

No. 496461

COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON

GULICK TRUCKING, INC., a Washington corporation,

Appellant,

v.

STATE OF WASHINGTON, EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

APPELLANT'S REPLY BRIEF

Aaron P. Riensche, WSBA #37202
Attorneys for Appellant
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

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A. INTRODUCTION

The assessment against Gulick Trucking, Inc. (“Gulick”) cannot stand for two separate and independent reasons: (a) Gulick established that owner-operators meet the independent-contractor exception in RCW 50.04.140(1); and (b) to the extent the Employment Security Department (“ESD”) interprets the independent-contractor exception in a manner that makes it impossible for owner-operators to qualify, this interference with traditional business models in the trucking industry is preempted by the Federal Aviation Administration Authorization Act (“FAAAA”). If the Court agrees with Gulick’s position on either of these two points, it must reverse.

With respect to the independent-contractor exception, ESD’s attempts to justify its Commissioner’s Review Office’s (“CRO”) decision rely on an interpretation of RCW 50.04.140(1) under which no worker in any industry can ever qualify. It is ESD’s position that any contract term that requires the contractor to do *anything* constitutes “control” under RCW 50.04.140(1)(a), rendering the independent-contractor exception meaningless. The Court should reject this absurd interpretation and reverse the CRO’s ruling.

As for FAAAA preemption, ESD's effort to regulate—and prohibit—a business model used in the trucking industry for a century and specifically *approved* by federal motor-carrier law is precisely the type of re-regulation that Congress intended to prevent by its enactment of 49 U.S.C. § 14501(c)(1). ESD's reliance on *dicta* from a case that never analyzed FAAAA preemption cannot overcome Gulick's uncontradicted evidence of a significant impact on prices, routes and/or services. ESD's attempt to preclude the entire trucking industry from the protections of RCW 50.04.140 is preempted.

B. ARGUMENT

1. **The CRO's erroneous decision is not entitled to any deference.**

The Court should reverse the CRO's decision below. ESD mistakenly claims that "Gulick improperly assigns error only to the superior court's order." ESD br. at 9. Gulick assigned error to the trial court's "order . . . which affirmed ESD's erroneous August 28, 2015 Decision of Commissioner." Gulick br. at 3. It is unclear what meaning ESD could have possibly extrapolated from that statement, other than that the CRO's decision was erroneous. In any event, Gulick has been entirely consistent in its objection to the CRO's decision, and this Court should disregard ESD's baseless, hypertechnical argument.

ESD also mistakenly argues that the Court must give deference to the CRO's rulings. *See* ESD br. at 10, 18. ESD's inconsistencies in interpreting RCW 50.04.140 preclude any deference on that issue. As explained in Gulick's opening brief, the CRO's interpretation, under which no owner-operator could ever qualify as an independent contractor, conflicts with its decision in *Penick v. Empl. Security Dep't*, 82 Wn. App. 30, 917 P.2d 136 (1996), where the CRO found that owner-operators were independent contractors. Its interpretation also contradicts the common-sense instructions that ESD gives to its own auditors as to how this statute should be applied to owner-operators. *See* CR1 at 545.¹

ESD's revised interpretation, making RCW 50.04.140 wholly inapplicable to owner-operators, is thus not entitled to any deference. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167, 183 L. Ed. 2d 153 (2012) (where an agency's interpretation conflicts with a prior interpretation, deference to the agency interpretation "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires'" (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986))). *See also Dot Foods, Inc. v. Washington*

¹ The Commissioner's Record is abbreviated herein as "CR" followed by the volume number.

Dep't of Revenue, 166 Wn.2d 912, 921, 215 P.3d 185 (2009) (“As a general rule, where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or application of a statute is by amendment or revision of the statute, rather than a new agency interpretation.”); *Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 891, 154 P.3d 891 (2007) (Washington courts “will not sanction a government agency’s arbitrary decision to change its interpretation” of even its own rules).

Moreover, ESD’s interpretation of the “control” element changes from one filing to the next. For example, on pp. 15–16 and 22 of its brief, ESD lists the following paragraphs as contract terms that supposedly show control: ¶¶ 5.9, 6.1, 6.4, 12.1, 12.6, 13.3, and 14.3. But the CRO did not identify these terms in its control analysis. *See* CR2 at 1129–30.²

More troubling is the fact that ESD also lists ¶¶ 1.7 and 13.4 as evidence of control. ESD br. at 16, 22. But the CRO actually listed these paragraphs as terms that demonstrate owner-operators’ “autonomy.” CR2

² ESD also mentions in a footnote that Gulick required its trailers to remain in the route determined by a program called PC Miler. ESD br. at 18 n. 8. But the contract term in question was *not* identified as a factor showing control by the CRO (CR2 at 1129–30); by ESD’s counsel at trial (CR1 at 238–40, 269–70, 957–60); in ESD’s discovery responses (CR1 at 579); in the auditor’s lengthy testimony about contract terms he felt showed control (CR2 at 674–85); or in his supervisor’s internal email claiming that there was control in the contracts (CR1 at 553). Moreover, the testimony that owner-operators choose their own routes was so overwhelming that the Administrative Law Judge sustained ESD’s objection to it as cumulative. CR2 at 923.

at 1128. The Court should not defer to ESD’s “expertise” on this issue when ESD cannot even agree internally as to how it should be analyzed.

Nor is the CRO’s interpretation of FAAAAA preemption entitled to any deference whatsoever. ESD’s purported basis for deference is its alleged “expertise in interpreting and applying unemployment tax law.” ESD br. at 10. ESD claims no expertise in interpreting federal preemption jurisprudence. Indeed, the CRO expressly acknowledged that this issue is not only beyond its expertise, but also outside of its legislative authority. *See* CR1 at 1122. As such, this Court should deny ESD’s request for deference.

2. **ESD misapplies the independent-contractor exception.**

a. Federal law prohibits ESD’s reliance on federally required contract terms to show control.

As Gulick explained in its opening brief, the CRO’s reliance on federally required contract terms conflicts with 49 C.F.R. § 376.12(c)(4), the legislative history behind the federal regulations, and the overwhelming weight of authority around the nation. Gulick br. at 15–19. ESD is mistaken when it argues that the scope of 49 C.F.R. § 376.12(c)(4) is limited to the “exclusive use” provision and does not reach “the numerous other federal lease requirements and safety regulations

governing the relationship between motor carriers and owner-operators.”
ESD br. at 20.

Contrary to ESD’s argument, this regulation provides that an “independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. § 14102 *and attendant administrative requirements.*” 49 C.F.R. § 376.12(c)(4) (emphasis added). In 49 U.S.C. § 14102, Congress authorized the Secretary of Transportation to require written lease contracts between carriers and owner/operators. This statute’s “attendant administrative requirements” necessarily include the specific contract terms required by these regulations.

ESD again misrepresents the law when it quotes from the Interstate Commerce Commission (“ICC”) and *Remington v. J.B. Hunt Transport, Inc.*, 2016 WL 4975194 (D. Mass. 2016). ESD br. at 21. The ICC plainly said that the correct interpretation of “the appropriate scope of the control regulation” holds “that the type of control required by the regulation does not affect ‘employment’ status.” *Petition to Amend Lease & Interchange of Vehicle Regulations*, 8 I.C.C.2d 669, 671 (I.C.C. June 29, 1992). Indeed, the portions quoted by ESD provide that the federal regulations should have a “neutral effect” on employee classification. *Id.* ESD defies that ruling when it argues that federally required terms should be used

against carriers to establish an employment relationship. This Court should follow the ICC’s guidance and the weight of authority around the country and disregard the federally required terms in its analysis.

- b. ESD’s interpretation of “control” is absurd and would render RCW 50.04.140 meaningless.

ESD’s “control” analysis is untenable; it merely culls through the contract and highlights any term under which the owner-operator undertakes an obligation, and argues that such terms show control.³ Under ESD’s analysis, no worker could ever qualify as an independent contractor because a contract, by definition, will always impose obligations on the contractor. ESD does not dispute this. And, while it asks the Court to disregard Washington Supreme Court authority holding that “general contractual rights” do not show control in the employment context, ESD offers *no* workable alternative analysis. *See* ESD br. at 23–25. This Court must impose some reasonable limits on the meaning of this term.

The common-law understanding of “control” applies. ESD attempts to distance this case from our Supreme Court’s discussion of “control” in *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472

³ ESD contends in a footnote that its auditor performed a “rigorous inquiry.” ESD br. at 6 n. 3. The cited pages do not bear this out. They merely show that the auditor, at trial, walked through the contract and, prompted by questioning by ESD’s counsel, pointed out certain terms that he thought showed control. ESD has never disputed that the auditors told Gulick, before they had seen any documents, that they were not authorized to treat owner-operators as independent contractors. *See* CR2 at 846–47; Gulick br. at 43.

(2002), by arguing that the definition of “employment” is broader under the Employment Security Act than at common law. ESD br. at 23–24. That is irrelevant. What is at issue here is the meaning of “control.” ESD can point to no authority holding that “control” means something different in the Employment Security Act than what it means at common law. To the contrary, the Legislature is presumed to be aware of the common law when it enacts a statute. *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973), *cert. denied*, 419 U.S. 808 (1974). The common law is not abrogated unless there is clear evidence the Legislature expressly decided to do so. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008).

Our Supreme Court held that virtually identical language in RCW 50.04.140’s predecessor excludes general contractual rights. ESD also asks this Court to ignore the Washington Supreme Court’s discussion of “control” in *Aerie No. 1 of Fraternal Order of Eagles v. Commissioner of Unemployment Comp. and Placement*, 23 Wn.2d 167, 160 P.2d 614 (1945), because the Legislature changed the definition of “employment” three days after it was decided. ESD br. at 24. But ESD omits that the “control” element under consideration in *Aerie No. 1* was virtually identical to RCW 50.04.140(1)(a). Like its successor, the prior version

required proof that the worker “has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact.” *McDermott v. State*, 196 Wash. 261, 267, 82 P.2d 568 (1938) (quoting *Laws of 1937*, ch. 162, § 19(g), p. 609). *Aerie No. 1* is therefore binding authority with respect to the virtually identical sentence in RCW 50.04.140(1)(a).

Liquidated damages and equipment-lease conditions do not show control. Finally, ESD does not address Gulick’s argument that liquidated damages and provisions relating to the leasing of equipment do not show control. *See* Gulick br. at 22–24. ESD thus concedes these points. This Court should reject ESD’s superficial, self-serving contract analysis and hold, consistently with *Aerie No. 1*, that Gulick established freedom from direction or control.⁴

- c. Owner-operators work outside Gulick’s places of business.

The second element requires proof that owner-operators worked “outside of all the places of business of the enterprises for which such service is performed.” RCW 50.04.140(1)(b). ESD does not dispute that,

⁴ ESD argues in a footnote that the table appended to Gulick’s opening brief contains argument and exceeds the page limits. ESD br. at 18 n. 9. Gulick disagrees. If the Court is inclined to consider ESD’s contention, however, Gulick requests that the Court take note of: (a) the number of lengthy arguments ESD reduces to footnotes, in a transparent effort to avoid the page limits; and (b) the fact that ESD’s brief is signed on p. 51, meaning that it is either over-length or unsigned.

throughout two days of trial, no evidence was ever presented of any owner-operator ever performing any service at Gulick's places of business. *See generally* CR2 at 640–948. The CRO nonetheless found that this element was not met because of three contract terms which make vague references to: (1) inspections being done at Gulick's regular inspection station; (2) repairs being done at Gulick's "contract shop"; and (3) trailers being dropped off at Gulick's terminal. CR2 at 1135.

As explained in Gulick's opening brief, this analysis was erroneous. Gulick br. at 25–27. ESD's only counterargument is that the mention of these places in the contract is itself evidence of work at Gulick's "places of business." This argument fails for three reasons.

First, ESD does not even address Gulick's point that the CRO conflates the analysis of the "places of business" element in RCW 50.04.140(1)(b) with the control analysis in RCW 50.04.140(1)(a). See Gulick br. at 26–27. By not addressing this point, ESD apparently concedes that the contract terms are irrelevant on this element and that the only question is "the reality of where 'such service *is* performed.'" Gulick br. at 27 (quoting RCW 50.04.140(1)(b)).

Second, ESD cannot point to a single instance, mentioned at any point in two days of trial, of any owner-operator ever performing any

services at Gulick's places of business. Gulick explained in detail how its operations work, establishing that they do not require the owner-operators to ever be present at any location owned by Gulick. *See* CR2 at 802–03, 839, 849–50, 891–92, 895, 897–98, 901-02, 904, 923, 928–29, 932, 938, 941. This evidence met Gulick's burden, and ESD did not rebut it. ESD cannot defeat that showing by pointing to vague contract terms that were never addressed by any testimony, or even argument, at trial.

Finally, ESD seems to have lost track of what "service" means in RCW 50.04.140. Element (b) refers to "such service," which is a reference to "services performed by an individual for remuneration" at the beginning of the statute. RCW 50.04.140. The testimony was undisputed that owner-operators' sole remuneration from Gulick is paid only for hauling freight from point A to point B. Owner-operators are paid "per-shipment" at either 80% or 87% of the amount that the customer pays for the shipment. CR1 at 342. Nothing in the contract suggests that the owner-operator is paid remuneration for having the equipment inspected or repaired, or for dropping Gulick's trailer off after a shipment is completed. The only reasonable inference from this evidence was that owner-operators would be paid the same amount for a shipment whether

or not the truck was inspected or repaired at a particular place and whether or not the trailer was dropped off at Gulick's yard post-shipment.

The CRO's superficial analysis thus cannot stand. The CRO simply assumed, contrary to all evidence, that the inspections, repairs, and trailer drop-offs were services for remuneration. This element is simply another illustration of why ESD's "expertise" does not warrant any deference whatsoever.

d. Owner-operators are independently established.

ESD's arguments on the third element, requiring proof that owner-operators were independently engaged, further expose the superficiality of ESD's positions. Indeed, much of ESD's argument on this issue conflicts with the CRO's analysis. ESD's repeated inconsistencies reinforce that its primary interest is in rationalizing a predetermined result, rather than in a fair application of law to fact.

ESD offers several arguments that conflict with the CRO's analysis. ESD argues, for example, that Gulick's right to exclusive use of the equipment precludes a finding that the third element is met. ESD br. at 30. At trial, ESD offered a similar argument with respect to the second element, i.e. that it could not be met because Gulick's right to exclusive use transformed the equipment into Gulick's "place of business." The

CRO rejected this argument as directly in conflict with 49 C.F.R. § 376.12(c)(4), which provides that nothing in the exclusive-use requirement is intended to affect whether a driver is an employee or independent contractor of the carrier. The CRO correctly explained that it would violate this provision if the exclusive-use requirement precluded application of the “places of business” element. CR2 at 26.

The same analysis applies to the third element. If the exclusive-use requirement prevented Gulick from meeting this element, 49 C.F.R. § 376.12(c)(4) would be equally offended. The Court should reject ESD’s repeated requests to ignore this regulation.

ESD also asks this Court to reweigh the evidence, by arguing that Gulick’s performance of certain administrative tasks should be considered evidence that owner-operators are not independent. ESD br. at 32. These assertions are not supported in the Administrative Law Judge’s findings of fact or in the CRO’s analysis. Moreover, ESD’s proposed conclusion—that truly independent businesses perform these operational tasks on their own—is entirely speculative. The Court may take judicial notice that small business owners often pay contractors to perform such tasks for them. Consistently, the owner-operator witnesses in this case all testified that *they pay Gulick* for these services. *See* CR2 at 898, 924, 938–39.

Another example of an argument raised by ESD in this appeal, but not endorsed by the CRO, is ESD’s point that the auditor excluded owner-operators with formal business entities. ESD br. at 30–31. This argument is a red herring. ESD was *required* to exclude formal business entities because ESD has authority to tax only “wages.” RCW 50.24.010. The Employment Security Act defines “wages” as “the remuneration paid by one employer during any calendar year *to an individual*” RCW 50.04.320 (emphasis added). For money paid to formal business entities, ESD cannot carry its threshold burden of showing “employment”—i.e. “wages” paid for “personal services”—under RCW 50.04.100. *See* CR1 at 231; *The Language Connection LLC v. Employment Sec. Dep’t*, 149 Wn. App. 575, 582, 205 P.3d 924 (2009); *Cascade Nursing Servs., Ltd. v. Employment Sec. Dep’t*, 71 Wn. App. 23, 35, 856 P.2d 421 (1993).

The implication in ESD’s argument—that a worker must register a formal business entity to meet the “independently established” element—is therefore just another example of ESD trying to render the independent-contractor exception meaningless. If only formal business entities could meet the third element, then RCW 50.04.140 would apply only to workers who were already excluded under RCW 50.04.100 and RCW 50.24.010.

This Court must reject that absurd interpretation. *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012) (“a court must not interpret a statute in any way that renders any portion meaningless or superfluous”) (citing *Svendesen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001)).

The argument actually raised by the CRO—that the owner-operators’ lack of federal operating authority precluded this element—is equally flawed. Notably, the Idaho Supreme Court rejected precisely that argument in *W. Home Transp., Inc. v. Idaho Dep’t of Labor*, 155 Idaho 950, 318 P.3d 940, 943–44 (2014). The court had previously established the same “bright-line rule” that ESD offers here, i.e. that owner-operators could not meet this element if they operated under the carrier’s federal authority. *See id.* at 942–43 (citing *Giltner, Inc. v. Idaho Dep’t of Commerce & Labor*, 145 Idaho 415, 179 P.3d 1071, 1076 (2008)).

In *W. Home*, the court held that its prior decision had “proven *unjust, unwise, and incorrect* because it fails to consider the nature of the owner/operator’s business, which serves a distinct market in the interstate trucking industry.” *Id.* at 943 (emphasis added). The crucial distinction was that the “business or service provided by an owner/operator is not the transportation of goods for manufacturers or shippers; rather, it is the transportation of goods for motor carriers” *Id.* Because federal

operating authority is unnecessary to this model, whether an owner-operator has such authority is “*completely inconsequential and irrelevant.*” *Id.* (emphasis added). The court thus took the unusual step of overruling its own precedent after only a few years. *Id.* This Court should avoid that process and reject ESD’s unjust, unwise, and incorrect argument now.

When the CRO’s improper focus on federal operating authority is removed, the correct analysis shows that the third element is met. The CRO admitted that several traditional factors weigh in Gulick’s favor:

For example, some, but not all, of the owner-operators had registered sole proprietorships in Washington during the audit period; the owner-operators provided equipment (i.e. trucks) and other supplies needed for the transportation of goods; the owner-operators made substantial investment in their businesses by purchasing the trucks or trailers; and their places of business were their trucks, which were outside of their homes.

CR2 at 1138.

The CRO also listed four factors that it believed weighed against a finding of independence. But three of these were federal requirements. *See* CR2 at 1138 (Gulick “provided protection from the risk of non-payment by the customers” by paying within fifteen days regardless of

whether the customer paid Gulick; “owner-operators could not haul for any third party without Gulick’s express written consent”; “the contracts required the owner-operators to display identification on their equipment to show the equipment was being operated by Gulick”). *Cf.* 49 C.F.R. §§ 376.12(f) (requiring lease to specify that owner-operator will be paid within fifteen days of submitting paperwork), 376.22 (requiring written agreement for a carrier to lease equipment that is under lease to another carrier), 390.21(b)(1) (requiring commercial motor vehicles to display the carrier’s trade name).

These terms are thus standard components of a traditional business model explicitly recognized by the federal government. They are also expressly *not* intended to preclude an owner-operator from being an independent contractor. 49 C.F.R. § 376.12(c)(4). This Court should reject ESD’s request to give federally required contract terms precisely the effect that the federal government ruled they should not be given.

In sum, Gulick established all three elements of the independent-contractor exception, RCW 50.04.140(1). The CRO’s decision must therefore be reversed.

3. **ESD’s attack on the owner-operator business model is preempted.**

In the alternative, if ESD is permitted to apply the Employment Security Act in the manner it proposes here, its actions are preempted by the FAAAA. ESD’s position is that no owner-operator can ever qualify as an independent contractor. As such, motor carriers are required not only to pay unemployment taxes but also to provide unemployment benefits to owner-operators, in violation of owner-operators’ contractual obligation to be responsible for all costs associated with their business operations. In an industry that has historically treated owner-operators as independent contractors—throughout the country for more than a century—this fundamental change to industry dynamics is a direct interference with prices, routes, and/or services and is therefore preempted under 49 U.S.C. § 14501(c)(1).

- a. This Court should reject ESD’s promotion of what the U.S. Supreme Court has called an “utterly irrational loophole” for generally applicable laws.

ESD tries to restrict the broad scope of FAAAA preemption by arguing that laws cannot be preempted if they are “generally applicable.” But if such a rule existed, the U.S. Supreme Court would not have held that a common-law claim for breach of the implied duty of good faith and fair dealing is preempted. *See Nw., Inc. v. Ginsberg*, ___ U.S. ___, 134 S.

Ct. 1422, 1430, 188 L. Ed. 2d 538 (2014). According to the Supreme Court, the notion that preemption “imposes no constraints on laws of general applicability” would create an “utterly irrational loophole” and “ignores the sweep of the ‘relating to’ language.” *Morales v. Trans World Airlines*, 504 U.S. 374, 386, 1112 S. Ct. 2013, 119 L. Ed. 2d 157 (1992). And, in a case relied on by ESD, the Seventh Circuit expressly *declined* to adopt “a categorical rule exempting from preemption all generally applicable state labor laws.” *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1055 (7th Cir. 2016) (emphasis added) (quoting *Massachusetts Delivery Ass’n v. Coakley*, 769 F.3d 11, 20 (1st Cir. 2014)).

Indeed, Division I of this Court recently rejected such a standard in *Hill v. Garda CL Nw., Inc.*, No. 74617-1-I, 2017 WL 1133408, 198 Wn. App. 326, __P.3d __ (Mar. 27, 2017). There, the plaintiffs sued the carrier for violations of state meal and rest-break laws. The court noted that the regulations were “generally applicable background laws that govern how all employers interact with their employees.” *Id.* at *6. The court held, however, based on the defendant’s explanation of how it must rearrange its routes to comply with these generally applicable laws, “that such significant impacts on its routes would likely warrant a finding of

preemption under the FAAAA.” *Id.* at *7.⁵ ESD’s proposed “generally applicable” exception therefore has no merit.

b. *Western Ports is not competent authority on FAAAA preemption.*

In its opening brief, Gulick explained why Division I’s preemption analysis in *Western Ports Transp., Inc. v. Employment Sec. Dep’t of State of Wash.*, 110 Wn. App. 440, 453–54, 41 P.3d 510 (2002), is not helpful here. Gulick br. at 38–40. *Western Ports* failed to analyze relation to prices, routes, or services—the linchpin analysis in FAAAA preemption. *See Rowe v. New Hampshire Motor Transport Ass’n*, 552 U.S. 364, 370–71, 128 S. Ct. 989, 169 L.Ed.2d 933 (2008). ESD *concedes* that “*Western Ports* did not discuss carriers’ prices, routes and services,” but argues that the court was “mindful” of the FAAAA. ESD fails to explain how a case that never discussed the key issue can be reconciled with the analysis mandated by *Rowe*, an opinion that is binding on this Court. *See Tabingo v. American Triumph LLC*, 2016 WL 4579116, at *2–3 (Wash. Apr. 28, 2016) (on matters of federal law, decisions of the U.S. Supreme Court are binding precedent) (citing *W.G. Clark Constr. Co. v. Pac. NW Regional Council of Carpenters*, 180 Wn.2d 54, 62, 322 P.3d 1207 (2014)).

⁵ The Court ultimately ruled against preemption based on the availability of a statutory “variance.” *Hill, supra* at *7 (citing RCW 49.12.105). There is no such statutory exception available under the Employment Security Act.

ESD also fails to acknowledge Division I's recent opinion in *Hill*. There, the court spent four pages addressing FAAAAA preemption of driver benefits. *See Hill, supra* at *5–8. And yet, it never once even mentioned *Western Ports*. *See id.* Apparently not even Division I considers *Western Ports* to be controlling authority on FAAAAA preemption.

c. ESD has no competent response to Gulick's uncontradicted expert testimony.

ESD's entire analysis is designed to distract from the merits of Gulick's preemption evidence, by focusing for example on an irrational loophole for "generally applicable" laws and an imaginary FAAAAA preemption analysis in *Western Ports*. But even when ESD eventually touches on the merits, it misses the point.

ESD has no response to the fact that requiring payment of the unemployment tax triggers many other effects. Gulick submitted uncontested evidence that prohibiting owner-operators from being full-fledged independent contractors is a fundamental industry change. *See* CR1 at 93, 99, 106. Owner-operators have long been considered independent contractors across the country and even, in particular, by ESD. *See Tamez v. Sw. Motor Transp., Inc.*, 155 S.W.3d 564, 572–73 (Tex. App. 2004); *Penick*, 82 Wn. App. at 39; CR1 at 545.

Reclassifying owner-operators as employees requires not only payment of the unemployment tax, but also provision of unemployment insurance. *See* RCW 50.01.010. This is a direct interference with a longstanding system of compensation and cost allocation in the industry. Owner-operators are responsible for all business costs, including insurance. CR2 at 899–900, 925–26, 937-38. They are incentivized to run their businesses efficiently and provide good customer service to maximize profits. *See Massachusetts Delivery Ass'n v. Healey*, 821 F.3d 187, 193 (1st Cir. 2016) (carriers incentivize owner-operators “to keep costs low and to deliver packages efficiently”); CR1 at 98.

Requiring Gulick to include unemployment insurance in owner-operators’ compensation changes incentives and shifts cost allocation. *Healey*, 821 F.3d at 193 (requiring carriers to provide employment-type benefits to owner-operators would deprive the carrier “of its choice of method of providing for delivery services and incentivizing the persons providing those services”); *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 438 (1st Cir. 2016) (reclassifying owner-operators as employees “would ultimately determine what services that company provides and how it chooses to provide them”).

Further, Gulick submitted uncontested evidence that the main purpose behind engaging owner-operators is to allow flexibility in responding to customers' shipping needs. CR1 at 92, 99. As such, it engages owner-operators with the understanding that there will likely be periods in the near future in which their services are not needed due to shifts in demand. *Id.* at 101.

ESD's tax structure discourages carriers from using owner-operators as a flexible supply of equipment to meet customers' needs. ESD rewards businesses that use a stable workforce and penalizes those that use a flexible personnel model, by increasing a business's tax rate whenever its employees claim unemployment benefits. *See* RCW 50.29.021(2), .025; RCW 50.20.050(2)(b)(v); WAC 192-320-005; CR1 at 75. This is another direct interference with "the way a carrier interacts with its customers." *Costello*, 810 F.3d at 1054. It thus falls "squarely within the scope of FAAAAA preemption." *Id.*

C. CONCLUSION

The owner-operators here were independent contractors. ESD reaches a contrary conclusion only by *rejecting*: (a) the Washington Supreme Court's instructions on the meaning of "control"; (b) the federal government's guidance on how federal regulations should affect worker

classification; and (c) ESD's own instructions to auditors on how to classify owner-operators. This improper approach has real-world implications for Gulick and all Washington motor carriers. For the reasons discussed above, the CRO's decision should be reversed, and this case should be remanded with instructions to set the assessment against Gulick aside.

RESPECTFULLY SUBMITTED this 31st day of May, 2017.

OGDEN MURPHY WALLACE, P.L.L.C.

By 

Aaron P. Riensche, WSBA #37202
Attorneys for Appellant

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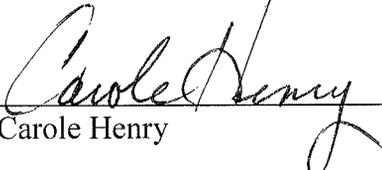
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Eric D. Peterson
Leah Harris
Assistant Attorney General
Licensing and Administrative Law Division
800 Fifth Avenue
Suite 2000
MS TB-14
Seattle, WA 98104-3188
ericp1@atg.wa.gov
leahh1@atg.wa.gov
lalseaef@atg.wa.gov

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 31st day of May, 2017 at Seattle, Washington



Carole Henry

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ericp1@atg.wa.gov
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