to as “SD.”
5

6
7 2. Defendant FedEx Ground Package Systems, Inc. and its predecessor Roadway
8 Package system, its officers, agents, servants, employee, representatives, and all persons acting in
9 concert or participating with them (hereinafter FEG), improperly classified SWAs as independent
10 contractors in violation of California law as described in the SD.
11

12
13 3. SWAs are entitled to the protections of California labor protective laws applicable
14 to employees and FEG has a duty to accord such rights to its SWA employees as long as the
15 employment model is the same or substantially similar to that as described in the SD.
16

17 4. Reimbursement is denied except to only those named plaintiffs and SWAs relative
18 to the limits of the already ordered accounting.
19

20 **PERMANENT INJUNCTION**

21
22 Pursuant to California Business and Professions Code §17203, FedEx Ground Package
23 Systems, Inc., its officers, agents, servants, employees, representatives, and all persons acting in
24 concert or participating with them, are permanently enjoined and restrained from engaging in or
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1 performing, directly or indirectly, any and all of the following acts:

2 1. Mis-classifying SWAs as independent contractors or entering into participating in,
3
4 or carrying out, any agreement to mis-classify SWAs as independent contractors, so long as FEG
5 retains the employment model or substantially similar employment model as described in the SD.

6
7 2. Violating or attempting to violate any provision of the California Labor Code, the
8 Industrial Welfare Commission Orders, or other state laws and regulations protecting SWAs as
9 Defendant's employees or otherwise depriving SWAs of the benefits of laws enacted for the
10 protection and/or advancement of the interests of employees, so long as FEG retains the
11 employment model or substantially similar employment model as described in the SD
12

13
14 3. This Permanent Injunction shall take effect within 180 days of its being signed by
15 the court. The Permanent Injunction shall initially be provided to all current SWAs with the first
16 pay check after the Permanent Injunction becomes effective and shall also be posted on driver
17 information bulletin boards in each terminal in California from the day it goes into effect for five
18 years.
19

20
21 Dated: OCT 07 2005
22

23
24 ~~HOWARD J. SCHWAB~~

25
26 Howard J. Schwab
27 Judge of the Superior Court
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4 ATTACHMENT "A"
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES
10

11 ANTHONY ESTRADA, JEFFREY) No. BC 210130
12 MORGAN and HARVEY ROBERTS,) STATEMENT OF DECISION
13 Plaintiffs,)
14 vs.)
15 FED EX GROUND,)
16 Defendants.)

17 _____)
18 This is a class action which has been bifurcated. The questions raised in this first phase
19 are whether (1) single work area pick up and delivery drivers in California (hereafter referred to
20 as "SWA") are independent contractors or employees of Fed Ex Ground (hereafter "FEG") which
21 was previously RPS, Inc. and (2) if they are employees, whether they have already been
22 indemnified for their expenditures at issue in this equity proceeding. The class of SWAs have
23
24 been defined in prior proceedings as follows:
25

26
27 "Each Pick Up and Delivery Contractor who at any time between May 11, 1996 and July
28 as Pick-up and Delivery Contractor driving full-time (meaning exclusive of time off for
vacation and/or illnesses) in a single service area dispatched from a California-based
terminal pursuant to the terms of the Pick Up and Delivery Contractor driving full-time

1 (meaning exclusive of time off for vacation and/or illnesses) in a single service area
2 dispatched from a California-based terminal pursuant to the terms of the Pick Up and
Delivery Contractor Operating Agreement.

3 An individual shall be considered "full time" as that term is employed in the class
4 certification order dated August 2, 2001 if such individual provided service to Defendant
5 as a pick-up and delivery driver in a single service area and did not subcontract his or her
6 service area for reasons other than vacation, sick leave, or other commonly excused
7 employment absences.

8 Excluded from the class are the following categories of persons or entities:

- 9 (a) multiple route contractors who operate or have operated more than one service
10 area for the period of time that they had contracts for more than one service area;
- 11 (b) corporate entities and/or Limited Liability Companies that have executed Pick-up
12 and Delivery Contractor Operating Agreements with RPS, Inc. and/or its successors;
- 13 (c) temporary drivers working directly for RPS, Inc. and/or its successors, as well as
14 those provided through the temporary employee agency referred to a "Pomerantz";
- 15 (d) drivers who work or worked directly for a Pick Up and Delivery Contractor and
16 who have not entered into a Pick-Up and Delivery Contractor Operating Agreement with
17 RPS, Inc. and/or its successors; and;
- 18 (e) line-haul drivers who have performed services for RPS, Inc. and/or its
19 successors."

20 Plaintiffs both individually and as a class desire the court to determine them to be
21 employees of FEG and not independent contractors pursuant to the factors set forth in S.G.
22 Borello & Sons v. Department of Industrial Relations (1989) 48 Cal3d341,350-355.

23 The named plaintiffs Anthony Estrada and Jeffrey Morgan in this phase are deemed to be
24 SWAs. However, named plaintiff Harvey Roberts is not a SWA, but a multiple work area pick
25 up and delivery driver (hereafter referred to as "MWA") having two routes. MWAs are defined
26 as "...multiple route contractors who operate or have operated more than one service area for the
27 period of time that they had contracts for more than one service area..." and have been
28 specifically excluded from the class. However, Mr. Roberts, as an individual plaintiff, seeks to

1 be determined as an employee of FEG.

2 The court will find as follows:

3
4 (1) that SWAs as defined in the class description are in fact employees and not
5 independent contractors, which finding also includes Mr. Estrada and Mr. Morgan.

6
7 (2) that the SWAs have not been indemnified for any expenses at issue in this case,
8 and

9
10 (3) that MWAs, including Mr. Roberts, are independent contractors and not
11 employees and that Mr. Roberts will be dismissed from this action.

12
13 The court makes these findings based upon all of the standards set forth in Borello, but
14 has been primarily guided by the factors of the right to control the manner and means of
15 accomplishing the result desired, whether there has been integration into the FEG operation, and
16 whether there is opportunity for profit or loss based upon managerial skill.
17

18
19 The court makes no value judgment as to whether independent contractor or employee
20 status is a better business model or more beneficial for society. The court agrees with FEG that
21 independent contractor status is a legitimate and acceptable mode of commerce.
22

23
24 Throughout the trial, the SWAs have been referred to as "contractors" or "drivers." The
25 court will refer to them as "SWAs" and to multiple work area pick up and delivery drivers as
26 "MWAs."
27

28 For there to be a class action, there should be commonality across the board. As such the

1 analysis of the court will be from this perspective and not localized anecdotes. It should be note
2 that FEG managers Thomas Campbell and Ed Leveque testified that for all practical purposes all
3 of the terminals were run in a similar manner. Further the bulk of the evidence the court is
4 relying upon was provided by testimony from FEG management.
5

6
7 The court finds that FEG, not only has the right to control, but has close to absolute actua
8 control over the SWAs based upon interpretation and obfuscation. According to FEG, the core
9 relationship between itself and the SWAs is the latter's independent contractor status which is
10 repeatedly set forth in the contract or Operating Agreement, hereafter referred to as "OA."
11 FEG's position is that the total relationship is encompassed in this document, which is a form
12 contract that is non-negotiable in all of its facets. The OA specifically notes that the contract is
13 one of independent contractor status and should be so interpreted. However as Borello points
14 out, the denomination of independent contract status does not prevent the court from considering
15 it to be in a contract of employment based upon the standards set forth in that opinion.
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20 A close reading of the OA, which all SWAs must sign in order to be able to work for
21 FEG, is comprised primarily of platitudes and guidelines. This, in effect, leaves its interpretation
22 in the sole hands of FEG, without any meaningful recourse to the SWAs but with potential severe
23 penalties and remedies that are intentionally kept uncertain and murky. In this regard, the court
24 agrees with Robert Wood, the legal expert who testified in rebuttal as to control by uncertainty.
25
26
27

28 This description of the workings of the OA, which in effect gives almost absolute control

1 over the SWAs (and even its own employees) is borne out by the testimony of FEG's
2 management team. It should be noted in the beginning that the OA is a brilliantly drafted
3 contract creating the constraints of an employment relationship with SWAs in the guise of an
4 independent contractor model. However, Timothy Edmonds, the head of Contractor Relations,
5 Todd Yesland, the terminal manager of San Diego, and Michael Vickers, the terminal manager at
6 Anaheim, all agreed that the OA was in effect a contract that relied upon a myriad of outside
7 sources beyond the document itself in order to be implemented. In fact Mr. Edmonds testified
8 that the following were sources outside of the OA which defined the relationship between FEG
9 and the SWAs.:

- 14 (1) Verbal information
- 15 (2) Posters on bulletin boards
- 16 (3) Welcome packets sent to new SWAs.
- 17 (4) Information given to new SWAs as to customer expectations and company
18 procedures
- 19 (5) Memoranda from management
- 20 (6) Audiotapes
- 21 (7) News Network and the "Scanner"
- 22 (8) Round Table Presentations

1 (9) Information from Contractor Relations personnel as they traveled to the various
2 facilities

3
4 (10) Internet and Website

5 (11) Custom

6
7 (12) Under certain circumstances, the Operations Management Handbook (hereafter
8 OMH) and the FedEx Ground Manual (hereafter FGM)

9
10 It should be noted that Mr. Edmonds testified that the above list was not exhaustive, but
11 that it set forth the majority of sources outside of the OA defining the SWA-FEG relationship.

12
13 Of the above extra-contractual sources, the most problematic is the role of the manuals,
14 the OMH and the FGM. It is the position of FEG that any extra contractual sources, especially
15 the manuals, are not relevant, as the total SWA-FEG relationship is encompassed in the OA.

16
17 This is, however, belied by the admission, as before discussed, by FEG management of a myriad
18 of extra contractual sources which define this relationship. The OMH and FGM are laden with
19 detailed descriptions of control by FEG over the SWAs as set forth by plaintiffs in Appendices B
20 and C to their brief. Examples of said control in the OMH are:

- 21
22
23 (1) New terminal managers should study the OMH
24
25 (2) 9.5 hours minimum service is required
26
27 (3) Realigning, adding and deleting work areas is an ongoing part of management
28

- 1 (4) Flexing is often the best and only way to maximize service to the customer
- 2 (5) Prohibition against informal flexing
- 3
- 4 (6) SWAs are to return to their domiciled terminal daily
- 5 (7) Required business plan discussions
- 6

7 Examples of control in the FGM are:

- 8 (1) Requirements to wear uniforms
- 9
- 10 (2) FGM defined as setting forth policies and procedures
- 11 (3) Terminal managers to observe and note appearance of SWA and equipment
- 12
- 13 (4) Required customer service rides

14 The above are mere examples of control in the manuals. There are others of equal
15 importance that have not been mentioned. FEG's insistence that the above manuals are not
16 relevant is based upon the clauses in the OA that in effect make any act or declaration invalid
17 that is contrary to the OA or independent contractor status. The assumption of FEG is that
18 everyone should be able to determine if something is in conflict with said status. First of all, the
19 OMH and FGM are not given to the SWAs, who are totally ignorant of their contents. (In the
20 same manner business discussion notes which can be used by a terminal manager to recommend
21 termination of a contract are not given to the SWAs.)
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26 Secondly, to think that the average SWA would be sophisticated enough to so interpret
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1 the OA is ludicrous. Mr. Edmonds testified that he teaches and reteaches a course to terminal
2 managers on the interpretation of the OA that can last as long as 12 hours. To imagine that a
3
4 SWA could easily master what takes management hours and hours to analyze is non-sensical.

5 To make it worse, FEG management, when they testified, could not agree upon the
6
7 parameters of the OMH and FGM; that is, if they were mandatory, suggestive or partially both.

8 There was testimony that the "informal flex" among SWAs, while forbidden by the OMH, was
9
10 encouraged by FEG management. The bottom line appeared to be that the determination of the
11
12 binding effect of any provision of the OMH and FGM was to be based upon a subjective
13
14 evaluation by management using common sense, which determination would be very situational.

15 However, if a manager made the wrong determination, it could conceivably cost that manager his
16
17 or her job.

18 Added to this confusion relative to the binding effect of extra contractual sources, the OA
19
20 itself is replete with vague terms of which the subjective interpretation by management could
21
22 cost a SWA a reconfiguration of his or her route or the loss of his or her contract. See especially
23
24 OA sections 1.2, 1.10, 1.12, 12.1, 12.3 and 18. Terms such as "a standard of service that is fully
25
26 competitive," "reasonable efforts," "cooperate with," "foster the professional image and good
27
28 reputation," "professional," and "proper decorum" create a broad leeway for interpretation.

There is no way for a SWA to be able to rationally determine the ground rules, when they are

1 based on a platitudinal contract and a panoply of extra contractual sources, some of which are
2 purposely made unknown to the SWA.

3
4 An example is section 13 of the OA which states that "This Agreement, the Addenda and
5 Attachments shall not be modified, altered, changed or amended in any respect unless in writing
6 and signed by both parties." However, Mr. Edmonds testified that if an addendum is added to a
7 contract, SWAs who had signed OAs prior to that addendum could still be bound by it, if said
8 new addendum was based upon "custom." Not only is this interpretation contrary to section 13
9 of the OA, as it adds change to the contract without written modification, but it also emphasizes
10 the importance of the extra contractual sources of the SWA-FEG agreement. Certainly the
11 relationship of SWA's and FEG is based upon far more than the OA itself.
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16 As will be shown, the right to interpret the OA and the other matters is in the sole hands
17 of FEG. By leaving such subjective interpretation to the discretion of management, the
18 relationship between the SWAs and FEG ceases to be a partnership, metamorphosing into a
19 tightly controlled hierarchical employment model.
20
21

22 There has been extensive testimony on whether management illegally has forbidden
23 SWAs to leave the terminal before the sort was completed; random road security audits; the
24 requirement of returning the trucks to the terminal; the use of supplemental trucks; standards of
25 appearance of both the truck and the SWA; penalties for failing to follow procedures in releasing
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1 packages, alleged required attendance at Round Table meetings, and at safety meetings with
2 attendance sheets; the use of bulletin boards; the role of memoranda from management; forced
3 customer service rides; the role of customer complaints; the "min and the max;" mandatory times
4 of service; the required use of pagers and cell phones; monthly reports; the use of Department of
5 Transportation standards; the reconfiguration of routes that are supposed to be the proprietary
6 rights of the SWA, allegations of forced unfair flexing; whether undue pressure was utilized by
7 FEG to encourage or coerce the SWA to be part of the flex program, business support package
8 and other FEG projects; and a myriad of other perceived wrongs.
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13 There is no necessity for the court to determine if each alleged event was the purposeful
14 design of FEG or the act of a "rogue" terminal manager. What is important is that by reason of
15 the interpretive power of FEG, such actions can and do flourish with the tacit approval of higher
16 management based upon the uncertainty of the standards which FEG determines to be applicable
17 or non applicable, depending on the situation. When a route of an SWA can be reconfigured or a
18 contract terminated because of a "service failure," the definition of which is determined by FEG
19 based upon situational subjectivity and a panoply of sources, which may or may not be binding,
20 there is almost absolute control. When a SWA is threatened by a management with "contract
21 termination," it creates an environment, where a terminal manager can blasphemously refer to
22 himself as the Almighty and wield power accordingly.
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1 The lack of objective, precisely defined guidelines either reflects a totally disorganized
2 business, which FEG is certainly not, or a highly motivated, well organized entity, which it is,
3 that utilizes control and order in order to meet its successful economic goals. Thus, FEG
4 unilaterally ordered its SWAs to work the Friday after Thanksgiving, which it had never done
5 before, in order to be competitive with other package delivery services.
6
7

8 FEG guarantees itself the sole right to interpret by obfuscation of available remedies to
9 those SWAs who would challenge its interpretation. These remedies are purposely left vague so
10 that even FEG management is not certain of their range.
11
12

13 According to Mr. Edmonds, Contractor Relations is a liaison between FEG and SWAs in
14 order to guarantee the independent contractor model. The purpose of Contractor Relations is to
15 review recommendations for contract termination or non-renewal and to make certain that
16 terminal managers do not overstep their bounds.
17
18

19 Although Contractor Relations claims to review contract termination recommendations
20 "de novo," they normally only consider the file, which contains business discussion notes the
21 SWA is not privy to, and without hearing the side of or reading any input from the SWA whose
22 contract is being considered to be ended.
23
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25 However, a closer look shows that Contractor Relations is nothing more than a mere
26 branch of management. Mr. Edmonds works with, has his office close to, and reports to higher
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28

1 management. He can be overruled by the Chief Operating Officer, the Senior Vice President of
2 Operations and the President of FEG. Any decision by Contractor Relations is subject to higher
3
4 management's approval or veto. Contractor Relations must be seen in a role akin to Human
5 Relations over employees, wherein the highest levels of management have the final say.
6

7 Remedies beyond Contractual Relations are vague indeed. The only mention of such a
8 remedy in the OA is in section 12.3 mandating arbitration as the sole means of redress for
9
10 contract termination. Otherwise the OA is totally silent on the issue. Management differed
11 dramatically in their testimony as to the available remedies. Mr. William Bradley, an attorney
12
13 who participated in the drafting of the OA, testified that the sole and exclusive remedy was
14 arbitration after termination and that for a SWA to obtain redress above and beyond Contractor
15 Relations, he or she would have to have his or her contract terminated in order to seek relief by
16
17 means of arbitration.
18

19 In contrast, Mr. Edmonds testified that SWAs could sue FEG for non-termination issues
20
21 in a court of law and could even have contract non-renewal claims arbitrated. Mr. Edmonds did
22 admit that he did not volunteer to SWAs any information about rights to arbitrate or sue.

23 This split of authority by FEG management on the scope of remedies was exacerbated by
24
25 both sides having the court take judicial notice of litigation brought by SWAs against FEG, the
26
27 great bulk of which was outside of California and thus not in the class purview. As pointed out
28

1 by plaintiffs, the majority of the out of state cases submitted by FEG were wrongful termination
2 cases and further FEG did not provide evidence of its litigation position in the vast majority of
3 those non California cases. In only one or two of the out of state cases might court action qualify
4 as a remedy against FEG. However, plaintiffs proffered two California lawsuits by SWAs
5 against FEG, in which FEG urged the court that the sole remedy as to all causes of action was
6 arbitration. Whether or not access to the courts is allowed under the OA under FEG's
7 interpretation is unclear: It appears that FEG takes either position when it best suits them, and
8 thus the answer to this conundrum would be situational. The court finds that FEG has obfuscated
9 the issue by making it uncertain as to which remedies exist in order to best serve its own
10 purposes.
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16 Since the OA is silent in the issue of court intervention, it would appear that such remedy
17 is available. However, FEG certainly has not clarified the issue. This court has not been
18 requested to and will not address the viability of the arbitration clause.
19

20 The above described methodology of FEG, in effect, gives it almost absolute unilateral
21 control over contract termination to the point of it being the same as termination at will.
22

23 FEG contends that it should be able to retain its independent contractor status for SWAs,
24 because unlike employees, the SWAs can buy and sell their routes, can come and go when they
25 please, hire other drivers, be an "absentee SWA" and obtain additional routes for increased
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1 profits.

2 While this argument has superficial appeal, a close examination reflects constraints
3
4 imposed by FEG upon the above scenarios.

5 There is no doubt that FEG has control over who can purchase a route from or be hired as
6
7 an employee by a SWA, the degree of which is disputed by the parties. Although FEG claims
8 that limits on the sale of routes or hiring of other drivers is guided primarily by the Department of
9
10 Transportation, such is contradicted by the testimony of Jeffrey Morgan, Harry Roberts, Nicholas
11 Wanta, Chet Takeuchi, and John Kirkwood. Their testimony is corroborated by the OA itself.
12
13 Section 18 requires for assignment of a route, "...a replacement contractor acceptable to Fed Ex
14 Ground..." Leonard Revoir, the terminal manager at Oakland, testified that FEG had "some
15
16 discretion" in determining whether an individual could purchase a route beyond Department of
17
18 Transportation requirements, although he did not know the parameters of that discretion.
19
20 Michael Vickers, a terminal manager, had written a business discussion note (Exhibit 93) stating
21
22 in pertinent part that "...although the selling of route and business is none of my business, he was
23
24 required to sell to only an RPS-approved buyer..." and "...although money is exchanged RPS will
25
26 not recognize a purchase by an non-improved (sic) candidate..." The court finds that FEG has its
27
28 own standards before approving a sale of a route or the hiring by a SWA of a driver.

26 Technically, SWA's may arrive at or leave the terminal at any time, but in fact they are

1 constrained by customer pick up and delivery windows contracted by the FEG sales force.
2 Although SWAs may attempt to change the windows or modify them by contacting the
3 customer, it is normally left to the latter's discretion. Paperwork requirements of FEG also limit
4 the freedom of the SWAs as to their leaving and returning to the terminal. These customer
5 windows also limit the flexibility of the SWA in determining his or her route.
6
7

8 One avenue to profit, as will be discussed later, is obtaining additional routes by a SWA
9 in becoming an MWA. However, no SWA can become an MWA without the consent of FEG
10 (unless without the knowledge of FEG, a person purchases another SWA's corporation that has
11 additional routes). A new route cannot be created without the approval of FEG. The chance of a
12 SWA to become a MWA is similar to that of an associate of a law firm, who has the opportunity
13 some day to become a partner. The mere potential of that associate to become a partner does not
14 transform his or her employee status to that of an independent contractor. Similar considerations
15 apply to "absentee" drivers or supplemental trucks.
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20 In conclusion, while on its surface the description of the SWA appears to be that of an
21 independent contractor, the pervasive control by FEG creates an employment relationship.
22

23 Of importance to the court is the clear evidence that SWAs are totally integrated into the
24 FEG operation. SWAs are defined in the OA as a "network" and are to "...foster the professional
25 image and good reputation of Fed Ex Ground...." (OA, Background Statement, Section 1.10(e)).
26
27
28

1 The SWAs wear required FEG uniforms and drive specifically mandated FEG logo laden trucks

2 The SWAs are long-term in years of service as testified to by defense economist Dr. Ali Saad.

3
4 Under section 11.1 and 11.2 of the OA, contracts are presently set for one, two or three
5 year terms, automatically renewable for one year unless FEG gives notice of non-renewal.

6
7 The SWAs are paid with weekly "settlement" checks that include various deductions.

8 Portions of the CCS bonus are based upon terminal as opposed to individual performance. The
9
10 SWAs normally park their trucks in the same spot on a daily basis, usually have their trucks
11 loaded by FEG employees and interact with the terminal managers. For all practical purposes, by
12 the nature of the work, the SWAs are engaged in the exclusive and full time pick up and delivery
13 service for FEG and are indentified as such. FEG also provides business cards for the SWAs
14 with its logo.

15
16
17 Most important of all, the court finds that the work of the SWAs is essential to FEG's
18 core business operation, the pick up and delivery of packages. If "lightning" were to strike so
19 that there would be no FEG, there would in fact be nothing left for the SWAs to do and they
20 suddenly would be totally bereft of business. This is because the SWAs would lack the terminals
21 where the packages are picked up or delivered, the customers obtained by the FEG sales force
22 and the FEG logistical support which is the crux of their daily work.

23
24
25 On the other hand, if "lightning" were to strike and there were suddenly no SWAs, FEG

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1 would lose its principal means of pick up and delivery. FEG counters that if the SWAs were to
2 suddenly disappear, it would be able to regroup using cartage agents and MWAs who would
3 enter a "feeding frenzy" in buying routes. The court does not find this response to be credible.
4 Unlike SWAs, cartage agents are truly independent and would not necessarily wear the FEG
5 uniform or have their trucks bear the FEG logo. MWAs would not be able to fill the breach. As
6 pointed out by various witnesses including Mr. Edmonds, serving additional routes is expensive,
7 involving the cost of hiring qualified drivers and purchasing or leasing trucks. In addition,
8 David Brady, a MWA, noted that slow growth in obtaining additional routes was the hallmark
9 of building a good business. There is also difficulty in getting additional qualified drivers.

14 Looking at FEG's major competition in the arena of package pick up and delivery service,
15 UPS, the US Post Office and DHL/Airborne, the primary model is that of an employment
16 relationship, although the US Post Office and DHL/Airborne also use independent contractors
17 that are more akin to cartage agents. Looking objectively at FEG's model, it is similar to the US
18 Post Office and DHL/Airborne, as FEG in effect utilizes employees (SWAs) and independent
19 contractors (MWAs and cartage agents). Thus the SWAs are integral to FEG.

23 The court finds that there is little or no opportunity for profit or loss as a SWA, but also
24 determines that there are tremendous opportunities in this regard for MWAs. At this point, the
25 SWAs and MWAs part company. Even though the MWAs are under strict controls by FEG,
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28

1 their profits are unlimited, making them true independent contractors. John Chapman, David
2 Brady and Joanie Rios, all MWAs, testified as to their enthusiasm for their entrepreneurial
3 opportunities for making good money. Unlike the SWA, who in effect is just a package pick up
4 and delivery person, a MWA has the opportunity to hire drivers and slowly but surely create a
5 little financial empire under the aegis of FEG.
6
7

8 In light of this, plaintiff Harry Roberts' case should be dismissed. He urges, that although
9 he is a MWA, he only has two routes and that he should be deemed an employee. The court
10 cannot engage in such a narrow analysis. FEG needs a "bright line" in order to conduct its
11 business as to the status of its workers. Whether a MWA has two or six routes is not relevant as
12 there is still a potential opportunity for profit or loss, that is not, as shall be discussed, affordable
13 to SWAs.
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17 It is true that a person hiring other workers can be deemed to be an employee and their
18 workers employees of the person or entity to whom they provide service S.G. Borello & Sons v.
19 Department of Industrial Relations supra, 48C3d341,356-358 Rinaldi v. W.C.A.B (1991)
20 227CA3d756,762. However in those cases, there was no opportunity for profit. It has been
21 shown that there is opportunity for both profit and loss as a MWA, no matter the number of
22 routes. As such MWAs will be deemed to be independent contractors and Mr. Roberts is hereby
23 dismissed from this lawsuit.
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1 In contrast, the evidence is clear that there is little or no room for economic opportunity
2 by SWAs. The SWA is given a list of customers to service on a route, checks in to the terminal,
3 services the customers and returns to the terminal. Randy Eller, the managing director of Field
4 Human Resource Programs for FEG, recognized that a benefit to being a SWA was that FEG
5 "...let them (the SWAs) know that we had a sales force through the company that sold, they
6 didn't have to sell..." (Deposition of Randy Eller, p77). In addition, SWAs were recruited for
7 their driving skills and strength and not business management. The only skills a SWA need have
8 is to be a good driver, be strong enough to pick up and deliver packages, be able to get along with
9 people and be able to fill out paperwork. No other specialized skills are necessary.
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14 The evidence was replete that the SWAs had little or no entrepreneurial opportunities.
15 One of the problems in dealing with the concept of the economic value of the SWA "contract" is
16 that it is in effect a "job." As noted, the SWA reports to the terminal, picks up and delivers
17 packages and returns to the terminal with a customer base determined by the FEG sales force.
18 There has been testimony by each side as to the financial value or lack thereof of said contracts,
19 but both have missed the mark. The contract has some value, the value of a "job" with a steady
20 income, nothing more and nothing less. A "job" with its concomitant ability to make a living
21 always has some worth. The question was raised why did SWAs remain with FEG when there
22 was the possibly of employment, higher pay and less risks with UPS. It can easily be inferred
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1 that just because UPS hires drivers, not everybody applying will get those jobs. Good jobs are at
2 a premium, and if an individual does not obtain one, that person still has to make a living and
3 will settle for less. Working for FEG as a SWA is a "living" and the income which may or may
4 not be competitive is acceptable. In addition, once a SWA works for FEG it is difficult to leave
5 for fear of breaching the OA and being saddled with payments for a truck.
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8 Furthermore FEG gives the SWAs a "safety net," requiring very little money up front, the
9 Business Support Program and the Contractors Assistance Program, (which in effect gives loans
10 for operating expenses deducted from the SWA's checks) and Service Guarantee Accounts.
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13 The mere fact that, with FEG's permission, a SWA could become a MWA does not
14 change the opportunity for profit status, just as noted before, the chance for an associate to
15 become a partner does not defeat that attorneys' status as an employee of a law firm. The court
16 therefore concludes that there is little or no entrepreneurial aspect in being a SWA.
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19 The court has weighed and carefully considered each of the Borello factors in reaching
20 its conclusion and many of those standards have been discussed in its above analysis of control,
21 integration and entrepreneurial opportunities. The court need not and will not mention
22 specifically each of these factors, although it has considered them. However, the court does note
23 the following aspects of FEG's relationship with the SWAs.
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26 Although the SWAs supply and upgrade the instrumentalities of their work in the truck
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1 and invest in their materials, FEG is involved deeply in the process, recommending leases of
2 trucks and the type of truck to be obtained, the Business Support Package to allow the SWAs to
3 obtain scanners, uniforms and others items required by FEG, the Contractor Assistance Program
4 for loans relating to operating expenses and Service Guarantee Accounts. These programs place
5 a great deal of control in the hands of FEG so that the SWAs can obtain the equipment, items and
6 upgrades in order to be able to do their work. The court agrees with plaintiffs in their description
7 of this system of safety nets as being similar to that of a "company store," wherein FEG deducts
8 monies from the weekly settlement checks so that SWAs can be provided with the necessities for
9 their job.
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14 As to whether or not the parties believed they were creating an employer - employee
15 relationship it would seem that the SWAs thought that they were either investing in a "job" or
16 believed that they would be independent contractors, only to find out by reason of the FEG
17 controls that they were being treated like employees. The court finds that in entering the
18 relationship, FEG purposely created controls of an employment nature, hoping that in spite of
19 those strictures, the status would still be seen and considered to be that of an independent
20 contractor.
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25 The court having weighed and considered the Borello factors, as discussed above, finds
26 the SWAs to be in an employment relationship with the FEG, which includes plaintiffs Mr.
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1 Estrada and Mr. Morgan and the certified class in so much as they meet the class definition.

2 FEG argues that the SWAs are estopped from denying independent contractor status by
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4 reason of their certifying that condition in the signing of insurance applications, in renewing OAs
5 after the class was certified and notice sent, and in filing taxes. The court rejects these arguments
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7 as the above events were forced on the SWAs by FEG, in that the latter drafted the OA, helped
8 provide the insurance and gave out forms only for independent contractors. As stated in Borello
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10 on page 349 of the opinion, "The label placed by the parties on their relationship is not
11 dispositive, and subterfuges are not countenanced."
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13 FEG urges that even if the SWA's are deemed to be employees, the OA cannot be
14 severed as the independent contractor concept is central to that document. However, Section 15
15 of the OA has a savings clause, stating, "If any part of this Agreement is declared unlawful or
16 unenforceable, the remainder of this Agreement shall remain in full force and effect." It would
17 seem by a reading of the OA that it could be severed and still be in effect to serve as an
18 employment contract. However it is not the function nor duty of this court at this time to
19 determine which provisions or sections have or have not survived after the severance.
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22 FEG urges that even if the SWAs are deemed to be employees that they have already
23 been indemnified the expenses they seek under Labor Code section 2802. No evidence was
24 presented to support this position and no language in the OA would bolster that theory. Rather
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1 all witnesses testified that the SWAs were responsible for their own expenses.¹

2 In conclusion the SWAs as defined herein are deemed to be employees and there has been
3 no indemnification of the expenses sought in the accounting. As such, there will be a phase two
4 of these proceedings on the accounting issues.
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6 Dated: 7/26/04
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10 HOWARD J. SCHWAB
11 Judge of the Superior Court
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25 ¹ FEG urges that Brian Jacobs and any other SWAs who operated tractor-trailers should be
26 excluded from the class. Those individuals who have the same OA as the SWAs will remain in the
27 class.
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