UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MENARD, INC.

and 18-CA-181821

LOCAL 153, OFFICE & PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Tyler J. Wiese, Esq.
for the General Counsel.
Gary K. Roehm, Esq.,
Eau Claire, Wisconsin,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on May 31 and June 1, 2017. Local 153, Office & Professional Employees International Union, AFL-CIO (Charging Party) filed the charge on August 10, 2016, and an amended charge on September 14, 2016. The Regional Director for Region 18 of the National Labor Relations Board (the Board) issued the Complaint on December 22, 2016. The Complaint alleges that Menard, Inc. (the Respondent or Menard) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by misclassifying delivery drivers as independent contractors rather than employees of the Respondent and by maintaining delivery service agreements that contain a mandatory arbitration clause that delivery drivers would reasonably understand as prohibiting them from filing class actions against the Respondent in any legal or arbitral forum, and from filing unfair labor practice charges with the Board. The Respondent filed a timely Answer in which it denied committing any of the violations alleged.

A threshold issue in this case is whether the individuals who deliver the Respondent's merchandise to customers are employees of the Respondent for purposes of the Act's coverage or, as the Respondent claims, independent contractors who are not within that coverage. Section 2(3), 29 U.S.C. Section 152(3) (excluding from coverage "any individual having the status of an independent contractor"). Whether the Respondent has committed either of the violations alleged – the unlawful misclassification of employees as independent contractors or the imposition of an unlawful mandatory arbitration provision on those putative employees – depends at the outset on whether the individuals at issue are employees and not independent contractors.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is a home improvement retailer with a principal office and place of business in Eau Claire Wisconsin. In conducting its operations it annually derives gross revenues in excess of $500,000, and purchases and receives goods valued in excess of $50,000 from entities located outside the State of Wisconsin. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND FACTS

The Respondent sells home improvement merchandise. It has approximately 300 stores in the continental United States. In addition to selling merchandise, the Respondent sells delivery services for the merchandise that customers purchase at its stores.[1] If a customer requests delivery, staff of the Respondent's stores arranges the delivery services, collects charges, makes initial delivery arrangements with the customers, determines the deliveries that will be assigned to a hauler for a particular delivery excursion, and loads the deliveries onto the delivery truck or trailer at the store. The Respondent has a decades-long history of using hauling contractors to transport the merchandise from its stores to the delivery locations and to unload the merchandise for the customer. The hauling contractors use their own trucks to perform this work and all of the contractors who testified were incorporated separately from the Respondent. The Respondent has three standard types of contracts – referred to as delivery service agreements – that it uses to enter into its relationships with these haulers. Each type of contract covers deliveries that the hauler makes using one of three general categories of trucks/instrumentalities.[2] Although the record does not show when the Respondent first began using hauling contractors, one such contractor testified that he has been party to hauling contracts with the Respondent since 1993. The evidence did not show that there was ever a time when this delivery work was performed primarily by acknowledged employees of the Respondent rather than by the hauling contractors. However, the record did show that in instances when a particular store does not currently have a relationship with a hauling contractor, the Respondent will have acknowledged employees deliver the merchandise using Respondent-owned trucks. The record indicates, however, that only a tiny fraction of deliveries are made by acknowledged employees rather than by the hauling contractors whose status is at-issue in this case.[3]

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[1] The Respondent refers to its store customers as "guests," and those customers are sometimes referred to as guests in the record.

[2] One type of contract is for deliveries the contractor makes using the contractor's own truck with a forklift or knuckle crane. A second type is for deliveries the contractor makes using the contractor's own forklift truck and a Respondent-owned trailer. A third is for deliveries the contractors make using a cube van/cargo van/box truck.

[3] The General Counsel presented evidence showing that for a recent period of roughly 1 year the

The evidence regarding the delivery work is discussed below in some detail, but it is helpful to note at the outset that the hauling contractors' circumstances vary widely. At one end of the spectrum are contractors who own a single truck, do the driving and delivering exclusively or almost exclusively themselves, have the Respondent as their sole account, and started their hauling company for the purpose of contracting with the Respondent. At the other end of the spectrum are larger, established, hauling contractors with multiple trucks, employees, and clients. One such contractor had as many as 15 trucks and 21 of its own employees, Transcript at Page(s) (Tr.) 412, 417, and made deliveries for multiple accounts besides the Respondent. The Complaint alleges that all the "delivery drivers" have been misclassified at all of the Respondent's 300 facilities. The variety of circumstances, however, makes it hard to understand exactly who the Complaint is alleging have been misclassified. With respect to a hauler who has a single truck and does all the deliveries him or herself, it is easy to discern which individual the Complaint is claiming should be classified as the Respondent's employee. However, with respect to larger hauling contractors, in particular those who have multiple employees that the hauling company itself pays and for whom it makes payroll deductions and provides insurance and other benefits, it is not clear who the General Counsel is alleging should be classified as employees of the Respondent. Is it employees of a hauling contractor who handle deliveries pursuant to the contractor's agreement with the Respondent? It would not seem so since neither the Complaint nor the General Counsel have asserted that these hauling contractors and the Respondent are joint employers of the drivers employed by the contractor. If not them, is it the owner of the hauling company who signed the contract and runs the business, but does a small fraction, if any, of the deliveries under the contract?

A similar incoherence results from the fact that the General Counsel, rather than seeking a remedy for named hauling contractors or individuals about whom the record contains specific evidence, is seeking a general remedy that would affect all the drivers who make deliveries for the Respondent's approximately 300 stores. In particular, the remedy that the General Counsel is seeking includes a proposed order requiring the Respondent to rescind every single contract and policy across the entire Company that refers to delivery drivers as independent contractors. See Brief of General Counsel at Appendix A. The General Counsel contends that this is warranted given the standard terms in the contracts that the Respondent uses with hauling contractors nationwide. However, as discussed below, the record presented showed that the manner in which business is conducted between the Respondent and hauling companies under those contracts varies significantly.[4] The General Counsel and the Respondent each presented

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Respondent's acknowledged employees made approximately 1500 deliveries. At first blush this appears to be a considerable number, but the record indicates that given the Respondent's size it is not a significant portion of total deliveries. The Respondent has approximately 300 stores. There was testimony that one hauler made about 1000 deliveries a year under a single cube van contract at a single one of the 300 stores. Transcript at Page(s) (Tr.) 126, 157. If only one hauler was making that many deliveries per year from each store, that would be a total of 300,000 deliveries, and the 1500 completed by the Respondent's acknowledged employees would amount to only one out of every 200 deliveries – or 0.5 percent of the total. Moreover, the record shows that it is not unusual for the Respondent to have multiple hauling contracts at a single store. If one assumes that each store has three contracts and that 1000 deliveries are being made annually under each contract it would mean there were 900,000 total deliveries. In that case, the 1500 completed by the Respondent's acknowledged employees would amount to only one out of every 600 deliveries – or 0.17 percent of the total.

[4] On the question of whether an individual is a statutory employee who comes within the jurisdiction of the Act, it is appropriate to look to the way the individual's work is actually performed and not to consider the written descriptions of that work to be controlling. That is the way the Board has analyzed the issue in the analogous situation where the dispute revolves around whether a particular individual is a statutory employee who is covered by the Act's protections, or a supervisor who, like an independent

the testimony of a small number of hauling contractors regarding their experiences with how their relationship with the Respondent works in practice. It is not possible from that small sample to discern to what extent the experience of a witness is, in certain aspects, consistent with how these relationships are conducted with the hauling contractors across all 300 stores, or even to discern to what extent there is consistency.

B. EMPLOYEES OR INDEPENDENT CONTRACTORS?

1. General Legal Standard

Section 2(3) of the Act excludes "any individual having the status of an independent contractor" from the definition of "employee," and thus from the protections the Act reserves for employees. The Board determines whether a worker should be classified as an employee or an independent contractor by considering the relevant common-law factors. Specifically, the Board has looked to the following, nonexhaustive, list of factors, which the Supreme Court has cited with approval:[5]

(1) The extent of control which, by the agreement, the master may exercise over the details of the work.
(2) Whether or not the one employed is engaged in a distinct occupation or business.
(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
(4) The skill required in the particular occupation.
(5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
(6) The length of time for which the person is employed.
(7) The method of payment, whether by the time or by the job.
(8) Whether or not the work is part of the regular business of the employer.
(9) Whether or not the parties believe they are creating the relation of master and servant.
(10) Whether the principal is or is not in the business.

FedEx Home Delivery, 361 NLRB 610, 611 (2014), enf. denied, 849 F.3d 1123 (D.C. Cir. 2017). No single one of these factors predominates in the analysis, and the weight given to a particular factor turns on the factual circumstances of each case. Ibid. In addition to these factors, the Board considers whether the individual has "actual" "entrepreneurial opportunity for gain or loss" – an inquiry that encompasses such considerations as whether the individual can work for other clients, can hire their own employees, and has a proprietary interest in the work. Ibid. The Board construes the independent-contractor designation narrowly so as to avoid "deny[ing] protection to workers the Act was designed to reach. Id. at 618-621.[6]

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contractor, is not. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 690 fn.24 (2006); *Chicago Metallic Corp.*, 273 NLRB 1677, 1690 (1985), enfd. 794 F.2d 527 (9th Cir. 1986).

[5] See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-324 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 751-752 and fn. 31 (1989); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256-259 (1968).

[6] The General Counsel contends that the Respondent has the burden on the issue of whether a worker is an independent contractor or a covered employee. Although the Board has held that a respondent has that burden in representation cases, see, e.g., *FedEx,* 361 NLRB at 610-611, it has never held that a respondent has that burden with respect to individuals for whom there is no chosen bargaining

2. Findings and Analysis Regarding Relevant Factors

a. Extent of Employer's Control over the Details of the Work

Facts

Regarding the Respondent's degree of control over the work of the contract haulers, the parties presented evidence on a number of fronts. These fronts included evidence regarding the extent of the Respondent's control over: what the hauling contractors are paid for deliveries; the schedule for the haulers' deliveries; the types of equipment used by the haulers; the liability insurance that haulers maintain for work under their contracts; the manner in which the delivery work is performed; the training of delivery personnel; whether the haulers are required to do business in the Respondent's name; and the standardized terms of the hauling contracts.

The amount that haulers are paid to deliver the Respondent's merchandise is generally set by the contracts between the haulers and the Respondent. At the outset, I note that when the hauling contractors are performing work for clients other than the Respondent, as a number of the contractors do, Tr. 237-238, 247-248, 385, 399-401, 421-424, 446-449, 454, the Respondent would have no control over the contractor's compensation for the work. With respect to the work that the hauling companies perform for the Respondent's stores, the evidence showed that the standard contracts provide for the Respondent to make payments to the hauler based on the distance between the particular store and the "zone" to which the delivery is going. The hauler is not free to negotiate these general distance-based delivery charges with the customer, but hauling contractors testifying for both the General Counsel and the Respondent stated that they have negotiated with the Respondent for additional compensation. Tr. 167-168, 434. The hauler does not receive these distance-based payments from the customer, but rather the customer pays the Respondent, and the Respondent pays the hauler.

The contracts also set forth amounts that are paid to the hauler for special handling at the time of the deliveries – for example, when the hauler performs the extra work of placing shingles on the customer's roof rather than leaving the shingles in a default location such as a driveway. Often this special handling is arranged in advance between the Respondent's store and the customer. However, the record shows that in some instances such special handling is not requested by the customer until the delivery arrives. When a customer first requests special handling at the time of delivery, some haulers will initiate contact with the Respondent's store, which will sell the special handling services to the customer, receive payment from the customer, and then compensate the hauler for the additional work according to the terms of the store's contract with the hauler. Tr. 47-49. This is the procedure described in guidance that the Respondent has created for store employees. Joint Exhibit Number (J Exh.) 8 at Page 5.

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representative, but with respect to whom the General Counsel is alleging that misclassification as non-employees constitutes an independent violation of Section 8(a)(1) of the Act. Indeed, the General Counsel recognizes that the Board has never even held that such misclassification would, if established, constitute an independent violation of Section 8(a)(1) as is alleged here. At any rate, I would expect that the General Counsel could not, simply by making the bare allegation that the Respondent violated the Act by misclassifying employees as independent contractors, put the burden on the Respondent to disprove that it had done so. Some initial showing on the General Counsel's part would seem to be in order where, as here, a bargaining representative has not already been selected for those individuals. At any rate, in this case it is not necessary to reach a conclusion regarding where the burden lies since the record contains substantial evidence regarding the relevant factors and my determination would be the same regardless of who bears the burden of proof on the issue.

However, not all of the hauling contractors follow, or even appeared to be aware of, the procedure that the Respondent describes in that guidance for store employees. Rather the record shows that some hauling contractors, when asked by a customer to provide special handling that has not been pre-arranged, will negotiate a price for these services directly with the customer and obtain payment directly from the customer without involving the Respondent at all. Tr. 435-436, 450, 462-463, 471; see also Tr. 170 (hauling contractor testifying for the General Counsel states that he works out special handling charges with the customer).

Another component of the hauling contractors' compensation comes in the form of a contractual "retention bonus." If, at the start of the calendar year, an existing hauling contractor continues its relationship with the Respondent by entering into a contract for the coming year, the Respondent pays the hauler a retention bonus that is based on the value of the merchandise the hauler delivered under the preceding year's contract. A hauler who enters into a new contract with the store is not required to continue that contract for a full year, but rather may cancel the contract after giving the store 60 days' notice.

The parties also presented evidence regarding the extent of the Respondent's and the hauling contractors' control over the scheduling of deliveries. This is an extremely important matter since hauling contractors who testified for both sides agreed that the profitability of their business depended in large part on whether the deliveries were scheduled in an efficient manner. Tr. 151, 194, 211, 236, 465. The schedule for a hauling contractor's daily deliveries is set, at least in the first instance, by a store employee known as a delivery coordinator. The delivery coordinator does this after consulting with the customer and attempting to meet the customer's desires. These schedules are communicated to the hauling contractors on the evening before the day when the deliveries are to be made. The store suggests a route that hauling contractors can take to the delivery locations, but the haulers are free to deviate from those routes.

The testimony of hauling contractors showed that although delivery coordinators create these schedules without input from the haulers who will be making the deliveries, the haulers can seek modifications to the schedules. Josh Zima, the owner of a hauling company with 13 full-time employees, routinely contacts the Respondent to make changes to schedules that he views as unworkable. Tr. 425-426. Zima also directly contacts the Respondent's customers on a daily basis to modify the delivery schedule in order to improve his efficiency. He does not seek approval from the Respondent before calling customers to make modifications and the Respondent has never penalized him for doing so. Todd Stephens, who operates a hauling company with 10 of its own employees, does not strictly follow the delivery schedule given to him by the Respondent. Rather he testified that he uses that schedule as "a basic guideline" and "routes the way it needs to be routed," without notifying the Respondent about these deviations from the schedule. Tr. 463-464. Like Zima, he contacts customers about the timing of deliveries on a daily basis. Another hauling contractor, Ahmed Elbassiouny, testified that he uses the schedule generated by the Respondent to determine which deliveries he will make in the morning and which in the afternoon, but that he is the "one to decide which one to do first and how to do my route." Tr. 381-382. Kevin Fisher, a contractor who testified on behalf of the General Counsel, stated that he "sometimes" contacts customers to change the delivery schedule set by the delivery coordinator, although he indicated that he does not do this normally. Tr. 159-160. Nick Gronemus, the manager of the Respondent's entire yard shipping and receiving operation, testified that the hauling contractors are free to contact the customers and seek to modify the delivery schedule created by a store's delivery coordinator. Tr. 333-334. On the other hand, there was evidence that this freedom was not shared by at least one hauling contractor. Specifically, Laife Denning testified that when he had a hauling contract with the Respondent he tried to increase his efficiency by calling customers to rearrange the delivery

schedules, but then a delivery coordinator intervened and directed him to stop calling customers. Tr. 99-100.[7]

In the case of the work that hauling contractors perform under the three types of standard contracts with the Respondent, the evidence shows that each contract is limited to work using a particular category of truck and/or equipment.[8] The hauling contractors purchase the necessary trucks from third parties – sometimes dealers, sometimes other hauling contractors – not from the Respondent. Although the trucks are always owned by the contractors, the contractors do sometimes haul Respondent-owned trailers. The haulers choose which trucks to purchase and which potential seller to purchase them from. Nevertheless, the General Counsel contends that the Respondent exercises significant control over the equipment the hauling companies use. The focus of this argument is the work done under the contracts covering deliveries made using a truck with a forklift or knuckle crane. In this regard, the evidence shows that the Respondent encourages employees to use a particular type of forklift, known as a "Masterlift," that the Respondent itself manufacturers and installs onto flatbed trucks for use loading and unloading merchandise.[9] The Respondent does not sell these devices directly to the hauling contractors, but rather sells them to third-party dealers who then sell Masterlift-equipped trucks to hauling contractors.[10] The nature of the work itself does not dictate the use of a Masterlift as opposed to some other type of lift device. Nevertheless, the record establishes one instance in which the Respondent's efforts to encourage a hauler to use a Masterlift truck could reasonably be characterized as coercive. In that instance a hauler who already had a suitable non-Masterlift truck refused a store manager's urging to purchase a Masterlift truck. In an apparent reaction to that refusal, the Respondent awarded a second contract for the same type of work at the store to a hauling contractor that did use a Masterlift truck. This resulted in the first contractors' share of the work at that facility being dramatically reduced. Tr. 35-39. On the other hand, the record shows that hauling companies have used non-Masterlift trucks to perform work under the forklift/knuckle crane contracts and that hauling companies have used Masterlift trucks to perform work for clients besides the Respondent.

The contracts that the Respondent enters into with the hauling contractors set forth certain requirements for liability insurance that the contractor must maintain. Unlike a number of other areas, the record does not indicate that the actual practices under those contract provisions varied significantly. Contractors purchase and pay the premiums for this insurance and the Respondent does not require them to use a particular insurance provider. In addition to requiring certain levels of liability coverage, the Respondent requires that the hauling contractors include the Respondent as an "additional insured." The parties presented additional

[7] Gregory Sondag, a hauling contractor, stated that he had no input into how the delivery coordinators scheduled the deliveries and that they would routinely schedule deliveries in a way that was highly inefficient. Tr. 236-237. However, Sondag's testimony did not establish whether, after receiving the schedule from the delivery coordinator, he was able to contact customers and reschedule to improve efficiency.

[8] For work that haulers do for clients other than the Respondent, it is fair to infer that the Respondent exercises no control over the types of equipment the hauling companies use. The record evidence does not indicate otherwise.

[9] The record does not provide a basis for determining whether the Respondent encourages the use of Masterlift-outfitted trucks because it considers them superior or better adapted to the Respondent's operations, or because the Masterlift device is more familiar to its employees, or because the Respondent profits from the sale of Masterlift devices, or for all, some, or none of these reasons.

[10] Some Masterlift truck sales, while made by third-party dealers, are for trucks onto which the Respondent has recently installed Masterlifts and which trucks are physically present at a facility of the Respondent at the time of the sale. Based on my review of the entire record, this is what I find was likely meant when a hauler referred to obtaining a Masterlift truck from the Respondent. Tr. 190-191.

evidence regarding the insurance that the Respondent requires under contracts applicable to work that haulers perform using their own truck, but a Respondent-owned trailer. One hauler testified that until recently the Respondent paid for the insurance coverage relating to the Respondent-owned trailer, but that the Respondent had started requiring him to pay for that coverage. Tr. 227-228. An agent of an insurance company testified that the Respondent had once contacted him directly to increase the amount of coverage that a hauling contractor had for a Respondent-owned trailer. The Respondent had not previously contacted the hauling contractor about this increase and when the insurance company informed the hauling contractor about the increase and the higher premium, the hauling contractor declined to authorize the increases and, instead, ceased using the Respondent's trailers.

Regarding the extent to which the Respondent directly oversees or participates in the delivery work, the evidence showed that once the Respondent gives the hauler a delivery schedule and loads the truck, the hauler then proceeds to secure the load, transport it, and deliver it, without any recognized employee of the Respondent accompanying to operate equipment or otherwise provide assistance or oversight. All the latter work is performed by the hauling contractor and any persons the contractor has hired or partnered with for that purpose. That being said, the Respondent's stores do remotely monitor the whereabouts of the hauling contractors while they are out making deliveries. The monitoring is accomplished using a Global Positioning System (GPS) device that the hauling contracts require the haulers to install in any truck used under those contracts. According to Zima, this tracking information has allowed the stores to answer customer inquiries about the timing of Zima's deliveries. Gregory Sondag, a hauling contractor, testified that by using the GPS device the Respondent had been able to tell where he was, whether he was on the route that the Respondent suggested, and whether he had stopped for a period of time. Tr. 232-233, 244-245. One hauling contractor stated that the Respondent had never used the GPS tracking information to take action against him, and the record did not show that the Respondent had ever used it in that manner against anyone.[11]

Although no recognized employees of the Respondent operate the haulers' equipment or assists in making the deliveries, the Respondent does have a program under which its store general managers accompany hauling contractors approximately four to six times per year while they are out making deliveries. Afterwards, the store managers provide a report regarding their observations to Gronemus, an upper level manager. Gronemus credibly testified that the purpose of this program is for the general managers to better understand the "environment" in which the haulers are operating, and also to assess whether the customers are satisfied. Tr. 335. The Respondent has never taken adverse action against a hauling contractor based on information gleaned from this "ride along" program.

The evidence was somewhat mixed regarding the extent to which the Respondent exerts control by requiring the haulers to do business in the Respondent's name. On the one hand, the hauling contractors do not wear uniforms bearing the Respondent's name or logo and indeed there was no evidence that the Respondent requires them to wear a uniform at all. One hauling contractor testified that the persons making deliveries wear the hauling contractor's own

[11] The hauling contractors are also required to have cell phones and store employees can, and do, contact the contractors on their cell phones during delivery runs. However, the General Counsel's contention that this is evidence of a level of control that is inconsistent with independent contractor status is frivolous. Brief of General Counsel at 18. For better or worse, it has become a common expectation that people will be available by cell phone to employers, customers, and clients. It is not unusual for cell phone contact information to be included on business cards and at websites in order to facilitate contact. According to one recent study, 95 percent of all American adults have cell phones. See http://www.pewinternet.org/fact-sheet/mobile/ (pew research report from January 2017).

uniforms. Tr. 376. Regarding the trucks themselves, the standard contracts state that the haulers should place *their own company name* on the trucks. The contracts also mention that the Respondent will provide decals to the contractor for placement on trucks, but not what type of decals. The record establishes that the contractors who operate the flat-bed trucks display their own company name on those vehicles, but do not display the Respondent's logo decals. Tr. 158, 215, 450.[12]

The situation is more ambiguous with respect to the hauling work performed using the cube vans. The record shows that the Respondent urged the haulers to place the Respondent's logo on the sides of those vehicles. Gronemus characterized this as a "recommendation" rather than a requirement. However, there was testimony from hauling contractors called by both sides that the stores indicated that the Respondent required the display of its logo on the cube vans. On the other hand, Zima stated that he did not display the Respondent's logo on a cube van that he used to make deliveries to the Respondent's customers. A store manager recommended that Zima place the Respondent's logo on that cube van, but Zima had not done so. Tr. 440-441.

The hauling contractors make their own decisions about hiring and firing of workers to assist them in making the deliveries under the contracts with the Respondent. The Respondent does not have control over the contractor's employees and, indeed, the record suggests that contractors sometimes hire day laborers without informing the Respondent. If a hauling contractor is going to use one of its employees on the Respondent's property, the contracts require that the employee pass a background check. The compensation and other terms of employment for the hauling companies' own employees are set between the hauling company and their employees, not by the Respondent. Any training received by the hauling contractor's employees is provided by the contractor, not the Respondent. Tr. 376-378, 445. Witnesses credibly testified that the hauling contractors, in some instances, withhold taxes from the paychecks of their employees, provide them with benefits, and issue w-2 forms. Hauling contractors are permitted to subcontract work under the contracts and while the contractor's choice of a subcontractor is subject to the Respondent's approval, the contracts provide that the Respondent may not "unreasonably with[o]ld" such approval. J Exh. 1, Page 7; J Exh. 2, Page 7; J Exh. 3, Page 8. The Respondent does not provide training to the hauling contractors themselves.

The General Counsel contends that the Respondent's stores present the contracts to the haulers as non-negotiable and that this evidences a level of control that is inconsistent with the haulers being independent contractors. The record supports the General Counsel's factual contention that the Respondent presents the contracts without prior negotiation, although there was testimony about one hauler who had negotiated special contract terms, Tr. 364, and that others had obtained adjustments for particular delivery locations, Tr. 167-168, 434. The record shows that the way the relationship between the Respondent's stores and the haulers is conducted under these standard contracts varies substantially.

[12] One hauler testified, that when he purchased a particular Masterlift-equipped truck it already had mud flaps that referenced the Respondent. He stated that a store general manager told him that the Respondent "wants [the mud flaps] for advertising . . . and they want them to stay on." However, the evidence did not show that any other trucks used by that, or any other, contractor had mud flaps referencing the Respondent.

Discussion

Although the evidence is somewhat mixed regarding the extent of the Respondent's control over the details of the hauling companies' work, I find that, on balance, this factor weighs in favor of finding that the hauling companies are independent contractors. In this regard I note, as is alluded to above and discussed more fully below, that haulers are not prevented from working for other clients and the Respondent has no control whatsoever over what the hauling contractors earn for such work, what equipment they use, or how they perform it. This ability to work for other clients weighs in favor of independent contractor status. See *FedEx*, 361 NLRB at 621 (whether owner-operators can make deliveries for other clients is a factor to consider in making determination regarding independent contractor status), *Dial-A-Mattress Operating Corp.,* 326 NLRB 884, 886 and 892 (1998) (truck owner-operators are independent contractors where, inter alia, they may have more than one vehicle performing deliveries and work for clients other than the alleged employer), *C.C. Eastern, Inc.*, 309 NLRB 1070, 1070-1071 (1992) (ability to work for other customers weighs in favor of independent contractor status). Even with respect to the work that the hauling companies perform when the Respondent is their client, the haulers have a level of control that the Board has found consistent with independent contractor status in the case of drivers making deliveries for a retailer. As in *Dial-A-Mattress* – where the Board found that the drivers were independent contractors – the hauling contractors in this case sometimes deal directly with the customers to impose special handling charges, they hire and train their own staff, they select and purchase their own trucks from third-party sellers, and they do not use acknowledged employees of the Respondent to operate their equipment or accompany them to help make deliveries. *Dial-A-Mattress*, 326 NLRB at 886 and 891; see also *NLRB v. United Ins. Co.,* 390 U.S. 254, 256-259 (1968), and *Roadway Package System*, 326 NLRB 842, 851 (1998) (whether the individuals are trained by the putative employer is a factor in independent contractor analysis). The haulers who contract with the Respondent are free to decide upon the routes they use to make deliveries and although they receive a schedule for each day's deliveries, they can seek modifications to that schedule to improve their efficiency. Independent contractor status is also indicated by the haulers' control over the hiring of helpers and employees, and the engagement of subcontractors. See, e.g., *C.C. Eastern, Inc*., supra.

In finding that the balance of the parties' control over the details of work weighs in favor of independent contractor status, I considered the evidence that the Respondent can track the whereabouts of the haulers using a GPS system and that several times a year store managers accompany the haulers to observe their work environment and assess customer satisfaction. Under the circumstances present here, this is not inconsistent with independent contractor status. A company that pays for work by an independent contractor, like one that pays for work by an employee, has an understandable interest in ensuring the quality and value of the work being performed. See *North Am. Van Lines, Inc. v. NLRB,* 869 F.2d 596, 599 (D.C. Cir. 1989) ("[E]fforts to monitor, evaluate, and improve the results or ends of the worker's performance do not make the worker an employee").[13] Nor is the existence of an independent contractor relationship inconsistent with the Respondent's requirement that the hauling companies maintain adequate liability insurance and name the Respondent as an additional insured. Indeed, such a requirement actually weighs in favor of independent contractor status since in employer-employee relationships the employers generally assume the risk of third-party damages, and do not require indemnification from their employees. *Dial-A-Mattress*, 326 NLRB at 891.

[13] The Court of Appeals disagreed with the Board finding of employee status, 288 NLRB 38 (1988), but the Court did not suggest that the specific observation quoted above was at odds with the Board's analysis.

I recognize that the Respondent generally presents the delivery service contracts to the haulers without negotiation and that this does indicate that the Respondent has a level of control over the terms under which the delivery work is performed. But this is insufficient to tilt the "control of the details of work" factor in favor of employee status. As the Board has observed, in both employer-employee relationships and independent contractor relationships the relative bargaining strength of the parties has a significant impact on each side's ability to dictate terms. *St. Joseph News-Press*, 345 NLRB 474, 481 (2005), but see *FedEx*, 361 NLRB at 625-626 (overruling *St. Joseph News* to the extent that it suggests that the Board cannot consider evidence that the putative employer has imposed constraints on the individual's ability to operate an independent business). It is not surprising that a large retailer like the Respondent would either use its relative bargaining strength or standardize the delivery service contracts across its operation. The fact that it does these things is not, under the circumstances here, inconsistent with the haulers operating as independent contractors.

b. Are the Hauling Contractors Engaged in a Distinct Occupation or Business and is the Work Part of the Employer's Regular Business?

Facts and Discussion

The Respondent is in the business of retail sales of home improvement merchandise, and I find that the hauling contractors are engaged in the distinct business of providing hauling and delivery services. Although the Respondent's stores arrange delivery services with their customers, the record indicates that they do this exclusively with respect to their own merchandise, and are not in the business of arranging deliveries for other companies. It is telling that in cases cited by the General Counsel where delivery drivers were found to be employees rather than independent contractors, the *employers were themselves delivery and transportation services* not merchandise retailers. The General Counsel relies, for example, on cases involving drivers making deliveries for FedEx Home Delivery, Time Auto Transportation, Corporate Express Delivery Systems, Slay Transportation Co., Roadway Package, Central Transport, Inc., Dixie Transport Co., and Aetna Freight Lines, Inc.[14] If in those cases the delivery drivers were viewed as being in the same occupation as the delivery services for whom they were working it is not persuasive precedent with respect to haulers who, like those at-issue here, were making deliveries not for a delivery service, but for a merchandise retailer. Indeed, when the Board considered the status of drivers who made deliveries to the customers of Dial-A-Mattress – like the Respondent, a merchandise retailer – the Board found that the drivers were independent contractors. 326 NLRB 884.

In reaching the conclusion that the hauling contractors in the instant case were engaged in a distinct occupation or business, I considered the evidence that the Respondent depends on the ability to arrange delivery services to facilitate the sale of some of the merchandise, particularly the heavier and larger merchandise, offered in its stores. However, even if one assumes that the delivery service is not only important, but essential, to the Respondent's business that does not mean that the Respondent is in the delivery business. If such dependence did establish that then the majority of on-line retailers – from giants like Amazon to individuals selling collectibles out of their home – would have to be considered delivery services

[14] *FedEx Home Delivery*, supra; *Time Auto Transportation*, 338 NLRB 626 (2002), enfd. 377 F.3d 496 (6th Cir. 2004); *Corporate Express Delivery Systems,* 332 NLRB 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002); *Slay Transportation Co.*, 331 NLRB 1292 (2000); *Roadway Package System*, 326 NLRB 842 (1998); *Central Transport, Inc.*, 247 NLRB 1482 (1980); *Dixie Transport Co.*, 218 NLRB 1243 (1975); *Aetna Freight Lines, Inc.*, 194 NLRB 740 (1971).

since their businesses generally depend on being able to arrange for services that deliver their products to customers.

While the Respondent enters into contracts with hauling companies that are ongoing concerns, it is also true, as the General Counsel points out, that the Respondent recruits individuals to start hauling companies and provides those individuals with information resources to help them get started. These resources include lists of trucks for sale and the names of lenders familiar with financing the purchase of the trucks. Based on my consideration of the entire record, I view these activities not as evidence that the Respondent is in the delivery business, but, if anything, as evidence that the Respondent is taking pains to attract outside hauling contractors so as to avoid having to get into the delivery business. I note, moreover, that although the Respondent provides the haulers and potential haulers with information about trucks for sale and potential lenders, the haulers are not required to use the Respondent's information. The testimony showed that hauling contractors can, and do, identify trucks and the funds to purchase them, without reference to any information provided by the Respondent.

Independent contractor status is also indicated because the haulers are incorporated. Tr. 41. In *Dial-A-Mattress* the Board found the fact that several of the disputed workers "function in the corporate form" to be evidence lending support to finding independent contractor status. 326 NLRB at 891; cf. *Roadway Package System*, 326 NLRB at 851-852 (when delivery drivers are not separately incorporated this lends support to finding them to be employees). In the instant case, that factor weighs even more heavily because all of the hauling contractors who testified "function[ed] in the corporate form."

Finally, I note that the haulers are not required to display the Respondent's name or logo on their trucks (although those operating cube vans are pressured to do so) or to wear uniforms referencing the Respondent. To the contrary, the haulers are required to display their own company name on their trucks and some drivers wear the hauling company's own uniform. In one of the cases relied on by the General Counsel, *Roadway Package System, Inc.*, supra, the Board ascribed employee to status to delivery drivers only after noting that the drivers, inter alia, were required to wear Roadway-approved uniforms, operate identical custom-designed vehicles, and display Roadway's name, logos and colors. Conversely, the absence of such requirements here weighs against employee status.

c. Kind of Occupation

Facts and Analysis

The record evidence does not focus on how the occupation of hauling contractor is generally performed in the relevant localities. Rather the evidence focused on how it is performed when the contract is with the Respondent. As to the contracts with the Respondent, the evidence showed that once the hauler leaves the Respondent's store to make a delivery, no acknowledged employee of the Respondent accompanies the driver to operate the truck or other equipment, perform any labor, or direct or oversee the unloading of the merchandise. It is true that the Respondent's store handles some related tasks – selling the delivery service to the customer, collecting payment from the customer, making initial delivery plans with the customer, loading the deliveries onto the truck or trailer. But the hauling contractors make the deliveries on their own without anyone from the Respondent present to direct or assist the contractor with the delivery or unloading. Given the only limited oversight that the Respondent exercises over the haulers' work, I find that the evidence bearing on this factor weighs lightly in favor of independent contractor status.

d. Skill Required for Work and Level of Supervision

Facts and Analysis

The evidence indicated that the haulers are required to obtain a commercial driver's license (CDL) if they operate some, but not all, of the types of trucks called for by the standard contracts with the Respondent's stores. Tr. 96-97, 422. The record does not show how common it is for the haulers to be required to have a CDL or how much training is required for them to obtain it. Although I expect that persons operating the knuckle cranes and forklifts would require some training or practice, the parties did not explore this and I do not have a basis for concluding that the skills required are significant. Indeed, the evidence indicates that the Respondent does not require the drivers to submit or demonstrate their qualifications. Tr. 127.

As the General Counsel notes, in *FedEx Home Delivery*, supra, the Board found that the skill level required of delivery drivers weighed against independent contractor status where, inter alia, those drivers were are able to obtain all the necessary skills during a 2-week training. In the instant case, not even 2 weeks' worth of training was shown to be required. On the record here, and given the Board's *FedEx* decision, I find that the skill level of the hauling contractors in this case weighs against finding them to be independent contractors.

e. Does Employer or Worker Supply the Instrumentalities and Place of Work?

Facts

The hauling contractors own the trucks that they use to perform work under their contracts with the Respondent's stores. They select their own trucks and purchase them from third-parties of their own choosing. The trucks are not custom-designed for work under the contracts. The haulers are responsible for the necessary financing, inspection, and maintenance relative to these trucks. They pay for all of this themselves, as they do for fuel, tires and everything else associated with truck ownership and operation. The Respondent does offer the haulers, and prospective haulers, information about vehicles for sale, and sources of financing, but the haulers are not required to use this information or any of the resources identified by the Respondent, and there was credible testimony from hauling contractors that had not used those resources. Tr. 396-397, 407, 432-433.[15] The hauling contractors also own the other instrumentalities required for the work, with the exception that in some instances contractors haul Respondent-owned trailers. The Respondent does not require the contractors to use the Respondent's trailers and the record does not establish how prevalent such usage is. There was credible testimony that using the Respondent's trailers is attractive to the hauling contractors because it saves them time inasmuch as deliveries can be loaded onto the trailers before the hauler arrives. The Respondent offers the use of its trailers without charge to the hauler. The Respondent pays for the maintenance and inspection of the trailers, but the hauling contractors who use them are required to escort the trailers through necessary maintenance visits and inspections.

Regarding the location where the haulers perform their work, I note at the outset that the haulers can perform work for clients other than the Respondent, and when they are doing that

[15] According to Gronemus, it is rare for a hauling contractor, or potential contractor, to be rejected when seeking financing to purchase a truck for use under one of the contracts. Gronemus testified that, although the Respondent does not itself provide financing or control whether a lender grants it, the Respondent will sometimes reach out to lenders regarding a prospective hauler who is having difficulty obtaining financing.

work it is fair to infer they are at locations other than the Respondent's. Even with respect to the haulers' deliveries to the Respondent's customers, the evidence showed that most of the haulers' time is spent on the road and at the locations where they are unloading merchandise for customers. When the hauling contractors are doing work under their contracts with the Respondent, they spend a limited amount of time at the Respondent's facilities obtaining and tying down loads. One hauler testified that obtaining and tying down the loads takes about an hour, and that he sometimes returns to the facility for additional loads during the course of the day.

The Respondent allows the hauling contractors to use available parking areas at its locations to store trucks, but it does not require them to park there and the haulers are able to make other arrangements. When a hauler does choose to park its truck at one of the Respondent's stores, the Respondent requires them to use the area in front of the store rather than in the loading area, both because space is limited in the loading area and because placing the trucks in a visible location raises customer awareness regarding the availability of delivery services.

Analysis

I find that this factor weighs in favor of finding that the hauling contractors are independent contractors. Most significant is the fact that the hauling contractors select, purchase, own, and maintain what is by far the most important instrumentality for their hauling work – the trucks. They can do this without any involvement by the Respondent. Although some choose to take advantage of lists offered by the Respondent, the evidence showed that others accomplish these activities without using those lists. The haulers in this case, unlike those in cases where employee status was found, are not dependent on the Respondent to obtain their trucks, and this lack of dependence weighs in favor of independent contractor status. See, e.g., *Portage Transfer Co.*, 204 NLRB 787, 787-789 (1973). Moreover, unlike the *Roadway* case, in which the company dictated "[e]very feature, detail, and internal configuration" and therefore the drivers could find "no ready market" unrelated to Roadway for the trucks, the Respondent in the instant case does not require the contractors to use heavily customized trucks. The evidence shows that trucks used for work under the haulers' contracts with the Respondent can be purchased and re-sold on the open market, and that haulers can use the trucks with which they make deliveries for the Respondent to perform services for other clients.

As noted above, most of the hauler's work is performed away from the Respondent's facilities. The Respondent does not require the haulers to park their trucks at its facilities during off-hours, and some haulers do make other arrangements. These circumstances are meaningfully different than those in *Roadway* where the drivers were not permitted to use their trucks for other clients during the day and were *required* to return their trucks to the company's facilities during the evening hours where they were not "readily available" to be used for work with other clients. 326 NLRB at 851. The evidence that the haulers spend most of their time away from the Respondent's facilities and are not required to return their trucks to the Respondent's facilities after hours weighs in favor of independent contractor status.

f. The Length of Employment

Facts and Analysis

A hauling contractor who wishes to continue his or her relationship with the Respondent after the end of the calendar year may execute a new hauling contract. Either party is able to

cancel that contract on 60 days' notice. The General Counsel presented the testimony of a few contractors who have continued to contract with the Respondent for long periods. The two with the longest tenures had contracted with the Respondent for 13 years and 24 years respectively. The General Counsel did not introduce evidence showing that this was typical of haulers working across the Respondent's approximately 300 stores. Since the General Counsel alleges a violation, and seeks a remedy, covering the "delivery drivers" at all 300 stores, the fact that a tiny sample of hauling companies have chosen to continue their relationships with the Respondent by repeatedly executing new annual contracts is of very little significance. Not only that, but it is often the case that the delivery drivers are not the contractor who maintains a relationship with the Respondent of any length. Rather the drivers can be employees of the hauling contractor. Indeed, Stephens Delivery – the contractor who the General Counsel points to as having a 24-year relationship with the Respondent – has nine of its own employees. The General Counsel did not present evidence regarding how long these employees had been employed by Stephens Delivery, much less how long any of them had been making deliveries under Stephens' contracts with the Respondent.

I find that the relatively short life of the hauling contracts, coupled with the ability of either party to end the contracts with 60 days' notice, weighs in favor of finding independent contractor status.

g. Method of Payment, Whether by the Time or by the Job

Facts and Analysis

As noted above, the Respondent's stores compensate the hauling contractors by the job based on distance-based "zones" and the provision of special handling services, and offer the haulers a retention bonus based on the merchandise the hauler has delivered during the term of the prior contract. The hauling contractors themselves purchase the fuel for the trucks, although two of the drivers stated that adjustments to their distance rates are triggered based on fluctuations in the price of fuel. The haulers invoice the Respondent for the services they provide in order to receive compensation. The Respondent does not guarantee the hauling contractors any minimum amount of compensation or number of deliveries. Cf. *Roadway Package System*, 326 NLRB at 853 (delivery drivers found to be employees based on, inter alia, evidence showing that the putative employer guaranteed new drivers a minimum income level). The Respondent does not pay the haulers a salary or an hourly rate. Nor does it withhold social security or other taxes, make workers compensation payments, or provide benefits such as health insurance or paid vacation. The haulers do not clock in, or clock out, for work with the Respondent. Board decisions show that a by-the-job compensation arrangement without paycheck withholding, like the one present here, is indicative of independent contractor status. *Minnesota Timberwolves Basketball*, 365 NLRB No. 124, slip op. at 10 (2017); *Dial-A-Mattress*, 326 NLRB at 892. I find that the "method of payment" evidence weighs heavily in favor of independent contractor status.

h. Whether the Parties Believe they are
Creating an Employer-Employee Relationship

Facts and Analysis

A preponderance of the evidence shows that the hauling contractors and the Respondent generally believe they are creating an independent contractor relationship, not an employee-employer relationship. Indeed, the General Counsel's brief does not identify a single witness – among either hauling contractors or managers – who testified that he or she believed an employee-employer relationship was created. To the contrary, witnesses for both the General Counsel and the Respondent testified that they understood the haulers to be independent contractors. Even Denning, a hauler who was a witness for the General Counsel, testified that he signed on with the Respondent as his own business, not as an employee. Tr. 77. Gronemus – the Respondent's corporate manager of shipping and receiving – characterized the haulers as independent contractors as did John Pedretti – a former store manager who no longer works for the Respondent. It is also worth noting, though certainly not controlling, that each of the three types of standard contracts that the Respondent and haulers sign to create or extend their relationships characterizes the hauler as an independent contractor. See J Exh. 1 at Page 1, J Exh. 2 at Page 1, and J Exh. 3 at Page 1.[16]

In the absence of any testimony, even from its own witnesses, that the parties believed the haulers to be employees of the Respondent, the General Counsel attempts to make its case on this factor by grasping at two stray and ambiguous remarks gleaned from the troves of communications the General Counsel obtained from the Respondent. One was a communication from a "2nd assistant general manager" at a store, who opined to another manager: "I believe we should be in control not the hauler. They work for us not vice versa." General Counsel Exhibit Number (Exh.) 77 at Page 1. This evidence is woefully inadequate not only because it is a single remark by a person who appears to be a low-level manager at a single store, but also because it does not reference or suggest the existence of an employer-employee relationship. This individual's view that the haulers "work for" the Respondent says nothing about the question of whether the haulers work for the Respondent as employees as opposed to as independent contractors. The second communication relied on by the General Counsel was also made by a "2nd assistant general manager" who stated during a contentious oral discussion with Fisher, a hauler, that, "It's an independent contractor but it's not, it's not a true independent contractor, because you're still contracted through us." GC Exh. 18(a) at Page 2. Not only is this a stray remark, but it actually characterizes the relationship as "independent contractor" and never mentions the possibility of an employee-employer relationship. What this 2nd assistant store manager meant when he told Fisher that their independent contractor relationship was not a "true" one is not clear, except to the extent that, in context, it is obvious that he was generally communicating that it reflects badly on the Respondent when customers do not receive their deliveries at the expected time. At any rate, I note that the hauler involved in this exchange, Fisher, was called by the General Counsel as a witness and, if Fisher believed he was an employee, he could have testified to that belief. He did not so testify.

[16] As noted previously, when deciding whether a worker is a statutory employee who falls within the Act's protection, it is appropriate to look to the way the individual's work is actually performed and not to consider the written descriptions of that work to be controlling. See *Oakwood Healthcare, Inc.*, 348 at 690 fn.24; *Chicago Metallic Corp.*, 273 NLRB at 1690.

For these reasons, I find that the understanding of both the Respondent and the hauling contractors is that haulers are working for the Respondent as independent contractors and that this weighs in favor of finding independent contractor status.

i. Significant Entrepreneurial Opportunity for Gain or Loss

Facts and Analysis

In addition to the list of common-law factors, the Board has examined whether the at-issue individuals have significant entrepreneurial opportunity. Relevant to this inquiry is, for example, evidence about the workers' ability to hire their own employees and work for other clients, and the extent of any proprietary interest in the work. *FedEx Home Delivery*, 361 NLRB at 617-619.

As alluded to earlier, the hauling contractors select their own employees and helpers without input from the Respondent. The only condition is that, before the hauling contractor may bring one of its own employees onto the Respondent's property, the hauling contractor is required to provide store management with identifying information for the employee and certify that the contractor "has conducted a criminal background check of the employee and found them free of criminal convictions for retail theft, theft related crimes, felony charges or convictions and property damages crimes." The contracts do not impose this requirement for employees the hauling contractor does not bring onto the Respondent's property. The freedom to hire, or partner with, other individuals gives the hauling contractors the ability to work for clients in addition to the Respondent. Zima's hauling company, for example, has 13 full-time employees and obtains upwards of 70 percent of its business from clients other than the Respondent. Zima uses some of the same equipment to perform services for both the Respondent and other clients. Tr. 421-423. Similarly, Stephens' hauling company has nine of its own employees and about half of its revenue comes from work it does for clients other than the Respondent. Tr. 461, 473. Elbassiouny's company has five of its own employees and uses some of the same equipment to service both the Respondent and his other clients. Tr. 371, 384-385. Contractors Janice Melby, Mark Oberg, and Sondag all also perform work for clients in addition to the Respondent. Tr. 237-238, 247-248, 399-401.

Some hauling contractors either could not, or chose not to, expand their business beyond work for the Respondent. The General Counsel argues that this was because the Respondent imposed two obstacles that rendered the contractor's entrepreneurial opportunities theoretical rather than actual. The two obstacles identified by the General Counsel were: the availability requirements in the contracts, which demand that the contractor make its delivery services available during store hours, J Exh. 1 at Page 1, J Exh. 2 and Page 1, J Exh. 3 at Page 1, and the non-compete clause in the contracts. J Exh. 1 at Pages 7-8, J Exh. 2 at Page 8, J Exh. 3 at 8. Regarding the availability requirement, the record shows that hauling contractors can, and do, overcome this hurdle by obtaining additional trucks and/or personnel so that they can meet their contractual availability obligation to the Respondent while also performing services for other clients. Moreover, there was credible evidence that the Respondent had worked with haulers to permit them to designate hours, days, or weeks, when they would be excused from providing services to the Respondent. Tr.161-162, 173, 401.

As to the non-compete clause in the contracts, the record shows that this, by its terms, applies only to contract hauling for *competitors* of the Respondents and only to those competitors who are *within 25 miles* of the store location where the hauler is providing services to the Respondent. This limitation does not prevent the contractors from doing outside non-hauling work, or from doing hauling work for clients who do not compete with the Respondent,

or from doing hauling work for the Respondent's competitors as long as those competitors are not within 25 miles of the relevant store. The fact that Zima, Stephens, Elbassiouny, Melby, Oberg, and Sondag have all been able to provide services to other clients shows that the actual entrepreneurial *opportunity* for such work exists, regardless of whether other contractors exploit that opportunity. The General Counsel cites *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), enforced, 292 F.3d 777 (D.C. Cir. 2002), as support for its argument that, given the non-compete clause, the contractors do not have a meaningful opportunity for entrepreneurial gain. However, in *Corporate Express* the contractors were "not permitted to use their vehicles to make deliveries for *anyone* other than [Corporate Express]." Ibid. (emphasis added). That is a formidable barrier to outside work, and one that is not comparable to the limitation in this case, which permits the haulers to use their vehicles to work for a broad range of other clients.

Regarding the proprietary interest in the work, the record shows that the hauling contractors can, and sometimes do, sell their companies. In addition they have the express right under the contracts to subcontract their work with the Respondent to others. On its face, that right is not limited in any way that would preclude a hauler from seeking something from the subcontractor in exchange for agreeing to cede the work. Facially the opportunity for such activity exists under the contracts and the record does not show that it is precluded.

I find that the haulers have a meaningful opportunity for entrepreneurial gain and that this weighs in favor of finding that they are independent contractors.

Conclusion

For the reasons discussed above, I find that the overwhelming majority of the factors identified in Board decisions favor a finding that the hauling contractors who contract with the Respondent's stores are independent contractors not employees.[17] Factors weighing in favor of such status include: the balance of control over the haulers' work, the extent to which the haulers are engaged in a distinct business, the type of occupation, the extent to which the haulers supply the instrumentalities of work, the length of employment, the method of payment, the belief of the parties as to the nature of their relationship, and the degree of entrepreneurial opportunity. Only one factor – the level of skill required – weighs in favor of employee status under Board precedent. That factor is outweighed by the many factors favoring independent contractor status. Of the alleged employees discussed in the cases cited by the parties, the ones who most closely resemble those in the instant case are the truck owner-operators in *Dial-A-Mattress*, supra, a case in which the Board found that the owner-operators who made deliveries for a merchandise retailer were independent contractors, and rejected the contention that they were employees. Like the owner-operators in *Dial-A-Mattress*, the hauling contractors in this case are making deliveries to customers of a merchandise retailer, hire their own employees, acquire and own their own trucks, are not guaranteed any minimum compensation by the Respondent, are identified in relevant documents as non-employees, and have significant entrepreneurial opportunity for gain or loss. I find that the same result reached in *Dial-A-Mattress* is warranted here.

Since the hauling contractors are independent contractors who, pursuant to Section 2(3), do not fall within the protections of the Act, the General Counsel's allegations that the

[17] I note that the record indicates that some of the drivers who make, or assist, with deliveries are employees, but employees of the hauling contractors, not of the Respondent. The complaint does not make any allegation regarding the hauling contractors' treatment of their employees and I make no finding in that regard.

Respondent violated Section 8(a)(1) of the Act by misclassifying those individuals as independent contractors and by requiring them to agree to an improper mandatory arbitration clause necessarily fail. Those allegations must be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The drivers that make deliveries pursuant to the delivery service agreements between hauling contractors and the Respondent are not employees of the Respondent.

3. The Respondent was not shown to have violated Section 8(a)(1) by classifying drivers that make deliveries pursuant to its delivery service agreements with hauling contractors as independent contractors.

4. The Respondent was not shown to have violated Section 8(a)(1) by maintaining a mandatory arbitration clause in its delivery service agreements with the hauling contractors.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[18]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 17, 2017.

PAUL BOGAS
Administrative Law Judge

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.