

## Judge Strikes FedEx Docs In Class Action Suit

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*Thursday, June 07, 2007* --- A judge overseeing the multidistrict action against FedEx Ground Package System Inc. for misclassifying delivery drivers as independent contractors on Tuesday granted the plaintiffs' motion to strike certain documents submitted by the delivery company during the class certification process.

U.S. Magistrate Judge Christopher A. Nuechterlein of the U.S. District Court for the Northern District of Indiana ruled that Fedex had violated a court order and attempted to circumvent page limitations by filing lengthy appendices along with its responses to the plaintiffs' motions for class certification, and struck the appendices and a seven-page response from the court record.

In November 2005, the court split the class certification in the hefty trial into three stages. The court limited each of the plaintiffs' briefs to 20 pages and FedEx's responses to 30 pages.

The plaintiffs sought leave from the court to file 19-page briefs instead, and use the extra pages to file an omnibus fact brief. The court allowed this over FedEx's objection.

After much delay, the plaintiffs filed their first wave of briefs in March, seeking nationwide classes in Kansas and California and statewide class status in Kansas, California, Massachusetts, South Dakota, Oregon, New Jersey, Iowa, Indiana, New York and Maryland.

FedEx then asked the court to allow it to file response briefs in excess of 30 pages, which the court denied. In April, FedEx filed its responses to the plaintiffs' briefs, along with a seven-page response to the plaintiff's omnibus fact brief and three appendices, which include 70 pages of documents in table form and two appendices to its responses to the California and Kansas cases.

The plaintiffs moved to strike the extra documents. The court agreed to strike the omnibus fact response and the California and Kansas appendices completely.

The court said that the other appendices included tables and facts, but not all the facts were objective. As a result, Judge Nuechterlein said, the court would simply ignore the additional arguments found in those documents.

"This court will not engage in the time-consuming analysis required to sift

through every page of this appendix to separate the appropriate portions from the inappropriate portions,” Judge Nuechterlein said. “However, plaintiffs can be assured that to the extent the appendix adds additional arguments, the appendix and its incorporations by reference will not be considered by this court.”

The complaints in the multidistrict litigation are similar to a class action in California three years ago, in which a judge awarded 200 FedEx drivers more than \$5 million in damages, ruling the company misclassified them as independent contractors when they were, in fact, employees.

The case motivated thousands of FedEx drivers across the country to file suit, with the centralized multidistrict litigation now representing more than 40,000 former and current pick-up and delivery drivers.

“It’s one of the most important cases being litigated in employment law, because FedEx is a business leader and is looked to as a business model, so if FedEx can get away with this kind of conduct, it encourages other businesses to do the same,” co-lead counsel Lynn Rossman Faris, an attorney at Leonard Carder LLP said in March.

She added that many state class actions had in their list of claims allegations of unfair business acts.

The drivers, all of whom work or have worked for FedEx Ground, are challenging their classification, arguing they are treated as employees with none of the attendant benefits.

The drivers are asserting a variety of state and federal claims for lost employee benefits, including overtime compensation, health insurance and retirement benefits, most of which depend on a preliminary finding of employee status.

According to court papers, the drivers worked exclusively for FedEx, driving trucks and wearing uniforms emblazoned with the company logo. Each one was required to fill in a 39-page contract, and purchase workers compensation and liability insurance through a company-sponsored group plan.

The complaint alleges that FedEx kept personnel files on every plaintiff, posted daily driver performance records at each terminal and reminded these so-called independent contractors that any failure to deliver or pick up packages would jeopardize their contracts.

The suit claims the most crucial test in determining the drivers’ employment status was whether or not FedEx reserved the right, exercised or not, to control the manner and means by which the work was performed.

‘There are dozens and dozens of ways in which the company controls the method in which the work is performed,’ Faris said. “There is no credible way

to argue that these people are treated like independent contractors.”

She said drivers paid company expenses including fuel, insurance, uniforms, equipment and truck repairs out of their own pockets, yet the service they provided was central to FedEx’s operation and was advertised as “part and parcel” of its product.

The company also retained the right to schedule delivery and pick-up times, with or without driver agreement, thereby effectively maintaining control over drivers’ work hours. FedEx could also unilaterally terminate drivers, the complaint alleges.

Faris said ground delivery drivers were distinct from the company’s express drivers only in the sense that the latter group was recognized as employees.

“I venture to guess that most people who receive deliveries have no idea that these individuals are not actually employed by the company,” Faris said. “They wear uniforms that say ‘FedEx,’ they drive trucks that say ‘FedEx.’ They are completely integrated into the company’s operations.”

Representatives for FedEx did not return requests for comment Thursday.

The plaintiffs are represented in this matter by attorneys from Leonard Carder LLP; Hamilton Law Firm PC and Lockridge Grindal Nauen PLLP.

FedEx Ground Package System Inc. are represented in this matter by attorneys from Ogletree Deakins Nash Smoak & Stewart PC; O’Melveny & Myers LLP; Jackson Lewis LLP; Scopelitis Garvin Light & Hanson PC; Baker & Daniels and internal counsel.

The case is In re FedEx Ground Package System Inc., Employment Practices Litigation, case number 03:05-MD-527, in the U.S. District Court for the Northern District of Indiana.

--Additional reporting by Christine Caulfield