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

VELOX EXPRESS, INC.

And Case 15-CA-184006

JEANNIE EDGE,
An Individual

Linda Mohns, and Kyle McKenna, Esqs.
for the General Counsel.
Benjamin C. Fultz and E. Rachael Dahlman Warf, Esqs. (Fultz Maddox Dickens PLC), Louisville, Kentucky.
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Little Rock, Arkansas on July 24 and 25, 2017. Jeannie Edge filed the initial charge in this matter on September 12, 2016. The General Counsel issued the complaint on March 31, 2017 and an amended complaint on April 13, 2017.

The General Counsel alleges that the Respondent, Velox Express, violated the Act in discharging the Charging Party, Jeannie Edge, and in misclassifying its drivers as independent contractors, as opposed to employees. He also alleges that Respondent has promulgated unlawful rules and a discriminatory route driver agreement.

As explained below, I conclude that Jeannie Edge was an employee of Respondent and that Respondent violated the Act in discharging her. I also find that Respondent violated the Act in misclassifying some other drivers as independent contractors.

With regard to the allegedly violative rules, I conclude that Respondent's non-disparagement policy violates the Act, but that it did not, by Carol Christ, violate the Act in sending an email to employees stating that all pay issues, complaints, concerns etc. should go through her and no one else. Finally, I find that Respondent did not violate the Act by issuing the route drivers agreement.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates a courier service.[2] It has headquarters in Indiana and maintains a facility in Memphis, Tennessee, where it annually performs services valued in excess of $50,000 in states other than Tennessee and purchases and receives goods in Memphis valued in excess of $50,000 from outside of Tennessee. 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.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

This case largely involves Respondent's operations in Arkansas and to some extent western Tennessee. Velox has a contract with Associated Pathologists, LLC (PathGroup), which is a diagnostic medical laboratory company, to collect medical samples from facilities such as doctor's offices, clinics and hospitals. Respondent delivers these specimens to PathGroup's laboratory in Nashville, Tennessee for analysis. Several drivers pick up samples in Arkansas, which are consolidated in Little Rock for transport by Velox's "long haul" drivers to Velox's Memphis facility. Then the samples are further consolidated for shipment by Velox to the PathGroup laboratory in Nashville.

Jeannie Edge worked for Velox picking up samples in Arkansas. Prior to working for Velox, Edge worked for Lab Express, which was replaced by Velox as the contractor collecting PathGroup specimens.

In 2016 Velox entered into independent contractor agreements with Edge and other drivers who collected the samples. These contracts, drafted by or for Velox, are "take or leave

---

[1] Tr. 155, line 7: should read, "the relevance of " rather than "letters."

[2] Respondent describes itself as a logistics company. It states it is not just a courier service because it designs routes for its customers. However, there is no credible evidence that Respondent is anything other than a courier service insofar as its contract with PathGroup is concerned. Indeed, the contract between PathGroup and Velox specifies that Velox will provide "courier services;" it does not mention any other type of service Velox is to render to PathGroup, R. Exh. 9.

PathGroup provided Velox with routes it had already designed; Velox then hired drivers to run those routes, Tr. 32, 185-87, 336. Larry Lee testified that Velox made many suggestions and changes to those routes. However, there is no evidence for this other than his self-serving testimony, which I decline to credit. So far as PathGroup is concerned, Velox is a courier company and advertises itself as such, G.C. Exh. 41.

[3] While Respondent contends that it is not the employer of its drivers, it concedes that it has other employees, such as its dispatchers, Tr. 339-40.

it" documents. There was no true negotiation or opportunity to negotiate on the part of the driver/courier.

Essentially, the drivers (also called medical couriers) were offered specific routes to service and compensation was based on the size of the route. So far as this record shows, drivers could not have more than one route that operated at the same time. Thus, they were unable to make a profit by hiring drivers to operate a route that they were not driving personally. If they could not drive their route on a given day, they had to ask permission from Velox's management for a day off. Velox then selected a substitute driver.

A driver's compensation could change if stops were added or subtracted to their route. Drivers had no responsibility or ability to develop business for Velox. They were not precluded from working for other businesses at the same time they worked for Velox. Jeannie Edge, for example, worked as an independent contract phlebotomist when not driving her assigned route for Velox. However, it is unclear whether drivers could work for someone other than Velox instead of covering their Velox routes. So far as this record is concerned, Velox drivers' ability to work for other businesses was no different than the opportunity for any employee to moonlight.

A threshold issue in this case is whether the drivers were independent contractors or employees, since the Act accords rights to the latter but not the former. Edge worked for Respondent from June 22, to August 21, 2016, at which time Respondent either terminated her contract or discharged her, depending on how you view her status. Prior to working for Velox, Edge worked for Lab Express, which Velox replaced as the contractor collecting medical samples for PathGroup's Nashville, Tennessee laboratory. During the period Edge drove for Velox, other drivers who worked for Respondent in Arkansas were Brett Woods, Jill Cross and Marilyn, whose last name does not appear in this record.

In June 2016, Edge executed an independent contractor agreement with Velox. Edge performed this job in her privately owned vehicle, purchased her own insurance and maintained her car at her own expense. Velox did not withhold income tax and did not provide health insurance to drivers. Velox couriers were not covered by Velox's workers compensation insurance policy either.

Velox promulgated many rules specifying how the drivers/couriers were to perform their jobs, G.C. Exhs.3, 5 and 11. When Edge needed a day off, she contacted Velox for permission. Respondent obtained a substitute driver. Drivers were generally not allowed to choose a substitute. In some cases it appears they could do so with the approval of Velox. This was a change from Lab Express' practice in which the driver was responsible for obtaining a substitute.

On July 24, Carol Christ, Velox's manager in Memphis emailed Velox's PathGroup drivers. She advised them that they must answer phone calls from Velox's dispatcher and respond to her emails. Christ also told drivers they must not leave lids off the Styrofoam containers and keep the Memphis storage areas neat.

In response to what she considered micromanaging by Christ, Edge began to complain that Velox treated the drivers as employees, rather than as independent contractors. Christ was aware that this was an issue with other drivers as well, Tr. 53-54, 235-36. In an email dated July 25, Edge told Christ that another driver had already said he was going to report the situation to the Internal Revenue Service. Christ forwarded Edge's email to Larry Lee, a Velox vice-president, who was Respondent's only witness in this case, G.C. Exh. 4 (reverse side) and is the person who terminated Edge.

On August 1, Christ sent an email to the drivers/couriers announcing a number of Velox policies, including the following:

> Line hauls MUST run on time every time therefore DRIVERS must be in the office on time.
>
> If you go early you risk missing stops. If you arrive at a pick up location and there are no specimens in the box, you should always KNOCK ON THE DOOR! It is your responsibility to make 100% sure that no one is inside finishing up specimens or running late.

G.C. Exh. 5.

On August 12, 2016, Edge collected specimens from the Compassionate Women's Clinic in Nashville, Arkansas (located in southwest Arkansas). A PathGroup representative called Velox on August 15 and said a specimen had been found in the parking lot at that facility. Respondent's manager in the Memphis, Carol Christ, sent Edge back to retrieve this specimen.

On about August 15, Velox issued a "Route Driver Agreement" to its drivers,[4] G.C. Exh. 11, which it required each driver to sign.[5] That document states as follows:

> **Route Driver Agreement**
> **1. Scheduled pickup times**
> **a. Do not start your route early**
> **b. Do not pickup from scheduled stops early**
> **c. Always check both the lockbox and inside**
> **d. Do not leave a stop that always has specimens, call your dispatcher so they can contact PathGroup.**
> **e. Always take a picture of your LB ticket in the empty lockbox and log the ticket number on your route sheet.**
> **2. Frozen Specimens**

[4] The complaint alleges that Respondent violated the Act by requiring drivers to sign the route driver agreement, complaint paragraphs 8(d), (f) and 9. I see no evidence that supports this allegation. The timing between Edge's July 25 email and promulgation of route driver agreement is insufficient to establish discriminatory motive. An equally plausible explanation is that the drivers route agreement was promulgated in light of recent service failures on the part of the Velox drivers.

[5] R. Exh. 24 is the same document. Larry Lee testified that he drafted this document and then sent it to Kent Tidwell at PathGroup for review. According to Lee, Tidwell told him his draft was perfect. Regardless, many of the specific requirements in this document emanate from Velox; not PathGroup.

a. Frozen specimens MUST be completely covered in dry Ice Inside your frozen cooler
b, Do not take the green pouch unless in a sealed pink sheet bag
3. Will Calls
a. You are to verbally call in your pick up on ALL will call orders.
b. You are to NEVER leave a will call until the dispatcher releases you.
c. Will Call users will always have something to pickup
4. Shoulder Bag
a. You are required to use a shoulder bag on ALL pickups, no exception.
b. Specimens go straight from the lockbox to your shoulder bag.
c. Always double check the area around the lockbox before returning to your vehicle.
5. Route Sheet
a. Your route sheet should be neat and complete.
b. Double check your route sheet before entering the consolidation area.
6. Consolidation
a. You are not to enter the consolidation area until asked to.
b. You are to double check that your totes, shoulder bag, coolers, and vehicle are empty before departing the consolidation office. You will then sign the Clear Tote log and have another Velox employee or IC sign as your verifier.
7. Line Hall,
a. Line haul drivers are to get food, gas, etc. before departing with the line haul.
b. Line haul drivers are to immediately contact their dispatcher if they are delayed for any reason.
c. Line haul drivers are expected to drive straight to GRM with no stops unless absolutely necessary.
d. You are to have someone at GRM acknowledge that your totes are empty prior to departing
8. Penalty
a. Drivers agree that they are subject to a $150.00 fine and or removal from the route If it is determined that through your negligence or failure to follow the standard operating procedure results in a service failure.

Acknowledgement
I have read and understand the above policy

Also on August 15, Respondent required Edge and other route drivers to participate telephonically in a meeting/conference call with Velox's Memphis Manager, Carol Christ.[6] A few days later, Christ demanded that Edge send her a copy of her driver's license and social security card so that Respondent could perform a background check. During that exchange, Christ texted Edge that, "You should really drop the employee crap. Had you simply done as asked yesterday [send Christ a picture of her SSN card and driver's license] it should have been done," G.C. 13, pg. 00121.

On Friday, August 19, Christ demanded that Edge sign Velox's driver route agreement that night, G.C. Exh. 13, page 00132. In a telephone call later that evening, Edge told Christ that she had consulted with an attorney and would sign the agreement on Monday if her attorney advised her to do so, Tr. 70-71, G.C. Exh. 14. Edge drove her route on Saturday

[6] Respondent notes that not all drivers attended this meeting. However, G.C. Exh. 9 makes it clear that attendance was mandatory. Respondent apparently did not enforce this requirement.

August 20, and Sunday, August 21. On Sunday night, Christ texted Edge to inform her that her contract with Velox had been terminated.[7]

Larry Lee, Respondent's vice-president, testified that Kent Tidwell, a PathGroup manager, called him on August 15, about the specimen found in the Compassionate Care parking lot. According to Lee, Tidwell was very angry and told him that he did not want the driver who was responsible to handle PathGroup specimens any more. PathGroup was Velox's only customer in the Little Rock area. Lee testified that he had a telephone conversation with Edge on August 15, in which she denied leaving the specimen in the Compassionate Care parking lot.[8] She told him that the paperwork in the bag containing the specimen was not wet, which it should have been had it been left outside over the weekend.

Lee testified further that he found Edge's explanation not to be credible and that on August 15, after the call, he directed Memphis manager Christ to terminate Edge's contract.[9] Lee did not explain why he found Edge's explanation incredible. He did not investigate the circumstances surrounding the specimen found on August 15 despite the fact some of these lent some support to Edge's claim, Tr. 363. Lee also did not explain why Christ waited 6 days to terminate Edge's contract after he had told her to do so, or why Christ allowed Edge to continue to handle PathGroup samples for another 6 days.

Normally, if there was a discrepancy between the number of specimens left by the Clinic and the number picked up the courier, it would be noticed immediately. Nobody reported any such discrepancy with regard to the August 12 collection at the Compassionate Care Clinic, G.C. Exh. 17, pp. 2-3. Blood specimens were drawn at Compassionate Care on Saturday and Sunday, August 13 and 14; thus it is quite possible that the specimen found on August 15, was not in Compassionate Care's lock-box when Edge collected their samples on August 12, Tr. 357-60.

Credibility Determinations

I do not find Lee's testimony regarding the reasons he terminated Edge's contract to be credible. Thus, I conclude that Velox did not terminate Edge's contract at the behest of PathGroup. I find this explanation to be a pretextual reason for the termination of her contract/discharge.

[7] Christ, a manger still employed by Velox, did not testify, thus Edge's account of this phone call is uncontradicted and credited.

[8] Obviously, this conversation occurred after Edge retrieved the specimen.

[9] Other errors admitted to by Edge are irrelevant to this case. Respondent's position is clearly that it was forced to terminate her contract due demands by PathGroup's Kent Tidwell arising out of the August 12 incident. There is no evidence that Tidwell was aware of Edge's prior mistakes when he allegedly demanded she be barred from handling PathGroup samples. Lee testified that when he talked to Tidwell and decided to bar the driver from handling PathGroup samples, he didn't even know that Edge was the driver responsible for the August 12 pick-up at Compassionate Care, Tr. 327.

Curiously, Lee testified that he would have terminated Edge's contract even if he found her explanation of what happened on August 12 credible, Tr. 327. This, in of itself, is compelling evidence that Respondent's stated reason for terminating her is pretextual.

Moreover, there is no documentation supporting his claim that Tidwell demanded that the driver who serviced Compassionate Care on August 12 not handle PathGroup samples again. Tidwell advised his subordinates on August 15 that "this driver has been terminated," R. Exh. 28. However, there is nothing to suggest that this was done at his behest. Neither Tidwell, nor any other representative of PathGroup testified in this proceeding.[10] Nothing in this record explains the circumstances surrounding Tidwell's August 15 email, which is clearly inaccurate, since Edge was not terminated until August 21, and there are many indications in this record that Respondent had no intention of terminating her on August 15.

For one thing, Edge continued to handle PathGroup samples for almost a week after Tidwell communicated with Lee. Secondly, the communication between Carol Christ, Velox's manager in Memphis, and Edge does not indicate any intention of terminating her contract prior to August 20. On August 17-18, Christ demanded that Edge send her photos of her license and social security card, a demand that makes no sense if Velox had already decided to terminate Edge's contract, G.C. Exh. 13. What is also significant in this exchange is the animus demonstrated by Christ towards Edge's assertions that Velox is treating her like an employee rather than as an independent contractor.

On August 20, Christ demanded Edge sign a route driver agreement and return it immediately. This is also a demand that makes no sense if Velox had already decided to terminate Edge's contract. Christ, who is still Velox's manager in Memphis, did not testify in this proceeding.

Edge consulted a private attorney about the route driver agreement and inadvertently informed Christ of this fact on or about August 19. Shortly thereafter Larry Lee had a conversation with Christ. On the evening of Sunday, August 21, Christ informed Edge that he independent contract agreement was being terminated.

The record is also devoid of any explanation as to why Tidwell would demand that the driver in the August 12 incident be barred from handling PathGroup samples and not make a similar demand in many other incidents in which Velox employees failed to pick up or mishandled PathGroup samples.

Lee testified that he often received complaints from Tidwell and Tidwell's subordinate, Mike Fuller, PathGroup's Director of Market Operations, about service failures in the West Tennessee/Little Rock Market, Tr. 292-93, 305-06, 308. Respondent did not terminate the contract of any driver servicing PathGroup in that market other than Jeannie Edge, Tr. 11.

[10] Lee also testified that Tidwell ordered him to look into how the sample was left on August 12, Tr. 322; this he did not do—other than talking to Edge and deciding that he did not believe her. Lee's lack of curiosity supports my inference of discriminatory motive in terminating Edge's employment, *K & M Electronics,* 283 NLRB 279 , 291 (1987).

An example of misconduct by another driver is as follows: a Velox driver ruined 3 samples on or about June 28, 2016, requiring that the specimens be redrawn. PathGroup demanded a $450 credit from Velox, but made no demands about the driver. Velox did nothing with respect to this driver other than counseling, R. Exh. 25, Tr. 318. By way of contrast, the specimen left at the Compassionate Women's Care Clinic on August 12, was not ruined.

Another example of misconduct by another driver(s) occurred just prior to a mandatory meeting for Velox drivers on August 15. One or more Velox drivers in Tennessee failed to collect specimens left in a lockbox, Tr. 54-55, 354. Velox took no action against that driver(s).[11]

A third example is that in early August, 3 Velox drivers mishandled PathGroup specimens, G.C. Exh. 7. They were fined $150 for their errors, but there is no evidence that PathGroup requested that they be barred from handling PathGroup specimens in the future, Tr. 377-78.

Due to Lee's lack of credibility on the reasons for Edge's termination, I decline to credit any of his testimony unless corroborated by documentary evidence or other reliable evidence of record.[12] In this regard, I note that much of his testimony on significant matters was elicited by leading questions from Respondent's counsel.

Analysis

The Independent Contractor Issue

Sections 7 and 8 of the National Labor Relations Act accord rights and protections to employees. Section 2(3) specifically excludes individuals having the status of independent contractor from the definition of "employee." A party seeking to exclude individuals performing services for another from the protection of the Act, has the burden of proving independent contractor status, *BKN* 333 NLRB 143, 144 (2001). The Board applies a multi-factor analysis in determining whether particular individuals are employees or independent contractors. No single factor is controlling.

Very often the line between "employee" and "independent contractor" is a fine one. However, in determining whether individuals fall on one side or another, one must keep in mind the admonition of the United States Supreme Court that, "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach and that the NLRA and similar statutes are "to be narrowly construed against employers seeking to assert them," *Holly Farms Corp. v. NLRB,* 517 US 392, 399 (1996). Thus, where it is a "close call," agencies and courts should err on the side on finding employee status.

[11] Respondent states at page 12 of its brief that the meeting on August 15 was "a direct result of Edge's mishandling a patient's medical specimen." This has not been established. In fact the record strongly suggests that meeting was called due a number of service failures by several Velox employees.
[12] I also do not take Edge's testimony at face value—unless corroborated by other reliable evidence-or uncontradicted by Respondent.

The Board has addressed the "independent contractor" vs. "employee" in a number of cases, such as the recent decision in *Pennsylvania Interscholastic Athletic Association, Inc.,* 365 NLRB No. 107 (July 11, 2017). In that case, the Board discussed its leading cases on this issue, including *Fed Ex Home Delivery,* 361 NLRB No. 55 (2014) enf. denied 849 F. 3d 113 (D.C. Cir. 2017); *Big East Conference,* 282 NLRB 335 (1986) enfd. 836 F. 3d 143 (3d Cir. 1987); *Sisters Camelot,* 363 NLRB No. 13 (2015) and *Pennsylvania Academy of the Fine Arts,* 343 NLRB 846, 847 (2004). Since each case is very fact intensive, it is best to analyze each factor with regard to the record in this case:

1) Extent of control by the employer

Several provisions of the drivers' independent contractor agreement are more consistent with employee status than independent contractor status. These include the drivers agreeing to submit to routine and random drug tests and the non-solicitation (in fact non-compete) provisions of the agreement, G.C. 2, paragraph 11, pp. 5-6. This contrasts with the situation in *Saleem v Corporate Transportation Group,* 854 F. 3d 131 (2d Cir. 2017) in which drivers could and did compete with the business they claimed was their employer.

Velox mandates the places at which the drivers collect specimens and the times at which the specimens must be collected. Drivers must not pick up samples earlier than the pick-up time required by Velox. They are also under a less precise requirement that specimens not be picked up too late because the drivers must return the specimens on time to Little Rock for consolidation and transport to Memphis. From Memphis, Velox drivers then take the samples to PathGroup's laboratory in Nashville.

Edge was not free to work when she wanted. Whenever she wanted a day off from work she had to ask permission from Carol Christ. As mentioned previously, this was a change from the practices of Edge's previous employer, Lab Express.

Respondent's route driver agreement, set forth in detail above, shows that Velox sought to exercise a great deal of control of its drivers/couriers. The record also establishes that Carol Christ ordered Edge to return to Nashville, Arkansas to retrieve a specimen not picked up on August 12.

The drivers' contracts with Velox provided that drivers would be liable for any expense that Velox would have to bear due to their errors. PathGroup, at least on some occasions, required Velox to credit it for the damage to specimens by Velox drivers, Exh. R-25.

Drivers were required to wear a Velox shirt, khaki pants and closed-toed shoes, G.C. Exh. 12, Tr. 229-30. They were also required to have an Android phone.

Respondent argues that the extent of its control cannot be considered in a finding that the drivers were employees, because Velox was merely passing along PathGroup's or HIPPA's requirements. This may be true for some of the rules it imposed on drivers, but not for many others. The uniform requirement and many of the items in the route driver agreement emanate from Velox; not PathGroup or HIPPA, G.C. Exh. 12.

There is no evidence that PathGroup required couriers to wear Velox uniforms for example. PathGroup only required that couriers dress professionally, Resp. Exh. 9, pg. 4, para. g. There is no evidence that PathGroup required Velox to subject its couriers to random drug tests. Many of the mandates in the route driver agreement were initiated by Velox VP Larry Lee, not PathGroup. This can be ascertained by comparing the route driver agreement, G.C. Exh. 11 with the Service Agreement between PathGroup and Velox, Exh. R. 9 and PathGroup's SOP for new and sensitive clients, Exh. R. 12.

Nowhere did PathGroup mandate a $150 fine for service failures. Its contract with Velox provides that Velox will indemnify PathGroup for actual losses. However, Velox's fine could be levied in a situation in which there was no loss to PathGroup, such as a missed specimen pick-up that does not result in the specimen having to be redrawn.

I conclude this factor, establishing that Velox exercised a great deal of control over the way its driver/couriers performed their jobs, weighs heavily in favor of employee status.

2) Whether the individual is engaged in a distinct occupation or business

Collecting medical samples is Respondent's business. Although Edge is free to work for other entities, she was not free do to so during the times she was supposed to cover her route. Edge's freedom to work for others is indistinguishable from the ability of any employee to work a second job.

Edge and other drivers are not in the courier business except insofar as they work for Velox. They are generally required to wear a shirt with a Velox logo and present themselves to the public as representatives of Velox rather than their alleged independent contractor business.

This factor favors employee status.

3) Whether the work is usually done under the direction of the employer or by a specialist without supervision

Velox drivers work independently in completing their routes without one-on-one supervision. However, the drivers are not free to perform the job in any way they see fit. Velox cared very much how the drivers did their job as opposed to simply requiring that it be completed in a satisfactory manner. It required the job to be performed with a shoulder bag, mandated how the specimens were handled and when they were to be picked up.

Given the control exercised by Velox as to how the drivers' job was performed, this factor weighs in favor of employee status.

4) Skill required in the occupation

Velox drivers are not highly skilled. I credit the testimony of Jill Cross that the job requires minimal training.[13] Other evidence in the record also supports this conclusion. For example, Brett Woods testified that when Velox took over the contract in Arkansas and West Tennessee, Velox provided only an hour and a half training for him and another driver, who unlike Woods, had no prior experience as a medical courier.

A driver must know which specimens must be frozen, which must be refrigerated and which can be kept at room temperature. A driver must also be familiar with a few uncomplicated procedures, such as using a shoulder bag when gathering samples, so that none are dropped. A driver must also be somewhat familiar with the requirements of HIPPA[14] regarding patient confidentiality and the security of medical information.

This factor favors employee status. Every person working for another person, whether an employee or independent contractor, needs to have some knowledge as to how the job is to be performed. Virtually no new employee is turned loose to perform a job for which they were just hired without some training. The level of knowledge required to be a Velox driver/courier does not rise to the level of a skill.

5) Whether the employer or individual supplies the instrumentalities, tools, and place of work.

Velox drivers use their own vehicles to perform their tasks. They are free to use their vehicles for purposes other than Velox's business. The drivers pay for their fuel, insurance and upkeep of their vehicles. Velox provides Velox shirts, shoulder bags, Rubbermaid tubs, ticket books and a route; little else. Drivers are not required to use the equipment provided by Velox except the shirt (assuming they have been provided one).

This factor, in isolation, favors independent contractor status.

6) Length of time for which the individual is employed

While the term of a driver's independent contractor agreement is for one year, either party may terminate the contract for any reason with one day's notice, G.C. Exh. 2. This is much more akin to an employment-at-will relationship than a contractual relationship in which one is hired to do a discrete task. In some more typical independent contractor situations, the relationship between the contractor and client ends when the discrete task is performed.

[13] At page 24 of its brief, Respondent discusses Edge's experience prior to her employment with Velox; Cross and other drivers had no such experience.

[14] Health Insurance Portability and Accountability Act of 1996. Every employee in health care related industries is subject to HIPPA. Given the consequences of a violation of that statute, it would be surprising if any such employee did not receive some training in its requirements.

Nevertheless, long-term independent contractor relationships have become more common in today's "gig economy." Some of these would not pass scrutiny if the Supreme Court's admonition in *Holly Farms Corp. v. NLRB* were adhered to.

This factor favors employee status.

7) Method of payment

The fact that the drivers are paid by the job, rather than by time usually favors independent contractor status. However, on close examination, Velox drivers' situation is more similar to an employee paid by the hour than an individual contractor paid to do a discrete job regardless of the time it takes. Drivers do not invoice Velox for time and materials; instead they are paid a fixed rate determined by Velox for their route. That rate is calculated according to the mileage and number of stops on the route.

The drivers must do their route every day, unless they call off to Respondent.[15] The time frame in which their job is to be performed is set by the pickup times at each stop on their route (they may not pick up early) and the need to have their collection samples ready for transport to Memphis in a timely fashion. In reality, the drivers' compensation is for the time spent picking up the samples, as well as completing a job.

Moreover, Respondent maintains total control over the drivers' compensation. It offers drivers a route with a set figure for payment. The driver has no ability to alter his or her compensation; they cannot collect samples from other routes and as a practical matter they cannot work for anyone else during the hours they perform their tasks for Velox.

Velox contends that drivers are able to negotiate their compensation, citing the example of David Chastain, R. Exh. 11, who asked for an increase in compensation when stops were added to his route. However, as a matter of policy, Respondent increased drivers' compensation when stops were added and decreased their compensation when stops were subtracted from a route, G.C. Exh. 3. Thus, it appears that Respondent merely increased Chastain's compensation in conformance with its general compensation policy.

Despite the fact that Velox drivers are nominally paid for by the job, the reality of their situation favors employee status.

[15] At page 29 of its brief, Respondent states that drivers are free to take off for work whenever they wish. I credit Edge's testimony at Tr. 44 that drivers had to ask Christ for permission to take a day off. Moreover, Christ's email of July 24, G.C. Exh. 3 (also R. Exh. 29) states that "requesting days off or calling out of work should go through me."

8) Whether the work is part of the regular business of the employer

This factor morphs into the same analysis as factor # 2. Collecting medical specimens is Respondent's business. The drivers do not perform any tasks for Velox that are not part of Velox's core mission.

This factor weighs heavily in favoring employee status.

9) Whether the parties believe they are creating an independent contractor relationship

Both Velox and Jeannie Edge believed they were creating an independent contractor relationship when Edge began her tenure with Velox. However, Driver Jill Cross believed that in fact she was an employee of Velox, Tr. 219.

Velox provided Edge with a 1099, rather than a W-2 form. Respondent did not withhold her income tax or have a workers compensation policy that covered her or other drivers. Couriers were not insured in any respect by Velox.

While Respondent believed it had an independent contractor relationship with its drivers, Edge came to believe this was no longer the case as Respondent increased its control over her. Moreover, Edge' subjective belief as to whether she was an employee or independent contractor is far less important than the economic realities of her relationship to Velox. A non-attorney is not in a particularly good position to understand the difference between being an employee and an independent contractor.

In light of the above, I find this factor weighs in neither direction.

10) Whether the principal is or is not in the business

Velox is in the business of collecting medical specimens. That is the business of the drivers. This factor favors employee status.

11) Whether the evidence shows the individual is rendering services as part of an independent business. I interpret this to be the same inquiry as to whether the individual has a significant entrepreneurial opportunity for gain or loss, *Corporate Express Delivery Systems v. NLRB,* 292 F. 3d 777, 780 (D.C. Cir. 2002). The record herein establishes that the drivers had no real opportunity to increase their "profit." Respondent offered Edge one route at a compensation rate Velox determined on the basis of mileage. Velox told her that was the only courier route available. Thus, she did not have any ability to increase the amount she received for driving for Velox. Furthermore, pursuant to the contract between Velox and PathGroup, Edge could not collect samples for PathGroup outside of her relationship with Velox, Resp. Exh. 9.[16]

[16] Analysis of a courier service would be much different if a driver was allowed to own multiple routes and lease them out for a profit. They may have been the arrangement between Lab Express and its

Velox argues that drivers could increase their profit by shopping for example, for cheaper gas. That opportunity is indistinguishable from an employee's opportunity to make their wages go further by searching for the best price on gas and other commodities.[17] In *Standard Oil Co.,* 230 NLRB 967, 971 (1977), the Board noted that such costs are more or less standardized and provide no significant opportunity for drivers to influence their net compensation.

Considering all the above factors, I conclude that Jeannie Edge was an employee of Velox.

Complaint paragraph 5 (misclassification as a separate Section 8(a)(1) violation)

The General Counsel alleges that Respondent violated the Act in misclassifying its drivers/couriers, apart from whether or not it violated the Act in discharging Jeannie Edge. This record establishes that all Respondent's courier/drivers who pick up specimens for PathGroup out of the Memphis office, have working conditions virtually identical to those of Edge—as evidenced by Velox's requirement that they sign the route driver agreement. I find that other Velox drivers collecting PathGroup specimens out of Velox's Memphis office are employees.

By misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection.

The Independent Section 8(a)(1) allegations

The General Counsel alleges that Respondent violated and is violating Section 8(a)(1) by maintaining the following Non-Disparagement Provision in its Independent Contractor Agreements, G.C. Exh. 2, pg. 6.

> During the Term and following the termination of this Agreement, regardless of the reason for such termination, Independent Contractors shall not do or say anything that a reasonable person would construe as detrimental or disparaging to the goodwill and good reputation of the Company, including making negative statements about the Company's method of doing business, the effectiveness of its business policies and practices or the quality of any of the Company's services or personnel.

---

drivers. The maintenance of control by Velox over who drove its routes, which limited the ability of its drivers to "profit" from the work of other drivers is important to my finding that Velox drivers are employees.

[17] In *Standard Oil Co.,* 230 NLRB 967, 968 (1977), the Board expressed the relevant factors somewhat differently than in some recent cases. Regarding factors mentioned in that case, I would note that the drivers perform their tasks in the name of Velox; not their allegedly independent businesses and that the drivers' working arrangement with Velox appears to be permanent, so long as performance is satisfactory.

The General also alleges that Respondent promulgated a violative rule when Carol Christ sent an email to the driver/couriers on July 24, 2016, G.C. Exh. 3.

The email in pertinent part states:

> Some of you were hired by John Willis, some were hired by me.
>
> If you work at the Memphis office, Little Rock AR, Jackson TN or Jackson MS, you are part of the Memphis branch and should report directly to me.
> Not John Willis and not Jim Gibson.
>
> Any pay issues, complaints, concerns, requesting days off or calling out of work should go through me.
> No one else.

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). As stated above, a rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; and/or 2) that the rule was promulgated in response to protected activity and/or 3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).

In *Lutheran Heritage* the Board retreated somewhat from its prior decisions in light of the decision of United States Court of Appeals for District of Columbia in *University Medical Center v. NLRB,* 335 F. 3d 1079 (D.C. Cir. 2003). In that case the Court declined to enforce the Board's decision at 335 NLRB 1318 (2001) regarding a rule prohibiting "disrespectful conduct." In *Lutheran Heritage,* the Board stated that it would not conclude that a reasonable employee would read a rule to apply to Section 7 activity simply because the rule *could* be so interpreted.

As to Christ's email, I find that it would not reasonably be read to prohibit employees from discussing wages, hours and working conditions with each other and seeking help on these issues from third parties (such as a union). On the contrary I find the email is more fairly read as requiring drivers to cease contacting other managers such as Willis and Gibson (Respondent's President) about pay and other issues pertaining to the drivers' working conditions and to contact Christ instead. I infer that Christ sent the email because employees were going to Willis and Gibson with their concerns, instead of her. Therefore, I dismiss complaint paragraph 7(a).

On the other hand, I find that the Non-Disparagement provision in the independent contractor agreement violates Section 8(a)(1). First of all, that provision applies to employees protected by Section 7 of the Act. By prohibiting negative statements about the Company's method of doing business, the effectiveness of its business policies and practices or the quality of any of the Company's services or personnel this provision purports to deny employees

protected rights. For example, negative statements about Velox's business policies and practices would reasonably be read to include employee statements relating to company policies concerning wages, hours and other terms and conditions of employment, *Claremont Resort & Spa,* 344 NLRB 832 (2005). Employees not only have Section 7 rights to make negative statements about such matters to other employees, they may also appeal to third parties, such as the press, the public or a labor organization, in order to get such policies changed, *Kitty Clover, Inc.,* 103 NLRB 1665, 1687-88 (1953); *Arlington Electric,* 332 NLRB 845, 846 (2000); *Emarco, Inc.,* 284 NLRB 832, 833 (1987).

Respondent violated Section 8(a)(1) in discharging Jeannie Edge

Having found that Jeannie Edge was Respondent's employee, I turn to the question of whether her employment was terminated in violation of the Act.

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging an employee because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* ... (Emphasis added)"

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Jeannie Edge clearly engaged in protected activity in complaining to management that she was being treated as an employee rather than as an independent contractor. She also discussed this with other employees. The record also establishes that Carol Christ and Larry Lee knew that the classification of employees was an issue for employees other than Edge, Tr. 53-54, 235-36, G.C. Exh. 4 (reverse side).[18] Thus, they were aware that her protected activity was concerted.

In order to prove a violation of Section 8(a)(3) and/or (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn

[18] Lee admitted to seeing G.C. Exh. 4, which establishes that he knew that the employee/independent question was an important issue to drivers other than Edge.

from circumstantial evidence as well from direct evidence.[19] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

The record establishes that Respondent was aware of Edge's protected activity (i.e., her agitation over the employee/independent contractor issue); that it bore animus towards that activity (E.g. G.C. 13, pg. 00121 in which Christ texts "You should really drop the employee crap. Had you simply done as asked yesterday [send Christ a picture of her SSN card and driver's license] it should have been done."). The timing of Edge's discharge, 3 days later, is sufficient to meet the General Counsel's initial burden of establishing a nexus between her protected activity and discharge.[20] Additionally, the timing between Respondent's knowledge that Edge was consulting an attorney over the route driver agreement and her termination is sufficient to satisfy the General Counsel's burden in establishing a relationship between her protected activity and her discharge.

Respondent's affirmative defense that it decided to terminate Edge on August 15 for her alleged misconduct in failing to pick up the Compassionate Women's Care Clinic specimen on August 12, is not credible. Moreover, I find, as stated previously, that is it a pretextual reason upon which I also rely in concluding that Velox fired Edge in retaliation for her protected concerted agitation on the employee/independent contractor issue, *Reeves v. Sanderson Plumbing Products,* 530 U.S. 133 (2000); *Shattuck Denn Mining Corp. v. NLRB,* 362 F. 2d 466, 470 (9th Cir. 1966); *Fast Food Merchandisers,* 291 NLRB 897, 898 (1988); *Flour Daniel, Inc.,* 304 NLRB 970, 971 (1991); *Norton Audubon Hospital,* 341 NLRB 143, 150-151 (2004). Finally, Respondent's failure to adequately investigate the circumstances of the "dropped specimen" at the Women's Care Clinic supports the inference of discriminatory motive.

Conclusions of Law

Respondent, Velox Express violated Section 8(a)(1) of the Act by:

1. Discharging employee Jeannie Edge on August 21, 2016.
2. Maintaining a Non-Disparagement Policy that would reasonably be read to prohibit employees from disparaging Velox and its officials insofar as employees' negative statements may relate to wages, hours and other terms and conditions of employment.
3. Classifying Jeannie Edge and other driver/couriers servicing PathGroup as independent contractors, rather than as employees.

[19] *Flowers Baking Company, Inc.,* 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB,* 70 F. 3d 863 (6th Cir. 1995).

[20] I recognize that some cases hold that this is not part of the General Counsel's initial burden, e.g., *Neises Construction Co.,* 365 NLRB No. 129 n.6 (September 11, 2017). However, assuming that it is, the General Counsel satisfied it.

REMEDY

The Respondent, having discriminatorily discharged Jeannie Edge, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth C*o., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No.8 (2010). Respondent shall compensate her for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on her Social Security earnings record.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

Respondent, Velox Express, Inc. its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, such as challenging Respondent's assertion that they are independent contractors.

(b) Maintaining a Non-Disparagement rule or policy which prohibits employees from making negative statements about the company insofar as they would be reasonably construed to include a prohibition of negative statements pertaining to wages, hours and other terms and conditions of employment.

(c) Classifying route drivers who are employees as independent contractors.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

[21] 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.

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

(a) Within 14 days from the date of the Board's Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Jeannie Edge whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision. Respondent shall compensate her for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings, as set forth in the remedy section.

(c) Compensate Jeannie Edge for the adverse tax consequences due to receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Revise or Rescind its Non-Disparagement policy.

(e) Take whatever steps are necessary to reclassify the courier-drivers servicing the PathGroup account out of Velox's Memphis office as employees and to treat them as employees rather than as independent contractors.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Jeannie Edge in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its offices in Little Rock, Arkansas and Memphis, Tennessee copies of the attached notice marked "Appendix".[22] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by

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

such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 22, 2016.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 25, 2017

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, such as challenging your classification as an independent contractor.

WE WILL NOT maintain a policy that prohibits you from disparaging this company or its officials insofar as it relates to wages, hours and other terms and conditions of employment.

WE WILL NOT continue to classify drivers who are employees as independent contractors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jeannie Edge full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeannie Edge whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Jeannie Edge for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

WE WILL compensate Jeannie Edge for the adverse tax consequences due to receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Jeannie Edge, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

VELOX EXPRESS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3408

(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-184006 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.