ORAL ARGUMENT NOT YET SCHEDULED
Case Nos. 07-1391, 07-1436

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDEX HOME DELIVERY, a Separate Operating Division
of FedEx Ground Package System, Inc.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 25,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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BRIEF OF WASHINGTON LEGAL FOUNDATION, UNITED STATES BUSINESS AND INDUSTRY COUNCIL, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

Dated: May 12, 2008

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that proposed *amici curiae* Washington Legal Foundation (WLF), U.S. Business and Industry Council (USBIC), and the Allied Educational Foundation (AEF) are non-profit corporations; they have no parent corporations, and no publicly-held company has a 10% or greater ownership interest.

Pursuant to Circuit Rule 26.1(b), *amici* describe their general nature and purpose as follows. WLF is a public-interest law and policy center that regularly appears in this Court in cases raising public policy issues. USBIC is a business trade association with approximately 1,500 member companies. AEF is an educational foundation based in New Jersey that on occasion appears in court in cases raising public policy issues.

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Richard A. Samp

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GLOSSARY

AEF	Allied Educational Foundation
DDE	Decision and Direction of Election, issued by NLRB First Region on September 20, 2006
DO	Decision and Order, issued by NLRB on September 28, 2007
FedEx	FedEx Home Delivery, a separate operating division of FedEx Ground Package System, Inc.
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
Teamsters	International Brotherhood of Teamsters, Local Union 25
USBIC	U.S. Business and Industry Council
WLF	Washington Legal Foundation

BRIEF OF WASHINGTON LEGAL FOUNDATION, UNITED STATES BUSINESS AND INDUSTRY COUNCIL, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

The interests of *amici curiae* are more fully set forth in their motion for leave to file this brief, as well as in their reply brief in support of that motion.

WLF is a public interest law and policy center that devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF strongly supports use of the independent contractor model; it believes that independent contractors play a key role in driving economic growth and business innovation. At the same time, it believes that some businesses improperly skirt the law by classifying individuals as "independent contractors" when they quite clearly are employees. By doing so, business do not merely gain an unfair cost advantage over rivals; they also strengthen the hands of those who would do away with the independent contractor model completely. *See* Richard Samp, *Abusing Independent Contractors Imperils Vital Business Model*, WLF LEGAL BACKGROUNDER (June 2, 2006).

The U.S. Business and Industry Council (USBIC) is a national organization of business owners and executives dedicated to making the U.S. domestic economy the world's leading engine of economic growth. The USBIC

has approximately 1,500 member companies in 44 states with approximately two hundred thousand employees. The USBIC believes that only a robust national economy, balanced in capabilities and dynamic in operation, can provide the material base for an American society that is stable at home and secure in the world. USBIC was founded in 1933 to represent the concerns of America's small and medium-sized business community. Member companies are typically family-owned or privately-held, mostly in the manufacturing sector. They are often the major employers in their home communities and the mainstays of the local economy.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions. AEF believes that rigorous enforcement of the nation's labor laws is essential to preserving the rights of American workers and to strengthening the American economy.

Amici are filing this brief in order to express their strongly held views regarding the proper uses of the independent contractor model in the American economy. While *amici* believe that some government regulators have gone too

far in restricting use of that model, they agree with the National Labor Relations Board (NLRB) that the significant degree of control exercised by Petitioner over those who perform delivery services for Petitioner requires that they be classified as employees.

STATEMENT OF THE CASE

Petitioner FedEx Home Delivery ("FedEx") seeks review of a finding of the National Labor Relations Board ("NLRB") that it violated the National Labor Relations Act ("NLRA") by failing to bargain with the union recognized as the representatives of its drivers in Wilmington, Massachusetts. Whether FedEx had an obligation to bargain turns to a large degree on whether its drivers are "employees" within the meaning of § 2(3) of the NLRA, 29 U.S.C. § 152(3).

FedEx contends that the drivers in question are not employees but rather are independent contractors. This brief – submitted by *amici* WLF, USBIC, and AEF – addresses that issue only. It does not address other claims raised by FedEx, including that the NLRB improperly prevented FedEx from introducing relevant evidence and that certain election results should be thrown out.

The decision that the FedEx drivers are employees was initially made in 2006 by the Regional Director of the NLRB's First Region. *See* Decision and Direction of Election dated September 20, 2006 ("DDE"). The decision

involved 20 "contractors" who drove for FedEx at its Jewel Drive terminal in Wilmington and 16 "contractors" who drove for FedEx at its Ballardvale Street terminal, also located in Wilmington. Three of the drivers at Jewel Drive operated more than one delivery route; all the other drivers operated a single delivery route.

The Regional Director determined that contractors who operated multiple routes were statutory supervisors and thus should be excluded from any bargaining unit. Accordingly, the proper classification of those contractors is not before the Court. The Regional Director further determined that all other full-time drivers at the two Wilmington facilities – including the drivers regularly employed by the multiple-route contractors – were "employees" of FedEx. The Regional Director ordered that a representation election be conducted; following the election, Local Union 25 of the International Brotherhood of Teamsters (the "Teamsters") was certified as the collective bargaining representative of drivers at both the Jewel Drive unit and the Ballardvale Street unit.

After FedEx refused to recognize and bargain with the Teamsters, the NLRB issued an order finding that FedEx had engaged in unfair labor practices; its September 28, 2007 Decision and Order (DO) directed FedEx to engage in

collective bargaining. FedEx petitioned for review of that order; the NLRB cross-petitioned to enforce the order.

SUMMARY OF ARGUMENT

Amici strongly support use of the independent contractor model as an important contributor to this Nation's continued economic health. By recognizing that individuals often provide services for others while maintaining independent control over the means and methods of their services, the law fosters an entrepreneurial spirit among those individuals, while granting firms that hire those individuals an increased flexibility that promotes efficient operations.

Appropriate use of the independent contractor model will be hampered, however, unless the courts provide firms with clear guidance regarding when a worker should be classified as an employee and when he/she should be classified as an independent contractor. When in doubt about the proper classification, many smaller firms will err in favor of an "employee" classification in order to avoid the potentially ruinous financial penalties they could face if a court later determined that someone classified as an independent contractor was really an employee. Conversely, some firms will take advantage of the ambiguity and their competitors' caution by inappropriately classifying employees as inde-

pendent contractors, thereby gaining an unfair competitive advantage. *Amici* respectfully request that the Court establish clear rules that allow employees to more easily distinguish employees from independent contractors. Such rules will, of necessity, require the Court to minimize the degree of deference it affords the NLRB's legal determinations in individual cases, to ensure that similar fact patterns produce similar results.

Both the common law and this Court's decisions make clear that the overriding factor in determining whether a worker is an independent contractor or an employee is the right-to-control test: the extent of supervision exercised by a putative employer over the means and manner of the worker's job performance. While courts are directed to take into account a large number of relevant factors in making the employee/independent contractor determination, maintaining the *primary* focus on the right-to-control test increases predictability of outcomes and thereby improves firms' ability to make correct classification decisions. FedEx urges the Court instead to focus largely on the extent of the "entrepreneurial opportunity" afforded to workers. *Amici* respectfully disagree; an "entrepreneurial opportunity" test is inherently vague, and relying on that test to a significant degree will merely lead to increased confusion. In any event, focusing on the right-to-control test inherently takes into account to some extent

the entrepreneurial opportunity afforded to workers: when workers are given freer rein regarding the means and manner of their job performance, their opportunity for true entrepreneurial activity increases significantly.

Applying the right-to-control test, the NLRB is undoubtedly correct: the single-route contract drivers at FedEx's Wilmington facilities are properly classified as "employees" under § 2(3) of the NLRA. All of them work virtually full-time driving their trucks for FedEx. They work on the five days specified by FedEx, within the relatively tight time frames required by FedEx's customers. Much of their pay is based on time spent on the job, rather than the quantity of work performed; FedEx has not demonstrated a significant disparity in net pay among the single-route drivers. They virtually always are required to accept the packages assigned to them. They have very little, if any, ability to build up their delivery routes, given that they cannot solicit customers or establish pricing. While drivers have a theoretical right to sell their routes, the NLRB determined as a factual matter that routes have little value apart from the value of a driver's truck. They are required to wear FedEx uniforms while delivering packages. Under those circumstances, it cannot be said that the drivers have meaningful control over the means and manner of their job performance. While single-route drivers are entitled to find someone else to drive in their place, the failure of any

single-route Wilmington drivers to arrange for such substitution on anything approaching a full-time basis suggests that that is not a economically viable alternative.

ARGUMENT

I. COMPANIES NEED CLEAR AND CONSISTENTLY APPLIED RULES REGARDING WHO IS AN EMPLOYEE, AND SUCH RULES CAN ONLY COME FROM THE COURTS

Amici fully concur with the assessment of Petitioner's *amici* that the independent contractor model has had an illustrious history in this Nation's economic development, and that that history has been mutually beneficial for both independent contractors and the firms for which they provide services. *See* Brief of American Trucking Associations, Inc., *et al.* ("ATA Br.") at 5-12. That holds true both for the trucking industry and for numerous other industries. *Id.* The reasons for the beneficial economic impact of independent contracting is self-evident: those who operate their own businesses and whose incomes are dependent on how successfully they perform have much more incentive than do employees both to work hard and to find innovative ways to perform more efficiently. More than 10.3 million Americans earn their livelihoods as independent contractors. *See* Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and*

Employees Without Employers, 27 BERKELEY J. EMP. & LAB. L. 251 (2006). *Amici* support establishment of legal rules that will permit the independent contractor model to continue to thrive.

Appropriate use of the independent contractor model will be hampered, however, unless the courts provide firms with clear guidance regarding when a worker should be classified as an employee and when he/she should be classified as an independent contractor. Firms have "strong interests in ensuring that the accepted legal standards for determining worker classifications are employed reasonably, uniformly, and predictably by administrative agencies and others." ATA Br. 2. The "multitude of different tests under a multitude of different statutes" often "condones confusion" within the business community and makes it very difficult for firms to engage in rational business planning. Statement of U.S. Rep. John Kline, Joint Subcommittee Hearing of the House Committee on Education and Labor, at 4 (July 27, 2007). Indeed, unless the courts spell out a clear set of rules that binds businesses and administrative agencies alike, business cannot even be assured that a judicial determination that its employees are properly classified will be adhered to in future proceedings.[1]

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[1] *See. e.g., California Logistics, Inc. v. California*, 161 Cal. App. 4th 242 (2008) (although California courts had three time *rejected* position of California Employment Development Department ("EDD") that small delivery service

Setting out clear rules also ensures a level playing field among competitors. When in doubt about the proper classification, many smaller firms will err in favor of an "employee" classification in order to avoid the potentially ruinous financial penalties they could face if a court later determined that someone classified as an independent contractor was really an employee. Yet, doing so will make it difficult for those firms to compete against firms that decide to take advantage of ambiguities in the law and their competitors' caution by inappropriately classifying employees as independent contractors.[2] One

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company's workers were employees, EDD told company that it would relitigate the independent contractor issue "as many times as it wanted to"; if delivery service wished to contest EDD's assessment of $1.3 million in delinquent taxes, it was required to pay the taxes and then sue for refund).

[2] Classifying employees as independent contractors provides a significant competitive advantage to companies that can get away with doing so. As one recent commentary noted:

> For independent contractors, companies do not have to withhold federal, state, local, Social Security or Medicare taxes; pay the employer's share of employment taxes; pay unemployment or workers' compensation insurance; offer benefits like sick and personal leave, vacation, health insurance, tuition reimbursement, retirement contributions and stock options; and pay minimum wage and overtime. The incentive to classify workers as contractors is great.

Michael J. Volpe, *et al*., "Your Independent Contractor May Be Your Employee," *Executive Counsel* at 20 (May/June 2008). Employees looking for a means of evading tax liability also have an incentive to be classified as

recent study concluded that 38% of employers improperly classify at least some of their employees as independent contractors. Tiffany Fonseca, *Collective Bargaining Under the Model of M.B. Sturgis, Inc.: Increasing Legal Protection for the Growing Contingent Workforce*, 5 U. Pa. J. Lab. & Emp. L. 167, 174 (2002). State law enforcement officials have announced that they have established the proper classification of workers as a "high priority," not only to prevent tax revenue losses but also because improper classifications "put[] law-abiding businesses at a disadvantage." Statement of Massachusetts Attorney General Martha Coakley (December 19, 2007), available at www.mass.gov/?pageID=cagopressrelease&L=I&LU=Home&sid=Cago&b=pressrelease&f=2007_12_19_fedex_fine&csid=Cago. Establishing clearer rules that distinguish between employees and independent contractors would go a long way toward increasing compliance and leveling the playing field among competitors.

Such rules will, of necessity, require the Court to minimize the degree of deference it affords the NLRB's legal determinations in individual cases, to

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independent contractors: businesses do not withhold income and payroll taxes from independent contractors. The IRS's National Taxpayer Advocate deems the under-reporting of income from "the cash economy" as one of the "most serious" problems facing the federal income tax system, and determined that fully one-third of all individual income not subject to withholding or information reporting is never reported by individual taxpayers. National Taxpayer System, 2007 Annual Report to Congress, available at www.irs.gov/pub/irs-utl/arc_2007.

ensure that similar fact patterns produce similar results. Indeed, the Court has made clear that while the NLRB's *factfinding* is entitled to considerable deference, the rationale for deference is significantly reduced when a case "calls for applying general principles of the law of agency – the distinction between employees and independent contractors – to undisputed facts." *North American Van Lines, Inc. v. NLRB* ["*NAVL*"], 869 F.2d 596, 598 (D.C. Cir. 1989). In such cases the Court does not defer to the NLRB's legal conclusions except where the arguments on both sides are evenly balanced and NLRB has "'made a choice between two fairly conflicting views.'" *Id.* at 599 (quoting *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968).

Whether a worker is classified as an "employee" can have considerable consequences under a variety of federal laws other than the NLRB. The Supreme Court has made clear that in each such statute, Congress intended that the term "employee" be defined as that term was understood under the common law. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003) (definition of "employee" under the Americans with Disabilities Act, 42 U.S.C. § 12111(5)); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (definition of "employee" under ERISA). Congress's intent that the term be given a uniform definition throughout federal law cannot be effectuated

if the courts defer to the NLRB and other administrative agencies on that issue.

II. THE OVERRIDING FACTOR IN DETERMINING HOW TO CLASSIFY A WORKER IS THE RIGHT-TO-CONTROL TEST

Both the common law and this Court's decisions make clear that the overriding factor in determining whether a worker is an independent contractor or an employee is the right-to-control test: the extent of supervision exercised by a putative employer over the means and manner of the worker's job performance. While courts are directed to take into account a large number of relevant factors in making the employee/independent contractor determination, maintaining the *primary* focus on the right-to-control test increases predictability of outcomes and thereby improves firms' ability to make correct classification decisions.

As the Court explained in *NAVL*:

> In applying traditional agency law principles, the NLRB and the courts have adopted a right-to-control test. The test requires an evaluation of all the circumstances, but "the extent of the actual *supervision* exercised by a putative employer over the 'means and manner' of the workers' performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees."

NAVL, 869 F.2d at 599 (quoting *Local 777, Democratic Org. Comm., Seafarers Int'l Union v. NLRB* ["*Seafarers*"], 603 F.2d 862, 873 (D.C. Cir. 1978). The Court supported its holding with a citation to long line of prior Court decisions

as well as to the Restatement (Second) of Agency § 220 (1958). The Court went on to list "[o]ther factors that weigh in the determination," including "the extent to which the worker has assumed entrepreneurial risk and stands to gain from risks undertaken," *id.* at 599, but then explained that:

> [T]hese factors are of far less importance than the central inquiry whether the corporation exercises control over the manner and means of the details of the worker's performance; indeed, these factors are probative only to the extent they bear upon and further that inquiry. *See, e.g., Restatement (Second) of Agency* § 220 (1958).

Id. at 600.

The Court affirmed its understanding of the primacy of the right-to-control test in *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855 (D.C. Cir. 1995). Citing both *NAVL* and *Seafarers*, the Court explained, "Whether a worker is an independent contractor or an employee is a function of the amount of control that the company has over the way in which the worker performs his job." *Id.* at 858.

Essentially ignoring the foregoing statements, FedEx urges the Court instead to focus largely on the extent of the "entrepreneurial opportunity" afforded to workers; it argues that its drivers should be deemed independent contractors because their relationship with FedEx allegedly provides them with significant opportunities to operate their own business. FedEx derives that test from the Court's decision in *Corporate Express Delivery Systems v. NLRB*, 292

F.3d 777 (D.C. Cir. 2003). But *Corporate Express* did not purport to overrule the long line of precedents that focused on the right-to-control test. Rather, it merely "upheld as reasonable" the NLRB's reliance on the entrepreneurial opportunity test in that one instance (as its basis for determining that those doing work for a delivery company were employees, not independent contractors). *Id.* at 780. While *Corporate Express* went on to speak favorably about the entrepreneurial opportunity test and its ability to "capture the distinction between an employee and an independent contractor" in the context of that case, it did not suggest that the test should supplant the right-to-control test in future cases raising the employee/independent contractor issue.

Amici respectfully disagree with FedEx's suggestion that the Court break from its previous focus on the right-to-control test; an entrepreneurial opportunity test is inherently vague, and relying on that test to a significant degree will merely lead to increased confusion. For one thing, just how easily a worker can avail herself of an entrepreneurial opportunity will rarely be apparent merely by examining the terms and conditions of her contract with the firm for which she provides services.[3] In this case, for example, FedEx urges that the

[3] If it is very difficult for a worker to avail herself of entrepreneurial opportunities supposedly available to her, for example, all agree that that those difficulties would point in the direction of employee status.

Court examine the records of its drivers throughout the country as evidence that the Wilmington drivers are offered meaningful opportunities to establish their own business. Any test that requires such a sweeping examination does not lend itself to straightforward and predictable application to future cases.

More importantly, the entrepreneurial opportunity test finds no support whatsoever in the common law. It is mentioned in neither the Restatement (Second) of Agency (1958)[4] nor the Restatement (Third) of Agency (2006).[5] The Supreme Court has consistently held that Congress intends the word "employee" as used in federal statutes to be interpreted in light of common-law understandings of the term. *Clackamas*, 538 U.S. at 448; *Nationwide Mut. Ins.*, 503 U.S. at 322-23; *United Ins.,* 390 U.S. at 256 ("The obvious purpose of [the amendment of NLRA § 2(3) to exclude independent contractors from the definition of employee] was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the [NLRB]."). The common-law understanding of the term "employee" is based on the right-to-control test, not the entrepreneurial

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[4] *See* § 220.

[5] *See* § 7.07, Comment f ("[A]n agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work.").

opportunity test.

As NAVL made clear, the extent to which a worker is afforded entrepreneurial opportunities is at least a relevant factor in determining his proper classification. *NAVL*, 869 F.2d at 599. But it is nonetheless a factor "of far less importance" than the right-to-control test; and indeed, it is "probative only to the extent that [it] bear[s] upon and further[s]" the right-to-control inquiry. *Id*. at 600.

III. UNDER THE RIGHT-TO-CONTROL TEST, SINGLE-ROUTE DRIVERS ARE EMPLOYEES OF FEDEX

Applying the right-to-control test, the NLRB is undoubtedly correct: the single-route contract drivers at FedEx's Wilmington facilities are properly classified as "employees" under § 2(3) of the NLRA. *Amici* do not consider this a close case; the Court should establish a clear rule that workers whose situation approximates that of the Wilmington drivers are to be classified as "employees" under federal law. While a small handful of factors point in the direction of an independent contractor finding, the great weight of the evidence indicates that FedEx exercises considerable control over the means and manner of its drivers' job performance.

Of greatest significance is the strict control FedEx exercises over its

drivers' work schedules. All of them work virtually full-time driving their trucks for FedEx. They work on the five days specified by FedEx (Tuesday through Saturday), within the relatively tight time frames required by FedEx's customers (deliveries can begin only after all packages are fully loaded in the morning, and must be completed by 8 p.m.). That situation contrasts sharply with the work conditions experienced by drivers in cases in which drivers were determined to be independent contractors. Thus, in *NAVL* the drivers were not on a fixed work schedule; rather, it was largely up to them to determine the "means and manner" of their job performance: they decided how long to wait between accepting loads and how frequently they would drive. *NAVL*, 869 F.2d at 600. FedEx insists that fixed work schedules should not be counted against independent contractor status if it is customer demand that necessitates such schedules. To the contrary, *amici* view the need to create fixed work schedules in order to meet customer demand as a very good indication that the workers are performing an essential part of the company's normal operation. *United Ins.* made clear that workers who "perform functions that are an essential part of the company's normal operations" should generally be deemed "employees" under the NLRA. *United Ins.*, 390 U.S. at 259.

The evidence suggests that the FedEx's pay scales are designed to reward

regular work attendance at least as much if not more than the number of deliveries performed. FedEx's compensation schedule ensures that drivers will earn roughly the same net income per day; for example, drivers whose deliveries are more spread out receive extra payments to compensate for the longer period of time it takes to deliver packages. FedEx's brief focuses on the gross pay of its drivers without indication of any significant disparity in the net pay of single-route drivers who work a full year. FedEx notes that the three drivers with more than one route had significantly higher gross incomes, but they undoubtedly also had significantly higher expenses because (unlike single-route drivers) they were required to hire other drivers to man their second and third trucks.

FedEx drivers are required to accept virtually all packages offered to them – all except damaged packages and those weighing more than 70 pounds. In contrast, the drivers in *NAVL* did not need to accept any load they did not wish to carry.

Nor is there any evidence that the Wilmington drivers could employ means and manner of operation that would turn their delivery route into an actual business. Because it is shippers who decide which delivery company to employ, the Wilmington drivers cannot use their contacts with those to whom they make deliveries in order to build up the volume of their business. They can neither

solicit customers nor establish pricing as a means of inducing new business – all pricing is controlled by FedEx. While drivers have a theoretical right to sell their routes, the NLRB determined as a factual matter that routes have little value apart from the value of a driver's truck. That finding is well supported by the evidence – numerous Wilmington drivers have abandoned their routes without compensation, and it is difficult to see why prospective drivers would pay an existing driver to acquire a delivery route when FedEx regularly offers such routes for free.

The FedEx drivers are required to wear uniforms while on the job. In contrast, the Court in *C.C. Eastern* relied on the absence of a uniform requirement (along with the fact that drivers were paid based solely on the number of deliveries) as an important reason for its "independent contractor" determination. *C.C. Eastern,*, 60 F.3d at 85-59. A requirement that drivers wear uniforms is a good indication that a company is at least as concerned with the means and manner of job performance as it is with the end product.

The one factor that points significantly in the other direction (*i.e.*, in the direction of an independent contractor determination) is that drivers are entitled to find someone else to drive in their place. But the failure of any single-route Wilmington drivers to arrange for such substitution on anything approaching a

full-time basis suggests that that is not a economically viable alternative. FedEx suggests that single-route drivers can create a real business by acquiring additional routes. But the entrepreneurial opportunities presented by a working relationship ought to be determined by the relationship that actually exists, not by what additional relationships the worker can create. If it is not possible for a single-route driver to employ a means and manner of job performance that creates a viable business, then he should not be deemed an independent contractor. Presumably, FedEx would be open to overtures from single-route drivers to perform a wide variety of contracting services for the company – maintaining company lawns, laundering uniforms, or cleaning offices at the end of the day, for example. The potential availability of such entrepreneurial opportunities is neither more nor less relevant than the potential availability of a second driving route for which an individual would be required to hire a more-or-less full-time driver.

CONCLUSION

Amici curiae respectfully request that the Court deny FedEx's petition for review on the independent contractor issue.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for *amici curiae*

Dated: May 12, 2008

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation (WLF), *et al*. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 4,585, not including the certificate as to parties, table of contents, table of authorities, glossary, certificate of service, and this certificate of compliance.

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Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2008, two copies of the foregoing brief of *amici curiae* WLF, *et al.,* in support of Respondent/Cross-Petitioner were deposited in the U.S. mail, with first-class postage affixed, addressed as follows:

Charles I. Cohen
Morgan, Lewis & Bockius
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Linda Dreeben
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Michael Feinberg
Feinberg, Campbell & Zack
177 Milk Street, Suite 300
Boston, MA 02109

_____
Richard A. Samp