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James C. Hardman*

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I. INTRODUCTION

One of the nation's basic labor laws, the Fair Labor Standards Act of 1938,1 was designed to correct and eliminate labor conditions detrimental to the maintenance of the minimum standards of living necessary for the health, efficiency, and general well-being of workers.

The numerous and complex provisions of the Act were all designed (1) to establish minimum wage levels to assure wage earners a minimum standard of living;2 (2) to encourage the employment of the maximum number of persons by requiring a premium or penalty rate for work above a weekly maximum number of hours;3 (3) to restrict and/or eliminate oppressive child labor provisions;4 and (4) to assure that male and female workers subject to the minimum wage provision receive equal pay for work requiring equal skill, effort, responsibility, and performed under similar working conditions.5

Now in its seventh decade, the FLSA has had a significant role in the country's intent to give greater dignity, security, and economic freedom to millions of workers and has undoubtedly played an influential part in the economic growth of our country.

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2. Supra note 1, at 1062-63 (current version at 29 U.S.C. § 206 (2007)). Effective July 24, 2007, the federal minimum wage for non-exempt employees is $5.85 per hour. If a state has a minimum wage law and an employee is subject to both federal and state law, the employee is entitled to the higher of the two minimum wages. U.S. Department of Labor, Wages - Minimum Wage, www.dol.gov/dol/topics/wages/minimumwage.htm (last visited Jan. 20, 2008).

3. Supra note 1, at 1063 (current version at 29 U.S.C. § 207 (2007)). All covered workers must be paid at least one and one-half times their regular rate of pay for all hours worked in excess of 40 in a work week. 29 U.S.C. § 207(a)(1) (2007).

4. Supra note 1, at 1067 (current version at 29 U.S.C. § 213 (2007)). Sixteen years is the minimum age for most employment within the scope of the Act. See 29 U.S.C. § 213 (2007). In the case of motor vehicle drivers and outside helpers, the minimum age is 18 years. 29 C.F.R. § 570.120 (2007).

II. BASIS OF LIABILITY

An employer’s liability under the Act is dependent upon the existence of an employer-employee relationship. The term “employ” is defined in the Act as “. . . to suffer or permit to work.”6 As a result of judicial construction, the term has been held to mean any physical or mental exertion controlled or required by the employer and pursued necessarily or primarily for the employer and his or her business.7

The mere label “independent contractor” does not remove a worker from protection of the Act.8 There must be a bona fide independent contractor relationship to render the Act inapplicable.9

A concise and clear test to determine whether “an employment relationship exists” was set forth in Goldberg v. Warren Bros. Road Co. and depends upon:10

1. the extent to which the services in question are an integral part of the ‘employer’s’ business;
2. the amount of the ‘employee’s’ investment in facilities and equipment;
3. the nature and degree of control retained or exercised by the ‘employer’;
4. the ‘employee’ s’ opportunities for profit or loss;
5. the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and
6. the permanency and duration of the relationship.

The determination of whether an employer-employee relationship exists, in fact, as well as in name, is an intensive process which requires considered judgment in applying the law to the facts.

In the motor carrier industry, the “employment classification” determination is frequently critical because of the high incidence of use of “owner-operators.”11 Owner-operators evolved as the recognition of

11. See James C. Hardman, Workers’ Compensation and the Use of Owner-Operators in Interstate Motor Carriage: A Need for Sensible Uniformity, 20 TRANSP. L.J. 255, 256 (1992). The term “owner-operator” reflects individuals who lease motor carrier equipment to a motor carrier with driver services. Id. Normally, the lessor performs the driver service. See id. The exact number of owner-operators is unknown as no governmental or private entity accumulates such data; PORT JOBS, BIG RIG, SHORT
independent contractor relationship grew in the federal Leasing and Interchange Regulations\textsuperscript{12} and by state common law and statutes in virtually all states.\textsuperscript{13} There are distinct advantages in utilizing owner-operators\textsuperscript{14} and, in the truckload segment of the industry, most motor carriers use such persons exclusively while other carriers operate a fleet utilizing driver-employees as well as owner-operators.\textsuperscript{15}

Since the “employment classification” issue arises in many other phases of motor carrier operations,\textsuperscript{16} it is important to consistently maintain the status of the individuals proverbially “across the board.” Otherwise, it would be impossible to operate effectively or economically.

The issue could also arise in the context of non-employee individuals who might not fall under the motor carrier exemption as a driver, but could still be

\textsuperscript{12} See 49 C.F.R. § 376.12(c)(4) (2007). For a discussion of the underlying reasons for this section, see Petition to Amend Lease and Interchange of Vehicle Registrations, 8 I.C.C.2d 669 (1992).

\textsuperscript{13} While the concept is well-recognized, its application to motor carrier operations has caused many problems. See Hardman, supra note 11, at 255-74.

\textsuperscript{14} CHARLES A. TAFT, COMMERCIAL MOTOR TRANSPORTATION 245 (Richard D. Irwin, Inc., 3rd ed. 1961). In the early years of trucking in this country, many entrants were small and undercapitalized and by using owner-operators they could avoid the capital burden of purchasing equipment. See id. at 233, 245. Likewise, during the history of entry regulation, carriers frequently were limited significantly as to what commodities they could haul and territory they could serve. See REGULATION AND DEREGULATION OF THE MOTOR CARRIER INDUSTRY 16-25 (John Richard Felton & Dale G. Anderson eds., 1989). These limitations frequently led to extreme peaks and valleys in their businesses. See id.

\textsuperscript{15} If they owned their equipment and used driver-employees, varying amounts of equipment would be idled and drivers unemployed during the down cycle. See id. Owner-operators, on the other hand, at the down cycle, would travel the “circuit” and seek a carrier who was experiencing a different business cycle. See MICHAEL H. AGAR, THE DILEMMAS OF INDEPENDENT TRUCKING: INDEPENDENTS DECLARED 45-46 (Smithsonian Institution Press 1986). Since many founders of carriers were embedded with the entrepreneurial spirit and the feeling that if they worked hard to become their “own boss” and succeeded, that same spirit would be instilled in current owner-operators. See id. This instinct is true today as many owner-operators expanded and operate a fleet of vehicles or ultimately become a carrier. See id.

\textsuperscript{16} See David Cullen, Rebirth of the Owner-Operator, FLEET OWNER, August 1, 2004, http://fleetowner.com/management/feature/fleet_rebirth_owneroperator/. The mixed fleet is a rather recent phenomenon which generally arose because of the shortage of drivers which has existed in the industry in the past ten years. See id. Using each type of operators allows the motor carrier to tap two sources of manpower. See id.

\textsuperscript{16} "Employment classification" issues, for example, arise in terms of workers’ compensation, unemployment compensation, affirmative action, ERISA, and employment taxes. See James C. Hardman, Unemployment Compensation and Independent Contractors: The Motor Carrier Industry as a Case Study, 22 TRANSP. L.J. 15, 17 (1994).
III. GENERAL COVERAGE OF THE ACT

Once it is determined that an "employer-employee relationship exists, it is essential to determine if the employee is covered by the Act. The Act applies to employees, not specifically exempt, who are:

A. Engaged in commerce; or
B. Engaged in the production of goods for commerce; or
C. Employed in an enterprise engaged in commerce or the production of goods for commerce.

The first two standards are determined on the basis of the duties performed by the individual employee, whereas the third standard is based on and determined on the business of the "enterprise." The standards are applied liberally and, thus, a significant number of businesses and individuals fall within the Act.

Application of these standards can be seen, for example, as they relate to the operations of motor carriers.

A. ENGAGED IN COMMERCE

It is generally conceded that employees of motor carriers handling freight, which has crossed a state line or moved from or to a foreign country, are within the Act's coverage because their employment is "engaged in commerce." Questions have arisen, however, in respect to employees of distributors and wholesalers.

In Walling v. Jacksonville Paper Co., the court held that the Act would apply to employees of local distributors or wholesalers of goods if they spend a substantial part of their time in (1) procuring or receiving goods from other states, or (2) handling or delivering to the local customers goods imported from other states in response to either special orders or a pre-existing contract or

17. This could occur, for example, in the case of loaders. JAMES C. HARDMAN, THE FAIR LABOR STANDARDS ACT AND MOTOR CARRIER OPERATIONS 38-40 (Pilgrim Enterprises, Ltd. 1974).
18. An exemption exists from the overtime provision, for example, for employees whose hours of service and qualifications are subject to regulations by the Secretary of Transportation under the Motor Carrier Act of 1935. 29 USC § 213(b) (2007). For other exemptions, see HARDMAN, supra note 17, at 31-71.
20. Id.
21. Id.
understanding with the customer. Even though the Supreme Court held that “substantial” time must be devoted to such activities, it has been held that a plant manager is “engaged in commerce” when he spent one-half hour per week, out of a work week of 59½ hours, unloading and storing out-of-state shipments of goods to be distributed later within the state.24

This latter decision appears to be more consistent with the general understanding that the Act should apply on the basis of the activity involved and not the extent to which the employee is engaged in the activity.25 In any event, it appears that employees involved in the local delivery and handling of goods are considered engaged in commerce if the goods are imported from a second state or country in response to a special order, pre-existing contract, or other understanding with the customer.26

Although coverage of the Act might not be extended under the “engaged in commerce” standard of the Act if there is not a pre-existing or special order, it seems clear that any movement of goods, which initially came from outside the state, would be covered under the Act as a result of the “engaged in the production of goods for commerce” standard.

B. ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE

The second standard is a broad one and is particularly so in respect to motor carrier operations, as the term “engage in the production of goods for commerce” has been held specifically to include the transportation of goods for commerce.27

The extent of the Act’s coverage can be seen by the decision in Wirtz v. Ray Smith Transport Co.28 In this case, the Act’s coverage extended to the drivers of an intrastate hauler of gasoline, kerosene, and diesel fuel products that were transported solely within one state.29 Although the carrier was not engaged in interstate commerce, the court held that the carrier engaged in the “production of goods for commerce” since the lading was subsequently used in

26. Transportation employers of retail businesses such as truck drivers or truck drivers’ helpers who regularly and recurrently cross state lines to make deliveries to or to pick up goods for their employers; or who regularly and recurrently pick up at railheads, air, bus, or such other terminals, goods originating out-of-state, or deliver such goods destined to points out-of-state; and dispatchers who route, plan, or otherwise control such out-of-state deliveries and pick ups are engaged in interstate commerce within the meaning of the Act. See 29 C.F.R. § 779.114 (2007).
27. Wirtz v. Instravaia, 375 F.2d 62, 65 (9th Cir. 1967).
interstate transportation or as fuel for equipment engaged in the building and maintenance of interstate highways, waterways and railroads.\textsuperscript{30} The courts also specifically noted that if the product can reasonably be expected to move in interstate commerce, in determining whether the product was produced for commerce it is immaterial that the actual interstate movement is several steps removed from the actual operation involved.\textsuperscript{31}

This same principle has been applied in other cases involving motor carrier operations. In \textit{Griffin Cartage Co. v. Walling}, for example, the employees of a cartage company were found to be within the provisions of the Act where 90% of the employer’s business consisted of transporting parts from one manufacturing plant to another manufacturing plant within the same state for additional processing and then to a manufacturer within the same state to be placed in automobiles sold and shipped in interstate commerce.\textsuperscript{32}

The broad scope of coverage under this standard can also be seen in decisions relating to the transportation of fuel and in-flight meals to military or commercial aircraft destined to make flights in interstate or foreign commerce. Such operations have been held to be included with the term “engaged in the production of goods for commerce.”\textsuperscript{33}

C. “ENTERPRISE” CONCEPT OF COVERAGE

The “enterprise” concept of coverage is not predicated on the activities of the individual employees, but rather on the business of the enterprise or establishment. An enterprise, as defined in the Act,\textsuperscript{34} consists of (1) related activities performed, (2) either through unified operation or common control, (3) by any person\textsuperscript{35} for a common business purpose. It does not matter whether the activities are performed in one or more establishments or by one or more corporate or other organizational units. An enterprise shall be deemed to be “engaged in commerce or in the production of goods for commerce” if it has employees engaged in commerce or in the production of goods for commerce or employees handling, selling, or otherwise working on goods or materials that have moved in or been produced for commerce by any person; and which:\textsuperscript{36}

\textsuperscript{30} \textit{Id.}; see also Wirtz v. Crystal Lake Crushed Stone Co., 327 F.2d 455, 457-459 (7th Cir. 1964); Goldberg v. Morris, 205 F. Supp. 302, 303-305 (E.D. Ky. 1962).
\textsuperscript{32} Griffin Cartage Co. v. Walling, 153 F.2d 587, 587 (6th Cir. 1946).
\textsuperscript{35} “Person” is defined as an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons. 29 U.S.C. § 203(a) (2007).
\textsuperscript{36} \textit{Id.} at § 203(s)(1)(A)(i).
(1) is engaged in any of the following businesses: laundering, cleaning or repairing clothing; construction or reconstruction, or both; or the operation of a hospital, nursing home, or a school for mentally or physically handicapped or gifted children; or elementary or secondary school or college, whether public or private, or operated for profit; or

(2) has an annual gross volume of sales of at least the amount prescribed by the Act.

A specific exception is provided for family-operated establishments. If the only employees of an establishment are the spouse, parents, or children of the owner, the establishment will not be covered as an enterprise or part of an enterprise for purposes of coverage of the Act.

As a practical matter, any motor carrier – unless “family operated,” or not having revenue in the amount prescribed – will find that its employees are covered under this standard unless it is engaged solely in intrastate commerce including the handling of goods of the same nature. Seldom will both conditions exist.

IV. EXEMPTIONS IN GENERAL

The exemption provisions of the Act are varied and complex. In some instances they suspend all of the four standards, i.e., minimum wage, equal pay, overtime and child labor, whereas in other instances they merely exempt one or more of the standards.

Furthermore, some of the exemptions apply to all employees while others only apply to certain employees and may be based on the nature of the duties performed by the individual employee, or upon the nature of the employer’s duties.

In determining whether an exemption exists, the employer must prove the applicability of all exemptions and that all exemptions are subject to a rule of strict construction and that any doubt will be resolved in favor of the employees. It should also be noted that a federal exemption may not preempt a state law regulating the same subject.

37. Id. at § 203(s)(1)(B).
38. The amount prescribed is $500,000.00 “exclusive of excise taxes at the retail level that are separately stated. Id. at § 203(s)(1)(A)(ii).
39. Id. at § 203(s)(2).
40. In addition, an exemption may also arise because of the definition of the term “employer” under which any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization is excluded. Id. at § 203(d).
42. Although the Act specifically speaks of minimum wage or maximum workweek or child labor provisions not being pre-emptive, it should be noted that no mention is made of overtime exemptions. See 29 U.S.C. § 218 (2007).
Federal and State Overtime Wage Coverage

The remainder of this paper shall focus on the Act’s motor carrier exemption and other exemptions specifically related to motor transportation.

V. THE MOTOR CARRIER EXEMPTION

A unique exemption in respect to motor carrier operations arises under Section 13(b)(1) of the Act\textsuperscript{43} which provides an overtime pay exemption\textsuperscript{44} for employees whose hours of service and qualifications are subject to regulation by the Secretary of Transportation under Title 49 of U.S.C.\textsuperscript{45}

The Department of Transportation’s\textsuperscript{46} jurisdiction to regulate hours of service extends to all employees whose activities affect the safety of operation of interstate motor vehicles.\textsuperscript{47} The exemption is based on the nature of the duties and not the proportion of time spent in performing such duties.\textsuperscript{48} Thus, an employee may be within the exemption even though portions of his duties do not affect safety.\textsuperscript{49} Likewise, the exemption will apply regardless of whether DOT has actually exercised its authority to regulate employment. It is the existence, not the exercise, of the authority that determines the scope of the exemption.\textsuperscript{50}

Generally, the following classes of motor carrier employees are exempt under this provision of the Act:

1. Drivers of motor vehicles operating in interstate commerce;
2. Drivers’ helpers on such vehicles;
3. Mechanics who repair and service such vehicles;
4. Loaders of such vehicles.\textsuperscript{51}

Care must be taken, however, in determining the scope of the exemption as it is based on the actual work done and not on the basis of the title applied to the employee.\textsuperscript{52} Likewise, there appear to be some variations from the strict rules previously alluded to, namely, that the amount of time spent in such

\textsuperscript{43} 29 U.S.C. § 213(b)(1) (2007) [hereinafter Motor Carrier Exemption or MCA].
\textsuperscript{44} Walling v. Palmer, 67 F. Supp. 12, 14 (M.D. Pa. 1946) (holding employees are still subject to the minimum wage provision of the Act).
\textsuperscript{46} Hereinafter referred to as “DOT”.
\textsuperscript{47} See U.S. v. Am. Trucking Ass’n, 310 U.S. 534, 549 (1940).
\textsuperscript{50} Levinson, 330 U.S. at 675; Morris v. McComb, 332 U.S. 422, 436 (1947).
\textsuperscript{51} 29 C.F.R. § 782.2 (b)(3) (2007).
\textsuperscript{52} Quinn, 108 F. Supp. at 357.
duties does not bear on the question of the exemption’s application. The question of the time spent in duties within DOT’s jurisdiction has arisen in many cases involving drivers and their helpers.

A. DRIVERS AND DRIVER HELPERS

In *Walling v. Comet Carriers*, for example, a driver, who engaged in interstate movements for 3 hours a week, was found not to be within the exemption because of the minimal time involved in the affected operations. A similar decision was rendered in *Walling v. Griffin Cartage Co.*, where the driver spent one percent of his time driving in interstate commerce. On the other hand, in *Southland Corp. v. Shew*, a driver who spent three or four percent of his time driving in interstate commerce was found to be within the exemption.

At best, it can be said that the exemption will apply to drivers except where the amount of interstate driving is sporadic and unsubstantial in terms of time and that the interpretation of this standard will vary according to the court deciding the matter.

*Starrett v. Bruce* is another interesting example of the applicability of the exemption to driver personnel. In this case, the driver was engaged in crushing stone and delivering it within the same state to contractors building and maintaining roads. The employer acknowledged coverage under the Act, but claimed the motor carrier exemption was applicable because it held interstate authority from the Interstate Commerce Commission; held itself out to perform interstate service; and had done so on an irregular basis prior to the driver’s employment. The court held the exemption applicable because the driver was subject to be assigned to hauling an interstate shipment.

In *Baird v. Wagoner Transportation Co.*, an opposite result was reached in a similar factual situation. The driver hauled fuel intrastate from a marine terminal to the company’s bulk plants, service stations, and ultimate

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57. *Id.*, at 322.
59. *Starrett*, 391 F.2d at 324.
consumers. The carrier held authority from the Interstate Commerce Commission but had not used the authority. Refusing to follow the Starrett case, the Court held that the mere fact that a carrier holds such authority is not enough to bring the carrier within the authority of the Commission.

The Baird decision seemingly overlooked the fact that under the Motor Carrier Act of 1935, a carrier with authority is subject to the authority of the Commission until such time as the authority is revoked. The Baird decision is also interesting, however, from another viewpoint. In order to reach the decision rendered, it was necessary to determine that the transportation involved was intrastate in character and thus not performed pursuant to the authority from the Commission. This issue arose despite the fact that the parties conceded the movement was interstate for purposes of the Act. This emphasizes the broad scope of coverage and liberal interpretation of the term “interstate commerce” under the Act and the importance of not relying on interpretations under other statutes.

The Baird court reached the conclusion that the movement from the bulk plant to the various final destinations was intrastate because the fuel that came from the second state lost its identity at the bulk plant. The question of when a sufficient interruption has occurred to cause the transportation to be intrastate rather than interstate and thus outside the scope of the exemption is, of course, a factual question.

One controversial area involves whether spotters or “hostlers” are within the Motor Carrier Exemption. In Walling v. Gordon’s Transportation, Inc., drivers who were spotting tractor and trailers at the carrier’s dock were held to be outside the exemption on the basis that the drivers merely moving tractor and trailers for loading or unloading or for repairs were not engaged in activities directly affecting safety.

61. Id. at 409.
63. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935). Currently, each registration (i.e. authority) is effective from the date specified by the Secretary of Transportation and remains in effect for such period as the Secretary determines appropriate by regulations. 49 U.S.C. 13905(b) (2007). On application of the registrant, the Secretary may amend or revoke a registration. A suspension, amendment, or revocation may also occur as a result of a complaint or upon the Secretary’s own initiative. 49 U.S.C. 13905(c) (2007).
64. Baird, 425 F.2d at 412 (distinguishing cases relied on by Appellants based on the “intrastate factors involved in the instant case”).
65. Compare id. at 411, with Galbreath v. Gulf Oil Corp., 294 F. Supp. 817 (N.D. Ga. 1968), aff’d., 413 F.2d 941 (5th Cir. 1969) (holding that a similar movement was interstate in nature even though only an average of 0.1% of sales were unpredictable at the time of arrival at the tank terminal). See also Mid Continent Petroleum Corp. v. Keen, 157 F.2d 310 (8th Cir. 1946); Shew v. Southland Corp., 370 F.2d 376 (5th Cir. 1966).
66. 4 Fed. Carr. Cas. (CCH) ¶ 80, 272, aff’d, 162 F.2d 203 (6th Cir. 1947).
67. Id.
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In *Walling v. Silver Fleet Motor Express*, on the other hand, yard drivers were found to be within the exemption when the tractors and trailers moved and spotted and would be used over-the-road; and when the yard driver determined whether the equipment was ready for that movement, lubricated the fifth wheel, connected the break hose and lights, and took the tractor and trailer to the carrier’s safety lane.

In both instances the service was performed on the carrier’s premises and it is not clear whether the yard personnel ever were used for over-the-road movements or subject to being called for such movements. If so, it appears that a different result may have been reached as authority exists that motor carrier personnel, who are or could be subject to the hours of service requirement of the DOT, would be included within the exemption.

There is a “general class” concept that drivers, who are within the class of workers subject to the hours of service requirement of the DOT, are included within the exemption whether or not they individually performed service in interstate commerce. This concept is consistent with the Hours-of-Service regulation that defines the scope of the Rules as applying to all motor carriers and drivers except as otherwise provided, none of which are relevant to this issue.

Spotters, like over-the-road drivers, are subject to the hours-of-service and other safety regulations. In Letter Ruling of Chief, Wage and Hour Section, USDOL, however, it was held that a driver who never left the property of the employer was not under the Motor Carrier exemption based on a letter from Director of Motor Carriers of the Interstate Commerce Commission in which it was stated the Interstate Commerce Commission “has no jurisdiction over drivers to establish qualification and maximum hours of service for transportation solely on private property and using public highways only to the extent the private road crosses a public highway”.

This advice from the Director of Motor Carriers was predicated on a unique factual situation and should not apply to a situation where the

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69. *Id.* at 853.
70. *See* *Starrett v. Bruce Trucking*, 391 F.2d 320 (10th Cir. 1968).
75. *Id.*
76. Significantly, in the formal ruling, the carriage performed by the drivers and/or motor carriers
spotting of equipment is a continuation or initiation of an interstate service. In Joe Hughes Jr. Contract Carrier Application, Interstate Commerce Commission jurisdiction was found not limited to services and transportation upon the highway and “transportation” for jurisdictional purposes, but clearly included the receipt of shipments from the consignor and delivery to the consignee whether receipt or delivery involves a point on a public highway. It was specifically noted that the safety rules applied whether the vehicles are on or off the highway.

Commissioner Lee, in dissenting on other grounds, noted that operations of trucks by motor carriers of property on private premises for loading and unloading shipments to be transported over highways in interstate or foreign commerce is a service in connection with such highway transportation and is subject the I.C.C.’s jurisdiction.

The Wage & Hour Division’s interpretation, however, states that hostlers or spotters are not exempt. Helpers of drivers on trucks engaged in interstate movements under the jurisdiction of the Commission have also been held to be within the exemption.

The premise for the inclusion of drivers’ helpers in the exception is that these employees assist in loading and unloading vehicles and also assist in directing the trucks into streets.

B. LOADERS

One area where there has been substantial litigation is the exempt status of loaders. Generally, it can be said that loaders, as a class, are exempt, whether they are closely supervised or not. The mere handling of freight on a dock or placing lading on a vehicle, however, is not within the term “loading” for purposes of the exemption. This is also true of a freight

never involved motor carriage of property over the highway. The carrier’s operation was performed solely on private property.

77. 23 M.C.C. 562 (1940).
78. Id.
79. Id.; see also C. Hobson Dunn Contract Carrier Application, 28 M.C.C. 476 (1940).
80. 29 C.F.R. 782.3 (2006).
82. See Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37, 42-43 (5th Cir. 1962); see also Wage and Hour Div. Opinion Letter (Dep’t of Labor May 1, 1968).
83. Levinson, 330 U.S. at 656; see also Walling v. Silver Fleet Motor Express, Inc., 67 F. Supp. 846, 853 (W.D. Ky. 1946) (holding unloaders are not within the exemption).
checker who does not actually load or supervise the loading of the vehicle.\textsuperscript{86}

The work contemplated under the exemption involves the actual stacking or placing of freight on the vehicles to be moved, or the supervision of this task. Moreover, it must affect the “safety of operation.”\textsuperscript{87} Normally the work will involve some amount of skill and judgment, although it might be highly supervised.\textsuperscript{88}

A dock foreman or supervisor will be included within the exemption if any of his or her duties have an effect on the safe loading of vehicles regardless of the time spent performing such duties.\textsuperscript{89}

C. MECHANICS

Mechanics engaged in the inspection, repair, and general maintenance of trucks engaged in interstate commerce, or supervisors of such mechanics, are within the exemption.\textsuperscript{90}

It appears that the work performed by the mechanics must be on the vehicles themselves and be directly related to putting them in proper condition for safe operation. Thus, the exemption has been held not to involve the mere rebuilding of batteries or parts or the repairing of tires that are removed from the truck and will not ordinarily be replaced on the same truck from which they were removed.\textsuperscript{91} Likewise, it has been held that an employee who has principally engaged in repairing heaters and radiators but who did some work on air lines, gas lines and water lines, and did practically all of work in the shop was not exempt from coverage of the FLSA.\textsuperscript{92} An employee engaged in the installation of new accessories making it possible for a carrier to begin its business with a particular piece of equipment has also been found to be outside the exemption.\textsuperscript{93} Also outside the exemptions are employees who have been

\begin{itemize}
\item \textsuperscript{86} Compare Porter v. Poindexter, 158 F.2d 759, 761 (10th Cir. 1947) (“[T]he title of checker or loader or some other title is immaterial. His status is determined by the actual duties performed.”), with Walling v. Huber & Huber Motor Express, Inc., 67 F. Supp. 855, 859 (W.D. Ky. 1946) (“A loader includes a checker if the checker supervises the loading of the trailer and is responsible for the proper loading.”).
\item \textsuperscript{87} Levinson, 330 U.S. at 671.
\item \textsuperscript{88} See Wirtz v. C & P Shoe Corp., 336 F.2d 21, 27-28 (5th Cir. 1964).
\item \textsuperscript{89} Compare Yellow Transit Freight Lines, Inc. v. Balven, 320 F.2d 495, 498 (8th Cir. 1963) (holding that the question of exemption should address motor vehicle safety, not merely the safety of operation), with Mitchell v. Meco Steel Supply Co., 183 F. Supp. 777, 778-779 (S.D. Tex. 1956) (holding that a night watchman, who from time to time assisted in loading trucks in the evening, was outside the exemption).
\item \textsuperscript{91} Kelling v. Huber & Huber Motor Express, Inc., 57 F. Supp. 617, 618-19 (W.D. Ky. 1944).
\item \textsuperscript{92} Tobin v. Mason & Dixon Lines, Inc., 102 F. Supp. 466, 469-70 (E.D. Tenn. 1951).
\end{itemize}
engaged in the manufacture of new trailers or such substantial repair of them as to amount to be rebuilding, and an employee who checked parts and accessories to see that they were not discarded before their useful life expired.

It is important to note also that the mechanics, to be exempt, must be the employees of the motor carrier. Mechanics in the employment of a leasing corporation would be governed by the FLSA regardless of the fact that the lessor leased all of its equipment exclusively to the motor carrier.

Mechanics employed by an independent contractor who services the vehicles of a carrier or vehicles engaged in interstate operation are outside the exemption.

D. MISCELLANEOUS NON-EXEMPT SERVICE EMPLOYEES

In various cases it has been held that gas pump attendants, washers and cleaners, painters, janitors, and night watchmen are not within the exemption even though they may perform incidental duties on a sporadic basis which might incidentally affect the safety of operations.

E. OTHER MISCELLANEOUS OCCUPATIONAL EXEMPTIONS INVOLVING MOTOR CARRIAGE TRANSPORTATION

Certain miscellaneous occupational exemptions peculiar to specific types of motor carrier operations also exist under the Act.

i. Trip Rate Drivers:

A specific exemption exists in respect to “any employee employed as a driver or driver’s helper making local deliveries, who is compensated for such

96. Wirtz v. Dependable Trucking Co., 260 F. Supp. 240, 242 & 244 (D.N.J. 1966); Moore v. Universal Coordinators, Inc., 423 F.2d 96, 99 & 100-01 (3rd Cir. 1970) (holding that drivers leased from a leasing company are subject to the Secretary of Transportation’s regulations); 49 C.F.R. § 390.5 (2007) (defining the term “employee” as including independent contractors).
100. Id.
102. Id.
employment on the basis of trip rates, or other delivery payment plan . . .” if
the Secretary of Labor finds that the agreement establishing such a basis of
employment has the general purpose and effect of reducing the hours worked
by the employees to, or below, the maximum workweek applicable to them
under the Act.104

It is clear that the exemption is intended to cover local operations that are
not subject to the regulation of DOT. Thus the government has disallowed the
exemption where the payment plans involve intercity journeys.105

Because of the use of the word “deliveries,” the statute excludes the
transportation of persons.106 It has also been found that the exemption does not
cover the transportation of employer’s goods from one segment of his business
to another segment.107

Overall, this exemption, like the Motor Carrier Act of 1935 exemption,
applies only insofar as the overtime compensation provisions of the Act would
otherwise be applicable.108

ii. Specific Industries:

Employees engaged in motor carrier operations might also fall within the
exemption provided for other industries and/or occupations within such
industries. Section 13(b)(16) of the Act, for example, provides for an
exemption from the overtime pay requirements for employees engaged in:

(A) the transportation and preparation for transportation of fruits or vegetables,
whether or not performed by the farmer, from the farm to a place of first
processing or first marketing within the same state, or

(B) in transportation, whether or not performed by the farmer, between the farm
and any point within the same State of persons employed or to be employed in the
harvesting of fruits or vegetables.109

Likewise, drivers of motor vehicles employed by airlines in air cargo
pickup and delivery service would be exempt from the overtime pay
requirements under Section 13(b)(3) of the Act which is applicable to “any
employee of a carrier by air subject to the provisions of Title II of the Railway

(stating that a written petition must be filed to qualify for this exemption).
105. Wage and Hour Div. Opinion Letter (Dep’t of Labor Mar. 7, 1962); Wage and Hour Div.
Opinion Letter (Dep’t of Labor Sept. 23, 1965).
Opinion Letter (Dep’t of Labor Feb. 17, 1965).
109. Id. at § 213(b)(16).
A similar exemption exists for “any employee of an employer engaged in the operation of a rail carrier subject to Part A of Subtitle IV of Title 49.”

The overtime compensation provisions of the Act are also inapplicable to taxi drivers and drivers and other related transportation employees employed in forestry or lumbering operations who are exempt from the overtime pay requirements of the Act to the extent they are engaged in transporting logs or other forestry products to a mill, processing plant, railroad or other transportation terminal, if the number of employees employed by the employer in such forestry or lumbering operation does not exceed eight.

Likewise, an exemption would exist for a driver-employee of an independently owned and controlled local enterprise engaged in the wholesale or bulk distribution of petroleum products.

The exemption is a partial one from the overtime pay provisions of the Act, and is only applicable if: (A) “the annual gross volume of sales of each enterprise is less than $1,000,000.00[,] exclusive of excise tax,” (B) more than 75% of its “annual dollar volume of sales is made within the State in which it is located,” and (C) not more than 25% of its sales may be made to “customers who are engaged in the bulk transportation of such products for resale.”

VI. SAFETEA—LU AND ITS POSSIBLE IMPLICATIONS

The enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users has had an important impact on the Motor Carrier Exemption and its coverage after August 10, 2005.

As previously noted, the MCA exemption applies to employees for whom the Secretary of Transportation may prescribe requirements for qualifications and maximum hours of service under the Motor Carrier Act. Prior to SAFETEA-LU, the exemption applied to “motor carriers” providing motor

110. Id. at § 213(b)(3).
111. Id. at § 213(b)(2).
112. Id. at § 213(b)(17); see Wirtz v. Cincinnati, Newport & Covington Co., 375 F.2d 513, 515 (6th Cir. 1967).
115. Id. (“[E]mployee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6 [29 U.S.C. § 206], and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.”).
vehicle transportation for compensation or “motor private carriers” meeting three criteria. 118 There was no reference to the size or weight of the vehicle which would be used in the transportation. 119

In SAFETEA-LU, Congress enacted a section directly related to the MCA exemption and dealing with (a) “safe operations of commercial motor vehicles”; (b) the minimization of “dangers to the health of operators of commercial motor vehicles and other employees whose employment directly affects motor carrier safety”; and (c) increase “compliance with traffic laws and with commercial motor vehicle safety.” 120

A commercial motor vehicle is defined as follows: 121

(1) “commercial motor vehicle” means a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle—

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, which ever is greater;

(B) is designed or used to transport more than 8 passengers (including the driver) for compensation;

(C) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

In the same Section, the following two definitions appear: 122

(2) “employee” means an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who—

(A) directly affects commercial motor vehicle safety in the course of employment; and

(B) is not an employee of the United State Government, a State, or a political subdivision of a State acting in the course of the employment by the Government, a State, or a political subdivision of a State.

119. See id. at § 13102(14)-(16).
122. Id. at § 31132(2), (3).
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(3) “employer”—

(A) means a person engaged in a business affecting interstate commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate it; but

(B) does not include the Government, a State, or a political subdivision of a State.

Further, the Secretary of Transportation was ordered to prescribe regulations related to commercial motor vehicle safety operations which included a specific provision that the operation of commercial motor vehicles would not have a detrimental effect on the physical condition of the operators.123

In the Motor Carrier Act, the definition of “Motor Carrier” was amended to include the modifier “commercial” to the term “motor vehicle transportation”124 and the same modifier was added to the term “motor vehicle” in the definition of “motor private carrier.”125

As a result of SAFETEA-LU, the MCA exemption has eliminated drivers and other personnel directly involved in safety duties unless commercial vehicles are involved.126

There are large segments of the motor carrier industry that are now subject to overtime payments because the vehicles that are commonly used in courier, package delivery, and local delivery services would not be considered a commercial vehicle.

VII. STATE COVERAGE

The following was presented in the July 7, 2004 Issue of the Tax Researcher.127

The state wage and hour laws are far from uniform in their treatment of overtime premiums. Seventeen states have NO general provision for maximum hours before “overtime” premium pay is required. Therefore, these states do not need and do not have any prescribed overtime premium rate of pay. The states are Alabama, Arizona, Delaware, Florida, Georgia, Iowa, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

125. Id. at § 13102(15).
Two states generally allow a work week longer than 40 hours before the overtime premium rate must be paid.\textsuperscript{128}

For example,

Kansas defines overtime as hours worked in excess of 46 hours in a week, while in Minnesota hours worked in excess of 48 hours in a week are paid an overtime premium.\textsuperscript{129}

Four states and Puerto Rico require overtime premium pay for excess hours worked in a single day. Alaska and Nevada require [1.5] times the regular rate for hours worked in excess of 8 hours in a day, 40 hours in a week. Puerto Rico has the same threshold, but requires the employer to pay twice the regular rate. Colorado requires premium pay [1.5 times] after 12 work hours in a day, and after 40 work hours in a week. However, California goes even further by requiring [1.5] times the regular rate for hours worked: (a) in excess of 8 hours per day, (b) in excess of 40 hours per week, and (c) for the first 8 hours worked on the 7th work day in the week. Furthermore, California requires the employer to pay twice the regular rate for hours worked: (a) in excess of 12 in a work day, or (b) after 8 hours on the 7th work day in the week.

The remaining 27 states and the District of Columbia use the same standard as FLSA, requiring [1.5] times the regular pay rate for any hours worked in excess of 40 in a week.\textsuperscript{130}

If a state’s law is more demanding than federal law, state law must be followed even though it surpasses the minimum compliance of the federal law.\textsuperscript{131} Likewise, if state law is less demanding, federal minimums must be met in order to be in compliance.\textsuperscript{132}

The general principles of overtime coverage, however, do not specifically address the issue of exemptions. For example, in 2004 the federal Department of Labor published new regulations “Defining and Determining the Exemptions for Executive, Administrative, Professional, Computer, and Outside Sales Employees,” \textsuperscript{133} and the issuance caused considerable confusion in terms of state laws.

At the time of promulgation, the new Regulations automatically went into effect in 32 states and the District of Columbia.\textsuperscript{134} In 18 states, however, the new regulations could not take place automatically and legislative or

\textsuperscript{128} Kansas (in excess of 46 hours) and Minnesota (in excess of 48 hours). \textit{Id.}

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} 29 C.F.R. § 541.4 (2007).

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} Defining and Delimiting the Exemptions for Executive Administrative, Professionals, and Outside Sales Employees, 29 C.F.R. § 541 (2007).

administrative action was required. States were indecisive in what action to take and the State of Illinois even passed a law keeping the old definitions before the Regulations were adopted merely on the scare of “change”.135

In terms of the Motor Carrier Exemption, the situation is similarly diverse. In the thirty-two states, where no overtime provisions exist under state laws, it is obvious that the Motor Carrier Exemption and federal law will apply.136 In respect to other states, a state-by-state investigation must be made. The investigation must be exhaustive since a simple answer may not be forthcoming.

In Minnesota, for example, the State has adopted the federal regulations of the Department of Transportation with some minor exceptions,137 but its statutory provision regarding “overtime” does not indicate that the federal motor carrier exemption would apply; however, reference to the federal motor carrier exemption appears in the definition section of the statute under the term “employee.”138

In New Jersey, however, the issue was resolved by judicial litigation. In Keeley v. Loomis Fargo & Co., it was decided specifically that the federal exemption did not preempt the state’s Wage and Hour Law which did not contain a motor carrier exemption.139

A review of the Keeley case and cases cited therein leads to the conclusion that, in the absence of the adoption of the federal Motor Carrier Exemption by the state, it will not apply if the state law overtime provision is to the contrary.

VIII. REVIEW AND REFLECTION

In reviewing and reflecting upon the FLSA, the Motor Carrier Exemption, and state law, it appears that the status of the law leads to the following conclusions:

A. THE FLSA HAS GENERALLY ACHIEVED ITS PURPOSE

The objectives of the Act, as enacted in 1938 and minimally amended thereafter, have achieved its sage objectives.

There has not been any real attempt to repeal the Act, or a proposed

135. Id.
139. Keeley v. Loomis Fargo & Co., 11 F. Supp. 517 (D.N.J. 1998), rev’d, 183 F.3d 257 (3rd Cir. 1999) (The District Court specially rejected a motion to have the case dismissed on preemption grounds arguing that the FLSA and the Federal Motor Carrier Act preempted New Jersey’s minimum wage and overtime law. The reversal involved the interpretation of a regulation allowing the state Commission of Labor to exempt putative employers from overtime and also damage issues.).
significant amendment, which is some strong evidence that citizens have accepted the Act’s goals and its implications. This is also true of the specific motor carrier exemption and the other transportation-related exemptions discussed in this paper.

At best, the only real challenge outstanding is to assure that the Act reflects the realities of the changing work world which was evidenced by and wisely reflected in the issuance of the administrative regulatory provisions regarding the “White Collar” exemptions in 2004.\textsuperscript{140}

B. STATE LAWS CONSTITUTE A SIGNIFICANT BARRIER TO INTERSTATE MOTOR CARRIERS

While businesses with multiple physical locations in different states may be able to adapt reasonably to state laws in which they are located, it is different where employees are not performing their tasks at a point within one state, but essentially operate in multiple states which really have little continuing “relationship” with the individual employee.

State wage laws, including the federal laws, were enacted envisioning that essentially employees would “punch in” at a set time and perform their work in a specific facility until he or she “punched out” at the conclusion of the “shift.” Rest breaks and lunch times could be fixed and controlled by supervisory oversight. Even agricultural workers were more amenable to the foregoing type of work environment.

At the time when most wage and hour laws were enacted, motor carrier operations were basically local in nature especially when compared to their operations today. Many operations were for short distances between two points. Driver-employees were utilized and were paid hourly wages. It was easy to measure how many hours it should take to provide the service and paid drivers actually started and ended the day at the carrier’s facility.

A large segment of the industry now operates across the 48 contiguous states and in Alaska and Canada. Drivers are frequently away from the motor carrier’s office or terminals for weeks with little oversight. The drivers take upon themselves the time and specific tasks to complete a freight movement.

Currently, because of the length of hauls and the relative freedom of the driver while on the road, most drivers, whether employee or an owner-operator, are paid on a “per mile” basis or on a percentage of the revenue charged to the shipper. In some cases, a negotiated-fixed rate is used. In the truckload segment of the industry, hourly wages are virtually null or limited to drivers utilized on local hauls.

While regulations under the FLSA have issued covering non-hourly payment plans such as piece work, commissions, and other variations of

\textsuperscript{140} Hardman, \textit{supra} note 139.
payment, these are not really responsive to the remuneration process used in the motor carrier industry. To develop a reasonable methodology of adopting an essentially “hourly” system to normal motor carrier operations would present an extremely challenging and administratively costly project. State control of such a project could lead to diverse formalities and results leading to many problems. Further, it would not address and might exacerbate the critical problems related to safety.

It is obvious that a driver and owner-operator could increase his “pay” by driving more miles and handling more loads and “overtime” as “dessert” would increase the temptation to do so despite the wear and tear on the equipment and more important, to the health and safe performance of the driver.

Significantly, the federal legislators recognized this and felt that two different units of the government and approaches to wage and hour issues should not interfere with each other. “Safety” of the public and the operators won out and thus the Secretary of Transportation, who was presumably more knowledgeable of trucking operations, was given the power to dictate the hours of service which drivers could drive based, in part, on the normal operations of carriers.141

IX. CONCLUSIONS

The motor carrier industry, from the standpoint of management, collective bargaining agents, and even independent owner-operators and others under the exemption, have not indicated any real problems with the federal motor carrier exemption which reflects that it should continue until industry changes occur to establish that its application is inconsistent with the purposes of the FLSA.

It would also behoove the motor carrier industry and supporters of the motor carrier exemptions to take affirmative steps to enact a federal statutory provision that would preempt any state law inconsistent with the federal exemption or seek state legislation adopting the federal preemption where necessary.

141. In developing the hours-of-service regulations, the Federal Motor Carrier Safety Administration (FMCSA) of the Department of Transportation systematically and extensively researched both United States and International health and fatigue studies and consulted with Federal Safety and health experts. It recognized our roads are better designed, constructed, and maintained in a nationwide network to provide greater mobility, accessibility, and safety for all highway users. It also recognized that vehicles have been dramatically improved in terms of design, construction, safety, comfort, efficiency, emissions, technology, and ergonomics. These factors, combined with years of driver fatigue and sleep disorder research has led to the Regulations and recent review and support the position that the Motor Carrier Exemption should prevail over the general overtime provisions.
I. INTRODUCTION

The idea of a free transportation system in the United States is quickly becoming a thing of the past. The I-35W Bridge collapse in Minneapolis demonstrated that deteriorating roads and bridges are an emerging problem for states, while congestion rules the day in almost every urban area. Instead of embracing the unpopular, like raising the gasoline tax, property taxes, or motor vehicle registration fees to resolve these problems, states are looking to something completely different: Public-Private Agreements or PPP's.1 These agreements between a state and a private company can provide the desperately

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needed funds to alleviate state's transportation woes.\textsuperscript{2} The Bush Administration views PPP Agreements as the solution to the problem and is heavily encouraging states to enter into them.\textsuperscript{3} But where do states and private companies start? What types of agreements are there? How should any potential pitfalls be avoided? This paper will discuss these issues and provide the proper tools to make the correct choices when the decision has been made to enter into a PPP agreement for the purpose of leasing or selling a transportation asset.

\section*{II. THE PROBLEMS STATES ARE FACING}

The tragic collapse of the I-35W bridge in Minneapolis brought a great deal of attention on our country’s deteriorating transportation infrastructure and problems concerning its maintenance and repair. Prior to the collapse, Minnesota Governor Tim Pawlenty vetoed legislation to raise the state’s gasoline tax in order to pay for road maintenance. After the collapse, Governor Pawlenty considered the option of raising the tax with offsets in other taxes, like the income tax.\textsuperscript{4} When Congress passed SAFETEA-LU,\textsuperscript{5} the $286 billion transportation bill, experts stated that it was “$100 billion short of the investment needed to maintain the nation’s roads and bridges.”\textsuperscript{6} Gasoline taxes have not changed since the early 1990’s.\textsuperscript{7} As a direct result of the unwillingness of legislators to raise gasoline taxes, the country will likely face a $4 billion deficit by 2009 unless Congress and individual states can generate new sources of funding.\textsuperscript{8}

As more people move into urban areas, states are experiencing increasingly congested streets and highways and the deterioration of that infrastructure. Solving these problems will require significant investment by local and state governments to improve the roads and highways. However,

\begin{itemize}
\item \textsuperscript{2} See generally id.
\item \textsuperscript{3} Mary Peters, Federal Highway Administrator, Speech at the 16\textsuperscript{th} Annual ARTBA Conference (December 9, 2004), http://www.fhwa.dot.gov/pressroom/re041209.htm.
\item \textsuperscript{4} Jason Hoppin, Minnesota's Eyes Are On I-35W Bridge, But Look Again: Across State, Lesser-Known Spans Deteriorate, Wait For Replacement, ST. PAUL PIONEER PRESS, Dec. 16, 2007, at A1. On February 25, 2008, the Minnesota House and Senate voted to override Governor Pawlenty's veto of the $6.6 billion transportation bill that will raise the gasoline tax by five cents, and another three and half cents over the next five years. There will also be an increase of the metro sales tax by a quarter percent, and new car buyers will have to pay more to register them. See Tom Scheck, House and Senate Override Governor's Veto, MIN. PUBLIC RADIO, Feb. 25, 2008, at http://minnesota.publicradio.org/display/web/2008/02/25/veto/ (last visited March 10, 2008).
\item \textsuperscript{5} Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144 (2005).
\item \textsuperscript{6} Matt Stearns, Governments Ponder Ways to Fix Nation's Roads and Bridges, KAN. CITY STAR, Aug. 10, 2007, at A4.
\item \textsuperscript{7} Id.
\item \textsuperscript{8} Id.
\end{itemize}
current funds allocated to such an endeavor fall considerably short of the levels needed to improve the infrastructure.\textsuperscript{9}

For example, a report by the American Society of Civil Engineers rated 42\% of Pennsylvania's bridges unsafe, and gave the state an overall grade of D for its infrastructure.\textsuperscript{10} It also found that out of the state’s 22,276 bridges, 25\% are considered structurally deficient, and 18\% are considered functionally obsolete.\textsuperscript{11} In order to improve our transportation system “to a level that benefits the nation’s economic productivity, all levels of government must invest $288 billion in 2006, $368 billion in 2015, and $561 billion in 2030;\textsuperscript{12} and estimates currently show that by 2015 the United States will be facing a $1.1 trillion transportation budget shortfall.”\textsuperscript{13}

Further, it is unlikely that future federal expenditures will continue to support state transportation budgets as most of these funds will be reallocated to maintain Social Security and other similar social programs.\textsuperscript{14} The lack of funding necessary to maintain road maintenance can be contributed to the gasoline tax losing its purchasing power; the inadequacy of the current structure of transportation finance to meet the state’s current transportation needs; and the emergence of more fuel efficient vehicles.

The collapse of the I-35W Bridge in Minneapolis has exposed the ugly fact that states are in desperate need of funds simply to keep up with the basic repairs that the daily wear and tear on highways cause. Prior to the tragedy, legislators focused their efforts on other pressing issues and redistributed the


\textsuperscript{11} Id.; see Ariel Hart, Transportation Leaders Tell Feds Tolls Needed, ATLANTA J. CONST. (Feb. 22, 2007), available at http://www.cobbridges.com/pdfs/Transportation%20leaders%20tell%20feds%20tolls%20needed.pdf (Georgia Transportation Commissioner Harold Linnenkohl stated that the state had a $7.7 billion deficit for projects intended for the next six years, and 500 projects have had to be pushed out into long range plans); see also Mal Leary, Condition of State's Bridges Growing Worse, DOT Says, BANGOR DAILY NEWS (Feb. 24, 2007), available at http://www.bangordailynews.com/news/t/default.aspx?a=146761&template=print-article.htm (A recent DOT survey revealed that 288 bridges (out of around 2,600) in the state are in poor condition and could face traffic limits or be closed altogether within the decade).

\textsuperscript{12} U.S. Chamber of Commerce-National Chamber Found., supra note 8, at 2. "Improve" means additional spending on highway and transit systems, which will both have a positive benefit/cost ratio and will improve the country's economy. To simply maintain our current transportation infrastructure "all levels of government must invest $235 billion in 2006, $304 billion in 2015, and $472 billion in 2030." "Maintain" means that road and traffic levels will remain the same, and anything below this level will cause road conditions to deteriorate, and congestion to grow. Id. at 1.

\textsuperscript{13} Id.

Funds intended for transportation infrastructure maintenance elsewhere. Before the collapse, Representative James Oberstar authorized a press release regarding the funds Minnesota received for transportation needs from the House Appropriations bill. Though the total amount procured for the state was approximately $12 million, $10 million was appropriated for Northstar, a commuter rail-line through Minneapolis, while the remaining was to be divided among a bike path, a walking path, and other similar projects which included road work and interchange reconstruction.

Most of the $286 million in the 2005 transportation bill was earmarked to pet projects in chosen Congressional Districts, which left states without the funds to maintain the existing transportation infrastructure. Senator Charles Schumer commented that most of the earmarks were “almost always for new construction and not maintenance,” and that “[t]he bottom line is that routine but important things like maintenance always get shortchanged because it’s nice for somebody to cut a ribbon for a new structure.”

In the Federal Government’s absence on transportation infrastructure maintenance, states are starting to take the initiative to ensure that their roads receive at least basic maintenance. For example, the legislature of Louisiana provided over $70 million towards road and bridge repair and Missouri passed both a multi-billion dollar bill for road repair and a bill that authorized the Department of Transportation to enter into a design-build project contract to fix or replace all 802 state bridges within five years. The state will pay the contractor once the bridges are complete and the winning contractor must maintain the bridges for 25 years.

At one time, the federal motor fuel tax was the primary source of funding for the nation’s roads, but as the fuel tax rates are fixed per gallon and are not indexed for inflation, they have lost one-third of their purchasing power since 1993. Of the sixty cents per mile that drivers pay to operate their motor vehicle, only one cent of that is paid towards the motor fuel tax.

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16. Id.
17. Id.
22. See U.S. Chamber of Commerce-National Chamber Foundation, supra note 8, at 2. In 1993 the tax was raised to 18.5 cents per gallon.
23. Id. If the tax was raised another half a cent it would fully fund the federal governments share...
Nevertheless, the federal government has not considered an increase in the tax since 1993. Meanwhile, twenty eight states have raised their gasoline tax between 1993 and 2003, but they are still facing the same fuel tax degradation the federal government is experiencing.24

A recent report by the U.S. General Accountability Office (GAO) points out that even if the federal and state gasoline taxes kept pace with inflation, the increasing use of hybrid and fuel efficient vehicles will further reduce the revenues received from the tax.25 Hybrid vehicle sales grew twentyfold between 2000 and 2005 and are estimated to grow to 1.5 million vehicles by 2025 because of increasing fuel prices.26 The owners of these cars will pay less fuel taxes because their cars use less fuel per mile than vehicles with gas only engines, but the vehicles will contribute to congestion and wear and tear on roads.27

The loss of purchasing power has caused state and local governments to turn to increased matching requirements, ballot proposals to draw on local property and sales taxes, and bonding of new capital investments against future state and federal tax revenues to make up for this gap in funding.28 Even though the funds raised by these techniques can result in marked improvement in local transportation infrastructure, they have to compete with other government services such as, “schools, housing, police, fire and rescue . . . for which revenues often are formally reserved.”29

Congestion is also adversely affecting this county’s economy. “Thirty-six percent of major urban highways are congested during peak travel times”30 and the Department of Transportation estimates that delays in the country’s transport system cost the country $200 billion annually, or around 2% of the Gross Domestic Product.31 Drivers in major urban areas lost 47 hours sitting in the automobile in 2003,32 and the trucking industry loses more than 200 million hours per year, costing the industry $8 billion because of the cost related to congestion.33 As the nation continues to grow the problem will only

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25. See id. at 16.
26. See id. at 15-16.
27. See id. at 16.
29. Id. at 4.
30. Id.
33. Shultz, supra note 30.
get worse. Approximately 80% of the nation’s population currently lives in urban areas. These figures will likely increase as our society continues to become more service-oriented and less agriculturally-oriented. The amount of cars on the road will also increase since most Americans change what they drive every two years, and the automobiles they used to drive will then be transferred to those who could not afford them a few years prior. As a result, the cost of vehicle registration has increased by 17% from 1993 to 2003. Also, more Americans are living on the edges of urban society in new homes, which increase the distance people drive, further adding to congestion.

The way the motor fuel tax is structured exacerbates its decline by “taxing fuel consumption, rather than street and highway use, [and] disconnects the price travelers pay for using the transportation system from the actual cost of providing the capacity they use.” This encourages discretionary trip taking at times of peak demand causing a variety of productivity, environmental, and community problems. Currently, states such as Oregon, Minnesota, and Kansas are looking into alternative methods to entering into PPP’s, including mileage based tax programs.

The funds available for transportation are being increasingly earmarked for specific projects, which severely reduces their ability to be flexible with funds and can drive up costs. For instance, Congressional earmarking of transportation reauthorization bills has increased from 10 to 6,371 between 1982 and 2005, which means that less money is available for discretionary projects. Further, states have been borrowing to make up for the shortfalls they are currently experiencing. At one time this made sense because of the costs

34. See U.S. Census Bureau, PEOPLE: Basic Counts (Jan. 19, 2005), http://factfinder.census.gov/ jsp/saff/SAFFInfo.jsp?_pageId=tp1_basic_counts (last visited Feb. 27, 2007) (stating that 80.3% of the population lives in metropolitan areas).
36. Id. at 13. According to the General Accounting Office, “[r]oad usage, as measured by vehicle miles traveled (VMT), grew at a steady annual rate of 2.8 percent from 1980 through 2003. For the 10-year period between 1994 and 2003, the total increase in VMT was 22 percent.”
37. National Governor’s Association, supra note 27, at 4.
38. Id. Free parking also exacerbates the problem. Id. This is because people looking for parking spaces create air pollution, street congestion, and accidents. See Donald Shoup, The High Cost of Free Parking, S.F. CHRON., June 3, 2005, at B9. Studies of traffic in downtown areas have shown that people searching for parking cause up to 74 percent of traffic. Id. Another study showed that looking for a parking space generates 1 million excess VMT or 38 trips around the earth per year. Id.
40. See National Governor’s Association, supra note 27, at 4.
42. National Governor’s Association, supra note 27, at 4.
saved by accelerated construction, plus future project revenues exceeded the amount of interest owed on the borrowed funds.\textsuperscript{43} However, recently states have been borrowing against future gas tax revenues (both state and federal) or general revenues to fund current needs.\textsuperscript{44} This could lead to disastrous results for states due to the loss of purchasing power of the gasoline tax, which could in turn lower bond ratings and make borrowing for transportation needs in the future more expensive.\textsuperscript{45}

Unfortunately, the nation’s current transportation funding process is inefficient and ineffective and cannot be corrected quickly or cheaply. States must quickly find solutions to these problems. One solution available to states is the Public Private Partnership Agreements requiring private sector companies to own and or lease the roads they build, or providing maintenance to some or all of the state vehicles. States would then receive much needed funds and the companies acquire the rights to run (and profit from) state owned transportation assets for a specified period of time.

\textbf{III. PUBLIC PRIVATE PARTNERSHIP AGREEMENT OPTIONS/ALTERNATIVES}

There are some options when deciding on what type of PPP to use when leasing transportation assets. There is the Design-Bid-Build agreement, which is where the state awards a construction contract to the lowest bidder, but handles the financing, operations, and maintenance of the transportation asset. There is also the Build-Own-Operate agreement where the state awards the highest bidding private entity the right to use their finances to build and operate the transportation asset. Of the options laid out in Figures 1 and 2 below, only the Private Contract Fee Service and the Long Term Lease Agreement deal with existing roads and or facilities. (Figure 1 displays the amount of state involvement for the following PPPs, while Figure 2 describes the features of the PPPs in more detail.)

\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 5.
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FIGURE 1: PUBLIC TO PRIVATE AGREEMENT SPECTRUM

<table>
<thead>
<tr>
<th>PPP OPTION</th>
<th>OVERVIEW</th>
</tr>
</thead>
<tbody>
<tr>
<td>Design - Bid – Build</td>
<td>This has been the traditional model for most of the 20th century to procure public works. This option segregates design and construction responsibilities by awarding an engineer and a private contractor. The public remains responsible for financing, operating and maintaining the infrastructure.</td>
</tr>
<tr>
<td>Private Contract Fee Services</td>
<td>Here the public sector has turned to the private sector to take over duties that have been traditionally left to public agencies. This can provide access to innovative technology applications and specialized expertise by opening these duties up to the private companies. Operations and Maintenance may be used to transfer responsibilities for a single highway facility or facilities. Duties can involve snow removal, grass mowing, and or other major repairs. Program and Financial Management consists of transferring all planning responsibilities to a private entity. This is usually most beneficial with large and complex projects. Private entities can coordinate environmental studies and approvals, engineering, construction, and financial planning.</td>
</tr>
<tr>
<td>Design – Build</td>
<td>This option combines two separate services into one fixed-fee contract for both architectural/engineering services and construction. SAFETEA-LU eliminated the $50 million floor on the size of contracts and the prohibition that an agency had to wait until the NEPA process was completed.</td>
</tr>
<tr>
<td>Build-Operate-Transfer or</td>
<td>Under this option the state or local government, using public funds, contracts with a single entity to provides long term</td>
</tr>
</tbody>
</table>

46. U.S. Dep’t of Transp.: Fed. Highway Admin., PPP Options - Public Private Partnerships - FHWA, available at http://www.fhwa.dot.gov/ppp/options.htm (last visited Feb. 12, 2007) (this footnote applies to both the continuum drawing and the table, the information in the table is hyperlinked from this cite).
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| Design-Build-Operate-Maintain | operation and/or maintenance services. The governmental entity retains the operating revenue risk and any surplus operating revenue. With these types of contracts, government entities need to take care to specify all standards to be met by the private entity because unless needs are not identified up front, they will usually not be met. |
| Long Term Lease Agreements | This entails a long term lease of existing toll road facilities to a private party for a specified number of years. During this time the private party has the right to collect tolls, however has to maintain the facilities, and in some instances, make improvements. |
| Design-Build-Finance-Operate | Here, the responsibilities of designing, building, financing and operating are transferred to the private sector. These types of projects are mainly financed by debt leveraging finance streams like tolls, vehicle registration fees, or bonds. |
| Build-Own-Operate | Here, the private entity has the right to develop, finance, build, own, operate and maintain an entire project, which it owns completely. |

Currently, Pennsylvania, New Jersey, and Texas are considering long term leases on existing roads. On the other hand, the state of Indiana has already leased the Illiana Expressway to the ITR Concession Company for $3.8 billion for a term of 75 years.

Another option that California, Colorado, and Texas have taken advantage of is converting their carpool lanes into High Occupancy Tolls or HOT lanes. According to Safe Accountable Flexible Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), states can charge low occupancy vehicles a fee for using the lane and either allow high-occupancy vehicles to use the lane or lanes for free or charge a lower price. These types of pricing


50. Id.; See e.g. Co. Dep’t Transp., I-25 HOV/Tolled Express Lanes - Toll Rates, http://www.dot.state.co.us/cte/expresslanes/fees.cfm (last visited March 26, 2007) (On Interstate 25 in Denver, Colorado, drivers are charged as low as $0.50 for non-peak driving and as high as $3.25 for the use of a 7 mile stretch of road between Downtown Denver and US-36); see also 23 U.S.C. § 166(b)(4)
schemes are to help reduce congestion during peak driving hours by offering a faster paced alternative to drivers who are willing to pay the price.

Another option California and Texas are looking into is creating privatized Truck only Toll lanes or TOT roads to help alleviate their transportation budget shortfalls. Currently, the California Department of Transportation is suggesting a toll road for trucks that would go from the Port of Long Beach serving both Riverside and San Bernardino counties and a toll road at the Mexican border that would have its own crossing.\(^5\) The reason behind TOT lanes, especially in California and Texas is competition for goods shipped from Asia.\(^5\) If Texas can create a private network of highways solely for trucks, which is not always in a state of disrepair (like some Southern California freeways), it can entice shippers to use its ports instead of California's.\(^5\) By creating TOT roads or lanes, states can reduce the congestion on public roads and quicken the pace that imported goods can be shipped to the United States' market.

Ultimately, no single project is the same as the next, but states have to be aware of certain issues when entering into a lease, a design-build-operate agreement, or a build-own-operate agreement. The first important issue is the non-compete clause. States should be cautious of clauses that can be too restrictive by preventing any maintenance of any road in a certain distance from the private toll road. For instance, when Indiana entered into an agreement with the ITR Concession Company, the state agreed not to build any road twenty miles in length and within ten miles of the new toll road for fifty-five years.\(^5\) The agreement also stipulated that US-20, which runs east to west through the state, is not a competing highway, but will be considered one if the state expands or improves it, and it comes within ten miles of the toll road.\(^5\) Therefore, if Indiana needs to do repairs or adjust the road because of congestion problems, they would be in breach of the contract.\(^5\)

An example of how a non-compete agreement can go sour is when the state of California wanted to improve State Route 91 (SR-91). In 1995, Orange County California leased the former median of SR-91 to the California Private Transportation Company, and the county agreed not to make improvements to the parts of the freeway that were not operated by the toll

\(^5\) See id.
\(^5\) See id.
\(^5\) Indiana Toll Road Concession Agreement by and between The Indiana Finance Authority and ITR Concession Company LLC (Apr. 12, 2006) available at http://www.in.gov/ifa/pdfs/4-12-06-Concession-Lease-Agreement.pdf.
\(^5\) Id.
\(^5\) See supra note 13, at 14. Currently Indiana does not have any plans in its long range transportation outlook to build such a road.
However, in the late 1990s, the public’s attitude changed with regards to the toll road. The toll road agreement’s non-compete clause prevented the increase of highway capacity within a one and a half mile area along the side of the toll road, but the state wanted to add merging lanes between the free lanes and the toll lanes to improve traffic safety. The non-compete clause allowed this, but the toll road company disputed the state’s safety analysis. In the end, the state was forced to buy the road back for $207.5 million. Though the situation in Orange County has not arisen in other jurisdictions, it is an illustration of what could take place.

In toll road agreements, there needs to be some flexibility so that the state can get the funds it needs, and the private company can make a profit. Nevertheless, states need to bargain for agreements that give them the ability to make, at a minimum, repairs to highways and roads within the vicinity of the toll way so that the state owned assets still have a viable life after the term of the lease expires. A lease agreement spanning several decades could allow competing roads to go into disrepair. Therefore, according Robert Poole, director of transportation studies at the Reason Foundation,

it makes sense to spell out in the agreement procedures for dealing with future needs, such as major additions to the toll road or allowances for a future administration to buy it back before the end of the agreement. The more the risk of unknowns can be minimized through such provisions, the better the deal that the State will be able to secure.

States should also be aware of how fast and by how much tolls can increase. Obviously, states should not leave it up to the private entity to come with the amount of the toll increases, but they should be aware of how toll increases will affect the users of the toll road in the future. For example, according to the Chicago Skyway sale agreement, toll prices started out at $2.00 (for passenger cars), went up to $2.50 beginning in 2005, and will stay there until 2008 when the price will rise to $3.00; in 2011, the price will increase to $3.50 and will increase fifty cents every two years until 2017.
Then, the toll price will be $5.00 and will increase either two percent, the percentage rate of the Consumer Price Index, or the nominal Gross Domestic Product every year, whichever is greater.\textsuperscript{64} Since February 2006 the Consumer Price Index in the United States has increased 2.4%,\textsuperscript{65} however, the Gross Domestic Product was up 6.3% in 2005 and 2006.\textsuperscript{66} If commuters realized wage increases like that there would not be much to complain about, but it is quite rare for an American worker to see a yearly increase in salary like that. If something similar was applied to the Pennsylvania Turnpike 67 years ago it would cost around $553 to travel from the Delaware River to the Ohio border, instead of the $22.75 it costs now.\textsuperscript{67} To combat such enormous toll increases states should insist on a ceiling amount that tolls can increase every year. This way the toll company is not seen as taking advantage of commuters, and public officials are perceived as being in tune to the needs of their constituents.

For states looking to lease or sell assets to private entities, generally large scale highways, bridges, and tunnel projects are well suited for such transactions as they are the most difficult to construct and maintain.\textsuperscript{68} A project like this can cost over two billion dollars, an amount extremely difficult to amass from public funding sources. If a beneficial agreement can be worked out between the state and private party for a long-term right to toll, then the state may only be responsible for a small portion of the total project cost.\textsuperscript{69}

IV. ESTABLISHING TOLL ROADS

Since establishing PPP Agreements is fairly new for states, the state legislature must either give an administrative agency the authority to enter into PPP Agreements for certain state projects, or establish a new agency or council within an existing agency to enter into the agreements. States used to be blocked from selling or leasing their roads until recently. On August 10, 2005,
President Bush signed into effect the Safe, Accountable, Flexible, Efficient Transportation Safety Act: A Legacy for Users or SAFETEA-LU. Along with guaranteeing $244.1 billion for the national highway system and other forms of transportation, SAFETEA-LU allows states to loan an equal share of their revenue from the act to a public or private company for the purpose of building a toll or non-toll facility on an interstate highway, thereby increasing the state’s opportunities to raise revenue by converting federal highways into toll roads. In order to receive the loan, the Secretary of Transportation must permit federal participation, and the private company must ensure compliance with the SAFETEA-LU’s guidelines and other federal laws. According to Tyler Duvall, the Assistant Secretary of the Department of Transportation (during a presentation before the Committee on House Transportation and Infrastructure Subcommittee on Highways, Transit and Pipelines hearing in February of 2007), the federal government’s role is to give away the majority of the responsibilities of running the highways and to ensure that the national transportation objectives are being achieved. “This includes ensuring that freight and passenger traffic can flow easily across state and international boundaries, and that the national connectivity of the highway system is maintained.” This means that the federal government will be watchful the possibility of states impeding interstate commerce by how they structure their toll pricing.

Nevertheless, the Chairman of the Subcommittee on Highways and Transit, Peter DeFazio implied that Congress might intervene if a state impedes interstate commerce by preventing individual states from entering into lease agreements over other forms of PPPs. For example, if a state was executing a Build-Own-Operate contract, but Congress determined the agreement might interfere with interstate commerce, Congress would step in and direct the state to enter into a Lease Agreement or a Build-Operate-Transfer type of agreement. However, can Congress require a state to enter into a different type of contract if they do not like the one the state is executing? According to the Commerce Clause, Congress has the power “to

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74. Id. at 13.
regulate commerce . . . among the several states," which means that “Congress may regulate when the commerce has interstate effects, even if the commerce occurs within a state." The Supreme Court articulated in Gibbons v. Ogden that Commerce “is traffic, but [also] something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." More precisely, commerce is business, and Congress is concerned that interstate commerce will be disrupted by truckers taking longer routes to avoid tolls because one state is charging higher tolls than another.

The Tenth Amendment states that powers not afforded to the United States by the Constitution are reserved for the states. The Constitution only gives Congress the police power in very few instances, but not over the states. According to the Supreme Court, the question would be whether the federal action “will impermissibly interfere with the integral governmental functions . . . ” of the state. Nevertheless, in United States v. Ohio Department of Highway Safety, the Sixth Circuit stated that “a scheme which seeks to enforce state cooperation in an effort to deal with a national problem will not fall under the Tenth Amendment if it leaves the states free to make choices which are essential to their function as states.” Here, the Environment Protection Agency (“EPA”) was suing the state of Ohio because Ohio failed to abide by the Clean Air Act by refusing to deny vehicle registration if a vehicle did not pass an emissions test. The court ruled that since air pollution is a national problem and "[t]he federal interest in controlling air pollution far outweighs any state interest in permitting non-complying vehicles to use public streets and highways," The states are bearing the brunt of the nation’s transportation budget shortfall since they are the owners of the roads that run through their state. Therefore, the state’s interest in ensuring its transportation infrastructure has enough funds to sustain itself into the future outweighs the federal government’s interest in interstate commerce. In order to guarantee that states and private toll road companies do not overstep their bounds in their PPP Agreement, the Department of Transportation needs to stay abreast on how that agreement might affect

78. Gibbons v. Ogden, 22 U.S. 1, 189-190 (1824).
79. U.S. Const. amend X.
80. See U.S. Const. art. I, § 8, cl. 17 (noting, among other things, that Congress has the power to “exercise exclusive legislation” over the District of Columbia and the U.S. Territories).
82. U.S. v. Ohio Dep’t of Highway Safety, 635 F.2d 1195, 1205 (6th Cir. 1980).
83. See id. at 1197.
84. Id. at 1205.
interstate commerce, and require states to amend them if they do so. As of yet, PPPs for toll roads are in their infancy and there has not been any real test of how a state has structured one.

Most importantly, for a state to have the authority to lease or sell its transportation assets to a private entity, the legislature will first have to pass authorizing legislation. In order to assist states in this process, the Federal Highway Administration has posted model legislation on its website, which is a survey of different states legislation. The legislation allows the state’s Department of Transportation to “solicit, receive, consider, evaluate, and accept a proposal” for a PPP. It also establishes criteria for the evaluation process each state should utilize for each proposal and offers the state two options on how the state will keep confidential or proprietary information exempt from disclosure under a state’s freedom of information act or open records act. Nevertheless, states must be careful to keep most, if not all, the records open once the bidding process is complete. This assures the public that the selection and contracting process is fair.

A problem that has arisen in states like Texas and Indiana in regards to authorizing statutes is that the Departments of Transportation have too much authority when entering into PPP agreements. For example, the Texas Department of Transportation currently has the sole authority to enter into development agreements “that provides for the financing, development, design, construction, or operation of a facility or a combination of facilities on the Trans-Texas Corridor,” and also has the sole authority to negotiate all of the terms with a private entity. This amount of power has troubled both the legislature and the public to the point where the Texas House passed a bill last year that would impose a two year moratorium on the construction of toll roads. The bill would create a “legislative study committee” that would

85. For example, a state could impede interstate commerce by charging higher than normal tolls, thereby forcing truckers to find less expensive, but longer routes. A state could also charge the same price as other states, but either have more tolls, or charge tolls for exiting the toll road at certain popular points as the Pennsylvania Turnpike Authority is considering doing now.
87. Id. at § 1-102(b).
88. Id.
89. See Poole & Samuel, supra note 61, at 10.
90. See id.
91. See id. at 6-7.
93. Id. at § 227.208(a).
94. See H.B. No. 2772, 80th Leg. (Tex. 2007) (which passed by a 123-17 vote on April 10, 2007, and has yet to pass in the Senate, where 26 of 31 senators support it); see also Gary Scharrer, Toll Road Moratorium Gets Overwhelming Support in the House, SAN ANTONIO EXPRESS NEWS, Apr. 11, 2007, at 9A.
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conduct . . . hearings and study the public policy implications of including in [the development agreement] a provision that permits the private participant to operate and collect revenue from the toll project. In addition, the committee shall examine the public policy implications of selling an existing and operating toll project to a private entity.95

According the bill’s sponsor, Representative Louis Kolkhorst, the moratorium allows the state to take a closer look “before we leap into contracts that last 50-plus years.”96 Indiana also gave oversight of any contract entered into between the state and a private entity to two separate review committees for any toll road purpose.97 Legislative maneuvers like the moratorium in Texas and the oversight committee in Indiana are the result of legislatures trying to bring some balance back to the contracting process where it is not only the state executive branch having control over PPP agreements.

V. THE PROS AND CONS OF PPP AGREEMENTS

A. PROS

States that either sell or lease their transportation assets can generate much-needed funds from the purchasing private entity. For the right to create the Illiana Expressway, the ITR Concession Company paid the state of Indiana $3.85 billion dollars in a single lump sum payment.98 Indiana is using the funds it has received to completely fund its “Major Moves” transportation project, retire more than $225 million in debt, and has deposited the remaining $3 billion.99 States can also get considerably more. For instance, Pennsylvania Governor Ed Rendell is seeking anywhere from $2 to $30 billion for the Pennsylvania turnpike; however, he stresses that anything on the lower end is clearly unacceptable.100

A huge lump sum payment for the sale or lease of a road can seem like winning the lottery to the state. This can be dangerous because a lump sum payment can disappear in a matter of years, while the private entity is left making money off of the toll road from anywhere from thirty to ninety-nine years. In order to avoid this, Governor Rendell said that any lease or sale

95. Id. at § 223.210(c).
96. Jake Batsell, Toll-Road Freeze Exempts Region: Legislature House Backs 2-Year Moratorium on Private Deals, but Outcry Spares 121 Plans, DALLAS MORN. NEWS, Apr. 11, 2007, 1A.
97. See e.g. Press Release, Indiana State Democrats, Illiana Expressway Legislation Approved by Senate (Feb. 12, 2007) (committees would be composed of eight legislators who would each advise and oversee the project’s progress).
99. Id. at 14.
would contain a limitation that would direct that the proceeds would only be spent on the transportation needs of the state. Further, at the Subcommittee on Highways and Transit hearing on Public-Private Partnerships in February of 2007, Chairman DeFazio and the witnesses all agreed that long term revenue sharing is favored over receiving a lump sum payment.

Toll roads built by the private sector, HOT lanes, and TOT lanes also have the capacity to reduce the congestion on all types of roads, public or private. Congestion increasingly worsened over the past fifteen years in urban areas in the United States. The White House contends that by building new roads and charging drivers to use them, congestion will decrease. “If a roadway is priced - that is, if drivers have to pay a fee to access a particular road - then congestion can be avoided by adjusting the price up or down at different times of day to reflect changes in demand for its use.” If a driver has a choice either to take a value priced lane, that is a HOT lane, or a toll road instead of a traffic-jammed freeway for a price, she might be more inclined to pay for her drive home instead of being stuck in traffic. Nevertheless, the White House emphasizes that value priced lanes and toll roads should only be focused in areas “where drivers demonstrate a willingness to pay a fee that is higher than the actual cost of construction,” which will allow communities to avoid raising taxes to build the lanes or roads. To accomplish this, states will have to commence feasibility studies that, among other things, focus on a rate the toll should be set to encourage users. Currently, this may be the only way to ensure that drivers want to use the lanes or road to avoid congestion.

With PPP Agreements, the risk of completing a project on time can be shifted to the private party since the flow of revenue depends on the project being completed. Therefore, the private entity has a strong incentive in ensuring the project is completed on time. Mega-projects have substantially higher risks of overrun costs, schedule slippage, and traffic shortfalls under public ownership. According to Tyler Duvall’s congressional testimony, a recent study conducted by the United Kingdom found that 88% of PPP projects were completed on time or earlier with no overrun costs, while public projects

101. Id.
102. See Public-Private Partnerships, supra note 57.
103. See Poole & Samuel, supra note 61, at 2-3 (discussion of the problems congestion has created).
105. Id.
106. Id.
108. See generally Halper, supra note 50.
109. See generally id.
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were completed on time 70% of the time, and were over budget 73% of the time.\textsuperscript{110} Lastly, private companies are more willing to take risks when encountering difficult situations than public entities.\textsuperscript{111} For instance, the private company operating California’s 91 Express Lanes in Orange County created value-priced congestion relief by charging different prices at different times of the day.\textsuperscript{112} Further, a private transportation company in Melbourne, Australia came up with the idea of using a sound tube for noise abatement instead of the sound wall used in the United States.\textsuperscript{113}

B. CONS

The differences in motives between the public and private sector can quickly lead to problems. With the sale or lease of transportation assets, there must be a balance between a fair price the state needs for the road, and the profit desired by private companies.

For example, when the state wants to get a project going they will solicit proposals from private companies. These proposals are to be assessed on things such as the project’s life, the inflation rate, the rate of revenue growth, and sometimes vehicle operating speeds.\textsuperscript{114} These proposals can cost a great deal of money, but to insulate themselves from these costs, private entities will put together a proposal that is not overly costly in order to maximize their profits.\textsuperscript{115} Putting together an inexpensive development plan can lead to surprises later, such as unexpected cost overruns.

Such a case is exemplified in the consortium that submitted the winning bid for the Channel Tunnel.\textsuperscript{116} The team of five banks and the developer contributed £47 million to the project, which represented only 0.96% of the £4.8 billion of the total projected cost.\textsuperscript{117} Yet, when the cost continued to grow, it became clear that no one had any idea on how much the project was going to cost.\textsuperscript{118}

\begin{itemize}
\item \textsuperscript{110} Public-Private Partnerships: Statement of Tyler D. Duval, supra note 72.
\item \textsuperscript{111} See Halper, supra note 50.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} See e.g. Tollroads News, Melbourne Oz Innovative Sound Tube, http://www.tollroadnews.com/node/2207/ (last visited Feb. 11, 2008).
\item \textsuperscript{115} Id. at 344.
\item \textsuperscript{116} Id. at 345-46.
\item \textsuperscript{117} Id. at 345.
\item \textsuperscript{118} Id. at 345-46. The Eurotunnel co-chairman even admitted financing had been sold so that no one had any idea on how much the Channel would cost, which is true since it cost almost twice as much as they forecasted.
\end{itemize}
States need to be careful to take private entities at their word about their proposals. To avoid this, Governor Corzine of New Jersey is emphasizing that his administration partake in careful due diligence. The purpose of such in-depth due diligence is to ensure that the state is equipped with the best possible understanding of the true value of the assets by the time states engage in negotiations.

With the rising concern of global warming and rising fuel costs it seems more appropriate for states to find more environmentally conscientious alternatives. It is predicted that the world will reach peak oil anytime between 2008 and 2018, when most of the toll road leases will still be in their infancy. Gasoline prices could easily be above ten dollars per gallon by then, and in order to get to their desired destination, drivers will be paying exorbitant tolls. Rising gasoline prices and more fuel efficient cars are why some states are turning to toll roads. However, the private entities that own/operate the toll roads could be facing the same predicament states are facing now if oil prices continue to rise. This is because drivers will not have a choice about putting fuel in their automobiles, but they will have an alternative to the way they get to their desired destination.

Instead of only offering toll roads as the sole transportation solution to dwindling budgets, states should also consider entering into PPP agreements with both bus and rail companies in order to develop improved transit systems. Further, both states and private entities should carefully consider how much tolls can increase over time in order to keep the toll roads competitive with both alternative roads and alternative forms of transportation. By doing this toll roads can ensure that they make a profit and states can ensure that they are not exacerbating this country’s dependence on foreign

120. Id.
121. “Peak Oil, or Hubbert’s Peak as it is sometimes referred to, is the point in time when global production of crude oil reaches in pinnacle and then enters into a permanent decline. While experts cannot say with exact certainty when Peak Oil will arrive, many believe that it may have already been surpassed. However, their [sic] are other petroleum experts who subscribe to the belief that Peak Oil hasn’t been witnessed yet but will within the near future.” Peak Oil Portal, What is Peak Oil?, http://www.peakoilportal.com/ (last visited Apr. 20, 2007).
123. See infra note 125 on discussion about toll increases on the Chicago Skyway.
125. See, e.g. Jeffrey Leib, RTD Opens Door to Tech, DENVER POST, Apr. 15, 2007, at A1 (noting that the Denver RTD is seeking both federal and private support to construct a maglev or magnetic levitation train to the Denver International Airport and to other points in the city).
sources of oil.

Some toll road critics are claiming that toll roads will not create a significant reduction in highway congestion because of the increasing number of drivers and cars on the road. In Indiana, critics against the Illiana Expressway have pointed to a 1992 Northwestern Indiana Regional Planning Commission study that shows a new expressway would do nothing to reduce congestion. The study says traffic would actually increase on the toll roads because much of the toll road’s capacity would be absorbed by vehicles coming from other congested roads. Other more recent studies completed for other states have shown that toll roads in fact increase congestion and promote disinvestment in urban areas by aggravating urban sprawl. In Texas, the San Antonio Toll Party points to SR-91 in Orange County California as to how toll roads cannot reduce congestion. This picture illustrates their point.

**FIGURE 3: ORANGE COUNTRY HOT AND NON-TOLL LANES**

![Image of Orange County Hot and Non-Toll Lanes]

HOT lanes - $8.50 to drive 10 miles

Non-toll lanes at peak driving time

The picture makes it clear that during the peak travel time of the day a


127. *Id.*

128. *Id.* The author points out that decisions should not be based on a 15 year-old study, but there are not any recent comparable studies to whether or not toll roads can reduce congestion.

129. *Id.*


131. *Id.* (picture taken by Edward C. Sullivan, California Polytechnic State University, San Luis Obispo, CA).
large number of drivers are choosing not to use the HOT lanes even though the road is jam packed. This picture, if an accurate representation of SR-91 at peak travel time, flies in the face of toll proponents arguments that drivers will choose to drive on a toll road or in HOT lanes if traffic is congested.

VI. CONCLUSION

Since PPP agreements for the sale or lease of roads in the United States are still in their infancy, it is still undetermined whether the benefits outweigh the costs, or vice versa. Nevertheless, as a result of the transportation budget shortfalls and deteriorating infrastructure states are facing, selling or leasing current or future transportation assets is certainly a viable way to maintain roads in at least minimal conditions. Additionally, with rising fuel prices and additional motor vehicles on the roads, states also need to develop alternatives to the current transportation infrastructure. In the end, it would be wise for states to heed what critics have to say about toll roads and then try to mitigate whatever problems could or do arise.
The Long and Lonely Road: the Saga of the Recent Amendments to the Hours of Service Regulations

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Catherine Spain*

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I. INTRODUCTION

Hours of service (the “HOS”) regulations have been in existence for more than seventy years.1 These rules are the primary regulations governing the number of hours a truck driver may work in a certain time period. For many years, the regulations were minimally revised, but recently, Congress focused on ensuring safer roads for the public. Numerous federal agencies have tried

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1 B.A. Lehigh University, June 2001.  J.D. University of Denver Sturm College of Law, May 2008. Executive Articles Editor, Transportation Law Journal 2007-2008. The author would like to thank Mr. James Hardman for his assistance with this topic.

to revise the regulations, but it is the most recent agency, the Federal Motor
Carrier Safety Administration (“FMCSA”), that has run into legal problems
each time new regulations are proposed. The agency lost a court decision in
2004 and litigated related regulations in December of 2006.\(^2\) In each proposal,
FMCSA did not follow the Administrative Procedures Act (the “APA”).\(^3\) In
addition, the newest proposal disclosed in January 2007 has brought up
numerous privacy questions that FMCSA might face in the future.\(^4\)

This article offers a background into the HOS regulations and revisions,
including the legal problems FMCSA faced with each proposal. In addition,
the new proposal for Electronic On-Board Recorders (“EOBRs”) is discussed
along with the possible privacy issues raised.

II. **HOURS OF SERVICE REGULATIONS: 1935-2006**

The Interstate Commerce Commission (“ICC”) was established on
February 4, 1887.\(^5\) ICC had authority over the business of all common carriers
engaged in the transportation of passengers or property.\(^6\) Although ICC
recommended regulations for motor carriers in 1928, HOS regulations were
not introduced until 1935, with the Motor Carrier Act.\(^7\) The Act provided for
the Secretary of Transportation to establish requirements for the qualifications
and maximum hours of service for drivers of a motor carrier.\(^8\) Over a period
of four years, ICC conducted studies and held hearings on the number of hours
worked by motor carrier drivers and adopted regulations establishing
maximum hours on March 1, 1939.\(^9\)

The 1939 HOS rules limited drivers to ten hours of driving within a
twenty-four hour period, unless the driver was off duty for at least eight
consecutive hours following the on-duty driving time.\(^10\) In a seven day period,
drivers were limited to sixty hours of on-duty time unless the company ran
vehicles every day of the week; then the limit was seventy hours within an
eight day period.\(^11\) A driver could obtain rest and restore available hours by

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3. Jami Jones, Appeals Court Hears OOIDA’s Hours-of-Service Arguments, LAND LINE
120506_hos_argument.htm.
7. Hours of Service of Drivers, 61 Fed. Reg. 57,252, 57,253 (proposed Nov. 5, 1996) (to be
10. Id.
11. Id.
using a sleeper berth in the truck. One year later, ICC mandated the use of Daily Logs for drivers to track their hours and other relevant information. These Daily Logs are generally referred to as Record of Duty Status (“RODS”). ICC explained that RODS allowed for

a standardized type of record to be maintained of the daily driving time and the weekly hours on duty which would be in the possession of each driver and which would enable a highway patrolman or other enforcement officer to determine immediately upon the stopping of the vehicle whether the driver had been on duty or was driving in violation of [the ICC] regulations . . . and to provide a record from which [the ICC] field representatives could readily determine whether or not the carriers are complying with the regulations.

In 1962 and 1963 the HOS rules were revised slightly. The ten hour limit on drive time was reserved, as was the sixty/seventy hour limit on on-duty time, but the “fifteen hour rule” was also established. The fifteen hour rule required those who had been on duty for thirteen hours after eight consecutive hours off duty, to stop driving after an additional two hours. Soon after, Congress passed the Department of Transportation Act which created the Department of Transportation (“DOT”) in 1967. All responsibility for motor carrier safety issues was transferred from ICC to DOT, which then assigned these responsibilities to the Federal Highway Administration (“FHWA”).

Enforcement of the HOS regulations was spotty before the 1990s. In 1994, Congress enacted the Hazardous Materials Transportation Authorization Act of 1994 in order to enforce the HOS regulations. Section 113 mandated that the Secretary of Transportation propose regulations to better ensure

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17. Id.
18. Id.
19. Id.
20. Id.
compliance with the HOS rules. Over a year passed and no rules were promulgated; Congress then mandated that FHWA issue an advance notice of proposed rulemaking regarding the HOS regulations. Less than a year later, FHWA published the advance notice.

Before FHWA is able to publish the proposed changes to the HOS regulations, authority over motor carrier safety issues is handed over to a new agency, FMCSA. The purpose behind the establishment of FMCSA was due to findings by Congress that the high number and severity of crashes involving motor carriers were intolerable; the number of inspections both on a federal level and state level were insufficient; and an additional agency was necessary in order to reduce the number of crashes involving large trucks. Congress clearly states that the agency, in carrying out its duties, “shall consider the assignment and maintenance of safety as the highest priority.”

### A. May 2000 Proposed Regulations

On May 2, 2000, FMCSA issued a notice of proposed rulemaking regarding the hours of service of drivers. The new HOS regulations were necessary as transportation systems had changed drastically. Motor carriers and other vehicles on the road could travel at higher speeds, more vehicles were using high-speed roads, and trucking was now a more prevalent way to transport goods since the HOS regulations were first introduced. The agency estimated that 755 fatalities and 18,705 injuries occurred each year due to fatigued motor carrier drivers.

The proposal dealt with five main issues. First, research showed there should be a more regular work day and that drivers are more alert when they work on a regular twenty-four hour cycle.

The proposal next dealt with the issue of drivers needing more

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27. Motor Carrier Safety Improvement Act of 1999 § 3-4
31. Id.
32. Id. at 25,546.
33. Id. at 25,553-54.
34. Id. at 25,554.
opportunities for daily and weekly sleep. The rules at the time only allowed for eight hours of off duty time; however, the rules did not factor in daily life activities such as eating meals or commuting. In order for the driver to obtain eight hours of sleep or more, the proposal would require “10 consecutive hours off duty within each 24-hour cycle, and two hours of additional time off in each 14-hour work period within each 24-hour cycle.”

The next suggestion was that any shift could not exceed twelve hours because research showed that performance decreases strikingly after more than twelve hours of work. FMCSA also considered the time of day a driver is on the road. The research conducted showed that there is a higher risk of accidents at night, so the proposal required drivers to work no more than five consecutive night shifts. Finally, FMCSA found that the potential for safety issues increased when drivers did not comply with HOS regulations. Therefore, FMCSA proposed that EOBRs be installed to track HOS, rather than relying on the paper log books that had been used since the 1940s.

FMCSA received more than 53,000 comments on the proposed changes to the HOS regulations; most of the comments were unfavorable. After almost ten years of research and hearings about revising the regulations, critics felt that the revisions were “restrictive, cumbersome and impractical.” The large amount of criticism on the May 2000 Proposal resulted in Congress passing two consecutive DOT Appropriations Acts that prohibited the agency from promulgating a final rule.

B. APRIL 2003 REGULATIONS

As a result of the DOT Appropriations Acts, FMCSA hired an independent consultant to review alternatives to the HOS regulations before issuing a new proposal. Despite its diligent efforts, proposed regulations from FMCSA were not issued quickly enough for Public Citizen, a public interest group that had been publicly pushing for changes to the HOS regulations. To push the agency to promulgate new HOS regulations faster,

35. Id. at 25,553.
36. Id. at 25,554.
37. Id. at 25,540.
38. Id. at 25,556.
39. Id. at 25,557-58.
40. Id. at 25,546.
41. Id. at 25,563.
43. Johnston, supra note 21.
44. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. at 22,459.
45. Id. at 22,459.
the group sued the Department of Transportation. In November 2002, Public Citizen and a number of other safety groups joined together to file a lawsuit, forcing FMCSA to issue new HOS rules.46

FMCSA settled the lawsuit with Public Citizen in February 2003 and agreed to issue a final HOS rule.47 On April 28, 2003, FMCSA promulgated the new rule. The new rule included provisions that required drivers to take off duty time after ten consecutive hours of work or after a fourteen hour shift.48 The provisions also increased driving time from ten to eleven hours, and permitted drivers to restart the driving clock after thirty-four hours of off duty time.49 FMCSA reserved the sleeper berth exception because the practice was so prevalent in the industry.50 The issue of installing EOBRs in motor carriers was not discussed in the new rule, even though it was included in the 2000 proposed rule.51

C. PUBLIC CITIZEN V. FMCSA

After an agency promulgates a rule, often times a public interest group or affected company will sue under the “arbitrary and capricious” standard found in the APA.52 This Act is the governing instrument for federal agency actions. The reviewing court must determine whether the action by the agency was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”53 In order to do so, the court must find that there was a “rational connection” between the evidence the agency possessed and the decision made regarding the evidence.54

The court must conduct a “thorough, probing, in-depth review” of the agency action.55 In order to do so, the court asks four questions:

(1) if the agency acted within the scope of its authority;
(2) if the agency can explain its decision;
(3) if the facts the agency relies on are in the record; and

49. Id.
50. Id. at 22,465-66.
51. Id. at 22,502.
53. Administrative Procedure Act § 2.
Although standard is narrow, one of the ways a court can find against the agency is if the agency “entirely failed to consider an important aspect of the problem.”

In *Public Citizen v. FMCSA*, plaintiffs Public Citizen, Citizens for Reliable and Safe Highways (CRASH), and Parents Against Tired Truckers (PATT) argued that the 2003 HOS regulations “failed to consider the impact of the rules on the health of drivers, a factor the agency must consider under its organic statute.” Therefore, the plaintiffs argued FMCSA’s promulgation of the regulations was arbitrary and capricious. The court agreed, holding that the agency likely departed from congressional intent and ruled in favor of Public Citizen.

Under 49 U.S.C. § 31136(a)(4), FMCSA is required to set minimum safety standards to ensure that “the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.” Not mentioned in the 2003 regulations was the impact of the new rules on a driver’s health. Although FMCSA argued that the health of the driver “permeated the entire rulemaking process,” the court found that the agency needed to speak directly to the issue of the health of drivers and explain why it proposed the rules it did.

In addition to the court holding that the 2003 rule was arbitrary and capricious, the court also had other concerns with the rule. Even though research showed that driver performance “begins to degrade after the 8th hour on duty and increases geometrically during the 10th and 11th hours,” FMCSA increased the allowable driving time from ten hours to eleven hours. The court also questioned the sleeper-berth exception, as research in the proposal found that sleep in a berth is less restorative than in a bed and that solo drivers did not use the sleeper berth as effectively as team drivers. If this was true, the court reasoned, then these facts support eliminating the sleeper-berth

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59. *Id.*
63. *Id.* at 1217.
64. *Id.*
65. *Id.* at 1218.
66. *Id.* at 1219.
exception, especially for solo drivers.\textsuperscript{67}

The court also discussed the lack of a requirement for motor carriers to install EOBRs.\textsuperscript{68} The agency left out the requirement of EOBRs because it felt that it could not adequately estimate the costs and benefits of installing the systems, it did not want to test out the existing devices, and was concerned with privacy issues regarding drivers.\textsuperscript{69} The court chastised the agency, stating that Congress directed FMCSA to collect and analyze data on automated and tamper-proof recording devices.\textsuperscript{70} The court reasoned that part of the agency’s job is to use its experience in the area to estimate costs and benefits of the systems.\textsuperscript{71} Also, because the agency recognizes that non-compliance with HOS regulations is prevalent in the industry and admitted this to the court, the agency should have at least attempted to analyze EOBRs for possible benefits.\textsuperscript{72}

The last issue the court discussed in the opinion was the thirty-four hour restart provision.\textsuperscript{73} The new provision would increase the maximum number of hours a driver could work each week.\textsuperscript{74} The fact that FMCSA did not address the increase in the hours of driving time each week made the court question the rule’s rationality.\textsuperscript{75}

The U.S. Court of Appeals vacated the HOS rules on July 16, 2004.\textsuperscript{76} The court remanded the case back to FMCSA for the agency to specifically consider the effect the new rules would have on a driver’s health.\textsuperscript{77} In addition, FMCSA was ordered to revisit the change in the number of allowable driving time hours, the availability of sleeper berths, the thirty-four hour restart time, and research the costs of EOBRs.\textsuperscript{78}

One month later, FMCSA contracted with the Transportation Research Board of the National Academy of Sciences to review literature regarding the health effects on drivers from the HOS regulations - including fatigue.\textsuperscript{79} Although the U.S. Court of Appeals ruled against FMCSA, two months after the ruling, Congress passed the Surface Transportation Extension Act of

\textsuperscript{67} Id.
\textsuperscript{68} Id. at 1220.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 1221.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 1221-22.
\textsuperscript{73} Id. at 1222-23.
\textsuperscript{74} Id. at 1222.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 1211.
\textsuperscript{77} Id. at 1216.
\textsuperscript{78} Id. at 1217.
This Act extended the April 2003 HOS final rule until September 30, 2005, or until FMCSA issued a new rule; whichever came first.

D. NOVEMBER 2004 SUPPORTING DOCUMENTS RULE

Before FMCSA issued new HOS regulations, the agency needed to clarify the documents a driver kept to verify the accuracy of the Driver Log. In 1982, a final rule regarding supporting documents and RODS was issued by FHWA. The rule required motor carriers to retain documents that verify the accuracy of the RODS for a period of six months. However, there was a loophole in the rule as the agency did not define the term “supporting document.” Compliance with HOS rules was therefore difficult to ensure as drivers would throw away or not collect the documents to support the RODS. In order to stop that practice FMCSA promulgated the supporting documents rule in 2004. The rule required that any written or electronic trip document must include the driver’s name or the vehicle number in order for the document to be connected with the individual driver.

There were numerous critics of the supporting documents proposal. The American Trucking Association argued that the rule conflicted with the requirements of the Hazardous Materials Transportation Authorization Act of 1994; did not meet the requirements of the Regulatory Flexibility Act and Paperwork Reduction Acts; lacked information needed by the Office of
Management and Budget for regulatory analysis and cost evaluation; and subjected motor carriers to more record-keeping responsibilities. Nonetheless, the Office of Management and Budget conducted a review of the proposal and cleared the rule for final publication on September 14, 2006. However, FMCSA did not publish the final rule because errors in the paperwork analysis portion of the proposal were found. On October 25, 2007, this proposed rule was withdrawn with FMCSA intending to publish new proposed rules sometime in the future.

E. JANUARY 2005 PROPOSED REGULATIONS

FMCSA issued the new HOS rules on January 24, 2005. The rules were identical to the April 2003 regulations vacated by the U.S. Court of Appeals. Despite the prior court opinion, a legislative proposal was announced a month later that, if passed, adopted the April 2003 regulations as if they had been adopted by a prior act of Congress. A separate legislative proposal was also put forth by the Bush administration proposing that FMCSA retain the authority to modify HOS rules through normal rulemaking, but limit its ability to consider the health of the driver. Under the Bush Administration’s proposal, FMCSA’s jurisdiction would be limited to ensuring that the operators of commercial motor vehicles were free from death or serious physical harm. If passed, the proposals would have circumvented the U.S. Court of Appeal’s ruling on the April 2003 proposed HOS regulation changes and changed the focus of the agency.

DOT fully endorsed the legislative proposal as the agency believed that under the April 2003 regulations drivers would be able to rest more, and, that the proposal offered “better use of driver time, more efficient handling of freight by shippers and receivers, and increased productivity.” In addition, DOT argued that continuing to work on the changes to HOS regulations was

95. Hours of Service of Drivers; Supporting Documents SNPRM; Withdrawal, 72 Fed. Reg 60,614, 60, 614 (Oct. 25, 2007).
97. Id.
98. The FMCSA tries to shield hours rules: proposal would write regulations into statutory law, 162 COMMERCIAL CARRIER JOURNAL 14, 14 (2005).
99. Id.
100. Id.
101. Id.
Recent Amendments to Hours of Service Regulations

The time-consuming and a large number of agency resources were participating in the project, taking time away from other duties. The highway bill that proposed to change the scope of FMCSA eventually died at the end of the 108th Congress; FMCSA decided to continue with the regulatory process using the January 2005 proposed regulations.

On August 25, 2005, the HOS rules were published as final rules. In the publication, FMCSA was vigilant in discussing driver health. The agency researched health and fatigue studies, consulted with safety and health experts, and contracted out literature reviews to ensure that all of the court’s issues with the April 2003 rule were covered. The report also cited data from the Fatality Analysis Reporting System (FARS), which is maintained by the National Highway Traffic Safety Administration. According to FARS, the total number of fatal crashes involving large trucks “decreased by 166, from 3,120 in 2003 to 2,954 in 2004.” The number of fatigue-related truck driver crashes dropped by 20.4 percent. While FMCSA admits the data sample is small, the study was cited in the final rule to suggest that the number of fatigue-related crashes is decreasing due to the new HOS regulations.

Four days after the 2005 HOS regulations were published, OOIDA filed a petition to challenge the new rules. Soon after, the California Trucking Association and the International Brotherhood of Teamsters joined the lawsuit. Public Citizen also filed a lawsuit in February 2006 against FMCSA over the 2005 HOS regulations.

One of the arguments made by the coalition was that the final rule was too different from the proposed rule because the agency offered too many suggestions regarding the sleeper berth exception; as such, there was no way to know which arrangement the agency was going to use in the final rule. An agency may make substantial changes from a proposed regulation; however, the final changes must be “in character with the original scheme” and “a

102. Id.
103. Id.
104. Hours of Service of Drivers, 49 C.F.R. §§ 385, 390, 395.
106. Id. at 49,998. FARS is a national census of fatal crashes involving all motor vehicles, including large trucks. Id. at §§ 385, 390, 395 at 49,999.
107. Id.
108. Id.
109. Id.
111. Id.
logical outgrowth” of the proposed regulation.\textsuperscript{114} The court will determine if the final rule was a logical outgrowth of the proposed regulation; otherwise, the regulation will be sent back to the agency to re-open for comments.\textsuperscript{115}

\section*{III. The Reintroduction of EOBRs}

After publishing the final rule on HOS regulations, FMCSA turned to the question of EOBRs. EOBRs were originally in the May 2000 proposed regulations, but the agency dropped the issue in the 2003 proposed regulations due to the controversy.\textsuperscript{116} In the seven years between EOBR proposals, the agency nonetheless continued to study the technology in hopes of reintroducing the idea in the future.\textsuperscript{117}

\subsection*{A. January 2007 Proposed Regulations on EOBRs}

On September 1, 2004, FMCSA published an advance notice of proposed rulemaking and requested comments on EOBRs.\textsuperscript{118} At the same time, FMCSA conducted its own research into the feasibility of incorporating EOBRs into the trucking industry and sponsored numerous outside studies.\textsuperscript{119} The proposed rulemaking was published in the Federal Register on January 18, 2007.\textsuperscript{120}

The EOBR technology standards FMCSA proposed include: (1) the ability to identify the individual driver; (2) the resistance of the system to tampering and providing inaccurate information; (3) the machine’s ability to provide a record of the work day for auditing purposes; (4) the ease and speed of enforcement personnel to access the information; (5) the protection given to personal or proprietary information stored in the EOBR; (6) the basic cost of the system; and (7) acceptability of the systems by drivers.\textsuperscript{121} In order to track where the truck is located, Global Positioning Satellite (GPS) technology or another location tracking system would be required.\textsuperscript{122}

As a surprise to many, FMCSA’s proposal did not make EOBRs mandatory for all motor carrier companies. To ease companies into the idea of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{114} Natural Res. Def. Council v. EPA, 824 F.2d 1258, 1283 (1st Cir. 1987) (quoting S. Terminal Corp. v. EPA, 504 F.2d 646, 658-59 (1st Cir. 1974)).
\item \textsuperscript{115} Id.
\item \textsuperscript{117} Id. at 2343.
\item \textsuperscript{119} Electronic On-Board Recorders for Hours-of-Service Compliance, 72 Fed. Reg. at 2343.
\item \textsuperscript{120} Id. at 2340.
\item \textsuperscript{121} Id. at 2343.
\item \textsuperscript{122} Id.
\end{itemize}
\end{footnotesize}
Recent Amendments to Hours of Service Regulations

EOBRs in the future, the agency recommended only those motor carriers with a “pattern violation” would be required to install and use an EOBR for two years.123 A “pattern violation” is defined as “a 10 percent or greater violation rate” of HOS regulations.124 FMCSA estimated that within the first two years of enforcement, EOBRs would be mandatory for 930 carriers with a total of 17,500 drivers.125

FMCSA encouraged voluntary adoption of EOBRs in the industry.126 In the proposal, the agency offered incentives for those companies that adopted the new technology, such as relaxing the HOS supporting document requirements.127

B. REACTIONS TO THE EOBR PROPOSAL

Trucking industry groups reacted differently to the EOBR proposal. For example, despite the application of HOS regulations to its motor carriers entering the United States, the Canadian Trucking Alliance supported the proposal; noting the impact of the proposal to be minor.128 The American Trucking Association found EOBRs to be a sensible approach as well.129 The Owner-Operator Independent Drivers Association (“OOIDA”), on the other hand, considered the rule to be “a flawed attempt to deal” with HOS rule violations.130 OOIDA argued that EOBRs would not ensure HOS compliance.131 Finally, Public Citizen concluded that the 2007 proposed rules did not go far enough to provide safety on public roads, encouraging FMCSA adopt a rule which would require all commercial trucks to install EOBRs.132

C. POTENTIAL LEGAL ISSUES WITH EOBR PROPOSAL

The 2007 proposed regulations on EOBRs raised a number of potential legal issues, including the issue on privacy. Although the agency briefly mentioned privacy in the 2007 regulations, the final rule will have to include

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123. Id. at 2340.
124. Id.
125. Id. at 2380.
126. Id. at 2340.
127. Id. at 2344.
131. Id.
132. Id.
more information in order to assuage the privacy concerns of drivers.\footnote{Electronic On-Board Recorders for Hours-of-Service Compliance, 72 Fed. Reg. 2340, 2369-70, 2382 (proposed Jan. 18, 2007) (to be codified at 49 C.F.R. pts. 350, 385, 395, 396).}

\begin{itemize}
\item \textbf{Compelling Government Interest}
\end{itemize}

The first instructive case on whether EOBRs infringe on a driver’s privacy is \textit{Skinner v. Railway Labor}.\footnote{Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 602 (1989).} In \textit{Skinner}, the Supreme Court addressed the Federal Railroad Administration’s rule that mandated drug tests for employees involved in train accidents.\footnote{Id. at 606.} Under the Federal Railroad Safety Act of 1970, the agency may prescribe “appropriate rules, regulations, orders, and standards for all areas of railroad safety.”\footnote{Id.} The Supreme Court balanced the compelling government interest – railroad safety – against the privacy concerns of the railroad employees.\footnote{Id. at 633.} The Court found that alcohol and drug abuse by railroad employees posed a safety risk to the public that outweighed the privacy interests of the employees.\footnote{Id.}

In the case of EOBRs, FMCSA has a compelling government interest that driver fatigue is a threat to other persons (as well as the driver) on the road. Compared to \textit{Skinner}, FMCSA’s compelling government interest is high, perhaps even more so than in \textit{Skinner} because more people are injured or killed by fatigued motor carrier drivers than impaired railroad engineers.\footnote{See Public Citizen, supra note 111 (citing some 5,000 deaths and 110,000 injuries each year attributable to driver fatigue).}

The fact that EOBRs do not infringe on a driver’s privacy is further supported by the Supreme Court’s decision in \textit{National Treasury Employees Union v. Von Raab}.\footnote{Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 656 (1989).} In that case, the Court held that the U.S. Customs Service properly implemented a drug-screening program for certain employees within the agency.\footnote{Id. at 677.} In limited circumstances, the Court reasoned, the Government’s need to conduct suspicionless searches outweighs the privacy interests of the employee.\footnote{Id.} If employees are subject to “background investigations, medical examinations, or other intrusions,” those employees, such as the employees of the U.S. Customs Service, should have a diminished expectation of privacy.\footnote{Id.} Applying the Court’s rationale to the implementation of EOBRs, FMCSA may argue that a motor carrier driver’s expectation of privacy should be lower than that of a non-regulated person, as

\begin{itemize}
\item \textbf{Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 602 (1989).}
\item \textbf{Id.}
\item \textbf{Id. at 633.}
\item \textbf{Id.}
\item \textbf{Id. at 606.}
\item \textbf{Id.}
\item \textbf{Id. at 633.}
\item \textbf{Id.}
\item \textbf{Id. at 677.}
\item \textbf{Id.}
\end{itemize}
the motor carrier driver is also subject to medical exams, drug and alcohol tests, and extensive record-keeping rules.\footnote{144}{See 49 C.F.R. § 391.1 (1995); 49 C.F.R. § 382.101 (2001); 49 C.F.R. § 395.8 (1998).} 

The Court of Appeals for the Ninth Circuit also dealt with regulations requiring random drug testing in \textit{Bluestein v. Skinner.}\footnote{145}{\textit{Id.}} \textit{Bluestein} involved private sector employees who would be required to partake in random drug testing through a Federal Aviation Administration regulation.\footnote{146}{\textit{Id. at}, 456-457 (quoting Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989)).} The court conceded that the random testing of employees is a factor to consider when weighing privacy issues against the government interest; however, the court chose safety over privacy,\footnote{147}{\textit{Id. at} 457.} and concluded that testing random employees without notice would be a greater deterrent against drug use.\footnote{148}{\textit{Id.}} Applying the \textit{Bluestein} court’s rationale to the implementation of EOBRs, FMCSA may argue that the intrusion into the information in EOBRs would similarly be a deterrent against HOS violations.

Perhaps the best case in support of EOBRs is \textit{International Brotherhood of Teamsters v. Department of Transportation.}\footnote{149}{\textit{Int’l Bhd. of Teamsters v. Dep’t of Transp.}, 932 F.2d 1292, 1292 (9th Cir. 1991).} The Court of Appeals for the Ninth Circuit essentially followed the previous cases regarding drug testing of employees. There, FHWA issued a rule requiring four different drug tests for commercial drivers: (1) random; (2) pre-employment; (3) post-accident; and (4) biennial.\footnote{150}{\textit{Id.} at 1294.} Following \textit{National Treasury}, the court held that the expectation of privacy for commercial truck drivers should be less than the public, in general, due to the highly regulated environment and the numerous federal regulations regarding a driver’s qualifications.\footnote{151}{\textit{Id.} at 1300.} “The intrusiveness of these drug-testing regulations, on their face, must be measured against the impositions on drivers’ privacy already worked by the nature of their job and its attendant regulations.”\footnote{152}{\textit{Id.}} The government interest for FHWA was to avoid accidents, deter drug use, and make roads safer.\footnote{153}{\textit{Id.} at 1303-04.}

If the 2007 EOBR regulations are challenged on the issue of privacy, FMCSA has a strong argument that the collection of data from the EOBRs is less intrusive than drug testing. Though information concerning when a driver is sleeping and where the driver is located may have some bearing on his or her privacy, drivers are already subject to numerous requirements and regulations, not to mention that the current paper RODS provide the same information as the EOBRs would convey.
ii. Searches Under the Fourth Amendment

Another aspect of privacy that FMCSA may confront is a person’s privacy protection under the Fourth Amendment.\(^{154}\) First, in the context of government action, drug testing is a search under the Fourth Amendment.\(^{155}\) Furthermore, the Fourth Amendment mandates that all searches and seizures be reasonable.\(^{156}\) However, there is an exception for special needs that make the “warrant and probable-cause requirement impracticable.”\(^{157}\) To start, the business must be a pervasively regulated business, such as an alcohol distributor or a gun dealer.\(^{158}\) A pervasively regulated business is one that has a “long tradition of close government supervision.”\(^{159}\) Because of that government supervision, someone in a closely regulated industry should have a diminished expectation of privacy.\(^{160}\)

There are three questions a court must ask when determining if a warrantless inspection on a closely regulated business is reasonable.\(^{161}\) First, there must be a substantial government interest in the regulatory scheme and that regulation must reasonably serve the substantial interest.\(^{162}\) Next, the warrantless inspections must further the regulatory scheme.\(^{163}\) Finally, the statute’s inspection program must advise the owner of a potential search, and the search must be limited in time, place, and scope.\(^{164}\)

The EOBRs pose no Fourth Amendment problem. The motor carrier industry is a pervasively regulated business as both drivers and motor carrier companies are subject to regulations. FMCSA has a substantial government interest in acquiring the information from the EOBRs. FMCSA’s goal is to ensure safety on the roads and compliance with HOS regulations. The EOBRs tell the agency official if the HOS regulations have been followed. Though an officer or agency official would not give notice to the truck driver before an inspection of the EOBR, for fear of the driver tampering with the device and the stored information, FMCSA agency statute would provide notice to drivers that they could be subject to a search. Otherwise, if the information is tampered with before the official can view the information, there is no way to ensure that the HOS regulations are being followed.

\(^{154}\) U.S. CONST. amend. IV.
\(^{156}\) U.S. CONST. amend. IV.
\(^{157}\) Skinner, 489 U.S. at 619.
\(^{159}\) Id. at 700.
\(^{160}\) Id. at 702.
\(^{161}\) Id.
\(^{162}\) Id.
\(^{163}\) Id.
\(^{164}\) Id. at 703.
Despite the strong application of the Burger case to EOBRs, some distinctions may exist. The Burger test applied to closely regulated businesses;\(^{165}\) a truck could be considered a driver’s home, as well as his business, and as such, may increase the driver’s expectation of privacy while he is sleeping or otherwise undertaking activities in his “home.”\(^{166}\)

### iii. Privileged Work Product

Another privacy issue that worries truck drivers is whether the information stored in the EOBR may be used against them in accident litigation. *In re Air Crash* gives some insight into the potential privacy problems a driver might encounter.\(^{167}\) On December 20, 1995, an American Airlines flight crashed in Colombia; tragically, 159 people died.\(^{168}\) The plaintiffs served a request on the airline for documents which were part of the ASAP program; the program was a “voluntary pilot self-reporting program designed to encourage pilots to report incidents and violations.”\(^{169}\) Data such as speed, navigational problems, and altitude were included in the documents; pilots who reported these incidents were given incentives, such as a reduced enforcement action by the Federal Aviation Administration.\(^{170}\)

American Airlines wanted to protect the information and argued two privileges: (1) the “self-critical analysis privilege”; or (2) a new common law privilege for the documents in the ASAP program.\(^{171}\) The court held that the self-critical analysis privilege could not be applied in this case.\(^{172}\) First, the privilege does not extend to objective facts, just to impressions and opinions; second, the privilege is only necessary if the flow of protected information would stop if discovery was allowed; and third, the privilege only extends to reports that were prepared with the expectation that the information would be kept confidential.\(^{173}\) However, the court held there was a limited common law privilege.\(^{174}\) In doing so, the court looked at three factors:\(^{175}\) (1) the private interests and public interests; (2) if there is an evidentiary benefit from denying the privilege; and (3) if the privilege is recognized by state courts and legislatures.\(^{176}\)

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165. *Id.*
166. *Id.* at 700.
167. *In re Air Crash Near Cali, Colombia, 959 F. Supp. 1529, 1529 (S.D. Fla. 1997).*
168. *Id.* at 1530.
169. *Id.* at 1531.
170. *Id.*
171. *Id.* at 1532.
172. *Id.*
173. *Id.*
174. *Id.* at 1533.
175. *Id.*
176. *Id.* at 1533-1535.
Truck drivers have a right to worry about the information stored on the EOBR. It could indicate if they speeding or if they were driving in violation of HOS rules. The burden would be on the party opposing discovery to prove why the information should be protected. Currently, there is no privilege that precludes discovery of recorded data in accidents. The self-critical analysis privilege would not be available to the information stored on the EOBR because the information would be facts, not opinions; the information flow would not be hindered by discovery because the information would already be required by FMCSA; and there is no expectation that the information would be kept confidential as agency officials and law enforcement would have access to the information. Nonetheless, a driver could argue for a limited common law privilege, which arguably, would permit them to be more forthcoming in the details of the incident. FMCSA could then use the information (provided either by the driver or EOBR) to increase safety on the roads.

VI. CONCLUSION

FMCSA has made numerous missteps while trying to change the HOS rules. Congress has pushed for revisions for a great number of years, along with many public interest groups. Trucking companies and industry groups would like to increase safety, but worry about costs and privacy issues. There is a lack of agreement between all of the parties as to the rules and technology needed to best accomplish the safety goals of the agency. The agency has not conformed to APA procedures and has lost in court because of it.

In July 2007, the Court of Appeals for the D.C. Circuit ruled on the challenges made to the 2005 HOS regulations. The court held that FMCSA violated provisions of the APA by failing to allow parties to comment on the proposed rules and that FMCSA did not explain the reasons and methodology behind the changes. FMCSA believed that the court found against the agency for procedural problems with the announced changes to the HOS regulations, but not with the substantive changes to the regulations. Therefore, in December 2007, FMCSA issued an interim final rule to adopt the 2005 HOS Regulations. FMCSA requested comments from interested parties until February 15, 2008, and announced that a final rule will finally be

177. Id. at 1531.
179. OOIDA v. FMCSA, 494 F.3d 188, 188 (D.C. Cir. 2007).
180. Id. at 193.
182. Id. at 71,247.
Recent Amendments to Hours of Service Regulations

issued sometime later in 2008.\footnote{183}

Changes to HOS regulations may finalize in 2008, but if the 2007 proposed regulations for EOBRs become final rules, the agency can expect more litigation in its future.

\footnote{183. Hours of Service of Drivers, 72 Fed. Reg. at 71,247.}
Interstate Wind: Using New Technology to Enhance Transportation Fuel Investments

Note

Joshua Prok*

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I. INTRODUCTION

The success or failure of any energy project depends on policy and politics, technology, and economics. Policy can influence the development of

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technology to accomplish an energy goal.\textsuperscript{2} It can make a project implementing that technology more economical by providing public funds.\textsuperscript{3} Also, public policy may reflect society’s support for certain energy goals furthered by energy projects.\textsuperscript{4} This paper endeavors to identify the law, policy, politics, and financing relating to innovative wind energy systems. Primarily, this paper addresses the possibilities of harnessing the wind created by vehicles on interstate highways to generate electricity through recent technological advances.

Exploring recent technology, policy and political trends, and financial opportunities shows that innovative wind generation projects within or adjacent to ground transportation corridors should be seriously considered as a means of improving the return on continuing investments in transportation fuels.

\section*{II. Expanding the Wind Resources Paradigm}

Wind is commonly defined as “air in natural motion, as that moving horizontally at any velocity along the earth’s surface” or “any stream of air, as that produced by a bellows or fan.”\textsuperscript{5} These multiple definitions suggest that wind may exist as a natural phenomenon, or that it may be manufactured. An example of manufactured wind is the air flow produced by vehicles, palpable while standing on a sidewalk as a bus charges by.\textsuperscript{6} Highways contain even more dramatic turbulence.\textsuperscript{7} And, a “piston effect” is created by air pushed through highway and transit tunnels by automobiles and trains.\textsuperscript{8}

\begin{itemize}
\item \textsuperscript{2} See id.
\item \textsuperscript{3} Id.
\item \textsuperscript{4} Id.
\item \textsuperscript{6} Large vehicles used in mass transit and motor carrier operations are probably the best producers of Interstate Wind. Thus, as wind in transportation corridors is developed as an energy source, the operators of these vehicles should be recognized for their enhanced contributions to the wind supply.
\item \textsuperscript{7} Posting of Arizona State University (Joe) to Archinect, http://www.archinect.com/schoolblog/blog.php?id=C0_374_39 (Apr. 10, 2007) [hereinafter De La Ree Project] (finding that “[a]verage vehicle speeds on the . . . highways are approximately 70 mph,” and that “the wind stream created over the freeways by our primary mode of transportation will create an average annual wind speed well beyond . . . 10 mph.”).
\item \textsuperscript{8} See FEDERAL HIGHWAY ADMINISTRATION, FEDERAL TRANSIT ADMINISTRATION, HIGHWAY AND RAIL TRANSIT TUNNEL INSPECTION MANUAL 2-15 (March 2003), http://ntl.bts.gov/lib/23000/23700/23726/inspect.pdf (figure 2.13 within the Manual depicts “air flow” with arrows coinciding with the “flow of traffic”); see also Public Art Program, Kinetic Light Air Curtain, http://www.flydenver.com/guide/art/detail.asp?ID=17 (last visited Feb. 2, 2008) (describing Antonette Rosato and William Maxwell’s installation containing, “a grouping of 5,280 propellers laid out on a grid system that changes from tight to loose configurations as the train passes. The propellers are made of reflective stainless steel and are 12” in diameter. The work, which includes blue fluorescent lighting,
Indeed, Congress has implicitly recognized this reality by not limiting its definition of “known wind resources” to natural phenomena. However, the wind industry seems sedentary in its thinking about where the wind is: the common paradigm is that wind can only be harnessed where it is created by meteorological effects. The National Renewable Energy Laboratory (NREL) illustrates this through its Wind Energy Resource Atlas of the United States that displays only collected meteorological site data. By ignoring the wind on our ground transportation corridors, however, NREL paints an incomplete picture.

By indulging in the suggestion that wind exists on highways, one opens an additional 160,000 miles of potential wind resources that comprise the National Highway System (NHS). The NHS is also depicted in map form (see Figure 1 below). An interposition of the Wind Energy Resource Atlas of the United States and the NHS provides an enhanced graphical representation of where wind is available.

The locations where the dark and thin lines representing the NHS are most noticeable – the southeastern United States – represent the areas where access to wind technology has not been recognized up to this point. Again, these areas are concentrated in the southern half of the country, and predominantly in the southeast.

By changing our conception of what constitutes a wind energy resource, we can redefine the potency of wind as a source of electricity for our nation’s future. Also, thinking of wind as a byproduct of ground transportation will aid society in gaining a better return on its investment in fossil fuels and other transportation fuels. As the ceiling has come off crude oil prices recently, and only continues to skyrocket, Congress feels more pressure to pass more aggressive legislation that addresses the implementation of alternative energy

13. Id. (The image may be viewed by following the map link on the right side of the screen.)
III. THE TECHNOLOGY OF INTERSTATE WIND

Recent technological innovations provide the impetus to rethink the location of wind resources. Their inventors suggest these devices can supplement the existing power grid or facilitate other transportation modes, such as light-rail or subway trains. Viewing wind availability as a function of traffic patterns instead of natural phenomena will therefore increase the predictability of new wind systems over traditional systems reliant on natural wind.

As stated earlier, the piston effect of wind is manifested when vehicles rush through enclosures. Concrete medians, referred to as Jersey barriers, commonly enhance safety on the highways by separating traffic from opposing directions. The New Jersey Barrier adds to the safety function of the concrete median by stacking two Darius turbines in a row within the structure. The turbines capture wind produced by a partial piston effect.


17. Id., (also commenting, ‘The technical problems of tying into the grid and managing the flow made me think of putting the power to a different use,’ [says Mark Oberholzer]. ‘I’m pretty excited about integrating a subway or light-rail train right where the barrier is. I love the idea of siphoning off electricity generated by private transportation to run public transportation.’ Using the power where it’s generated, rather than redistributing it through the grid, avoids energy losses that occur during transportation and eliminates the cost of adding extra infrastructure.”).

18. See Kelly, supra note 10, at 13-7 (stating the “major challenge” of wind is its “intermittent” nature).


22. Cavanaugh, supra note 16.
created when vehicles pass the median in either direction. Commenting on the effectiveness of vertical-axis turbines in this application, inventor Mark Oberholzer stated, “[o]pposing streams of traffic create really incredible potential in terms of a guaranteed wind source.” Oberholzer’s invention is “still in the research phase,” however. A similar concept in the research phase is styled a “Parasitic Catalyst” by its inventor Joe De La Ree. It replaces steel support tubes from highway signs with two horizontal-axis wind turbines that collect the wind created by the “turbulence” from cars passing below. De La Ree estimates each Parasitic Catalyst could generate 9,600 kilowatt hours annually. Another promising technology is the micro-wind turbine jointly developed by the Mechanical Engineering Department at the University of Hong Kong and Motorwave Limited. The micro-wind turbine consists of small plastic gearwheels attached to a small generator. The gears are made of recycled plastic and best receive wind within thirty degrees of perpendicular. These turbines work when moved by wind speeds as low as two meters per second and continue to work at higher speeds, unlike conventional turbines that function less efficiently in variable wind conditions.

23. Id.; see also HIGHWAY AND RAIL TRANSIT TUNNEL INSPECTION MANUAL, supra note 8, at 2-15.
24. Cavanaugh, supra note 16.
25. Id.
29. Id. (commenting on turbine efficiency and power output, De La Ree writes,

Average vehicle speeds on the valley highways are approximately 70 mph. Using average annual wind speeds of 10 mph as a baseline, each single wind turbine will produce 9,600KwH of energy, annually (enough to fully power my 700 [square foot] apartment). This power production estimate will increase exponentially with an increase in wind turbulence speed. I believe that the wind stream created over the freeways by our primary mode of transportation will create an average annual wind speed well beyond the baseline of 10 mph.).

31. Id.
33. HKU, supra note 30 (explaining the enhanced performance ability of a micro-turbine: “Conventional small wind turbines only work 20-40% of the time due to variations in wind speed, whereas the micro-wind turbines can operate 80% of the time [in both weak and strong wind conditions."]) The Motorwave home page also notes that all turbines deployed in Hong Kong continued to work during a recent typhoon where wind speeds reached 110 kilometers per hour. See Motorwind, http://www.motorwavegroup.com/new/motorwind/index.html.
Lucien Gambarota, the inventor of the micro-wind turbine, stated that the driving philosophy behind this technology was “to make renewable energy accessible in terms of price and technology.”34 Motorwave’s primary market is the individual.35 For example, a typical domestic system, which is rated at 170 watts at wind speeds of ten meters per second, and which consists of twenty micro turbines and a generator with steel supports for deployment, sold for $349.36 For larger applications, Motorwave sells the turbines in sets of forty turbines and separately sells bundled converters and high-speed wind regulators.37 The micro-wind turbines can be arranged in a myriad of patterns and span great distances.38

Recently, Motorwave demonstrated the commercial viability of the micro-wind turbine when the Hong Kong Sea School deployed an array of 396 turbines on its rooftop to generate electricity and provide advertising.39 The Sea School project is depicted in Figure 2 below. Given the versatility and commercial viability of the micro-wind turbine, it appears to be the best current technology to harvest wind from the highways. These turbines could be deployed in lengthy stretches along barriers on highways to collect the wind created by vehicles as they pass. By deploying three rows of turbines, for example, chevron patterns could be created in the array to aid highway travelers through turns. Like the aforementioned technologies, the micro-wind turbine could be applied to alleviate general strain on the electric grid and even power new transportation infrastructures,40 traffic control signals, lighting fixtures, tunnel ventilation systems,41 and transmission systems.42
IV. POLICY AND POLITICAL ATTITUDES

As previously mentioned, public policy indicates society’s choice to support practices and technologies. Federal law expresses support for wind energy by making the Secretary of Energy responsible for implementing a Comprehensive Program Management Plan for Wind Energy Systems. Congress requires the Secretary to submit plans annually to the House Committee on Science and Technology and the Senate Committee on Energy and Natural Resources with revisions as circumstances make necessary. The Secretary’s revisions must address:

(1) the anticipated research, development, demonstration, and technology application objectives to be achieved by the program;

(2) the program elements, management structure, and activities, including any regional aspects and field responsibilities thereof;

(3) the program strategies and technology applications plans, including detailed mile-stone goals to be achieved during the next fiscal year for all major activities and projects;

(4) any significant economic, environmental, and societal effects which the program may have;

44. See Zillman, supra note 1.
46. Id. § 9203(b).
(5) the total estimated cost of individual program items; and

(6) the estimated relative financial contributions of the Federal Government and non-Federal participants in the program.\footnote{47}

Concurrently, the Secretary must annually assess “renewable energy resources within the United States, including . . . wind, . . . taking into account changes in market conditions, available technologies, and other relevant factors.”\footnote{48} Congress also authorized appropriations of \$10,000,000 for each fiscal year from 2006 to 2010 to foment this endeavor.\footnote{49}

Concerning research, development, and demonstration of wind technologies, the Secretary is required to “accelerate existing research and development” to achieve “widespread utilization of wind energy systems.”\footnote{50} The Secretary is also charged to “continue an aggressive program for the development of prototypes of advanced wind energy systems.”\footnote{51} To that end, the Secretary must “solicit and evaluate proposals for research and development of any new or improved technologies.”\footnote{52} Congress empowers the Secretary “to enter into contracts, grants, and cooperative agreements with public and private entities”\footnote{53} providing for, “purchase, fabrication, installation, and testing to obtain scientific, technological, and economic information from the demonstration of a variety of prototypes of advanced wind energy systems under a variety of circumstances and conditions.”\footnote{54}

Therefore, Congress has set forth a strong policy to move forward with innovative wind technology and has not limited its application to wind produced by nature.\footnote{55} The federal government also supports wind energy production through tax incentives, including the Production Tax Credit, and subsidies.\footnote{56} But the federal government could be doing more by adopting Renewable Portfolio Standards.\footnote{57} Furthermore, the federal government

\begin{itemize}
\item \footnote{47} Id. \textsection 9203(c).
\item \footnote{48} Id. \textsection 15851(a).
\item \footnote{49} Id. \textsection 15851(c).
\item \footnote{50} Id. \textsection 9204(a).
\item \footnote{51} Id. \textsection 9204(b)(1).
\item \footnote{52} Id. \textsection 9204(b).
\item \footnote{53} Id. \textsection 9202(4) ("[T]he term ‘public and private entity’ means any individual, corporation, partnership, firm, association, agricultural cooperative, public - or investor-owned utility, public or private institution or group, any State or local government agency, or any other domestic entity.").
\item \footnote{54} Id. \textsection 9204 (c). Also note that Congress, in its broad grant of discretion to the Secretary of Energy, exempts this section from the rulemaking provisions of 5 U.S.C. \textsection 553 (2008) and 42 U.S.C. \textsection 7191. Id. \textsection 9204(d).
\item \footnote{55} Id. \textsection 9202(5) (defining “known wind resource” as “a site with an estimated average annual wind velocity of at least twelve miles per hour”).
\item \footnote{56} Brisman, supra note 21 at 55-61.
\item \footnote{57} Id. at 59-60 (noting that the states are taking leadership in this endeavor). Also, the House of
continues to subsidize generation that uses conventional fossil fuels at greater rates than renewable resources. 58 While Congress focused on increasing Corporate Average Fuel Economy Standards in passing the Energy Independence and Security Act of 2007, it failed to consider the benefits of capturing vehicle wind byproducts. 59 The federal government, thus, should redouble its efforts to help American industries bring technologies similar to those discussed above into the domestic and international markets.

Adding to the perceived failure of Congress to make the strong language of the Wind Energy Systems legislation meaningful, individuals can inhibit development of wind energy. 60 Opponents of renewable and alternative energy projects typically invoke aesthetics to oppose development. 61 Wind energy, like other renewable resources, has been criticized for its negative impacts on the visual appeal of the human horizon. 62 In spite of these concerns, microgeneration allows us to rethink where wind resources exist. Micro-turbine technology also allows us to integrate wind generation systems into the environment in ways unobtrusive to the eye: technology may be concealed within highway barriers, 63 or even displayed as an advertising medium. 64 Similarly, opponents citing noise from wind energy generation should be pacified by advances in engineering, in addition to the fact that highways are already noisy places. 65

Others oppose wind projects for their perceived effects on avian death...
rates.\textsuperscript{66} Hysteria over avian mortality caused by wind turbines piqued public interest when turbines over Altamont Pass in California killed or injured over thirty threatened golden eagles and over seventy raptors in just three years.\textsuperscript{67} But, these relatively high numbers pale in comparison to avian deaths wrought by other human activities, such as hunting, ground transportation, and erecting buildings.\textsuperscript{68} Despite this comparison, wind turbines maintain the unfortunate moniker of “condor Cuisinarts,”\textsuperscript{69} although innovations like painted turbine blades and implementation of sonar systems help mitigate the avian mortality effects.\textsuperscript{70}

The recent technological advances discussed above may suffer from concerns for avian mortality, but these concerns should not inhibit their implementation. The aforementioned Parasitic Catalyst, which most resembles an avian meat grinder, probably enhances avian mortality risks more than any technology previously discussed.\textsuperscript{71} Protective gratings that house turbines but still allow air to flow into the turbine, as incorporated into the design of the New Jersey Barrier,\textsuperscript{72} may alleviate this avian mortality risk. And coloring micro-turbines with reflective paint may also mitigate avian risks while enhancing the safety of the highways.\textsuperscript{73}

While micro-turbine arrays in particular can also enhance driver awareness of highway features and hazards, their mere existence within the Interstate right-of-way is subject to federal safety standards.\textsuperscript{74} Federal law grants the Secretary of Transportation discretion to “accommodate” any utility facility after considering the “environmental and economic effects together with interference or impairment of the use of the highway” and determining that no adverse effects of such use will ensue on “highway and traffic safety.”\textsuperscript{75} A key strategy in the research and development stage of innovative

\textsuperscript{66.} Brisman, \textit{supra} note 21.
\textsuperscript{67.} Id. at 70.
\textsuperscript{68.} Id. at 71-72.
\textsuperscript{69.} Id. at 73 (quoting Katharine Q. Seelye, \textit{Windmills Sow Dissent For Environmentalists}, N.Y. Times, June 5, 2003, at A28).
\textsuperscript{70.} Id. at 72-73.
\textsuperscript{71.} De La Ree Project, \textit{supra} note 7.
\textsuperscript{72.} See Cavanaugh, \textit{supra} note 16 (illustrations of protective gratings that house the turbines may be enlarged by clicking on the images on right side of the page).
\textsuperscript{73.} Brisman, \textit{supra} note 21, at 72-73.
\textsuperscript{75.} Id. § 109(l)(2)(A)-(B) (2006) ("[T]he term ‘utility facility’ means any privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public; and . . . the term
wind technology, therefore, is to take advantage of the categorical exclusion from the National Environmental Policy Act (NEPA) for wind resource investigation. Once highway wind resources are empirically demonstrated, concerns over maintaining highway safety should predominate.

Federal agencies that rent or dispose “real property interests” obtained with federal funds under title 23 of the United States Code are generally bound to get “fair market value” for the interests conveyed and must “use the funds for transportation purposes.” Leases can be accomplished by agreements between State transportation departments and lessees that provide for “the safety and integrity of the federally funded facility[,] . . . removal of improvements at no cost to the FHWA [(Federal Highway Administration)], [and governmental] access . . . for inspection, maintenance, and reconstruction.” Exceptions apply for uses that promote “the overall public interest for social, environmental, or economic purposes[,]” and public transportation. This indicates that developers seeking to use wind generated from “private transportation to [electrify] public transportation” may be preferred recipients of federal land grants and leases.

Also, interests conveyed for “use by public utilities” are separately

77. 10 C.F.R. § 1021 (subpart D, Appendix B, B3.1 (h)) (2008) (“Onsite and offsite site characterization and environmental monitoring, including siting, construction (or modification), operation, and dismantlement or closing (abandonment) of characterization and monitoring devices and siting, construction, and associated operation of a small scale laboratory building or renovation of a room in an existing building for sample analysis. Activities covered include, but are not limited to, site characterization and environmental monitoring under CERCLA and RCRA. Specific activities include, but are not limited to . . . [i]nstallation and operation of meteorological towers and associated activities, including assessment of potential wind energy resources.”).
78. 23 C.F.R. § 710.403 (d) (Subpart D. Real Property Management) (2008).
79. Id. § 710.407 (a)-(b) (requiring that changes to facilities “shall be provided without cost to Federal funds unless otherwise specifically agreed to by the [State transportation department] and the FHWA.”).
80. Id. § 710.403 (d)(1).
81. Cavanaugh, supra note 16 (quoting Christine Real de Azua of the American Wind Energy Association as stating, [u]sing the power where it’s generated, rather than redistributing it through the grid, avoids energy losses that occur during transportation and eliminates the cost of adding extra infrastructure. Certainly having them closer to where you actually use the electricity is very helpful).
provided for, and are excepted from the general fair market value rule. The FHWA has indicated that the policies of accommodating utility facilities on the interstate highways should not conflict with maintaining safety or other laws or regulations, or impair the highway’s aesthetic quality. Specifically, a “clear zone” is established “between the traveled way and the right-of-way line” for safe use by errant vehicles. The “clear roadside policy” also mandates that the clear zone be free of “obstacles which are likely to be associated with accident or injury to the highway user” and that “appropriate countermeasures . . . reduce hazards.” “Use and occupancy agreements” provide the necessary documentation “by which [State] transportation departments [approve] the use and occupancy of highway right-of-way by utility facilities or private lines.”

These permits must include:

(a) [t]he transportation department standards for accommodating utilities[. . .;]

(b) [a] general description of the size, type, nature, and extent of the utility facilities being located within the highway right-of-way[;]

(c) [a]dequate drawings or sketches showing the existing and/or proposed location of the utility facilities within the highway right-of-way with respect to the existing and/or planned highway improvements, the traveled way, the right-of-way lines and, where applicable, the control of access lines and approved access points[;]

(d) [t]he extent of liability and responsibilities associated with future adjustment of the utilities to accommodate highway improvements[;]

(e) [t]he action to be taken in case of noncompliance with the transportation department’s requirements[; and]

(f) [o]ther provisions as deemed necessary to comply with laws and regulations.

These agreements must in turn be approved by the FHWA and revised as

82. 23 C.F.R. § 710.403 (d)(2) (2008).
83. Id. § 645.203 (c); Id. § 645.207 (The FHWA defines aesthetic quality as: “desirable characteristics in the appearance of the highway and its environment, such as harmony between or blending of natural and manufactured objects in the environment, continuity of visual form without distracting interruptions, and simplicity of designs which are desirably functional in shape but without clutter.”).
84. Id. § 645.207.
85. Id.
86. Id. (This section further broadens the term “utility facility” by stating, “[t]he term utility shall also mean the utility company inclusive of any substantially owned or controlled subsidiary. For the purposes of this part, the term includes those utility-type facilities which are owned or leased by a government agency for its own use, or otherwise dedicated solely to governmental use.”).
87. Id. § 645.213.
Recognizing the historical tradition of “accommodating utility facilities within the highway right-of-way,” the FHWA advocates that a joint use principle should guide highway right-of-way requirements, and that, “[t]he lack of sufficient right-of-way width to accommodate utilities outside the desirable clear zone, in and of itself, is not a valid reason to preclude utilities from occupying the highway right-of-way.”\textsuperscript{89} “New above ground installations,” such as micro-turbines, are generally prohibited within the clear zone, unless the controlling transportation department\textsuperscript{90} “[determines] . . . that placement underground is not technically feasible . . . and there are no feasible alternative locations.”\textsuperscript{91} Furthermore, When it is essential to locate such above ground utility facilities within . . . the clear zone . . . appropriate countermeasures to reduce hazards [may be required] . . . . [including] placing utility facilities at locations which protect or minimize exposure to out-of-control vehicles, using breakaway features, using impact attenuation devices, using delineation, or shielding.\textsuperscript{92}

Similarly, the FHWA calls for formulation and submission of accommodation plans by State transportation departments concerning “installations within freeways.”\textsuperscript{93} Therefore, the FHWA regulations do not prevent a utility company from placing micro-turbines in the clear zone, where they are likely to be most effective, because the technology will not work underground. Continued engineering and testing is required to determine the most effective placement strategies and countermeasures to be employed during the siting process for micro-turbine arrays, possibly considering attaching them to crash barriers or noise barriers.\textsuperscript{94} And further inquiries into state accommodation plans will be necessary once technology becomes feasible for application in the center median.\textsuperscript{95} See Figure 3 below, a photograph taken by the author, depicting micro-turbines installed on the center median of Interstate 25 in

\textsuperscript{88} Id. § 645.215(a).

\textsuperscript{89} Id. § 645.209 (a) (acknowledging that “safety [is] of paramount, but not of sole, importance when accommodating utility facilities within highway right-of-way.”).

\textsuperscript{90} Id. § 645.207 (“Transportation department” is defined as, “that department, agency, commission, board, or official of any State or political subdivision thereof, charged by its law with the responsibility for highway administration.”).

\textsuperscript{91} Id. § 645.209 (b) (2008).

\textsuperscript{92} Id.

\textsuperscript{93} Id. § 645.209 (c) (2008) (noting that such plans must adhere to the requirements set out in sections 645.211 and 645.215).

\textsuperscript{94} See Id. § 645.207 (2008) (exhorting that, “[i]n all cases full consideration shall be given to sound engineering principles and economic factors.”).

\textsuperscript{95} See Cavanaugh, supra note 16 (noting that the New Jersey Barrier awaits further research and development).
Denver, Colorado.

**FIGURE 3**: MICRO-TURBINES DEPICTED AT INTERSTATE 25 AND DRY CREEK IN DENVER, CO

V. FINANCE OPPORTUNITIES AND CHALLENGES

The Energy Policy Act of 2005\(^{96}\) established a rebate program for consumers who install a “renewable energy system in connection with a dwelling unit or small business,” providing the lesser of twenty-five percent of the expenditure or $3,000.\(^{97}\) Thus, products like Motorwave micro-turbines, which are already modestly priced,\(^{98}\) can become even more affordable for the individual.

Large scale renewable energy projects, by contrast, are much more expensive, requiring additional public funding.\(^{99}\) However, project financing can be a favorable option for capital-intensive energy projects.\(^{100}\) “Non-recourse project financing” is

A type of financing in capital-intensive industries in which a project’s financial backing is based upon the ability of the project’s potential cash flow to pay off project debt, rather than relying upon the credit-worthiness of the project.

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98. 20 Micro Turbines with Generator, *supra* note 36.
100. *Id.*
sponsors. Under this type of project financing, the debt, equity, and credit
enhancement are combined for the construction and operation of a facility. The
assets of the facility, including the long-term revenue producing contracts, become
the collateral for the lenders.\footnote{101}

To ease high project costs, Congress has authorized the Secretary of
Energy to “solicit and evaluate proposals for Federal assistance” in the form of
“(1) contracts and cooperative agreements; (2) grants; [and] (3) loans” made by
“public or private entities wishing to utilize wind energy systems.”\footnote{102}

Cost-sharing cooperative agreements have been employed by the
Department of Energy (DOE) since the late 1980s to “[provide] financial
assistance to a project sponsor, on a cost-sharing basis, without taking an
equity or security interest in the venture.”\footnote{103} The government’s return on
investment is its quality-control role in the project.\footnote{104} By involving itself in
these agreements, DOE usually “attract[s] new financial support for the project
from traditional project-finance[r]s.”\footnote{105} The federal government usually bears
most of the project costs, (up to eighty percent) for technologies in research
and development.\footnote{106}

Cooperative research and development agreements also assist research
and development of new technologies at “government-owned, contractor-
operated national laboratories.”\footnote{107} These agreements generally foment new
technology toward the commercialization stage.\footnote{108} The national laboratories
are ideal environments for developing the nascent technologies discussed
previously, \footnote{109} as well as for testing commercially viable technologies, e.g.,
Motorwave micro-turbines,\footnote{110} in novel applications.

“[D]irect grants for large systems”\footnote{111} are available to cover the costs of
purchase and installation, not to exceed “50 per centum . . . [in] the first six
years . . . [and] 25 per centum . . . during the seventh or eighth year.”\footnote{112} Loans
are made available for small and large wind energy systems to cover “up to 75
per centum of the total purchase and installation costs of wind energy systems
providing in the aggregate up to three hundred and twenty megawatts peak generating capacity involving at a minimum four projects. 113 Loan terms are not to last more than twenty years beyond the operational capacity of the system, and interest is fixed at the same rate used for “water resource planning projects.” 114

The Secretary of Energy is also “authorized to provide funds for the accelerated procurement and installation of small and large wind energy systems by Federal agencies” and “to enter into arrangements with appropriate Federal agencies, including the Water and Power Resources Services and the Federal power marketing agencies for large wind energy systems, to carry out such projects and activities as may be appropriate for the broad technology applications.” 115

The Department of Agriculture (DOA) also provides grants and loans as “financial assistance to agricultural producers and rural small businesses for the purpose of purchasing and installing renewable energy systems and energy efficiency improvements in rural areas.” 116 Beyond limiting applicants to rural 117 agricultural producers 118 and small businesses 119 that are, or are more than half owned by U.S. citizens, 120 DOA limits assistance to eligible projects with “technical merit[,]” involving “pre-commercial or commercially available, and replicable technology . . . located in a rural area . . . controlled

113. Id. § 9205(f)(1).
114. Id. § 9205(f)(2)-(3).
115. Id. § 9205(c)(4), (g).
117. Id. § 4280.103 (“Rural” is defined as “[a]ny area other than a city or town that has a population of greater than 50,000 inhabitants and the urbanized area contiguous and adjacent to such a city or town according to the latest decennial census of the United States.”).
118. An “[a]gricultural producer” is “[a]n individual or entity directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations.” Id.
119. A “[s]mall business” is:

An entity . . . in accordance with the Small Business Administration’s (SBA) small business size standards by the North American Industry Classification System (NAICS) found in Title 13 CFR part 121. A private entity, including a sole proprietorship, partnership, corporation, cooperative (including a cooperative qualified under section 501(c)(12) of the Internal Revenue Code), and an electric utility, including a Tribal or governmental electric utility, that provides service to rural consumers on a cost-of-service basis without support from public funds or subsidy from the Government authority establishing the district, provided such utilities meet SBA’s definition of small business. These entities must operate independent of direct Government control. With the exception of the entities described above, all other non-profit entities are excluded.

110. 7 C.F.R. § 4280.107(a)(1)-(3).
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by the agricultural producer or small business for the financing term of . . . [the federal assistance].”121 This control element heightens the importance that an eligible applicant gains a real property interest in the portion of rural Interstate highway where a wind system will be deployed for the term to be covered by federal assistance before applying.122

Grants are not to exceed “25 percent of total eligible project costs”123 and total grant funding is not to exceed $750,000 per individual per fiscal year, $500,000 of which can fund renewable energy systems.124 A simplified application, involving less onerous technical data requirements, applies to grant applications with total eligible project costs less than $200,000.125 Guaranteed loans from eligible lenders126 may be used to plan and construct renewable energy systems or to improve existing renewable energy systems.127 Guaranteed loans are available in amounts from $5,000 to $10,000, not to exceed “50 percent of total eligible project costs” with reductions in the cost percentage guaranteed as the loan amount increases.128 Interest rates are negotiable.129 Direct loans are available according to a “Notice of Funds Availability” publication each year that DOA decides direct loans will be available.130 Eligible applicants pursuing eligible projects may combine these funding opportunities.131

While the foregoing suggests an abundance of federal assistance options for renewable energy project financing, the glut in generation capacity within

121. Id. § 4280.108(b), (d), (f).
122. See generally Id. § 4280.108.
123. Id. § 4280.110(a).
124. Id. § 4280.110(d)-(e).
125. Id. § 4280.109(a)(3).
126. Eligible lenders are listed in 7 C.F.R. § 4279.29, and exclude mortgage companies comprising bank-holding companies. Id. § 4280.130.
127. Id. §§ 4280.112, 4280.123(c).
128. Id. § 4280.123(a)-(c) (“The maximum percentage of guarantee is 85 percent for loans of $600,000 or less; 80 percent for loans greater than $600,000 up to and including $5 million; and 70 percent for loans greater than $5 million up to and including $10 million.”).
129. Id. § 4280.124(a).
130. Id. § 4280.161(a).
131. Id. § 4280.193(a)-(b). Funding limitations are:

(1) The amount of any combined grant and guaranteed loan must not exceed 50 percent of total eligible project costs. For purposes of combined funding requests, total eligible project costs are based on the total costs associated with those items specified in §§ 4280.110(c) and 4280.123(e). The applicant must provide the remaining total funds needed to complete the project. (2) Third-party, in-kind contributions will be limited to 10 percent of the matching fund requirement of any financial assistance provided to the applicant. (3) The minimum combined funding request allowed is $5,000, with the grant portion of the funding request being at least $1,500.

Id. § 4280.193(b).
the “merchant power plant[]” industry makes obtaining funds more difficult. 132
An increasing problem in renewable energy project financing, therefore, remains in attracting traditional private investors. 133 Especially because of the frontloading of public investment, typically reserved for research and development of new technology, private investment later in the game literally can make or break businesses relying on project financing. 134 Although public investment can provide leadership for the private sector to support new technologies, profit gratification motivating private investment may not immediately materialize because of technological risks. 135 Thus, planning for later stages of project development, and adequately allocating risks through creative contracting is essential. 136 In short, preparing a dynamic business, as well as an innovative technology, is necessary for private venture financing. 137

VI. CONCLUSION
Pressure is mounting on the United States, both from the international community and from within, to shift our reliance on fossil fuels to renewable energy resources. 138 Current national goals provide a “20% Wind Energy Vision” as a national power source in 2020 based on conventional assessments of available wind resources. 139 Meanwhile, the Environmental Protection Agency touts micro-turbine technology as the “cutting edge . . . cornerstone in the distributed generation field.” 140 Returning to Figure 1, depicting a

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134. Id. at 1.
135. Id. at 2 tbl.2. See also Goldman et al., supra note 132, at 3.
136. See Goldman, supra note 132, at 3.
137. Murphy, supra note 133, at 14, 15 (explaining that developing leadership in company management positions, analyzing market conditions, providing liquidity in the form of public offerings or securities, and maintaining an appropriate corporate structure are crucial to attract venture financing because “investors are interested in businesses (not technologies) that are strongly market focuses with products that reflect that focus.”).
140. Environmental Protection Agency, Local Action Plan Recommendations Denver, Colorado,
dramatic enhancement of what constitutes an available wind resource in the southeastern portions of this country, the future of wind seems even brighter.

While technology is now developing to make our ground transportation systems more sustainable and cost-effective, businesses should be preparing to embrace the challenge of converting our highways into wind resources.\textsuperscript{141} Doing so will alleviate strain on the electric grid and power new transportation modes for our growing communities. If entrepreneurs and utilities in the south and southeastern United States use federal assistance to take the lead in implementing this technology, the crucial private investment sector may become more willing to bear the costs of expanding this vision into reality.\textsuperscript{142} Federal agencies can also move this technology into the mainstream through demonstration deployments. By acting now, future generations may be more apt to applaud our efforts to shape an innovative and secure energy economy than to criticize our unwillingness to change.

\textsuperscript{141} After expanding the wind resources paradigm, NASCAR tracks also become potential energy supplies. See Stern, \textit{supra} note 26. Similarly, rail corridors can become potential wind resources. And, the effectiveness of more traditional micro turbine deployment on urban rooftops, for both electric generation and advertising, should not be discounted. See Motorwind, \textit{supra} note 42.

\textsuperscript{142} The mild climate of the South may be best suited for permanent deployments, as snowplowing and other winter roadway maintenance may very well hinder micro turbine operations. Seasonal operations could be useful in other regions, however, to alleviate the strain on electric grids during summer heat waves.
Going Overboard on Overtime:  
Bostain v. Food Express, Inc.

Case Comment

David M. Hyams*

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I. INTRODUCTION

In Bostain v. Food Express, Inc., the Washington Supreme Court held in a 5-4 decision that employers must pay Washington-based interstate truck drivers overtime pay, even if their work week is comprised of less than forty hours of work actually performed within the State. The holding has the

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2. J. Madsen penned the opinion, and was joined by C.J. Alexander and JJ. Chambers, Johnson, and Fairhurst. J. Johnson wrote a dissenting opinion, in which JJ. Owens, Sanders, and Bridge joined.
potential to impact employers of Washington-based interstate truck drivers, other employees of such companies, the economy of Washington State, and the motor carrier industry as a whole. In fact, now that the United States Supreme Court has denied Food Express’s petition for certiorari, lest action is taken to rectify the decision, the death knell may have rung for the interstate motor carrier industry in Washington.

II. FACTS AND PROCEDURAL HISTORY

For nearly a decade, Larie Bostain was an interstate truck driver for Food Express, Inc., a California corporation headquartered in Arcadia, California, that hauls food between destinations in several western states. Food Express operates a terminal in Vancouver, Washington, out of which twenty-five trucks haul containers of bulk products brought by train into Washington to places in Washington, Oregon, and Idaho. The company is subject to the Federal Motor Carrier Act (“FMCA”). Mr. Bostain was fired in 2002 for insubordination. In his final year of work, he worked an average of forty-eight hours per week, but never more than forty of those were within Washington, with sixty-three percent of his drive time occurring outside of the State.

Mr. Bostain and his wife brought suit in December 2002, claiming unpaid overtime and wages, willful failure to pay wages, and also seeking attorney fees. They argued that, under the Washington Minimum Wage Act (the “MWA”), he was entitled to overtime pay or the reasonable equivalent thereof. Mr. Bostain never received overtime; he was paid an hourly wage and by the mile once he drove more than 200 miles. The trial court granted summary judgment in favor of the Bostains, holding that MWA entitles truck drivers employed in Washington to overtime pay, even if some of their driving time takes place outside of the state. The court awarded Mr. Bostain nearly $10,000 in unpaid overtime wages.

On appeal, the Court of Appeals of Washington held that the MWA applied only to hours worked within Washington and thus reversed the trial court’s decision. The Washington Supreme Court granted the Bostain’s
petition for discretionary review and reversed the appellate court.\(^{13}\) The Washington Supreme Court held that under the MWA, an employer is liable for overtime hours based upon the total hours worked, irrespective of the state in which the work transpired.\(^{14}\) It also held that administrative interpretations to the contrary are invalid,\(^{15}\) and that its holding did not violate the commerce clause of the Constitution.\(^{16}\)

Amici have been in no short supply, with numerous briefs having been filed. Among those who filed briefs: the American Trucking Associations, Inc., the Washington Trucking Associations,\(^{17}\) Gordon Trucking, Inc.,\(^{18}\) Washington’s Department of Labor and Industries,\(^{19}\) the Washington Employment Lawyers Association,\(^{20}\) and Interstate Distributor Co.\(^{21}\) Thus, because of the attention this case has received and its potential impact, it merits consideration.

III. LEGAL BACKGROUND

The Bostain court confronted three substantial legal issues. First, the court had to determine whether the Washington Minimum Wage Act’s overtime pay requirements applied only to hours worked within Washington State, and thus, whether Mr. Bostain was entitled to such pay.\(^{22}\) Second, the court considered the enforceability of interpretive rules promulgated by Washington’s Department of Labor and Industries that seemed to conflict with the court’s rendering of the MWA.\(^{23}\) Finally, the court examined whether its interpretation violated the commerce clause of the Constitution.\(^{24}\)

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\(^{13}\) See Bostain, 153 P.3d at 848-49.
\(^{14}\) Id. at 852.
\(^{15}\) Id.
\(^{16}\) Id. at 854. The court also addressed issues concerning attorney fees, damages, and prejudgment interests. A summary and analysis of these issues will not be conducted.
\(^{18}\) Brief of Gordon Trucking, Inc. as Amicus Curiae in Support of Petitioner, Food Express, (No. 07-402), 2007 WL 3196728.
\(^{19}\) Brief of Amicus Curiae Department of Labor and Industries, Bostain v. Food Express, Inc., 153 P.3d 846 (Wash. 2007) (No. 77201-1), 2005 WL 3937004.
\(^{21}\) Brief of Amicus Curiae Interstate Distributor Co., Bostain, (No. 77201-1), Appendix to Motion for Leave to File Amicus Curiae Brief in Re: Respondent Food Express, Inc.’s Motion for Reconsideration (March 27, 2007).
\(^{22}\) See Bostain, 153 P.3d at 850-52.
\(^{23}\) See id. at 852-54.
\(^{24}\) See id. at 854-57.
A. MOTOR CARRIER LIABILITY UNDER WASHINGTON MINIMUM WAGE ACT

The Washington Minimum Wage Act, though not identical, is “patterned after the federal Fair Labor Standards Act.” The MWA requires employers to compensate certain employees for time worked in excess of forty hours per week. This statute provides that,

> [e]xcept as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Furthermore, the MWA adds that,

> [a]n individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.

Although, most states follow the Fair Labor Standards Act’s maximum hour requirements exemption for employees – subject to standards set by the Secretary of Transportation via the Motor Carrier Act, the Federal Motor Carrier Act rules pertaining to maximum hours and overtime pay do not preempt state law on the subject. Therefore, the MWA is free to set its rules as it sees proper.

B. ADMINISTRATIVE REGULATIONS

Washington’s Department of Labor and Industries is vested with the powers and duties to administer and enforce laws relating to employment, hours of work, and wages. WAC 296-128-011 and WAC 296-128-012 were promulgated “to address the unique circumstances presented by interstate truck
drivers who, by the very nature of their jobs, may travel far beyond Washington’s boundaries.\textsuperscript{31} Those rules only require overtime pay for hours worked within Washington.\textsuperscript{32}

Washington recognizes a distinction between interpretive and legislative rules, each having a different effect on the courts.\textsuperscript{33} “Legislative rules bind the court if they are within the agency’s delegated authority, are reasonable, and were adopted using the proper procedure.”\textsuperscript{34} Interpretive rules, however, are simply notice of an agency’s position and are not binding on the courts, having only persuasive power.\textsuperscript{35} Nevertheless, an agency’s interpretation of a statute is given deference by the court when the agency is empowered to administer and enforce the statute, and the statute is ambiguous.\textsuperscript{36} Ambiguity lies when a statute bears “more than one reasonable interpretation.”\textsuperscript{37} However, if the statute is not ambiguous, the agency’s expertise is not needed and its interpretation enjoys lesser deference.\textsuperscript{38} If the agency’s interpretation conflicts with the statute, there will be no deference at all.\textsuperscript{39}

C. COMMERCE CLAUSE

The United States Constitution gives Congress the power to regulate commerce among the states.\textsuperscript{40} This power granted to the federal government has long been understood as an implicit power to circumscribe the states’ ability to enact laws that impact interstate commerce. Though not explicitly stated in the Constitution, the “dormant Commerce Clause” prohibits states, \textit{sans} Congressional consent, from engaging in regulation that “restrict[s], obstruct[s], burden[s], impede[s], or interfere[s] with interstate or foreign commerce.”\textsuperscript{41} A balancing test is used when evaluating whether certain state statutes run afoul of the commerce clause.

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. \ldots If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be

\begin{flushleft}
31. Department, \textit{supra} note 19, at *2.
32. \textit{Id.}
35. \textit{Wash. Bus.}, 120 P.3d at 54.
38. \textit{Waste Mgmt.}, 869 P.2d at 1038.
39. \textit{Id.}
40. U.S. CONST. art. I, § 8, cl. 3.
\end{flushleft}
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tolerated will of course depend on the nature of the local interest involved, and on
whether it could be promoted as well with a lesser impact on interstate
activities.42

Thus, although a state is prohibited from directly regulating, forbidding,
or burdening interstate commerce, if, in the legitimate, reasonable exercise of
its police power, it incidentally or indirectly affects such commerce, no
violation will be found.43

IV. THE COURT’S DECISION

The court set forth its opinion in seven parts of varying length. First, the
court concluded that the MWA unambiguously requires all hours worked by a
Washington-based employee, no matter what state those hours happened to be
earned in, be considered when compensating the employee for overtime; thus,
Mr. Bostain was entitled to overtime wages.44

Second, the court held that the Department of Labor and Industries’ rules
stating overtime under the MWA was to be calculated on the basis of hours
worked within Washington State did not warrant judicial deference because the
statute was not ambiguous and because the rules were in violation of the
statute’s purpose.45

Third, the court found that any burden that might be placed upon
interstate commerce by requiring employers of Washington employees to pay
them overtime for all hours worked was of no great consequence, especially in
light of the local benefits; thus, the court-interpreted version of the MWA was
in accord with the commerce clause.46

Fourth, the court awarded attorneys fees to the Bostains for their appeal
and the court’s discretionary review.47

Fifth, because the law concerning out-of-state hours under the MWA was
unsettled, the court denied the award of double damages to the Bostains
provided under the MWA for an employer failing to compensate its employees
for overtime.48

Sixth, the court upheld the trial court’s award of prejudgment interest
because the overtime wages claim was a liquidated one.49

Finally, citing a paucity of evidence to hold otherwise, the court denied
Food Express’s contention that the trial court erred in dismissing its affirmative

44. Bostain, 153 P.3d at 852.
45. Id. at 854.
46. Id. at 856-57.
47. Id. at 857.
48. Id.
49. Id.
defense that Bostain should be estopped from pursuing his claim because he
got ten years without receiving overtime and only complained out of
retaliation when he was terminated.\(^{50}\) Because of the important impact of the
first three findings of the court, a more detailed review of these areas is
presented below.

A. \textsc{Motor Carrier Liability under Washington Minimum Wage Act}

The court first addressed whether the overtime provision of the MWA
applies only to work conducted within Washington.\(^ {51}\) Prior to analyzing the
issue, the court set forth its hermeneutical goals and methodology: to
effectuate legislative intent and to give effect to the plain meaning of a statute
by considering it within its statutory context.\(^ {52}\)

Upon a prima facie reading of RCW 49.46.130(1) and (2)(f), the court
determined that the statute does not require overtime pay to be restricted to
hours worked within Washington, and actually anticipates that interstate truck
drivers will be paid overtime.\(^ {53}\) Because of the way RCW 49.46.130(2)(f) is
written, truck drivers subject to the Federal Motor Carrier Act are assured
compensation for working in excess of 40 hours per week, whether under the
MWA or by some other “reasonably equivalent” compensation.\(^ {54}\) This is
because RCW 49.46.130(2)(f)’s exclusion to RCW 49.46.130(1)’s mandate to
provide overtime compensation is conditioned upon the truck or bus driver
being compensated under a reasonably equivalent system; thus, there is no
ambiguity in the statute that truck drivers will receive overtime compensation.

Moreover, the location of the work performed is irrelevant, according to
the court, because, by definition, a worker subject to the FMCA performs a
portion of his or her work out of state.\(^ {55}\) The FMCA applies to motor carriers
transporting people or property between states or within a state if the route
traverses another.\(^ {56}\) Therefore, the plain language requires compensating
interstate truck drivers for overtime, regardless of where the hours were
worked.\(^ {57}\)

In order to understand the statute in its proper context, the court looked to
RCW 49.46.005, which sets forth the purpose of the MWA: “to establish
minimum standards of employment within the state of Washington . . . and to

\(^{50}\) Id. at 858.
\(^{51}\) Id. at 850.
\(^{52}\) Id.
\(^{53}\) Id. at 851.
\(^{54}\) Id.
\(^{55}\) Id.
\(^{57}\) \textit{Bostain}, 153 P.3d at 851.
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encourage employment opportunities within the state.”58 Contra the Court of Appeals, the court found that this statement of purpose did not mean that only work conducted within the Washington’s borders was subject to overtime compensation, but that the MWA was intended to protect Washington employees and thereby enhance employment opportunities.59 This purpose would be contravened if Washington-based employees were excluded just because they work outside the State.60 Furthermore, reading the declaration too restrictively would frustrate the intended purpose of protecting employees—an outcome to be avoided in statutory interpretation.61

Also, because remedial exemptions are to be construed narrowly and applied only in a manner that is clearly consistent with the legislative spirit, and interpreting “hours” to mean “hours worked in Washington State” would not be an interpretive decision possessing such clarity, the court could not so interpret it.62 Finally, such a construction would violate the rule of liberal construction requiring MWA provision to be construed in favor of employees.63 Therefore, the court concluded that, under the plain language of the statute, the trial court was correct in its determination that when determining the overtime due a Washington-based employee, all hours worked, regardless of where worked, must be considered.64

Because Mr. Bostain was a Washington-based employee, the court held he was entitled to overtime; thus, the trial court’s award of unpaid overtime wages was upheld.65 Conceding that it would normally have ceased its analysis at this point, the court pressed forward to consider whether its decision conflicted with administrative rules.66

B. ADMINISTRATIVE REGULATIONS

The court considered two administrative rules that seemed to challenge its holding: WAC 296-128-011 and WAC 296-128-012.67 These rules were promulgated in response to the Washington Supreme Court’s 1988 ruling that the FMCA does not preempt the MWA and that the MWA overtime provisions

58. WASH. REV. CODE § 49.46.005 (2007); Bostain, 153 P.3d at 851.
59. Bostain, 153 P.3d at 851.
60. Id. at 852.
61. Id. (citing Burnside v. Simpson Paper Co., 864 P.2d 937, 940 (Wash. 1994) (holding that “statutes should be interpreted to further, not frustrate their intended purpose”)).
62. Id. at 852.
63. See id. (citing Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett, 42 P.3d 1265, 1267 (Wash. 2002)).
64. Id.
65. See id.
66. Id.
67. See id.; see also WASH. ADMIN. CODE 296-128-011, 012 (2007).
apply to interstate trucking company employees. WAC 296-128-011 requires employers of interstate truck drivers to maintain records of their work hours, including overtime hours, and to indicate how payments are calculated. Of consequence is the rule’s definition of “overtime rate of pay,” which reads “the amount of compensation paid for hours worked within the state of Washington in excess of forty hours per week.” Thus, the rule indicates that overtime compensation is based upon work performed within Washington.

WAC 296-128-012 sets forth a method of calculating overtime pay for interstate truck drivers that is reasonably equivalent to that required by the MWA, so that the employee is compensated for “hours worked within the state of Washington in excess of forty hours per week at an overtime rate of pay.”

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68. See Bostain, 153 P.3d at 852 (citing Dep’t of Labor & Indus. v. Common Carriers, Inc., 762 P.2d 348 (Wash. 1998)).
69. Id. at 853; see also WASH. ADMIN. CODE 296-128, 011 (2007).
70. WASH. ADMIN. CODE 296-128-011(1); see also Bostain, 153 P.3d at 853.
71. WASH. ADMIN. CODE 296-128-012(1)(a); see also Bostain, 159 P.3d at 853. The administrative rule prescribes the following method to calculate pay that is reasonably equivalent to 1 ½ the worker’s hourly wage (the required rate under the MWA):

The following formula is recommended for establishing a uniform rate of pay to compensate work that is not paid on an hourly basis and for which compensation for overtime is included:

1. Define work unit first. E.g., miles, loading, unloading, other.
2. Average number of work units per hour =
   Average number of work units accomplished per week divided by
   Average number of hours projected to be worked per week
3. Weekly Base Rate = Number of units per hour x 40 hours x base rate of pay
4. Weekly Overtime Rate =
   Number of units per hour x number of hours over 40 x overtime rate of pay
5. Total weekly pay = Weekly base rate plus weekly overtime rate
6. Uniform rate of pay = Total weekly pay divided by Total work units

Example: A truck driver is paid on a mileage basis for a two hundred thirty mile trip performed about ten times a week. The base rate of pay is twenty cents a mile. The overtime rate of pay is thirty cents a mile. The average length of the trip is four and one-half hours.

1. 2300 mi. per week divided by 45 hours per week = 51.1 miles per hour
2. (a) 51.1 miles/hour times 40 hours times .20/mile = $408.80
   (b) 51.1 miles/hour times 5 hours = 255.5 miles
   (c) 255.5 miles times .30/mile = $76.65
Thus, the manner of calculating compensation that is reasonably equivalent to overtime presumes the hours are worked within Washington. Therefore, the two rules are clearly at odds with the court’s holding. The court recognized as much, declaring the rules to be inconsistent with the MWA’s plain language and stated purpose, as well as “with the principles that apply to interpretation of remedial legislation governing payment of wages.”

Declaring itself as possessing the ultimate authority to interpret statutes, the court stated that an agency’s interpretation of a statute should only be granted deference if “(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency’s special expertise.” Finding that the statute is not ambiguous, the court refused to defer to the Department of Labor and Industries’ interpretive rule. The court further stated that deference is never appropriate whenever an agency’s interpretation runs counter to a statutory mandate. Thus, because the administrative rules would not benefit Washington employees and would discourage employment opportunities within the State, deference cannot be granted and the rules are invalid.

C. COMMERCE CLAUSE

Having established that the MWA “unambiguously requires that overtime be paid to a Washington employee based on all hours worked,” the court then addressed the challenge that its holding is unconstitutional because it violates the commerce clause. The court determined that its interpretation of “RCW 49.46.130 is not facially discriminatory because it does not openly discriminate against interstate commerce in favor of intrastate economic interests,” and that it does not “have a direct effect of favoring in-state interests.” Thus, it next considered its holding in light of the Pike balancing test.

(d) $408.80 plus $76.65 = $485.45 divided by 2300 miles = 21.1 cents mile

(b) In using a formula to determine a rate of pay, the average number of hours projected to be worked and the average number of work units accomplished per week shall reflect the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over a representative time period within the past two years consisting of at least twenty-six consecutive weeks.

WASH. ADMIN. CODE 296-128-012(1)(a)-(b).

72. Bostain, 153 P.3d at 853.
73. Id. at 854 (citing Edelman v. State ex. re Pub. Disclosure Comm’n 99 P.3d 386, 388 (Wash. 2004)).
74. See id.
75. Id.
76. See id.
77. Id.
78. Id. at 855.
The court found that there was no burden on interstate commerce that outweighed the legitimate local purpose served by its holding – assuring Washington employees are properly compensated.\textsuperscript{79} The only regulatory burdens demanded by the statute are upon employers that hire Washington-based employees and do business in Washington: they must identify the workers subject to the MWA and maintain records of their hours.\textsuperscript{80} Such requirements do not rise to the level of impermissible burdens on interstate commerce.\textsuperscript{81}

Continuing with its \textit{Pike} analysis, the court addressed whether the MWA, as interpreted by the court, creates inconsistency among the states.\textsuperscript{82} Additional obligations created by a law that are reconcilable are not inconsistent under the dormant commerce clause.\textsuperscript{83} As to whether the compliance costs would outweigh the local benefits, the court reasoned that, under a choice of law analysis, an employer whose employee is subject to the MWA would not have to comply with another jurisdiction’s law for that employee.\textsuperscript{84}

Statutes regulating conduct occurring in another state have been found unconstitutional.\textsuperscript{85} But the court did not believe this is the case with the MWA, as it applies only to employers who have Washington-based employees; thus, there would be no attempt to apply the law to transactions unrelated to the State.\textsuperscript{86} The court concluded that not only would there be no broad extraterritorial impact that would outweigh MWA’s local benefits (e.g., compensating Washington-based drivers for working overtime and encouraging employers to hire more employees to avoid the high costs of overtime wages) but, given the importance of the local public interest, any burden there on interstate commerce is permissible.\textsuperscript{87} Therefore, the court reasoned its interpretation was constitutional.\textsuperscript{88}

V. THE DISSENT

In a firm dissent, Justice Johnson argued against each of the majority’s substantive conclusions.\textsuperscript{89} He and the other three dissenting justices believed

\textsuperscript{79} See id.
\textsuperscript{80} See id.
\textsuperscript{81} Id.
\textsuperscript{82} See id.
\textsuperscript{83} See id. (citing State v. Heckel, 143 Wash. 2d 824, 838 (Wash. 2001)).
\textsuperscript{84} See id. at 855-56.
\textsuperscript{85} See id. at 836 (referring to Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (finding an Illinois law that regulated the purchase of stock beyond its borders unconstitutional)).
\textsuperscript{86} See id.
\textsuperscript{87} See id.
\textsuperscript{88} Id. at 857.
\textsuperscript{89} See id. at 858-64 (Johnson, J., dissenting).
the MWA requires overtime compensation only for hours worked in excess of forty per week within Washington; therefore, Bostain was not entitled to overtime wages. To begin with, RCW 49.46.130(1) is silent as to whether the hours to be factored into overtime calculations are limited to hours worked within Washington. Moreover, the fact that the trial court and the court of appeals came to opposite conclusions on this issue is evidence enough that there is ambiguity. Thus, administrative rules and legislative history should be consulted for interpretive guidance.

The dissent noted the repeated references in RCW 49.46.005 to impacting employment matters within the State for Washington employees. The majority’s attempt to minimize the language by suggesting it would contravene the statute’s purpose to limit overtime hours to those worked within the State was unconvincing to the dissent. Interpreting “hours” to mean “hours worked within Washington” is consistent with the plain language of the statute and does not require stretching the statute beyond its intended purpose.

Additionally, the rule promulgated by the Department of Labor and Industries, WAC 296-128-011, provides further justification for why the legislature intended to focus the benefits of the MWA’s overtime provisions on employees working in Washington. As noted above, the rule “confirms that to receive overtime under RCW 49.46.130(1), an employee must work more than 40 hours per week within the state of Washington.” The majority did not give this rule proper attention, dismissing it because the statute was not ambiguous and because the rule was inconsistent with the MWA’s purpose. However, given that the courts below split on the issue and that the Department of Labor and Industries (“DLI”) undisputedly had the power to enforce the MWA, which fell within its expertise, the elements for deferring to an agency rule were satisfied.

As for the majority’s view that the administrative rule was in conflict with the statute’s intent, the dissent argues that the rule and the MWA are not in conflict, but the rule simply provides a definition for an undefined term in the statute – the very thing administrative rules are intended to do. The dissent also found it significant, although the majority did not, that the Washington

90. See id. at 863 (Johnson, J., dissenting).
91. See id. at 859 (Johnson, J., dissenting).
92. See id. (citing City of Pasco v. Pub. Employment Relations Comm’n, 833 P.2d 381 (Wash. 1992)).
93. See id. at 860.
94. Id.
95. Id.
96. Id. at 861.
97. Id.
98. See id. at 861-62.
99. Id. at 862.
Transportation Law Journal

VI. ANALYSIS OF THE DECISION

The holding of Bostain could result in events that would make it one of the most ironic decisions in modern jurisprudential history.105 The majority repeatedly stated that the Court of Appeals and DLI’s interpretation of RCW 49.46.130(1) was not consistent with the MWA’s stated purpose, i.e., to encourage employment opportunities and to protect employees in Washington.106 Thus, the court apparently believed that by granting Washington-based interstate truck drivers overtime pay for working more than forty hours, some or all of which may or may not have been within Washington, the court was furthering the legislative intent. Although the court couched its opinion in textualist language, it seems to have been informed just as much by, if not more so, policy considerations. After all, “Washington has a ‘long and proud history of being a pioneer in the protection of employee

100. Id.
101. Id.
102. Id. at 862-63 (citing Pike, 397 U.S. at 142).
103. Bostain, 153 P.3d at 863.
104. Id.
105. The problems the dissent pointed out with the majority’s argument will not be repeated here, although an analysis of the holding would certainly incorporate the arguments made by the dissent.
106. See Bostain, 153 P.3d at 851-55.
Overboard on Overtime: Bostain v. Food Express, Inc.

However, an analysis of what is ultimately beneficial to overall employment opportunities for Washington and its employees must encompass more than simply enabling a slightly larger percentage of the working population to obtain overtime compensation. If it could be demonstrated that the court’s decision would actually harm local interests, then, by the court’s own lights, it is incompatible with the purpose of the MWA and thus, incorrect.

Although the court refers to it many times, it never once defines what a “Washington-based” employee is. Must the employee be a resident of Washington? How many days of the year must a Washington-based employee actually reside in Washington? It is not uncommon for interstate truck drivers to be away from their homes for weeks at a time on a trip cycle that chains multiple pick ups and deliveries in numerous states together. Would a Washington resident that drove for a company located in another state and earned all of his hours outside of Washington still be entitled to overtime under the MWA? Must the employer actually have a facility in Washington in order to be the sort of employer liable to Washington-based employees? The court gives no guidance on this issue. What can be inferred, however, is that Mr. Bostain qualifies.

Mr. Bostain lived in Washington, worked out of Food Express’s Vancouver terminal where he also began and ended his routes, picked up his Arcadia-issued paychecks at the terminal, and drove with a Washington driver’s license. Food Express, however, is a California Corporation that has an Arcadia office and a terminal in Vancouver. None of these seem to be necessary conditions, however.

Suppose A, an interstate truck driver, moves to Washington. On her first day in the state, before she has time to get a new license or to even set up a mailing address, she meets B, the owner of a trucking company that is headquartered in Oregon, just across the Washington-Oregon border; the company is incorporated in Delaware and occasionally makes a delivery to Washington. B hires A to begin work that day. She immediately drives across the border, picks up her load in Oregon, and does not return to Washington until her chain trip is completed four weeks later. While she was away, two pay cycles expired, with the funds being wired electronically from the company’s Oregon bank to her New York-based credit union.

This concededly far-fetched example removes all the obvious characteristics that seemed to qualify Bostain as a “Washington-based”

107. Id. at 852 (quoting Drinkwitz v. Alliant Techsystems, Inc., 996 P.2d 582, 586 (Wash. 2000)).
110. Id.
employee, or her employer as a Washington employer, but it is not evident from the court’s opinion that B would not be required to pay A for overtime under Washington’s Minimum Wage Act. In order to apply the MWA, there need only be a “‘substantial relationship between the subject matter, the parties, and the forum state.’”111 This nebulous standard does little to assuage the tremendous level of uncertainty created by the court’s decision for employers and employees. This would hardly seem to be the outcome of a decision that encourages employment opportunities and protects employees.112

The court’s ruling also seems to ignore the realities of the motor carrier industry and the potential impact its decision could have on the industry in Washington. The interstate trucking business is one of high competition and low profits.113 This requires motor carriers to maximize their equipment and drivers, often keeping both on the road weeks at a time, traversing multiple states.114 To conduct a conflict of laws analysis for every driver for every route for every pay period, is incredibly discouraging to employers, and thus, employment opportunities. Interstate Distributor Company (“IDC”), a Washington-based truckload carrier, employs 520 Washington-based interstate drivers.115 IDC speculates, however, that the court’s decision will impose such an enormous burden that it will be forced to shut down.

Already taxed by federal regulations imposed on the industry, IDC has managed to survive as a company, in part by relying on the heretofore recognized proposition that overtime only need be paid to interstate drivers working more than forty hours a week in Washington.116 Under this overtime

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111. Id. at 856 (quoting Haberman v. Wash. Pub. Power Supply Sys., 744 P.2d 1032, 1054 (Wash. 1987)).
112. Obviously, the typical case will involve a Washington resident and an employer that operates within state borders.
114. On pages 3 and 4 of its amicus curiae brief, Interstate Distributor gives this example of a schedule of just one of its Washington-based drivers from January 25, 2007 through February 11, 2007:

- a. Load picked up in Olympia WA, delivered to Commerce, CA;
- b. Load picked up in Lancaster, CA, delivered to Hazleton, PA;
- c. Load picked up in Fishkill, NY, delivered to Eagan, MN;
- d. Load picked up in Fridley, MN, delivered to Phoenix, AZ;
- e. Load picked up in Phoenix, AZ, delivered to Flagstaff, AZ;
- f. Load picked up in Flagstaff, AZ, delivered to Montebella, CA;
- g. Load picked up in Ontario, CA, delivered to Hagerstown, MD;
- h. Load picked up in Myersville, MD, delivered to Swedesboro, NJ;
- i. Load picked up in Jamesburg, NJ, delivered to Denver, CO; and
- j. Load picked up in Cheyenne, WY, delivered to Tacoma, WA.

Brief of Amicus Curiae Department of Labor and Industries, supra note 19, at *3-4.
115. Id. at *1, 3.
116. See id. at *5.
structure, it was able to “employ thousands of Washington-based drivers for almost three decades.” However, the financial demands the court’s rendering will place upon IDC will force it to either close its operations, or to increase its rates and adjust its drivers’ schedules. Either option would have the same result, as IDC could not remain competitive with those companies not bound by Washington’s laws. IDC’s most reasonable option, therefore, is to: (a) relocate its headquarters and trucking operations outside of Washington and (b) no longer employ or hire Washington-based drivers. This would obviously have a negative impact on both the employment opportunities in Washington, as well the compensation and security of Washington employees.

IDC’s seemingly dire predictions of what will be the result of the court’s decision are not isolated. Many of the amici echo the same. Gordon Trucking noted that, due to the unique nature of interstate trucking, multi-state trucking companies can hire drivers based in other states “to serve the Washington market.” As stated above, profit margins in the industry are low, typically ranging from three to five percent. To pay a Washington-based interstate driver would increase labor costs by more than sixteen percent, a cost that would eliminate any profit and could not be offset by price increases.

Thus, the Washington Supreme Court’s attempt to encourage employment opportunities and to protect employees in Washington by interpreting RCW 49.46.130(1) and (2)(f) according to their plain, “unambiguous” meaning, could spell the end for an entire segment of the State’s economy. One can only hope that legislative or administrative steps will be taken before it is too late.

Of course, some would consider the picture painted here of the court’s holding as rather bleak and unfair. The decision could have the potential to force motor carriers to be more efficient in managing their drivers’ schedules, and would provide the drivers with a shorter work week and greater

117. Id.
118. See id. at *5-6.
119. Id. at *6.
121. Id. at *18.
122. Id. at *18-19; Gordon derives this percentage from the following calculation: Federal regulations permit interstate drivers to work 60 hours per workweek. Paying time-and-a-half (the WMWA’s overtime rate) for hours worked between 40 and 60 in a workweek increases costs by 16% before additional payroll taxes. (At a straight-time rate of $20/hour, 60 hours at straight time is $1,200. Forty hours of straight time plus 20 hours at time-and-a-half ($30/hour) is $1,400, which is 116% of $1,200.)
123. In a December 2007 e-mail correspondence with a representative of the American Trucking Association, the author learned that administrative remedies are being pursued, rather than legislative. Email from Robert Digges, representative, American Trucking Association, to David Hyams, author (Dec. 3, 2007, 07:17 MST).
compensation – benefits lacking in an industry rife with turnover. Time will tell.

VIII. CONCLUSION

The court in Bostain attempted to do the citizens of its state a service by faithfully interpreting an overtime wage statute. The court’s decision was favorable for Mr. Bostain, but not so for Food Express. Unfortunately, because of the disastrous implications of the holding, Mr. Bostain may be the only Washington-based interstate truck driver to ever so benefit.

Carrier Brokers Gone Broke: Who Should Pay the Broker’s Carrier-Subcontractor Services?

Case Comment

Kimberly Martinez*

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I. INTRODUCTION

A bill of lading is evidence of a valid contract of carriage that contains presumptions of liability between a shipper and carrier. The Supreme Court of the United States has held that shippers and carriers may contract around the presumptions by allocating who shall pay the freight charges and to whom. For instance, a shipper may enter into a motor carrier contract under which the

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carrier may subcontract with another motor carrier to haul the shipper’s freight. The issue then becomes whether the shipper is liable to the carrier-subcontractor under the shipper’s motor carrier agreement.

II. BACKGROUND

The facts of each case determine whether a carrier-subcontractor can successfully bring a lawsuit for payment against the shipper when the primary carrier fails to pay the carrier-subcontractor. The two cases illustrating this point are *J & P Trucking, Inc. v. USA Motor Express, Inc. (In re USA Motor Express, Inc.)* and *Southern Freight, Inc. v. LG Electronics U.S.A., Inc.* The court in both cases examined the law of the transportation industry regarding the dealings between shippers, first-carriers, and second-carriers. Although the respective courts decided the same issue, the cases resulted in different outcomes. The court in *USA Motor Express* held that the shipper is not responsible for paying the amount charged by the carrier-subcontractor for hauling the shipper’s loads when the carrier-broker failed to pay. In contrast, the court in *Southern Freight* held that the secondary carrier could independently seek recovery against the shipper under the presumption of shipper liability. The distinguishable factors between the two cases turn on contractual relationships between the parties in light of the bill of lading.

III. CONTRACTUAL OBLIGATIONS TRUMP PRESUMPTIONS OF CONSIGNOR’S LIABILITY

Bills of lading serve as a transportation contract between the shipper and carrier. The terms and conditions of bills of lading have the force and effect of a statute. Although a bill of lading contains liability presumptions, shippers and carriers may contract around them and default terms only apply if the

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3. *Id.* at *2.
5. *See USA Motor Express*, No. 06-J-4875, slip. op. at 6 (holding plaintiffs right of action is against broker-carrier, not shipper).
7. *Id.*
8. *Id.*
parties fail to agree on the contractual terms. Moreover, a shipper is presumably the consignor whose transportation of goods infers a promise to pay the party hauling its goods. The inference is rebuttable if the bill of lading indicates that consignor-shippers did not act on their own behalf. Thus, shipper-consignors are typically responsible for shipping charges because the one who ships the goods assumes the obligation to pay the freight charges unless an independent contract provision evidences otherwise.

Issues of shipper liability typically result when a transportation contract permits a carrier to subcontract with another carrier for the transportation of the shipper’s goods. Transportation contracts may allow a carrier to subcontract with another carrier to carry out the transportation of the shipper’s goods. Accordingly, a shipper-consignor may rebut the liability presumption embedded in bills of lading by providing evidence that the parties contracted around such presumption. Nonetheless, courts are unlikely to hold shipper-consignor liable to pay freight charges to a subcontracted carrier when: (1) the court finds that the principal-carrier failed to disclose it acted as an agent for the carrier-subcontractor pursuant to a broker agreement; (2) shippers expressly waive their liability by executing a non-recourse provision; or (3) separate hold harmless contract provision.

In USA Motor Express, the Alabama District Court discussed the liability, if any, of a shipper to pay for a motor carrier-subcontractor’s services when the broker-carrier fails to pay the carrier-subcontractor prior to filing bankruptcy even though the shipper paid the broker-carrier. In other words, the court looked at whether carrier subcontractors who transported goods for a shipper pursuant to a separate broker agreement may seek payment from the shipper for the broker-carrier’s failure to satisfy its payment obligations when the shipper is not a party to the broker agreement. The decision of this court turned on the shipper’s agreement with the broker-carrier.

The pertinent facts of USA Motor Express are as follows. On November 21, 2005, the plaintiffs, J & P Trucking Company and Nassbaum Trucking, Inc. (“Plaintiffs”), filed a declaratory judgment action against USA Motor Express, Inc. (“USA”), LG Electronics USA, Inc. (“LG”), and other defendants. Plaintiffs sought declaration of their rights and legal relationship

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11. USA Motor Express, No. 06-J-4875, slip. op. at 4.
12. See id.
13. Id.
14. Id.
15. See id. at **4-5.
17. See USA Motor Express, No. 06-J-4875, slip op. at 3.
18. See id.
19. Id. at *1.
with the named defendants.20 Specifically, the plaintiffs argued that LG should pay for their transportation of goods because USA never paid them for hauling LG’s goods. Prior to Plaintiffs’ declaratory action, USA filed a petition for bankruptcy with the United States Bankruptcy Court for the Northern District of Alabama.21 Therefore, the court dismissed USA from the lawsuit because USA’s filing of the bankruptcy petition stayed the proceedings pursuant to the United States Bankruptcy Code.22

The facts leading up to the case stem from two independent contracts between the parties. The defendant, LG contracted with USA to haul its goods (“Motor Carrier Agreement”). The pertinent parts of the Motor Carrier Agreement permitted USA, as carrier, to “[S]ubcontract with other motor carriers . . . to perform the transportation services under the agreement.”23 Further, LG, as shipper, promised to pay USA for the freight charges provided USA hold LG harmless against all other demands and suits by carriers seeking duplicate payments or other charges.24 Thus, USA entered into an agreement with Plaintiffs to haul LG’s load pursuant to a Transportation Brokerage Contract.25

Plaintiffs entered into a Transportation Brokerage Contract as independent contractors. USA, as broker, promised to pay Plaintiffs for the freight charges upon receipt of each Plaintiffs freight bill, bill of lading, and delivery receipt.26 Additionally, each Plaintiff retained USA as their broker for purposes of soliciting merchandise for transportation and for accepting payment for the transportation of goods.27 The agreement further authorized USA to act as their agent to invoice shipper or consignor for non-payment of freight charges.

LG paid USA for transporting its goods.28 USA then paid Plaintiffs generally within the specified time set forth in their Transportation Brokerage Contracts.29 However, Plaintiffs stopped receiving payment from USA prior to it filing bankruptcy even though LG paid it for the hauling of goods.30 Further, Plaintiff, J & P, asserted that LG continued to pay USA after it terminated USA as its agent.31 Based on the above, Plaintiffs are not likely to receive

20. Id (discussing plaintiffs declaratory relief pursuant to 28 U.S.C. § 2201).
21. Id.
22. Id. at *1 n.3
23. Id. at *3.
24. Id.
25. Id. at **1, 3.
26. Id. at *3.
27. Id.
28. Id. at *1
29. Id.
30. Id.
31. Id. at **1, 5.
 Carrier Broker’s Gone Broke

payments for hauling LG’s load because USA filed bankruptcy and is the most likely reason why Plaintiffs claim that LG owes them for the shipments.

Plaintiffs did not dispute that LG paid for the transportation of its goods. Rather, Plaintiffs argued that LG should pay them again because they are not bound to the terms of the Motor Carrier Agreement. Conversely, LG argued that it does not owe Plaintiffs for the shipments because it already paid USA pursuant their contract and it is not in contractual privity with Plaintiffs. In response, Plaintiffs counter argued that LG remained liable – pursuant to the bills of lading – to Plaintiffs for shipping charges, irrespective of its payment to bankrupt USA. The court, however, disagreed.

The USA Motor Express court found after examining all relevant contracts that the broker-carrier acted as an agent for the carrier-subcontractors, holding the shipper had no liability to pay the carrier-subcontractors even though the broker-carrier failed to pay. The court reasoned that the parties’ independent contracts clearly evidenced that LG agreed to pay USA for the transportation of its goods and USA agreed to pay Plaintiffs, as motor carrier-subcontractors for its freight. Further, the court pointed out that USA expressly held LG harmless against all claims seeking duplicate payments. Therefore, Plaintiffs could not seek independent relief against LG for USA’s failure to satisfy its payment obligations under the Transportation Broker Contract.

Prior to the USA Motor Express decision, the Superior Court of Georgia decided the issue differently based on a case with similar facts. In Southern Freight, the Superior Court of Georgia placed a higher importance on the shipper’s bills of lading rather than on the parties’ independent contracts. As a result, the Southern Freight decision had a different outcome than the USA Motor Express decision. The carrier-subcontractor, Southern Freight, tried collecting its unpaid freight charges from the consignor-shipper, LG Electronics, U.S.A., Inc. (“LGE”), after the broker-carrier, USA Motor Express, Inc. (“USAM”), failed to satisfy its payment obligations.

The Southern Freight court, like the USA Motor Express court, evaluated the contractual relationships between LGE and USAM, and Southern Freight and USAM. LGE entered into a transportation contract (“Transportation

32. Id. at *3.
33. Id.
34. See id. at 5.
35. See id. at *4.
36. Id.
The parties moved the shipments pursuant to bills of lading issued by LGE. USAM then contracted with Southern Freight for the delivery of LGE’s goods. Pursuant to their agreement, Southern Freight billed USAM, including the transportation of LGE’s freight. LGE’s bills of lading ultimately governed the pickup process and deliveries.

Each bill of lading had USAM as the designated carrier and defined carrier as “[A]ny person or corporation in possession of the property under this contract.” Nonetheless, Southern Freight also placed its name on each bill of lading. The bills of lading also contained a Section 7 non-recourse provision. LGE signed this section in only two out of sixty-nine bills of lading. In addition, LGE and USAM voided the terms and conditions in all bills of lading without Southern Freight’s knowledge. LGE paid USAM and USAM paid the second carrier. At no time did LGE and Southern Freight have a contract or enter into a contract.

Southern Freight started billing LGE after USAM failed to satisfy payment for the hauling of LGE’s load even though LGE had no knowledge of Southern Freight let alone its transportation rates for the loads of cargo. Subsequently, USAM filed bankruptcy. As a result, Southern Freight commenced a lawsuit against LGE in efforts to collect the unpaid freight charges. The Southern Freight court reviewed the independent contracts and found no written contracts between LGE and Southern Freight. Nonetheless, the court held LGE liable for amounts due to Southern Freight. The court reasoned that the bills of lading created a contract between LGE and Southern Freight, and the contract between Southern Freight and USAM “[did not] bar Southern Freight from independently seeking recovery against LGE, as the shipper.”

The USA Motor Express decision emphasized the importance of contract law unlike the Southern Freight decision. A court in reviewing the terms of a

38. Id. at 59,473.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id. at 59,743-44.
46. Id. at 59,743.
47. See id.
48. Id. at 59,744.
49. Id. at 59,742.
50. Id. at 59,475.
51. Id.
contract must give effect to the plain meaning of the contractual terms and presume that the parties intended all clearly stated terms.\textsuperscript{52} The court should enforce the contract unless it is ambiguous.\textsuperscript{53} A contract is unambiguous if the court finds that there is only one reasonable meaning. The court may in determining if the contract is a final expression of obligations, consider trade usage, course of dealing, and course of performance.\textsuperscript{54}

Again, in \textit{USA Motor Express} the court gave full weight to the contract between LG and USA and the contract between Plaintiffs and USA, concluding both clearly reflect the full intentions of each respective party.\textsuperscript{55} The court pointed out that Plaintiffs knew they entered into a contract with USA solely to arrange shipment of loads, USA paid them for hauling these loads, and they expected payment solely from USA regardless if the shipper paid for such services.\textsuperscript{56}

Moreover the \textit{USA Motor Express} court conceded that Plaintiffs were correct that LG, consignor, is liable for shipping charges provided there are no other contracts and the parties signed section 7 of the recourse provision.\textsuperscript{57} The court rejected Plaintiffs argument, finding the two separate contracts contradicted Plaintiffs’ argument. LG entered into a carrier contract with USA under which it promised to pay for the freight charges.\textsuperscript{58} Further, USA executed a hold harmless provision protecting LG against all other demands and suits by carriers seeking duplicate payments or other charges.\textsuperscript{59} Given these facts, the court concluded that the evidence failed to reveal that LG knew that USA further consigned the load with another carrier for purposes of shipping LG’s load and LG properly waived its liability to LG and subsequent carrier-subcontractors; thus, it could not be held liable.\textsuperscript{60} The court reasoned that to hold LG liable would effectively disregard both contracts of the parties, which the court is not at liberty to do.\textsuperscript{61}

The court bolstered its reasoning by pointing out that the contract between USA and LG clearly stated that the parties’ intended that LG would pay USA for shipment even if USA subcontracted the hauling of the loads.\textsuperscript{62} In fact, Plaintiffs expressly shows that they retained USA as their agent with complete “authority to act in their behalf for the sole purpose of securing merchandize

\begin{itemize}
  \item \textsuperscript{52} See \textit{USA Motor Express}, No. 06-J-4875, slip op. at 5.
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} See id.
  \item \textsuperscript{56} See id.
  \item \textsuperscript{57} Id. at *4.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id. at **4-5.
  \item \textsuperscript{60} See id. at *5.
  \item \textsuperscript{61} See id.
  \item \textsuperscript{62} See id.
\end{itemize}
and collecting payment for transportation.\textsuperscript{63} Although sympathetic to Plaintiffs position, the court stated that all parties were bound to contracts they willingly and knowingly entered.\textsuperscript{64} Therefore, the court refused to redraft the parties’ respective contracts to include unforeseeable events such as USA payment default.

In contrast, the \textit{Southern Freight} decision turned on the fact that the contract between LGE and USAM failed to limit the shipper’s liability for USAM’s failure to pay Southern Freight. The \textit{Southern Freight} court also found that the bills of lading constituted a contract between LGE and Southern Freight.\textsuperscript{65} The court then held that Southern Freight has a contractual right to expect payment pursuant to LGE’s bills of lading.\textsuperscript{66} Stated differently, LGE, as shipper, failed to take the necessary precautions to secure its release from double payment because it failed to sign the non-recourse provision and did not have a hold harmless provision in its contract with USAM.\textsuperscript{67} Nor did Southern Freight know that LGE and USAM agreed to void the terms and conditions of bills of lading.\textsuperscript{68} Therefore, the court ultimately allowed Southern Freight to seek payment against LGE, reasoning LGE’s contract with USAM failed to exclude the presumption of shipper liability.

\textbf{IV. CONCLUSION}

\textit{USA Motor Express} emphasized the importance of contract law when determining the liability of each respective party. While the \textit{USA Motor Express} decision refused to place any payment liability on the shipper despite the fact Plaintiffs’ loss is uncollectible against bankrupt USA, it does insinuate a different conclusion had LG known USA acted as an agent for Plaintiffs by focusing on the fact LG did not know USA consigned LG’s load under a separate contact. Further, the court emphasized the importance of the contracts of each party. \textit{Southern Freight} emphasized quite the opposite. This case focused on the importance of the terms and conditions of bills of lading. The court seemed more willing to impose the shipper liability presumptions regardless of the independent contracts between the parties by finding bills of lading constituted contracts between the carrier-subcontractor and the shipper-consignor. This is true even though neither party knew about their respective independent contracts with the carrier-broker.

Both cases, however, are not without similarities. Each case cited to other

\begin{itemize}
  \item 63. \textsuperscript{Id.}
  \item 64. \textsuperscript{See id. at 6.}
  \item 66. \textsuperscript{See id. at 59,472, 59,475.}
  \item 67. \textsuperscript{See id. at 59,475.}
  \item 68. \textsuperscript{Id.}
\end{itemize}
court decisions emphasizing the importance that shippers properly waive their rights by: (1) executing section 7 non-recourse provisions located in bills of lading, or (2) executing an independent contract shifting the shipper’s presumptive liability. Further, the cases illustrate the important social policies involved where broker-carriers file bankruptcy while leaving carrier-subcontractors without the ability to collect payment. USA Motor Express seemed unwilling to open the door for the possibility that carrier-subcontractors would receive double payment whereas Southern Freight emphasized the presumptive right of carriers to collect directly from the shipper absent any express waiver by the shipper even if the result is double payment.

For several reasons, the Southern Freight decision has better social implications. The better policy is to ensure that carrier-subcontractors receive payment for their services, even if doing so results in double payment. Firstly, the likelihood of carrier-subcontractors receiving double payment is slim where they become unsecured creditors in bankruptcy filings by broker-carriers. Secondly, Shippers should know that when they permit carriers to subcontract with another carrier for purposes of hauling the shippers’ goods, it is possible it will have to pay the carrier-subcontractor if the carrier-broker fails to satisfy its payment obligations. This is especially true under Southern Freight that found the shipper’s bills of lading evidenced a contract between the carrier and shipper. Finally, shippers know of the presumptions imposed in bills of lading despite whether they know about broker-carriers’ independent subcontracts; and that courts presumptively hold shippers liable to the carrier without an express contract provision releasing them from such liability.

In sum, courts should be more willing to hold all parties liable to each other under the reasoning in Southern Freight. Social concerns also suggest that courts should protect the carrier-subcontractor from assuming the economic burden when the law permits shippers to expressly contract around their presumptive liability. The contrast between USA Motor Express and Southern Freight further shows the need for predictability. Therefore, future litigation of the issue is likely to continue, and will become especially pertinent in the face of bankruptcy proceedings.

69. See id. at 59,474-75.
70. See USA Motor Express, No. 06-J-4875, slip op. at 5.
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Have Truck, Will Drive:
The Trucking Industry and the Use of Independent
Owner-Operators Over Time

Douglas C. Grawe*

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I. INTRODUCTION

In American lore two images stand out. One is the entrepreneur, the person who wants to test his or her own mettle in the marketplace, i.e., be his or her own boss. The other image is the open road, i.e., exploring the great wide open of the American landscape. One profession, one business, combines both. The profession: the independent owner-operator. The independent owner-operator is free to make his or her own decisions, including hauling loads to places throughout the country on what is still, on occasion, an open road. Independent owner-operators are not competing in the same environment today as they were one hundred years ago, but they remain a staple of the transportation industry nonetheless. Regulation and deregulation of the industry, technological advancements, and economic cycles have all impacted the independent owner-operator. In the following pages I will trace the course of the independent owner-operator, traversing from the pre-regulation era, through the Motor Carrier Act of 1935 – the height of regulation into the 1960s, the steady deregulation of the 1970s and 1980s, and into the current defensive of the trade today.

1. The independent owner-operator is an independent trucker who lacks federal operating authority. As the court in Central Forwarding, Inc. v. Interstate Commerce Commission explains:

They are persons owning one or a few trucks who lack [Interstate Commerce Commission] operating authority. Since they cannot transport regulated commodities in interstate commerce in their own right, they rely on two sources of business: (1) they lease their services and equipment to a carrier in order to utilize the carrier’s operating authority, or (2) they make hauls exempt from [Interstate Commerce Commission] regulation by transporting agricultural products, working for a private fleet, or transporting goods intrastate.

698 F.2d 1266, 1267 (5th Cir. 1983).


The Owner Operator Independent Drivers Association, the largest trade association representing independent owner-operators, currently cites having more than 160,000 members owning and/or operating more than 240,000 vehicles. OOIDA.com, About Us Page, http://www.ooida.com/about_us/about_us.html (last visited May 20, 2008).

A trade publication, Transport Topics, annually publishes a survey of the largest for-hire motor carriers in the industry. The 2007 survey included 100 carriers, of which 83 listed the breakdown of owner-operators versus employee drivers. The carriers cited 59,690 tractors leased from independent owner-operators in their fleets, and seven carriers cited exclusive use of independent owner-operators. See Top 100 For-Hire Carriers 2007, TRANSPORT TOPICS (Feb. 14, 2008) http://www.tmnews.com/tt100/2007/fhranking.asp. In 1978, it was cited that independent owner-operators made up 40 percent of all intercity truck traffic in the United States. See Cent. Forwarding, Inc., 698 F.2d at 1268.
II. PRE-REGULATION: THE INDEPENDENT OWNER-OPERATOR AND THE TRUCK

The independent owner-operator starts the business with a truck. The truck is the tool of the trade. The truck is the storefront and when it is moving, revenue is coming in. But the truck had to beat a stalwart in the transportation business in order to build a customer base: the horse. The truck came about to compete against the workhorse, and in time the truck, aided by an improvement in road conditions, and performance improvements, overtook the horse in terms of productivity. So with one truck and the desire to move goods, the independent owner-operator was in business. “Everybody wanted to become a trucker. At a time when jobs were scarce, gas prices were at rock bottom, and trucks were reliable enough not to break down all the time.” The independent owner-operator found a local shipper, set the rate, and effectively was a motor carrier. However, in 1935, the United States federal government stepped in and regulated the industry.

At the time, the federal government felt the need to control predatory pricing and what it perceived as unscrupulous business practices. New motor carriers popped up everyday. One person who owned a truck could become a motor carrier simply by hauling one load for a local goods producer. A flood of able drivers and able equipment plummeted rates and owner-operators struggled to last. Having seen something like this before in the railroad industry, the federal government looked to the Interstate Commerce Commission to act. Discriminatory pricing and rate abuses ultimately led to

6. “A down payment on a truck and a driver’s license were all it took to get into the industry.” Id.
10. Dempsey, supra note 5, at 281.
11. Paul Dempsey described the times prior to regulation of the railroad industry in 1887 in his article Transportation: A Legal History:

Many railroads went through bankruptcy and reorganization, and the value of their stock was wiped out. Some had issued watered stock in order to raise money fraudulently. Many
the Federal Government regulating rail carriers beginning in 1887 with An Act to Regulate Commerce and through the Interstate Commerce Commission (the “ICC”).12 The ICC’s rail history led Congress to act with regard to motor carriers.

The Motor Carrier Act of 1935 extended the reach of the ICC.13 The Motor Carrier Act of 1935 became law during the height of President Franklin Delano Roosevelt’s New Deal. Among the alphabet agencies and programs of the New Deal, the ICC continued to grow, continuing its trend as an exemplary agency.14 The ICC had substantial power over rail and truck transportation through rule making and rule enforcement.15 The ICC was in fact a gatekeeper to the industry and a watchdog to those within it.16

Since the beginning of regulation, there have been three primary types of farmers would buy stock in anticipation of lucrative dividends and reasonable transportation costs for shipping their crops to eastern markets. Governments and farmers alike suffered as many railroads went through bankruptcy and reorganization, effectively wiping out the value of the stock sold to investors.

State governments attacked the rail industry for its bribery of public officials, sale of worthless securities, and rate and service discrimination between places and persons. In addition, farmers were left with mortgages, worthless stock, exorbitantly priced or nonexistent transportation, and increased taxes needed to cover local government investments. Midwestern farmers, the primary victims of the rate abuses, assailed the excessively high and discriminatory rates that the railroads charged to carry agricultural products from points of origin, over which carriers had a monopoly, to eastern markets or processing areas. They criticized the railroads’ high rates, land grants, and political power. In the meantime, their taxes were increased to cover the parallel investment made by their state and local governments. This led to blind antagonism toward the railroads.

Id.


[c]entry into the field is strictly limited; a carrier can operate only under an ICC certificate issued upon the finding that the proposed service is in fact required by the present or future public convenience and necessity. Routes are specifically delineated between points fixed in the certificate, and the commodities transportable thereunder may be limited.

Id.
carriers in the trucking industry: common carriers, contract carriers, and private carriers. Private carriers haul goods they themselves produce. Private carriers were exempt from regulation under the ICC once they received a permit. Oftentimes the independent owner-operator tried to meet the definition of a private carrier. The independent owner-operator would dedicate his equipment to one shipper and haul that shipper’s goods throughout the country at the direction of the shipper. If the independent owner-operator dealt with a motor carrier, rather than directly with the shipper, then there was a question of fact. That was because common and contract carriers were regulated by the ICC. “Essentially the issue is as to who has the right to control, direct, and dominate the performance of the service. If that right remains in the carrier, the carriage is carriage for hire and subject to regulation.” On the other hand, “[i]f it rests in the shipper, it is private

17. See id. at § 203(a)(14). This section provides,

The term ‘common carrier by motor vehicle’ means any person who or which undertakes, whether directly or by lease or any other arrangement to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

18. See id. at § 203(a)(15). This section provides,

The term ‘contract carrier by motor vehicle’ means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

19. See id. at § 203(a)(17). This section provides,

The term private carrier of property by motor vehicle means any person not included in the terms ‘common carrier by motor vehicle’ or ‘contract carrier by motor vehicle,’ who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

20. See id. at § 209(a). This section provides,

No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business.

carriage and not subject to regulation . . . ." 22 Private carriers liked to use independent owner-operators, because they could exercise enough control to maintain the exemption from ICC regulation, while at the same time pass the cost of owning and operating the equipment onto the independent owner-operators. The independent owner-operators liked to have some increased control in their operations and enjoy a chance to increase profits based on improved performance.

The presence of an independent owner-operator in any transaction for transportation services has led to some of the most difficult classifications the ICC has had to make over the years of regulation. 23 The relationship between the independent owner-operator and the person directing the freight could determine what control, if any, the ICC would have. 24 The Motor Carrier Act of 1935 required carriers to prove they were “fit, willing, and able to perform the proposed operations, and that their proposed operations were required by present or future public conveniences and necessity.” 25 If the motor carrier met those requirements, the ICC would issue the motor carrier a “certificate of public convenience and necessity.” 26 The ICC also regulated contract carriers by requiring them to obtain a permit before operating. 27 The contract carrier also had to prove its worthiness for the permit. 28 It was this hurdle, this

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22 Id.
23 See id. at 415, n.29.
24 For example,

If the vehicles of the owner-operators, while being used by applicant, were operated under its discretion and control, and under its responsibility to the general public as well as to the shipper, then its operations in which such vehicles were employed, come within the phrase ‘or by a lease or any other arrangement’ of section 203(a)(14), and applicant, as to such operations, was a common carrier by motor vehicle.

26 Id. at 31.
27 Drum, 368 U.S. at 371, supra note 21.
28 Id. at 374. In Drum, the Court noted:

From the beginning underlying principles have been, and have remained, clear. A primary objective of the scheme of economic regulation is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market. This is the goal not only of Commission surveillance of licensed motor carriers as to rates and services, but also of the requirement that the persons from whom shippers would purchase a transportation service designed to meet the shippers’ distinctive needs must first secure Commission approval.
The Use of Independent Owner-Operators Over Time

The certificate of public necessity, which made it more difficult for the independent owner-operator to find his or her niche.29

III. THE MOTOR CARRIER ACT OF 1935: OWNER-OPERATORS THINK OUTSIDE THE ICC BOX

Now it took more than just a will and a truck to be a motor carrier. The owner-operator had to show the ICC there was a shipper in need of its services, that other carriers already in existence were not able to meet the shipper’s needs, and that the owner-operator would be able to protect the public’s interests.30 So the motor carrier was charged with proving its fitness to the federal government. It would document the equipment it owned, the locations it could service, and the freight it could move.31 The whole point of regulation though was to control the quality and quantity of motor carriers in the industry.32 The ICC demanded to know what rates were being charged for each load.33 No one was to get any discounts and no one was to get charged

Id. at 374-75.

29. See Dempsey, supra note 25, at 7-8. As Dempsey determined in his article,

The Motor Carrier Act of 1935 required carriers seeking motor common carrier operating authority to prove that they were fit, willing, and able to perform the proposed operations, and that their proposed operations were required by present or future public convenience and necessity. For applicants to meet the burden of proof on the latter criterion, the ICC determined that they had to establish that the proposed operations would serve a useful public purpose responsive to a public demand or need. Having established the public purpose, the applicant then had to show that the purpose could not be served as well by existing carriers and that the applicant could serve that purpose without impairing the operations of existing carriers in a manner contrary to the public interest.

Id.

30. See, e.g., John Joseph Norton Common Carrier Application, 1 M.C.C. 114, 115-16 (1936). Providing that,

[w]here a certificate is sought to engage in the transportation of commodities generally and to serve a public already served by railroad, express, and motor carriers, the burden of proof is upon applicant to show that the latter are not rendering a type or character of service which satisfies the public need and convenience, and that the proposed service would tend to correct or substantially to improve that condition.

Id.


32. See Dempsey, supra note 5, at 284-85. Quoting the Federal Coordinator of Transportation: “The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it.” Id. at 285.

higher rates. The rates were to be published for all to see.\textsuperscript{34} Thus, the ICC verified that the rates charged were fair and reasonable for the market.\textsuperscript{35} The ICC verified that the motor carrier had equipment available to cover the locations and freight demands it proffered to meet. The ICC verified that the demand for the motor carrier’s services actually existed, and that no other existing motor carrier could meet those needs.\textsuperscript{36} All of that verification made it cumbersome at best, impossible at worst, for new motor carriers to enter the market.\textsuperscript{37} So while independent owner-operators tried to grow their business from a one-truck operation, they thought outside the ICC’s boxes to give themselves a place to start.

The ICC’s boxes did not include certain exempt properties such as agricultural products.\textsuperscript{38} The independent owner-operator could easily fill the need of produce shippers without economic influence from the ICC, and many owner-operators did fill that need.\textsuperscript{39} While hauling produce to the markets was a key niche for the owner-operator to fill, being relegated to exempt properties made it difficult to get home.\textsuperscript{40} So the independent owner-operator had to keep thinking of ways to move the truck and keep their storefront open without having to obtain a certificate from the ICC.

To further avoid the grasp of the ICC, the owner-operator could lease the equipment to a motor carrier that already had the ICC’s blessing.\textsuperscript{41} For instance, a truck owner could lease his equipment to the motor carrier to haul a particular load that the motor carrier had the authority to haul.\textsuperscript{42} This way the

\textsuperscript{34} 339 F. Supp. at 557. “All tariffs must be filed, posted and published.” \textit{Id.} (citing to 49 U.S.C. § 317).

\textsuperscript{35} \textit{Id.} (citing to 49 U.S.C. §§ 2-3, 316-17). “Reasonable rates and charges are necessary; discriminatory or special rates or rebates are prohibited, as is discriminatory favoritism to any shipper.” \textit{Id.}

\textsuperscript{36} Dempsey, supra note 25, at 7-8.


\textsuperscript{38} \textit{See} Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, 545 (1935), which states as follows:

\text{Nothing in this part, except provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include \ldots (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof).}

\textit{Id.}

\textsuperscript{39} Am. Trucking Ass’ns v. United States, 344 U.S. 298, 302-03 (1953).

\textsuperscript{40} \textit{Id.} at 302-06.

\textsuperscript{41} \textit{See} Dixie Ohio Express Co. Common Carrier Application, 17 M.C.C. 735, 737-741 (1939).

\textsuperscript{42} \textit{See}, e.g., Interstate Commerce Comm’n v. Allen E. Kroblin, Inc., 113 F. Supp. 599, 602-03 (D. Iowa 1953). There, the court found that,

\text{In order to haul return loads of non-exempt commodities, it is necessary for the uncertificated carriers to haul them under the certificate of a certificated carrier. In order to haul such loads}
motor carrier bears all the administrative costs and pays the independent owner-operator for his equipment and his driver. While some motor carriers used this to find a legitimate competitive advantage, “historically, this practice led to abuses which threatened the economic stability of the trucking industry and public interest.”

“Unscrupulous ICC-licensed carriers would use leased vehicles to avoid safety regulations governing equipment and drivers. Authorized carriers’ use of non-owned vehicles also caused public confusion as to who was financially responsible for the vehicles.”

The ICC was still allowing motor carriers to lease equipment though, acknowledging it as a bona fide business practice. The independent owner-operators continued to satisfy the needs of many entrepreneurs wanting to ease their way into the trucking industry on their own terms. In fact,

[T]he ICC, the body charged with responsibility for developing and maintaining a strong national transport system with the full legislative blessing of Congress, recognizes in a formal and vital way that carriers (common or contract) are entitled to obtain needed equipment and augment fleets to care for increases in traffic by means of leases.

For the motor carrier, the benefit was in avoiding the liability to the general public and the cost of the equipment itself. Because the motor carrier did not actually own the equipment, the independent owner-operator bore those risks and costs. Oftentimes, it was the independent owner-operators that allowed motor carriers to, in effect, expand service offerings without asking permission from the ICC. One example was called an interchange involving an independent owner-operator. The independent owner-operator would haul one load for motor carrier A that has certification to move steel from Pittsburgh to Cleveland. Motor carrier A, though, did not have the certification from the ICC to move a load of steel from Cleveland to Chicago; motor carrier B had that certification. The Pittsburgh steel shipper needed to move its steel from Pittsburgh to Chicago and it already had a good relationship with motor carrier A. It did not know motor carrier B and did not wish to do business directly under the certificate of a certificated carrier, the practice of trip leasing developed. It should be noted, however, that the practice of ‘trip leasing’ is not confined to uncertificated carriers hauling exempt agricultural commodities. Under the practice of ‘trip leasing’ an uncertificated carrier who had hauled a load of exempt agricultural commodities from the area of production to a market point would at such point, by means of brokers or otherwise, contact certificated carriers whose certificates permitted them to haul certain non-exempt commodities from such market point to points in the vicinity of the area of production.

Id.


44. Prestige Cas. Co., 99 F.3d at 1342 (citing Am. Trucking Ass’ns, 344 U.S. at 304-05; Empire Fire and Marine Ins. Co. v. Guaranty Nat. Ins. Co., 868 F.2d 357, 362 (10th Cir. 1989)).

with motor carrier B. It wanted to work with motor carrier A. So the motor carriers would agree to lease the independent owner-operator, along with the owner-operator’s equipment to motor carrier A for the first leg of the trip, and then to motor carrier B for the second leg of the trip. The load would move all the way to Chicago as it needed to, the shipper was able to deal only with motor carrier A, the same driver moved the load for the entire trip, and each motor carrier remained within its operating authority granted by the ICC.46

The ICC caught on to this practice after the passage of the Motor Carrier Act of 1935, issuing interim rules in 1950 to govern these leasing practices as well as equipment actually owned by the motor carriers.47 The Court in *King* recited the final rules in its assertion that the ICC did in fact have the authority to govern owner-operator leases.

The regulations (§207.4) permit authorized carriers (common or contract) to ‘perform authorized transportation in or with equipment which they do not own under the following conditions.’ A written contract is required, §207.4(a)(2) prescribing (3) minimum period of 30 days if owner-driver, (4) exclusive possession and responsibility in lessee-carrier, (5) the specific compensation as lease rental, (6) duration, (7)(a) requiring copies of lease to be on vehicle, (b) receipts for equipment, (c) safety inspection, (d) identifying markings on vehicle, (e) pre-employment medical examination of driver and safety instruction, and (f) record of equipment with cargo manifests, etc.48

46. The United States Supreme Court described this scenario and an alternate scenario in *American Trucking Associations*:

Because of the limiting character of the regulatory system, authorized carriers have developed a wide practice of using non-owned equipment. They have moved in two directions. The first is interchange. This includes those arrangements whereby two or more certificated carriers provide for through travel of a load in order to merge the advantages of certification to serve different areas. In this fashion, a wholly or partially loaded trailer may be exchanged at the established interchange point, or even an entire truck travel the line without interruption, under the guise of a shift in control. The second is leasing. This relates to the use of exempt equipment in authorized operations. Carriers subject to Commission jurisdiction have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands. By a variety of arrangements, the authorized carriers hire them to conduct operations under the former’s permit or certificate. Such operators thus travel approved routes with nonexempt property, and in the great majority of instances sever connections with their lessee carrier at the end of the trip.

344 U.S. at 303.

47. *Id.* at 300-01, 307-08. The Court in *American Trucking Associations* also noted,

The use of nonowned equipment by authorized carriers is not illegal, either under the Act or the rules under consideration. But evidence is overwhelming that a number of satellite practices directly affect the regulatory scheme of the Act, the public interest in necessary service and the economic stability of the industry, and it is on these that the rules focus.

*Id.* at 303-04.

48. 349 F.2d at 882 n.29 (citing 49 C.F.R. § 207.4 (1964)).
The focus for the ICC was to regulate the motor carrier. By extension that meant requiring aspects of the independent owner-operator’s operation, but only through the motor carrier. “Regulation comes from regulating the carrier, not the vehicle-furnisher.” These new regulations went to the protection of the public.

ICC regulations now require that every lease entered into by an ICC-licensed carrier must contain a clause stating that the authorized carrier maintain “exclusive possession, control, and the use of the equipment for the duration of the lease,” and “assume complete responsibility for the operation of the equipment for the duration of the lease.” Further, all authorized carriers must maintain insurance or other form of surety “conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles” under the carrier’s license.

The United States Supreme Court confirmed this extension of the ICC’s authority in United States v. Drum in 1965. The ICC now was charged with monitoring the leasing arrangements between the motor carriers and the independent owner-operators. A motor carrier now had to maintain, “exclusive possession, control, and use of the equipment for the duration of the lease.” If the equipment was in fact leased to the motor carrier, the lease must be in place for at least 30 days. This prevented independent owner-operators from bouncing from motor carrier to motor carrier for each load to keep their equipment moving. This 30-day lease requirement also hindered the independent owner-operator that hauled exempt freight one way and tried to lease on with an authorized carrier to haul non-exempt back to the starting point.

49. Id. at 883.
51. See Drum, 368 U.S. at 385.
54. See id. at 317-18. Here, the Court held that

[The mere fact that commercial carriers of agricultural products will hereafter be required to establish their charges on the basis of an empty return trip is not the same as bringing them within Commission jurisdiction generally. The exemption extends, by its own words, to carriage of agricultural products, and not to operations where the equipment is used to carry other property. Needless to say, the statute is not designed to allow farm truckers to compete with authorized and certificated motor carriers in the carriage of non-agricultural products or manufactured products for off-the-farm use, merely because they have exemption when carrying only agricultural products.

Id. at 318.
Consider what the safety standards of the industry without these new regulations from the ICC would have been. With the independent owner-operator bouncing from one motor carrier to the next, or from one shipper to the next, the incentive for safe operations was lost to the incentives to increase income.\textsuperscript{55} “Because of the fact that the great bulk of the arrangements cover only one trip, leasing carriers have little opportunity or desire to inspect the equipment used, especially in cases where the agreement is made without the operator’s appearance at the carrier’s terminal.”\textsuperscript{56} Although it must be noted that at the time of the \textit{American Trucking Associations} case, the safety data available did not necessarily match this perception of reckless disregard for highway safety by independent owner-operators.\textsuperscript{57} Regardless, the leasing of equipment from independent owner-operators had its advantages for motor carriers. The motor carriers were passing the costs of operating the equipment onto the owner-operators.\textsuperscript{58} Passing on that cost led to a competitive price advantage for carriers leasing equipment.\textsuperscript{59}

The cost picture of a carrier who depends largely on leased equipment is far different from that of a carrier owning his own trucks. Not only is the former able to undertake operations with relatively slight investment, but his current overhead involved in operating leased equipment is solely administrative, with the owner of the exempt equipment bearing the expense of gas, oil, tires, wages, and depreciation out of his share of the fee. And to refer to the exempt owner’s own expenses as determinative of what is a “reasonable” rate would be manifestly impossible as long as the relationships between lessor and lessee are too tenuous, short-termed and informed, and the compensation of each based on a division of revenue.\textsuperscript{60}

In exchange for passing on these operational costs, the motor carrier would pay the independent owner-operator a higher rate, whether based on mileage or revenue, to compensate for the risk. Whether there were thirty-day leasing requirements or not, the independent owner-operator had to keep the truck moving. Unless the independent owner-operator wanted to battle the bureaucracy of the ICC to obtain the certificates of public necessity, the independent owner-operator could not solicit freight on his or her own from shippers.\textsuperscript{61} The independent owner-operator was forced to rely on the motor

\textsuperscript{55}. \textit{Am. Trucking Ass'ns}, 344 U.S. at 305.
\textsuperscript{56}. \textit{Id}.
\textsuperscript{57}. “The conclusion that highway safety may be impaired rests admittedly on informed speculation rather than statistical certainty. A road check examination conducted by the Bureau did not indicate any significant difference in the number of safety violations between leased and owned vehicles.” \textit{Id}. at 305 n.7.
\textsuperscript{58}. \textit{Id}. at 332-33.
\textsuperscript{59}. \textit{Id}. at 303, 306.
\textsuperscript{60}. \textit{Id}. at 306.
\textsuperscript{61}. \textit{Id}. at 326-27.
carriers with the certificates to provide them with freight to keep the equipment moving, or relegate themselves to hauling exempt goods. Because the owner-operator was independent, he had to bare the costs of his business, i.e., he had to buy the truck, he had to fuel the truck, and he had to maintain the truck. If the truck sat idle, the owner-operator sat idle, and that meant no money coming in. Thus, for the independent owner-operator, jumping from one motor carrier to the next was a necessary business practice to keep money flowing. Being strangled to leases with one motor carrier at a time for at least thirty days would not have been an appealing concept for the independent owner-operator.

Still, operating independently through a lease appealed to many over the administrative headaches of being a full-fledged motor carrier, or the restrictions of being a company driver. As opposed to the company driver, the independent owner-operator gets a chance to increase their profits through better decision-making. The company driver will be paid some sort of flat rate for moving a load of goods selected by the company. The motor carrier will tell the company driver when and where to fuel along the way, when and where to maintain or repair the truck, select the type of truck to operate, select the features on the truck, etc. The company driver may have no say in those matters, and any and all profits go to the motor carrier for those decisions.

On the other hand, the independent owner-operator may feel they can do a better job minimizing those costs, selecting preferred loads, selecting preferred routes, and thus maximizing profits. So when the independent owner-operators make those decisions, they get to reap the benefits or suffer the losses. As an example, an independent owner-operator may get better fuel rates in Iowa as opposed to Wisconsin, so they might minimize fuel purchases in Wisconsin and maximize fuel purchases in Iowa. The independent owner-operator may be able to do some maintenance on their own so as to minimize maintenance costs. The independent owner-operator may prefer a highway route through the house instead of an interstate route. This freedom of choice is a core characteristic of the independent owner-operator and it is what gives independent owner-operators the chance to grow their business into greater prosperity, possibly more trucks, more drivers, and even their own operating authority down the road.

The ICC respected these freedoms, and at this point it appeared the ICC had the motor carrier industry covered. The ICC was one of the strongest agencies in the federal government, regulating motor carriers for safety, as well as fair and reasonable business practices. As one commentator pointed out, “destructive competition abated, and during the half century which followed,
motor carrier service was ubiquitously available throughout the nation at a price that was ‘just and reasonable.’ Service was safe and dependable to large and small communities throughout the nation.”

Through the 1940s and into the 1950s, ICC regulation was at its peak. The independent owner-operator had learned to live with the leasing provisions, high rates, and with the industry stable, the independent owner-operator had found comfort.

IV. THE 1960S AND 1970S – NO FUEL FOR THE TRUCKS, BUT FUEL FOR DEREGULATION GROWS

The comfort of the 1940s and 1950s for the independent owner-operator slowly gave way to a push for deregulation. Beginning in the 1960s public opinion turned against big government and regulated industries. Government bureaucracy was facing a backlash. Adam Smith’s teachings were revitalized. And without any act by Congress, or any decision by the courts, the ICC underwent a change in opinion. Dating back to John F. Kennedy, Presidents were pushing agencies away from regulation and encouraging more free market principles. Under President Jimmy Carter in 1978, the ICC began de facto deregulation of the motor carrier industry.

For the independent owner-operator, nothing had changed on paper. Congress had not passed any law deregulating trucking, and the courts had not made any decision deregulating trucking. However, the change in ideology by the ICC did lead to changes for the independent owner-operator. All of the sudden the burden of proving that a motor carrier was “fit, willing and able to perform” services needed by the public was no longer a heavy burden to

66. Id. at 187, 208.
67. The ICC did not help its public image when it took enormous amounts of time to make regulatory decisions. “The commission once heard testimony that took up 53,000 pages to transcribe before deciding the proper rates to set for shipping grain. It took 11 years to come to a decision on a railroad merger.” Sanger, supra note at 14.
68. “By the 1960s critics began to charge that the [ICC] was actually anti-consumer, keeping rates artificially high and becoming far too close to the industry it was supposed to regulate. There were corruption charges, and in the end it was the pro-consumer movement that pressed for deregulation and doomed the agency.” Id.
73. Id. at 18-19.
Motor carriers were simply asking for certificates for public necessity and the ICC was handing them out. The independent owner-operator no longer had to tie himself directly to a motor carrier. The administrative burden put down by the ICC was now one the independent owner-operator could handle. Congress backed up the ICC’s new directive (although not to the extent the ICC wanted) with the passage of the Motor Carrier Act of 1980. Congress intended to promote greater competition in the industry by allowing easier entry into the market, simplifying the path through the certification process, and easing restrictions on motor carrier operations. The market became flush with motor carriers, especially small motor carriers with one to five trucks at their disposal, ready and willing to haul freight for shippers. It was no longer the government determining who was best to move freight for the public; rather, it was the shippers making the calls. The shippers now had tremendous influence as to what rates they would pay and what service they would demand, because more and more motor carriers were lining up at their docks willing to serve. The independent owner-operator could sell services directly to the shipping customer; it no longer had to use the services of the motor carrier, once it had the rubber stamp of operating authority from the ICC.

The ease of entry into the market, while challenged heavily by independent owner-operators, namely by the Owner-Operator Independent Driver Association and the American Trucking Association, did lead to more independent owner-operators on the road. More drivers on the road and

74. Id. at 18.
75. Dempsey, supra note 5, at 347 (citing Freeman and Gerson, Motor Carrier Operating Rights Proceedings – How Do I Lose Thee?, 11 TRANSP. L.J. 13, 15 n.3 (1979) (providing statistics of percentage of applications for operating authority that ICC approved from 1975 until 1979)).
76. “The 1980 Act left unchanged the applicant’s burden of proving fitness, willingness, and ability by codifying an applicant’s obligation to establish that the proposed service will serve a useful public purpose, responsive to a public demand or need.” Dempsey, supra note 25, at 8.
79. “By late 1983 the [ICC] had issued operating authority to more than eighteen thousand new carriers under the 1980 Act, and had issued over sixty thousand new certificates.” Dempsey, supra note 25, at 30.
more capacity available to shippers began to hurt the independent owner-operator trade.81 During the regulated years, the union drive became a formidable force in the transportation industry. The International Brotherhood of Teamsters, founded in 1903, rose to prominence and exuded tremendous influence in the transportation industry, peaking in the 1960s and 1970s.82 After deregulation beginning in 1978, competition increased, shippers pushed back for cheaper rates, and margins for motor carriers thinned.83 As margins thinned, motor carriers could hardly afford current rates paid to drivers, much less afford to offer any meaningful raises.84 For motor carriers and independent owner-operators alike, it became more and more important to monitor all operational costs.85 The independent owner-operator had to closely monitor fuel expenses, truck repair expenses, and personal expenses.86 Motor carriers would most often compensate the independent owner-operators on either a mileage basis or percentage of revenue basis. If the motor carrier paid the owner-operator a percentage of gross revenue received from the shipper, then the motor carrier had little to worry about in the way of rising fuel costs. Those rising fuel costs had to be absorbed by the owner-operators, leaving less and less leftover from their percentage cut from the shipper. This type of percentage payment system led to investigations and promulgated rules by the ICC in 1974 to try to come up with a form of national fuel surcharge program.87 The independent owner-operator was still driving the truck, but to stay alive the owner-operator had to continue thinking less as a driver, and more as a businessperson.

As a businessperson, the independent owner-operator has always had to think about fueling the truck. The 1970s made that thought a 24-hour concern for all truck owners.88 Drastic fuel shortages and fuel price increases were crippling to independent owner-operators.89 At the time, a motor carrier was locked into set rates with a shipper for at least thirty days.90 The independent owner-operator’s lease with the motor carrier was built on a revenue split of twenty-five percent to the motor carrier and seventy-five percent to the independent owner-operator.91 The owner-operator was responsible for all of

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81. Dempsey, supra note 25, at 31-32.
82. Catherine S. Manegold, Teamsters’ Fate Could Hang on Outcome of Truck Strike, N.Y. TIMES, Apr. 27, 1994, at A10.
83. Id.
84. Id.
85. Cent. Forwarding, Inc., 698 F.2d at 1268-70.
86. Id.
88. Id.
89. Id.
90. Id. at 1268.
91. Id.
the fuel costs for operating the truck. With the owner-operators forced to stomach the fuel price increase, the motor carriers had no pressure to increase their rates with the shippers; their twenty-five percent share of the revenue was not impacted. Therefore, the independent owner-operator, smaller in business scope than the motor carrier, had little to bargain with, and the motor carrier had little incentive to negotiate with the independent owner-operator. Feeling trapped with no options, independent owner-operators stopped their trucks twice in the 1970s. Unfortunately, the shutdowns did lead to violence, and while it is debatable whether or not to classify the shutdowns as successful, the shutdowns did lead to action at the federal level.

“In 1973, in response to a strike by the nation’s owner-operators, the Interstate Commerce Commission began hearings, studies, and a rulemaking proceeding regarding the relationships between owner-operators and the motor carriers from whom they lease equipment.” The hearings were discussed at length in *Global Van Lines, Inc. v. Interstate Commerce Commission.* Among the hearings, the 95th Congress found the following:

In 1973 the nation’s independent (owner-operated) truckers experienced their winter of discontent. In a concerted protest, they shut down operations to protest a host of economic problems with which they were beset. The impact was sufficient to set in motion a series of congressional hearings on the plight of independent truckers. The various hearings uncovered a number of problems and abuses suffered by independent truckers. The owner-operators were found to be ‘caught in a continuing cost crunch,’ faced with rising costs, inflexible income, difficulties in obtaining long-term financing and questionable industry practices.

The ICC subsequently started its own inquiry and began a rule making process. The notice for the rule making cited ten areas of interest in the leases of independent owner-operators, including:

(1) Compensation for Equipment and Driver; (2) Payment by Authorized Carriers to Lessors for Transportation Services Rendered; (3) Providing Copies of Rated Freight Bills at Time of Settlement; (4) Responsibility of Authorized Carriers for Fuel Costs and Other Items Associated with Transportation Services Rendered by Lessors; (5) Insurance; (6) Payment of Detention Charges and Other Accessorial Charges; (7) License Plate Fee Proration; (8) Escrow Funds; (9) Safety

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92. *Id.*
93. *Id.*
94. *Id.* at 1268-69.
95. *Id.*
98. 627 F.2d 546, 547-48 (D.C. Cir. 1980).
99. *Id.*
100. *Id.* at 547.
In 1979, the ICC promulgated formal rules on the same. The formal rules stated that “the Commission is inclined to the view that the establishment of minimum standards for leasing contracts is a desirable starting point for an overall revision of the existing leasing regulations.”

While the fuel strike itself turned much of public against truck drivers of all nature, it did lead to positive changes in the treatment of independent owner-operators by motor carriers – at least on paper.

V. DEREGULATION: SOME INDEPENDENT OWNER OPERATORS ADJUST THE BUSINESS MODEL

President Jimmy Carter tried to bring those positive changes to the motor carrier industry, and to independent owner-operators especially with the enactment of the Motor Carrier Act of 1980. “I am also particularly pleased that the bill will improve truck service to small communities and enhance business opportunities for independent truckers.” The intent was to limit the involvement of the Federal Government.

In 1996, the most significant remnants of economic regulation were...
eliminated with the passage of the Interstate Commerce Commission Termination Act of 1996. The ICC was disbanded, and the remaining regulations such as safety regulations, were placed under the eyes of the Surface Transportation Board. In time the U.S. Department of Transportation established the Federal Motor Carrier Safety Administration (“FMCSA”) to monitor motor carrier safety. For all intents and purposes, the motor carrier industry was free of economic regulation for the first time since 1935. The independent owner-operator still had the obligation to adhere to safety regulations such as the Hours of Service regulations and truck safety regulations, but the economic regulations were formally lifted.

Some owner-operators took the opportunity to obtain authority without the administrative burden of economic regulation, while others continued hauling exempt products or leasing to motor carriers. It is a business decision every owner-operator has to make. Do they want to sell their services, invoice for their services, collect for their services, and maintain safety records, all the while continuing to operate their truck, maintain their truck, and manage the load? If they do, then they have the option to obtain operating authority. If they do not, then they still have the option of hauling exempt freight or leasing to a motor carrier while still maintaining their independence. The independent owner-operator can choose the business model best for them.

VI. THE FUTURE OF THE INDEPENDENT OWNER-OPERATOR: A BUSINESS MODEL FACING CHALLENGES

Despite being a vital part of the transportation industry for nearly a
century, as recognized by the United States Supreme Court, Congress, and representative trade associations, the independent owner-operator profession is facing new challenges from governments at all levels. While the federal government has the authority to govern the transportation of freight between the states, it is the individual states that could still hamper the relationship of the independent owner-operator and motor carriers. The many independent owner-operators remaining leased on or contracted to larger motor carriers face government challenges today. Just as the motor carrier must meet the safety requirements set forth by the FMCSA, the independent owner-operators must as well. The shippers demand improved service from its motor carriers (and thus its owner-operators) including load tracking and improved security measures.

State agencies, such as unemployment agencies and workers compensation agencies, have begun to take notice of these “requirements” being pushed onto independent owner-operators. The question the agencies want to answer is: “were these independent owner-operators truly independent, or were they in fact employees of the motor carriers?” Unfortunately for the independent owner-operators, more and more often state

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115. Id.
118. See http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6186 (statement of Richard A. Samp, House Committee on Ways and Means, May 8, 2007, Chief Counsel of the Washington Legal Foundation) (“The ‘independent contractor’ model of conducting business affairs is coming under increasing assault from government regulations, labor activists, and plaintiffs’ attorneys, who often view the model as an impediment to maximization of tax revenues and to increased unionization of work forces. Such objections are generally wrong headed and overlook the key role that independent contractors play in driving economic growth and business innovation.”).
123. “FedEx was fined $190,000 by [the] Massachusetts’ attorney general for misclassifying 13 drivers as independent workers rather than full-time employees. . . .” FedEx Facing $319 Million in Back Taxes After IRS Audit, TRANSPORT TOPICS (Dec. 26, 2007) http://www.ttnews.com/articles/basetemplate.aspx?storyid=18901. “In California the state supreme court let stand a verdict against FedEx Corp. in a case in which drivers for FedEx Ground argued they should be treated as employees, not independent contractors. The drivers were awarded $11.3 million in damages.” Id.
124. “The Internal Revenue Service also is auditing [Federal Express’] trucking unit for the years 2004 to 2006 to see whether workers were wrongly labeled as contractors rather than employees for tax purposes.” Id.
agencies found that the requirements pushed onto the independent owner-operators by the federal government and shippers stripped the independent status away from the owner-operators. For its part, the federal government has tried to explain the role of federal leasing regulations and its impact on the independent contractor status by issuing regulations to clarify the role of the federal regulations.125 “Nothing in the provision required by paragraph (c)(4) is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier. An independent contractor relationship may exist when a carrier complies with 49 U.S.C. §1107 and attendant administrative requirements.”126

This regulation is not preventing what industry experts see as an attack on the independent owner-operator trade. “American Trucking Associations has launched a campaign to protect the trucking industry’s use of independent contractors, a move officials said is needed to counter recent court decisions and an increasingly ‘hostile’ legislative environment.”127 This campaign is moving state by state, supporting legislation granting a safe harbor for independent contractors in the motor carrier industry. The industry has considered pursuing a new law at the federal level, but it does not appear to be an advantageous time to pursue such an action. “Consensus of opinion was that it was not the time to go to Congress. The legislative environment is more hostile to the use of owner-operators.”128 “A bill proposed by Senators Barack Obama and Richard Durbin, both Illinois Democrats, would eliminate ‘safe harbor’ provisions in the tax code for independent contractors and, if passed into law, could force companies to abandon the owner-operator business model.”129

To withstand any kind of “attack” on the independent owner-operator, motor carriers must adhere to the laws, rules and regulations of state and federal governing bodies relating to independent contractors. Motor carriers must not simply label drivers as independent contractors to try to limit their tax obligations, reporting obligations, and liability when the motor carriers in fact want to control every facet of the drivers’ performance.130 If a motor carrier is going to utilize the services of an independent owner-operator, the motor carrier must adhere to the “Federal Truth in Leasing Regulations,”131 and must

126. 49 CFR Part 397.12(c)(4).
128. Id.
129. Id.
130. The term “independent contractor” and “independent owner-operator” are at times used interchangeably in the transportation industry.
131. In fact, the Owner-Operator Independent Drivers Association has advocated for numerous
think of the owner-operator as a business partner. Among other things, the current Federal Truth in Leasing Regulations require written leases; receipts for equipment specifically identifying the equipment leased to the motor carrier and the duration of such lease; identification of the equipment; records of trips made under the lease, and exclusive possession and responsibilities of the equipment during the lease.

The other assault on the independent owner-operator is the everyday cost of fuel. Soaring diesel prices can cut right into the profits of independent owner-operators. “The [American Trucking Associations] estimates the trucking industry will pay $109 billion for fuel this year, up more than 5% from last year and more than double that paid four years ago.”

While business costs and government intrusion will continue to impact the owner-operator trade, the impact on daily lives that technological advancements have been cannot be ignored. Independent owner-operators are running businesses on wheels. The cabs of the tractors are wired offices. Shippers and motor carriers track the tractor’s location through satellites, communicate with the independent owner-operators through satellite messaging and cell phones, while the independent owner-operators can process paperwork through laptop computers, wireless Internet access, and scanning documents. That technology helps the business of the owner-operator but it also helps the life of the owner-operator. Cell phones and laptops help independent owner-operators keep in contact with family and friends at

drivers that OOIDA felt were mistreated under contractual terms. Furthermore, “[t]he Interstate Commerce Commission Termination Act authorized owner-operators to bring private causes of actions against carriers for certain violations of the Motor Carrier Act and its implementing regulations.” Owner-Operator Indep. Drivers Ass’n, Inc. v. Arctic Express, Inc. 270 F.Supp.2d 990, 993 (U.S. Dist Ct. S.D. Ohio Eastern, July 2003).

132. As Steven Gundale, the Senior Corporate Communications Manager for Dart Transit Company noted,

You have to start out with the viewpoint that your independent contractors are business owners. They have business needs, and you have to provide a favorable business environment for them, or they won’t stay. On the other hand, give them every tool they need to succeed in business, and you’ll succeed too.

Andy Duncan, Companies in the Cab, CCJ MAGAZINE, Sept. 2007.

133. 49 C.F.R. § 376(a).
134. Id. at § 376.11(b).
135. Id. at § 376.11(c).
136. Id. at § 376.11(d).
137. Id. at § 376.11(c).
139. Id.
The Use of Independent Owner-Operators Over Time

home.141 This balance is an increasing concern for independent owner-operators.142

VII. CONCLUSION: THE INDEPENDENT OWNER-OPERATOR KEEPS ROLLING ALONG

The transportation industry has changed and continues to change. It adapts to government regulations, technological advancements, political climate, economic cycles, and cultural evolutions. The independent owner-operator is no different. The independent owner-operator has the equipment and the will to do the work. From trip-leasing to keep trucks rolling to shutting down equipment in objection to soaring fuel prices, the independent owner-operator continues to find a way to keep the business moving. Regardless of the recent protectionist philosophy of government or the increased demands of shippers, the past 100 years of independent owner-operator evolution leads me to believe the entrepreneurial spirit will continue to live on in future independent owner-operators. Consumers still want goods, shippers still want to get those goods to them, and trucks will continue to get those goods to those consumers. Independent owner-operators have trucks, and they will drive.

141. See id.
142. See id. Gary Kelley, vice president of driver recruiting at U.S. Xpress, stated,

In 1975 when I started there was not as much competition for drivers as there is today. So we could be as tough as we wanted to do. We recruited what company operations departments wanted. We went for people with clean records, an excellent history of stability in jobs, good, solid clean-cut people. And we sent them over the lower 48, and they got home for two or three days every six weeks or so. It was ridiculous. We turned them into nomads with no family life or chance of a family life. But plenty of people wanted the work and brought the dream of the freedom of the highway, and we could recruit to those specifics.

. . .

A big percentage of the guys behind the [over-the-road] wheel want to be husbands and dads, and women in the driver’s seat want to be wives and moms as well as drivers. So companies are changing to accommodate what drivers now want in their lifestyle more than ever before.

Id.
Independent Contractor Employment Classification: 
A Survey of State and Federal Laws 
in the Motor Carrier Industry

Gregory M. Feary*

I. INTRODUCTION

Although the use of owner-operators, which are one-man/one-truck owners and operators of trucks under lease to motor carriers, and fleet

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operators, which are incorporated owner-operators, sole proprietors, or partnerships that own and operate more than one truck through the use of other drivers’ services, is common throughout the 48 contiguous states, the classification of owner-operators and fleet operators as either independent contractors or employees for purposes of workers’ compensation and unemployment tax varies considerably from state to state. The classification varies because the trucking industry is not governed by a uniform body of federal laws for purposes of various state laws such as workers’ compensation and unemployment tax.

While each state has enacted separate workers’ compensation acts and unemployment tax laws, a single pre-identified state law is often the sole basis for a motor carrier’s decision regarding whether to consider its owner-operators to be independent contractors. Consequently, there is an inherent conflict between the interstate nature of the trucking business and the intrastate application of workers’ compensation and unemployment tax laws.

Due to this conflict, many states have enacted statutes which explicitly deem owner-operators to be independent contractors for purposes of workers’ compensation or unemployment tax. Those states which have not enacted statutes to resolve the conflict continue to approach the determination of whether owner-operators are independent contractors or employees on a case-by-case, fact-sensitive basis using common law tests.

Conversely, the Fair Labor Standards Act (the “FLSA”) uniformly applies to owner-operators who are found to be employees in any state. While the FLSA does not generally apply to truck drivers, drivers’ helpers, loaders, or mechanics, motor carriers must also pay careful attention to the FLSA to avoid costly penalties associated with misclassifying individuals they employ.

This Article provides an overview of the methods adopted by the 48 contiguous states to determine whether owner-operators and fleet operators are classified as independent contractors or employees for purposes of workers’ compensation and unemployment tax. While there is no uniform legal test that transcends the many laws and social policies involved, this Article will discuss a number of factors favoring independent contractor status which are common to each test, the most important of which focus on the owner-operator’s management of his or her own separate and independent business. This Article will also provide an overview of the FLSA and its application in the transportation industry.

2. See id. at 261.
3. See id.
II. WORKERS’ COMPENSATION LAW

Determining whether an owner-operator is classified as an independent contractor or employee for purposes of workers’ compensation tends to be one of the most litigated and contested issues in the trucking industry. This conflict is of no greater importance than when the management of a motor carrier must determine whether the motor carrier’s owner-operators are independent contractors or employees for the purpose of whether to provide workers’ compensation coverage or to require such coverage to be procured by the owner-operator. Moreover, a facially similar coverage known as occupational accident or work accident coverage may be an acceptable alternative in many states, but determining whether this coverage is viable as a legal alternative in most states depends on the central question of whether the owner-operator is an independent contractor.6 While some states have enacted legislation to provide greater certainty regarding classification, many states continue to look to the common law for guidance.

A. STATUTORY CLASSIFICATIONS

As of January, 2008, twenty-one states had enacted owner-operator statutes within their workers’ compensation acts.7 Although the twenty-one statutory states provide greater certainty regarding whether owner-operators, and in some cases employees of fleet operators (e.g. second drivers), are considered independent contractors or employees vis-à-vis the motor carriers to which they are leased for purposes of workers’ compensation, limiting criteria or “loopholes” still exist in most of the owner-operator statutes.8 Consequently, under some circumstances, an owner-operator, even in these statutory exemption states, may be subject to a case law determination regarding his status as an independent contractor or employee. The legislation enacted in the statutory states can be generally categorized as either following a (1) “Blanket Approach” or (2) “Multi-Factor Approach.”

The Blanket Approach describes those statutes which deem an owner-operator to be an independent contractor within a relatively simple definition. Currently, thirteen states, Alabama,9 Georgia,10 Indiana,11 Kansas,12

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6. Hardman, supra note 1, at 269.
7. The twenty-one states include Alabama, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, and Wyoming.
Louisiana, Mississippi, Missouri, Montana, Oklahoma, Oregon, Tennessee, Texas, Washington, and Wyoming subscribe to the Blanket Approach. The Blanket Approach provides a broad standard and takes into consideration most segments of the trucking industry. Motor carriers seeking to classify owner-operators as independent contractors are well served to operate in states subscribing to this approach. While the Blanket Approach is preferred by most motor carriers, limiting criteria is imbedded in some of the blanket statutes which may result in the disqualification of the application of the independent contractor statute. Consequently, motor carriers should be diligent in understanding the scope of a statutory exemption, rather than presuming the exemption grants immunity from providing workers’ compensation coverage.

A simple example of the limiting criteria found in statutes subscribing to the Blanket Approach is present in the Washington statute, which provides interstate owner-operators are independent contractors, but intrastate owner-operators are not. In Kansas, the statute requires owner-operators not to be treated as employees for tax purposes. The Kansas statute further provides owner-operators are to be covered by an occupational accident insurance policy. A third form of limiting criteria is found in Texas, where the statute requires a form to be completed by the owner-operator and filed with the Texas Workers’ Compensation Commission.

17. OKLA. STAT. tit. 85 § 3 (2007).
23. See e.g., KAN. STAT. ANN. § 44-503c(c) (2006): “[O]wner-operator’ means a person, firm, corporation or other business entity that is the owner of one or more motor vehicles that are driven exclusively by the owner or the owner's employees or agents under a lease agreement or contract with a licensed motor carrier.”
24. See id.: “[P]rovided that neither the owner-operator nor the owner's employees are treated under the term of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. 3101 et seq., the federal social security act, 42 U.S.C. 301 et seq., the federal unemployment tax act, 26 U.S.C. 3301 et seq., and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. 3401 et seq.”
27. § 44-503c.
Oklahoma also follows the Blanket Approach, but its statute provides owner-operators are not classified as independent contractors if there is a truck purchase leaseback arrangement between the motor carrier and the owner-operator.29 A purchase leaseback arrangement generally involves a transaction in which a motor carrier sells or rents a truck to an owner-operator who then, under the owner-operator contract, leases it back to the motor carrier together with the driving services of the owner-operator.30 A final example of limiting criteria sometimes imbedded in the Blanket Approach is found in Mississippi, where the statute provides owner-operators must be covered by either a policy of occupational accident coverage of $1,000,000 or workers’ compensation insurance.31

The Multi-Factor Approach describes those statutes which deem owner-operators to be independent contractors if several enumerated factors are met. Currently, eight states, Colorado,32 Florida,33 Iowa,34 Maryland,35 Minnesota,36 Montana,37 North Carolina,38 and South Dakota,39 subscribe to the Multi-Factor Approach. Some factors often found in the statutes include whether the owner-operator (1) is responsible for the maintenance of the vehicle; (2) bears the principal burden of the vehicle’s operating costs; (3) receives compensation based on factors related to the work performed, and not on the basis of the hours or time expended; and (4) is free from control, or freely determines the details and means of performing the services.40

The Multi-Factor Approach narrows the field of owner-operators who will be classified as independent contractors because each factor must be met. Consequently, the Multi-Factor Approach is more likely to disqualify owner-operators in certain sub-segments of the trucking industry from being automatically deemed independent contractors.

For example, in Iowa, the statute provides a statutory pitfall which seems to negate the automatic application of the statute to deem owner-operators as independent contractors by including a very fact-sensitive factor which requires

29. OKLA. STAT. tit. 85 § 3(9) (2007).
34. IOWA CODE §§ 85.61 (11)(g)(2), (3)(a)-(f) (2008).
36. MINN. R. 5224.0250(2)(A)-(G) (2007-2008) (providing alternate tests to determine whether owner operators are independent contractors or employees).
owner-operators to supply the “details and means of performing the services.” While it is possible the Iowa legislature intended for this factor to open up the independent contractor status to inquiry via due process, Iowa courts have generally held owner-operators to be independent contractors and litigation does not seem unusually frequent.

Although the North Carolina statute does not clearly enumerate the factors required to classify owner-operators as independent contractors, it appears the statute requires that an owner-operator possess motor carrier interstate operating authority, which very likely limits the number of owner-operators classified as independent contractors. Conversely, the Minnesota Rules are quite clear, but the requirement that independent contractors must be paid on a productivity basis likely hampers certain motor carriers’ use of bonuses that may not be directly tied to the rendering of a service.

A final example of a factor which proves to limit the number of owner-operators who will be classified as independent contractors is found in the Montana statute, which creates a certification process through which an owner-operator is required to file an application asserting he is free from control; this application must be approved before an owner-operator is deemed an independent contractor for purposes of workers’ compensation.

On a final note with respect to statutory classifications, the statutory states generally only deem owner-operators, and not employees of fleet operators, to be independent contractors. However, four of the statutory states, Alabama, Louisiana, Tennessee, and Texas, include fleet operators in their statutes in the context of deeming certain employees (e.g. second drivers) to be independent vis-à-vis the motor carriers to which their services are leased. While these statutes do not explicitly deem fleet drivers to be independent contractors, the statutes do provide that motor carriers are not responsible for providing workers’ compensation coverage to these second/feel

41. § 85.61(11)(g)(3)(e).
42. See, e.g., Finch v. Schneider Specialized Carriers, Inc., No. 03-1012, 2004 Iowa App. LEXIS 1076, at *8-9, 15-16 (Iowa Ct. App. Sept. 29, 2004) (holding owner-operator was independent contractor when six-factor test met), vacated by 700 N.W.2d 328 (Iowa 2005).
44. MINN. R. 5224.0290(2)(E) (2007). Such restrictions are likely to create difficulty for package carriers during peak seasons. R. 5224.0290(2)(E). The restriction might also affect home delivery companies that pay a bonus to owner operators in rural areas. R. 5224.0290(2)(E).
46. Hardman, supra note 1 at 26.
drivers in some circumstances.\textsuperscript{51}

Of course, even if an owner-operator is not statutorily deemed to be an independent contractor, it may be argued (except for a few states) the owner-operator meets the common law definition of independent contractor; consequently, even in the statutory states, motor carriers should be well-informed regarding the common law tests to determine whether a worker is an independent contractor.

**B. COMMON LAW TESTS**

As referenced above, the states that have not enacted statutes specifically deeming owner-operators to be independent contractors continue to make such a determination on an extremely fact-sensitive case-by-case basis.\textsuperscript{52} While some common law decisions are very broad, such that there will be very few circumstances outside of the scope of the precedential decision, others are more fact-sensitive; thus, the precedential value of such cases creates less guidance regarding the issue of whether owner-operators will be classified as independent contractors or employees for purposes of workers’ compensation. The following common law analysis is even useful in those states that provide statutory exemptions for owner-operators because owner-operators who are not statutorily deemed to be independent contractors may meet the common law definition of independent contractor.\textsuperscript{53}

The methods of analysis adopted by the courts in the states which look to common law in making the independent contractor classification can be divided into four categories. The four categories of analysis are: (1) Right of Control Analysis; (2) Modified Right of Control Analysis; (3) Relative Nature of the Work Analysis; and (4) Restatement of Agency Analysis.

The Right of Control Analysis generally requires the court to determine whether the motor carrier or the owner-operator controls the daily details of the owner-operator’s work duties.\textsuperscript{54} The vast majority of the states consistently apply the Right of Control Analysis; these states include: Arizona,\textsuperscript{55}

\textsuperscript{51} See LA. REV. STAT. ANN. §§§ 23:1021(10); 25-5-1(4); 50-6-106(1)(A)-(B); 406.122(a), (c).

\textsuperscript{52} See, e.g., White v. Henshaw, 363 So. 2d 986, 988 (Ala. Civ. App. 1978) (finding decisions whether owner operators are independent contractors depends on the facts of each case); 41 AM. JUR. 2d Indep. Contractors § 5 (2008) (stating the determination of whether a person is an employee or an independent contractor is made on the particular facts of the case).


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Connecticut, 56 Idaho, 57 Illinois, 58 New Jersey, 59 New Mexico, 60 New York, 61 North Dakota, 62 Ohio, 63 Pennsylvania, 64 Rhode Island, 65 South Carolina, 66 Utah, 67 Vermont, 68 Virginia, 69 West Virginia, 70 and Wisconsin. 71 Although Alabama, 72 Georgia, 73 Iowa, 74 Kansas, 75 Louisiana, 76 Minnesota, 77 Maryland, 78 Mississippi, 79 Missouri, 80 Montana, 81 and Wyoming. 82 These are


62. In re Griffin, 466 N.W.2d 148, 150 (N.D. 1991); see infra note 95.


74. See Towers v. Watson Bros. Transp. Co., 294 N.W. 595, 596 (Iowa 1940). Although this case was decided prior to the enactment of the statute, it provides useful guidance regarding the analysis which would occur if an owner-operator fails to meet the statutory exemption.


78. Williams Const. Co. v. Bohlen, 56 A.2d 694, 696 (Md. Ct. App. 1948). Although this case was decided prior to the enactment of the statute, it provides useful guidance regarding the analysis which would occur if an owner-operator fails to meet the statutory exemption.

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statutory states, the Right of Control analysis may be deferred to by the court if the owner-operator does not meet the statutory definition of independent contractor.

The factors that are most often referenced in the case law regarding whether owner-operators are to be classified as independent contractors or employees include: (1) forced dispatch; (2) equipment ownership; (3) length of route/opportunity to make detail decisions; (4) delivery time deadlines; (5) reporting to dispatch requirements; (6) protocol for hiring/firing other workers; (7) personal appearance standards; and (8) discipline protocol. 83

Most of the aforementioned factors are more persuasive when used to find an owner-operator to be an employee, rather than an independent contractor. The first two factors, forced dispatch, and lack of equipment ownership, tend to be the most persuasive factors in a determination an owner-operator is an employee. Consequently, if a judge determines a motor carrier requires the owner-operator to accept every load tendered by dispatch or the motor carrier owns the trucking equipment, the owner-operator will most likely be considered to be controlled by the motor carrier.

The second category of common law classification has been coined the Modified Right of Control Test. In the states subscribing to this analysis, it is clear the Right of Control Analysis is used as a predominant factor in determining the work status of an owner-operator; however, an additional factor, whether the owner-operator is in an independent trade, occupation, or profession, is also an important element of the work status determination. 84

Currently, seven states have adopted the Modified Right of Control Analysis. These states include: California, 85 Colorado, 86 Kentucky, 87 Maine, 88 Massachusetts, 89 North Carolina, 90 and Oregon. 91

80. Wilmeth v. TMI, Inc., 26 S.W.3d 476, 480 (Mo. Ct. App. 2000). Although this case was decided prior to the enactment of the statute, it provides useful guidance regarding the analysis which would occur if an owner-operator fails to meet the statutory exemption.
83. See generally Hardman, supra note 1.
85. See Albillo, 8 Cal. Rptr. 3d at 355; see also § 5705.
89. See Ferullo’s Case, 121 N.E.2d 858, 859 (Ma. 1954); see also MASS. GEN. LAWS ch. 152, § 1(4)(g) (2003).
The third category of common law classification, the Relative Nature of the Work Analysis, is currently employed by Nevada, New Jersey, New York, North Dakota, Tennessee and the District of Columbia. The Relative Nature of the Work Analysis provides a two prong test that is generally difficult to overcome. First, the work performed by the owner-operator must be sporadic and not permanent; second, the work performed by the owner-operator must be incidental to, and not a principle part, of the motor carrier’s business. As this test is so difficult to overcome, three of the four states that use it are known to be the most unfavorable for classifying owner-operators as independent contractors. Conversely, North Dakota uses the Relative Nature of the Work Analysis, but case law has found owner-operators not to be independent contractors. There has however, been some recent administrative rulings that suggests a greater possibility in New York for an owner-operator to be found an independent contractor.

The final category of common law classification is the Restatement of Agency Analysis. The Restatement of Agency Analysis is a ten-factor test which includes the Right of Control Analysis as one factor, but also examines nine additional factors, which include: (1) whether the one employed is engaged in a distinct occupation or business; (2) whether, in the locality, the work is usually done under the direction of the employer; (3) the skill required in the particular occupation; (4) whether the employer supplies the instrumentalities, tools, and the place of work for the person doing the work; (5) the length of time for which the person is employed; (6) the method of payment, whether by the time or by the job; (7) whether or not the work is a part of the regular business of the employer; (8) whether or not the parties believe they are creating the relation of master and servant; and (9) whether or
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not the putative employer is engaged in business. The states which currently subscribe to the Restatement of Agency Analysis include Arkansas, Delaware, Florida, Indiana, Nebraska, and Texas.

III. UNEMPLOYMENT TAX

Determining whether an owner-operator is classified as an independent contractor or employee for purposes of unemployment tax has proven to be a second key area of dispute for many motor carriers. In much the same way the various states’ workers’ compensation acts and case law provide guidance on the issue of owner-operators’ status as independent contractors, state unemployment tax laws also do the same. Yet, it is important to remember that the statutory schemes and case law in any given state may not agree regarding whether an owner-operator is considered an independent contractor. In a similar response to workers’ compensation issues, some states have enacted legislation to provide greater certainty regarding classification, while other states continue to look to the common law for guidance.

A. STATUTORY CLASSIFICATIONS

As of January, 2008, fourteen states had enacted owner-operator exemptions within their unemployment tax law. These states are Florida, Georgia, Illinois, Indiana, Kansas, Maryland, Minnesota, Missouri, Nebraska, New Jersey, Oklahoma, Oregon, and Texas.

103. Id.
112. Ind. Code § 22-4-8-1(a).
Those states which do not have a specific statutory exemption for owner-operators generally have adopted various industry exemptions from the definition of employment for unemployment tax purposes. The statutory owner-operator exemptions vary greatly in their specificity and application among the states. New Jersey, for example, offers the exemption only to owner-operators who operate vehicles weighing 18,000 pounds or more. Illinois maintains a very detailed owner-operator exemption requiring a number of factors to be met. These factors include a prohibition of truck lease-purchase agreements involving the motor carrier or related entity. The exemption is further limited to operators of “trucks, truck-tractors, or tractors.” Accordingly, it is extremely important for motor carriers to closely scrutinize the exemptions in any of the states in which owner-operators are utilized to assure compliance.

Some of the states which have enacted a statutory exemption subscribe to an ABC Test, which is a three prong test that deems an owner-operator to be an employee unless the motor carrier can demonstrate that all three prongs are met. Although owner-operators are not specifically referenced in each, the following states use an ABC Test to determine whether a worker may be classified as an independent contractor: Arkansas, Colorado, Connecticut, Delaware, Idaho, Louisiana, Maine, Massachusetts, Nevada, New Mexico, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, and West Virginia.

122. VA. CODE ANN. § 60.2-212.1 (2008).
125. 405/212.1.
127. § 11-10-210(e).
128. § 11-10-210(e).
129. COLO. REV. STAT. § 8-70-115 (2007).
130. CONN. GEN. STAT. § 31-222 (2008).
140. TENN. CODE ANN. § 50-7-207(e) (2008).
141. UTAH CODE ANN. § 35A-4-204 (2007).
Virginia.\textsuperscript{144} While some states use a test that compresses the three prongs into a two prong, or AB Test,\textsuperscript{145} the general analysis remains the same.

In general, the three prongs typically include: (A) the individual has been and will continue to be free from control or direction over the performance of the services both under the individual’s contract of service and in fact; (B) the service is either outside the usual course of business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of service.\textsuperscript{146} These ABC or AB tests tend to make it unlikely an owner-operator will be classified as an independent contractor rather than an employee.

Prong “A” of the ABC Test typically requires an owner-operator to be free from the direction and control of the motor carrier in order to be deemed an independent contractor.\textsuperscript{147} Similar to the Right of Control Analysis discussed with respect to workers’ compensation, direction and control is universally deemed to be the most important factor in determining independent contractor status.\textsuperscript{148}

Although it is a fact-sensitive analysis, it is generally likely a putative employer will be able to demonstrate it does not exercise direction and control over the owner-operator.\textsuperscript{149} The remaining prongs, however, prove much more difficult to overcome.

Prong “B” of the ABC Test, which requires the owner-operator to perform a service that is outside the usual course of business for which the service is performed, can be much more difficult to overcome if it is strictly interpreted.\textsuperscript{150} For example, some state unemployment tax regulators define the “service” of both motor carriers and owner-operators to be that of transportation; consequently, owner-operators would categorically fail to meet Prong “B” of the ABC test.

Finally, the “C” prong of the ABC Test, which requires the owner-operator to be engaged in an independently established trade, tends to be the most averse to classifying an owner-operator as an independent contractor.\textsuperscript{151} This prong is difficult to overcome because state unemployment tax regulators

\textsuperscript{144} W. VA. CODE ANN. § 21A-1A-16 (2007).
\textsuperscript{145} See, e.g., 43 PA. CONS. STAT. ANN. § 753 (2007); IDAHO CODE ANN. § 72-1316 (4) (2008).
\textsuperscript{146} NEV. REV. STAT. § 612.085 (2007).
\textsuperscript{147} Hardman, supra note 1 at 25.
\textsuperscript{148} Id.
\textsuperscript{149} See, e.g., Danielle Viktor, Ltd. v. Dept’ of Labor & Indus., 892 A.2d 781, 791 (Pa. 2006).
\textsuperscript{150} E.g., NEV. REV. STAT. § 612.085 (2007).
\textsuperscript{151} E.g., § 612.085.
often require the motor carrier to demonstrate the owner-operator is performing services for other motor carriers or is not otherwise dependent upon the motor carrier for the owner-operator’s livelihood. Although independent contractor agreements are often drafted to make it clear the owner-operator is not required to operate solely for the motor carrier, it is common for owner-operators to only perform service for a single motor carrier, especially when ample freight delivery opportunities are available. Moreover, federal leasing regulations require that an owner-operator’s truck be under the “exclusive possession, control, and use” of the motor carrier for the duration of the lease. This however does not preclude trip-leasing (an arrangement between the primary motor carrier and a motor carrier offering the owner-operator a backhaul opportunity), nor an owner-operator leasing a second truck to another motor carrier.

Although contrary case law exists, viewing the factors as a whole, those states which subscribe to the ABC Test are more likely to classify owner-operators as employees, rather than independent contractors.

B. COMMON LAW TESTS

The states that have not enacted statutes either generally utilizing the ABC Test for purposes of determining employment status or specifically exempting owner-operators from the definition of employee for purposes of unemployment tax subscribe to a common law analysis to determine whether owner-operators are classified as independent contractors or employees for purposes of unemployment tax. Although this common law analysis has generally developed through case law, some states codified it into a general statutory test. Some states which have codified the common law factors include: Arizona, California, Florida, Iowa, Louisiana, North Dakota, Ohio, Rhode Island, and Wisconsin.

While the common law analysis subscribed to by each state varies, a
number of common factors typically arise. In general, the factors subscribed to are the same as the factors considered in the Restatement of Agency Analysis discussed with respect to workers’ compensation. In Kentucky, for example, the common law test includes the following factors: (1) “the extent of control”; (2) whether “the one employed is engaged in a distinct occupation or business;” (3) the kind of occupation involved; (4) the skill required; (5) who supplies the tools; (6) “the length of time for which the person is employed;” (7) “the method of payment”; (8) whether “the work is a part of the regular business of the employer;” (9) whether “the parties believe they are creating” a master-servant relationship; and (10) “whether the principal is or is not in business.”

Iowa administrative code has adopted the general common law test for determining independent contractor status, but it specifically indicates employment status, rather than independent contractor status, is presumed. However, Iowa also includes whether the worker has the right to employ assistants as a factor weighing toward an independent contractor classification.

Again, determining whether an owner-operator will be classified as an independent contractor or employee for purposes of unemployment tax using the common law analysis is fact-sensitive. Nevertheless, as compared to a strict construction of the statutory ABC Test, the common-law analysis states likely provide a greater opportunity for successfully defending the independent contractor classification of owner-operators.

IV. FAIR LABOR STANDARDS ACT

Among other things, the FLSA requires employers to pay overtime to employees who work in excess of 40 hours during a workweek. However, the FLSA does not generally apply to truck drivers, drivers’ helpers, loaders, and mechanics. Nonetheless, the same people who are concerned with the above discussion about classification of owner-operators as either independent contractors or employees for the purposes of worker’s compensation and unemployment must also pay careful attention to the FLSA to avoid costly penalties associated with misclassifying individuals they employ. Many motor carriers mistakenly believe that, like their drivers, helpers, loaders, and mechanics, all of their salaried employees are exempt from the FLSA’s
A. CLASSIFICATION UNDER THE FLSA

Only employees, and not independent contractors, are covered by the FLSA. The FLSA exempts from application of its overtime requirement those employees whose hours of service are governed by Federal Motor Carrier Administration ("FMCSA") regulations. FMCSA hours of service regulations apply to truck drivers who either cross state lines or make intrastate transportation of shipments that originate in or are bound for another state or country. Because the bulk of a motor carrier's workforce is exempt from application of the FLSA, it is common for carriers to underestimate the impact of the FLSA on their wage and hour practices. As an employer of exempt employees, non-exempt employees, and independent contractors, a motor carrier must have a thorough understanding of the FLSA, and its test to determine which individuals are covered by its provisions and which are not.

As a federal enactment subject to interpretation by far fewer courts than the provisions discussed in Parts II and III, above, determination of an individual’s status as either an independent contractor or employee under the FLSA tends to be more uniform than the state-specific tests associated with worker’s compensation and unemployment law. Federal courts apply an “economic reality test,” which generally examines between four and six factors, to determine the status of the individual in question. The factors considered by the courts are: (1) the extent of the individual’s investment in equipment and facilities; (2) the individual’s opportunities for profit or loss; (3) the degree of control exercised by others over the individual’s work; (4) the permanency of the relationship between the individual and the persons for whom he or she performs work; (5) the skill required of the individual in performing his or her work; and (6) the extent to which the individual’s work is an integral part of the operation.

None of the factors, standing alone is dispositive. Similarly, contractual labeling of an individual as either an independent contractor or employee is immaterial.

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175. MONICA GALLAGHER, 2007 CUMULATIVE SUPPLEMENT TO THE FAIR LABOR STANDARDS ACT 38 (Ellen C. Kearns, ed., 2007).
176. Id. at 44-50.
177. Id. at 80.
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B. EXCEPTIONS TO FLSA OVERTIME REQUIREMENTS

Employers may use “white collar exemptions” to avoid paying overtime to bona fide executives and administrative employees that fit certain criteria.  Two common tests to determine which employees fit the exception are the “salary basis test” and the “duty test.”

Generally, under the salary basis test, an employee is exempt from overtime if he or she receives regular compensation in an amount of at least $455 per week, regardless of the quantity or quality of work performed. To satisfy the duty test, an employee must direct the work of two or more full-time employees and exercise discretion and independent judgment in the performance of office or non-manual work related to management policies or general business operations.

C. FEDERAL AND STATE LAW INTERPLAY

The FLSA provides federally-mandated entitlements for non-exempt employees. States having jurisdiction over motor carriers, however, may have wage and hour laws which increase the entitlements due to qualifying employees. For example, 32 states currently have higher minimum wages than that provided in the FLSA, while 10 states match the FLSA minimum wage. Other state wage and hour laws provide entitlements not mentioned in the FLSA, such as mandatory employee rest breaks. Motor carriers must therefore pay careful attention to not only the FLSA, but the laws of the individual states in which they operate.

Although the classification of owner-operators as either independent contractors or employees generally does not impact a motor carrier’s liability under the FLSA, carriers still face exposure from classification of other individuals they employ. A motor carrier should periodically consult counsel to review the classification of its non-exempt employees in order to avoid the costly fines associated with violating the law.

V. CONCLUSION

Although the information provided in this Article is merely intended to

179. E.g., 29 C.F.R. § 541.100 (2008).
180. 29 C.F.R. §§ 541.600(a), 541.602(a) (2008).
184. U.S. Department of Labor, supra note 183.
provide an overview of (1) the various methods adopted to determine whether owner-operators should be classified as independent contractors or employees for purposes of workers’ compensation and unemployment tax and (2) the FLSA and its application to the transportation industry, the various considerations discussed in this Article should be looked into in depth by motor carriers before making decisions regarding the classification of owner-operators and other workers they employ.
Crimping Entrepreneurship:
The Attack on Motor Carrier Sponsored
Equipment Acquisition Programs

James C. Hardman*

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I. INTRODUCTION

It is the dream of many people to become their own boss – to establish a business over which they have control and where the rewards (or losses) are reflective of their ability and efforts expended in the endeavor. There are few industries where a realistic opportunity exists for individuals to achieve their dreams. In many industries, the capital required, the education needed, or other requirements make entry into the market extremely difficult. The trucking industry is a significant exception. The industry is composed of many small trucklines and, more significantly, the use of independent businesspersons as independent contractors is a wide-spread practice. While there are few statistics reflecting the number of such independent businesspersons leasing motor carrier tractors to motor carriers, it is reasonably estimated that at least 368,000 are engaged. With the anticipated growth of motor carriage in the United States, it can be expected that the number of

1. There are over 458,000 trucking companies of various sizes from the largest, with thousands of vehicles, to companies with only one truck. Seventy percent (70%) of the company driver employees operate six trucks or fewer and 88% of all truck lines can be classified as small businesses. Most are small partnerships or sole proprietors that own only one or two tractors and semi-trailers. See Professional Truck Driving Institute, The Trucking Industry, available at http://www.ptdi.org/careers/industry.aspx.

2. In this paper, the terms “owner-operator,” “independent contractor,” “independent businessperson,” and “entrepreneur” are used interchangeably to reflect an individual who contracts a motor vehicle of which he or she holds title, or under a bona fide lease to a motor carrier, and chooses to drive that vehicle under the contract.

The Commercial Carrier Journal annually surveys the 250 largest motor carriers. In August of 2006, it reported statistics that the carriers had 618,630 drivers either as employees or owner operators and agents. Of this total, 481,967, or approximately seventy-eight percent, were company drivers while 136,663 or approximately twenty-two percent were owner operators. Twenty eight percent of the motor carriers operated solely driver employee fleets, twenty percent of the carriers operated exclusive owner operator fleets, with the remaining operating mixed fleets. See Avery Vise, Another Very Good Year, Com. Carrier J, Aug. 2006, at 86-96.

3. In 2006, over 1,673,950 truck drivers of Heavy and Tractor-Trailer vehicles were reported operating across the country. See U.S. Dep’t of Labor: Bureau of Labor Statistics, Occupational Employment and Wages, May 2006, available at http://www.bls.gov/oes/current/oes533032.htm. The study cited in footnote 2 indicated that approximate 136,663, or twenty-two percent of total operators engaged by the 250 largest truckload carriers, were owner operators. The largest trade association of independent contractors in the trucking industry reports that it had 160,313 members on January 18, 2008. See Owner-Operator Independent Drivers Association, Current OOIDA Membership, available at http://www.ooida.com. The Bureau of Labor Statistics has estimated that independent contractors comprise ten percent of the total heavy-duty, long-haul distance labor force. See Inst. for Transp. Research & Educ. N.C., N.C. State Univ., The Shortage of Long-Haul, Heavy-Duty Truck Drivers in North Carolina, p. 11 (Sept. 2007). If this ten percent figure was applied to the entire BLS figure above, there would be 167,395 independent contractors in the United States trucking industry. This figure is probably inaccurate in light of the data set forth in footnote 2 and the fact that one trade association claims a membership with comparable numbers. A more reasonable estimate would be that at least 368,269 owner-operators exist based on the twenty-two percent figure in footnote 2.
owner operators will increase unless governmental interference at the federal and/or state level crimp such development. 4 Significantly, body politics have enacted a host of laws which encourage the use of independent contractors in a twisted way. They have done so by placing onerous burdens on the employer-employee relationship. 5 At the same time, however, governments discourage the use of such independent contractors even to the extent of enacting outright statutory provisions which do not recognize the difference between “employment” and “engagement,” of an independent businessperson.

In North Carolina, for example, the independent contractor, who as a sole proprietor or a sub-contractor in providing service to a motor carrier, must be covered by workers’ compensation insurance. 6 The more insidious interferences arise from body politics adopting unclear criteria for classifying workers and contradictory criteria within the venues, who then repeatedly change its interpretation over time. 7 One can only think of James Madison’s sage observation: 8

It will be of little avail to the people that the laws are made by men of their own choice; if the laws are so voluminous that they cannot be read or so incoherent that they cannot be understood; if they . . . undergo such incessant changes that no one knows what the law is doing or can guess what it will be tomorrow.

Carriers and individual businesspersons in the motor carrier industry are in such a morass at this time.


5. See Table II to this article. This Table was prepared as part of a study by John Enright and William Dole, Entrepreneurial Independent Contractors vs. The State, Heartland Policy Study No. 56 (The Heartland Institute) April 30, 1993 at 7. The authors indicate that companies, by purchasing labor from independent contractors, are able to avoid a morass of government interference and costs. Id. at 16.


II. THE “EMPLOYMENT CLASSIFICATION” ISSUE IN TRUCKING OPERATIONS

While the use of independent businesspersons dates back to early trucking operations and has been instrumental in the growth of trucking, there has been a strong reluctance on the part of the federal and state governments to recognize the value of such individuals and how and why the relationship exists and is flourishing in the industry. There is seemingly an underlying perception that motor carriers only use the entrepreneurial independent contractor to avoid employment taxes and employment benefits, and to pay less compensation.9 The economics of the relationship belie this. There are significant differences between what a carrier remunerates to a driver-employee and to an independent businessperson. Although there is no standardized payment program among carriers, a random selection of a motor carrier which operates with each type of participant indicates independent businesspersons were paid approximately 2.7 times the per mile remuneration paid to driver employee.10 The percentage difference is intended to compensate the independent contractor for providing driver services, operational costs, employment taxes, a host of business expenses, and, hopefully, provide a profit. If the margin is not sufficient to prove satisfactory to undertake or continue one’s own business, the independent businessperson has the option to contract with another motor carrier with a more favorable contract payment schedule or to decide that he or she would be economically better off to become a driver-employee.

Contrary to some perceptions in the legislative and administrative communities, independent businesspersons are not forced into that classification because they could not find a driver-employee position. This is clearly not true in the trucking industry.11 In some areas of law, for example,


10. The conclusion was based on an informal and limited review of the advertisements of carriers in The Trucker, a national newspaper for the truckload industries, Vol. 21 No. 1 (Jan. 1-14, 2008); Vol. 20 No. 24 (Dec. 15-31, 2007); Vol. 20 No. 22 (Nov. 15-30, 2007); Vol. 20 No. 21 (Nov. 1-14, 2007).

11. The trucking industry indicates that it is facing a driver shortage which will remain a pressing problem for the industry for years to come. The American Transportation Research Institute [“ATRI”] has prepared a Report, Critical Issues in The Trucking Industry - 2007 (Oct. 2007). A representative sample of carriers indicated that the driver shortage remains the number one issue facing the trucking industry. The same issue placed first in 2005 and placed second in 2006. Global Insight, Inc., supra note 4. Opportunities in either classification are readily available as evidenced by various printed publications available free at truckstops or otherwise and which over seventy percent of the content is opportunity advertisements for driver employees and independent contractors as opposed to news or
there is the feeling that if a person is injured “on-the-job,” they should be entitled to receive workers’ compensation whether they are an employee or an independent contractor.\textsuperscript{12} Workers’ compensation, however, was historically predicated on an employer-employee relationship and the concept that the remedy of a job related injury could best be sated by the employer paying for workers’ compensation insurance and, in effect, accepting the liability without evidence of fault, and the employee waiving common law negligence relief.\textsuperscript{13}

Few, if any, would argue with the above concept, but extending coverage beyond the employer-employee relationship to cover all individuals, including sole proprietors of their own business, is clearly not warranted unless the non-employee voluntarily chooses and pays for such coverage. Yet decisions made in the legal, administrative, and legislative arena indicate that this general view regarding “entitlements” is not limited to the workers’ compensation ring, but is also present in other areas of law. The independent contractor relationship is not only under scrutiny to see that the “classification” decision is an honest and defendable one, but under attack in concept alone.

III. EQUIPMENT ACQUISITION IN THE TRUCKING INDUSTRY

Whether a motor carrier or an independent contractor, a challenge exists to obtain the equipment needed for their business to remain competitive and which provides the opportunity to operate efficiently and economically affording the opportunity for profitable operations. Essentially, motor carrier equipment is acquired in three manners.\textsuperscript{14}

1. Financing Leases in which the financing company either remains as the owner of the vehicle until the lease is satisfied and title passes, or the title passes upon the financing and the financier secures a secured party until the lease terms are satisfied.\textsuperscript{15} Such leases are frequently referred to as Conditional Sales Contracts. The term of the lease is definite, the purchase price and schedule of periodic payments set, and at the end of the term if the conditions are met, the title transfers and/or the lien is lifted. During the term,
the lessee is considered the owner for tax purposes and secures the value of depreciation.

2. **TRAC Leases** in which the financing company leases the vehicle to the individual or entity for a term certain with fixed charges. The financing company keeps the title to the vehicle and enjoys the benefit of the depreciation. The parties agree to a schedule similar to an amortization table for determining the value of the vehicle periodically, usually on a monthly basis, and the lessee has the opportunity to purchase the vehicle during the term at the current “TRAC” value. If the lessee does not exercise the foregoing option before or at the terms end, the financing company is obligated to sell the vehicle at fair market value. The lessee, as well as unrelated parties to the lessee, may bid to purchase the vehicle at the termination of the lease. If the sale price is less than the “TRAC” value at the lease’s term end, the lessee is obligated to pay the difference to the financing company. If the fair market value sale price exceeds the “TRAC” value at terms end, the financing company may keep the full amount of the sale price or share a portion with the lessee.

3. **TRUE Leases** are strictly a “lease” or “rental” of the vehicle. The lease may be coupled with an option to buy the equipment. Usually, in the trucking industry, an option is given based on a projected fair market value at the inception of the lease or an option based on actual fair market value at the end of the lease. The lessor maintains the benefits of depreciation during its term and the lessee acquires no ownership rights during the lease term.

Each type of lease has its benefits. For example, a TRUE lease is especially beneficial to independent contractors in the trucking industry because:

(a) The term of lease normally involves a shorter period. The term period cannot exceed 80 percent of the equipment’s useful life and the monthly or periodic monetary requirements are less than a finance lease because the lessor keeps the benefit of depreciation which has more value to the lessor than as

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16. “TRAC” refers to the Terminal Rental Adjustment Clause that requires the purchase or sale of the vehicle at the term end of the lease. The lessee is required to make an “unknown,” open-ended payment to the lessor at lease term end; if the lessor does not receive proceeds of a sale or other disposition of the vehicle sufficient to recover investment plus its return on investment, the lessee must make up the shortfall. *Id.* at 11.

opposed to the lessee. The lessee writes off the full lease payment as a current expense. Thus, a lower lease payment normally occurs.

(b) At the end of the shorter term period and assuming an option exists, the lessee has a choice. He or she may not exercise the option because they want to secure a newer vehicle which would have better features and/or be under a new warranty period. The market value of equipment may also have fallen and the lessee may feel he or she can get the same vehicle on the open market for less than the option price. The reverse could be true. The tractor is cheaper under the option than buying another vehicle in the market.

John Seibel, one of the pioneers in the field of lease-purchase programs in the trucking industry and current President of a highly-successful carrier related equipment leasing company, indicated that many independent contractors enter a new TRUE lease for a new vehicle after the prior lease terminates as they desire to always have a vehicle under full warranty and with the latest features and accessories. Some independent contractors have exercised options as well as entering into a new vehicle acquisition lease and developed a fleet operation or, if the market price had risen over the option price, to secure title to the vehicle and sell it for a profit on the open market. Mr. Seibel also indicated that with a FINANCE lease, the lessee has more of a visceral feeling that he or she is the “owner.” Since the term of such leases is longer, the monthly or periodic payments are less and at the end of the term the lessee is a free and clear owner without any “option” payment or a large “last” payment. The acquisition is normally completed with the payment of one dollar or a nominal payment. Many lessees are also used to taking depreciation because of past experience and feel comfortable in such an arrangement.

A TRAC lease has some of the advantages and disadvantages of each of the above depending on the parties involved and “market movement” during

18. Since the Lease-Purchase Program’s inception in 1984, independent contractors of one trucking company Highway Sales, Inc. has served, Dart Transit Company, have purchased a total of 4,531 tractors, 1,333 with TRUE lease with buyout options and 3,198 with FINANCE and/or TRAC leases. Interview with John Seibel, President, Dart Transit Co. (Jan. 18, 2008). See Patricia Smith, Lease Purchase Programs: Know the Laws, Heavy Duty Trucking, July 2005, at 54 for information about John Seibel and the Highway Sales Program.
19. See Interview with John Seibel, supra note 18.
20. A “fleet operation” is a business where one individual or entity contracts two or more vehicles to one or more motor carriers with driver service. The fleet “owner,” if an individual may or may not drive a vehicle himself or herself.
21. Generally, in recent years, the used tractor market has been favorable for the independent contractor to consider this option. *Id.*
22. *Id.*
the term. The TRAC leases are more common with bank financing because it affords the most market-value protection to the financier.23

Although a number of leasing sources are available to independent contractors, direct financing through programs sponsored by motor carriers is now popular among independent contractors.24 Carrier sponsored programs may involve direct financing by the motor carrier, indirect financing through an affiliated financing company, or a participating independent third-party financing sources.25

IV. THE FUNDAMENTAL “OWNERSHIP” ISSUE

Despite the fact that independent contractors should have free choice in determining how to finance an equipment acquisition, some current statutes involving the employment classification issue have made it difficult for leasing parties to have assurance that the type of lease chosen will not influence the employment status.

The issue arises from the diversity over the meaning of the term “owner-operator” and variants of it in various states as evidenced by the following examples of statutory provisions:26

Example 1: Iowa Code 85.61(13)(c):

An owner-operator who, as an individual or partner, or shareholder of a corporate owner-operator, owns a vehicle licensed and registered as a truck, road tractor, or truck tractor by a governmental agency, is an independent contractor while performing services in the operation of the owner-operators’ vehicle if all of the following conditions are substantially present: . . .27

23. Id.

24. Financing is available through financing and leasing company, captive credit companies of equipment manufacturers, and franchised dealers/distributors of equipment in the motor carrier industry. See e.g. Wilson Cross, Tackling the Equipment Finance Challenge: Varied Lease Options Can Be Tailored to Meet Your Needs, Private Carrier, March 1998, at 17.

25. Although there are no statistics indicating how many motor carrier-sponsored programs exist, a review of any of the printed publications designed to attract owner-operator attention, see e.g. The Trucker, http://www.trucker.com (last visited Mar. 18, 2008), reflect a significant percentage of motor carriers offering lease-purchase plans. See also David Cullen, Let them have trucks: Lease/rental vehicles attract owner-operators, available at http://driversmag.com/ar/fleet_let_trucks_leaserental/ (last visited Mar. 18, 2008). Mr. Seibel also indicated that many such programs have “blossomed” in the past ten years. See Interview with John Seibel, supra note 18.


Example 2: Louisiana Code Revised Statute 23:1021(10):

“Owner operator” means a person who provides trucking transportation services under written contract to a common carrier, contract carrier, or exempt hauler which transportation services include the lease of equipment or a driver to the common carrier, contract carrier, or exempt hauler. An owner-operator and the drivers provided by an owner-operator, are not employees of any such common carrier or exempt hauler for the purposes of this Chapter if the owner operator has entered into a written agreement with the carrier or hauler that evidences a relationship in which the owner operator identifies itself as an independent contractor. For purposes of this Chapter, owner operator does not include an individual driver who purchases his equipment from the carrier or hauler, and then directly leases the equipment back to the carrier or hauler with the purchasing driver.28

Example 3: Oklahoma Code 85-1-§3-6:

“Employee” shall not include a person, commonly referred to as an owner-operator, who owns or leases a truck-tractor or truck for hire, if the owner-operator actually operates the truck-tractor or truck and if the person contracting with the owner-operator is not the lessor of the truck-tractor or truck...29

Example 4: Washington Code 51.08.180(1):

“Worker” means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as a separate alternative, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.30

Example 5: Wyoming Code 27-3-108(x):

2317 & 2320 (West 2008).

By an individual who is the owner and operator of a motor vehicle which is leased or contracted with driver to a for-hire common or contract carrier.  .  .  .31

Example 6: Kansas Code 44-503c(2)(c)

(2) As used in this subsection:

(c) “owner-operator” means an individual who is the owner of a single motor vehicle that is driven exclusively by the owner under a lease agreement or contract with a licensed motor carrier.32

In some instances, the workers’ compensation statute – or other similar statute – clearly indicate the term “owner-operator” includes a person who “owns or leases” the equipment.33 In most instances, however, the term is not specifically defined.34

The experience the motor carrier industry had in the state of Missouri is a prime example of what could be a problem for sponsors of lease-purchase programs where TRAC or TRUE leases are involved and the lessee does not have title to the vehicle he or she wishes to use under an operating agreement with a motor carrier. The interpretation of the term “owner and operator” arose in three cases in Missouri.

In the first case, Harp v. Malone Freight, Inc.,35 the operator of the vehicle under lease to the motor carrier was driving a tractor owned by his brother who was leased the vehicle to the motor carrier. The court found the exclusion of workers’ compensation coverage did not apply because the statutory provision clearly did not exclude an individual who is an “operator” but not an “owner” of the leased truck. 36

In Owner Operator Independent Drivers Ass’n v. New Prime, Inc.,37 the applicability of the exclusion arose in the context of a class action for the

36. Id. at 670.
return of workers’ compensation premiums which the independent contractors made because the motor carrier required workers’ compensation coverage. Rejecting the carrier’s argument that the definition of “owner,” as used in other chapters of the statute, should be used to interpret the term, the court found that since workers’ compensation coverage was intended to cover the largest possible class of people, the court felt that, “perhaps,” this accounted for the legislators’ choice not to adopt the broader definitions of “owner.” Noting that the equipment was leased by an affiliated leasing company of New Prime and the court specifically found that the lessee would not obtain any ownership interest in the vehicle during the period of the lease, the court applied the strict statutory construction applied by the Harp court.

In the third case, Nunn v. C.C. Mid West, the individual operator used his truck under a lease-purchase agreement with a leasing company related to the motor carrier. The lease provided that unless Mr. Nunn exercised his right-to-purchase option, “at times during the term of the Lease, no title to tractor shall vest in Lessee.” The Administrative Commission found the lease to be invalid in part because of the relation between the carrier and the leasing company. The court rejected this relationship as a basis for finding the lease-purchase agreement was not at “arm’s length” and found the lease valid and that the real issue was whether the lease itself created an ownership interest in Mr. Nunn. The carrier raised the same arguments which were presented to the court in the New Prime case and after reviewing the decisions in the Harp case and the New Prime case, the court agreed that the lease did not create an ownership interest in the Lessee.

These three cases resulted in the motor carrier industry seeking a statutory clarification of what was intended by the term “owner and operator” espousing that the term “owner” be defined as set forth in the Federal Leasing and Interchange Regulations, reading: “Owner – a person (1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment, or (3) who has lawful possession of equipment registered and licensed in any State in the name of that person.”

The statute was amended in 2005 and the new exclusion provision provides that a for-hire motor carrier operating under a “Certificate” issued by

38. Id. at 172-73.
39. Id. at 173.
41. Id. at 393
42. The vehicle acquisition agreement was with a totally-owned subsidiary of the parent company of the carrier. Id. at 391.
43. Id. at 396-97.
44. Id. at 399.
45. 49 C.F.R. § 376.2(d) (2001).
a federal or state transportation regulatory agency should not be determined to be the employer of the Lessor as defined at 49 C.F.R. Section 376.2(f).\textsuperscript{46} Significantly, in a provision dealing with “statutory employee” liability in the workers’ compensation statute, exclusion was also provided for a relationship between a regulated motor carrier and “ . . . an owner, as defined in subdivision (43) of Section 301.010, and operator of a motor vehicle”.\textsuperscript{47}

The cited section defines “owner” as follows:\textsuperscript{48}

\begin{quote}
\begin{flushleft}
(43) “Owner”, any person, firm, corporation or association, who holds the legal title to a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law \ldots.
\end{flushleft}
\end{quote}

It is difficult to understand why the legislators would adopt such a convoluted definition and, while the definition expands the term “owner” beyond title holder, it appears that a TRUE lease, without an option to purchase, would not be excluded under the statutory employee provision. In any respect, it is clear that motor carriers and independent contractors have been and are in undefined territories because of legislators’ and revisors’ misunderstanding of how motor carrier operations are conducted generally and, in particular, in terms of lease-purchase plans.

V. MOTOR CARRIER-SPONSORED EQUIPMENT ACQUISITION PROGRAMS AND WHY THEY EXIST

As previously noted, the trucking industry is one of the few industries where a realistic opportunity exists for individuals to achieve their dream to own and operate their own business. While the comparative capital cost of acquiring a truck and beginning business may be relatively small in relation to other businesses where hundreds of thousands or even millions of dollars are required, it is, and can be, a barrier. A new over-the-road tractor purchased from a franchised truck dealer by an individual owner-operator could cost anywhere from $97,000 to $125,000. A reasonable estimate of an average used tractor that is three years old would range from $55,000 to $65,000. Individuals do not have any significant ability to negotiate a lower purchase

\begin{flushright}
\textsuperscript{46} Mo. Ann. Stat. § 287.041 (West 2007).
\textsuperscript{47} Id. § 287.040 (West 2007).
\textsuperscript{48} Id. § 301.010 (43) (West 2007).
\end{flushright}
Complicating the attempt of an individual to become an independent businessperson is the fact that financing companies have traditionally been very conservative in granting credit to individuals for truck purchases or have imposed high interest rates which make it difficult for any individual to succeed since contract payments to owner-operators were essentially flat until the past few years while the cost of equipment and financing has escalated tremendously. Motor carriers on the other hand are in a position to avoid or control some of the risk problems an independent financier encounters, and many have established bona fide programs to allow new entrants achieve their goals or have allowed those already engaged in the business to upgrade their equipment. Motor carriers can make bulk purchases at lower prices and can secure discounted rates and credit terms which allow them to structure their programs at prices and credit terms which help the contractors make and meet the necessary financial commitments with attendant benefits to the motor carrier in terms of fleet size and quality. The following chart shows other typical advantages the motor carrier or a related company has over the independent financier.

<table>
<thead>
<tr>
<th>ITEM</th>
<th>INDEPENDENT FINANCIER</th>
<th>MOTOR CARRIER</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Background of Individual Applicant</td>
<td>Restricted to normal credit check information.</td>
<td>In addition to normal credit check information, has access to work information and health information as a result of government regulations.</td>
</tr>
</tbody>
</table>

49. Interview with John Seibel, supra note 18.

50. See id.

51. The motor carriers’ benefit, in terms of attracting new entrants into the trucking industry desiring to become entrepreneurs and their own boss, include retaining existing operators who desire to change their status from a driver employee to an independent contractor, or securing individuals from other trucklines who do not offer such plans. The shortage and/or turnover of operators is acute in the industry and it is estimated to increase. See Global Insight, Inc., supra note 4. The plans offer an opportunity to tap the driver-employee and independent contractor pools. Having new equipment in the operation is beneficial in soliciting and securing freight because vehicle breakdowns decrease, cleaner and more attractive equipment is offered, and vehicle safety is enhanced. See Interview with John Seibel, supra note 18.
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<tr>
<td>2. Tying Relation</td>
<td>Seldom can or will limit use of equipment to maintaining a contract with a carrier for full term of lease.</td>
<td>Can condition sale or lease to applicants on its use during finance period to subcontract work with it.</td>
</tr>
<tr>
<td>3. Purchase/Lease Payments</td>
<td>Has to rely on individual’s sending prompt payment and monies not spent on other items.</td>
<td>Payment taken from contract payments otherwise due to individual and remitted to financier.</td>
</tr>
<tr>
<td>4. Vehicle Inspections to Assure Vehicle is Not Being Abused and Properly Maintained</td>
<td>Difficult to accomplish because vehicle is mobile and used throughout wide geographic area.</td>
<td>Sees vehicle on more regular basis as it moves between facilities or can be routed to a specific facility for inspection.</td>
</tr>
<tr>
<td>5. Contact</td>
<td>Very little if any personal contact after purchase/lease.</td>
<td>Contact virtually every day, frequently personal in nature. Can discuss problems, etc.</td>
</tr>
<tr>
<td>6. Damage to Equipment</td>
<td>No prompt notice or knowledge unless individual reports it.</td>
<td>Prompt notice and knowledge without individual reporting it or notice more likely.</td>
</tr>
<tr>
<td>7. Breaches</td>
<td>No advance indications except falling behind in payments.</td>
<td>Promptly aware of inactivity, health or injury data or safety problems affecting ability to meet contract terms.</td>
</tr>
<tr>
<td>8. Locating After Breach</td>
<td>Limited knowledge as to possible location of</td>
<td>Access to information related to COBRA,</td>
</tr>
</tbody>
</table>
In respect to item 1 above, motor carriers tend to grant credit with a greater emphasis on “work ethic” rather than current and/or potential financial ability. Thus more individuals with limited financial assets are provided an opportunity to become entrepreneurs and work ethic has proven to be a good indication of success.

Tying arrangements not only account for the advantages of items 3 through 8 above, but also help assure the individual has a viable source of business available to the lessee and that there are not involuntary gaps in business revenue as an individual might attempt to secure business from other carriers if he or she had the freedom to move the equipment from carrier-to-carrier. Because of government regulations, moving from carrier-to-carrier involves certain obstacles (i.e., application inquiries, drug and alcohol tests, and so on) during which time the individual cannot haul.

Motor carriers would also not consider such programs if it was thought that they would end up financing equipment used in a competitive carrier’s operation. Because of the advantages the motor carrier has, the independent businessperson can also secure advantages as follows:

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52. Interview with John Seibel, supra note 18.
53. Id
54. “Tying” typically involves the seller of a product requiring a purchaser to take another product as well. In the situation under discussion, it refers to the personal practice of lessors of equipment requiring that the equipment be utilized in conjunction with a lease of the equipment with the related motor carrier. Historically, “tying” agreements were held and thought to be per se illegal and third-party financier lease contracts still are essentially void of such provisions whereas motor carriers-sponsored programs normally require such clauses and there is no indication that a legal problem exists. See Christian Ahlborn, David S. Evans, & A. Jorge Padilla, The Antitrust Economics of Tying: A Farewell to per se Illegality, The Antitrust Bulletin 287-88 (Spring-Summer 2004), available at http://www.usdoj.gov/atr/public/hearings/single_firm/comments/219224_b.htm.
55. Carriers will vary the number of vehicles leased to its realistic anticipation of freight which will be available for transportation by independent contractors. A lack of freight availability would not only hinder the independent contractors’ ability to be a successful participant; but also hurt the motor carrier contracting the equipment. John Seibel believes “success” of participants is the strongest selling point of a program. Interview with John Seibel, supra note 18.
57. Interview with John Seibel, supra note 18.
(1) **Advantage of the Motor Carrier’s Purchasing Power.** Equipment costs are decreased and thus financing costs are reduced.58

(2) **Risk Reduction.** The motor carrier can afford to gamble on more individuals because the motor carrier’s risks, as discussed above, are less than an independent financier’s.

(3) **Continuity of Subcontract Work.** The interest of the motor carrier and the individual in terms of achieving success, i.e. the motor carrier completing a profitable transaction and the individual acquiring the tractor clear and free of any lien, portends that sufficient business is available for the individual to be successful financially. The motor carrier would not offer such programs if sufficient freight were not available and thus the individual has good assurance the opportunity for success exists.

(4) **Professional Assistance.** The interest of the motor carrier to have the transaction be a success also means that it will be a willing resource to the individual if assistance is needed in finding reputable maintenance shops, or administratively, in securing necessary licenses and permits, insurance, and other information helpful to new businesspersons.

Why would a motor carrier concern itself with helping individuals become a successful independent businessperson? Among the reasons are:

(1) **Belief in Entrepreneurship.** Many trucklines started as one-person businesses, and owners hold on to the principle that a person works smarter and harder if he or she feels they are working for themselves.

Dart Transit Company is an example of a motor carrier belief in entrepreneurship. In a greeting to independent contractors in a special edition of its newsletter for such contractors, Donald G. Oren, Past President and now Chairman of the carrier stated:

Dart Transit Company is a unique carrier in that it still believes in the entrepreneurial spirit. Rather than rushing to company owned equipment and driver employees like many other carriers, Dart has maintained its confidence in the independent contractor and remains a 100% independent contractor fleet.

We want you to have the continued opportunity to make basic decisions about your business and to experience the opportunities which exist as an independent businessman.

58. Highway Sales, Inc., for example, normally secures equipment in lots of 100 or more at a cost which could not be matched by an individual making an acquisition. *Id.*
Some people do not understand what it means to own or control your own tractor with specs of your own desire. Some people do not understand the feeling that one experiences knowing that the harder and/or more intelligent one works, the more money one can earn. Some people do not understand that it’s a good feeling to be able to decide how to expend income in the manner and for the purposes you determine.

There are many in this country who want every person to be considered an employee so that their job of collecting taxes or imposing social schemes becomes easier, or because their own economic opportunities are enhanced in an employer-employee situation. Their attitude is that burdens can be transferred to others and economic benefit can be achieved by dealing with the “big guy” instead of many small businessmen such as yourself.

We at Dart don’t buy these stories. Dart started with one tractor under contract with an independent contractor and a trailer and has achieved its growth because it believed in the principles we now apply to our relationship with contractors as well as shippers and receivers of the freight we haul.

Because of the threats to that spirit and relationship, we have prepared this document to reaffirm our position and to share it with you. We are confident that you will find it is to your benefit as well as ours to preserve the independent contractor relationship in the trucking industry.59

(2) Loyalty. A person who is given a meaningful opportunity to advance oneself and develop his or her own business will become a loyal subcontractor as long as the truckline continues to be fair and equitable in the contractual relationship.60

(3) Expansion Opportunities. Many trucklines, because of their size and access to capital do not have the capital to finance a driver-employee fleet.61 The lease/purchase program allows funds to be used in other facets of the business.

(4) Explore New Markets. Consistent with expansion opportunities as discussed above, there is an extreme shortage of drivers in the industry.62 The

60. Many of the original group of individuals who were the first participants in the Highway Sales program and who have not retired still contract their vehicles to Dart and others have been contracted to Dart in double digit numbers of contract years. Interview with John Seibel, supra note 18.
61. It should be noted that the capital requirement is not merely financing the equipment, but is also financing things such as building and staffing maintenance and repair facilities or subcontracting to an independent business, and acquiring parking space since “company” equipment is normally “parked” at company facilities as opposed to owner-operators who generally drive their equipment to their homes or other parking spots.
“opportunity to become your own boss” can attract new entrants into the industry and to the carrier offering a lease/purchase program. It also affords an opportunity to compete for owner-operators by carriers who have historically only used driver-employees, but, because of the driver shortage, have now instituted owner-operator operations in part to secure “operators.”

The advantages to both participants in the program are equally available whether the financing document is between the motor carrier and the independent businessperson or if an “affiliated” leasing company is involved.

VI. STATUTORY/ADMINISTRATIVE/JUDICIAL IMPEDIMENTS

Despite the clear and convincing evidence of the advantages and successes of the Purchase Lease Acquisition programs, states are taking action to preclude such programs or cripple existing programs by statutory provision or court and administrative decisions. An inherent problem facing motor carriers and independent contractors is that the state statutes covering areas in which the employment classification issue arises were frequently enacted to cover locally-based businesses where workers essentially provided service in one state and, to a large extent, in an industrial-factory setting. Even in the trucking industry, most carriers historically were involved in operations in a single state or a limited geographic area because of entry regulations and operational limitations.

The concept of multiple-state industrial or service operations was not envisioned. The deregulation of the trucking industry in the 1980s saw a proliferation of new trucklines and expansion of existing carriers into new territories and carrying a broad range of commodities. While such expansion created new opportunities for business, it also created legal problems of operating in a “patch quilt” of state laws which had little uniformity in text, common law, or in factual application.

The lease-purchase plans are also a factor to consider in terms of needed “uniformity.” South Carolina, for example, enacted a statutory provision in 2007 which exempts independent contractors in the trucking industry from workers’ compensation coverage unless the equipment is acquired from the

63. Service offerings were limited to territories described in their operating certificates, and truckload carriers were limited to hauling specifically named commodities to limited geographical areas. The equipment and roads were not conducive for long journeys until the emergence of “Turn Pike” and Interstate Highways in the 1950s and, thereafter, with the completion of Designated Interstate Highway System in the late 1970s. This opened up expanded opportunities for motor carriers to extend their operations geographically. See generally Paul Stephen Dempsey, Transportation: A Legal History, 30 TRANSPL. J. 255, 273, 293, 313-14, 343, 347 (2003) (discussing the evolution of motor carrier regulation).
The Attack on Motor Carrier Sponsored Equipment Acquisitions

motor carrier. In Oklahoma, “owner-operators” who actually operate a truck-tractor or truck for-hire do not fall within the term “employee” for the purposes of workers’ compensation with the provision that “the person contracting with the owner-operator is not the lessor of the truck-tractor or truck.” Under the Unemployment Compensation Insurance Act of Illinois, employment does not include service performed by an individual as an operator of a truck, truck-tractor, or tractor if six specific factors are satisfied, one of which is that the person or entity:

Either leases the equipment or holds title to the equipment, provided that the individual or entity from which the equipment is leased, or which holds any security or other interest in the equipment, is not:

(i) The person or entity to which the individual is contracted for service, or

(ii) Owned, controlled, or operated by or in common with, to any extent, whether directly or indirectly, the person or entity to which the individual is contracted for service or a family member of a shareholder, owner, or partner of the person or entity.

Significantly, the legislators included specific definitions of the terms “family members,” “ownership,” “control,” “operations,” “persons,” or “entity” which, presumably, would cover any and all relationships possible and for all practical purposes precludes lease-purchase plans. This is evidenced by one example of the application of the relevant provision in the Illinois Administrative Code dealing with the issue. The example reads:

Madison operates a truck for XYZ Trucking, a corporation in which Jefferson is a

64. South Carolina Workers’ Compensation Act, S.C. Code Ann. § 42-1-360(9) (2007). The applicable part of the provision reads:

(9) an individual who owns or holds under a bona fide lease-purchase or installment-purchase agreement a tractor trailer, tractor, or other vehicle, referred to as ‘vehicle’, and who, under a valid independent contractor contract provides that vehicle and the individual’s services as a driver to a motor carrier. For purposes of this item, any lease-purchase or installment-purchase of the vehicle may not be between the individual and the motor carrier referenced in this title, but it may be between the individual and an affiliate, subsidiary, or related entity or person of the motor carrier, or any other lessor or seller. Where the lease-purchase or installment-purchase is between the individual and an affiliate, subsidiary, or related entity or person of the motor carrier, or any other lessor or seller, the vehicle acquisition or financing transaction must be on terms equal to terms available in customary and usual retail transactions generally available in the State. This individual is considered an independent contractor and not an employee of the motor carrier under this title.

five-percent shareholder. Madison holds title to the truck, but ABC Finance Company, which is managed by the brother of Jefferson’s father-in-law, holds a lien on the truck. Section 212.1 does not exempt the services Madison performs for XYZ from the Act’s definition of “employment”, since the individual who operates ABC is a family member of a shareholder of XYZ.69

In New Jersey, the unemployment compensation statute provides that an exemption from unemployment compensation coverage exists for:

Services performed by operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and used for the highway movement of motor freight, who own their equipment or who lease or finance the purchase of their equipment through an entity which is not owned or controlled directly or indirectly by the entity for which the services were performed and who were compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move.70

It should be noticed that in each instance there are some variations as to the effect the test would have in terms of the lease-purchase plan and while they may not reflect a significant difference on first impression, the differences could be substantial. Initially, it should be noted that in Oklahoma, Illinois, and South Carolina, no limitation exists in terms of the size or weight of the vehicle, whereas New Jersey indicates the vehicle must weigh a minimum of 18,000 pounds or more. This weight limitation could affect the vehicle fleets of motor carriers engaged in local delivery, home delivery, messenger, courier, and other carriers which utilize smaller vehicles. It should also be noted that New Jersey limits the exemption to “highway movements.” Does this include “highway routes within city limits?” Does it only include carriers who provide “X %” of their operations on highways versus city streets?

These statutes indicate the problems faced by carriers who may have facilities in multiple states and/or operate in intrastate or interstate commerce in multiple states. Apart from state statute issues, administrative agencies and the judiciary have considered the lease-purchase program issue and their decisions also account for problems facing motor carriers and independent contractors to engage in a relatively simple business agreement.

In *Byrne Trucking, Inc. v. Employment Division*,71 for example, individuals entered into hauling contracts with the motor carrier pursuant to an arrangement wherein carrier-owned equipment was leased by the carrier to the operators who in turn leased it back to the carrier. The equipment leases provided that the equipment would be used exclusively in the carrier’s service

The court, in its review, discussed some provisions which are expressed other than in terms of independent contractors, in general, and lease-purchase plans, in particular. The court stated, “the arrangement . . . could have been found to be a subterfuge to make an employee who was operating [the motor carrier’s] equipment appear to be something which he was not.” Continuing, it was said, “In light of these lease arrangements, the Division and the referee were entitled to look with a jaundiced eye at those situations in which the equipment was purported to have been sold by [the motor carrier] to the operators who then leased it back to [the motor carrier].” It then stated:

In the absence of proof that the agreements concerning ownership rights to the trucks were actually honored and were not forgotten upon termination of the hauling arrangement and that the agreements were other than paper transactions, [the motor carrier] could be found not to have carried its burden of proof that the services rendered were other than employment.

The court continued, however, to address an issue which is of more concern to motor carriers. The case involved unemployment compensation taxes. One of the factors in resolving the employment classification issue was whether the individual was engaged in an independently established business. The court also found that the fact that the individual owner or owners were purchasing from the carrier or others did not resolve the issue of whether they had an “independently-established business.” The court found that there was justification for the finding that the lessors were only using their equipment to make a job for themselves rather than that they were conducting an independently-established business. The court stated: “[t]he operators’ testimony that if they were terminated [by the motor carrier] they would make a similar arrangement with another [carrier] is irrelevant. Any workman who loses his job can go to work for someone else – providing there is another job for him to go to.” Continuing, the court said: “[u]nemployment compensation is designed to provide protection during those times when an arrangement cannot be made with another firm providing similar service because there is insufficient demand for similar services.”

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72. Id. ("The leases also provide[d] for a purchase option.").
73. Id.
74. Id.
75. Id. (citing Mitchell Bros. Truck Lines v. Employment Div., 587 P.2d 475, 476 (Or. 1978)).
77. Byrne Trucking, Inc., 587 P.2d at 474.
78. Id. at 474-75 (the court cited the criteria to establish an “independent established business”) (citing Kilpatrick v. Peet, 428 P.2d 405, 409 (Or. 1967)).
79. Id. at 475.
80. Id.
Apparently, no consideration was given to the fact that independent contractors, as independent businesspersons, voluntarily face the threat that their business might be unsuccessful and suffer demise.

On the other hand, there have been favorable decisions regarding lease-purchase plans. In *North American Van Lines, Inc. v. Nat’l Labor Relations Board*, the motor carrier assisted drivers to finance the purchase of tractor equipment to establish their own business. It offered financing at competitive rates. The court rejected the agency’s finding that the program evidenced an “employee” classification finding that the carrier’s programs were essentially an “effort to support the drivers’ efforts to establish their businesses and completed their contract tasks, as opposed to an effort to assert control over the details or manner of performance.” The court stated that the equipment acquisition was of such nature, noting: “NAVL offers [equipment] financing at competitive rates and frequently sells the financing agreement to third parties.”

While there is no doubt that the proverbial “con-artists” have existed as they do wherever money is involved and that some “fly-by-night” carriers had sponsored business faulty programs that may have broken existing laws or regulations, there is no evidence that this was and, more importantly, is now a considerable problem.

The proliferation of new programs, the quality and reputation of motor carriers providing such programs, and the acceptance of them by independent businesspersons seemingly leads to the conclusion that the market has adjusted and that the problem programs, to the extent they existed, have been exposed and driven from the field or forced to make changes in their practices.

**VII. THE BONA FIDE TEST**

It is difficult to conceive why the person or entity which finances an equipment acquisition is per se of critical importance much less fully

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82. Id. at 604.
83. Id.
84. Interview with John Siebel, *supra* note 18.
86. Interview with John Siebel, *supra* note 18.
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Determinative of a person’s status as an “independent contractor.” The real issue is whether the purchase agreement and/or lease is a bona fide one. If a true legal agreement exists in which the parties have undertaken a contractual obligation for a bona fide purpose and said agreement is enforceable by its terms and in practice, the issue of the motor carrier or an affiliate being a party should be moot.

The bona fide test has been adopted in various state statutory provision or administrative regulations. The bona fide test has also been recognized by the Internal Revenue Service. Although the “Twenty Common Law Factor Test” has been closely associated with the IRS’ handling of the employment classification issue, the equipment acquisition program issue is not directly addressed in the test. However, in various internal documents and educational releases, it is clear that the IRS has recognized that leased vehicles are acceptable as meeting the issue of whether the holding of such equipment represents an investment in equipment and that the issue is whether the acquisition of the equipment was bona fide.

In the Technical Guideline the IRS set forth a simple, concise, and sage test to create a strong influence that an independent contractor status exists as follows:

(a) he/she owns the equipment or holds it under a bona fide lease arrangement;
(b) he/she is responsible for the maintenance of the equipment;
(c) he/she bears the principle burdens of the operating costs, including fuel, repairs, supplies, insurance, and personal expenses while on the road;
(d) he/she is responsible for supplying the necessary personal services to operate the equipment;
(e) his/her compensation is based upon a division of the gross revenue or a fee based upon the distance of the haul, the weight of the goods, the number of deliveries, or combination thereof; and
(f) he/she generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier and specifications of the shipper.

The IRS, in reality, has set forth the most extensive discussion of lease-purchase plans and sets forth tests or criteria upon which such programs will be judged.

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89. See, e.g., I.R.S., EMPLOYMENT TAX PROCEDURE: TRUCKING INDUSTRY-CONTRACTOR OPERATIONS, INTERNAL REV. MAN., 46(10)2, 8479-5 (8-12-75).
90. Id.
In Employment Tax Guidelines: Classifying Certain Van Operators in the Moving Industry, the IRS essentially weighed the Twenty Factor Test and relegated them by importance into “Critical Fact,” “Significant Facts,” “Other Relevant Facts,” and “Facts of Little Relevance” categories. The critical factor in the classification test was determined to be whether the operator had “the potential to realize a profit or loss” and that the threshold criterion in determining this issue was whether the operator had “a substantial investment in equipment.”

If not, the individual would be considered an employee.

Seven requirements were set forth to make a determination of the equipment issue and each were discussed each in some detail. Initially, the IRS indicated that “[t]he parties must intend that the Van Operator have a substantial investment in the power equipment unit and must treat the transaction consistently with that purpose.” In setting forth the above-referenced requirement, the IRS indicated that “[t]he parties must document the transaction appropriately (that is, a title in the Van Operator’s name in the case of a purchase and a note or other evidence of indebtedness if the purchase is financed, or a lease agreement in the case of a lease).” The IRS indicated that “[t]he transaction will be examined considering the terms in light of all the facts and circumstances, including the overall relationship between the parties.”

A further requirement mandated that “[t]he purchase price or the valuation used to determine payments, in the case of a lease, must reflect a reasonable valuation for the power unit” and must be personally liable for the power unit. Also,

“[t]he Van Operator must be personally liable for payments if a purchase is

91. See I.R.S., EMPLOYMENT TAX GUIDELINES: CLASSIFYING CERTAIN VAN OPERATORS IN THE MOVING INDUSTRY 11-31 (1998), available at www.irs.gov/pub/irs-utl/van-ops.pdf (hereinafter “MSU”). The document was produced as part of the IRS’ Market Segment Understanding Program [MSU] which the IRS initiated as an “innovative approach to resolving some longstanding disagreements with various industries on administrative or technical tax issues. An MSU identifies a particular area where the facts, law, or both are unclear, or noncompliance is widespread, within an independent market segment.” Id. at 1. The program is similar to the Market Segment Specialization Program [MSSP] which produced a document covering the trucking industry See I.R.S., MARKET SEGMENT SPECIALIZATION PROGRAM, TRUCKING INDUSTRY 5-4–5-6, available at http://www.unclefed.com/SurviveIRS/MSSP/ truck.pdf. The Trucking Industry MSSP focuses on general audit techniques and basically does little more in terms of the classification issue than sets out the “Twenty Factor” Classification Test. Id. While the MSU refers to “Van Operators in the Moving Industry,” it is submitted that the test essentially applies to all trucking. See I.R.S., EMPLOYMENT TAX GUIDELINES: CLASSIFYING CERTAIN VAN OPERATORS IN THE MOVING INDUSTRY 1 (1998).

92. MSU, supra note 91, at 9.
93. Id.
94. Id. at 13.
95. Id.
96. Id.
97. Id.
financed or for lease payments in the case of a lease. If the purchase is financed, the amount of the payments must reflect a reasonable interest rate and reasonable amortization. In the case of a lease, the amount of the payments must reflect a reasonable interest rate."98

In expanding upon the issue of the of reasonable valuation, the IRS noticed that the amount of the purchase price or the valuation used to determine payments, in the case of a lease, would have to reflect a reasonable valuation for the tractor or truck. A reasonable valuation would be assumed if it is consistent with that derived from the N.A.D.A. Official Commercial Truck Guide, The Truck Blue Book, or similar source, adjusted for condition, mileage, bulk discounts, or other factors relevant to the individual power unit.99

In respect to personal liability for payments, the IRS specifically noted that “except in cases where the Van Operator pays the entire purchase price in a single payment, the Van Operator must be personally liable to make fixed periodic payments consistent with the form of the transaction.”100 The IRS specifically recognized that the payment may occur through deduction from the payments due the Van Operator from the carrier.101

In the case of a lease, the IRS’ guidelines require fixed minimum payments. “If, however, there is a fixed minimum rental at fair rental value, the fact that a Van Operator may pay a higher rental based upon fees collected does not suggest the absence of a substantial investment.”102

In the case of a financed purchase and in the case of a lease, the amount of the payments would have to reflect a reasonable interest rate. An interest rate would be considered reasonable if it was equivalent to rates charged by independent lenders or lessors providing financing for power units of similar type and quality or if it is at least equal to the applicable federal rate under section 1274(d) of the Internal Revenue Code.103 “In the case of a variable interest rate, the rate is reasonable if, on the effective date of the loan and on any date the interest rate changes, the rate at least equals the applicable federal rate then in effect under section 1274(d).”104

If the purchase is financed, the IRS would require that the amount of the payments must reflect a reasonable amortization. Thus,

[a]mortization of principal is reasonable if the amortization schedule is (1) similar

98. Id.
100. MSU, supra note 91, at 14.
101. See id.
102. Id.
104. MSU, supra note 91, at 14.
to that offered by other financial institutions to comparable borrowers for a power unit of similar type and quality, or (2) at least sufficient to amortize the indebtedness over the greater of five years or the useful life of the power unit, if the taxpayer [Van Operator] can demonstrate a useful life greater than five years.\textsuperscript{105}

The following example was set forth by the IRS to illustrate the requirement that the amount of the payment reflect a reasonable valuation of the power unit, a reasonable interest rate, and reasonable amortization:

Example: The Van Operator and the Company enter into an agreement under which the Van Operator obtains from the Company a power unit for a term of five years. The power unit has a value of $50,000, according to the Truck Blue Book. The power unit is expected to have a residual value of $10,000 after five years. At the time the Van Operator and the Company enter into the agreement, the applicable federal rate under section 1274(d) is 7 percent. The agreement calls for monthly payments by the Van Operator.\textsuperscript{106}

To calculate the minimum amount that would be considered a reasonable monthly payment under circumstances in the above example, two factors are relevant: (1) the amount of interest the Company would receive on the $50,000 value of the truck over five years (using the applicable federal rate on a declining monthly balance), and (2) the amount the Company would receive for the power unit’s depreciation over five years.\textsuperscript{107} The first computation shows that total interest payments of $10,617 would be required.\textsuperscript{108} The second computation shows that total payments for depreciation of $40,000 would be required since only $10,000 of the power unit’s original $50,000 value would remain after five years.\textsuperscript{109} The total, $50,617, divided by sixty payments, yields a monthly payment of $844.\textsuperscript{110} Thus, a substantial investment would be found only if the agreement required monthly payment of at least $844.\textsuperscript{111}

The IRS also indicated that “the Van Operator must be free to select the entity from which the Van Operator obtains the power unit.”\textsuperscript{112} The IRS also indicated that “the Van Operator must be responsible for the vehicle, including maintenance, fuel, liability insurance, and risk of loss from damage or destruction.”\textsuperscript{113} If the lessor performs standard maintenance, the cost of maintenance must be included in determining the Van Operator’s periodic

\textsuperscript{105} Id.
\textsuperscript{106} Id. at 15.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
payments and must be clearly shown as a separate cost item in determining the payment amount.\textsuperscript{114}

In the case of a lease, the IRS would require that the arrangement must generally have duration of at least one year.\textsuperscript{115} The IRS also indicated that the agreement must provide for financial remedies against the Van Operator in the event of default.\textsuperscript{116} A default may include the Van Operator’s termination of association with the Company,\textsuperscript{117} but the Company must demonstrate that it acted in a commercially reasonable manner to enforce the obligation.\textsuperscript{118}

While the foregoing requirements evidence the seven basic requirements, the IRS also noted two other considerations in resolving the “bona fide” test. Initially, the IRS indicated that terms of the lease-purchase arrangement “must not undercut or diminish the substantial nature of the Van Operator’s investment.”\textsuperscript{119} The arrangement has to “be considered in light of all the facts and circumstances, including the overall relationship between the parties.”\textsuperscript{120}

The following example was given to illustrate a possible factual situation:

Example: A Company decides to convert its employee-drivers to independent contractors. It tells its drivers that from now on, they must lease a power unit from the Company for $1,000 a month and the Company will lease it back from them at the same rate, plus an amount to reimburse the drivers for expenses such as fuel and oil changes, for which they will be responsible. Nothing else about the relationship between the parties will change. In this example, the overall relationship between the parties remains that of employer-employee; the Company controls the financial aspects of the drivers’ work. The drivers do not have the opportunity for profit or loss.\textsuperscript{121}

The IRS also indicated that an examiner must review all ancillary contracts, including the Federally-regulated lease, riders, and other side agreements and interview both the Company and Van Operator with respect to those agreements.\textsuperscript{122} The IRS noted that companies often use multiple agreements, which may or may not be consistent.\textsuperscript{123}

\begin{thebibliography}{99}
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. (the IRS did recognize the moving industry as seasonal and that the entire business relationship between the carrier and van operator may last for a shorter period, for example, May through September and that in such a case the leasing arrangement must have the same duration of the Van Operator’s service or hauling agreement).
\item \textsuperscript{116} Id. at 16.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\end{thebibliography}
consistent with the characterization of the transaction by the parties, this supports, but is not conclusive of, a finding that the arrangement should be respected.124 If the documents are inconsistent, further analysis would be needed.125 Occasionally, the terms of a transaction in the opinion of the IRS are so altered by another agreement that the transaction is devoid of economic substance and should be disregarded.126 In sum, the IRS indicated that an examiner must look to the true substance of the transaction.127

The following example was given by the IRS its concern:

Example: A Van Operator leases a power unit from the Company for $1,000 a month. The lease agreement states that the Company will perform all maintenance and that the portion of the lease payment attributable to maintain is $250. The Van Operator also has an FHWA-regulated lease agreement to provide driving services and a power unit to the Company. The FHWA-regulated lease agreement provides that the Company will pay the Van Operator $1,000 a month for the sublease of the power unit and $8 an hour for hours worked. Under the FHWA-regulated lease, if the Van Operator stops driving for the Company, the power unit is returned to the Company, neither party is liable for its lease payments, and the Company pays the Van Operator the hourly rate for hours worked. In this example, the Van Operator does not have a substantial investment in the power unit or the risk of loss because the FHWA-regulated lease agreement relieves the Van Operator of liability to make the lease payments and guarantees the Van Operator $8 an hour for hours worked.128

This pronouncement of the IRS is extremely important in establishing lease-purchase plans, administering, valuating, and defending them in the context of a “bona fide” test. Equally important is the use of the Guidelines in the lobbying of states and other federal agencies to adopt statutes and/or regulations to recognize that any equipment requirement not only include an owned vehicle, but those held under a bona fide equipment lease.

VIII. REFLECTIONS UPON THE MARKET SEGMENT UNDERSTANDING

The Market Segment Understanding “MSU”129 reflects a sage recognition that the employment classification should be determined in the context of a specific industry or portion thereof. It provides significant guidance in terms of motor carrier equipment acquisition programs as well as addressing the employment classification issue in general. At the same time, the MSU should not be considered an absolute answer to the propriety of a particular program or programs in general. Initially, concerns must be expressed that some basic

124. Id.
125. Id.
126. Id.
127. Id.
128. Id. at 16-17.
129. MSU, supra note 91, at 16.
misconceptions were made. It is felt that the IRS may have overlooked the fact that motor carriers and affiliated companies are not in the business of financing and leasing for the same reasons as third party financiers. The latter’s rewards come from maximizing profits generated by their financing businesses. The larger and more successful motor carriers and their related companies seek profits generated by their financing and leasing of equipment, but the margin of such profits sought is tempered by the benefits flowing to the related, but prime, motor carrier business.

A general principle in the insurance industry is that premiums are related to the degree of risk involved. Financing and leasing embrace the same concept of the risks undertaken in the determination of finance terms and/or lease terms. If a motor carrier is able and willing to take a greater risk than the public financing companies, for the reasons previously discussed, and if the carrier is willing to accept a lower profit margin on leasing operations because of the advantages to its prime business, it does not appear logical to require the motor carrier to charge lease fees or finance charges comparable to those of independent financing companies.

The real issue is whether the individual purchaser or lessee is undertaking an obligation which will bear on his ability to make a profit or incur a loss. If the terms of the purchase or lease, coupled with contract terms covering the motor carrier service, are such as to guarantee the purchaser or lessee a profit, obviously the purchase agreement or lease is not bona fide. This was recognized in the MSU\textsuperscript{130} and there is no dispute that a lease and motor carrier agreement involving circular payments is not a bona fide arrangement. The essential point should be whether a risk of making a profit or loss utilizing the equipment is present.

Some concern exists because the MSU has taken the position that the purchaser or lessee should have the unrestricted use of the equipment.\textsuperscript{131} This should not be a requirement. Initially, it should be noted that if this were, in fact, a bona fide requirement, the motor carrier or affiliated company would be placed in a position where they could be financing equipment for use in their competitor’s business or be creating new competitors by the purchasers or lessees.

The motor carriers and their affiliates would be facing the same risk as independent financing companies without any compensating benefits in their motor carrier business. Their programs would be nothing more or less than those of an independent financing company. While some motor carriers and affiliates may find the profit potentials attractive enough to accept such status, this is really not the intent or reasons why such programs are created and have

\footnote{130. MSU, }\textit{supra} note 91, at 18. Where a Company prohibits a Van Operator from accepting jobs from other firms or individuals, right to control by the Company is indicated.

\footnote{131. Id. at 18-19.}
flourished. Further, many individuals would be precluded from their dreams of having their own vehicles and operate it as an independent businessperson.

Further, most tying arrangements which have been reviewed recognized that there may be occasions where the relationship must, because of law or otherwise, be terminated and provide that the tying provision may be renegotiated or resolved by some of the following methods:

(a) the individual making a security deposit to cover the increased risk of the vehicle being contracted to another carrier or if a security deposit was required initially to increase the amount of such deposit;

(b) the individual being able to refinance the vehicle by independent sources within a reasonable period of time;

(c) the individual being able to exercise a premature purchase of a leased vehicle at the higher of fair market value or what it would cost the lessor to secure a clear title;

(d) the individual agreeing to contract with a motor carrier approved by the seller or lessor.132

An individual should be able to agree to commit the equipment to one carrier for a set period of time to achieve his/her goal of acquiring ownership of equipment as long as it is being done voluntarily. The only possible bearing a tying arrangement should have on the employment classification issue is if the motor carrier uses the tying clause to exercise inappropriate direction and control over the individual business operations under the motor carrier contract. However, if the motor carrier’s contract terms and practices involving individuals leasing or buying equipment are the same as for all independent contractors including those not in the equipment acquisition program, a tying arrangement should be a moot issue.

It is also felt that if the parties are faced with a default or merely want individually or jointly to terminate the lease of the equipment, the parties shall be able to provide alternatives to resolve these problems. The above-cited provisions, which have been used by drafters makes sense in a business setting being considered as “commercial reasonable steps” under the IRS standard,133 are not deviate attempts to circumvent the substantial investment test or undertaking personal risks in the relationship.

The MSU position is that a bona fide lease must be for a minimum period of one year unless the lease is for the duration of the operating contract with

132. The MSU did not address the tying arrangement in the context of the termination of an Agreement and the examples cited are merely some drafters’ attempts to resolve the issue in a “commercial reasonable manner.

133. The MSU merely talks of financial remedies in terms of the “Default Provision” whereas contract reformation might be a more sensible remedy. MSU, supra note 91, at 16.
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The requirement of such a period does not appear to be sensible. If a lessee, for example, desires a six-month lease anticipating that he would purchase another vehicle from an independent company or the motor carrier when a new model is available, why should this raise an issue of whether the six-month lease is a bona fide one? A month lease for example, may be appropriate if the lessee’s prime vehicle is undergoing major repairs and a second substitute vehicle is desired for use in meeting the lessee’s operating contract with the motor carrier.

Private non-trucking independent businesspersons in other industries lease photocopy machines or computers on a month-to-month basis. Companies will lease a motor vehicle on a daily basis to meet peak delivery commitments. The period of the lease is not significantly relevant and material. The question is whether the individual Van Operator is providing equipment normally not furnished by an employee at his/her own expense and, based on its usage, whether the individual could stand to achieve a profit or suffer a loss. While a longer term lease agreement might tend to indicate a “more” significant investment, a specific term length as a gauge of being bona fide should not be dictated or controlling.

The above is particularly true since the requirement would not only apply if the lease is made through the motor carrier or an affiliated company. Why would a lease for a period of less than one year with an independent leasing company not raise the same bona fide issue that it is raised in respect to the motor carrier or affiliated company?

The requirement that the Van Operator must be free to select the entity for whom it obtains the vehicle135 is also of concern except if this means Van Operator may not be forced to enter into a purchase agreement or lease with a person or entity not of his/her own choosing. If this requirement means that Van Operator must have the right to determine the franchised equipment dealer who sells or leases the vehicle to the entity sponsoring the purchase or lease program to the Van Operator, an objection exists.

It is not clear how this bears on the issue of substantial investment or employment classification. The program terms and success may and usually will be dependent upon the sponsor’s source of equipment and the deal negotiated with that source in securing the equipment. The vehicle or vehicles which are available to the independent contractor are made known to the potential lessee who has the choice of choosing to accept the available vehicle or not before any acquisition is consummated. An equipment acquisition program cannot exist if each potential lessee were allowed to select the franchised dealer from which to secure the vehicle having it custom

134. MSU, supra note 91, at 15; see also note 115 for additional information.
135. Id.
specifications desired by an individual.\textsuperscript{136} As previously discussed, such programs involve offer mass purchases of standard special equipment from a single source as means of being able to offer such equipment at advantageous terms.

Finally, franchised dealers or independent finance companies frequently charge four percent more interest on their deals as opposed to a motor carrier sponsored programs because their risks are greater and, in most instances, their overhead is higher.\textsuperscript{137} Why should the motor carrier or affiliated company be forced to raise its rates merely to protect an independent contractor relationship?

While the federal interest rate is offered as a fall-back position, why should a motor carrier or affiliated company even be forced to charge this rate? The parties should be free to make this determination and if the motor carrier’s program is seeking a greater interest rate than third party financiers, potential lessee should and will use other sources.

Economic common sense will keep motor carrier’s from not seeking a reasonable profit on such programs. Even if the motor carrier or affiliated company were willing to break-even on the program, which is probably not realistic, it is difficult to conceive how this bears on the employment classification issue. The fact of the matter is that the independent contractors, in the context of his/her own situation, has made a substantial investment, abet a bargain one, to become an independent businessperson.

Thus, it is suggested that the question of a specific test the relationship of a payment to value is not a significant. The real issue, as stated before, is whether the independent contractor has taken on an obligation to acquire equipment not usually furnished by an employee and whether he/she has entered into a contract where the use of such equipment in a business involves a question of earning a profit or sustaining a loss.

IX. Conclusion

How can body politics justify legislation or regulations which effectively precludes an individual’s desire and dream to become an independent businessperson from becoming a reality? Many individuals want to be their own boss and be an independent businessperson. They recognize in doing so they are undertaking financial risks. How body politics justify effectively precludes an individual desire and dream to become an independent businessperson. These individuals should have the freedom to acquire equipment from a source they choose.

No governmental entity should undertake the task of determining what is

\textsuperscript{136} Interview with John Siebel, \textit{supra} note 18.

\textsuperscript{137} \textit{Id.}
good or bad for individuals in establishing or operating their business as long as no laws are violated. Penalizing motor carriers and individuals for choosing to participate in carrier sponsored programs is clearly a step in the wrong direction. Such bona fide programs are economically sound and advantageous to lessees. It is time that the crimping of such program by body politics is stopped.
TABLE II: HOW GOVERNMENT ENCOURAGES THE USE OF INDEPENDENT CONTRACTORS

<table>
<thead>
<tr>
<th>Burdens and Benefits</th>
<th>Independent Contractor</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax Collection and Reporting</td>
<td>Employer withholds no taxes, reports to IRS annually with a single form.</td>
<td>Employer calculates, withholds, pays, and reports to several state agencies and IRS on monthly or quarterly basis.</td>
</tr>
<tr>
<td>Layoff or Firing</td>
<td>Employer pays no penalty unless termination involves a breach of contract.</td>
<td>Employer’s unemployment Insurance tax rate increases when employees are terminated.</td>
</tr>
<tr>
<td>Wage Garnishment</td>
<td>Employer cannot be required to garnish checks.</td>
<td>Employer can be required to garnish wages for child support or other causes.</td>
</tr>
<tr>
<td>Civil Rights Suits</td>
<td>Difficult to prove discrimination by employers against independent contractors. Set-aside programs encourage independent contracting.</td>
<td>Discrimination relatively easy to prove. Affirmative Action programs are costly to administer and make firing difficult.</td>
</tr>
<tr>
<td>Americans with Disabilities Act</td>
<td>Independent contractors are not “Reasonable accommodation”</td>
<td></td>
</tr>
</tbody>
</table>

**Employee Benefits**

Independent contractors provide their own benefits.

Tax benefits available to employers who provide employee benefit plans, but strings attached can make plan costly, “one-size-fits-all” plans rarely meet the needs of individual employees.

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**Immigration Law**

Independent contractors are not covered.

Employee must verify employees’ citizenship status and be prepared at all times for INS audit.

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**Overtime Provisions**

Independent contractors are not covered.

Flextime discouraged by requirements that overtime be paid at time-and-a-half; part-time employees cannot work 40-hour weeks; salaried employees cannot be docked for partial days.

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**Business Expense Deductions**

Independent contractors find it relatively easy to deduct personal investments in computer equipment, skills upgrading, etc.

Employees generally cannot deduct business expenses unless they can show the expense was required by their employer as a condition of keeping their job.

Bridgette Miller

I. INTRODUCTION

In the midst of the political season, the transportation industry is focusing its attention on Senator Barrack Obama. But the attention is not only focused on his Presidential candidacy, but also on his proposed bill that would
eliminate the safe harbor provisions of Section 530. As the law stands, Section 530 of the Revenue Act of 1978 permits employers to seek relief by avoiding the harsh penalties for reclassifying an independent contractor as an employee. The bill, the Independent Contractor Proper Classification Act of 2007 (hereinafter “Classification Act”), would eliminate the protections afforded under Section 530 and expose employers to lawsuits initiated by employees for allegedly misclassifying them as independent contractors. This Article addresses the potential impact of Senator Obama’s bill on the employer, particularly in the context of the motor carrier industry, as well as the current framework to assess the motor carriers’ classification of owner-operators as an independent contractors.

At this point, the Classification Act has only been introduced to the Senate and is not yet law. Nonetheless, motor carriers and employers should be vigilant on the status of this bill, as its passage would have a significant impact on the viability of owner-operators as independent contractors.

II. THE INCOMING AND OUTGOING TIDES OF TAX WITHHOLDINGS

The consequences that flow from the classification of an individual as employee or independent contractor are significant, to both employer and the misclassified individual. For the employer or motor carrier, classifying an individual as an employee requires the employer to withhold Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Tax Act (FUTA) taxes, and federal income tax from an employee’s wages. The act of classifying an individual as an employee affects the employers' tax obligations as well. ROBERT MCCALLUM, WORKERS CLASSIFICATION: EMPLOYEE VERSUS INDEPENDENT CONTRACTOR, http://www.lesourd.com/publications/workerclassification.pdf (last visited Feb. 16, 2008). Pursuant to sections 3111(a) and 3301(a), employers must pay a share of
also pay the employer’s share of FICA and FUTA taxes when classifying an individual as an employee.\textsuperscript{10} If the employer fails to withhold taxes from an employee’s wages, the employer will be required to pay the Internal Revenue Service (IRS) “1.5 percent of the wages paid . . . to such employee” and “20 percent of the amount [of social security that should have been withheld for the employee].”\textsuperscript{11} The employer is required to pay this amount and other tax assessments for years,\textsuperscript{12} regardless of any intentional wrongdoing, unless the employer obtains relief under the safe harbor provisions of Section 530.\textsuperscript{13}

Conversely, if the employer willfully fails to pay taxes, the employer will be required to pay twice the amount of taxes and Social Security otherwise required by 26 U.S.C. 3509(a).\textsuperscript{14} In such cases, the IRS may impose against the employer “a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.”\textsuperscript{15} With these harsh consequences, employers may think twice before classifying an individual as an independent contractor, particularly if the motives are to avoid the burdens of withholding and paying taxes for employees.

Yet at least one court has concluded that an employer does not willfully evade tax obligations by classifying an individual as an independent contractor, even though the classification is done to avoid “the trouble and expense of withholding taxes from workers’ wages. . . .”\textsuperscript{16} The court held that when the employer seeks out and relies on the advice of counsel to determine whether an individual qualifies as an employee or independent contractor, and is otherwise compliant with all withholding requirements under the Internal Revenue Code, an employer is not willfully evading his obligations under the law.\textsuperscript{17} Nonetheless, such a decision merits careful consideration because

\textsuperscript{10} 26 U.S.C. §§ 3111(a), 3301(a) (2008).
\textsuperscript{12} Pursuant to Section 6501(a) (2008), the IRS may take as long as three years to assess back taxes. McCallum suggests that this period may be longer when an individual has been misclassified as an independent contractor, “since no employment taxes would have been filed, there technically is no statute of limitations for assessment, and the IRS would not be precluded from asserting liabilities for multiple years.” McCallum, supra note 8, at 9 n.7 (citing 26 U.S.C. § 6501(c)(3) (2008)).
\textsuperscript{14} 26 U.S.C. § 3509(a) (2008).
\textsuperscript{17} Id. The court also noted that the employer “was conscientious in meeting the reporting requirements for his workers.” Id. Specifically, “[h]e withheld income taxes for those workers characterized as employees and filed 1099’s for all independent contractors, even those whose wages were negligible.” Id.
misclassifying an employee as an independent contractor can cost the employer millions of dollars.\textsuperscript{18}

Although the impact of misclassification on the employer is evident, the impact on the misclassified person may also be costly. For example, if an employee is mistakenly classified as an independent contractor, the employee is responsible for any income tax deficiency that he or she may owe as a result of the misclassification.\textsuperscript{19} Additional taxes (or fees) may be imposed as well, including taxes for the employee’s failure to file tax returns during the period they were classified as an independent contractor.\textsuperscript{20} Aside from the imposition of taxes, misclassified independent contractors may have also been deprived benefits otherwise available to employees, such as health benefits, medical leave, workers compensation, retirement benefits, overtime pay, and stock options.\textsuperscript{21} Such consequences are the impetus for Senator Obama’s Classification Act.\textsuperscript{22}

By treating the “employee” as an independent contractor, employers may cut costs as much as thirty percent, Obama reports.\textsuperscript{23}

With the consequences of misclassification presenting difficult struggles to both employers and misclassified independent contractors, there is no doubt that the need to provide tax relief on both sides is essential. How that relief is provided is where the safe harbor provisions of Section 530 and Classification Act come into consideration.

III. SECTION 530: SAFE HARBORS FOR MOTOR CARRIERS

A. STEP ONE: IS THE MOTOR CARRIER ELIGIBLE FOR RELIEF?

As a preliminary matter, Section 530 does not apply to employees.\textsuperscript{24} The purpose of Section 530 is to protect businesses from insurmountable tax assessments (and inevitably going out of business).\textsuperscript{25} In the motor carrier

\begin{thebibliography}{9}
\bibitem{22} Obama, \textit{supra} note 20, at 16.
\bibitem{23} \textit{Id}.
\bibitem{24} Ahmed v. United States, 147 F.3d 791, 797 (8th Cir. 1998).
\bibitem{25} Nu-Look Design, Inc. v. Comm’n of Internal Revenue, 356 F.3d 290, 292 (3rd Cir. 2004); \textit{see also In re Arndt}, 201 B.R. 853 (M.D. Fla. 1996) (providing that the purpose of Section 530 “was created by Congress to provide a ‘safe harbor’ to employers who had misclassified their employees as
industry, Section 530 is especially critical because of the motor carriers’ reliance on owner-operators. To ensure that motor carriers and other valuable industries are able to stay in business, Section 530 of the Revenue Act of 1978 offers relief to employers who owe federal taxes because they have misclassified individuals as independent contractors. Through this provision, Section 530 allows the motor carrier to treat the individual as an independent contractor to avoid the tax consequences of misclassification, but only if the following requirements are met:

1. the taxpayer must file requisite federal tax returns (including information returns) on a basis consistent with the taxpayer’s treatment of the individuals in question as independent contractors (the reporting consistency requirement);

2. the taxpayer must treat all persons holding substantially similar positions as independent contractors (the substantive consistency requirement); and

3. the taxpayer must have a reasonable basis for treating the individuals in question as independent contractors (the reasonable basis requirement).

The first requirement is fairly straightforward. To meet this requirement, the motor carrier must show that all federal tax forms submitted were those forms required to be submitted for an independent contractor. In other words, the motor carrier cannot have submitted any form treating the individual as an employee to qualify for relief under Section 530. The second requirement, however, “requires an examination of all the facts and circumstances, including particularly the activities and functions performed by the individuals.” This analysis becomes complex, particularly for independent contractors in good faith.


27. To determine whether an individual is an employee or independent contractor involves an assessment of several considerations, “but is essentially made by examining the [employer’s] right to control how, when, and where the person performs services.” Internal Revenue Service, U.S. Dept. of Treasury, Frequently Asked Tax Questions and Answers, http://www.irs.gov/faqs/faq-kw54.html (last visited Feb. 17, 2008).

28. Greco v. United States, 380 F. Supp.2d 598, 615 (M.D. Pa. 2005) (Rev. Rul. 87-41, 1987-C.B. 296) (emphasis added); see also Hardman, supra note 17, at 118 (setting out the three requirements that an employer must meet to continue treating the individual as an independent contractor).


31. Id. However, “[d]ifferences in the positions held by the respective individuals that result from the taxpayer’s treatment of one individual as an employee and the other individual as other than an...
in cases where motor carriers employ drivers and hire independent contractors to perform substantially similar positions. In *McLain v. United States*, for example, plaintiff’s employee drivers and independent contractors both “haul[ed] freight; . . . receive[d] their job assignments from plaintiff’s dispatchers on a daily basis; . . . submit[ted] driver’s logs and bills of lading; and . . . haul[ed] the freight in trailers provided by plaintiff bearing the name ‘Warren C. Sauers.’” Despite these similarities, the court determined that there was sufficient evidence to determine that the independent contractors and employees did not share a substantially similar position. The court noted in particular that the independent contractors “could choose what loads to haul[,] . . . had their own offices or advertised their services to others and . . . could take advances on their pay.”

The final requirement under Section 530 requires the motor carrier to have a reasonable basis for treating the individual as an independent contractor before obtaining relief. The third prong also involves the consideration of several factors. Pursuant to Section 530, a motor carrier may establish a reasonable basis for treating an employee as an independent contractor by relying on:

(A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

(B) a past IRS audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or

employee . . . are to be disregarded in determining whether the individuals hold substantially similar positions.” *Id.* For instance, the fact that employee takes part in a “qualified pension plan or health plan” and the independent contractor does not should not have any bearing on whether the independent contractor and employee share a “substantially similar positio[n].” *Id.*


33. *Id.*

34. *Id.; See also* Halfhill v. United States, 927 F. Supp. 171, 176 (W.D. Pa. 1996). In *Halfhill*, the court held that the plaintiff’s employees and independent contractors did *not* share substantially similar positions, and therefore, that the plaintiff did not qualify for Section 530 relief. *Id.* Specifically, the court found that:

[The] plaintiff treated his only driver, Halfhill, as an employee in 1978 and 1979, but from 1982 through 1990, plaintiff treated all the individuals who drove HT’s trucks, including Halfhill, as independent contractors. The type of work performed by Halfhill in the 1970’s, however, was substantially similar to the work performed by all of the drivers in the 1980’s; these individuals drove HT’s trucks, negotiated with carriers regarding the leasing of HT’s vehicles, and were paid a percentage of what HT’s trucks actually earned. Thus, because plaintiff has inconsistently labeled individuals who performed similar job functions, he is not entitled to § 530’s shelter.

*Id.* (emphasis in original).

2008] Obama Bill to Close the Safe Harbor of Section 530?

(C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.\(^{36}\)

In applying the reasonable basis prong, courts have clung to Congress’s mandate that the “reasonable basis” test is to be “construed liberally in favor of taxpayers.”\(^{37}\) Beyond this basic guideline, courts have construed the provisions of reasonable basis with varying degrees. For example, some courts have construed provision (A) to permit employers to rely on certified public accountants and attorneys as “technical advice with respect to the tax payer,”\(^{38}\) while other courts have required a further showing of reasonable reliance.\(^{39}\)

Even though provision (B) appears to be fairly straightforward, there is discord between courts reviewing Section 530 claims and the IRS’s interpretation of provision (B). For example, the Fifth Circuit permits a taxpayer to rely on his prior audit to obtain relief under Section 530, even though the audit was for a business in a completely different industry than the business subject to the tax assessments.\(^{40}\) The IRS clearly rejects this holding. In *Lambert*, the IRS argued that Lambert could not “use an audit conducted within one industry to provide a [safe harbor] governing employees in another industry.”\(^{41}\) In rejecting the IRS’s argument, the court held that “[t]he relationship of the taxpayer to his workers is the most important element of the § 530(a)(2)(B) analysis,” and not the substance of the work performed by the independent contractor.\(^{42}\) As such, the court should look to the “terms of control, supervision, pay and demands” of the employer’s and individual’s relationship, rather than the substance of the work completed.\(^{43}\) This analysis is favorable to the motor carrier industry, particularly where a trucking company performs several services in carrying out its operations. Nonetheless, this is only one jurisdiction’s interpretation of provision (B) and other courts may not adopt the Fifth Circuit’s approach.

In turning to provision (C), courts have developed several theories for what constitutes a “long-standing recognized practice of a significant segment of the industry.” For example, the Second Circuit held that provision (C) “cannot plausibly be understood to require uniformity of practice,” but rather, that “[t]he plain language of § 530 makes clear that . . . a taxpayer must prove

\(^{36}\) *Id.* at § 530(a)(2)(A)-(C).


\(^{39}\) *Arndt*, 201 B.R. at 860; *Vorsheck v. Comm’n of Internal Revenue*, 933 F.2d 757, 759 (9th Cir. 1991).

\(^{40}\) *Lambert’s Nursery and Landscaping, Inc. v. United States*, 894 F.2d 154, 157 (5th Cir. 1990).

\(^{41}\) *Id.*

\(^{42}\) *Id.*

\(^{43}\) *Id.* at 156.
that a significant segment of the industry follows a particular practice - not that every segment of the industry follows that practice.\textsuperscript{44} While the Second Circuit still leaves the question of what constitutes a significant segment, at least one court has confined significant segment to a narrower margin.\textsuperscript{45} The court held that significant segment can be less than half of the overall industry.\textsuperscript{46} To provide further guidance on the issue, Congress established the Small Business Job Protection Act of 1996,\textsuperscript{47} which effectively supplements Section 530 by adding the following:

\begin{quote}
[I]n no event shall the significant segment requirement of subparagraph (C) thereof be construed to require a reasonable showing of the practice of more than 25 percent of the industry (determined by not taking into account the taxpayer), and . . . in applying the long-standing recognized practice requirement of subparagraph (C) thereof—

(i) such requirement shall not be construed as requiring the practice to have continued for more than 10 years, and

(ii) a practice shall not fail to be treated as long-standing merely because such practice began after 1978.\textsuperscript{48}
\end{quote}

Based on this amendment, an employer’s showing of a significant segment of the industry can be accomplished with less than twenty-five percent of the industry following the employer’s same practice. This is indeed a favorable reading for trucking companies, particularly if courts decide to group motor carrier operations into a single industry – rather than recognizing the individual areas of motor carrier operations – such as moving and storage, hauling of perishables goods, and so on – because anything over twenty-five percent could require a large number of trucking companies to constitute a significant segment.

Lastly, it should be noted that some courts have developed a fourth prong under the reasonable basis determination.\textsuperscript{49} These courts have held that the common law rules as to what constitutes a “reasonable basis” may be used to find that a motor carrier reasonably relied on the provisions of Section 530.\textsuperscript{50} Whether a reasonable basis exists under this analysis depends on the facts and circumstances of each case and whether the reasonable basis was made in good

\begin{footnotesize}
\textsuperscript{44} 303 W. 42nd St. Enter., Inc. v. Internal Revenue Service, 181 F.3d 272, 276-77 (2d Cir. 1999) (quoting Springfield v. United States, 88 F.3d 750, 754 (9th Cir. 1996)).
\textsuperscript{46} Id.
\textsuperscript{48} Id.
\textsuperscript{49} E.g., Select Rehab, Inc. v. United States, 205 F. Supp. 2d 376 (M.D. Pa. 2002).
\end{footnotesize}
faith. Not all jurisdictions have adopted this fourth prong and as such, reliance on showing some other reasonable basis should be reviewed in light of the jurisdiction controlling the motor carrier’s case.

As demonstrated from the discussion above, the application of Section 530 cannot be riddled down or put into a basic formula. The application of Section 530 requires a thoughtful analysis of the language and interpretations of Section 530 in the motor carrier’s controlling jurisdiction to the facts of each case. As such, motor carriers should consult with their attorneys before classifying the individual as an independent contractor to prospectively avoid the consequences of misclassification, or if faced with a misclassification challenge, to determine their likelihood of success under Section 530.

B. STEP TWO: WHAT RELIEF MAY THE MOTOR CARRIER OBTAIN?

First, the employer or motor carrier may seek relief from the IRS before having to step through courtroom doors. Under the Classification Settlement Program (CSP), the motor carrier has the option of turning directly to the IRS to resolve their case with a standard settlement agreement. The CSP essentially consists of “a series of graduated settlement offers.” In a nutshell, if

(1) [T]he business meets the Section 530 reporting requirement but either clearly doesn’t meet the consistency requirement or clearly cannot meet the reasonable basis test, the offer will be a full employment tax assessment for the one tax year under examination.

(2) [T]he business meets the Section 530 reporting requirement and has a colorable argument that it meets the consistency requirement and the reasonable basis test, the offer will be an assessment of 25% of the employment tax liability for the audit year.

This is a valuable remedy if it does not appear that the motor carrier will be able to prevail under a Section 530 defense. Although the CSP program does not offer the motor carrier the same relief as Section 530, CSP does allow the motor carrier to avoid the full assessment of fines and back taxes otherwise imposed for misclassifying employees.

On the other hand, if the motor carrier is able to establish a prima facie case for relief under Section 530, the burden shifts to the government to show

51. Id.
52. 33A A M. JUR. 2D Federal Taxation § 9167 (2008).
53. Id.
54. Id. (emphasis added).
55. Id. (emphasis added).
56. Id.
that the motor carrier is not entitled to relief. If the government fails to meet its burden, the motor carrier will be entitled to relief under Section 530 and will be exempted from owing back taxes for misclassifying the “independent contractor” as an “employee.” In either situation, whether the motor carrier utilizes the CSP provisions or prevails under a Section 530 defense, the motor carrier will at least have some relief against the assessment of significant fines and back taxes.

IV. THROWING OUT A LIFE LINE TO “EMPLOYEES”:
THE PURPOSE OF OBAMA’S CLASSIFICATION ACT

The purposes of Section 530 and the Classification Act are aimed in two completely different directions. Section 530 provides relief to employers facing significant tax assessments for misclassifying, in good faith, employees as independent contractors. The Classification Act, if enacted, would provide relief to workers who have been labeled independent contractors and want to seek the benefits of employee status. Assuming the full text of the bill is passed, the Classification Act would seriously weaken the protections afforded to employers and thus, the “motor carrier employer” under Section 530.

As an initial matter, it should be noted that the Classification Act does not eliminate Section 530, but would subject motor carriers to a host of challenges. First, the Classification Act allows “any individual who performs services for a taxpayer” to file a petition against the taxpayer (or employer) for the taxpayer’s reliance on Section 530 in classifying the individual as an independent contractor. Upon the filing of a petition, the Secretary of Treasury would determine, based on a set of procedures

57. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755, at 1766 (appearing in notes to 26 U.S.C.A. § 3401 (2005)). For authority holding the employer to a different standard, see Boles Trucking, Inc. v. United States, 77 F.3d 236 (8th Cir. 1996) and Dains v. United States, 149 F.3d 1182, 1998 WL 385470, at *7-8 (6th Cir. 1998) (unpublished opinion). In Boles Trucking, Inc., the court found that under the clear text of the statute, ‘reasonable basis’ is what must be proved by the taxpayer—it is not an expression regarding the level of proof or quantum of evidence. Congress’s silence as to an altered burden must be taken as meaning the traditional burdens apply, i.e., a taxpayer’s reasonable basis must be proved by a preponderance of evidence.

77 F.3d at 240 (emphasis in original).


61. Classification Act, supra note 1, at § 3(f)(1).

62. Id. Taxpayer in this context is the employer.
“established by the Secretary of Treasury,” whether the motor carrier had misclassified the individual as an employee.63

If the Secretary of Treasury determines that the motor carrier has misclassified the individual, the Secretary of Treasury may “award expenses, including expert witness fees and reasonable attorney’s fees” and “such expenses against the taxpayer [motor carrier] . . . on behalf of such individual.”64 Moreover, the Classification Act mandates that upon the finding of a misclassification, that the Secretary of Treasury:

(1) if necessary, perform an employment tax audit of such taxpayer;

(2) inform the Department of Labor about such misclassification;

(3) notify the individual of any eligibility for the refund of self-employment taxes under chapter 2 of the Internal Revenue Code of 1986; and

(4) apply the provisions of [26 U.S.C. 3509, “Determination of employer’s liability for certain employment taxes”] and direct the taxpayer to take affirmative action to abate the violation.65

In essence, the Classification Act would subject the motor carrier to an administrative action by any individual who may have performed business for the motor carrier. The administrative action would be on a set of procedures promulgated by the government in its own tribunal and upon a finding of misclassification, subject the motor carrier not only to attorney fees and fines, but also, the full amount of federal taxes owed to the IRS. However, the Classification Act does not end there. In confronting an individual’s challenge, the Classification Act eliminates the motor carrier’s ability to rely on a long-standing industry practice for the basis of claiming the protections under Section 530.66 As such, a motor carrier’s ability to show a reasonable basis for classifying an individual as an independent contractor will be limited to reliance on judicial precedent and technical advice or a prior IRS tax audit under the first and second prongs of Section 530.67

The Classification Act also imposes administrative requirements on motor carriers. First, motor carriers will be required to notify individuals hired as independent contractors that their status as an independent contractor deprives them of certain labor and employment benefits.68 The motor carrier must also

63. Id. (emphasis added).
64. Id.; GovTrack.us., supra note 5.
65. Classification Act, supra note 1, at § 3(g)(1)-(4).
66. Id. at § 2(b)(2).
68. Classification Act, supra note 1, at § 5(b). The employers will not be responsible for developing the information to provide notice to independent contractors. Rather, “Secretary of the Treasury and the Secretary of Labor shall develop model materials for providing such notice.” Id.
notify these individuals of the federal tax obligations as an independent contractor and that if the individual wants to challenge their status as an independent contractor, they have a right to do so.\(^{69}\) If the independent contractor does challenge his or her classification, the motor carrier is not permitted to take any action against the independent contractor which could be viewed as retaliation.\(^{70}\) Rather, the motor carrier must assist in the challenge by maintaining records of all “independent contractors retained by the [motor carrier], including [the] name, address, Social Security number and Federal tax identification number” for a minimum of three years.\(^{71}\)

Finally, the Classification Act would authorize the IRS to issue “regulations and revenue rulings”\(^ {72}\) that are currently prohibited under Section 530 and otherwise disseminate information about the impact of misclassified individuals between the government branches.\(^ {73}\) By allowing the IRS to issue regulations and revenue rulings, the Classification Act will enable the IRS to establish a body of precedent that, while beneficial to clarify disputes surrounding employee versus independent contractor disputes, could be potentially geared toward the IRS’s goals in collecting taxes.\(^ {74}\) To the motor

\(^{69}\) Id.

\(^{70}\) Id. at § 3(f)(3)(A).

\(^{71}\) Id. at § 5(c).

\(^{72}\) Id. at § 2(b).

\(^{73}\) Id. at § 4. The Secretary of the Treasury and the Department of Labor will be required to issue annual reports on the impact of misclassifications, including,

(1) information on the number and type of enforcement actions against, and audits of, employers who have misclassified workers,

(2) relief obtained as a result of such actions against, and audits of, employers who have misclassified workers,

(3) an overall estimate of the number of employers misclassifying workers, the number of workers affected, and the industries involved.

(4) the impact of such misclassification on the Federal tax system, and

(5) the aggregate number of worker misclassification cases with respect to which each Secretary has provided information to the other Secretary and the outcome of actions taken, if any, by each Secretary in each worker misclassification case with respect to which the Secretary has received such information.

\(^{74}\) Senator Obama reports that “[a] 2006 study of misclassified employees in Illinois found $53.7 million loss of unemployment insurance taxes and a $149 million to $250 million loss of income tax.” Obama, supra note 20. Looking at these bare figures, the IRS’s incentive to promulgate rulings that
carrier industry, the Classification Act could have a devastating impact because the area of employment classification would essentially become a highly regulated area. Reports issued by the Secretary of the Treasury may portray motor carrier companies as “out to get the little people” when in effect, such companies consist of hardworking owner-operators that the Classification Act is purporting to protect.75

V. THE CURRENT STATUS OF THE CLASSIFICATION ACT

Fortunately, the Classification Act is early in the legislative process.76 The Classification Act must still be debated before the Senate Finance Committee, passed by the House of Representatives and Senate, and signed by the President before becoming law.77 The likelihood of the Classification Act becoming law is slight, as “[s]uch laws . . . are not designed to achieve a cohesive frame-work for resolving labor and employment problems. Rather, they are intended to respond to, and protect, interested groups – including legislators who need to respond to their constituencies.”78 This statement is particularly true in light of Senator Obama’s competitive Presidential campaign. Just seven days after the Classification Act’s introduction, an article written in the Chicago-Sun Times praised the introduction of the bill, stating “Chicago workers and ethical employers should be thanking Barack Obama and Dick Durbin for their introduction of the Independent Contractor Proper Classification Act of 2007.”79 The article challenges, at least implicitly, the protections afforded to employers under Section 530.80 According to the author, Section 530 allows employer’s to “avoid payroll taxes favor tax collection – without regard to the employer’s reliance on the independent contractor, owner-operator market, is readily apparent.

75. Classification Act, supra note 1, at § 4.
76. GovTrack.us., supra note 5. The Classification Act was introduced by Senators Obama, Durbin, Kennedy, and Murray on September 12, 2007. Classification Act, supra note 1. “Introduced bills go first to committees that deliberate, investigate, and revise them before they go to general debate.” GovTrack.us., supra note 5. In this case, the Classification Act has been assigned to the Senate Finance Committee. Id. “The majority of bills never make it out of committee.” Id.
77. “Introduced bills go first to committees that deliberate, investigate, and revise them before they go to general debate.” GovTrack.us., supra note 5. In this case, the Classification Act has been assigned to the Senate Finance Committee. Id. Even assuming the Senate Finance Committee sends the Classification Act to the House of Representatives, the bill “may undergo significant changes in markup session.” Id. Employers (and their counsel) should also “[k]eep in mind that sometimes the text of one bill is incorporated into another bill,” and therefore may not have been abandoned, despite the fact that the original bill was not further pursued. Id.
78. Fleming, supra note 59, at 1081.
79. Kim Bobo, Workers Need Protection, CHICAGO SUN-TIMES, Sept. 19, 2007, at 38. Senator Obama’s bill has gained support from AFL-CIO, Change to Win, the National Employment Project, and “business associations representing the interests of more than 200,000 construction employees.” Obama, supra note 20
80. Bobo, supra note 78.
and workers compensation," "steal benefits and protections from workers," and "steal taxes from the public that could go to schools or mass transit."81 Without knowing the current status of the law, a large majority of the working population could be moved to side with Senator Obama, and perhaps not only for his proposal of his Classification Act, but for other protections he may provide as our county’s potential President.

The current status of the law however, is far from allowing employers to merely skip down the halls of the IRS and classify their employees as independent contractors as they please. As discussed above, Section 530 has a complex three part test that employers must pass before they may rely on the safe harbor provisions of Section 530. Moreover, the purpose in passing Section 530 was not to provide a loop-hole for “employers” to avoid payroll taxes or steal benefits from employees, but rather to “alleviate what was perceived as overly zealous pursuit and assessment of taxes and penalties against employers who had, in good faith, misclassified their employees as independent contractors.”82

While it is unfortunate that some employers may abuse Section 530 to escape their tax obligations, the purpose and design of Section 530 is far from promoting or fostering tax evasion. Also, employees and the public must not forget that harsh consequences befall employers for their willful attempt to evade taxes,83 and that the provisions of Section 530 only allow employer’s to seek relief for back FICA and FUTA taxes.84 The employers must either seek relief elsewhere, or pay over any back state and federal income taxes owed as a result of misclassification.

Viewing Section 530 in conjunction with the entire federal and state tax framework reveals that the current status of the law offers a great deal of protection to businesses, particularly in the motor carrier-independent contractor market, and should be maintained rather than eliminated. And while authorities view the proposal of the Classification Act as an attempt to rally political support for Senator Obama’s constituency at this point, it is nonetheless a serious affront to Section 530’s provisions and motor carriers and their counsel should keep a watchful eye out as it progress through the legislative process.

81. Id.
82. Ahmed, 147 F.3d at 796.
Who’s the Boss? Addressing the Increasing Controversies Associated with the Owner-Operator/Employee Dichotomy

David C. Dunbar, G. Clark Monroe II, & Benny M. “Mac” May*

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I. INTRODUCTION

The classification of workers as employees or independent contractors, given all of the associated uncertainties, ambiguities and perils, has been and continues to be problematic for the trucking industry through the years. Indeed, trucking companies have been litigating the issue since the first half of the last century.\(^1\) Suffice it to say that this is not a new concern. However, worker classification issues have recently generated an explosion of activity at various levels and in numerous areas of state and federal government.\(^2\) Several states have recently passed or are considering legislation on the issue, either globally or in specific areas of law.\(^3\) Most of the recent legislation involves classification issues pertaining to responsibility for workers’ compensation insurance or state employment taxes.\(^4\) Some states specifically allow for workers’ compensation coverage to be replaced by owner/operator-purchased “occupational disability” policies,\(^5\) while some specifically prohibit and condemn the practice.\(^6\)

The federal government has also demonstrated concern about worker classification, specifically as it relates to the responsibility for, and payment of,
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taxes. The Internal Revenue Service recently announced the “Questionable Employment Tax Practice (QETP) initiative,” wherein it has agreed with at least twenty-nine states “to exchange data, thereby leveraging resources and encouraging businesses to comply with federal and state employment tax requirements.”

One piece of troubling Congressional legislation proposed by Presidential candidate Barack Obama, would have monumental, and potentially devastating, impact upon countless businesses who classify workers as independent contractors. Ultimately, it would restrict the freedom of thousands of workers and business owners to freely contract. Senator Obama, and six co-sponsors, introduced the legislation on September 12, 2007. This broad, sweeping legislation seeks, among other things, to require the establishment of a procedure for workers to petition for a determination of their status as employees or independent contractors. It would also prohibit businesses from retaliating against workers who file status petitions and require the Secretary of Labor to identify and track complaints involving worker misclassification for purposes of enforcing wage and hour laws and investigate industries identified by the Internal Revenue Service as violators.

Another provision would direct the Secretary of Labor to include on workplace posters required by the Fair Labor Standards Act a notice informing workers of their right to seek a status determination from the Internal Revenue Service. The legislation, if passed as proposed, would require businesses to notify the independent contractors with whom they do business of the workers’ federal tax obligations, the labor and employment protections inapplicable to independent contractors, and the workers’ rights to seek a status determination from the Internal Revenue Service, and would further require businesses to maintain for three years a list of all independent contractors with whom they do business, including the names and tax identification numbers thereof.

From a motor carrier perspective, this proposed legislation could make it cost prohibitive for some to use the independent contractor model, which may very well be the underlying intent.


10. Id.

11. Id.

12. Id.

13. Id.

14. Id.
All of these new laws and proposals will undoubtedly generate countless hours of litigation, as well as legal battles on other fronts, in the future. Penalties for improper classification vary, but can be significant, not only for the company, but also for its officers, individually. The uncertainty associated with this eruption of federal and state legislation, as well as the constant flow of inconsistent common law decisions, make it difficult, if not impossible, for the industry to gauge future financial performance. Parties will inevitably seek clarification, limitation, expansion, and in some instances, condemnation, of laws which they perceive to be ineffective, oppressive, or perhaps unconstitutional.

In 2006, the trucking industry in the United States employed an estimated 3.4 million drivers, approximately nine percent of whom were owner-operators. These numbers are expected to climb by approximately eight percent over the next decade. These circumstances, along with the current nationwide driver shortage, which is only expected to get worse, make it more important than ever for trucking industries to maximize the utility of the workforce. There is no question that the trucking industry will be heavily impacted by state and federal legislation and the resulting litigation across the country, regarding worker classification.

Given these current trends and circumstances, it is critical that industry attorneys be fully prepared to address these issues and controversies, whether it be through litigation, administrative practice, or one or more forms of alternative dispute resolution. Knowing which route to pursue in a given

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16. Companies are compelled to alert potential investors to the risks associated with the uncertain classification of workers. See SIRVA, Inc., Registration Statement (Form S-1) at 16 (May 7, 2004) (stating that “owner/operators are currently not considered to be employees by taxing and other regulatory authorities. Should these authorities change their position and consider our owner/operators to be our employees, our costs related to our tax, unemployment compensation and workers’ compensation payments could increase significantly”), available at http://sec.edgar-online.com/2004/05/07/0001047469-04-016483/Section10.asp; US 1 Indus., Inc., Annual Report (Form 10-K) (Mar. 19, 2007), available at http://sec.edgar-online.com/2007/03/19/0000351498-07-000003/Section3.asp.


18. Id.

situation, its ramifications and how to address the issues at hand in any particular arena is crucial to the competent and effective representation of clients.

II. SETTING THE STAGE

Motor carriers can, to some extent, control some of the risk associated with classification disputes by considering and negotiating the parameters for such disputes on the front end, including specific terms for the same in the leasing agreement or other related agreements. Negotiated terms can include forum selection clauses, choice of law provisions, and language requiring arbitration or other alternatives for dispute resolution.20

Forum selection clauses and choice of law provisions can, to some extent, allow contracting businesses a measure of certainty and predictability as to the laws under which their contracting relationships will be scrutinized. Such provisions will likely be enforced in classification disputes “so long as the contract bears a substantial relationship to the chosen state and so long as the parties’ choice does not thwart a fundamental policy of the state whose law would otherwise be applied.”21 The fact that one of the parties to the agreement is headquartered or incorporated in the selected state will typically result in a finding that such state has a substantial relationship to the parties and their transaction.22

Relegating classification disputes to arbitration or some other form of alternative dispute resolution may also provide some measure of protection. Assuming that the parties cannot reach an agreement and must have someone else make the decision for them, it is, in most instances, preferable to leave that final decision to an independent arbiter, rather than to a government official whose employer may have a direct stake in the outcome. Arbitration will typically provide some parameters for the issues in dispute, thereby limiting potential exposure for the business.23 Furthermore, any alternative dispute


23. In a recently overruled decision, the Mississippi Employment Security Commission found in
resolution process will usually provide the advantage of at least some measure of confidentiality. Much of the recent nationwide litigation and agency action regarding FedEx’s classification of its employees has surely had an effect, not only to the image and bottom line of FedEx, but also on the public awareness of classification issues, and hence the national and state movements regarding same.

Claims under most federal employment laws are arbitrable. In owner-operator classification disputes, counsel for purported employees are likely to argue that the Federal Arbitration Act specifically excludes employment contracts pertaining to workers involved in the transportation of goods in interstate commerce. There is conflicting authority on this issue. Some jurisdictions have held that this exclusion does not apply to owner-operators, because their agreements with motor carriers are not “contracts of employment.” However, others have held that the exclusion applies in this favor of an individual worker, but then unilaterally applied its ruling to “similarly situated” persons who had contracted with the purported employer. The effect on the purported employer would have been potentially devastating.


26. The Act provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (2008). This exclusion provision “is limited to transportation workers, defined . . . as those workers ‘actually engaged in the movement of goods in interstate commerce.’” Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112 (2001) (quoting Cole v. Burns Int’l Sec. Serv., 105 F.3d 1465, 1471 (D.C. Cir. 1997)). The Court went on to state that the exclusion is reflective of Congress’s “concern with transportation workers and their necessary role in the free flow of goods . . . .” Circuit City Stores, Inc., 532 U.S. at 121. The Court then concluded that “[i]t would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation.” Id.

context.\(^{28}\) In any event, the party seeking to avoid application of the Federal Arbitration Act always has the burden of establishing that it does not apply to their particular claim.\(^ {29} \) Of course, businesses will not have any control over the when and where of some disputes, especially those brought by governmental agencies. In those cases, arbitration and forum selection clauses are of little value. However, proper planning and foresight in negotiating agreements with owner-operators can serve to minimize exposure to these risks.

### III. COMMON ISSUES AND PERILS

#### A. LACK OF KNOWLEDGE BY JUDGES AND OTHER OFFICIANTS

When defending a motor carrier’s position regarding the independent contractor status of its owner-operators, the biggest obstacle to overcome is often the lack of experience of the decision maker of the intricacies of the Federal Motor Carrier Safety Regulations. It is, of course, always incumbent upon counsel to emphasize any law or facts necessary for an informed decision. However, this is especially true when dealing with industry-specific practices, regulations and other issues.\(^ {30} \) It cannot be assumed that an administrative law judge who deals solely with workers’ compensation issues or unemployment matters, a United States Tax Court judge, or even a federal district judge, will have any understanding of the nuances of motor carrier regulations. While this consideration is present in many forms of complex litigation, it is especially crucial in the context of motor carrier worker classification disputes. As is discussed infra, many factors which typically counsel in favor of classification of a worker as an employee are automatically present in disputes involving motor carriers due to the specific requirements of the federal “truth-in-leasing” regulations.\(^ {31} \) Some measure of education must be undertaken to ensure that those already present factors are not counted against the carrier in the final analysis. Thus, in trying these issues, one must be fully prepared to wear the hats of both advocate and professor.

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\(^{29}\) See Gilmer, 500 U.S. at 26.

\(^{30}\) Darwin S. Williams, An Interview with U.S. District Court Judge Patrick J. Schiltz, BARRISTER (Ramsey County Bar Ass’n, St. Paul, MN), April 2007, at 3.

B. INFLUENCE OF PUBLIC POLICY CONSIDERATIONS AND NATURAL
PRESUMPTIONS

There can really be no question that the classification of workers has
certain public policy considerations. When a decision requires subjective
determinations, the risk is presented that what would otherwise be a “tie” under
the appropriate analysis will be decided in favor of sound public policy, or
more accurately, the welfare of the forum state (or federal government). The
best defenses against such adverse action are education of the decision maker
on the applicable standards and the creation of a sound record for appeal. Also
working against the motor carrier in classification cases is the natural tendency
of persons, be they lay people or learned judges, to presume that an individual
performing work for a business is an employee of that business. This is
especially so when the terms of that individual’s work are so meticulously
regulated such as is the case in the motor carrier context.

C. POTENTIAL FOR COLLECTIVE-ACTION EFFECT

Many classification disputes will be brought as collective-action litigation
in which a ruling is sought to be applied not only to the prosecuting party, but
also to all similarly situated workers. In such instances, the motor carrier at
least has the benefit of knowing what is at stake from the outset. The more
dangerous, and potentially disastrous, situation arises where a judge, or more
often an agency, hears the claim of an individual, and then chooses to
unilaterally apply its findings as to that claim to all “similarly situated
workers. Again, when the risk of such a ruling is present, it is absolutely
crucial to ensure the development of a proper record for appeal.

(“[T]he proper classification of workers as employees or independent contractors serves an important
public policy. Proper classification is required for appropriate payroll deductions, including state and
federal income tax, and Social Security and Medicare contributions, and also affects the provision of
health insurance and other benefits. These taxes and benefits impact not just the individual worker, but
also impact the collection and payment of taxes and the provision of health and other benefits, which
are matters of public concern.”).

33. 49 C.F.R. § 376.12.

2007)) (“Collective-action treatment is proper for misclassification claims when the employees have
essentially the same basic job responsibilities.”); See also Narayan v. EGL, Inc., No. C-05-04181
6906, 2007 WL 2903180 (N.D. Ill. Oct. 01, 2007); Parker v. Rowland Express, Inc., 492 F. Supp. 2d
1159 (D. Minn. 2007).

35. See discussion supra note 24.

36. These considerations are certainly not meant to be all-inclusive. Each classification case will
pose different problems and issues. There are numerous other potential obstacles that may present
themselves, depending upon the type of case involved in the dispute. For instance, in a workers’
IV. PREPARATION FOR TRIAL OR HEARING

A. REVIEW AND DEVELOP UNDERSTANDING OF ANY AND ALL RELEVANT STATUTORY PROVISIONS, REGULATIONS AND COMMON LAW AUTHORITIES

Early identification of the specific criteria to be considered by the trier in making the worker status determination is crucial, as those criteria will determine the nature and scope of the proof that will be required at the trial or hearing. The United States Supreme Court established a common law agency test\(^\text{37}\) that is used by various jurisdictions in making classification determinations for application of certain federal social legislation.\(^\text{38}\) Others utilize the six factor “economic realities” test.\(^\text{39}\) The Internal Revenue Code defines the term “employee” for purposes of responsibility for Social Security, Medicare and unemployment tax withholding, and has provided a set of twenty criteria to be considered in making the appropriate classification.\(^\text{40}\)

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\(^{37}\) The common law agency analysis requires the consideration of numerous factors, including 1) the hiring party's right to control the manner and means by which the product is accomplished; 2) the skill required by the hired party; 3) the duration of the relationship between the parties; 4) the hiring party's right to assign additional projects; 5) the hired party's discretion over when and how to work; 6) the method of payment; 7) the hired party's role in hiring and paying assistants; 8) whether the work is part of the hiring party's regular business; 9) the hired party's employee benefits; and 10) tax treatment of the hired party's compensation. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).


\(^{39}\) The “economic realities” test is comprised of the following factors: 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is an integral part of the alleged employer's business. Ruiz v. Affinity Logistics Corp., No. 05CV2125 R(CAB), 2006 WL 3712942, at *2 (S.D. Cal. 2006) (Fair Labor Standards Act case); see Bonnett v. Arctic Express Inc., 7 F. Supp. 2d 977, 981 (S.D. Ohio 1998) (Family Medical Leave Act dispute).

\(^{40}\) See Rev. Rul. 87-41, 1987-1 C.B. 296 (The set of criteria are: (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) right to terminate.).
Fortunately, the Internal Revenue Service has previously determined that owner-operators are independent contractors and not employees. Some states have adopted these criteria for use in applying their own statutes, while others have established completely different sets of criteria for classifying workers, depending upon the purpose of the classification. Depending upon the applicable criteria, it may or may not be necessary to present testimony from certain management personnel with the company, such as a member of the human resources department or a regulatory compliance officer.

Specific knowledge of all applicable federal regulations governing the relationships between motor carriers and owner-operators is also necessary for effective representation. Many of the criteria typically utilized in a classification analysis are addressed in the regulations. The specific language in the regulations has been used to support findings of both independent contractor and employee status. It is certainly important to determine

42. See K & D Auto Body, Inc. v. Div. of Employment Sec., 171 S.W.3d 100, 104-13 (Mo. Ct. App. 2005) (applying an in depth analysis of the IRS factors and holding that the factors are “routinely applied” in classifying workers for the purpose of tax liability); see Longmire v. Ind. Dep’t of State Revenue, 638 N.E.2d 894, 897 (Ind. Tax 1994).
43. In Mississippi, for example, there are different sets of statutory criteria to be utilized when the determination is being made for workers’ compensation purposes. Miss. Code Ann. §71-3-3(r) (2007) (“Independent contractor means any individual, firm or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workers independent of the employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses, one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result.”). Mississippi common law complements this statutory definition with the ‘control test’ and the ‘nature of the work’ test. Davis v. Clarion-Ledger, 938 So. 2d 905, 908-09 (Miss. Ct. App. 2006). Mississippi has a subsidiary statute for employment tax and unemployment compensation. Miss. Code Ann. §71-5-11(J)(14) (2007) (“Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the department that such individual has been and will continue to be free from control and direction over the performance of such services both under his contract of service and in fact; and the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant.”). Mississippi common law, in turn, provides seven criteria to be considered in employment tax cases: “(1) The extent of control exercised over the details of the work; (2) Whether or not the one employed is engaged in a distinct occupation or business; (3) The skill required in the particular occupation; (4) Whether the employer supplies the tools and place of work for the person doing the work; (5) The length of time for which the person is employed; (6) The method of payment, whether by the time or by the job; and (7) Whether or not the work is a part of the regular business of the employer.” Miss. Dep’t of Employment Sec. v. Prod. Connections, LLC, 963 So. 2d 1185, 1187 (Miss. Ct. App. 2007).
45. See Hernandez v. Triple Ell Transp., Inc., 175 P.3d 199, 203 (Idaho 2007) (Affirming a workers’ compensation referee who found that a classification dispute involving motor carrier and owner-operator “was partially affected by a federal law that regulated the professional relationship between motor carriers and owners of leased equipment. She reasoned that because 49 CFR §
whether the particular venue of the dispute has ever addressed the issue before, and if so, to what result. Where no precedent exists, the argument should be made that purpose of the “Truth-in-Leasing” regulations\(^\text{47}\) is “to promote full disclosure, eliminate opportunities for . . . illegal and/or inequitable practices, and to promote the stability and economic welfare of owner-operators,” not to establish an employment relationship between motor carrier and owner operator,\(^\text{48}\) and that utilizing the leasing requirements set forth in the federal regulations to support a finding of an employment relationship would be unconscionable, especially in light of the clear language in the regulations cautioning against it.\(^\text{49}\)

B. KNOW AND FORMULATE THE PRESENTATION AROUND THE APPLICABLE STANDARD OF PROOF

Given that the line between employee and independent contractor will often be very thin, there is a good chance that any given classification dispute

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\(^{376.12(c)(4)}\) mandated that [motor carrier] engage in activities that normally would favor a finding of an employer-employee relationship, this federal regulation eliminated many of the traditional factors used to determine employment status. The factors were eliminated, she held, because they were already required by federal law and therefore did not affect the level of control that [motor carrier] could exert over [owner-operator].”); see also Universal Am-Can, Ltd. v. Workers’ Comp. Appeal Bd., 762 A.2d 328, 331 (Pa. 2000) (“[W]e agree with [motor carrier] that based upon the unequivocal language contained in § 376.12(c)(4), the regulation found at § 376.12(c)(1), relating to possession, control, and use does not mandate a determination of employee status.”).

46. W. Ports Transp., Inc. v. Employment Sec. Dep’t of State, 41 P.3d 510, 519 (Wash. Ct. App. 2002) (“On their face, these regulations are designed to fix responsibility for the safe operation of leased vehicles-with-drivers in interstate commerce on the carrier, and to provide a paper trail by which such responsibility can be audited; they are not designed to protect motor carriers from responsibility under state laws governing unemployment benefits. . . . We assume without holding that [the owner-operator] did qualify as an independent contractor under federal motor carrier regulations governing interstate commerce, and did qualify as an independent contractor under common law principles.” The court concluded, however, that “an individual may be both an independent contractor for some purposes, and engaged in ‘employment’ for purposes of Washington’s exceedingly broad definition of covered employment.”); Oliver & Iverson v. Honeycutt, 798 N.E.2d 890, 894 (Ind. Ct. App. 2003) (“[N]o longer are courts and the Worker’s Compensation Board bound to the determination that if a lease which is entered into meets the requirements of the leasing regulations as established by the Federal Motor Carrier Safety Administration that it is conclusive proof that the injured driver was an employee of the common carrier. Rather, we are to look to the factors which are traditionally applied by the fact-finder when determining whether an employee-employer relationship exists.”).


49. 49 C.F.R. § 376.12(c)(4) (“Nothing in the [leasing] provisions . . . is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.”).
will turn on the standard of proof to be applied to the evidence. Because of public policy considerations, workers' compensation laws typically provide that any doubt will be resolved in favor of a finding of an employer/employee relationship, and thus coverage. The same is generally true for unemployment compensation laws. However, jurisdictions have noted that these disputes involve responsibility for payment of an excise tax, and have modified the burden to resolve any doubts in favor of the taxpayer. Formulating case presentation to address—and in some instances—utilize, the standard of proof can be very effective. Typically, the taxing jurisdiction will point to tort-oriented cases that follow a different standard than that applicable to the taxing authority. For instance, in cases where any doubt is to be resolved in favor of the tax paying motor carrier, and against the taxing power, special emphasis should be placed upon ambiguities in the applicable statutes.


52. Vaughan v. Warner, 157 F.2d 26, 31 (3rd Cir. 1946); Brown v. LaNasa, 152 So. 2d 33, 35 (La. 1963) (“It would appear to us that . . . the two lower courts, impressed with the beneficent purposes of the act, have given it the broad and liberal construction permissible when such legislation is being viewed from the standpoint of an ‘employee’ claiming benefits thereunder, and have completely overlooked the fact that before such benefits can come into being a compulsory contribution (or excise tax) must first be paid by an ‘employer,’ and that this can only be levied by the taxing authority under a statute that is clear and unambiguous and, strictly construed, leaves no question but that such tax is due and payable, the rule prevailing in such instances being that every doubt as to its application must be resolved in favor of the taxpayer and against the taxing power. In this respect the taxing and the beneficent sections of the act are considered to be entirely separate and distinct.”); Miss. Dep’t of Employment Sec. v. Prod. Connections, LLC, 963 So. 2d at 1187 (While the burden of proof is upon the party seeking to show that the worker is not an employee, “employment security contribution assessments are an excise tax and, therefore, every doubt as to their application must be resolved in favor of the taxpayer and against the taxing power.” quoting Miss. Employment Sec. Comm’n v. PDN, Inc., 586 So. 2d at 840).

53. See Lorain County Auditor v. Ohio Unemployment Comp. Review Comm’n, 863 N.E.2d at 138 (citing Salz’ v. Gibson Greeting Cards, Inc., 399 N.E.2d 76, 78-79 (Ohio 1980) (holding that the Unemployment Compensation Act should be construed liberally when plaintiff has been terminated against his will).
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and common law. When such favor is not present for the client, the presentation should concentrate more on the lease agreement and the specific relationship between the motor carrier and the owner-operator.

C. CONSIDER THE POTENTIAL APPLICATION OF FEDERAL PREEMPTION IN STATE CASES

Motor carriers enjoy some protection from interference in their business by the several states by way of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). Arguably, the application of unemployment or workers’ compensation assessments upon motor carriers, despite the clear intentions of those carriers and the owner-operators with whom they contract to establish independent contractor relationships, is in contravention of the FAAAA and the Lease and Interchange Regulations, which specifically recognize and provide for the establishment of such independent contractor relationships.

The United States Supreme Court ruled recently that the FAAAA preempted a law enacted in Maine which sought to impose certain "recipient-verification" requirements upon carriers who transport tobacco products.

55. A good article for use in “teaching” the court or administrative body about the history of the industry, the leasing concept and its details is found in a prior article by Jessica Goldstein. See Jessica Goldstein, The Lease and Interchange of Vehicles in the Motor Carrier Industry, 32 TRANS. L.J. 131 (2005) (explaining how the Regulations work and why the current provisions are in place).
56. 28 U.S.C. § 14501(c)(1) (2005) ("[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.").
57. See id.; 49 C.F.R. § 376.
58. 49 C.F.R. § 376.12(c)(4).
59. Rowe v. N.H. Motor Transp. Ass'n, 2008 WL 440686, No. 06-457, *991 (U.S. Feb. 20, 2008). Maine law required state-licensed tobacco shippers to utilize a delivery company that provides a recipient-verification service that confirms that the buyer is of legal age, and, further, charged knowledge to carriers where the package shipped is marked as originating from a Maine-licensed tobacco retailer, or if it is received from a distributor on an official list of un-licensed tobacco retailers. Id. In finding preemption, the Court noted that “motor carriers will enjoy ‘the identical intrastate preemption of prices, routes and services as that originally contained in’ the Airline Deregulation Act”. Id. at *994-95 (quoting H.R. REP. No. 103-677, at 83 (1994) (Conf. Rep.)). The Court then applied a previous decision interpreting the Airline Deregulation Act and found that “[t]he Maine law . . . produces the very effect that the federal law sought to avoid, namely, a State’s direct substitution of its own governmental commands for ‘competitive market forces’ in determining (to a significant degree) the services that motor carriers will provide.” Id. at *995 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1994)). The Court went on to note that “[t]o interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress’ major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace”). Id. at 996 (citing H.R. REP. No. 103-667, at 87 (1994) (Conf. Rep.)).
The Michigan Court of Appeals struck down a regulation which prohibited the use of leased tractors from independent business persons on the basis of preemption. However, the Ninth Circuit has found that California’s Prevailing Wage Law was not preempted from application to motor carriers by the FAAAA. With the Supreme Court’s recent decision, it is likely that preemption arguments will become more and more prevalent in motor carrier worker classification disputes.

D. THE WRITTEN LEASE AGREEMENT

Classification disputes are, by their nature, heavily fact-driven. Each case will turn on the application of the pertinent classification test to the facts present. Although the criteria utilized by various agencies and jurisdictions vary greatly, it is widely recognized that the right to control the manner and means of the work performed is generally the single most important factor in any worker classification dispute. Any classification dispute arising between

60. In re Federal Preemption of Provisions of the Motor Carrier Act, 566 N.W.2d 299, 308 (Mich. Ct. App. 1997). The challenged statute read as follows: “The lease, contract, or arrangement shall provide that the vehicle, at all times, while being operated under the lease, contract, or arrangement, shall be operated only by persons who are employees of the holder who stand in relation to the holder as employee to employer.” Id. (citing MICH. COMP. LAWS § 479.10a(6) (2002)). The statute was stricken on the basis that it was “‘related to’ the costs and ability of many motor carriers to provide their service in Michigan,” and that it was “clear” the regulation affected routes and services and “most probably” affected prices. Id. at 309.

61. See Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184 (9th Cir. 1998). In Mendonca, a group of public works trucking contractors challenged California’s Prevailing Wage Law (“CPWL”), arguing that it was preempted by the FAAAA’s general preemption provision because it “increases its prices by 25 [percent], causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue.” Id. at 1189. The group sought to show its rates for “services” were based on costs, performance factors and conditions including prevailing wage requirements. Id. The Ninth Circuit rejected these arguments, finding that, although the prevailing wage law was “in a certain sense . . . ‘related to’ [plaintiff’s] prices, routes, and services,” its effect was “no more than indirect, remote, and tenuous” and it did not frustrate the purpose of deregulation by acutely interfering with the forces of competition. Id. (citing Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 334 (1997)).

62. See Roberson v. Indus. Comm’n (P.I. & I. Motor Exp., Inc.), 866 N.E.2d 191, 200 (Ill. 2007) (In a workers’ compensation dispute, the Illinois Supreme Court noted that “[n]o rule has been, or could be, adopted to govern all cases in this area.” (citing Henry v. Indus. Comm’n, 106 N.E.2d 185, 187 (Ill. 1952)).

63. See id.

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a motor carrier and an owner-operator will likely turn on the specific language in their agreement because the specific rights and duties of the motor carrier and the owner-operator are generally set forth in that agreement. As noted supra, many of the typical common law factors applied in making a worker classification determination are addressed in the Truth in Leasing Regulations.65 Given the elements of control that the Regulations require motor carriers to exert over owner-operators, whether as employees or independent contractors, the classification of a particular driver, or class of drivers, may very well turn on whether the trier of fact chooses to disregard those required elements of control for purposes of the classification66 or rely on them specifically for a finding of sufficient control.67

There are four factors that are widely used in determining whether a “right to control” exists.68 These include direct evidence of the right to

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65. 49 C.F.R. 376.12. See also Hernandez, 175 P.3d at 203; see Roberson, 866 N.E.2d at 202.
66. See Hernandez, 175 P.3d at 203-05; see also Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd., 762 A.2d at 334-35 (stating that "In applying the traditional test for determining whether a workers' compensation claimant is an independent contractor or employee, we must consider control over the work to be completed and means of performance. Factors which demonstrate compliance with government regulations do not assist in the application of the test. The existence of the regulations precludes a motor carrier and an owner-operator of leased equipment from negotiating any terms subject to the regulations. Neither party has bargaining power, or the ability to control the work to be done, when dealing with matters subject to regulation.").

In reviewing the written lease agreement, consider whether the agreement equates to a “lease of a vehicle,” with operational personnel to be provided by the lessor, or whether it is a “personal service contract” with the operator of the vehicle. Where the agreement merely provides for the lease of the vehicle, along with the furnishing of any qualified driver, as opposed to requiring that the owner-operator himself drive the vehicle, the owner-operator certainly maintains control and discretion over at lease some portion of the method of executing the work.\footnote{71}{NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 382-83 (3d Cir. 1979).}

The issue of corporate markings on the leased vehicle is often made an issue in the classification analysis.\footnote{72}{Hernandez, 175 P.3d at 203-04 (citing Universal Am-Can, Ltd., 762 A.2d at 332).} In the context of motor carrier contracts, such markings are a federal requirement.\footnote{73}{Federal Motor Carrier Marking of CMVs Requirements, 49 C.F.R. § 390.21(b) (2007) provides that:}

The marking must display the following information: (1) The legal name or a single trade name of the motor carrier operating the self-propelled CMV, as listed on the motor carrier identification report (Form MCS-150) and submitted in accordance with § 390.19; (2) The motor carrier identification number issued by the FMCSA, preceded by the letters “USDOT”; (3) If the name of any person other than the operating carrier appears on the CMV, the name of the operating carrier must be followed by the information required by paragraphs (b)(1), and (2) of this section, and be preceded by the words “operated by.”

\cite{Id. at 390.21(c) (2007) provides further that:}

The marking must— (1) Appear on both sides of the self-propelled CMV; (2) Be in letters that contrast sharply in color with the background on which the letters are placed; (3) Be readily legible, during daylight hours, from a distance of 50 feet (15.24 meters) while the CMV is stationary; and (4) Be kept and maintained in a manner that retains the legibility required by paragraph (c)(3) of this section.
adherence to this federal requirement should not be held against the motor carrier in the classification analysis, as it is not an indicia of control on the part of the motor carrier. Ultimately, there is no room for negotiation regarding the control and marking required by the Regulations, and thus, neither party is in a bargaining position on these issues.

Where the lease agreement does not clearly address a particular criterion to be considered by the judge or officiant, or does not do so adequately, it will be necessary to produce testimony or other evidence as to how the motor carrier conducts its operation and why. For example, it is often required that owner-operators communicate with the motor carrier on a daily basis, or at the time of reaching certain periods in the contract work. Such could potentially be seen as the exertion of control by the motor carrier over the owner-operator. To avoid a finding of control, it may be necessary to produce testimony that the purpose of such communications is not to exert control over the owner-operator, but rather to more efficiently conduct the business which the parties contracted to conduct. Justification for such communications could include determining when the driver makes a delivery and whether the driver would be able to haul another load in compliance with the federally mandated hours of service regulations. Other reasons for such regular communications could include assuring that the operator did not suffer an adversity due to hijacking, injury, illness or otherwise, passing on any emergency information that operator’s family desires to be relayed to the operator, advising the operator of any deviation of freight to an alternate delivery point desired by the shipper, advising the operator of any severe weather reports and road closing notices received from local or state officials in the area of transport, and monitoring the progress and location of the shipment at shipper’s request or direction.

Where applicable, it will also be helpful to develop testimony and/or evidence indicating that the owner-operator exerts control over numerous aspects of the “time, manner and method” of how the work contemplated under the lease is executed. Indicia of such control can include choice of equipment by make, model, color, which qualified person will drive the vehicle, whether to use helpers, loaders/unloaders, or co-drivers, specific hours of operation and the method and manner of payment of fuel and highway use taxes.

Another area of inquiry in determining the right to control is the

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74. *Hernandez*, 175 P.3d at 203-04 (citing *Universal Am-Can, Ltd.*, 762 A.2d at 332).
76. See *Hernandez*, 175 P.3d at 202 (quoting *Kiele*, 905 P.2d at 84); accord *Fisher*, 695 A.2d at 59; accord *Blackmon*, 653 S.E.2d at 337 (quoting *Hodges*, 234 S.E.2d at 117); accord *Lawyers Title Ins. Corp.*, 361 F. Supp. 2d at 449 (quoting *American Tel. & Tel. Co.*, 42 F.3d at 1435); accord *Nelson*, 538 S.E.2d at 282; accord *Home Design, Inc.*, 2 P.3d at 794 (quoting *Am. Tel. & Tel. Co.*, 42 F.3d 1421 at 1435).
furnishing of “major items of equipment.” It is important to establish that the owner-operator is providing a tractor or vehicle of significant value. A new tractor can reflect an investment in excess of $100,000. Used tractors can also have significant value, depending on year and condition. Further, the written lease agreement may require the owner operator to provide a trailer as well. In some areas of the industry, such as refrigerated freight, iron and steel, and flatbed operations, a trailer could have a value in excess of $30,000. The significant value of the over-the-road equipment furnished by the owner-operator reflects the owner’s business investment, and therefore, should be emphasized in the motor carrier’s proof.

VI. PRESENTING THE CASE

As discussed supra, it should always be presumed that the trier of fact has little or no knowledge of motor carrier operations or law. With that in mind, organize the testimony and evidence so that trier of fact is not required to jump back and forth between exhibits and subjects. For example, one phase of the presentation should, in most instances, focus around the written lease agreement, as discussed supra. Initially, the document should be introduced as the underlying agreement between the parties, as required by federal regulations. Then discuss each provision, establishing whether or not it is required by the regulations.

Make sure that your witnesses use terminology that the decision maker will understand and which are consistent with your case theme. Prepare your witnesses and work with them to avoid using industry specific terms such as “deadhead” and “bobtail.” When the use of such terms cannot be avoided, make sure that their meanings are clearly explained as they arise.

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77. Hernandez, 175 P.3d at 202 (quoting Burdick, 712 P.2d at 572); see also Stamp, 9 P.3d at 731 (citing Kaiel, 879 P.2d at 1323; Nelson, 538 S.E.2d at 280 (citing S.C. Workers’ Comp. Comm’n, 459 S.E.2d at 303; Thorpe, 174 S.E.2d at 399; Am. Agrijusters Co., 988 P.2d at 787 (citing Sharp, 584 P.2d at 1301); Houghland, 891 P.2d at 566-67 (citing Savinsky, 740 F.2d at 1160); Ward, 999 F.2d at 1403; Youngblood, 364 S.E.2d at 439; Chavis, 180 S.E.2d at 649 (citing Thorpe, 174 S.E.2d at 399 and S.C. Indus. Comm’n v. Progressive Life Ins. Co., 131 S.E.2d 694, 695 (S.C. 1963).

78. See “An Interview with U.S. District Court Judge Patrick J. Schiltz,” Williams, Darwin S., 19 RCBA Barrister No. 4, p. 3 (April, 2007) (“[G]ood advocates are great teachers. They are able to see their cases through the eyes of a busy judge who likely knows little about, say, the industry practices or legal doctrines at issue. They build up the judge’s knowledge, step-by-step – clearly, smoothly, logically.”). Darwin S. Williams, An Interview with U.S. District Court Judge Patrick J. Schiltz, Ramsey County Bar Association Barrister, April, 2007 at 3. (“[G]ood advocates are great teachers. They are able to see their cases through the eyes of a busy judge who likely knows little about, say, the industry practices or legal doctrines at issue. They build up the judge’s knowledge, step-by-step – clearly, smoothly, logically.”).


80. See id.
VI. CONCLUSION

Advocating the position of a motor carrier lessor requires a fundamental understanding of the intricacies of the Federal Motor Carrier Safety Regulations and common law interpretation thereof, the specifics of the written lease agreement(s) executed by the motor carrier, and the involved owner-operator(s) and the reasons underlying the provisions of the agreement. This basic knowledge is crucial for the advocate’s cogent, effective articulation of how the agreement relates to the actual operations of the motor carrier, the needs of the carrier’s customers, government regulations.

If the decision maker first understands the important interrelationship of these factors, the law and the business model of the specific motor carrier, then the motor carrier’s likelihood of success will be optimized.