FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc. *and* International Brotherhood of Teamsters, Local Union No. 671. Cases 34–CA–012735 and 34–RC–002205

September 30, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA, JOHNSON, AND SCHIFFER

The issue in this case is whether drivers who operate out of FedEx Home Delivery's Hartford, Connecticut terminal are employees covered under Section 2(3) of the National Labor Relations Act or, instead, are independent contractors, excluded from coverage.

The Regional Director found the drivers to be statutory employees, and following the Union's victory in an election, certified it as the drivers' representative.[1] We denied review of that finding. When FedEx Home Delivery (the Respondent) refused to recognize and bargain with the Union, the General Counsel issued a complaint. Ordinarily, we would grant the General Counsel's motion for summary judgment and find that the Respondent violated Section 8(a)(5) and (1) of the Act.[2] Following our denial of review, however, the U.S. Court of Appeals for the District of Columbia Circuit held that drivers performing the same job at two FedEx Home Delivery facilities in Wilmington, Massachusetts, were independent contractors.[3]

FedEx argues that the court's holding compels the Board to revisit its earlier denial of review. We agree. The court's decision raises important and timely questions about the Board's approach in independent-contractor cases. Accordingly, we have reexamined the merits of the underlying representation issue.[4] Today, we restate and refine the Board's approach.

First, we reaffirm the longstanding position—based on the Supreme Court's *United Insurance* decision[5]—that, in evaluating independent-contractor status "in light of the pertinent common-law agency principles," "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[6] Consistent with Supreme Court precedent, our inquiry remains guided by the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency § 220 (1958).

Second, we more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss, a factor that the Board has traditionally considered. In this respect, we decline to adopt the District of Columbia Circuit's recent holding, insofar as it treats entrepreneurial opportunity (as the court explained it) as an "animating principle" of the inquiry.[7] In our view, the Board should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity. Mindful of the Supreme Court's admonition in *United Insurance* that "there is no shorthand formula or magic phrase that can be applied to find the answer,"[8] the Board should evaluate—in the context of weighing all relevant common-law factors—whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.

After careful consideration of the entire record and the briefs of the parties, and for the reasons that follow, we find that FedEx Home Delivery's Hartford drivers are employees under Section 2(3) of the Act. The Respondent thus violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union that represents them.[9]

I. LEGAL BACKGROUND

Before offering a detailed statement of the facts relevant to our inquiry here, we set out the basic, and by now uncontroversial, legal principles that govern cases like this one.

Section 2(3) of the Act, as amended by the Taft-Hartley Act in 1947, excludes from the definition of a covered "employee" "any individual having the status of an independent contractor." 29 U.S.C. § 152(3). The party asserting independent-contractor status bears the

[1] The Union, International Brotherhood of Teamsters, Local Union No. 671, was certified on May 27, 2010, as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All contract drivers employed by Respondent 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] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Sec. 102.67(f) of the Board's Rules and Regulations.

[3] *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

[4] The Board initially granted the Acting General Counsel's Motion for Summary Judgment here and found that the Respondent violated the Act. 356 NLRB 39 (2010). Following the Respondent's filing of a petition for review with the District of Columbia Circuit, the Board vacated its decision in an unpublished Order.

[5] *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968).

[6] *United Insurance*, supra, 390 U.S. at 258.

[7] *FedEx Home Delivery*, supra, 563 F.3d at 497.

[8] *United Insurance*, supra, 390 U.S. at 258.

[9] Member Miscimarra recused himself and took no part in the consideration of this case.

burden of proof on that issue. See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001). Accord: *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001) (upholding Board's rule that party asserting supervisory status in representation cases has burden of proof).

In applying the independent-contractor exclusion, the Board is bound by the Supreme Court's decision in *United Insurance*, supra. There, the Court held that "[t]he obvious purpose of [the 1947] amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors." 390 U.S. at 256. The Court acknowledged that the application of the common-law agency test may be challenging, given the "innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." Id. at 258. Nonetheless, the Court emphasized that "there is no shorthand formula or magic phrase that can be applied to find the answer." Id. Instead, the Court stated that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." Id.

In identifying the relevant common-law factors to consider in distinguishing between employees and independent contractors under the Act, the Board must also conform to the Supreme Court decisions that have applied the same common-law test under other Federal statutes. In those cases, the Court has cited with approval the nonexhaustive, multifactor test articulated in the Restatement (Second) of Agency § 220 (1958), and has reiterated that no single factor of that test is determinative. See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323–324 (1992) (applying Employee Retirement Income Security Act (ERISA)); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 751–752 and fn. 31 (1989) (Copyright Act). Restatement § 220 provides that:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) The extent of control which, by the agreement, the master 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 master and servant.
>
> (j) Whether the principal is or is not in the business.

Following Supreme Court precedent, the Board has applied the Restatement factors, with no one factor being determinative. The Board's seminal decision in this area is *Roadway Package System*, 326 NLRB 842 (1998) (*Roadway III)*. There, the full Board rejected the notion that the predominant factor in its independent-contractor analysis is whether an employer has a "right to control" the manner and means of the work performed by an individual. 326 NLRB at 850. Such an approach, the Board found, was foreclosed by the Supreme Court's teachings. *Roadway* laid out the following principles for evaluating independent-contractor status: (1) all factors must be assessed and weighed; (2) no one factor is decisive; (3) other relevant factors may be considered, depending on the circumstances; and (4) the weight to be given a particular factor or group of factors depends on the factual circumstances of each case. Since 1998, the Board has uniformly adhered to this analytical approach.[10]

[10] See, e.g., *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011); *St. Joseph News-Press*, 345 NLRB 474, 477–478 (2005). Indeed, the Board has continued to repudiate efforts to give primary emphasis to any factor in evaluating an individual's status. See *St. Joseph News-Press*, supra, 345 NLRB at 478; *Argix Direct, Inc.*, 343 NLRB 1017, 1020 fn. 14 (2004); *Slay Transportation Co.*, 331 NLRB 1292, 1293 (2000). The Board has similarly reiterated that the list of Restatement factors "is not exhaustive, and the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors in another case." *Lancaster Symphony*, supra at 1763.

In addition to the factors set forth in Restatement § 220, the Board has considered, as one factor among the others, whether putative contractors have "significant entrepreneurial opportunity for gain or loss."[11] Related to this question, the Board has assessed whether purported contractors have the ability to work for other companies,[12] can hire their own employees,[13] and have a proprietary interest in their work.[14] As we will explain, however, we do not share the view of the District of Columbia Circuit that, over time, the Board has come to treat entrepreneurial opportunity as the decisive factor in its inquiry.

We turn now to the factual background of this case.

II. FACTUAL BACKGROUND

FedEx Ground Package Systems comprises two operating divisions: FedEx Ground Delivery, which primarily serves business customers, and FedEx Home Delivery, which primarily serves residential customers. FedEx Home Delivery (FedEx, hereafter) was established around 1998, when FedEx Corporation acquired Roadway Package System, Inc.[15] At the time of the hearing, FedEx Home Delivery operated around 500 terminals with about 4000 drivers nationwide. In this proceeding, the Union seeks to represent about 20 FedEx drivers who work out of the Respondent's Hartford terminal.

The Hartford terminal, which was established in March 2000, operates from Tuesday through Saturday and covers areas in northern Connecticut. Within this territory, FedEx maintains about 26 primary service areas or routes. FedEx assigns each route to a driver; the routes generally correspond to different zip codes. At the time of the hearing, 18 of these routes were assigned to single-route drivers, 2 routes were open, and the remaining routes were assigned to three multiple-route drivers whom the Union does not seek to represent.[16]

A. Recruitment and Training

FedEx holds nationwide job fairs and runs advertisements seeking drivers. After a candidate completes a job application, FedEx reviews her driving and criminal records pursuant to Department of Transportation (DOT) regulations. FedEx requires candidates with acceptable records to take a physical exam and pass a DOT-required drug test. If successful, FedEx hires candidates as temporary drivers through Kelly Services, a temporary agency. Temporary drivers are required to undergo a physical examination by a FedEx-approved physician and complete a DOT-required driver-training course administered by FedEx at no cost. FedEx pays temporary drivers for time spent in training, which includes 5 days of classroom training, 4 days of behind-the-wheel instruction, and 5 days accompanying managers as they make deliveries. The classroom segment covers how to load packages into a vehicle, use the package scanner, read road plans, and leave packages for residents who are not home. Following training, the new hires may continue as temporary drivers, who assist permanent drivers and cover existing and open routes as necessary, or they may acquire vehicles and become permanent drivers, whose status is at issue here.

B. Operating Agreement

Prospective drivers who have completed training and have acquired a vehicle are presented with FedEx's Standard Contractor Operating Agreement (the Agreement). The Agreement, which spells out the respective rights and obligations of each party, is used by FedEx on a nationwide basis; it covers topics such as equipment requirements, vehicle operations, insurance coverage, compensation, and termination of services. The Hartford terminal manager reviews the Agreement with prospective Hartford drivers and allows them to review the Agreement independently with a lawyer, accountant, or other person of their choosing. At the outset, the Agreement states that a driver provides services for FedEx "strictly as an independent contractor, and not as an employee of FHD for any purpose." With two exceptions, prospective drivers do not have the ability to negotiate over the terms of the Agreement. Drivers may negotiate over which particular route is assigned to them, and over one aspect of their compensation: the Temporary Core Zone Density Settlement, described

[11] *Roadway III*, supra, 326 NLRB at 851; *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998); *Roadway Package System*, 288 NLRB 196, 198 (1988). See also *Standard Oil Co.*, 230 NLRB 967, 971 (1977) (finding that "all meaningful decisions of an entrepreneurial nature which affect profit or risk of loss are controlled by the Company").

[12] See *C.C. Eastern, Inc.*, 309 NLRB 1070, 1070–1071 (1992), enf. denied 60 F.3d 855 (D.C. Cir. 1995); *Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000).

[13] See *C.C. Eastern*, supra, 309 NLRB at 1071; *Slay Transportation*, supra, 331 NLRB at 1294.

[14] See *Roadway III*, supra, 326 NLRB at 853.

[15] In three previous decisions, the Board found Roadway Package System drivers to be statutory employees. See *Roadway Package System I*, 288 NLRB 196 (1988); *Roadway Package System II*, 292 NLRB 376 (1989), enfd. 902 F.2d 34 (6th Cir. 1990); *Roadway Package System III*, 326 NLRB 842 (1998).

[16] In addition, FedEx employs an unspecified number of temporary and supplemental drivers, who among other things, cover the open routes. These drivers are also excluded from the petitioned-for unit.

more fully below. Otherwise, the Agreement is presented on a take-it-or-leave-it basis to all drivers. The Agreement gives drivers the option of incorporating as a business; at the time of the hearing, three Hartford drivers had incorporated.

FedEx typically makes unilateral changes to the Agreement once a year after which drivers are given 30 days' notice to review the changes and sign the modified agreement. Drivers may choose to enter into a 1-year or 2-year Agreement, which is automatically renewed for successive 1–year periods after the expiration of the initial term, unless either party provides the other with 30 days' notice of nonrenewal. FedEx has the right to terminate the Agreement without notice if the Hartford terminal closes, there is a decline in business, or the driver breaches the Agreement by engaging in misconduct, reckless or willful negligent operation of equipment, or failure to perform her contractual obligation. In the event of a dispute over a termination decision, the Agreement provides for arbitration. Drivers are required to place $500 in an escrow account controlled by FedEx to cover any debts owed to FedEx when the Agreement is terminated. The Agreement also enumerates 25 specific unsafe driving acts or omissions for which FedEx may suspend the driver.

C. Vehicles

In order to service their routes, drivers must purchase a van or truck that FedEx deems appropriate. Although the Agreement does not specify the make or size of a driver's vehicle, it provides that the vehicle is subject to FedEx's "determination of its suitability for the service called for." The Regional Director found that most Hartford terminal drivers purchase their vehicles from a local or national truck dealer, or from a current driver looking to relinquish her route. FedEx provides drivers with the names of local and national dealers, but drivers are not obligated to purchase or lease their vehicles from those sources. FedEx also maintains a web database listing the names and contacts for all current drivers who are seeking to sell their vehicles. Drivers negotiate the terms of all vehicle sales without FedEx's involvement. FedEx does not provide financing or guarantee loans obtained by drivers, but it does provide drivers with the names of lenders, whom drivers are not obligated to patronize.

FedEx requires that the vehicles be white, have a backing camera, and be maintained in a clean condition, free of damages or extraneous markings. Pursuant to DOT regulations, and to foster brand recognition, FedEx requires all vehicles to display the FedEx logo, which is larger than the DOT minimum size. Drivers can opt to have FedEx paint its logo onto the vehicle, or purchase a removable magnetic logo; FedEx directs drivers to a particular business for applying the logo to the vehicles. Drivers who operate vehicles of a certain size must install, at their own expense, a shelving system that prevents packages from getting crushed during delivery. Pursuant to DOT regulations, drivers must submit daily driver logs and vehicle inspection reports, and the vehicles must pass an annual safety inspection.

Drivers bear all expenses in operating their vehicles, including costs of repair, maintenance, fuel, oil, taxes, tires, insurance, and license fees. In order to track the vehicle's fitness, FedEx requires drivers to submit a monthly maintenance form noting the vehicle's tire tread depth and attaching any receipts for maintenance and completed repair work. If a vehicle becomes inoperable for any length of time, drivers are required to provide a suitable alternative at their expense; drivers generally rent replacement vehicles from a national car rental firm such as Enterprise.

The Agreement provides that, while the vehicle is in the service of FedEx, "it shall be used by [the driver] exclusively for the carriage of the goods of FHD, and for no other purpose." At all other times, drivers may use their vehicles for other commercial or personal purposes, provided they remove or mask FedEx's logos. The Regional Director found no evidence that any driver at the Hartford terminal had ever used her vehicle for other commercial purposes.

D. Route Acquisition

Individuals who are interested in becoming permanent drivers may obtain routes from FedEx. FedEx does not sell routes; rather, if FedEx has a vacant or open route, it provides that route at no cost to a prospective driver or an existing driver who is seeking a different or additional route. Routes become available if the previous driver of a route resigns or is terminated, or if FedEx creates a new route. Drivers may also acquire routes from existing drivers, who are permitted under the Agreement to convey their routes, as described below. The Agreement states that drivers have a "proprietary interest" in their assigned routes.

Each Agreement includes an addendum that sets forth the specific route to be serviced by the driver. The Agreement provides that "as the customer base and package volume in the Primary Service Area increases, the geographic size of the area which Contractor will be able to serve with the Equipment can be expected to decrease." The Agreement thus permits FedEx, with 5 days' written notice, to unilaterally reconfigure any driver's route in order to "take account of customer service requirements," such as addressing a growing or shrinking customer base in that area. During the 5-day

notice period, the driver has the opportunity to demonstrate that she can meet the level of service called for in the Agreement. FedEx may then reconfigure the route if it determines that the driver has failed to make such a demonstration. If a reconfiguration reduces the average number of packages on a driver's route, that driver will be compensated for the lost work under a formula set forth in the Agreement.

E. Business Support Package

Drivers have the option to purchase FedEx's Business Support Package (BSP) at a cost of $4.25 per day; if purchased, the cost is deducted from the driver's compensation. The BSP includes various items that drivers need to make deliveries: uniform and identification badges bearing FedEx's name; vehicle decals bearing FedEx's logo; a scanner and related communications equipment; mapping software; driver assistance programs; and a weekly vehicle washing service necessary to comply with both government regulations on waste water runoff and with contractual standards. Although drivers are free to purchase these required goods and services elsewhere, there is no evidence that any Hartford-based driver has ever done so, or that all components of the BSP would even be available for purchase elsewhere.

F. Duties and Responsibilities

The Agreement requires that drivers make their vehicles available for delivery from Tuesday through Saturday. The process of package delivery from the Hartford facility begins when FedEx's three trailers arrive from its New Jersey and Connecticut hubs between 4 and 6:30 a.m. During that period, FedEx's package handler employees sort, scan, and assemble approximately 3000 daily packages onto pallets (during peak periods, the number of daily packages swells to around 9000). Most Hartford-based drivers arrive at the terminal between 6 and 7 a.m. and begin loading the packages from the pallets onto their respective vehicles. Drivers use scanners to report their on-duty time and to scan each loaded package; once they have finished loading, drivers report to the Respondent's terminal managers, who close the route by resetting the scanner. Managers also provide each driver with a route manifest and turn-by-turn instructions that list the driver's stops and suggest a delivery sequence. Drivers are not obligated to follow the suggested sequence; in fact, they can and do deliver packages in any order and by any route they choose.

The Agreement compels drivers to deliver all packages assigned to their route on the same day the packages arrive at the Hartford terminal. In making the deliveries, drivers must meet FedEx's nationwide standard of providing services in a way that "can be identified as being part of the [Respondent's] system." This means that drivers must: wear FedEx's uniforms and badges, maintained in good condition; present personal appearances consistent with FedEx's standards; and leave packages for recipients not at home in accordance with FedEx's protocols. Drivers are also discouraged from delivering packages after 8 p.m.

Upon completing each delivery, a driver is required by FedEx to input information regarding the delivered package, including the identification of the person who signed for the package, into the scanner. The scanned information tracks the movement of packages and is instantly transmitted to FedEx. When drivers go off-duty, they must enter their off-duty time into the scanner. They must also submit a daily delivery report to FedEx that indicates whether they failed to deliver any of the packages assigned to their route. FedEx uses these reports to determine if drivers are failing to provide proper service and if so, whether termination of a driver's contract is warranted.

Drivers must follow specific protocols for deliveries if the recipient is not home; if they fail to adhere to protocols, fail to obtain a required signature, or release a package to the incorrect address, they may be liable for the loss of the package. FedEx maintains the right to conduct up to four driver audits per year during which a manager rides along with a driver to verify that the driver is meeting customer service standards and protocols. FedEx also maintains the right to conduct two customer service rides annually, during which a manager rides along for a day to evaluate the driver's customer contacts and driving methods, and may suggest operational improvements to the driver related to package loading, delivery sequencing, scanning practices, and other responsibilities. The manager also evaluates whether the driver has an appropriate workload and rates the driver's performance in areas such as professional appearance and customer courtesy. FedEx may memorialize these evaluations and rely on them in deciding whether to terminate a driver's agreement.

Aside from requiring drivers to deliver all packages on the same day they arrive at the terminal, drivers have discretion to operate their routes and perform deliveries in the sequence and manner they see fit. FedEx does not have the authority to direct drivers regarding their specific hours of work, whether or when they take breaks, the order in which they make deliveries, or other details of their work. Drivers are free to use their vehicles to perform personal duties during the day, and most park their vehicles at their homes at night.

FedEx retains the right to adjust the volume of a driver's daily deliveries. Any day when the volume of packages on a driver's route exceeds the volume that she can be reasonably expected to timely deliver, FedEx may reassign packages to another driver. FedEx also maintains a practice known as "flexing" whereby the terminal manager adjusts the number of packages delivered by each driver by directing drivers to deliver packages to locations outside of their route; this occurs when a driver has an excessive number of packages or FedEx needs to cover a regularly-assigned route because of illness or other reasons. A driver may not reject "flexed" packages assigned to her. Drivers, without FedEx's permission, may "flex" packages to each other, principally to drivers who service adjacent routes.

Drivers play no role in generating customers or establishing prices to be charged to customers; instead, customers contact FedEx to arrange a delivery and FedEx exclusively sets delivery prices, which are quoted and charged to customers. Customer complaints about drivers are directed to FedEx and are investigated by managers at the Hartford terminal.

G. Compensation

Under the Agreement, FedEx unilaterally determinates drivers' rates of compensation and pays them with a weekly settlement check that is based on, among other things, the number of packages delivered, the number of stops made, the distance traveled, and the number of days a driver's vehicle is available to provide service. FedEx also pays various bonuses to drivers, including a quarterly bonus for drivers who service two or more routes; a quarterly service bonus based on years of service; a bonus for meeting certain accuracy goals; and a group bonus if all drivers at the terminal meet an inbound service goal for the period. In addition, the settlement check includes a Temporary Core Zone Density payment ranging from $27 to $127 daily to drivers who service routes where customer density and package volume are still developing. The record does not indicate a typical or average income for Hartford drivers.

FedEx provides other financial support to drivers. For instance, if fuel prices rise substantially, the Agreement provides that FedEx will pay drivers a fuel/mileage settlement of up to 10 cents per mile depending on fuel prices within a 5-mile radius of the terminal. The Agreement also authorizes FedEx to pay certain vehicle-related "licenses, taxes and fees" on behalf of each driver; it then deducts those expenses from the driver's compensation. In order to encourage drivers to accumulate a fund to cover vehicle maintenance expenses and other costs of operation, FedEx maintains and pays interest on a Service Guarantee Account into which the drivers can deposit money. For each quarter in which a driver's average balance in the account is $500 or more, FedEx contributes $100. The Regional Director found that FedEx also periodically assists drivers with other vehicle-related issues, including lending drivers money for repairs, and intervening on behalf of drivers involved in repair and warranty disputes.

FedEx does not provide drivers with any fringe benefits, such as vacations or paid holidays, nor does it withhold taxes from their settlement checks. Most Hartford drivers participate in FedEx's time-off program, under which FedEx makes available approved drivers to service the routes of permanent drivers while they are on vacation.

H. Insurance

The Agreement requires that drivers carry three forms of insurance in types and amounts specified by FedEx: (1) general liability insurance; (2) deadhead insurance, which insures drivers against damages they incur while operating their vehicles for personal use; and (3) work accident insurance, which is akin to workers' compensation coverage. Failure to maintain any of these constitutes a contractual breach that could lead FedEx to terminate the Agreement. DOT regulations require that FedEx carry insurance for property damage, personal injuries, cargo loss, or damage caused by its vehicles or its drivers' vehicles. FedEx maintains a self-insured general liability program that indemnifies it and its drivers against such claims resulting from the operation of equipment in connection with FedEx's business. FedEx does not charge drivers for the cost of general liability insurance, but all drivers are responsible for the first $500 in damages resulting from the operation of their vehicles; after 1 year, that amount is reduced to $250, and after 2 years, it is eliminated altogether. Driver indemnification does not occur if the driver engages in willfully negligent or intentional misconduct, or if she fails to comply with FedEx's safe driving program standards. Drivers are responsible for maintaining both deadhead insurance and work accident insurance at their own expense. FedEx has a relationship with Protective Insurance, which will provide drivers with the required insurance; if the drivers choose to insure through Protective, FedEx deducts insurance premiums from their settlement checks. The record shows that drivers frequently obtain insurance through Protective because it offers rates that are significantly lower than the rates drivers can obtain elsewhere on their own.

I. Entrepreneurial Opportunities

In arguing that Hartford drivers are independent contractors, FedEx relies heavily on what it identifies as

three specific entrepreneurial opportunities: (1) drivers' ability to hire other drivers; (2) drivers' ability to sell routes; and (3) drivers' ability to operate multiple routes.

1. Hiring of supplemental drivers and helpers

Single-route drivers need not personally perform all of their contractually-obligated deliveries. Instead, a driver may hire another DOT-qualified and Respondent-approved driver, typically one of FedEx's temporary drivers or another permanent driver, to perform her deliveries. If the volume of deliveries on a driver's route is beyond the capacity of a single vehicle, the driver may choose to lease a second vehicle, referred to as a supplemental vehicle, and hire a supplemental driver to fulfill the route's demands. The Regional Director found that at least half of the Hartford drivers have used supplemental vehicles and drivers, usually during the peak holiday season. Drivers may also hire helpers who ride alongside the driver and assist in delivering packages. Helpers' employment terms and conditions are negotiated exclusively between the driver and the helper. At the time of the hearing, only one Hartford driver had ever employed a helper.

2. Route sales

Drivers may also sell their routes to buyers deemed qualified by FedEx and willing to enter into the Agreement with FedEx "on substantially the same terms and conditions" as the original driver. Although drivers need not receive FedEx's permission regarding a pending route sale, FedEx must be notified once the sale is complete so that the buyer can sign the Agreement. FedEx is not involved in the negotiations between the parties, but it retains the right to approve the individual acquiring the route. The Regional Director found that the overwhelming majority of drivers acquired their routes from FedEx or from a previous driver at no cost for the route itself. For example, in some instances, the former driver merely relinquished her route at no cost to the new driver, or sold her vehicle to the new driver, but did not receive further consideration for conveying the route itself. The record indicates that there had been only two route sales at the Hartford terminal since it opened in 2000. If a driver wishes to give up her route but cannot find any takers, she must relinquish her route to FedEx for no compensation.

3. Multiple-route operators

Finally, drivers have the right to obtain and operate multiple routes; supplemental routes can be obtained from FedEx or another driver. To service an additional route, the driver acquires an additional vehicle and either hires her own driver to regularly service the route, or contracts with one of FedEx's temporary drivers. All hired drivers must be DOT-qualified and approved by FedEx. Hired drivers must follow all of the applicable work rules and protocols, including using the package scanner and wearing FedEx's uniform and badge while making deliveries. Multiple-route operators have sole authority to hire and dismiss their drivers, to supervise them, and determine the terms and conditions of their relationship with their drivers, including hours, bonuses, and approval of time-off requests. Multiple-route operators are responsible for paying their drivers' compensation, and for all expenses associated with hiring drivers, such as the cost of training, exams, employment taxes, and accident insurance. If FedEx learns of delivery problems with one of the hired drivers, it has the contractual right to pursue the matter with the multiple-route operator. The Regional Director found that, since the Hartford terminal opened in 2000, a total of six drivers have operated multiple routes; at the time of the hearing, three drivers were operating multiple routes. Here, however, the Union does not seek to represent multiple-route drivers, or the drivers that they hire.

III. THE REGIONAL DIRECTOR'S DECISION

The Regional Director found that FedEx failed to establish that its drivers are independent contractors. At the outset, the Regional Director indicated that, consistent with Board precedent, he would apply the common-law agency test and consider all the incidents of the individuals' relationship with the employing entity. Using this approach, the Regional Director relied on the following factors in finding the drivers to be employees: (1) FedEx exercises substantial control over details of drivers' job performance; (2) drivers perform a regular and essential part of FedEx's business; (3) drivers do not need significant skill or experience to perform delivery functions; (4) FedEx provides drivers with necessary instrumentalities, tools, and workplace; and (5) FedEx unilaterally establishes compensation rates for all drivers.

The Regional Director acknowledged that several factors, such as drivers' obligation to purchase their own vehicles and drivers' discretion over delivery schedules, supported finding independent-contractor status. He noted, however, that the same factors were present in *Roadway III*, supra, where the Board, in substantially similar circumstances, found them insufficient to satisfy the employer's burden. Finally, the Regional Director rejected FedEx's argument that drivers' options to operate multiple routes and sell their routes established independent-contractor status. Regarding drivers' option to operate multiple routes, the Regional Director found that the record did not indicate that drivers incurred an entrepreneurial risk in choosing to operate more than one route, nor did the record show that multiple-route drivers

realized a greater net per-route profit than single-route drivers. He also noted that none of the drivers in the petitioned-for unit are multiple-route drivers.

In addition, the Regional Director discounted the import of drivers' right to sell their routes, noting that routes originating out of the Hartford terminal are available from FedEx at no cost or in conjunction with a vehicle sale. Moreover, drivers are required to sell only to buyers approved by FedEx and willing to enter into the Standard Contractor Operating Agreement. Finally, he observed that there had been only two route sales since the Hartford terminal opened in 2000, an insufficient number to support independent-contractor status.

In light of all the record evidence, the Regional Director concluded that FedEx failed to establish that its drivers are independent contractors.

IV. ANALYSIS

FedEx contends that the District of Columbia Circuit's holding, on "virtually identical" facts, that FedEx Home Delivery drivers in Wilmington, Massachusetts, were independent contractors requires the Board to reach the same result here. We acknowledge that the court's decision cannot be squared with the Regional Director's determination here. But, after careful consideration, we decline to adopt the court's interpretation of the Act.

Nothing in the text of the Act, or its legislative history, speaks directly to the precise issue in this case: how to interpret and apply common-law agency principles in distinguishing between employees and independent contractors and so determining statutory coverage under Section 2(3) of the Act. Notably, the Supreme Court has held that the "task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the [National Labor Relations] Act," the Board. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984), quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944). In turn, the Court has applied the principle of *Chevron*[17] deference to the Board's interpretation of at least one exclusion from employee coverage in Section 2(3) of the Act.[18] Finally, in *United Insurance*, supra, a pre-*Chevron* decision, the Court described the independent-contractor inquiry as involving the "application of law to facts" and held that the Board's determination should not be rejected by a reviewing court so long as the Board "made a choice between two fairly conflicting views." 390 U.S. at 260.

In *FedEx Home Delivery*, in contrast, a divided panel of the court concluded that it would not "grant great or even 'normal' deference to the Board's status determinations" "because the line between worker and independent contractor is jurisdictional—the Board has no authority whatsoever over independent contractors." 563 F.3d at 492. However, as the Supreme Court subsequently reaffirmed, deferential review does, indeed, apply in "cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers." *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013).[19]

Below, we explain why we have chosen not to adopt the court's interpretation of the independent-contractor exclusion in Section 2(3) of the Act. Neither Supreme Court nor Board precedent mandates that position, and adopting it would mean a broader exclusion from statutory coverage than Congress appears to have intended. To eliminate any uncertainty about the Board's test and its application going forward, we restate and refine our approach. Finally, applying our refined formulation of the Board's standard, we find that the Hartford drivers are employees under the Act, and thus conclude that FedEx violated Section 8(a)(5) and (1) of the Act by refusing to bargain with their representative.

A.

The *FedEx Home Delivery* court stated that the common-law agency test was the appropriate legal standard. It observed, however, that over the course of several recent decisions, the standard had changed its focus from the employer's right to exercise control over the means and manner of the worker's performance to the "significant entrepreneurial opportunity for gain or loss." 563 F.3d at 497. "[W]hile all the considerations at common law remain in play," the court observed, "an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." Id.

As we understand the court's decision, it treats the existence of "significant entrepreneurial opportunity" as the overriding consideration in all but the clearest cases posing the independent-contractor issue under the Act.

[17] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[18] *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996) (upholding as reasonable Board's interpretation of "agricultural laborer" exclusion); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977)(same).

[19] Among the cases cited by the *City of Arlington* Court was a decision involving the Board, *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 fn. 7 (1984). There, the Court rejected the argument that it was not required to defer to the Board's reasonable interpretation of Sec. 7 of the Act inasmuch as its scope was "essentially a jurisdictional or legal question concerning the coverage of the Act." 133 S.Ct. at 1871.

Whether or not the Supreme Court's decision in *United Insurance*, supra, permits this approach, we do not believe that the decision compels it. *United Insurance* does not reflect the use of a single-animating principle in the inquiry or identify entrepreneurial opportunity as that principle. To the contrary, as explained, *United Insurance* (and subsequent Supreme Court decisions) emphasized that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 390 U.S. at 258; *Community for Creative Non-Violence v. Reid*, 490 U.S. at 752. The Supreme Court's decisions look to the Restatement (Second) of Agency as capturing the common-law standard, and the Restatement teaches that the factors enumerated there are "*all* considered in determining the question [of employee status]."[20] (Emphasis added.) The Restatement makes no mention at all of entrepreneurial opportunity or any similar concept. That silence does not rule out consideration of such a principle, but it cannot fairly be described as requiring it. At least arguably, the court's approach is in tension with the admonition of *United Insurance* that "there is no shorthand formula or magic phrase that can be applied to find the answer" as to who is an employee and who an independent contractor under the Act. 390 U.S. at 258.

In turn, we do not read the Board's precedent, as grounded in *Roadway III*, as adopting the position reflected in the court's decision. Indeed, the Board decisions cited by the court confirm that the Board has adhered to the "all incidents of the relationship" approach set forth in *Roadway III* and earlier cases.[21] The Board has never held that entrepreneurial opportunity, in and of itself, is sufficient to establish independent-contractor status.

In *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002), the Board, "weighing all incidents of their relationship with the Respondent," found that the owner-operators who delivered packages for the employer were employees rather than independent contractors. Id. The Board noted that those owner-operators "had no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss,"—but it did so as part of a thorough and balanced accounting of all relevant factors. Id. Accordingly, the Board found, among other factors routinely considered under the common-law test, that owner-operators performed an essential part of the employer's business; worked full time and were fully trained by the employer; were not permitted to use their vehicles to make deliveries for anyone other than the employer; were required to wear uniforms and display the employer's logo; and received routes, base pay, and daily freight allocations that were unilaterally determined by the employer. Id. Contrary to the court, the Board did not give more weight to entrepreneurial opportunity than any of the other factors that it assessed.[22]

Similarly in *Arizona Republic*, 349 NLRB 1040 (2007), another decision on which the *FedEx Home Delivery* court relied, the Board evaluated entrepreneurial opportunity as one factor in its analysis, but gave it no special prominence as an "animating principle." The Board found that the newspaper carriers' entrepreneurial opportunities—including their ability to operate multiple routes, negotiate piece rates, and deliver other products while on their routes—weighed in favor of independent-contractor status. But the Board gave comparable weight to other facts: that the employer did not exercise control over details of the carriers' work; that the employer did not supervise or subject carriers to discipline; that carriers provided and maintained their own vehicles and tools; and that the parties clearly intended to form an independent contractor relationship. Id. at 1043–1046. Thus, the Board concluded that "the bulk of the evidence"—not merely evidence of entrepreneurial opportunity—"establishe[d] that the carriers [were] independent contractors." Id. at 1046.

B.

In examining one exclusion in Section 2(3) of the Act, the Supreme Court has observed that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp.*, supra, 517 U.S. at 399 (applying agricultural laborer exclusion). Consistent with this admonition, we believe that, within the framework of common-law agency principles, the Board should construe the independent-contractor exclusion narrowly. But to be clear, in declining to adopt

[20] Restatement (Second) of Agency § 220(1), comment c.

[21] See, e.g., *Operating Engineers Local 701 (Lease Co.)*, 276 NLRB 597, 600–601 (1985); *Perrysville Coal Co.*, 264 NLRB 380, 381 (1982); *Kentucky Prince Coal Corp.*, 253 NLRB 559, 560 (1980).

[22] We do not share the *FedEx Home Delivery* court's view that the General Counsel, in defending the Board's *Corporate Express* decision, urged the court to focus primarily on entrepreneurial opportunity. The General Counsel's brief in that case reiterated the Board's position that "all of the incidents of the work relationship must be assessed and weighed with no one factor being decisive." 2001 WL 36039100 (D.C. Cir. 2001). The General Counsel urged the court to consider the absence of entrepreneurial opportunities, but only as a single factor. In any case, of course, the General Counsel's position on appeal could not substitute for, much less displace, the view of the Board itself. See generally *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

the view of the court, we do *not* hold that the Board may not, or should not, give weight to evidence demonstrating that a putative contractor exercises significant entrepreneurial opportunity for gain or loss. The Board has done so in the past, and we will continue to do so. We take this opportunity, however, to restate and refine the Board's approach, in two respects. First, we make clear what the Board understands by entrepreneurial opportunity: an actual, not merely theoretical, opportunity for gain or loss. Second, in restating and refining our approach, we explain the place of entrepreneurial opportunity in the Board's analysis, as part of a broader factor that—in the context of weighing all relevant, traditional common-law factors identified in the Restatement—asks whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.

1.

In a decision that preceded *FedEx Home Delivery*, the District of Columbia Circuit observed that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the company's claim that the workers are independent contractors." *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855 (D.C. Cir. 1995). We agree, and we reaffirm that principle today.

The Board has been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial autonomy, and those that are circumscribed or effectively blocked by the employer. In *Roadway III*, supra, for instance, the Board rejected the employer's argument that delivery drivers' proprietary interest in their routes and their ability to sell their routes made them independent contractors. The Board noted that the employer "imposed substantial limitations and conditions on both . . . features of the driver's relationship such that neither one retains any significant entrepreneurial characteristics." 326 NLRB at 853. Specifically, the employer exercised control over whether a driver could sell her route, to whom, and under what circumstances. Id. In addition, the employer retained the right to unilaterally reconfigure all routes, and it was unclear whether any drivers had ever realized any gain or profit from the sale of their routes. Id.[23]

Similarly, in *Slay Transportation*, supra, the Board rejected the Regional Director's finding that drivers possessed entrepreneurial opportunities via their ability to hire drivers and control costs to enhance their income. 331 NLRB at 1294. The Board noted that the employer established and controlled the rates of compensation, leaving little room for drivers to increase income through their own efforts. Id. Moreover, although drivers were permitted to hire other drivers, they could do so only at the wage rates set by the employer. Id. Accordingly, the Board concluded that "despite this theoretical potential for entrepreneurial opportunity, the control exercised by the Employer over the other aspects of its relationship with the owner-operators severely circumscribes such opportunity. In reality, there is little economic independence realized by the owner-operators." Id.[24]

The approach taken by the court in *FedEx Home Delivery* was different. There, the court accepted FedEx's assertions of entrepreneurial opportunity with little weight given to these countervailing considerations. In finding, for example, that drivers had a genuine entrepreneurial opportunity to assign their routes without the employer's permission, the court relied solely on the fact that two drivers were able to sell their routes for a nominal profit. 563 F.3d at 500. In fact, employees' opportunities in this area were significantly constrained: drivers could sell only to buyers that the employer accepted as qualified; the employer awarded routes to drivers without charge; and the employer retained the unilateral right to reconfigure routes. Nonetheless, the court concluded that the drivers' ability to assign their routes was a "significant . . . and novel" indicator of contractor status. Id.

The court also relied heavily on the fact that drivers were permitted to operate multiple routes. Id. at 499.[25] But the record showed that only three drivers operated multiple routes, and that those individuals had been excluded from the unit as statutory supervisors. Likewise, the court emphasized that drivers could use their trucks to conduct business independently of FedEx, despite the fact that no current drivers had ever done so, and that drivers' weekly work commitment to FedEx would have realistically prevented them from taking on extra business during nonwork hours. Id. at 498–499.

Insofar as the court's decision holds that even a showing of theoretical entrepreneurial opportunity supports a finding of independent-contractor status—and, indeed, will prove decisive if other factors point in conflicting directions—we disagree. Such an expansive approach departs from the mainstream of Board precedent, lacks clear support in traditional common-law

[23] See also *Roadway I*, supra, 288 NLRB at 198–199.

[24] See also *Stamford Taxi*, supra, 332 NLRB at 1373 (finding that rules maintained and enforced by the employer "severely restrict[ed] the drivers' entrepreneurial opportunities to engage in taxicab business independent of the [employer]").

[25] Here, of course, multiple-route drivers are not part of the bargaining unit that the Union seeks to represent.

principles, and could dramatically broaden the independent-contractor exclusion under the Act. The fact that only a small percentage of workers in a proposed bargaining unit have pursued an opportunity demonstrates that it is not, in fact, a significant aspect of their working relationship with the putative employer. Indeed, if the day-to-day work of most individuals in the unit does not have an entrepreneurial dimension, the mere fact that their contract with the employer would permit activity that might be deemed entrepreneurial is not sufficient to deny them classification as statutory employees.[26]

For similar reasons, we disagree with the court's assertion in *FedEx Home Delivery* that the Board was required to admit and assess systemwide evidence of the number of route sales and the amount of profit, if any, on such sales. We find instead that to be relevant, evidence of entrepreneurialism must pertain directly to the individuals that the petitioner actually seeks to represent.[27] Indeed, our focus on actual opportunity demands that we assess the specific work experience of those individuals in the petitioned-for unit. Evidence that goes only to employees who are outside of the petitioned-for unit is unlikely to have probative value. Thus, unless a multifacility or systemwide unit is sought, evidence regarding the entrepreneurial experience of workers at other facilities cannot substantiate or refute the entrepreneurial opportunity of the individuals at issue.[28] The hearing officer's decision here to exclude from the record similar systemwide evidence of entrepreneurial opportunity was fully consistent with his duty to "protect the integrity of [the Board's] processes against unwarranted burdening of the record and unnecessary delay."[29] Here, systemwide evidence of entrepreneurial opportunity cannot substitute for the absence of similar evidence relating to employees in the petitioned-for unit. In any case, as we will explain, even if the systemwide evidence that FedEx sought to introduce had been admitted and credited, it would not affect our ultimate conclusion here, given the weight of the record evidence supporting a finding of employee status.[30]

2.

Actual entrepreneurial opportunity for gain or loss, then, remains a relevant consideration in the Board's independent-contractor inquiry. We address here how such evidence is to be properly assessed as part of the analysis of the traditional common-law factors. In the past, the Board has been less than clear about this point: In some cases, entrepreneurial opportunity has been analyzed expressly as a separate factor; in others, it has been integrated into the Board's analysis of other factors.[31] The Board has also spoken in terms of the "economic independence" of putative contractors from their employing entities.[32] Today, we make clear that entrepreneurial opportunity represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*.

This formulation is grounded in established law. In *United Insurance*, for example, the Supreme Court observed that the insurance agents involved did "not operate their own independent businesses." 390 U.S. at 259. And citing *United Insurance*, the Board in *Roadway III* explained that the drivers did not operate an independent business but rather "performed functions

[26] In *Arizona Republic*, supra, 349 NLRB at 1045, the Board stated that "the fact that many carriers choose not to take advantage of [an] opportunity to increase their income does not mean that they do not have the entrepreneurial *potential* to do so." Applying this principle, the Board determined that newspaper carriers were independent contractors after finding that 363 carriers, or 29 percent of them, had multiple routes. Id. at 1045 fn. 6. To the extent that the Board's approach in *Arizona Republic* is inconsistent with today's holding, it is overruled.

[27] This approach is consistent with the Board's practice in other representation contexts. See, e.g. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 698 (2006) (refusing to consider the supervisory characteristics of employees not included in petitioned-for unit); *Crittenton Hospital*, 328 NLRB 879 fn. 6 (1999) (same); *Dayton Tire & Rubber Co.*, 206 NLRB 614 fn. 3 (1973), enfd. 503 F.2d 759 (10th Cir. 1974) (same). See also *D&L Transportation*, 324 NLRB 160, 161 (1997); *Tele-Computing Corp.*, 125 NLRB 6 fn. 6 (1959).

[28] In *Roadway III*, supra, the Board relied on evidence showing that only a small percentage of drivers in the employer's nationwide system had taken advantage of purported entrepreneurial opportunities. For instance, the Board noted that only 3 out of Roadway's 5000 drivers nationwide had used their vehicles for other commercial purposes. 326 NLRB at 851. The Respondent argues that *Roadway III* supports the consideration of systemwide evidence, but we do not read the decision as compelling such consideration. In any case, for the reasons explained here, we have clarified the Board's approach today.

[29] *Jersey Shore Nursing & Rehabilitation Center*, 325 NLRB 603 (1998). See also *Bennett Industries*, 313 NLRB 1363, 1363 (1994) ("[I]n order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute.").

[30] FedEx faults the Regional Director for "preclud[ing] a full and complete record," and barring FedEx from "proving its case to the fullest," but it does not explain why systemwide evidence would be relevant to the drivers in the petitioned-for unit. We believe that the Regional Director's ruling was correct, but at worst, it was harmless error, considering the record as a whole.

[31] See, e.g., *Lancaster Symphony Orchestra*, supra, 357 NLRB 1761, 1763 (treating entrepreneurial opportunity as a separate factor); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004) (same). Cf. *Roadway III*, supra, 326 NLRB at 851–853 (considered in tandem with other factors); *Stamford Taxi*, supra, 332 NLRB at 1373 (same).

[32] *Slay Transportation*, supra, 331 NLRB at 1294.

that are an essential part of one company's normal operations." 326 NLRB at 851.[33]

The independent-business factor encompasses considerations that the Board has examined in previous cases, including not only whether the putative contractor has a significant entrepreneurial opportunity (as defined above), but also whether the putative contractor: (a) has a realistic ability to work for other companies;[34] (b) has proprietary or ownership interest in her work;[35] and (c) has control over important business decisions,[36] such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital.[37]

In applying this factor, the Board must necessarily consider evidence (as it has previously) that the employer has effectively imposed *constraints* on an individual's ability to render services as part of an independent business.[38] Such evidence would include limitations placed by the employer on the individual's realistic ability to work for other companies,[39] and restrictions on the individual's control over important business decisions.[40] Pursuant to this inquiry, the Board will consider whether the terms or conditions under which the individuals operate are "promulgated and changed unilaterally by the company."[41] *United Insurance*, supra, 390 U.S. at 259.

To the extent that the Board's decisions in *Arizona Republic*, supra, 349 NLRB at 1045, and *St. Joseph News-Press*, supra, 345 NLRB at 481–482, may have mistakenly suggested that such considerations are *not* relevant to the Board's independent-contractor inquiry, the two decisions are in tension with prior precedent, as well as inconsistent with the view articulated today. Those decisions are now overruled.

The more comprehensive independent-business factor we set out today synthesizes the full constellation of considerations that the Board has addressed under the rubric of entrepreneurialism. Our formulation tracks the forthcoming Restatement of the Law Third Employment Law, and thus is consistent with contemporary developments in jurisprudence.[42] At the same time, the independent-business factor supplements—without supplanting or overriding—the traditional common-law factors, to which the Board will continue to give full consideration and appropriate weight. As with all other relevant factors, the weight given to the independent-business factor will depend upon the factual circumstances of the particular case.

V. APPLICATION

Consistent with the preceding discussion, we now carefully consider all relevant factors and find that the drivers who operate out of FedEx Home Delivery's Hartford terminal are statutory employees under Section 2(3) of the Act. Our discussion tracks the factors set out in § 220 of the Restatement (Second) of Agency—cited with approval by the Supreme Court and routinely applied by the Board—before concluding with the newly-articulated independent-business factor. As explained, under established law, the burden of proof is on the party asserting independent-contractor status, here FedEx.[43]

A. Extent of Control by Employer

FedEx exercises pervasive control over the essential details of drivers' day-to-day work. It requires that drivers make their vehicles available for delivery from Tuesday through Saturday, configures all of their service areas, and controls the number of packages to be

[33] See also *Slay Transportation*, 331 NLRB at 1294 (owner-operators do not operate independent businesses; rather they work exclusively for the employer). Compare Restatement of the Law Third Employment Law (Tentative Draft No. 2) Sec. 1.01 ("[A]n individual renders services as an employee of an employer if . . . the employer's relationship with the individual effectively prevents the individual from rendering the services as part of an independent business.").

[34] See *DIC Animation City*, 295 NLRB 989, 991 (1989) (noting that "for 10 months out of the year, the writers do not work for the Employer and do work for other companies"); Cf. *C.C. Eastern*, supra, 309 NLRB at 1070–1071.

[35] *Roadway III*, supra at 846–848, 853; *BKN*, supra, 333 NLRB at 145.

[36] See *Penn Versatile Van Division of Penn Truck*, 215 NLRB 843, 845 (1974) ("One of the basic factors in determining that an individual is an independent contractor is his opportunity to make business decisions affecting his profit or loss.").

[37] See, e.g. *AAA Cab Services*, 341 NLRB 462, 465 (2004) (weighing these considerations); *R. W. Bozell Transfer*, 304 NLRB 200, 200–201 (1991) (same); *Daily Express*, 211 NLRB 92, 94 (1974) (same).

[38] See *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008) ("[The employer's] restrictions against its drivers' operating independent businesses or developing entrepreneurial opportunities strongly supports the NLRB's determination that [its] drivers are employees.").

[39] See *Time Auto Transportation*, 338 NLRB 626, 638–639 (2002), enfd. 377 F.3d 496 (6th Cir. 2004) ("The witnesses credited testimony reveals that Respondent's procedures and its policies prevented drivers from performing similar services for other companies, a factor relied on by the Board and courts in concluding that individuals are statutory employees.").

[40] See *Standard Oil*, supra, 230 NLRB at 971 (finding employee status where the company made all "significant business decisions").

[41] See also *Stamford Taxi*, supra, 332 NLRB at 1373 (noting that employer's ability to unilaterally draft, promulgate, and change the terms of the driver's lease arrangements "weigh[s] heavily in favor of employee status").

[42] See Restatement of the Law Third Employment Law, Reporter's Notes, comment D, and the cases cited therein.

[43] See, e.g., *BKN*, supra, 333 NLRB at 144.

delivered and stops to be made. FedEx accurately points out that drivers enjoy some discretion over minor facets of their work, namely the order in which to deliver packages and the specific routes they travel. But "for a rational driver, these decisions are mainly or wholly dictated by the location of customers who need delivery that day and the amounts they need. Such 'decisions' are made every day by deliverymen whose employment status is never questioned and involve little if any independent judgment."[44] Similarly, while drivers have some say over starting times and when to take breaks, their freedom is limited by FedEx's requirement that all packages be delivered on the day of assignment, and by 8 p.m. Drivers' minimal discretion over logistical choices does not outweigh FedEx's fundamental control over their job performance.[45] We find that the extent of control factor weighs in favor of employee status.

B. Whether or not Individual is Engaged in a Distinct Occupation or Business

By virtue of their uniforms and logos and colors on their vehicles, drivers are, in effect, doing business in the name of FedEx rather than their own. Even those drivers who operate as incorporated businesses do business in FedEx's name.[46] In practice, drivers are fully integrated into FedEx's organization and receive "considerable assistance and guidance from the company and its managerial personnel."[47] Drivers also rely extensively on FedEx's BSP, scanner system, and package handlers—who sort, scan, and assemble packages on pallets for drivers—to perform their jobs. Absent their affiliation with FedEx, drivers would lack the infrastructure and support to operate as separate entities.[48] We find that the distinct-occupation factor weighs in favor of employee status.

C. Whether the Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision

Although drivers are ostensibly free of continuous supervision in their work duties, FedEx essentially directs their performance via the enforcement of rules and tracking mechanisms. Drivers are required to adhere to a strict company protocol, with guidelines governing dress, appearance, safety, and the details of package delivery.[49] FedEx conducts periodic audits and appraisals of driver performance, and has the ability to track all major work activities—including signing in and out, and deliveries—in real-time via scanner. Significantly, FedEx may also impose disciplinary measures—including suspension or termination—if drivers fail to comply with contractual rules and procedures.[50] Accordingly, we find that the direction factor weighs in favor of employee status.

D. Skill Required in the Occupation

Drivers are not required to have any special training or skills; in fact, drivers receive all necessary skills via 2 weeks of training provided by FedEx. The skill factor thus weighs in favor of employee status.[51]

E. Whether the Employer or Individual Supplies Instrumentalities, Tools, and Place of Work

Drivers own their vehicles and pay for most costs associated with their operation, characteristics that the Board has, in some instances, found to be supportive of independent-contractor status.[52] But the significance of vehicle ownership is undercut considerably here by the fact that FedEx plays a primary role in dictating vehicle specifications and facilitating the transfer of vehicles between drivers. FedEx eases drivers' burden in acquiring vehicles by providing prospective drivers with the names of dealers, and by operating a vehicle-sales database.[53] In addition, drivers operate out of the FedEx

[44] *Standard Oil Co.*, supra, 230 NLRB at 972 (finding that drivers' control over minor job performance details, such as determining their routes and sequence of deliveries, are "hardly significant indicators of entrepreneurial activity or controlling the means of performance").

[45] FedEx asserts that much of the control it exerts over drivers—namely the administration of drug tests and physical exams, display of the FedEx logo on vehicles, and its safety inspection requirements—is mandated by regulations. As explained, however, we find that FedEx's control over drivers far surpasses what is required by law. See *Stamford Taxi*, supra, 332 NLRB at 1385.

[46] See *Roadway III*, supra, 326 NLRB at 851 (noting that "the drivers' connection to and integration in Roadway's operations is highly visible and well publicized"). Cf. *Argix Direct*, supra, 343 NLRB at 1020–1021(finding independent-contractor status where trucks could be any make, model, or color, and drivers could place their own corporate names or logos on trucks).

[47] See *United Insurance*, supra, 390 U.S. at 259.

[48] See *Gateway Chevrolet Sales*, 156 NLRB 856, 866 (1966) (finding individuals' work to be "completely integrated into Respondent's regular business in a manner characteristic of an employer-employee relationship").

[49] See *Slay Transportation*, supra, 331 NLRB at 1293–1294; *Lancaster Symphony*, supra, 357 NLRB 1761, 1763.

[50] See *Slay Transportation*, supra, 331 NLRB at 1294; *Lancaster Symphony*, supra, 357 NLRB at 1763.

[51] See *United Insurance*, supra, 390 U.S. at 259. See also *Corporate Express*, supra, 332 NLRB at 1522; *Prime Time Shuttle*, 314 NLRB 838, 840–841 (1994).

[52] See *Argix Direct*, supra, 343 NLRB at 1020. But see, e.g., *Adderly Industries*, 322 NLRB 1016, 1022–1023 (1997); *R. W. Bozell Transfer*, supra, 304 NLRB at 201 (truck ownership unsupported by other factors does not suggest independent contractor status).

[53] See *Roadway III*, supra, 326 NLRB at 851–851. Accordingly, "[a]lthough it does not directly participate in these van transfers, [the

Hartford facility, where they work in tandem with FedEx's package handlers. Because aspects of the instrumentalities factor cut both ways, we find it to be neutral.

F. Length of Time for which Individual is Employed

Although drivers enter into 1-year or 2-year Agreements, those Agreements are automatically renewed for successive 1-year periods after the expiration of their initial terms. In effect, drivers "have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory."[54] Drivers' sizeable capital investment in vehicles, which must meet FedEx's specifications, and other FedEx-related equipment also suggests the expectation of a continuous working relationship rather than a short-term arrangement. We find that the length-of-time factor weighs in favor of employee status.[55]

G. Method of Payment

FedEx establishes and controls drivers' rates of compensation, which are generally nonnegotiable.[56] While drivers are not paid an hourly wage, FedEx's system of compensation nonetheless greatly minimizes the possibility of genuine financial risk or gain. Specifically, FedEx insulates drivers against loss by: (1) guaranteeing a daily "vehicle availability payment" to drivers simply for showing up on contractually-mandated days; (2) subsidizing drivers in emerging routes via a Temporary Core Zone Density settlement that compensates them for what FedEx deems to be a "normal" level of packages and deliveries; (3) granting drivers a compensatory payment if FedEx reduces customer volume on their routes; and (4) providing a fuel/mileage subsidy if gasoline prices increase substantially. All of these mechanisms "serve[] as an important safety net . . . to shield [drivers] from loss" and "guarantee[] an income level predetermined by [FedEx] . . . ."[57]

FedEx likewise minimizes the possibility for meaningful economic gain. To this end, FedEx retains the right to curtail or reconfigure service areas in response to growing customer bases, and to reduce the volume of packages on a driver's route if FedEx determines that it exceeds the volume she can reasonably deliver. Accordingly, even though FedEx's compensation formula nominally accounts for incentive factors, drivers' ability to increase earnings based on deliveries, stops, or mileage is broadly constrained by FedEx's control over service areas. "[U]nlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits."[58]

Concededly, FedEx does not provide fringe benefits, such as vacations or paid holidays, withhold taxes from settlement checks, or pay for drivers' work accident insurance, all of which weigh in favor of independent-contractor status. We find these considerations to be outweighed, however, by the fact that FedEx "establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers."[59] For these reasons, we find that the method of payment factor weighs in favor of employee status.

H. Whether or not Work is Part of the Regular Business of the Employer

The drivers devote a "substantial amount of their time, labor, and equipment to performing essential functions that allow [FedEx] to compete in the package delivery market."[60] FedEx's central mission is the delivery of packages to customers; the drivers' job is to effectuate that purpose. Accordingly, drivers "perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business."[61] The regular-business factor thus weighs heavily in favor of employee status.

I. Whether or not the Parties Believe they are Creating an Independent-Contractor Relationship

FedEx believes that it is creating an independent-contractor relationship when it requires that drivers sign a contract acknowledging that characterization. But drivers do not have an opportunity to negotiate over that term, and a majority of unit members voted to be represented as employees in collective bargaining with FedEx. The intent factor is therefore inconclusive.[62]

Respondent's] involvement in these deals undoubtedly facilitates and ensures that a fleet of vehicles, built and maintained according to its specifications, is always readily available and recyclable among the drivers." Id. at 852.

[54] *United Insurance*, supra, 390 U.S. at 259.

[55] See *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984) ("open-ended duration" of workers' relationship with employer weighs in favor of employee status); Cf. *Pennsylvania Academy*, supra, 343 NLRB at 847.

[56] *Lancaster Symphony*, supra, 357 NLRB 1761, 1766.

[57] *Roadway III*, supra, 326 NLRB at 853.

[58] Id. at 852.

[59] Id.

[60] Id. at 851.

[61] Id.; *United Insurance*, 390 U.S. at 259; *Slay Transportation*, supra, 331 NLRB at 1294.

[62] *Lancaster Symphony*, supra, 357 NLRB at 1766.

J. Whether the Principal is or is not in the Business

FedEx, by the terms of the Agreement, "is engaged in providing a small package information, transportation, and delivery service throughout the United States." Because FedEx is engaged in the same business as the drivers, we find that this factor weighs in favor of employee status.[63]

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

FedEx has adduced limited evidence of actual entrepreneurial opportunity for drivers, even if we considered the systemwide evidence described in its offer of proof and properly excluded by the Regional Director. We agree with FedEx that drivers' right to hire and supervise supplemental drivers (which more than half have exercised) is indicative of independent-contractor status.[64] But we give little weight to the drivers' right to sell their routes, which is more theoretical than actual. FedEx exercises considerable control over whether a driver may sell at all, to whom, and under what circumstances. FedEx retains the right to approve all individuals acquiring routes and obliges them to enter into the Agreement "on substantially the same terms and conditions" as the original driver. Moreover, the nature of FedEx's operation necessarily limits the actual value of routes and any proprietary interest that drivers might have in them. Specifically, FedEx does not charge drivers to acquire new or existing routes, and it is permitted to reconfigure or discontinue routes at any time.[65] It is perhaps unsurprising then that the Regional Director found that only two route sales had taken place in the history of the Hartford terminal.[66] As FedEx acknowledges in its brief, multiple-route drivers are expressly excluded from the petitioned-for unit. Finally, the actual exercise of the opportunity to sell her route takes a single-route driver *out* of the unit because the sale ends the driver's relationship with FedEx. The ability to sell a route, then, has limited bearing on the status of drivers who remain in the unit.[67] It is not an incident of their ongoing relationship with FedEx, but an aspect of its severance.

It is also highly significant that drivers' arrangement with FedEx effectively prevents them from working for other employers. Although drivers have a nominal right to use their vehicles for other commercial purposes when they are not delivering packages for FedEx, the Regional Director found no evidence that any Hartford driver had ever done so. As a practical matter, drivers' work commitment to FedEx—typically from 6 a.m. to 8 p.m. from Tuesday through Saturday—occupies the time when most other commercial opportunities would be available.[68] The availability of overnight hours to procure other work, in between mandatory daylong shifts, is hardly indicative of true entrepreneurial freedom.[69] On top of that, drivers' vehicles are specifically tailored for FedEx's operation, and drivers must mask FedEx's logo before using vehicles for other purposes.[70] In our view, drivers' "lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice . . . and more a matter of the obstacles created by their relationship with [FedEx]."[71]

We note finally that drivers have no control over important business decisions. Indeed, FedEx has total command over its business strategy, customer base and recruitment, and the prices charged to customers.[72] Moreover, FedEx unilaterally drafts, promulgates, and changes the terms of its Agreements with drivers, features that "weigh heavily in favor of employee status."[73] There is no evidence in the record that the drivers advertise for business or maintain any type of business operation or business presence. For all of these reasons, we find that drivers "do not have the

[63] See *Community Bus Lines/Hudson County Executive Express*, 341 NLRB 474, 475 (2004) (observing that "owner-operators' work is the precise business of the Respondent").

[64] See *Dial-A-Mattress*, supra, 326 NLRB at 893. We note that the existence of such an opportunity, in itself, does not preclude a finding of employee status. See *Roadway I*, 288 NLRB at 198–199.

[65] See *Roadway III*, supra, 326 NLRB at 853.

[66] In its motion for reconsideration, the Respondent asserts that, since the issuance of the Regional Director's decision, "there have been more than 20 route sales at Hartford." Even assuming that to be true, the Respondent's assertion tells us nothing about the circumstances of each sale or whether any profit was realized by the drivers. Nor would it change the fact that all of these sales would have been made pursuant to the terms imposed by the Respondent, as described above. For the same reason, systemwide evidence of route sales would not weigh significantly in favor of independent-contractor status.

[67] We thus find immaterial the Respondent's assertion, in its motion for reconsideration, that the number of multiple-route operators has increased from three to six since the Regional Director issued his decision.

[68] Indeed, the Agreement states that FedEx "seek[s] to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment."

[69] See *Time Auto Transportation*, supra, 338 NLRB at 638–639. The record also reveals that DOT regulations prohibit drivers from working more than 12 hours a day or 60 hours a week.

[70] See *Roadway III*, supra, 326 NLRB at 851.

[71] Id. Cf. *Argix Direct*, supra, 343 NLRB at 1020–1021 (finding contractor status where employer placed no restriction on the use of drivers' trucks, trucks could be of any model or color, and drivers placed their own names and logos on trucks).

[72] See *C.C. Eastern*, supra, 309 NLRB at 1072.

[73] *Stamford Taxi*, supra, 332 NLRB at 1373.

independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor."[74]

We conclude, that considering the evidence as a whole, this factor weighs in favor of finding employee status.

VI. RESPONSE TO MEMBER JOHNSON'S DISSENT

In dissent, Member Johnson makes three principal arguments, which, after careful consideration, we reject. First, he argues that the approach we adopt today is not permitted by the Act, because it is somehow inconsistent with the common-law test that Congress has required the Board to apply. Second, he endorses the approach taken by the District of Columbia Circuit in *FedEx Home Delivery* as the best option statutorily open to the Board. Third, he argues that, our approach, even if permissible, reflects a flawed "entrepreneurial opportunity methodology." We address each argument in turn.

A.

Member Johnson begins by asserting that the "unmistakable origin and inspiration" for our approach today is the Supreme Court's 1944 decision in *Hearst Publications*,[75] which endorsed the Board's then-prevailing "economic realities" test. Congress rejected that approach in adopting the Taft-Hartley Act in 1947, as the Supreme Court explained in *United Insurance*, supra. The "obvious purpose of this amendment," in the Court's words, "was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act," as opposed to a standard based on "economic and policy considerations within the labor field." Contrary to the dissent's claim—and in clear contrast to *Hearst*—our approach today is demonstrably faithful to *United Insurance* and the common-law test.

We have carefully applied the traditional, nonexclusive common-law factors identified in the Restatement (Second) of Agency and endorsed by the Supreme Court. Consistent with prior Board case law, we have integrated an examination of entrepreneurial opportunity into the test, but without making that factor decisive or neglecting other incidents of the relationship between the drivers and FedEx.[76] On this score, it is worth pointing out that the U.S. Court of Appeals for the Ninth Circuit, applying a California common-law test that closely resembles the Restatement approach, recently concluded that FedEx drivers in California are employees, not independent contractors.[77] The Ninth Circuit concluded that the "entrepreneurial opportunities" cited by FedEx did not support independent-contractor status, given the company's control over those opportunities.[78]

Member Johnson's attempt to link our approach to *Hearst*, supra, then, has no basis. Nor does his related claim that we have adopted the test articulated by then-Member Liebman, dissenting from the Board's decision in *St. Joseph News-Press*, supra. As explained, we overrule *St. Joseph News-Press*, 345 NLRB 474 (2005), today, insofar as that decision mistakenly suggested that the Board cannot consider evidence that a putative employer has effectively imposed constraints on an individual's ability to render services as part of an

[74] *United Insurance*, supra, 390 U.S. at 258.

[75] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

[76] If anything, it is our colleague whose position is grounded in a particular set of "economic and policy considerations" (though not considerations clearly drawn from the history and purposes of the Act), at the expense of traditional agency principles.

[77] *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014). See also *Slayman v. FedEx Ground Package System, Inc.*, 765 F.3d 1033 (9th Cir. 2014) (holding that FedEx drivers are employees under Oregon law, applying State right-to-control test and State economic-realities test).

In *Alexander*, supra, the Ninth Circuit applied the "multi-factor test set forth in [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989)]." 2014 WL 4211107 at *5, slip op. at 14. The Ninth Circuit described the test this way:

> California's right-to-control test requires courts to weigh a number of factors: "The principal test of an employment relationship is whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired."
>
> . . . .
>
> California courts also consider "several 'secondary' indicia of the nature of a service relationship." The right to terminate at will, without cause, is "[s]trong evidence in support of an employment relationship."
>
> . . . .
>
> Additional factors include:
>
> (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.
>
> These factors "[g]enerally . . . cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations."

Id. at *6, slip op. at 14–15. (Internal citations omitted.) The Ninth Circuit accordingly addressed FedEx's right to control the manner and means in which the drivers performed their work, as well as the remaining secondary factors. The similarity between the approach followed by the Ninth Circuit and that of the Restatement (Second) of Agency § 220, examined here, is clear, despite our dissenting colleague's contrary suggestion.

[78] *Alexander*, supra, 2014 WL 4211107 at *11, slip op. at 24–26.

independent business. To reject the view of the *St. Joseph News-Press* majority on this point, of course, is not to adopt the test of the dissent in that case—and we do not. Our test is the test articulated here.

B.

In Member Johnson's view, the Board can and should adopt the approach of the District of Columbia Circuit in *FedEx Home Delivery*, supra. We have already explained why we have chosen not to do so. In short, we believe that the court's approach would create a broader exclusion under Section 2(3) of the Act than Congress actually intended, denying the protections of the Act to workers who are, in fact, employees under common-law agency principles. The Ninth Circuit's recent *FedEx Ground* decisions suggest as much.

We do not understand Member Johnson to argue that the Board is *required* to adopt the District of Columbia Circuit's approach, which approach the court incorrectly ascribed as the Board's own view. Member Johnson points to no decision of the Supreme Court that treats "entrepreneurial opportunity" as an "animating principle" of the common-law agency test.[79] Nor does he point to anything in the Restatement (Second) of Agency—which has guided the Court in this area—that clearly refers to the concept of "entrepreneurial opportunity," much less makes it the "animating principle" of the inquiry.[80] As we have shown, the very notion of such an "animating principle" is hard to reconcile with the Supreme Court's admonition against the use of a "shorthand formula or magic phrase" in making the independent-contractor determination.[81] The dissent, then, does not persuade us that "entrepreneurial opportunity" should be the focus of the Board's analysis.

C.

Much of Member Johnson's dissent is taken up by his attempt to show that, in distinguishing between actual and theoretical entrepreneurial opportunity (as he concedes the Board must do), we have placed too much emphasis on the degree to which bargaining unit workers in fact *take* an opportunity. For our colleague, this point is crucial, because of the overriding weight he would give to the entrepreneurial-opportunity factor (at the expense of the traditional common-law factors) and, in particular, to route sales as the determining evidence of entrepreneurial opportunity. Our commonsense approach, by contrast, looks to demonstrable facts, not speculative theories. As we have suggested, however, in this case the debate is academic. Even if we employed precisely the "methodology" that Member Johnson demands, and even if we considered and credited the systemwide evidence that FedEx proffered here,[82] our ultimate conclusion would be the same, given the weight of the evidence supporting the other common-law factors.

Most of the traditional common-law factors strongly support a finding of employee status. The independent-business factor, as we denominate it today, also points toward employee status. In that context, we have considered the entrepreneurial opportunities available to FedEx drivers, and found them to be minimal. In particular, we accord little weight to the right of drivers to sell their routes, given the control FedEx exercises not only over that right, but also over the existence and configuration of the route itself.[83] A driver's actual sale of her route, in turn, takes her out of the bargaining unit. All of these considerations persuade us that a driver's right to sell her route is of very limited significance here, in its own right and, more particularly, in the context of the record as a whole. Simply put, and contrary to Member Johnson's view, this case does not turn on "sample size," "business valuation principles," and whether there was a "market for route sales."[84] Member

[79] Remarkably, after wrongly asserting that *our* approach is drawn from the Congressionally abrogated "economic realities" test of the Supreme Court's *Hearst* decision, Member Johnson invokes another Supreme Court decision, *Silk*, that applied the same economic realities test. *U.S. v. Silk*, 331 U.S. 704 (1947) (applying Social Security Act). The *Silk* Court made plain that it was following *Hearst*. Id. at 713–714 ("Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the Hearst case."). The *Silk* Court did not apply common-law agency principles.

Member Johnson also cites appellate decisions where courts have pointed to the *absence* of entrepreneurial opportunities as supporting a finding of employee status. See *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008); *Painting Co. v. NLRB*, 298 F.2d 492 (6th Cir. 2002). But those decisions cannot be fairly read to say that the *presence* of some entrepreneurial opportunities would suffice to establish independent-contractor status. Nor do those cases support the D.C. Circuit's analysis or undermine the approach we take here.

[80] Member Johnson explains that he "would apply entrepreneurial opportunity as an important element in determining the factors b, c, e, f, i, and j in the Restatement," but he does not argue that the Restatement itself does so.

[81] *United Insurance*, supra, 390 U.S. at 258.

[82] FedEx's offer of proof regarding systemwide evidence asserts that, as of March 2007, there were 933 multiple-route operators, and that, from 2005–2006, there had been at least 11 route sales in the northeast region. As we have noted, multiple-route operators are not in the unit and a driver's actual sale of her only route would terminate her employment relationship with FedEx.

[83] Accord: *Alexander v. FedEx Ground*, supra, 2014 WL 4211107 at *11, slip op. at 26 (describing control exercised by FedEx with respect to route sales as negating significance of asserted entrepreneurial opportunities).

[84] Member Johnson describes route sales as a "hallmark of entrepreneurial opportunity," but he does not convincingly demonstrate why. What the selling driver conveys to the buyer is the creation of FedEx and remains subject to the control of FedEx in every important

Johnson endorses the "assessment of entrepreneurial opportunity" while recognizing the Board's lack of expertise. Indeed, it seems to us highly implausible that Congress intended to make the Board's independent-contractor inquiry turn on an economic mode of analysis it objected to the Board performing.[85]

VII. CONCLUSION

Here, it was FedEx's burden to establish that the drivers are independent contractors, and it has failed to carry that burden.

As explained, the great majority of the traditional common-law factors, as incorporated in the Restatement (Second) of Agency, point toward employee status:

> that FedEx exercises control over the drivers' work;
>
> that the drivers are not engaged in a distinct business;
>
> that the work of the drivers is done under FedEx's direction;
>
> that the drivers are not required to have special skills;
>
> that drivers have a permanent working relationship with FedEx;
>
> that FedEx establishes, regulates, and controls the rate of drivers' compensation and financial assistance to them;
>
> that the work of the drivers is part of the regular business of FedEx; and
>
> that FedEx is in the same business as the drivers.

Two of the traditional factors—who supplies the instrumentalities of work, and whether the parties believed they have created an independent-contractor relationship—we view as inconclusive, but they would in any case not outweigh the remaining factors. Finally, we have carefully considered an additional factor: whether the evidence tends to show that the drivers render services to FedEx as part of their own, independent businesses. We have determined that, on the whole, it does not—and we would reach the same conclusion even considering the systemwide evidence that FedEx proffered, but that the Regional Director excluded from the record.

Weighing all the incidents of drivers' relationship with the Respondent, we conclude that FedEx Home Delivery's Hartford drivers are statutory employees and not independent contractors.[86] Accordingly, we grant the General Counsel's Motion for Summary Judgment.[87] On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation, with a place of business in Windsor, Connecticut, the Respondent's facility, has operated a home package delivery service.[88]

During the 12-month period ending June 30, 2010, the Respondent, in conducting its operations described above, derived gross revenues in excess of $500,000 and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Connecticut.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Brotherhood of Teamsters, Local Union No. 671, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on May 11, 2007, the Union was certified on May 27, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All contract drivers employed by Respondent 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

respect: FedEx has both the right to adjust the volume of daily deliveries and the right to reconfigure the route at any time. Moreover, it has exclusive control over the customer base, recruitment, and pricing.

[85] As noted by Member Johnson, the Board is prohibited from employing individuals for the purpose of economic analysis. 29 U.S.C. § 154(a).

[86] Consistent with *Roadway III*, supra, we note that "the same set of factors that was decisive [here] may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other." 326 NLRB at 850, quoting *Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982).

[87] The Respondent's request that the complaint be dismissed in its entirety is therefore denied.

[88] In its answer to the complaint, the Respondent admits that FedEx Ground Package System, Inc. is a Delaware corporation with a place of business in Windsor, Connecticut, and that the corporation has a home delivery service offering.

> guards, professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated June 2 and 11, 2010, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about June 2, 2010, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about June 2, 2010, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc., Windsor, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters, Local Union No. 671 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All contract drivers employed by Respondent 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.

(b) Within 14 days after service by the Region, post at its facility in Windsor, Connecticut, copies of the attached notice marked "Appendix."[89] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since on or about June 2, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 34 a sworn certification of a responsible official on a form provided

[89] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER JOHNSON, dissenting.

In light of the U.S. Court of Appeals for the District of Columbia's decision that delivery truckdrivers at two FedEx facilities in Massachusetts are independent contractors,[1] the Board must today reexamine its earlier denial of review of the Regional Director's finding, in a factually indistinguishable case, that drivers at FedEx's Hartford, Connecticut terminal are statutory employees. We all nominally agree that, in resolving independent-contractor issues, the Board applies the common-law agency test "with no one factor being decisive," as required by the Supreme Court.[2] As with many multifactor tests, however, the agency test is amenable to substantial variations in the weight assigned to each factor and, thereafter, in the resulting conclusions.[3] In response to the court's emphasis on the factor of entrepreneurial opportunity, my colleagues have done more than clarify and return to the analysis previously articulated by the Board in *Roadway Package Systems, Inc.*, 326 NLRB 842, 849 (1998) (*Roadway III*), and subsequently applied in *St. Joseph News-Press*, 345 NLRB 474 (2005). They have essentially adopted the view of the dissenting Board Member in the latter case, and thereby fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of "right to control" factors relevant to perceived economic dependency.

In my view, this shift goes beyond the established limits of our agency discretion to define independent contractors under the traditional common-law agency test; even if permissible, it arbitrarily fails to give adequate weight to entrepreneurial opportunity as part of the test. Further, my colleagues compound that failure by both incorrectly measuring and then artificially restricting the relevant evidence for assessing what opportunity actually exists for FedEx delivery drivers. I therefore respectfully dissent.

[1] *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

[2] *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968).

[3] Even when concurring with the Board's holding in recent cases, I have noted that tests that rely on an extensive array of factors are susceptible to results-oriented analysis and the dangers posed by same. *Los Angeles Airport (LAX) Hilton Hotel & Towers*, 360 NLRB 1080, 1089 fn. 3 (2014) (Member Johnson, concurring). However, under Supreme Court precedent, we are bound to apply such a multifactor test here.

I. THE MAJORITY'S TEST IS AN IMPERMISSIBLE RESURRECTION OF THE CONGRESSIONALLY REJECTED *HEARST* STANDARD, IN THAT IT WARPS THE COMMON LAW TEST TO SUBORDINATE EVIDENCE OF ENTREPRENEURSHIP TO THAT OF "DEPENDENCY"

The majority's "refinement" of the Board's approach to independent-contractor cases begins with the proposition that "entrepreneurial opportunity" must be understood to mean actual, not merely theoretical, opportunity for gain or loss. That is reasonable to a point, as I discuss later in this opinion, but my colleagues go beyond that point both legally and factually. Legally, they refine the analysis of the entrepreneurial opportunity factor by reformulating it as simply one minor aspect of a new, nondeterminative factor looking to whether the alleged independent contractor is, in fact, rendering services as part of an independent business. Notwithstanding the majority's disclaimers, I contend that this is the standard advocated in the *St. Joseph News-Press* dissent,[4] and it is implicitly founded on the policy-based notion that the Act should be construed to protect as many service providers as possible from any imbalance in economic bargaining power between them and the other party to the service contract.

The majority is convinced that accepting the court's position would result in "a broader exclusion from statutory coverage than Congress appears to have intended," contravening the Supreme Court's admonition that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996). However, the majority errs by applying this admonition in a vacuum. The particular exemption reformulated in this case—the independent-contractor exemption—has a long and storied history. That history is replete with a Congressional mandate reversing the Board, as fully recognized by the Supreme Court many years ago, that forbids us from journeying down the path the majority chooses now. Specifically, the majority acknowledges but fails to give meaningful weight to a legal background manifesting a clear Congressional intent that the Board must apply the common-law agency test in determining the scope of the independent-contractor exemption, and that it do so in a way that does not reflect the more

[4] "Here, then, it is entirely appropriate to examine the economic relationship between the [r]espondent and the carriers to determine whether the carriers are *economically independent business people*, or substantially dependent on the [r]espondent for their livelihood." 345 NLRB at 484 (Member Liebman, dissenting) (emphasis added).

expansive and specifically rejected "economic realities" or "economic dependence" test.[5]

Whether or not admitted, the unmistakable origin and inspiration for the majority's test is *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), where the Supreme Court articulated a policy-based economic reality test for determining independent-contractor status in cases involving the scope and coverage of New Deal social legislation, such as the Wagner Act. As later summarized by the Court in *U.S. v. Silk*, 331 U.S. 704 (1947), applying the same test to the Social Security Act,

> The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, 29 U.S.C.A. s 151 et seq., we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, s 220. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act."[6]

Adverse Congressional reaction to this more expansive alternative to the common-law test led to the specific exclusion of independent contractors from the Act's coverage in the Taft Hartley Amendments of 1947. As explained in the House report on this legislation

> [I]n . . . *National Labor Relations Board v. Hearst Publications, Inc.*, the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passes the act, not new meanings that, nine years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." . . . It is inconceivable that Congress, when it passes the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words, not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of 'employee.[7]

Subsequently, the Supreme Court recognized that Congress had effectively abrogated the holdings in *Hearst* and *Silk* to the extent they authorized policy-based alternatives to the common-law agency test of employee and independent-contractor status in the absence of express statutory language.[8] Thus, unlike our Act's exemption for the "agricultural laborer" at issue in *Holly Farms*, which Congress specifically intended to be narrowly construed,[9] the legislative history on the exemption for "independent contractors" shows that Congress clearly and specifically intends that the exemption for independent contractors *not be* too narrowly construed, and that the common-law agency test must apply. In short, Congress has declared a wide gulf between the concepts of (a) the independent contractor left uncovered by the Act, and (b) the employee covered by the Act, and, thanks to the 1947 reforms, the only bridge over that gulf is Congress' own legislative action, not our reformulation of a legal test or our purported economic analysis.

[5] *NLRB v. United Insurance Co. of America*, 390 U.S. at 256.
[6] 331 U.S. at 713.
[7] H.R. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947).
[8] *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324–325 (1992).
[9] *Holly Farms Corp.*, 517 U.S. at 399 fn. 6 (noting that legislative history suggests that Congress intended for the agricultural laborer exclusion to be narrowly construed).

In overruling *St. Joseph News-Press* and effectively adopting the rationale expressed by the dissent there, my colleagues apparently cling to the belief that an economic dependence test of independent-contractor status is still permissible if engrafted onto the common-law agency test. I disagree, as did the *St. Joseph News-Press* majority.[10] Notwithstanding their protestations to the contrary, my colleagues' articulation of an economic dependency test, even dressed in the common-law agency wrappings, cannot be divorced from the policy-based rationale endorsed in the *Hearst* and *Silk* opinions, which the Supreme Court has itself deemed to be "feeble precedents for unmooring the term ['employee'] from the common law."[11] In sum, the Board's discretion to redefine the limits of the independent-contractor exemption as the majority does today is therefore not as broad or entitled to judicial deference as my colleagues suppose it to be.[12] None of the factors of *Roadway Express III*, either singly or in combination, can serve as a Trojan Horse for the proposition that any nonequivalency of bargaining power in a service contract must then create Board jurisdiction. It is for Congress, not the Board, to address the policy-based concerns the majority may have regarding the common-law test and the significance of entrepreneurial opportunity under that test, even as applied to individuals providing exclusive service to one entity with superior economic power.[13]

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[10] 345 NLRB at 481 ("It is not appropriate, as advocated by the dissent, for the Board to implement such an alteration of the legal landscape without Congressional direction.").

[11] *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 324. The majority's reference to the recent decision in *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014), is singularly unhelpful to their disavowal of reliance on the discredited rationale of *Hearst* and *Silk*. The issue litigated in *Alexander* was whether FedEx drivers should be considered employees or independent contractors under the *California* Workmen's Compensation Act. That issue was governed by a State law standard, not the independent-contractor standard pertinent to the Act that I discuss herein. Indeed, the Ninth Circuit panel repeatedly made the point that it was deciding this issue under the applicable State law test, which the parties agreed was the multifactor test set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). The California Supreme Court there expressly stated that

> the concept of "employment" embodied in the [California Workmens Compensation] Act *is not inherently limited by common law principles*. We have acknowledged that the Act's definition of the employment relationship must be construed with particular reference to the "history and fundamental purposes" of the statute.
>
> . . . .
>
> Federal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting "employees." *Where not expressly prohibited by the legislation at issue, the federal cases deem the traditional "control" test pertinent to a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover*. [Id. at 352. (Emphasis added.)]

The Court cited *Hearst* and *Silk*, inter alia, in support of the highlighted social policy proposition. It specifically distinguished the law applicable to determinations of independent-contractor status under the Federal Insurance Contributions Act and Federal Unemployment Tax Act where, as in our own Act, Congress affirmatively amended the statutes in 1948 to provide that the employment relationship must be determined by "usual common-law rules." Id., citing *U.S.* v. *Webb, Inc*., 397 U.S. 179, 183-190 (1970). In an accompanying footnote, the Court stated "[w]e find no similar express confinement to common law principles in our workers' compensation scheme." Id. at 352 fn. 6. It could not be clearer, then, that the test articulated by the California Supreme Court in *Borello & Sons* and applied by the Ninth Circuit in *Alexander* is not the common-law test that Congress requires us to apply, even if its "secondary indicia," as the majority points out, overlap with the common-law factors of Restatement § 220. This test is instead a variant of the policy-based economic realities test of *Hearst*, *Silk*, and the *St. Joseph*'s dissent. Similarly, the other Ninth Circuit decision cited by the majority applied Oregon State right-to-control and economic realities tests, neither of which is equivalent to the common-law test we are required to apply under the National Labor Relations Act. *Slayman v. FedEx Ground Package System, Inc*., 765 F.3d 1033 (9th Cir. 2014). Indeed, it proves my point that these State tests ultimately declare themselves "not inherently limited by common law principles" and in favor of making "a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover" (*Borello*, 48 Cal.3d at 352), despite technically including common-law agency factors. Just like the majority's new test, the State tests are inquiries ultimately tilted on policy grounds to favor statutory coverage even where they may contain some common-law agency factors. As described above, Congress made a different coverage determination with the Act.

[12] In contending that the Board is entitled to substantial judicial deference in determining the scope of its jurisdiction with respect to defining independent-contractor status, the majority misplaces reliance on *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013). That case involved deference to the so-called gap-filling discretion of an administrative agency where Congress has not spoken directly addressed the precise statutory question at issue. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842–843 (1984). Here, Congress has spoken, and the Supreme Court has interpreted its intent to require the traditional common-law agency test. The deference issue here is therefore comparable to the issue in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc*., 416 U.S. 267, 289 (1974), where the Supreme Court held that the Board had no authority to depart from past practice, in contravention of Congressional intent, by narrowing the definition of managerial employees excluded from the Act's jurisdiction.

[13] The majority's analysis provides no real distinction from the issues facing any sole proprietorship or small business that contracts as a service provider to a company as immense as FedEx Ground. Large, modern corporations will always be able to set the terms of engagement in such dealings, yet this does not make the owners of the contractor businesses their employees. The majority's analysis, indeed, if applied to small government contractors bound to the extensive obligations typically imposed by the national Government in its contracts, would seemingly make all of them government employees.

II. THE MAJORITY'S TEST, REGARDLESS OF ITS INTRODUCTION OF ECONOMIC DEPENDENCE, IMPERMISSIBLY GIVES THE CONCEPT OF ENTREPRENEURIAL OPPORTUNITY SHORT SHRIFT

Even considered apart from the limitations imposed by Congress and judicial precedent, the majority's approach impermissibly and arbitrarily discounts the historical significance of evidence pertaining to entrepreneurial opportunity under the traditional common-law agency test and fails to provide an accurate and practical measure of "actual" entrepreneurial opportunity. On this point, I do not read the *FedEx* court's decision as a major departure from the traditional test or as giving inordinate emphasis to entrepreneurial opportunity over all other factors. At most, as discussed in section III below, the *only* responsive refinement necessary in the Board's independent contractor analysis is to define factors relevant to "actual" entrepreneurial opportunity, using a realistic, practicable, and economically valid methodology.[14]

As set forth in *Roadway III*,[15] the Board applies the nonexclusive 10-factor common-law agency test from the Restatement (Second) of Agency § 220,[16] cited with approval in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–752 (1989). In applying this test, the Board follows the Supreme Court's direction that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[17] In the majority's view, the *FedEx* court's decision contravenes this direction because it now treats the entrepreneurial opportunity factor as dispositive in cases where the common-law factors equally support both independent-contractor status and employee status. A more precise interpretation of the court's decision, however, is that it merely and correctly recognizes the importance of the entrepreneurial opportunity factor in the independent-contractor analysis. This interpretation fully comports with Supreme Court and Board precedent.

Although the Board does not treat any factor as generally dispositive, it has observed:

> Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.[18]

The *FedEx* opinion is not to the contrary. The court observed that the common-law test "is not merely quantitative[,]" not just a matter of counting up the factors on each side of the question, but that "[i]nstead, there also is a qualitative assessment to evaluate which factors are determinative in a particular case, and why."[19] It went on to hold that "while all the considerations at common law remain in play, an *important animating principle* by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." Id. at 496 (emphasis added). In this context, it is clear that the court did not intend that the entrepreneurial opportunity factor be treated as dispositive in every factual context. It certainly did not run afoul of the Supreme Court's observation in *United Insurance*, quoted by the *FedEx* court, that there is no "shorthand formula or magic phrase that can be applied to find the answer" in an independent-contractor analysis.[20] Indeed, the court

[14] As I will later explain, systemwide evidence excluded from the preelection hearing in the underlying representation case is relevant and necessary in order to have an accurate understanding of the actual opportunities available to the drivers here. Thus, in my view, the preferable alternative is to remand this case to the region to reopen the record and to allow the parties to submit this systemwide evidence.

[15] 326 NLRB 842, 849 and fn. 32 (1998).

[16] § 220 provides, in pertinent part:

> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) The extent of control which, by the agreement, the master 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 master and servant.
> (j) Whether the principal is or is not in the business.

[17] *NLRB v. United Insurance Co.*, 390 U.S. at 258. The Supreme Court added that "[w]hat is important is that the total factual context is assessed in light of the pertinent common-law agency principles." Id.

[18] *Argix Direct, Inc.*, 343 NLRB 1017, 1022 fn. 19 (2004) (quoting *Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982)).

[19] 563 F.3d at 497 fn 3.

[20] 390 U.S. at 258.

noted that this "emphasis" on entrepreneurship did not make applying the test "purely mechanical."[21]

It bears noting here that, although the policy-based economic reality test has been abrogated by Congress, one holding from the Supreme Court's *Silk* decision still stands. This holding solidly emphasizes the decisive significance of entrepreneurial opportunity *even in the context of the test applied there—which is the same test that the majority applies here*. Two cases were consolidated for consideration in *Silk*. In one, the Court affirmed the decision of the Seventh Circuit that drivers who worked exclusively for Greyvan Lines and had its name on their trucks were independent contractors. In relevant part, the Court stated: "These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance [*Greyvan*] they haul for a single business, in the other [*Silk*] for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."[22] Simply put, it would be incongruous to hold that drivers who own, possess, and use their own trucks as, by definition, the central instrumentality of their work were not contractors, absent substantial offsetting circumstances beyond the fact that they work exclusively for one company. Thus, there is nothing remarkable at all about citing this aspect of *Silk* as contrary to the result reached by my colleagues even under the test they advocate.[23]

Furthermore, the *FedEx* court's emphasis on the entrepreneurial opportunity factor is not only consistent with Supreme Court precedent, it is shared by other lower courts as well, whether or not identified as a separate factor in the analysis. See, e.g., *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1097 (9th Cir. 2008) ("In finding that the incidents of the relationship between Friendly and its drivers militate in favor of 'employee' status, we place particular significance on Friendly's requirement that its drivers may not engage in any entrepreneurial opportunities."); *Painting Co. v. NLRB*, 298 F.3d 492, 500 (6th Cir. 2002) (finding no independent-contractor status where employer "controlled the employment" of the two individuals at issue and where neither individual "exhibited any meaningful entrepreneurial or proprietary characteristics that would lead one to believe that they controlled the terms of the work they completed"); *Collegiate Basketball Officials Assn., Inc.*, 836 F.2d 143, 145 (3d Cir. 1987) (applying "right to control" test, court examined factors such as type of services rendered, the potential for additional profits through the exercise of entrepreneurial skill, ownership and maintenance of equipment); *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d at 974 ("While a balancing of the various indicia of control is somewhat inconclusive, the entrepreneurial characteristics of the owner-operators tip decidedly in favor of independent contractor status.").[24]

As my colleagues acknowledge, the Board itself has long considered whether individuals have "significant entrepreneurial opportunity for gain or loss"[25] in the context of its analysis of independent-contractor issues. Originally it did so as part of the "right to control" test.[26] More recently, particularly since *Roadway Express III*, the Board has increasingly recognized the significance of evidence of entrepreneurial opportunity, including considering it as a separate factor.[27]

In sum, the *FedEx* court's decision can be easily reconciled with extant judicial and Board precedent. Contrary to my colleagues' rationale, it clearly did not represent a sharp departure from that precedent, nor does it justify a response from us that *is* a sharp departure

[21] 563 F.3d. at 497.

[22] *Silk*, 331 U.S. at 719.

[23] I note that at least two Supreme Court justices have expressed this view of *Silk*. See then-Judge Breyer's opinion for the court in *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57, 64 fn. 8 (1st Cir. 1981) ("That the [*Silk*] Court reached this result is particularly significant in that it applied a more expansive definition of the term 'employee' than that applicable here") and then-Judge Kennedy's opinion of the court in *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d 966, 975–976 (9th Cir. 1978) ("in view of its consideration of the economic reality test, the Court's determination that the Greyvan drivers were independent contractors assumes greater significance for our purposes").

[24] See also *Labor Relations Division of Construction Industries of Massachusetts, Inc. v. Teamsters Local 379*, 156 F.3d 13, 19–20 (1st Cir. 1998) (in affirming district court's reversal of arbitrator's decision finding that truckdrivers were employees under the LMRA, the First Circuit reaffirmed that fundamental inquiry is "right to control" test, but that, "[w]hile no one factor is decisive in this determination, there can be little doubt of the prominence of the factor of entrepreneurial risk and reward . . . .").

[25] *Roadway III*, 326 NLRB at 851.

[26] See, e.g., *BKN, Inc.*, 333 NLRB 143, 145 (2001) (finding writers to be employees because they "perform functions that are an essential part of the Employer's normal operations" and have "no substantial proprietary interest and no significant entrepreneurial opportunity for gain or loss when they are writing scripts for the Employer"); *DIC Animation City*, 295 NLRB 989, 991 (1989) (finding that writers are independent contractors "because they control the manner and means by which the results are accomplished and are subject to certain risks involved in an entrepreneurial enterprise" and because employer's "limited control is insufficient to warrant a finding that the writers are employees").

[27] E.g., *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 846 fn. 1 (2004) (listing the entrepreneurial opportunity factor as separate factor).

from precedent by diminishing the significance of the entrepreneurial opportunity factor to the point where it will rarely be considered as among the decisive factors in determining independent-contractor status. My colleagues have made entrepreneurial opportunity a mere subfactor in their analysis. This gives short shrift to what should be an "animating principle," especially entrepreneurship—a form of economic opportunity that most believe marks a clear dividing line between operating one's own business and merely performing a work assignment.[28]

III. THE MAJORITY'S VIEW OF ENTREPRENEURIAL OPPORTUNITY FAILS TO GIVE SUFFICIENT WEIGHT TO THE SIGNIFICANCE OF ROUTE SALES

Although I do view the *FedEx* court's decision as consistent with Supreme Court and Board precedent, I agree with the majority that the Board needs to clarify that when it refers to entrepreneurial opportunity, it means *actual* entrepreneurial opportunity, as opposed to *theoretical* entrepreneurial opportunity. The Board already considers whether entrepreneurial opportunities—because the employer exercises restrictive controls in some manner—are rendered more theoretical than actual entrepreneurial opportunities.[29] In this respect, the majority merely reaffirms the principle, espoused by the D.C. Circuit, that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the company's claim that the workers are independent contractors," *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995). I agree with this principle, but more needs to be said about its application to determine what constitutes an actual "*significant* entrepreneurial opportunity for gain or loss" *Roadway III*, 326 NLRB at 851 (emphasis added).

A. Contrary to the Majority's Position, the Sales in this Case are Evidence of Actual Entrepreneurial Opportunity

As previously discussed, the majority tilts its analysis against giving appropriate weight to evidence of entrepreneurial opportunity by cabining consideration of such evidence as relevant only to a mere subpart of the single factor of "rendering services as an independent business." My colleagues pay lip service to the argument that drivers' right to hire and supervise supplemental drivers, which more than half have exercised, indicates independent-contractor status. I agree more wholeheartedly than the majority that the fact of hiring others to help perform the object of a contract indicates independent-contractor status.

However, it is far more troubling that the majority also gives "little weight" to the drivers' right to sell their routes, which is deemed "more theoretical than actual," because of the extent of FedEx controls over a sale.[30] Given these controls, the majority finds it "perhaps unsurprising" that the Regional Director found only two route sales had taken place at the Hartford terminal. Then, diminishing the significance of route sales to the vanishing point, the majority opines that their analysis would be the same even under FedEx's rejected proffer of additional sales at Hartford, as well as of systemwide sales. They reason that a route sale at Hartford would either remove the seller from the petitioned-for unit because the driver's relationship with FedEx would terminate or it would remove the purchaser of an additional route from the petitioned-for unit because multiple-route drivers are excluded. Thus, they contend, evidence of route sales has limited bearing, if it is not altogether immaterial, with respect to the status of drivers remaining in the unit.

In marked contrast to the majority's approach here, the *FedEx* court had found that drivers had significant entrepreneurial opportunity where two drivers were able to sell their routes for profit ranging from $3000 to $16,000, drivers could operate multiple routes, and drivers could use their trucks to conduct other business outside of FedEx work. 563 F.3d at 499, 500. For the panel majority, the fact that at least one person had availed of an opportunity was sufficient to establish that an actual opportunity exists because "there is no unwritten rule or invisible barrier" preventing others from availing of such opportunities. Id. at 502 (quoting *C.C. Eastern*, 60 F.3d at 860). That view is consistent as well with the Board's statement in *Arizona Republic*, 349 NLRB 1040, 1045 (2007), which the majority today also overrules, that "the fact that many carriers choose not to take advantage of [an] opportunity to increase their

[28] To be specific, I would apply entrepreneurial opportunity as an important element in determining the factors b, c, e, f, i, and j in the Restatement (Second) of Agency § 220, in the particulars of this case. See fn. 16, above. This application leads me to the conclusions set forth below.

[29] See, e.g., *Slay Transportation*, 331 NLRB 1292, 1294 (2000) (finding employee status where, "despite [a] theoretical potential for entrepreneurial opportunity, the control exercised by the [e]mployer over the other aspects of its relationship with the owner-operators severely circumscribed such opportunity"); *Roadway III*, 326 NLRB at 853 (finding employee status where employer "imposed substantial limitations and conditions").

[30] For the sake of clarity, the FedEx "route" is not the same as the classic delivery route. It is a delineated delivery territory where the driver has the right under the Agreement to deliver packages and receive a settlement check from FedEx, based on various factors, for that service.

income does not mean they do not have the entrepreneurial *potential* to do so."[31]

In my view, the *FedEx* court supplied us with both the correct definition of actual entrepreneurial opportunity from a route sale, if the analysis is reduced to a basic theory of proof, and the weight to be assigned evidence of this opportunity in proper application of the required common-law test. *The fact that someone actually took an entrepreneurial opportunity is proof positive that the opportunity existed in the first place.* If the Board cannot or does not deploy a more accurate econometric analysis due to the state of a factual record, that should suffice to carry the employer's burden. What the Board cannot do, and exactly what the majority has done here, is declare that the actual taking of the entrepreneurial opportunity (here, at least one sale) amounts to nothing, because "not enough people in the proposed unit" took the opportunity and, in any event, those who take the opportunity remove themselves from the unit, making evidence of the sale of minimal relevance to the remainder. Specifically, my colleagues maintain that the facts relied upon by the D.C. Circuit show that FedEx drivers have only a theoretical entrepreneurial opportunity and that the court gave "little weight" to countervailing considerations.[32] In both respects, I believe the opposite is true. The facts in the FedEx case before us and the one decided by the D.C. Circuit, which all agree are not meaningfully distinguishable, provide sufficient evidence of entrepreneurial opportunity, and my colleagues give far too little weight to them, particularly as to the evidence of route sales, in balancing all of the traditional common-law test factors.

First, it seems the majority and I have a basic disagreement on whether sales of the "business" at issue from one putative contractor to another signify anything at all in terms of actual entrepreneurial opportunity. In my view, sales of routes between drivers in this case are highly important in demonstrating actual entrepreneurial opportunity: (1) they constitute a type of actually realized opportunity; (2) they show that the asserted business actually has an independent value derived from an arm's-length exchange between two individuals; (3) they show that potential participants (i.e., potential buyers and sellers) are actually sizing up a market that actually exists for the asserted business (see fn. 49, below); (4) they show that the value of the asserted business is actually greater than zero, i.e., two common-law employees typically don't negotiate and fix a price when one replaces another who quits a job; and (5) they provide a price—a measure of the value that can help us determine whether the entrepreneurial opportunity is actual.[33] Sales thus tend to be a hallmark of entrepreneurial opportunity, not immaterial or irrelevant to it.[34] The majority rejects this principle, based on the power of FedEx to potentially change certain terms of its Agreement with the drivers. But the majority's analytical reliance upon *FedEx's potential use of contractual power* in order to minimize

[31] I note, however, that the Board also considered that the carriers were allowed to hire other carriers at their discretion; that several carriers delivered other papers in addition to the Arizona Republic; that many carriers held other jobs; and that carriers could negotiate piece rates and accept tips from subscribers. 349 NLRB at 1044–1045.

[32] Both the majority's departure from the teaching of the 1947 amendments, *United Insurance*, and *Darden*, as well as the majority's specific failure to give due weight to entrepreneurial opportunity shown by the facts here, amount to reversible error. However, in addition, I strongly disagree with the majority's assumptions that (1) FedEx's emphasis on branding so that its customers would have a seamless perception of the FedEx delivery system, or (2) FedEx's "business service package" monitoring tools and their use here, would constitute evidence in favor of control, and thus employee status. As to the first point, any delivery service might want to present the consumer with the "look" of a unified service while having little actual control over the person driving the vehicle. As to the second point, monitoring is not "control over the details of the work," which is what the Restatement test specifies as relevant. There is no evidence in this case that FedEx is constantly dispatching drivers or giving mandatory directions for deliveries. At most, it adds emergency deliveries, something any contractor has to contend with, and it gives drivers optional directions, something that is commonly available today through various mobile phone apps. Notably, the drivers themselves can trade particular deliveries by "flexing" them to each other. Finally, government-based control should not be counted as evidence of FedEx Ground's control of the details of the work or of route sales transactions.

[33] A uniform series of sales for a nominal amount typically would not be evidence of actual opportunity. However, the mere existence of a no or a low price does not rule out that an actual entrepreneurial opportunity exists. Some businesses have been bought for $1, with the hope of "unlocking" significant or even massive potential value under new management. For example, this happened with Newsweek in 2010. See http://dealbook.nytimes.com/2010/10/07/newsweeks-price-tag-1 (last visited September 13, 2014).

[34] The majority assails the conclusion that sales are a hallmark of opportunity, but its premises are faulty. Even if "[w]hat the selling driver conveys to the buyer is the creation of FedEx," that is true of any third-party contractual right that is assigned. Moving on, I dispute the majority's contentions that the economic opportunity "remains subject to the control of FedEx in every important respect." First, that FedEx *potentially* can alter the contract (but only with notice, not "at any time" as the majority posits) in terms of the overall volume of deliveries and route reconfiguration should be immaterial to a consideration of *actual* economic opportunity, especially an opportunity that has been demonstrated by sales for considerable monetary value. Indeed, the majority's argument here reinforces my conclusion that their approach is simply an economic dependence test looking primarily to *potential control* by FedEx. Moreover, contrary to the majority, FedEx does not have "exclusive control over the customer base, recruitment, and pricing." The customer base is determined by who, nationwide, uses FedEx on any particular day to deliver a package within the route's territory; the drivers can recruit helpers or replacements themselves; and FedEx cannot and does not instantaneously change its compensation formula at its whim.

the relevance of *the drivers' actual sales* clearly highlights that the majority is applying an economic realities test. Respectfully, I do not think the majority has considered the full impact of what a sale signifies in the context of the common-law test.

Second, I disagree with the majority's central claim that the court gave too little weight to countervailing considerations. In my view, the court fully and correctly considered the same constraints FedEx placed on a driver's ability to take advantage of opportunities that the majority does above. The court gave those considerations little weight, and that is all the weight those considerations deserve. For example, although the majority does not dispute the fact that drivers have sold their routes, it claims their ability to sell was "significantly constrained" because they could only sell to buyers that FedEx "accepted as qualified." But as the court found, being "qualified" merely meant that the buyer also satisfied Department of Transportation regulations, *FedEx Home*, 563 F.3d at 499, and the Board has held that government-imposed rules and regulations generally do not constitute control by the employer. *A.K.A. Metro Cab Co.*, 341 NLRB 722, 724 (2004). Moreover, the existence of some approval condition or some other paper restrictions on the assignment of a contract, if they are typically not exercised to thwart the sale, is not a meaningful barrier to selling. Our Federal procurement regulations, for example, also pose restraints on the ability of government contractors to freely assign government contracts to each other, but none would argue that this transforms the contractors into government employees. Here, it is not the fact of any conditional restraint that is relevant—most business contracts pose some restriction on assignment to a new party—but whether assignments are *totally forbidden* by the contract, as they typically would be regarding the services of a common-law employee. A common-law employee typically cannot assign out work duties to another to perform in his or her stead.

The majority also emphasizes that FedEx awards "routes to drivers without charge" without explaining how that offsets the fact that there had been route sales of $3000 to $16,000 (or higher, according to the proffer by FedEx). Indeed, I believe that the price differentials establish that the purchasers of those routes viewed them as having some entrepreneurial potential beyond those routes they could have for free. The significant differentials in route prices across routes in general, including the FedEx-assigned "free routes" and those sold among drivers, become apparent once one surveys all the proffered evidence (see fn. 49, below) and indicate at least *a $55,000 route price differential*. In my view, such a differential also indicates that individual driver management of a route can cause that much "swing" in route profitability inside the FedEx route system. That "swing" in potential reward is a key measure—if not the ultimate measure—of the actual entrepreneurial opportunity with which the Board should be concerned. The D.C. Circuit also pointed out that the routes do not come with a truck and driver, which presumably would be provided by the driver with his funds and time. *FedEx Home*, 563 F.3d at 500. Again, I agree with the court.

Admittedly, the *FedEx* court did not address the above-mentioned argument that evidence of route sales is of little fundamental significance to determination of the employee status of individuals in the petitioned-for unit because the seller of a single route has terminated any relationship with FedEx and the single-route purchaser of another route is thereby excluded from the unit. By this reasoning, of course, and assuming the veracity of the Respondent's proffer of evidence of a substantial systemwide increase in route sales and multi-route drivers (as my colleagues apparently do), then evidence of route sales can *never be consequential* in my colleagues' analysis no matter how often it occurs in a unit such as defined here. But, as pointed out above, a sale is a realized opportunity. It is thus evidence of opportunity, not evidence of the absence or termination of opportunity. It shows continuing entrepreneurial opportunity in the putative bargaining unit because the "new participant" has joined the unit, not left it. It also shows such opportunity in that this new participant (i.e., the buying "entrepreneur") gauged the facts and thought that the route he or she purchased was worth something more than zero. In fact, from this buyer's perspective, the buyer believes the route—under his or her new management—to be worth *more* than the price he or she paid for it, or else the buyer would have not paid that price.[35]

However, leaving out all the economics, I have a problem with the logic of the majority's characterization of sales as irrelevant because the sellers exit the proposed bargaining unit. Let's imagine two people standing on a hill overlooking a bay on the coast. One asks the other, "I wonder if there is an actual opportunity for whales to live in this bay?" A whale then breaches in the middle of the bay and then swims out for the open ocean. I don't think the two observers would then turn to each other and

[35] The buyer may think that he or she can run the route better, and create more profit than the prior driver could. See fn. 33, above.

conclude, "there is no actual opportunity for whales to live in this bay."[36]

I interpret the majority's position to be simply that "FedEx's route sales are irrelevant." However, I may be incorrect and the majority's assessment is not that "sales are irrelevant" but rather the majority believes instead (or as well) that "[t]he fact that only a small percentage of workers in a proposed bargaining unit have pursued [a route sale] opportunity demonstrates that it is not, in fact, a significant aspect of their working relationship with the putative employer." Inasmuch as my colleagues would find any number of sales to be of little significance to their application of the independent-contractor test, and they claim they would reach the same result here if systemwide evidence were considered, it is not clear why they even bother to make this statement. However, looking to the "small percentage" theory, in order for an entrepreneurial opportunity to be actual, there has to be a showing that a certain number of individuals have seized that opportunity. In other words, the majority considers all evidence of entrepreneurial opportunity to be theoretical—notwithstanding lack of employer constraints[37]—if an insufficient "percentage" of individuals in the proposed unit are taking advantage of the opportunities.

But there is a fundamental problem with the premise that a low number of sales transactions automatically evidences that there is no actual opportunity. Fully functional markets may exist even when both (1) few observable transactions occur and (2) they occur rarely over time. As an extreme example, consider the market for aircraft carriers. Ten Nimitz class carriers were constructed by Newport News Shipbuilding Company in Virginia. The *USS Nimitz*, the lead ship of the class, was commissioned on May 3, 1975, and *USS George H.W. Bush*, the tenth and last of the class, was commissioned on January 10, 2009.[38] On average, we can deduce that only one aircraft carrier was produced every 3.4 years. Despite the rarity of these transactions, none would argue that no market for aircraft carriers exists. A more down-to-earth example is residential real estate in a typical suburban market (unlike the District of Columbia metropolitan area). Depending on the neighborhood, houses may sell slowly over time, and any particular house might sell only once every few decades. Other examples of relatively low rates of transactions abound in the economy, such as mergers and acquisitions or unique items. Both these categories are instructive, given that the employer claims that route sales are a form of business acquisition and that most of its sales routes, from a functional perspective on a day-to-day basis, are relatively exclusive and thus unique. In other words, FedEx's contention essentially is that these route sales are acquisitions of businesses that also have near-exclusive geographic rights; that contention would dovetail with a low rate of sales transactions from a common sense perspective.[39] Going beyond this mistaken premise, there are also problems with the methodology of the majority's "small percentage" assumptions.

B. The Majority's Entrepreneurial Opportunity Methodology is Flawed: The Wrong Tools are Used to Ask the Wrong Questions about Opportunity

The majority and the D.C. Circuit use the same evidence to support opposing positions. Perhaps this divergence stems from the fact that the Board and the court have not explained how counting the number of times individuals have availed of certain opportunities is an accurate measurement of the significance or *value* of actual entrepreneurial opportunity. As noted above, the Board has analyzed entrepreneurial opportunity for gain or loss in terms of constraints on the ability to take such opportunities (e.g., whether a putative contractor has the ability to work for other companies or hire employees without approval); and entrepreneurial risks or losses (e.g., whether a putative contractor has proprietary interest in the work or capital expenditures). The Board, however, has never really discussed entrepreneurial

[36] The "whale-as-sale" analogy works for an additional reason. Much of what we could conceivably use to determine the existence of an actual opportunity for entrepreneurship comes from observing realized opportunities, one of which is sales. Like the observers on the hilltop, we cannot measure much more than the occasional appearance of the whale above the waterline.

[37] Apart from route sales, the majority also asserts that no current drivers have ever used their trucks to conduct business independently of FedEx, and the work commitment would have prevented them from taking on extra business during nonwork hours. Id. In fact, even when FedEx required its logos and markings to be removed or masked for both commercial and personal purposes, there was evidence that drivers had used their trucks for "personal uses like moving family members," and a multi-route driver had used his truck for a separate delivery service for a repair company. *FedEx Home*, 563 F.3d at 498–499. Moreover, as the court pointed out, the drivers were only obligated to provide service 5 days a week, a schedule which certainly would not preclude operating another part-time business. Id. at 499 fn. 5.

[38] See Jane's Fighting Ships, 107th edition, edited by Commodore Stephen Saunders, RN, New York, NY Arco 2004–2005, at 893; "USS George H.W. Bush Aircraft Carrier Commissioned," Roger Runningen and Tony Capaccio, Bloomberg News, January 10, 2009. Admiral Chester W. Nimitz and President Bush both served with distinction in World War Two, the first as Commander in Chief of our Pacific fleet and a major, visionary architect of the strategy employed in that theater of war, and the second as a frontline pilot of a Grumman TBM Avenger, who fought in several major engagements.

[39] This would be especially true if the capital investment (a truck) is not insignificant relative to the net income of the entrepreneur.

opportunity for gain beyond counting the number of individuals who have taken advantage of opportunities. Thus, beyond defining actual entrepreneurial opportunity, it is imperative that the Board adopt an analysis that is grounded in concepts under which entrepreneurship actually operates, and which can answer the relevant question in the independent-contractor analysis of whether putative contractors have actual entrepreneurial opportunity for *significant* gain or loss.

Notably, as the majority's discussion makes apparent, the assessment of entrepreneurial opportunity is fundamentally an attempt to use economic concepts to delineate where the jurisdictional line of the Act should fall. As a Board, we are forbidden to directly employ economists. *See* 29 U.S.C. § 154(a). Our resulting lack of expertise is another reason why the Board's claim to deference is particularly weak in this case. As I note above, I empathize with and fully understand that the majority is duty-bound in this case to tackle the concept of entrepreneurial opportunity, and I agree with the majority on the general proposition that we should separate the actual economic opportunities from the merely theoretical. But here, if the Board is to determine what is an actual entrepreneurial opportunity and what weight that opportunity must be given in assessing whether an individual is rendering services as an "independent business," it cannot overlook staple concepts of economics and econometrics in conducting its evidentiary review. I fear the majority has done that here, making any claim to deference even weaker. Although I am neither economist nor statistician, I will do my best to demonstrate the apparent weaknesses in the majority's approach.

Here, the majority's position is demonstrably incorrect in categorically asserting that: "[t]he fact that only a small percentage of workers in a proposed bargaining unit have pursued an opportunity demonstrates that it is not, in fact, a significant aspect of their working relationship with the putative employer." The majority, although it apparently does not recognize this, is essentially claiming that because a sample (the bargaining unit and its routes) had few observed transactions, there is no entrepreneurial opportunity because no meaningful market activity exists. Here, the "sample size" of routes associated with the proposed bargaining unit in this case is 18 single-driver routes, from which the majority assumes it can measure whether there is overall economic opportunity.[40]

But making statistical claims about economic opportunity (or anything else) based on low sample sizes is inherently problematic. Samples smaller than 30 typically are not useful in drawing empirically valuable inferences about broader phenomena, with the potential exception of randomized samples that also have a normal distribution curve of data (i.e., the archetypal "bell curve"[41]) within the sample. See Frank L, Schmidt, John E. Hunter, Vern W. Urry, "Statistical Power in Criterion-Related Validation Studies," *Journal of Applied Psychology*, 1976, Vol. 61, No. 4, 473–485. This is because:

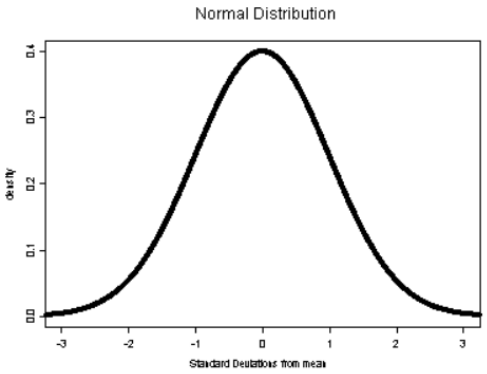
> [t]he law of large numbers does guarantee that very large random samples will be highly representative of the population from which they are drawn. Those who falsely assume that small samples will be similarly representative are endorsing the law of small numbers. The result is a gross overestimation of the amount of information contained in small samples and the correlated overestimation of the power of statistical tests to extract this "information."

Id. at 473.[42] See also Jacob Cohen, *Statistical Power Analysis For The Behavioral Sciences* (1987 ed.) at 7 ("The

[40] The routes should comprise the correct sample, as we are looking to measure sales. This is because entrepreneurial opportunity—one measurable form of it at least—comes from the sale of a route, not the sale of a driver.

I note, however, an independent flaw in the majority's limitation of the analysis of economic opportunity to single-route drivers in the petitioned-for unit. Multiple-route drivers are conveniently excluded from consideration as supervisors. This avoids the question whether they are FedEx supervisors *or supervisors of their own enterprise* who, by investing capital to purchase more than one route, have demonstrated the economic opportunity in doing so.

[41] See, e.g., John E. Freund, *Modern Elementary Statistics* (7th ed. 1988) at 218–224 for a basic discussion of the normal distribution, its characteristics, and appearance. Suffice it to say that the normal distribution shows a distribution of values clustering around some arithmetic mean (represented at "0" below) that resembles the below figure:



[42] Two of the three authors of this study were officials at the Personnel Research and Development Center of the U.S. Civil Service Commission. The authors note that sample sizes of 30 to 60 persons

larger the sample size, other things being equal, the smaller the error and the greater the reliability or precision of the results.").

Courts, including the Supreme Court, have recognized the problem with using small sample sizes to draw general inferences, in disparate impact discrimination cases, a class of cases where statistical proof is commonly used. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996–997 (1988) (discussing use of statistical evidence in disparate impact discrimination cases; "Without attempting to catalog all the weaknesses that may be found in such [statistical] evidence, we may note that typical examples include small or incomplete data sets and inadequate statistical techniques.") (internal citation omitted); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 621 (1974) (in race discrimination case, "the District Court's concern for the smallness of the sample presented by the 13-member panel was also well founded"); *Pollis v. New School for Social Research*, 132 F.3d 115, 121 (2d Cir. 1997) ("The smaller the sample, the greater the likelihood that an observed pattern is attributable to other factors and accordingly the less persuasive the inference of discrimination to be drawn from it."); *Coble v. Hot Springs School District No. 6*, 682 F.2d 721, 734 (8th Cir.1982) (sample of 15 employment decisions over a course of 8 years "too small to support any inference of a discriminatory pattern or practice"). The sample of 18 routes present in this case, then, is too small to draw an overall conclusion about the absence of an economic opportunity. Moreover, there are fewer than 30 in the majority's posited sample, even if we looked at "individuals in the potential unit" rather than routes as comprising the relevant group to measure market activity. To compound matters, the majority is attempting to make a much more difficult inference than usually asserted from a sampling analysis, which typically is trying to prove the existence of something (e.g., discrimination in a hiring process). Instead, the majority is essentially trying to prove a negative, i.e., that "there is no functioning market for route sales" (and thus there is no entrepreneurial opportunity). In a statistical sense, trying to prove the absence of anything requires a much larger sample than a typical test.[43] See Cohen, *Statistical Power Analysis*, at 4 (the "power" of a statistical test is the probability that it will result in the conclusion that a phenomenon exists where it does in fact exist; discussing how statistical tests should have considerable statistical power in order to be useful); Table 2.4. at 54–55 (showing how, to conduct an analysis with the recommended statistical power of .80, and holding statistical significance constant, sample size must increase dramatically in order to detect phenomena of smaller and smaller effect); Douglas G. Alonan, J. Martin Bland, "Statistics," *Absence of evidence is not evidence of absence*, British Medical Journal, Vol. 311, No. 7003 (Aug. 19, 1995), p. 485. The majority appears to have fallen victim to a "belief in the law of small numbers," i.e., that viewing the experiences of a relatively small group of people in a large population can tell us anything about the economic opportunities present for either.[44]

Low sample size is not the only problem. Obviously, the sample we are presented with in this case was *not* randomly selected; it represents instead a group consciously selected by the petitioner for election victory

were considered adequate by government entities at that time in 1976 for criterion-related validation studies (e.g., the type of study then used to detect evidence of race discrimination). Id. at 473. However, they conducted an independent analysis of 406 studies with a much larger median size of 68, demonstrating that even with this larger sample size, there was a significant chance of "false positives." Id. at 482. They further demonstrated that once sample size was reduced to 30, a criterion known to be *valid across nearly half* of the sample would now be reported by the studies *as "invalid" 73 percent of the time*. Id. Even I, with a layperson's view of statistics, can see their point—attempting to make inferences with small samples can be little better than a coin toss. See also Shinichi Nakagawa, "Forum: A farewell to Bonferroni: the problems of low statistical power and publication bias," *Behavioral Ecology*, Vol. 15 No. 6 (June 2004): 1044–1045 (measuring an experimental and control group, both of a sample size of 30, for a five variable test, and finding that the statistical power of such test to detect even a "medium"-level statistical effect is significantly less than acceptable).

[43] I note in this regard that the *Roadway III* Board drew its conclusions *only after examining sales across Roadway's entire national system*:

> Furthermore, it is unclear whether any driver has gained or profited materially from the sale of his service area. For the most part, the evidence consists of unverified and incomplete information contained in e-mail messages between Director Breese and some other managers, none of which were parties to these transactions. . . .
>
> The testimonial evidence shows that the sales by drivers Gonzales, Irions, Hawkins, and Steenburgen took place at Roadway's behest, if not direction to the drivers, to sell or risk having their entire contract terminated. No gain was shown. *In a system of over 5000 drivers assigned to over 300 terminals*, we find that these few forced sales, given their circumstances, are insufficient to support a finding of independent contractor status.

326 NLRB at 853 (emphasis added).

[44] Amos Tversky and Daniel Kahneman, Hebrew University of Jerusalem, "Belief in the Law of Small Numbers," *Psychological Bulletin*, 1971, Vol. 76, No. 2. 105–110 (erroneous intuitions about the laws of chance include believing that (1) a sample randomly drawn from a population is highly representative, i.e., similar to the measured population in all essential characteristics and (2) sampling is a self-correcting process; these beliefs lead to expectations about characteristics of samples that underestimate true variability, at least for small samples).

purposes and that petitioner believed was arguably appropriate as a bargaining unit. Another problem is that the group of transactions that actually would supply us with meaningful information across this sample is equally small. In other words, we only have binary data on "sales" versus "no sales" (with no information on attempted sales, for example), and there is only one "sale" versus "non-sale" data point for each route. To put it mildly, this is not a "robust data set." There is no assurance that any distribution would be normal enough to justify drawing inferences about a market for sales from only this sample, and the majority posits none.[45]

The majority does not address any of these core problems in its methodology. Indeed, it does not even recognize that these are problems, or even views sales as relevant at all in this case. This omission should not inspire judicial deference. The linchpin of the majority's test—that the mere measurement of (1) a low number of sales within; (2) a small group of persons thus shows that; and (3) there is no "real" economic market in existence for those persons—simply isn't so.[46]

C. The Correct Approach Would Have Been to Review Whether There was a Market for Route Sales, and Using this Approach, the Case Should Have Been, at the Least, Remanded to Allow the Employer and Petitioner to Submit Evidence on a Systemwide Basis

Besides its failure to give sales any weight at all, or use the right tools and correct premises, the majority fails to identify any value benchmark for sales that would satisfy the test of actual entrepreneurial opportunity. Unfortunately, the majority applies an inchoate "significant aspect of the working relationship" standard. But an entrepreneur's economic decision to exploit an entrepreneurial opportunity does not look to something that amorphous. It depends instead on an assessment whether "the expected value of the entrepreneurial profit will be large enough to compensate for the opportunity costs."[47] This would suggest use of the widely recognized and accepted *fair market value* standard to measure the actual value of route sales. "Fair market value" is "the price at which the property would change hands between a willing buyer and a willing seller" in a market consisting of all potential buyers and sellers of like business.[48] Once the Board has ascertained or at least estimated the fair market values of the entrepreneurial opportunities available to the drivers, it can then examine whether the entrepreneurial opportunity factor is significant enough to weigh in favor of finding independent contractor status.

The relevant information necessary to determine the fair market value of an entrepreneurial opportunity will vary depending on the nature of the business in each case. At this stage, and in this case, there is insufficient evidence in the record to provide anything more than minimal guidance. As noted previously, one entrepreneurial opportunity available to all drivers and which has already been taken by at least a couple of drivers is the opportunity to buy a route. Thus, route sales would be a centrally important transaction and evidence of route sales would thus be equally central. For example, there is evidence of at least one driver who purchased his route for $6000. That price did not include a vehicle and there is no other evidence about the transaction, such as the seller's ultimate profit from the sale. There is also evidence that one of the drivers, before working at the Hartford terminal, had sold his route at a FedEx facility in Bethpage, New York, to another driver for $42,000. Thus, in addition to the monetary value of the route sale, evidence submitted should also include details as to whether a vehicle was included in the sale and the seller's ultimate profit. Another factor that affects the value of the routes is how often routes become available for sale. At the time of the hearing, there were only 26 routes overall (the total number of routes serviced by single- and multiple-route drivers) at the Hartford terminal, but there is no evidence as to how many routes since 2000 have become available for purchase.[49] Furthermore, there is little evidence here

[45] Indeed, it should be obvious that the 18 routes presented in the "sample" used by the majority—with one value of $6000 and 17 values of zero—are not distributed in any pattern like a normal bell curve. See fn. 41, above. The distribution within the sample instead has a standard sample deviation of *over 300 units*, which would then dictate using an extremely large number of routes to ensure a statistically probative sample. See George Snedecor and William Cochran, *Statistical Methods* (7th ed. Iowa State Univ. Press, 1980), at 31, 53 (containing formulas for calculation of sample standard deviations and estimating an optimal sample size from an observed standard deviation).

[46] That, conversely, the existence of many transactions tend to show a functioning market is in place, however, is plausible to me, depending on what kind of transactions they are.

[47] Shane, Scott, and S. Venkataraman, "The promise of entrepreneurship as a field of research." *Academy of Management Review*, Vol. 25, No. 1, 217–226, 223 (Jan. 2000) ("The decision to exploit an opportunity involves weighing the value of the opportunity against the costs to generate that value and the costs to generate value in other ways.").

[48] *U.S. v. Cartwright*, 411 U.S. 546, 551 (1973); Pratt, Shannon P., and Alina Niculita, *Valuing a Valuing a Business: The Analysis and Appraisal of Closely Held Companies*, (5th ed. 2008), pp. 41–42.

[49] In this respect, I note that FedEx's proffer regarding systemwide evidence asserts that a "representative listing" of route sales in the New Jersey and New England areas contains *no fewer than 10* such

that would allow us to establish the relevant market for these routes, whether it be national, regional, or local.[50]

The majority's approach disdains the need for complete information about the fair market value of the route sales. Such evidence, they say, would not change the result reached here because their assessment of economic opportunity does not turn on "sample size," "business valuation principles," and whether there was a "market for route sales." They are agnostic, at best, as to the relevance of such evidence. They maintain that even accepting all the systemwide evidence of route sales that FedEx presented here and in the associated cases (see fn. 49, above), the outcome is still a finding of employee status. I obviously disagree with their methodology. The fact that many sales are occurring with that much money changing hands between the drivers indicates that there are businesses of independent value being evaluated and sold by business owners who control these enterprises, as opposed to being mere episodes of work force reshuffling controlled by FedEx.

Although the FedEx court did not necessarily require systemwide evidence for the same reasons as I do, it recognized that such evidence was relevant to the extent that multiroute drivers and other FedEx drivers nationwide operated under the same Operating Agreement as the petitioned-for drivers in that case.[51] If the issue being examined were whether certain daily tasks support finding independent contractor or employee status, what other drivers in other terminals are doing would be irrelevant. But that is not the case here; the Board is required to analyze an "opportunity for entrepreneurship" factor which necessitates *trying to prove or disprove the existence of a marketplace* where profit can result. Consequently, I think a far more prudent and accurate alternative to the task of determining the existence of a route sales market based only on "those individuals in the [18 route, 26 person] petitioned-for unit" would be to consider detailed evidence of other FedEx drivers—multiroute and nationwide. To that end, I would remand the case back to the Regional Director to reopen the record and accept relevant systemwide evidence to allow a proper determination of the fair market value of the entrepreneurial opportunities available to the drivers here, in line with my more comprehensive approach outlined above. However, inasmuch as my colleagues state they would reach the same result here even if they were to consider the proffered systemwide evidence, I would hold, consistent with the *FedEx* court's determination, that the existence of the actual sale or sales[52] evidenced here were enough to show entrepreneurial opportunity in that aspect of the relationship between the Hartford drivers and FedEx. This evidence, considered with other factors in a proper application of the statutorily-required common-law test, is sufficient to warrant finding the employer satisfied its burden to show independent contractor status.

Conclusion

My colleagues maintain that entrepreneurial opportunity for gain or loss remains a relevant consideration in the Board's independent-contractor analysis, albeit, in a minimized role as "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*." I wish this were so. In my view, the test they articulate is an impermissible diminution of the significance of entrepreneurial opportunity and, in any event, an unwarranted response to a judicial decision that has substantial support in court and Board precedent. This test relegates evidence of entrepreneurial opportunity factor to such minor significance as to contravene the principle that the "weight to be given a particular factor or group of factors *depends on the factual circumstances of each case*." [Emphasis added.] (Maj. Op. at 2.) In this and virtually all future cases where independent-contractor status is contested, the majority has essentially determined that little weight be assigned to the entrepreneurial opportunity factor. Because the majority has failed to articulate a compelling

sales, with amounts paid ranging from $15,000 to $55,000. The parties have also agreed to incorporate the transcripts, decisions and directions of elections, and proffers of entrepreneurial activity from prior FedEx cases into the record in the instant case. *FedEx Home Delivery (FHD) (Wilmington, MA)* (Cases 1–RC–22034 and 1–RC–22035, review denied 11/8/06); *FHD (Worcester, MA)* (Case 1–RC–21966, review denied 3/23/06); *FHD (Barrington, NJ)* (Case 4–RC–20974, review denied in relevant part 8/3/05); *FHD (Fairfield, NJ)* (Case 22–RC–12508, review denied 1/26/05). The systemwide evidence in those cases shows that terms of routes sales vary with some transactions only involving the route, some including both the route and vehicle, and some including some financing such as a down payment and the assumption of vehicle loan payments. The evidence also shows that at least two transactions involved a broker and broker fees.

[50] Determining a relevant market might be synonymous with determining a correct sample size.

[51] *FedEx Home*, 563 F.3d at 499 fn. 6. In his partial dissent in *FedEx Home*, Judge Garland disagreed with the majority's "view that the common-law test has gradually evolved until one factor . . . has become the focus of the test . . . and can be satisfied by showing a few examples, or even a single instance, of a driver seizing an entrepreneurial opportunity." 563 F.3d at 504. Judge Garland found no such evolution but agreed that the Regional Director erred in preventing FedEx from introducing systemwide evidence concerning the number of route sales and the amount of profit and would have remanded the case for further proceedings "to give FedEx a fair opportunity to make its case under the appropriate test." Id. at 519.

[52] See fn. 49, above.

reason as to why such a drastic response is necessary to respond to the court's decision and to resolve this case, I respectfully dissent. As I explained above, only after the case has been remanded back to the Regional Director to reopen the record and accept systemwide evidence can the Board have the ability to conduct a comprehensive analysis of the entrepreneurial opportunity factor. Lacking that comprehensive evidence, and in the alternative as explained above, I would hold that that the employer satisfied its burden to show independent contractor status.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters, Local Union No. 671 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All contract drivers employed by us at our 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.

FEDEX HOME DELIVERY, AN OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEMS, INC.

The Board's decision can be found at – www.nlrb.gov/case/34-CA–012735 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.