

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

3PD, INC.¹

Employer,

Case 27-RC-8505

and

TEAMSTERS LOCAL UNION NO. 455,
Petitioner

DECISION AND DIRECTION OF ELECTION

On November 26, 2007, the Petitioner, Teamsters Local Union No. 455, filed a petition under Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (Act), seeking to represent the approximately twenty-three delivery drivers (drivers) who work for 3PD, Inc.(3PD or the Employer). On December 6, 2007, a hearing was held in the National Labor Relations Board, Region 27 office in Denver, Colorado before Hearing Officer Angie L. Berens. Following the close of the hearing, the parties timely filed briefs. The primary issue to be resolved in this case is whether or not the drivers in the petitioned-for unit are employees within the meaning of Section 2(3) of the Act or whether they are independent contractors. 3PD contends that these drivers are not subject to the Board's jurisdiction because they are independent contractors, who own and operate their own businesses. 3PD further asserts that if these drivers are not found to be independent contractors then they should be found to be supervisors under

¹ 3PD's name as amended at hearing. Until the end of June 2007, 3PD apparently operated under the name Affinity Logistics. In June 2007 3PD bought all outstanding stock of Affinity Logistics and 3PD has been operating under the name 3PD since then. ²

Section 2(11) of the Act because each driver typically employs at least one helper whom the driver alone has the authority to hire, fire and compensate. The Petitioner asserts that the drivers are employees and not independent contractors because of various indicators that weigh in favor of this status. The Petitioner also takes the position that the helpers in this case are not employees of 3PD and therefore, because the drivers do not exercise supervisory authority over employees of 3PD they are not statutory supervisors. For the reasons enunciated below, I conclude that the petitioned-for drivers are employees of 3PD under Section 2(3) of the Act and they are not statutory supervisors under Section 2(11) of the Act.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that 3PD is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and that it is subject to the jurisdiction of the National Labor Relations Board (Board). Specifically, I find that 3PD, a Georgia corporation with a facility located in Denver, Colorado, the only facility at issue, is engaged in providing logistical support services to commercial customers. During the past 12 months, a representative period, 3PD purchased and received goods and materials at its Denver, Colorado facility valued in excess of \$50,000 directly from suppliers located outside the State of Colorado.
3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act. 3

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. It is appropriate to direct an election in the following unit of employees:

INCLUDED: All full-time and regular part-time delivery drivers employed by the Employer at its Denver facility

EXCLUDED: Delivery drivers' helpers, office clerical employees, sales, employees, warehouse employees, professional employees, managers, guards, and supervisors as defined in the Act, and all other employees. **STATEMENT OF THE CASE 3PD's Denver Operation**

3PD is a nationwide business that provides logistics support at approximately 80 facilities throughout the United States. 3PD provides logistical management and support services to delivery operations for commercial customers, including Sears Logistics Services, Inc. (SLS), the entity that handles all of the logistical activities, including operating warehouses, for Sears, Inc. (Sears). Sears, a retail organization, sells household merchandise to the general public, including appliances, electronic equipment, exercise equipment, lawn and garden equipment and snow blowers and provides delivery services for this merchandise. Although 3PD is not involved in the actual sale of goods to the Sears customers, it works with SLS in managing its primarily residential delivery services by analyzing the geographical area to which the deliveries are to be made, the types of products that are to be delivered and the length of time needed to deliver the products including installation time. 3PD, in turn, provides drivers to perform the actual delivery services.

Sears operates the cross-dock facility and warehouse at which 3PD's Denver operation is located. 3PD's Denver operation serves the greater Denver metropolitan area.

² The parties stipulated at the hearing that at the Denver facility, Operations Manager Rich Cartwright, Assistant Manager Roy Fleming, Assistant Manager Todd Lutz, Assistant Manager David Kaczmarek and clerical employee Tomiko Herder were all employees of 3PD. The record establishes that 3PD maintains a separate employee handbook that applies only to these employees at the Denver facility. The drivers at issue do not receive a copy of this handbook and the record is clear that its policies do not pertain to drivers.

³ Each driver employs a helper to assist in performing these deliveries. As discussed later in this decision, the helpers are not employees of 3PD.

area, Boulder, the Colorado Springs metropolitan area and Cheyenne, Wyoming. The record establishes that at the time of the hearing there were approximately 23 drivers working out of the Denver 3PD location, who make approximately 110,000 deliveries each year. 3PD employs four managerial and a clerical employee at the Denver facility.² Each driver receives a delivery manifest (Manifest) at the beginning of the work day. The

Manifest, sets forth, in detail, the driver's delivery schedule for that day including the sequence of the deliveries, what products are to be delivered at each stop, the location of the delivery, and the estimated delivery time window for each delivery. Individual

Manifests are sent by "Sears" via computer to 3PD every morning. According to the record, each Manifest contains approximately 18 scheduled deliveries per day although that can vary depending on the time of the year.

The driver's typical work day begins each morning at about 6:30 a.m. when 3PD holds a meeting called a "stand-up" (Stand-up) that all drivers and helpers³ scheduled to work that day are required to attend. Drivers and helpers report at varying times before the scheduled Stand-up. Although the testimony varied, drivers either pick up their individual Manifest, from their mailbox in the drivers room, or from a 3PD manaduring the Stand-up.

The drivers and helpers then proceed to the dock to load the equipment that they are scheduled to deliver that day onto their trucks. At each scheduled delivery stop, the helper and driver unload and install the newly purchased 5

⁴ Drivers perform minimal installation, but they do not hook up gas appliances , water heaters or hard-wired electrical installations.

⁵ For example, if a customer was not present to accept delivery or if the customer refused delivery, that equipment would be returned and unloaded at the dock at the end of the day.

⁶ Since the Petitioner also presented a witness with the last name of Hitt (the record establishes that there is no relation), I will refer to the witnesses by their first and last name.

⁷ According to Charles Hitt, at the end of June 2007, 3PD bought all of the outstanding stock of Affinity Logistics (Affinity) which had apparently been performing the work that 3PD is now performing at the Denver facility at issue in this proceeding. However, it is not clear from the record how long Affinity performed those operations or how long Charles Hitt was employed by Affinity and “operationally responsible” for the management of the logistics operation at this Denver facility.

merchandise. The record establishes that minimal skills are required to complete the installation of the delivered equipment. ⁴

After the day’s scheduled deliveries are complete, the drivers and helpers return to the loading dock at the Denver facility to unload undelivered products⁵. Before turning the completed Manifest in to the 3PD office at the end of the day, the driver is required to obtain signatures on the Manifest from a Sears representative at the dock (the MOD) and a 3PD manager.

Drivers are required to carry cell phones, either a personal one or one leased from 3PD. At the hearing 3PD presented one witness, Charles Hitt⁶, the Executive Vice-President of Operations for 3PD, who oversees the United States and Canada. According to the record, during his employment with 3PD and its predecessor Affinity⁷, Charles Hitt, never served as the operations manager or site manager of the 3PD Denver operation, nor has he been, in any way involved in its day-to-day operation. The Petitioner presented two witnesses, Matthew Hitt and Jose Rivas, who are both currently drivers for 3PD. ⁶

⁸ One of the exhibits shows that the applicant was “referred” by “walk in/news ad”.

⁹ This Description of Responsibilities of Contractor sets forth the following requirements to qualify for consideration as an “independent contractor” with the Employer: that an applicant must own or have the ability to purchase a 26 foot straight truck; have a valid driver’s license with applicable endorsements; be able to pass all Department of Transportation (DOT) medical requirements including physicals and random drug screens; have and maintain an acceptable MVR and criminal report; provide annual documentation showing that any vehicles used on behalf of the Employer passes DOT inspections; have the ability to maneuver a 26 foot straight truck through metropolitan areas with “due care and accuracy”; be able to perform heavy lifting that may sometimes be combined with stair climbing; be accurate in record keeping; be bondable; and possess “good communication skills for customer interaction.

¹⁰ In this document and virtually every other document entered into evidence by both parties, and in fact in some testimony on the record, the name “Affinity” is used. The parties stipulated, and I note, that any and all references to “Affinity” refer to “3PD” unless specifically indicated otherwise.

¹¹ The Agreement states that the drivers cannot operate the vehicle for any other motor carrier or entity during the terms of the Agreement without prior written consent from 3PD.

STATUS OF DRIVERS

Operating Agreement

The record does not establish how 3PD recruits prospective drivers.⁸ However, driver applicants complete an “Application for Contract” (Application) and a “Description of Responsibilities of Contractor”, which are given to an applicant in the “initial stages”.⁹

This “Application” concludes by having applicants sign a statement that they fully understand the requirements necessary to “qualify for consideration as an independent contractor”.

The record establishes that when an applicant is offered a driving position with 3PD, that offer is contingent on the driver agreeing to execute an agreement titled “Independent Contractor Operating Agreement” (Agreement)¹⁰, which the Employer asserts establishes all of the terms and conditions under which the drivers work. It seems clear from the record that the purpose of this Agreement is to cast the drivers as independent contractors and the Agreement specifically provides that the driver is an independent contractor and not an employee of the Employer. The terms and conditions of the Agreement, briefly summarized specify that each driver must provide a vehicle¹¹; 7

¹² The record shows that the drivers are responsible for any and all damages to their vehicles, the merchandise in their control, and the homes to which they make deliveries.

¹³ Although the drivers are solely responsible for fueling their trucks, they are paid a fuel surcharge from 3PD. According to Charles Hitt, this surcharge is to offset escalating fuel prices.

¹⁴ According to the Agreement, either party is allowed to bring disputes related to termination or any aspect of the Agreement to arbitration under the Commercial Rules of the American Arbitration Association.

must pay for all operating expenses¹² including maintenance, insurance, fuel¹³, tolls, registration fees, road use taxes, fines and inspection expenses; must comply with all Department of Transportation (DOT) regulations and State laws and regulations; and must purchase and maintain specified types and amounts of insurance. The Agreement also specifies how the drivers' compensation will be calculated including items which will be "charge back items" such as truck rentals, fuel and fuel taxes and a "performance bond/escrow". Finally the Agreement sets forth the fact that either party may terminate the agreement at any time.¹⁴

Although the provisions of the Agreement, on its face, appear to support the Employer's contention that the drivers are independent contractors, the record evidence with respect to the actual terms and conditions under which the drivers perform their assigned work, including evidence presented by the Employer, clearly contradict the Employer's position.

Vehicles

As noted above, the drivers are required to provide their own vehicles.¹⁵ However, contrary to the requirement in the "Description of Responsibilities of Contractor" referred to above, the drivers at the Denver facility are not required to own their own trucks but instead may lease them. Although 3PD does not "provide" vehicles for the drivers, the record establishes that drivers can easily sublease vehicles through 3PD pursuant to 3PD's existing agreement with Ryder Trucks. A sample of a truck 8

15 Although 3PD does not require that any specific vehicle be utilized, the record establishes that almost all drivers at issue utilize a diesel fueled, single axle box van with dual wheels that is 24-26 feet in length.

16 However, while the Employer offered into evidence copies of many business records that relate to the drivers' employment including the Agreement, I note that it did not offer into evidence an example of any truck lease. Therefore, the only example of a truck lease in the record is that between 3PD and Matthew Hitt. 3PD did offer into evidence an application for insurance that lists the leinholders name as Ryder Transportation and the lessor's name as Affinity.

lease in the record, titled "Equipment Sublease Agreement" establishes that the Employer subleased Petitioner witness Matthew Hitt his truck and that Mr. Hitt agreed that the terms of the lease agreement in effect between "Ryder" and the Employer would be the terms that applied between the Employer and Matthew Hitt. The sublease was effective on November 20, 2006 for 60 months and provides that Matthew Hitt will lease the vehicle for that term. This sublease also provides that the monthly payments due will be deducted from the driver's earnings each month and that the driver shall procure and maintain in effect specific insurance as a condition of the sublease. The record evidence also establishes that if a driver's Agreement is terminated, he will be released from the sublease with 3PD at the time of the termination, and any new driver that is hired to replace the terminated driver will lease that same truck.

The Employer's witness Charles Hitt testified that while some drivers owned their own vehicles, to the best of his knowledge, the "vast majority" of drivers at the Denver facility lease their trucks "from" Ryder.¹⁶ Petitioner witness Matthew Hitt testified that he knew of three drivers who owned their own vehicles. Charles Hitt also testified that, in addition to leasing the vehicles, the "Ryder" leases are typically a full-service lease and Ryder performs normal maintenance on the leased trucks. It is undisputed that if drivers require maintenance outside the "normal wear and tear", or if drivers do not 9

17 As noted above, the driver is also wholly responsible for operating expenses as well as any fines, including parking or traffic tickets or penalties.

18 Jose Rivas testified that a 3PD manager told him to remove his own business logo from his truck and replace it with the Affinity logo.

19 For example Matthew Hitt testified that he owns a business, called MH Delivery, but the record does not establish any details about the operation of that business, if he formed this business in order to work for 3PD or if the business existed before he began to work for 3PD. The record also contains an exhibit that shows that a driver operated "MVP Trucking, LLC" and the form contained the driver's employer identification number. However several of the forms in evidence also utilize the driver's social security number.

20 3PD offered into evidence a Vehicle Registration receipt which shows a driver's name and indicates that it is a second truck. However, Charles Hitt did not provide any specific information about the utilize a Ryder vehicle, the driver is wholly responsible for performing all maintenance and repairs on the vehicle.¹⁷

The record contains conflicting evidence with respect to the driver's ability to use his vehicle for commercial purposes other than performing deliveries for the Employer.¹⁸ The Employer asserts in its brief that each driver "runs a stand alone business, independent from 3PD." However, what little incidental independent evidence the record contains about each driver's independent business is very inconclusive.¹⁹ Charles Hitt also testified that some drivers run more than one vehicle for 3PD, in which case the driver would obtain a second vehicle and then hire a second driver and helper, although there is only minimal evidence of this.²⁰

Charles Hitt testified that the drivers are free to provide services for other individuals or companies, even competitors. However, the record does not contain any evidence that any of the drivers utilize their trucks to engage in any other commercial operation other than performing delivery services for 3PD. Moreover, the Agreement specifies that the drivers cannot operate equipment for any other motor carrier or entity during its term without prior written consent from 3PD and there is no record evidence that any driver has either requested or been granted consent by 3PD (or Affinity) to provide services for any other motor carrier. Charles Hitt did admit that, per the 10

operation of this second truck. Matthew Hitt testified that he has “heard of” other drivers owning and running two trucks, but he also did not provide any details.

²¹ He stated that to otherwise use the truck would violate DOT standards.

²² Petitioner’s Exhibit 4 is a memo from 3PD stating it is strictly prohibited to allow anyone to drive the truck who has not been certified by 3PD. Charles Hitt testified that this requirement is again due to DOT regulations.

²³ The record is silent as to the method in which drivers are paid and how often drivers are paid although the Employer entered into evidence one example of a “Direct Deposit” form for a driver that contained gross amounts. The record does show that the drivers will be paid for the deliveries they make regardless of the profitability of 3PD.

Agreement, the drivers cannot use a vehicle that has the 3PD logo on it for any other purpose.²¹ However, although the Agreement provides that the drivers may use the trucks for other purposes if they cover the 3PD logo, Charles Hitt testified that a driver’s use of the vehicle for other purposes is not suggested and that in those circumstances the drivers should go rent a plain vehicle. Finally, Matthew Hitt testified that both a former 3PD manager and a current 3PD manager told him that the drivers are not allowed to use the trucks for anything other than personal use.

The record also establishes that drivers are not permitted to let anyone who isn’t authorized by 3PD drive their vehicle²².

Compensation

The Agreement specifies at Appendix A that drivers are compensated a “minimum of 60% of all hauling revenue generated from the operation of the drivers’ equipment”.²³

Although Charles Hitt testified that the drivers’ compensation varies among drivers, beyond this conclusory statement, there is no evidence in the record to show that the payment per stop varies among drivers or that the payment is negotiable by the drivers.

In fact, as noted above, the Agreement provides that drivers are compensated a “minimum of 60% of all hauling revenue generated from the operation of the drivers’ equipment” and there is no evidence that the revenue generated from the operation of the drivers’ equipment varies between drivers. ¹¹ deliver has a f the g

²⁴ Failed deliveries are deliveries that a customer has missed or the driver has missed.

Drivers are not guaranteed any specific number of deliveries or a specific amount of revenue. The drivers’ basic compensation is based on a flat rate paid for each delivery although the record is silent with respect to the monetary amount that drivers are paid per delivery. The record establishes that the drivers are compensated solely for the deliveries they successfully complete. In order to be considered complete, the drivers must make the delivery, then obtain signatures on their daily Manifest from the customer, from the MOD at Sears, and from a 3PD manager. The drivers then turn these signed Manifests into 3PD which form the basis for the driver’s compensation. If the driver fails to obtain the required signatures on the Manifest he is not compensated for that stop. Drivers are also not paid for stops that are considered “failed

ies”²⁴. The record establishes that, in addition to the regular compensation, 3PD program called the Employer’s Quality/Productivity Incentive Program that pays incentives for high customer satisfaction scores. These scores are generated based on delivery customer surveys conducted by a third-party for Sears. The customer is asked to rate drivers and helpers on “teamback”, “appearance”, which is the appearance of driver and helper, and “protect”, which is how well the driver and helper protect the customers’ floors and other areas of their homes. In order to receive the bonus, the drivers have to receive a rating of above a 94.3% overall. The bonuses received for high customer satisfaction range between 50 cents and two dollars per stop. Although one witness testified that at some

point he and some other drivers had a general feeling that this concern to a manager and the manager assured him that wasn't the case.²⁵ fuel they use making their

not feel com

25 However, the Manual states: "To establish 'who is the best contractor/team and who is the worst'...rank all contractors on a daily/weekly/monthly basis. The contractors/teams that are always on top arhero's [sic], those on the bottom receive a LOT of attention of a different kind!!! Believe us, you wbe "on top." 26 For example, with respect to the detail covering interactions with the customer at the delivery stop,Manual specifies that a responsible adult must be present to accept the delivery and that if a customer signature is not legible the delivery team must have the person signing print his or her name on the Manifest. The Manual also instructs how the delivery team is to remove doors if that is necessary to make the delivery including the fact that "Spring Loaded Hinges will NOT be removed." The Manual provides that if a customer is not at home the delivery team must leave a "Not Home" tag at the Customer's location and then call a route monitor to satisfy SLS that the delivery team was at the customer's home. The Manual also requires that the delivery team must contact a Route Monitor or Voice Response unit after each stop. According to the Manual if the delivery is refused, the delivery team must contact the Route Monitor and that the delivery team is to stay at the customer's home until the issue is resolved. Refused merchandise must be returned to the dock in its carton. The Manual spec a number of delivery prohibitions for the delivery team including that they may not remove windows, h

ere may be consequences for lower scores, the witness further testified that he voiced this c

As noted, drivers are also paid a fuel surcharge for the deliveries.

Drivers do not receive any fringe benefits from 3PD. Contractor Delivery Procedures Manual The Contractor Delivery Procedures Manual (Manual), created by 3PD in conjunction with Sears and issued periodically to all drivers, lists detailed and very specific instructions for the vast majority of delivery procedures that drivers will use in performing their work. These instructions include itemized loading and unloading procedures, instructions on how to complete delivery Manifests, a listing of delivery tools that the driver is required to have to make deliveries, as well as the Employer apparel, accessories and personal grooming requirements for the delivery team. The introduction to this Manual specifies that it "details the majority (not all) of the procedures, limitations and expectations of what Sears and their customers will expect 13

wiring within an electrical outlet. With respect to the removal of the customer's current appliances or bedding, the Manual specifies that the delivery team will remove such items only on a one-on-one basis for the equipment delivered and that they cannot reconnect the customer's current appliance elsewhere or leave the customer's old televisions outside. The Manual also specifies that if the delivery team is moving an old freezer or refrigerator that they must remove the front door before the old appliance is moved outside. The Manual also specifies that such actions would be considered a "theft of services". With respect to trash returned to the dock, the Manual specifies that trash must be separated into two separate types, cardboard and "styrofoam/misc".

27 The record shows that the drivers select and purchase their own moving equipment, such as dollies and team straps and floor protectors, and the drivers also select and purchase their own tools, such as drills and levels.

The Manual, under a heading of "Other Requirements" sets forth the requirement that delivery teams making deliveries that day will attend the daily "Stand-up". As discussed, *supra*, these are meetings for the delivery teams that are typically held at 6:30 a.m. each day, although all of the witnesses agreed that the time for the Stand-up could vary somewhat each day. Both of the Petitioner's witnesses testified that attendance at the Stand-up was mandatory, a position that is consistent with the description of the Stand-up in the Manual. Jose Rivas testified that notice of the Stand-up was posted at work. The Stand-ups are run by a 3PD manager, and include discussions of a variety of topics such as traffic patterns, weather issues, safety concerns, new products that have been launched, and Quality Satisfaction scores derived from the survey of Sears customers. The Manual also specifies that delivery teams will adequately stock their vehicles with specific items provided by SLS and that the driver must provide "clean protective blankets, pads and tie down straps and proper tools to complete all deliveries including level, power drill and drill bits."²⁷

An additional item under "Other Requirements" is the Employer's "Delivery Team Apparel and Appearance" that specifies that the delivery team must have a clean and 14 The Manual also sets forth personal grooming requirements required by customers, and how to handle damage to customer

delivery teams must wear standardized shirts or mock turtlenecks and jackets that depict "Sears Authorized Delivery" on them. The Manual even specifies what type of undershirt the delivery team should wear. The delivery teams are also required to wear industrial navy blue pants and can wear navy blue baseball caps that contain the Sears logo. The drivers purchase the shirts, jackets and caps through 3PD. The Manual also specifies that the driver's belt must be black with a covered buckle and that they must wear industrial black leather shoes. The Manual lists two types of acceptable shoes including manufacturer names and stock numbers. One of Petitioner's witnesses testified that he was once threatened with termination of his contract for wearing yellow shoes to perform his work on the dock although he states that he had black shoes in the truck which he intended to wear to make his deliveries after loading the truck. Finally, the Manual specifies that each member of the delivery team must have a back support/protector or other personal safety equipment.

²⁹ The Manual specifies that the delivery team must be clean shaven but where beards are chosen they must be "neatly groomed and properly shaved SURROUNDING the beard". The Manual provides that management will maintain a supply of shaving kits for teams to use should they forget to shave that morning. In addition the Manual requires that shoes be neat and clean and that managers will maintain a supply of shoe cleaning kits. The Manual also prohibits "earrings or other visible pierced jewelry" as well as visible tattoos.

³⁰ These instructions include such details as: the delivery team must "Apply Product Services magnet to one appliance per delivery"; slice cardboard cartons and pack them into a single empty carton; and collect non-cardboard packing material in a separate container.

professional appearance and sets forth the Employer's uniform requirements. ²⁸"Other Requirements" section of the Ma

gements for the delivery team²⁹. The Manual also provides detailed "Appliance and Electronics Delivery

Procedures" that are very specific and provide step by step installation instructions for the set-up and connection of appliances and electronics, refrigerators and freezers, gas and electric ranges, washing machines and dryers, dishwashers, televisions, VCRs and sound systems.³⁰ Some of the other instructions contained in this Manual specify the correct way to load and unload equipment, how to enter a customer's home, delivcompletion "prohibitions", specific instructions about how to handle merchandisrefused, exchanged or returned er's homes or property.

²⁸15 lly, the Manual sets forth in detail the components of the Quality Measu

³¹ One of Petitioner's witnesses testified that he compared the prices of other insurance providers and the provider with whom 3PD has the existing arrangement was the least expensive.

³² Four separate insurance identification cards were offered into evidence by 3PD. All four listed Affinity as the "Insured". However, 3PD also offered into evidence a Certificate of Insurance, apparently relating to the Workman's Compensation insurance policy that one driver held, which lists the driver as the "Insured" and 3PD as the certificate holder.

Fina

rement Program and the Employer's Quality/Productivity Incentive Program mentioned earlier. Insurance The record establishes that 3PD requires drivers to carry various types, and amounts, of insurance in order to be able to work as a driver. These include Commercial General Liability Insurance (\$1,000,000 combined single limit), CommAutomobile Liability Insurance (\$1,000,000 per occurrence), Physical Damage Insurance (\$65,000 any one vehicle), Umbrella and Excess and Liability Insuran(\$4,000,000) and Worker's Compensation and Employer's liability insurance (the rdoes not specify the amount). The record also establishes that 3PD requires that several of the policies have a specified deductible. Although the drivers are requicarry the insurance, they can obtain their own insurance or opt to purchase an insurance package through a program offered by 3PD.³¹ According to the record evidence, it appears that almost all of the drivers purchase their insurance through 3PD's program. For those drivers who obtain their insurance through 3PD, 3PD deduct is deposited on most of the policies³². While Charles Hitt testified that drivers maintain all of 16 Sched

³³ The evidence establishes that, until August 2007 drivers were not scheduled to work on Sundays and after that time (when Sears started making next-day deliveries) drivers were required to be available to work on some Sundays.

³⁴ The record does not contain any specific examples of this occurring. their own insurance certificates, 3PD keeps at least a copy of each certificate for its files. Charles Hitt testified that drivers are not given a fixed amount of work on a daily or weekly basis. Both parties offered copies of weekly schedules into evidence and from these schedules it is apparent that drivers are scheduled to work either five or six days per week.³³ The record contains conflicting evidence with respect to whether the drivers have the flexibility to work on whichever days they choose. Charles Hitt testified that drivers can choose to “not make their services available” on some days and that drivers choose to work extra days. According to him, in each situation, they need simply advise 3PD of their availability.³⁴ However, both of Petitioner’s witnesses testified that, if they want to choose “not make their services available” on a particular day, drivers have to request time off, in writing and in advance.³⁵ Matthew Hitt testified that on one occasion his request for time off was denied because there weren’t enough other drivers scheduled for that day. Jose Rivas testified that in recent months 3PD had denied a vacation request that he had made as well as a request for time off when he was sick. On an additional occasion when he didn’t return to Colorado for scheduled work after he had been on vacation, a 3PD manager told him it was lucky they had found someone very difficult to find a replacement driver who would be late and was told to apologize to all the drivers at the meeting or that the time that a driver’s end varies, based on the number of deliveries, how long each deliver

³⁵ There are examples of numerous of these written requests for days off in the record. ³⁶ In view of the evidence that 3PD requires that all of its driver must successfully pass a background check before performing its delivery work, the pool of available replacement drivers would seem to be very limited. ³⁷

The record does not indicate how late the witness was when he testified he was “running late”. them, someone who is certified and meets 3PD standards they could take the day off. Petitioner’s witnesses though assert that it is ill meet 3PD standards.³⁶ ³⁷ Thus, the driver’s ability to “not make their services available” is limited by a number of factors. The testimony with respect to the issue of when drivers are required to report for work is also contradictory. Specifically, Charles Hitt testified that the drivers do not have an assigned time to arrive, and don’t all arrive at the same time. While the Petitioner’s witnesses agree that they may not necessarily be required to arrive at any given time, one witness testified that once, when he was “running late”, the manager took his leave away from him and sent him home for the day. This same witness testified that when he was late on another occasion and missed the first five minutes of the Stand-up, he was verbally warned for being

g. As noted earlier, the Manual provides that all scheduled drivers and helpers should attend the Stand-up. The record is silent with respect to how many hours each day the drivers work and what time each driver’s day ends. However, it appears that a particular day would last and other incidental problems or delays. Delivery Manifests Although Charles Hitt testified that drivers are not given a fixed amount of work 18 hours a day, to driver Accord ed

where he made fewer than eighteen deliveries, it was because 3PD was spreading out the work among drivers. No other evidence contradicts his testimony.

³⁹ The record is clear that no 3PD manager supervises the drivers while they are in customers' homes.

⁴⁰ However, the drivers can experience a delivery failure which is not their fault for example when a customer is not home at the scheduled delivery time.

⁴¹ It appears that drivers are prohibited from removing the replaced appliance or equipment if such removal is not specified on the Manifest.

⁴² However, it is undisputed that the drivers can decide which streets to take in order to make their deliveries, as long as they comply with the time limits established by the Manifest. Moreover, one of Petitioner's witnesses did testify that the drivers have some limited discretion to vary the sequence

At each delivery stop they are required to have the customer sign the Manifest acknowledging the delivery. Drivers would consist of approximately eighteen deliveries³⁸ and that the Manifests for all drivers are substantially equivalent. As discussed, drivers are given a Manifest each morning that schedules their deliveries. Specifically, the Manifest lists the name and address of the customer, the time window for the delivery, the estimated time of arrival, the travel time to the stop, the estimated service time for the stop, the product being delivered, and any notes about a particular delivery.³⁹ Drivers are not free to refuse stops listed on the Manifest. Such a refusal would be considered a delivery failure and could lead to the termination of the driver's contract. ⁴⁰ The Manifest will also indicate if the driver is required to remove any old appliances or other equipment from the delivery point as part of the delivery service.⁴¹

Accordingly, the Manifest essentially establishes the driver's route on a particular day.⁴² Although the Manifests typically list eighteen stops for each driver, Charles Hitt testified that the drivers may "trade" loads among themselves and that they do not need 3PD's permission to make such a trade. However, the record does not contain any examples of such trades and since the drivers are required to have the customer sign their Manifest acknowledging the delivery, it is unclear how the drivers would obtain the ³⁸and time of year.

Matthew Hitt testified that he has had as few as eleven deliveries on a particular day or as many as twenty-six. He also testified that almost on a daily basis he would request 3PD to assign him 19 and for so testified that the drivers and a 3PD manager on their Manifest.⁴⁵ He testified that the drivers should protect the Manifests from the

specified on their Manifest. For example, they may arrive earlier to a delivery, if the customer at a previous stop is not at home.

43 Matthew Hitt testified that if he is running early or late for a scheduled delivery, he will either call "Sears" or the customer directly to resolve the problem himself, but he would not contact 3PD.

Similarly, Charles Hitt testified that if there is a problem with a delivery, the drivers should call Sears Customer Service, and not 3PD.

44 However, there is no other evidence in the record that such a route trade has occurred.

45 One of Petitioner's witnesses testified that a topic at a recent stand-up was that drivers had to have the three signatures on the Manifest or they would not be paid.

required signature if the delivery was not listed on the Manifest they were assigned that day.

Moreover, the Manual provides that the drivers must run all delivery routes "exactly as specified on the Manifest, unless otherwise directed by an SLS associate." This is "...in

order to meet the customers' strict demands for timely delivery of merchandise while efficiently completing deliveries."⁴³ Charles Hitt al

can "trade" routes, but acknowledged that they must inform 3PD of such a trade for "liability reasons". He testified that 3PD generally approves such route trades and he could think of no circumstance where it hasn't been approved.⁴⁴ After they complete their deliveries the drivers return to the Denver facility, since they must get the signatures of the Sears MOD

The Manual further s

"elements" and "wear and tear" and prohibits drivers from presenting "folded, crinkled, weather-beaten, etc." Manifests to customers. Training/Orientation

Charles Hitt testified that 3PD does not train the drivers with respect to how to perform most aspects of their jobs, including loading and unloading of merchandise at the use of tools.⁴⁶ The record establishes that when hired, the drivers do receive training from which consists of their riding along and observing an experienced individual "to see 20 y two days, with e or six days. Petitioner's witness Matthew Hitt, who has worked for the Emplo

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46 However, 3PD offered into evidence a five star presentation dealing with aspects of how Sears views customer service, which Charles Hitt testified is shown approximately one or two times per year in Denver.

47 The record shows that, at the close of hearing, the parties attempted to reach a stipulation that the helpers are not employed by 3PD, but were not able to do so. However, neither party asserts on brief, nor is there any evidence in the record to show, that the helpers are employed by 3PD. what they do". During this training time, drivers become familiar with routes and with the installation of much of the Sears merchandise. 3PD pays these drivers an unspecified per diem rate while they are training. The record evidence is contradictor with respect to the duration of this training. For example, Charles Hitt, who has not been directly involved in the day-to-day operation of 3PD's Denver operation, testified that since the drivers have experience, their training lasts for at least

possibly five
years at the Denver facility since November 2006, testified that he participated "third-party ride along" training for two weeks when he was hired. Helpers⁴⁷ The record establishes that each driver has a helper, primarily because the majority of the products being delivered are large enough to require two people and the helper assists the driver in loading products at the dock and unloading and installing products at customer's locations. The drivers interview, select and hire their own helpers. Drivers also have discretion to terminate their helpers, without consulting with 3PD, and this has in fact happened. Moreover, the drivers are solely responsible for paying helpers and negotiating their individual pay r

ates for their helpers, including arrival and departure times as well as breaks and assign them their daily tasks. The drivers are required by 3PD to carry workman's compensation insurance that covers their helpers. 21 Ready t. ivers and 3PD has no input into any aspect of the helpers' employment relationship with the driver; however, 3PD does re a standard background criminal

If a driver's helper is not able to work on a particular day the driver may first try to find a helper by asking around at the dock , but the driver also has the option to use Ready Man, a temporary labor agency. 3PD has the Ready Man telephone number in its office and Ready Man will simply send a bill to 3PD for the helper's services and 3PD will deduct those costs from the compensation deposited into the driver's bank account he record establishes that, in general, the helpers are employed by the require that any helper submit to

I check, the same as the drivers, in order to satisfy Sears' requirements. **ANALYSIS AND FINDINGS** Section 2(3) of the Act, as amended by the 1947 Labor Management Relations Act (the Taft-Hartley Act) provides that the term "employee" does not include "any individual having the status of independent contractor." The meaning of this 1947 amendment was first considered by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). This case held " [t]here obvious purpose oamendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. There is no doubt that we should apply the common-law agency test in distinguishing an employee from an independent contractor. This Court further stated

rthand formula" or "magic phrase" associated with the common-law test; instead the Court instructed that, under the common-law test "all incidents of the relationship must be assessed and weighed with no one factor being decisive." 22 t individual's relationship to the employing entity. hether or not following factors to be applied here: er the details of the work;) The kind of occupation, including whether, in the locality in question, the by a specialist without supervision; 4) The skill required by the drivers; 5) Whether 3PD or the drivers supply the instrumentalities, tools, and the) The length of time the drivers are employed; 7) The method of payment, whether by time or by the job; 8) Whether the work in question is part of 3PD's regular business; 9) Whether the parties believe they are creating an employment relationship; rove

Thus in determining whether an individual is an employee or an independent contractor under Section 2(3), the Board applies the common-law agency test and considers all of the incidents of the in *adway Package System*, 326 NLRB 842 (1998). The determination of w

individual is an independent contractor is quite fact-intensive. The multifactor analysis set forth in Restatement (Second) of the Agency, Section 220 includes the

The control that 3PD exercises over
Whether the drivers are engaged in a distinct occupation or work;

3

work is usually done under 3PD's direction or

place of work for the drivers;

6

and

10) Whether the driver is in the business. *BKN, Inc.*, 333 NLRB 143 (2001). As the Petitioner correctly notes, and as Board law establishes, the burden is on the party asserting independent contractor status to prove that such individuals are not employees. *Id.* at 144. Applying the common-law agency test to the facts of this case, I find that the factors weigh more strongly in favor of employee status for the drivers at 3PD. In so doing, I rely on the precedent established by this record and which can be distinguished from *Dial-A-Matt* and *Heiler*. Under the law, the drivers are not in a business. The documents in evidence certainly establish that it is not necessary,

finding, I rely on the Board's *Roadway* decision, which involves a factual situation similar to the

Press Operating Corporation, 326 NLRB 884 (1998), which was decided the same day as *Roadway* and upon which 3PD relies. In *Roadway*, the Board weighed all of the factors set forth in the common-law agency test and found that the drivers were employees. In finding drivers to be employees in *Roadway*, the Board relied, *inter alia*, on several factors also present in this case. As in *Roadway*, the 3PD drivers perform a function that is a regular and essential part of 3PD's normal operations, the delivery of the Sears merchandise. Moreover, the record establishes that the drivers here, as in *Roadway*, are effectively not permitted to use their vehicles for other commercial purposes. While the parties agreed that a driver could choose not to work on particular days, the evidence establishes that the drivers must follow a specific procedure in order to obtain 3PD's permission to miss work on those days or risk having their contract terminated. Based on both the vehicle arrangement and the drivers' schedules, I find that, as the Board did in *Roadway*, "[t]his lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice by the ... drivers and more a matter of the obstacles created by their relationship with [the Company.]" T

contractual right to engage in outside business falls within the category of "entrepreneurial opportunities that they cannot realistically take," because of 3PD's limitation on the drivers' use of their trucks and the fact that the drivers' work schedule prevents them from taking on additional business during the work week. The record here is unclear with respect to how many of the drivers incorporate a 24-hour term of the order of conditions that drivers are required to make forth in their contract.

since several drivers use individual rather than employer identification numbers. The vast majority of drivers sublease their trucks from 3PD which has the obligation for the lease. The drivers' subleases terminate when their Agreements end. The nature of the sublease does not support independent contractor status since the drivers have not assumed any obligation under the lease unconnected with their employment. The record also establishes that 3PD exercises substantial control over the drivers' performance of their functions and that the drivers' daily duties weigh in favor of their employee status. The drivers have no control over their work schedules which are established by 3PD through the daily Manifests. While the record establishes that the drivers may make very limited adjustments to these schedules, and that they may schedule their breaks and lunch when they choose, it is clear that drivers are required to follow the schedule set by the Manifest. While 3PD controls their deliveries in accordance with the schedule established in the Manifest because of the customer service requirements set by Sears, the record establishes that 3PD also considers on-time delivery of critical importance. Drivers must also follow 3PD's delivery and installation procedures as set forth in the Manual. While it appears that the drivers are hired with a certain skill level at least for driving the vehicle, 3PD provides them with on-the-job training and the Manual dictates in detail at least the great majority of delivery and equipment installation procedures. The drivers may be free, as 3PD contends, to load products any way they want and determine what streets they will use to deliver their route, however, that limited discretion may only be utilized within the confines of having to meet the schedule set forth in the Manifest and the Manual's directions about the manner in which drivers unload and install the equipment. As in *Roadway*, the drivers must wear appropriate appearance and uniform policy or face termination of their contract. I find that the Manifests require that drivers obtain insurance through carriers with which it has arrangements. Moreover, 3PD withholds any Federal, state or local taxes from drivers' checks, I find that this factor

uniforms and must meet appearance standards as evidenced by both the Manual and separate

Manifests and Manual are substantial indicators of the control that the 3PD exercises over the detail of the drivers' work which establishes the drivers' employment status. Moreover, just as in *Roadway*, 3PD "provides support to the drivers in ways are inconsistent with an independent contractor status." Specifically, 3PD leases vehicles from Ryder and subleases them to, apparently, the majority of drivers. 3PD also requires the drivers to carry several types and specific amounts of insurance, including workman's compensation insurance to cover their helpers, while offering them the opportunity to purchase

However, the documents relating to the insurance that 3PD requires the drivers to carry primarily lists 3PD as the "Insured" and the Insurance Identification cards do not even list the drivers' names. In addition the record evidence establishes that the manner in which drivers are compensated also supports their employee status. Specifically, the drivers' rate of compensation is set forth in the Agreement and the record contains no probative evidence, beyond merely conclusory testimony from the Employer's witness, that any individual driver is able to negotiate this rate. In addition, it is clear from the record that 3PD keeps track of drivers' performance with the "Quality Measurement Program" and that drivers are monitored and rewarded for good performance and implicitly warned ("...those [teams] on the bottom receive a LOT of attention of a different kind. Believe us, you want to be 'on top'") about substandard performance. Although 3PD does not yet have, as of the date of the hearing, hired drivers and helpers. In fact in the sixty-three

does not outweigh the other factors which establish the drivers' employee status. Based on the above factors I find that in this case, as in *Roadway*, "[T]he Employer simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities." *Roadway* at 851. In concluding that the drivers are statutory employees, I acknowledge some factors that support 3PD's contention that the drivers are independent contractors. Each driver employs a helper for his delivery work for 3PD, whom the driver selects, hires, and compensates. 3PD is required to know the identity of each helper because of the requirement that helpers undergo background checks. However, the drivers in *Roadway* also employed helpers and they were found to be statutory employees. Therefore, that factor is not dispositive of the issue before me and does not outweigh the other factors supporting my finding of employee status. Furthermore, *Dial a Mattress*, the case cited by 3PD, can be distinguished in this regard. In *Dial a Mattress* the fact that the owner-operators employed helpers had more significance because some owner-operators had 6 or 10 vehicles, for which the

instant case, the helper does not operate independently from the contractor and merely constitutes a reduction in the drivers' earnings. In a similar manner, *Argix Direct, Inc.*, 343 NLRB 1017 (1994), cited by 3PD can also be distinguished. In *Argix*, unlike the instant case, the employer notably put no restrictions on the contractors' use of vehicles for other purposes, the contractors were able to choose to not take routes on some days and in fact, some worked only one day a week for *Argix* so they could work elsewhere. Furthermore, the contractors in *Argix* were not assigned routes, as they are in 3PD and the number of their stops varied from day to day. Lastly, in *Argix*, five of the contractors owned twenty of 27 vehicles from some other factors, as distinct from any authority over any employees employed by 3PD, I find that

s and hired drivers to operate them, in contrast to the instant case where it is unclear from the record that any driver owns more than one truck. I also note that although each driver executes a copy of the Agreement that seeks to create independent contractor status, that Agreement appears to be a "take it or leave it" document, not subject to negotiation.

Although the Agreement itself, as written contains several provisions that appear to reflect the drivers' independence, the actual conditions under which the drivers work, as set forth in this decision, belie that independence. Therefore, notwithstanding the fact that the Agreement expresses the intention that the drivers be independent contractors and contains indicators of independent contractor status, I find that there are factors cited above, which establish that the twenty-three drivers in question are employees under the Act and not independent contractors. Finally, the Employer has asserted that, if the drivers are not independent contractors, then, in the alternative, they are supervisors within the meaning of the Act and therefore this petition should be dismissed. The record establishes, and the parties appear to agree, that the helpers are employed by the drivers and not by the Employer. The record further shows that the drivers hire and fire and compensate their helpers at their own discretion. While those authorities constitute indicia of supervisory status, it is well established that in order to qualify as a supervisor under Section 2(11) of the Act, and be excluded from a bargaining unit, the putative supervisor must exercise supervisory authority over the employees of the requested bargaining unit.

Crenulated Comp Ltd., 308 NLRB 1216 (1992); *Fleet Transport Co.*, 196 NLRB 436 (1972); *Eureka Newspapers*, 154 NLRB 1181 (1965). Because the drivers at issue here do not exercise any supervisory authority, they do not qualify as supervisors within the meaning of Section 2(11) of the Act for **CLUSION**

⁴⁸ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed. Please see the attachment regarding the posting of election notice.

within the meaning
purposes of this petition. **CON**
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DIRECTION OF ELECTION An election by secret ballot shall be conducted by the Undersigned among the employees in the Unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.⁴⁸ Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who were laid off before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for **TEAMSTE NO. 455**

have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, shall be eligible to vote for collective bargaining purposes by:

RS LOCAL UNION

LIST OF VOTERS In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility* NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the **full** names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-54533 on or before **January 11, 2008**. No extensions.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570.

This request must be received by the Board in Washington by **January 18, 2008**.

Dated at Denver, Colorado, this 4th day of January, 2008.

/s/ Michael W. Josserand, Regional Director

Michael W. Josserand, Regional Director

National Labor Relations Board

Region 27

700 North Tower, Dominion Plaza

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