

NO. 49646-1-II

**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.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Gulick Trucking, Inc., a motor carrier, attempts to avoid paying unemployment compensation taxes for its drivers who own and operate their own trucks (“owner-operators”), claiming they are independent contractors not covered by the Employment Security Act. The Commissioner of the Employment Security Department correctly ruled that the owner-operators are in Gulick’s employment under the Act and, therefore, Gulick must pay unemployment insurance premiums on their wages. Substantial evidence supports the Commissioner’s findings, and the conclusions are free of legal error because this case is controlled by *Western Ports Transportation, Inc. v. Employment Security Department*, 110 Wn. App. 440, 450-58, 41 P.3d 510 (2002), which held an owner-operator was in covered employment of a motor carrier for unemployment compensation purposes, and federal law did not preempt the Act. *Western Ports* has been the law in Washington for over 15 years, is consistent with other states’ decisions, and should be followed.

Gulick raises a theory of federal preemption that relies on the false assumption that the tax will result in a “restructuring” of the trucking industry. This is empty rhetoric. As a matter of law, the Act requires employers to pay unemployment taxes only; it does not affect worker classification for any other legal purpose. This tax imposes only a minor

cost increase and does not have the significant impact necessary to invoke federal preemption. The Court should affirm the Commissioner's decision.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Commissioner correctly rule that Gulick failed to prove its owner-operators were free from its control or direction over the performance of services under RCW 50.04.140(1)(a) as applied in *Western Ports Transportation, Inc. v. Employment Security Department*, when numerous contract provisions demonstrated a right to control owner-operators' performance, including requirements to cooperate fully with dispatch personnel and communicate politely with Gulick's employees and customers?

2. Did the Commissioner correctly rule that Gulick failed to prove its owner-operators performed services outside of all of Gulick's places of business under RCW 50.04.140(1)(b), when the contract required them to have their equipment inspected at Gulick's inspection station, and Gulick offered no evidence to prove this did not happen?

3. Did the Commissioner correctly rule that Gulick failed to prove that its owner-operators were engaged in independently established businesses under RCW 50.04.140(1)(c), when none of the owner-operators had their own federal motor-carrier authority or had formed legitimate business entities, and the owner-operators who testified saw themselves as indistinguishable from Gulick?

4. Does the Federal Aviation Administration Authorization Act (FAAAA), which preempts state laws that significantly impact motor carriers' prices, routes, or services, preempt applying Washington's Employment Security Act to the services of owner-operators, when the Act applies generally to all Washington employers, poses only a minor cost increase, and affects owner-operators' classification only for purposes of the Act?

III. COUNTERSTATEMENT OF THE FACTS

A. **Gulick Hires Owner-Operators to Perform Its Trucking Operations**

Gulick Trucking is a for hire common motor carrier based in Vancouver, Washington. Agency Record Vol. 2 (AR2) 793, 859, 1086 (Finding of Fact (FF) 3). It hauls freight for customers and contracts with many “owner-operators” to perform those freight hauling services. AR2 858-860. Gulick leased tractors or tractors and trailers (equipment) from owner-operators, who own their own equipment. AR1 327-337; AR2 1086 (FF 4, 6). The owner-operators drove the equipment to move freight on behalf of Gulick from one location to another. AR1 327; AR2 858, 1086 (FF 5). The customers paid Gulick, and Gulick paid the owner-operators on a bi-weekly basis. AR2 1086 (FF 4, 8). Gulick operates under authority from the Federal Motor Carrier Safety Administration and the Department of Transportation. AR1 97, 316; AR2 1136.

Gulick entered into contracts called “Lease & Subhaul Agreements” with the owner-operators to lease the owner-operators’ equipment and to secure their driving services. AR1 327-357.¹ In addition to furnishing equipment, the Agreements require the owner-operators to

¹ Appendix A is a copy of the Agreement. The parties both submitted three sample contracts into the record, one from each year in question. AR1 327-56, 593-621. Both parties agree there is no material difference among the contracts. Appellant’s Open. Br. 6 n.2. As such, the remainder of this brief cites only to the contract provisions for the sample contract at pages 327-337 of the Administrative Record.

“transport freight from origin points of shipment designated by Carrier to destination points of shipment.” AR2 327, ¶ 1.2 The Agreements also require owner-operators to, among other things: “cooperate fully with all Carrier’s dispatch personnel” and to transport goods “in a manner which promotes the goodwill and reputation of” Gulick (AR1 327, ¶¶ 1.2; 1.3); obtain Gulick’s “express written consent” to transport persons or property of a third party (AR1 328 ¶ 5.8); perform regular safety inspections (AR1 328 ¶ 5.4); and install and use Qualcomm, a mobile device through which Gulick communicates load requirement and tracks contract compliance (AR1 334, ¶ 20.1). The Agreements also permit Gulick to take possession of the owner-operator’s trucking equipment and complete a delivery if the owner-operator fails to do so. AR1 327, ¶ 1.4. Other specific contractual provisions are discussed in detail in Section V.B.1.

When a load is delivered, Gulick collects payment from its customers. AR2 865, 1126. It then remits 80 percent of the income to owner-operators who use Gulick’s trailers and 87 percent to owner-operators who use their own trailers. AR1 331, ¶ 14.1; AR2 at 865. Gulick pays its owner-operators on a bi-weekly basis. AR1 331, ¶ 14.1; AR2 866. Gulick pays its owner-operators even if the customers do not pay Gulick. AR2 866. The owner-operators’ payments were reported to the IRS on Forms 1099. AR1 324-26; AR2 663.

B. The Department Audited Gulick's Payroll Records for Unemployment Tax Compliance and Issued a Tax Assessment

The Department audited Gulick to determine whether it had properly reported all wages and paid unemployment insurance taxes under Title 50 RCW. AR2 1109. Gulick deemed its owner-operators to be exempt independent contractors and had not reported or paid taxes on their wages. The Department's auditor determined that the services provided by approximately 120 of Gulick's 152 owner-operators amounted to covered employment under the Employment Security Act, RCW 50.04.100, and they did not meet all parts of the independent contractor exception test, RCW 50.04.140. AR1 97, 369. The Department also determined that 30 percent of the payments to owner-operators amounted to taxable wages, while the remaining 70 percent should be excluded as equipment lease payments. AR1 367; AR2 672.

Accordingly, the Department issued Gulick an Order and Notice of Assessment in the amount of \$155,133.33 for taxes, penalties, and interest for 2009, 2010, 2011, and the first three quarters of 2012. AR1 306-08; AR2 1109. The Department subsequently agreed to waive the assessment amount for 2009 and the first quarter of 2010, lowering the amount due to \$112,855.17, by the parties' agreement. AR1 281, ¶ 3; AR2 1109.

C. The ALJ, Department's Commissioner, and Superior Court Affirmed the Assessment

Gulick filed an administrative appeal. AR1 309-310. In the administrative proceedings, Gulick moved for summary judgment, arguing that federal law preempted application of the Act's unemployment insurance provisions to the services performed by owner-operators. AR1 4-34. The Administrative Law Judge (ALJ) and, on further appeal, the Department's Commissioner denied the motion. AR1 171-73²; AR2 1123.

The matter proceeded to an evidentiary hearing, at which the Department's auditor testified about his extensive audit research and findings.³ AR2 at 658-700. Gulick offered the testimony of its controller, Don Adams, and the testimony of three owner-operators. AR2 791-853, 919-46. It had previously provided with its Motion for Summary Judgment the declarations of Adams; Larry Pursley, the Executive Vice President of the Washington Trucking Associations; and Joe Rajkovacz, the former Director of Regulatory Affairs for the Owner/Operator Independent Drivers Association. AR1 90-106. Following the hearing, the

² Appendix B is a copy of the ALJ's order denying summary judgment.

³ Gulick asserts that the audit results were "predetermined." Appellant's Open. Br. 8-9. If the results had been "predetermined," the auditor would not have engaged in the rigorous inquiry he described at AR2 559-700. In any event, the Commissioner did not find that the audit results were "predetermined," and Gulick makes no argument about why it should result in reversing the Commissioner's decision.

ALJ entered findings of fact and conclusions of law affirming the assessment in the stipulated amount. AR2 1085-91.⁴

Gulick petitioned for review with the Department's Commissioner. AR2 1095-99. Addressing the federal preemption argument, the Commissioner noted that as a quasi-judicial body within the executive branch, it lacks authority to determine whether laws are constitutional, but the argument was sufficiently developed for judicial review. AR2 1122.⁵ However, the Commissioner did find that the Washington State Court of Appeals had already "considered and rejected the argument that federal transportation laws preempted state employment security law." AR2 1123 (citing *W. Ports Transp., Inc.*, 110 Wn. App. at 454-57).

The Commissioner further ruled that the owner-operators were in Gulick's employment under RCW 50.04.100 because "the owner-operators' personal services directly benefited Gulick's business" of transporting goods in interstate commerce for its customers, and because "it is beyond dispute that Gulick paid wages for the services provided by the owner-operators." AR2 1124. Regarding the independent contractor exception test, the Commissioner found that while "owner-operators enjoy some autonomy with regard to the performance of their truck-driving services," "Gulick exerts extensive controls over the methods and details

⁴ Appendix C is a copy of the ALJ's initial order.

⁵ Appendix D is a copy of the Decision of Commissioner.

of how the driving services are to be performed.” AR2 1127, 1128.

Accordingly, Gulick did not establish that the owner-operators were free from its control or direction under RCW 50.04.140(1)(a). AR2 1129.

The Commissioner further determined that Gulick did not establish that the owner-operators’ services were performed outside the usual course of Gulick’s business or outside of all Gulick’s places of business, the second element of the exception test under RCW 50.04.140(1)(b). Finally, the Commissioner concluded that Gulick did not establish that the owner-operators were “customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service” under RCW 50.04.140(1)(c). AR2 1139. The Commissioner affirmed the modified assessment. *Id.*

Gulick appealed the Commissioner’s order to the Clark County Superior Court, which upheld the order. CP 200-03.

IV. SCOPE AND STANDARD OF REVIEW

Judicial review of the Commissioner’s decision is governed by the APA under RCW 34.05.510 and RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the agency decision and record. RCW 34.05.558; *Courtney v. Emp’t Sec. Dep’t*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012). The Court reviews the decision of the Commissioner, not the underlying decision of

the ALJ. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993). Gulick improperly assigns error only to the superior court's order. *See* RAP 10.3(h); Appellant's Open. Br. 3.

The burden of demonstrating the invalidity of an agency action is on the party challenging the decision—here, Gulick. RCW 50.32.150; RCW 34.05.570(1)(a). The Court should grant relief only if “it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d).

The Court reviews the Commissioner's findings to determine, based on the evidence in the administrative record, whether substantial evidence supports those findings. RCW 34.05.558; *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Evidence is substantial if it is “sufficient to persuade a rational, fair-minded person of the truth of the finding.” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The reviewing court “view[s] the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” below and may not reweigh evidence or witness credibility. *Wm. Dickson Co.*, 81 Wn. App. at 411. Unchallenged factual findings are verities. *Tapper*, 122 Wn.2d at 407.

The Court determines de novo whether the Commissioner correctly applied the law to the factual findings. *Tapper*, 122 Wn.2d at 407.

However, because the Department has expertise in interpreting and applying unemployment tax law, the Court should give appropriate weight to the agency's interpretation. *Courtney*, 171 Wn. App. at 660.

V. ARGUMENT

Under the Employment Security Act, Washington employers must contribute to the unemployment compensation fund “for the benefit of persons unemployed through no fault of their own.” RCW 50.01.010; RCW 50.24.010. The Act is intended to “mitigate the negative effects of involuntary unemployment” by applying the “insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment.” *Penick v. Emp’t Sec. Dep’t*, 82 Wn. App. 30, 36, 917 P.2d 136 (1996). “Consistent with the mandate for liberal construction, RCW 50.01.010, courts construe exemptions to the [Act] narrowly.” *Washington Trucking Ass’ns v. Emp’t Sec. Dep’t*, No. 93079-1, slip op. at 3 (Wash. April 27, 2017). “[T]he burden of proof [is] on the party who seeks the exemption.” *W. Ports*, 110 Wn. App. at 451.

Under the Act, persons who perform services for wages for the benefit of a purported employer are in employment under RCW 50.04.100—and the employer must pay taxes on their wages—unless the employer can prove all elements of a narrow statutory exception under RCW 50.04.140. RCW 50.24.010; RCW 50.04.072; *Washington Trucking*

*Ass'n*s, slip op. at 3. Gulick does not appeal the Commissioner's conclusion that the owner-operators were in Gulick's employment, and Gulick failed to prove exception from coverage under all three elements of RCW 50.04.140(1).

Gulick incorrectly argues the Act is preempted by federal law. This is wrong because it relies on the false premise that the assessment will "restructure" the trucking industry. As a matter of law, the Act requires employers to pay unemployment taxes only. This tax applies generally to all Washington employers, imposes only a minor cost increase, and does not have the significant impact necessary to invoke federal preemption. The Court should affirm the Commissioner's decision.

A. Gulick Does Not Appeal the Determination That the Owner-Operators Were in Employment Under RCW 50.04.100

To qualify as an employer under the Act, an entity must have persons in "employment." RCW 50.04.080. The definition of "employment" in the Act is "exceedingly broad." *W. Ports*, 110 Wn. App. at 458. It is broader than at common law or for other legal purposes. RCW 50.04.100. "Employment" exists if the worker performs personal services for the alleged employer or for its benefit and receives wages. *Penick*, 82 Wn. App. at 40. Since "the transportation of goods necessarily requires the services of truck drivers, it is clear that the [carrier] directly used and

benefited from the drivers' services." *Id.* When a worker meets these criteria for being in employment, the burden shifts to the employer to prove the independent contractor exception test in RCW 50.04.140.

Penick, 82 Wn. App. at 42; *W. Ports*, 110 Wn. App. at 451.

The Commissioner properly concluded that the owner-operators were in Gulick's "employment" under the Act. AR4 1114. Gulick does not assign error to this conclusion and makes no argument about it.

Appellant's Open. Br. 3, 12. Thus, Gulick could avoid liability for unemployment insurance taxes only if it could establish the owner-operators were independent contractors under RCW 50.04.140. It did not.

B. Gulick Failed to Prove Its Owner-Operators Are Excepted from Coverage Under the Narrow Test of RCW 50.04.140(1)

RCW 50.04.140 is an exception to a tax imposed for the protection of unemployed workers. Thus courts "will scrutinize much more closely" the facts alleged by the party seeking the exception. *Fors Farms, Inc. v. Emp't Sec. Dep't*, 75 Wn.2d 383, 391, 450 P.2d 973 (1969). The question under RCW 50.04.140 is not whether owner-operators are independent contractors "under federal motor carrier law or common law. Instead, the question is whether [they] meet all [of the] prongs of the exemption test contained in the act, regardless of common law definitions." *W. Ports*, 110 Wn. App. at 459. That is because "employment" under the Act is

“unlimited by the relationship of master and servant as known to the common law or any other legal relationship.” RCW 50.04.100; *W. Ports*, 110 Wn. App. at 458-59.

The Act offers two methods to establish an independent contractor exception under RCW 50.04.140. Gulick only sought to establish the elements of subsection (1). Appellant’s Open. Br. 12-30. Under subsection (1), services performed by an individual for remuneration shall be employment “unless and until it is shown to the satisfaction of the commissioner” all of the following three elements:

- (a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and
- (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and
- (c) Such 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.

RCW 50.04.140(1); *Affordable Cabs, Inc. v. Emp’t Sec. Dep’t*, 124 Wn. App. 361, 369, 101 P.3d 440 (2004) (employer must prove all three parts).

The Commissioner properly concluded that Gulick failed to prove exception under each of the three elements. AR2 1127-39.

1. Gulick failed to prove its owner-operators performed services free from its control or direction under RCW 50.04.140(1)(a)

To satisfy the first element of the exception, Gulick needed to prove its drivers were free from control or direction during the performance of services, “both under the contract of service and in fact.” RCW 50.04.140(1)(a). “The crucial issue is not whether the employing unit actually controls, but whether it has the right to control the methods and details of the worker’s performance.” *W. Ports*, 110 Wn. App. at 452.

a. Washington employment security cases set forth the relevant test for control or direction

Within the trucking business, the employing unit’s control over work assignments is evidence of control or direction. *Penick*, 82 Wn. App. at 43. Further, the right to terminate a worker for substandard work is “incompatible with freedom from control over the performance of services.” *Id.* (citing *Schuffenhauer v. Emp’t Sec. Dep’t*, 86 Wn.2d 233, 237, 543 P.2d 343 (1975)). The courts have found that even truck drivers who choose their own routes and work hours are not free from control if the company has the right to terminate them for unsatisfactory performance, determines job assignments, and requires drivers to check in daily and clean their trucks. *Penick*, 82 Wn. App. at 43.⁶ Similarly, a truck

⁶ *Penick’s* discussion about owner-operators is dicta. See Appellant’s Open. Br. 44. That case was about company drivers. *Penick*, 82 Wn. App. at 34.

driver who worked under an “independent contractor agreement” and owned his own trucks was not free from control or direction where the trucking firm required the driver to submit monthly vehicle reports, participate in the company drug testing program, purchase insurance through the trucking company, and seek approval prior to carrying passengers. *W. Ports*, 110 Wn. App. at 455.

b. The owner-operators were not free from Gulick’s control or direction under the contract or in fact

The Commissioner properly concluded that Gulick failed to prove its owner-operators were free from its control or direction over owner-operators’ services under RCW 50.04.140(1)(a). AR2 1128-33. As the Commissioner found, many of the same or similar elements identified in *Penick* and *Western Ports* are present here, including:

- Gulick has exclusive possession, control, and use of the trucking equipment during the term of the agreement (AR1 328, ¶ 5.8);
- owner-operators may not transport persons or property for any third party without Gulick’s express written consent (*Id.*);
- owner-operators must “cooperate fully with all Carrier’s dispatch personnel in performance of the Agreement,” and must transport goods “in a manner which promotes the goodwill and reputation of” Gulick (AR1 327, ¶¶ 1.2, 1.3);
- owner-operators must pay a \$50 fine for failing to meet scheduled pickup or delivery appointments set by Gulick or its customers, failing to follow temperature requirements, or failing to immediately report an accident (AR1 327, ¶¶ 1.5, 1.6; 331, ¶ 15.2);

- owner-operators must obtain Gulick’s “express written consent” to transport persons or property of a third party (AR1 328, ¶ 5.8);
- owner-operators must perform regular safety inspections, note the inspections on driver’s logs, and immediately make needed equipment repairs (AR1 328, ¶ 5.4);
- owner-operators must “check the identity, temperature (if temperature controlled), condition and count of all cargo . . . to confirm that said cargo conforms to the bill of lading” and immediately notify Gulick of any damage, shortages, or temperature discrepancies (AR1 331, ¶ 15.1);
- owner-operators must “properly protect and promptly transport and deliver cargo” to the consignee (*Id.* ¶ 15.3);
- owner-operators must install and use Qualcomm, a mobile tracking and communication device for to communicate load requirement and track contract compliance, and pay a monthly usage fee of \$60 (AR1 334, ¶ 20.1);
- owner-operators must contact Gulick by telephone in the event of an accident resulting in injury or damage to cargo (AR1 330, ¶ 12.5);
- owner-operators must furnish non-trucking use/bobtail liability insurance with a \$1,000,000 liability limit, and name Gulick as the insured (AR1 331, ¶ 13.4; AR2 870-73).
- Gulick can take possession of the owner-operator’s trucking equipment and complete a delivery if the owner-operator fails to do so (AR1 327, ¶ 1.4);
- Gulick can terminate the Agreement if an owner-operator violated federal, state, or local safety laws or Gulick’s safety rules and regulations, was convicted of a felony or traffic crime, had a pattern of late pickups and deliveries, became unavailable for dispatch, exhibited a pattern of uncivil or impolite communications with Gulick’s employees or customers, or did not adequately maintain equipment as defined by Gulick’s maintenance guidelines (AR2 1130; AR1 333, ¶ 19.2).

All of the above requirements “are generally incompatible with freeing the owner-operators from [Gulick’s] control and direction; in other words, Gulick is not just interested in the *end result* of the transportation services performed by the owner-operators, but it also concerns itself as to ‘*how*’ the transportation services are to be performed by the owner-operators.” AR1 1129-30 (citing *Jerome v. Emp’t Sec. Dep’t*, 69 Wn. App. 810, 817, 850 P.2d 1345 (1993)). These provisions set out more than control over equipment or general contractual obligations. *See* Appellant’s Open. Br. 19-24. At a minimum, requiring full cooperation and polite communications shows Gulick’s right to control performance. *See W. Ports*, 110 Wn. App. at 452.

Gulick is wrong that the Commissioner “essentially conceded” that the exemption standard was met by noting some indicia of autonomy. Appellant’s Open. Br. 14.⁷ The Commissioner merely acknowledged that the owner-operators “enjoy some autonomy”—“on the one hand.” AR2 1128. For example, Gulick’s owner-operators who use their own trailers

⁷ Gulick refers to the alleged standard for control or direction in the “truck-driving context” by discussing the Department’s Status Manual. Appellant’s Open. Br. at 13-14, 28, 44. This is an internal manual that contains guidelines that do not represent the agency’s interpretation of the Employment Security Act. *See Ass’n of Wash. Bus. v. Dep’t of Rev.*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005) (even interpretive statements not binding on public or court “and are afforded no deference other than the power of persuasion.”); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 635 n.32, 90 P.3d 659 (2004) (noting that agency’s purported failure to follow a permit writer’s manual that was not adopted as a regulation did not justify modification of agency condition in a permit). The Status Manual does not supplant statutes or case law.

are free to reject loads from Gulick, can select their routes,⁸ are responsible for costs incurred in operating and maintaining their equipment, and can employ their own drivers. AR2 1128-29. But the Commissioner weighed this evidence against the indicia of control “[on] the other hand,” and explicitly stated that “Gulick’s lack of control over some specific details of the owner-operators’ truck-driving services does not neutralize the extensive direction and control it does exercise.” AR2 1132. To establish exception, RCW 50.04.140(1)(a) requires proof of freedom from control or direction, not proof of some indicia of autonomy.

Substantial evidence—i.e., the multiple contract provisions governing the owner-operators’ relationship with Gulick—supports that the owner-operators were not free from Gulick’s control or direction over the performance of services. The Commissioner’s conclusion is due deference because of the Commissioner’s expertise in interpreting the Act. *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).⁹

⁸ In contrast, the Agreement prohibited owner-operators who leased trailers from Gulick from moving the trailer “from one location to another location without prior authorization from [Gulick],” and the trailers had to “stay in route determined by [Gulick], using PC Miler to determine best route. If [owner-operator] should move [Gulick’s] trailer without authorization and/or out-of-route miles, [Gulick] shall charge [owner-operator] for the miles traveled at a rate of 0.26 cents per mile, which charge will be deducted from [owner-operator’s] settlement.” AR1 329 ¶ 6.4.

⁹ Appendix A attached to Gulick’s opening brief, in which Gulick refutes that many of the contract provisions are evidence of control, is argument and a seeming attempt to avoid the page limit for briefing.

c. The Commissioner properly considered federal lease provisions

Some of the factors the Commissioner considered are federal requirements. But *Western Ports* permits considering federally required controls in applying the statutory exception test—including the written lease requirements under 49 C.F.R. § 376.12. *W. Ports*, 110 Wn. App. at 453-54 (evaluating “controls over the leased trucks-with-drivers” in addition to those controls exerted by the carrier itself over the owner-operators’ services). As the court thoughtfully explained:

It would make little sense for the Legislature to have specifically included service in interstate commerce as “employment” only to automatically exempt such service under RCW 50.04.140 based on federal regulations that require a high degree of control over commercial drivers operating motor vehicles in interstate commerce

Id.; see also *Henry Indus., Inc. v. Dep’t of Labor & Indus.*, 195 Wn. App. 593, 621, 381 P.3d 172 (2016) (construing nearly identical control element in Industrial Insurance Act’s independent contractor statute: “The fact that the customer sets the requirements is immaterial to the analysis.”).

Indeed, the more highly regulated an industry is, the less likely workers in that industry will be free from a putative employer’s control or direction. Gulick essentially argues for the opposite interpretation: any time there are many requirements by a third party, like the government—or by logical extension, a customer or insurer—the *less* likely the worker

is to be an employee because those controls cannot be considered. This makes little sense and would undermine the purposes of the Act by carving out workers in highly regulated industries from unemployment insurance coverage under this element.

The regulation Gulick contends precludes considering federal lease provisions under a state-law inquiry provides:

Nothing in the provision required by *paragraph (1)(c)* of this section is intended to affect whether 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.

49 C.F.R. § 376.12(c)(4) (emphasis added). The scope of this qualifying provision only reaches to 49 U.S.C. § 14102 and 49 C.F.R. Part 376 in general, and 49 C.F.R. § 376.12(c)(1) in particular; it does not extend to include other federal safety regulations, such as those contained in 49 C.F.R. Part 395 or Part 396. It says nothing about the numerous other federal lease requirements and safety regulations governing the relationship between motor carriers and owner-operators, which are included in Gulick's contract, and no rule prevents their consideration.

Moreover, the Interstate Commerce Commission's guidance says nothing about barring consideration of the numerous federal leasing requirements under the state law inquiry. *See* Appellant's Open. Br. 16-17.

Rather, the ICC has stated that it “take[s] no position on the issue of independence of lessors.” 8 I.C.C.2d 669, 671 (1992). While the ICC has made clear that the control regulation should not be deemed “prima facie evidence of an employer-employee relationship,” it also has sought to “reinforce [its] view of the neutral effect of the control regulation.” *Id.* Thus, the ICC is “explicitly agnostic on the issue of the carrier-driver relationship.” *Remington v. J.B. Hunt Transport, Inc.*, 2016 WL 4975194 at *5 (D. Mass 2016). If the ICC intended to preclude considering federal lease requirements when making employment determinations under state law, then it could have said so. Gulick overstates the ICC’s guidance.

Gulick essentially asks the Court to overrule *Western Ports*. See Appellant’s Open. Br. 18-19. But the case has been controlling precedent in Washington for over 15 years. Stare decisis compels respect for and adherence to this prior decision; it should be reversed only if it is shown to be incorrect and harmful. *State v. Ray*, 130 Wn.2d 673, 677-78, 926 P.2d 904 (1996). Here, Gulick disagrees with the law, but it has not shown that the law is wrong or harmful. On the other hand, overruling *Western Ports* would harm *other* carriers and drivers who have relied on and complied with its holding and paid their fair share of taxes and give an unfair advantage to carriers who failed to follow this precedent.

Moreover, though Gulick points to some states that have ruled otherwise, Appellant's Open. Br. 18-19, *Western Ports* is not an outlier. *See, e.g., C.R. England, Inc. v. Dep't of Emp't Sec.*, 7 N.E. 3d 864, 876-78 (Ill. App. Ct. 2014) (concluding FAAAA did not preempt state Unemployment Compensation Act and finding *Western Ports* "instructive"); *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1188 (Colo. Ct. App. 2011) (same). The *Western Ports* court noted that different states ruled differently. 110 Wn. App. at 460-61 (citing cases). There is no reason why this Court should not follow *Western Ports*.

d. Gulick exerted control above and beyond the federal lease requirements

Even if the federal lease requirements could not be considered, multiple contract provisions require owner-operators to comply with Gulick's and/or its customers' policies and procedures, not just those required by federal law or pertaining to only the equipment. *See, e.g.,* AR1 327, ¶¶ 1.2, 1.5, 1.6, 1.7; 328, ¶¶ 5.6, 5.7; 329, ¶¶ 5.9, 6.1, 6.4; 330, ¶¶ 12.1, 12.5, 12.6; 331, ¶¶ 13.3, 13.4, 14.3, 15.1, 15.2, 15.3; 333, ¶ 19.2(a)-(d). This shows Gulick has the *right to control* their performance, which is the "crucial issue" under case law. *W. Ports*, 110 Wn. App. at 452.¹⁰ The agreements here were not mere equipment leases.

¹⁰ Gulick argues that the Commissioner ignored the express provision that Gulick "shall have no right to and shall not control the manner or prescribe the method of

Moreover, while owner-operators could refuse loads offered by Gulick, only Gulick determines what loads to offer. Gulick provides the means by which its drivers acquire work and controls what assignments are offered to them. AR2 858, 863. And, if a driver repeatedly fails to respond to dispatch, Gulick could terminate the Agreement. AR1 at 333, ¶ 19.2(b); AR2 at 875. Thus, while Gulick’s argument that the Court should not consider federally-mandated controls is incorrect, it is also immaterial because of these additional controls.

e. The common law test for control does not apply

This is a statutory case. Therefore, Gulick’s contention that the Court should adopt the common law test for control articulated in *Seattle Aerie No. 1 of Fraternal Order of Eagles v. Commissioner of Unemployment Compensation and Placement*, 23 Wn.2d 167, 160 P.2d 614 (1945), and *Kamla v. Space Needle Corporation*, 147 Wn.2d 114, 52 P.3d 472 (2002), is off-base. Appellant’s Open. Br. 19-21. The Legislature has expressly provided that “employment” under the Employment Security Act is broader than the common law test, RCW 50.04.100, and

accomplishing the services required by this Agreement, except as necessary for the Carrier to comply with applicable law.” Appellant’s Open. Br. 15 (citing AR1 349). This provision does not negate the pervasive controls in the contract. The attempted rebranding has no effect. *See W. Ports*, 110 Wn. App. at 451 (“Contractual language, such as a provision describing drivers as independent contractors, is not dispositive; instead the court considers all the facts related to the work situation.”).

Seattle Aerie was decided before the Legislature made that explicit.¹¹

Kamla addressed whether an employer retained the right to direct a contractor's work so as to bring the employer within the "retained control" exception to the general rule of non-liability for injuries of a contractor. *Kamla*, 147 Wn.2d at 119. It is not an unemployment case and did not discuss Title 50 RCW. Neither case has any relevance here.

Furthermore, the Legislature has declined to modify the Act since the *Western Ports* decision, which indicates legislative acquiescence in the interpretation. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009). Notably, the Legislature specifically exempted owner-operators from coverage under the Industrial Insurance Act since 1982. RCW 51.08.180; Laws of 1982, ch. 80, § 1. It has never provided for such an exemption under the Employment Security Act. The Court should reject Gulick's invitation to apply a common law definition of the term "control or direction" under RCW 50.04.140(1)(a) to rewrite case law on control or direction under the Act.¹²

It does not matter whether certain provisions are "natural," or "reasonable," or "commonly found" in contracts. *See* Appellant's Open.

¹¹ *Seattle Aerie* was decided on June 28, 1945, and the current definition of "employment" became effective on July 1, 1945. Laws of 1945, ch. 35, § 11 (definition); ch. 36, § 192 (effective date). It has not been meaningfully amended since.

¹² Even if the *Kamla* test applied here, Gulick exerted more control than just general contractual rights. *See supra* Section IV.B.1.b.

Br. 23-24. The Employment Security Act is broadly construed in favor of coverage, and multiple provisions of the owner-operators' contracts with Gulick support the Commissioner's conclusion, backed by ample case law, that Gulick did not establish its owner-operators' freedom from its control or direction under RCW 50.04.140(1)(a).

2. Gulick failed to prove its drivers provided services “outside the usual course of business for which such service is performed” or “outside of all the places of business of the enterprises for which such service is performed” under RCW 50.04.140(1)(b)

The Commissioner properly concluded that Gulick failed to prove the second element of the independent contractor exception test under RCW 50.04.140(1)(b): that the service in question be “either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed.” AR2 1133-35. Gulick does not argue that it proved the first alternative under this test—that its owner operators provided services outside the usual course of Gulick's business. Appellant's Open. Br. 25 (arguing only that Gulick met the second alternative in RCW 50.04.140(1)(b)).

Substantial evidence supports the Commissioner's finding that the services performed by owner-operators were not “performed outside of *all* the places of business of the enterprises for which such service is

performed.” RCW 50.04.140(1)(b) (emphasis added); AR2 1135. Under the Agreement, the owner-operators had to have their equipment inspected “at Carrier’s regular inspection station before the start of any trip.” AR1 328, ¶ 5.2; AR2 at 1135. Also, “Regular safety inspections [were] required to be done *by [Gulick’s] contract shop* at no charge to the [owner-operator].” AR1 329, ¶ 5.9. And the owner-operators who leased trailers from Gulick were required to “return trailer(s) to Carrier’s terminal at the end of the contract or whenever the parties terminate the contract.” AR1 329, ¶ 6.5. Gulick did not rebut this evidence.

Gulick argues that its evidence demonstrated that the owner-operators performed services “over the open road” and that they were not required to perform work at or go to Gulick’s facilities to collect loads or clock in or out. Appellant’s Open. Br. 25-26. But this does not rebut the contractual evidence that required owner-operators to have their trucks inspected at Gulick’s “regular inspection station” or “contract shop.” AR1 328, ¶ 5.2; AR2 at 1135; AR1 329, ¶ 5.9. Gulick offered no evidence that this did not happen, and, at the hearing, it was Gulick’s burden to prove that the services were performed outside of *all* of Gulick’s places of business. *See Affordable Cabs*, 124 Wn. App. at 369. It was not the Department’s burden to prove that the contract provisions requiring inspections at Gulick’s places of business were actually enforced. At most,

Gulick established that its owner-operators performed *most* of the services outside of Gulick's places of business. It is of no consequence that the Commissioner based his findings on contract provisions that the Department did not argue in its administrative briefing, and Gulick cites no authority that this would be a basis to reverse the findings. The Commissioner properly ruled that Gulick did not prove this element of exception, and substantial evidence supports it.

3. Gulick failed to prove its owner-operators were independently established businesses under RCW 50.04.140(1)(c)

Gulick failed to prove that its owner-operators were “customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.” RCW 50.04.140(1)(c); AR2 1135-39. This element requires evidence of “an enterprise created and existing separate and apart from the relationship with the particular employer, an enterprise that will survive the termination of that relationship.” *Jerome*, 69 Wn. App. at 815. As another court explained, “[t]he purpose of this requirement is to assure that workers whose income is almost wholly dependent upon continued employment by a single employer are protected from the vagaries of involuntary unemployment, regardless of their status as employees or independent contractors under the common law.” *SZL*, 254 P.3d at 1183

(interpreting nearly identical language in Colorado’s employment security act, and favorably citing *Western Ports*).

a. The owner-operators did not have their own motor carrier authority, which precludes them from continuing in business if their relationship with Gulick ended

Several factors may indicate whether an independent business exists. *See Penick*, 82 Wn. App. at 44. The factors include whether the worker: (1) has a separate office or place of business outside of the home; (2) has investment in the business; (3) provides equipment and supplies needed for the job; (4) whether the alleged employer fails to provide protection from risk of injury or nonpayment; (5) whether the worker works for others and has individual business cards; (6) is registered as an independent business with the State; and, (7) is able to continue in business even if the relationship with the alleged employer is terminated. *Id.* (citing *Jerome*, 69 Wn. App. at 815). This last factor—the ability to continue in business even if the relationship with the carrier ends—is the most important factor under longstanding law. *See All-State Constr. Co. v. Gordon*, 70 Wn.2d 657, 666, 425 P.2d 16 (1967) (“Most important for unemployment compensation are those factors—investment, good will, an independent clientele, and the like—which enable the worker to continue in business if he loses a particular customer, and which thus prevent that

loss from rendering him unemployed.”) (quoting Willcox, *The Coverage of Unemp’t Comp. Laws*, 8 Vand. L. Rev. 245, 265 (1955)).

Truck ownership alone is not enough to demonstrate the existence of an independent business that will survive termination of the contractual relationship. To be truly independent, owner-operators need their *own* motor carrier authority from the Federal Motor Carrier Safety Administration. *See id.*; *SZL*, 254 P.3d at 1183; AR 1137 (Commissioner’s recognition of this as a paramount factor in the trucking industry).

Having one’s own motor carrier authority is not a mere paperwork formality. It is essential to the viability of an independent business in the trucking industry and the ability to continue in the business of hauling freight. The Commissioner need not be blind to this. If owner-operators who do not have separate motor carrier authority “were terminated by [the carrier], in all likelihood they would be out of work until they could make similar arrangements with another carrier.” *Stafford Trucking, Inc. v. Dep’t of Indus., Labor & Human Rel.*, 306 N.W.2d 79, 84 (Wis. Ct. App. 1981). Thus if the contractual relationship ends with Gulick, the owner-operators will lose the ability to haul freight, which would render them unemployed. *See All-State Constr. Co.*, 70 Wn.2d at 666. Although the owner-operators can then go work for another carrier under that carrier’s authority, this is no different than any at-will employee’s ability to find a

new job. During the period while they are unemployed and searching for work, the owner-operators should be covered by unemployment benefits as other workers would be, thereby minimizing the suffering and economic hardship of involuntary unemployment. *See* RCW 50.01.010.

None of the owner-operators included in the audit had independent motor carrier authority. AR2 688-89, 1136, 1139 (“[I]t is beyond dispute that the owner-operators did not have their own operating authority.”). Besides, even if an owner-operator had independent hauling authority, under the contract, the owner-operator would need to seek Gulick’s written permission to use it. AR1 328 ¶ 5.8. In short, while owner-operators own their trucks, their exclusive lease with Gulick prohibits them from operating the trucks to haul freight for anyone other than Gulick during the lease term without written permission of Gulick. *Id.* An owner-operator can hardly be said to carry on an independent business if he or she was wholly dependent on Gulick for income.

b. The Department assessed the wages of owner-operators who had not formed legitimate business entities

The auditor investigated whether the owner-operators had formed their own businesses. AR2 689-93. If a driver had formed an LLC or corporation that was active during the audit period, he did not include them in the assessment. AR2 692, 758. Of the remaining drivers who *were*

included in the audit results, most did not have active Unified Business Identifier (UBI) numbers during the audit period. AR2 691-92. For those who did have active UBI numbers during the audit period, the auditor researched whether they had open, active accounts with the Department of Revenue to determine whether they were reporting business revenue during the audit period. AR2 693-94, 765-67, 1136. None of the owner-operators included in the audit had reported their earnings to DOR. AR2 694, 1136. Thus the Department assessed the wages only of drivers who had not formed legitimate business entities.

c. The owner-operators did not appear independent to the public, and they did not view themselves as independent from Gulick

Independence can potentially be evidenced by a showing that workers solicited, advertised, or otherwise held themselves out as a separate business to the public. *See Penick*, 82 Wn. App. at 44. But Gulick did not present any evidence its owner-operators did this. In fact, as the Commissioner identified, the Agreement *prohibited* owner-operators from competing or soliciting its customers during the term of the Agreement *and* for at least five years thereafter. AR1 334, ¶ 20.7; AR2 1138-39. Additionally, the Agreement required the owner-operators to display Gulick's identification on their trucking equipment to show the equipment was being operated by Gulick. AR1 329, ¶ 7. Though this is a federal

requirement, it prohibits the owner-operators from expressing that they are businesses independent from Gulick, and the non-compete provision prohibits them from actually obtaining any business directly from any of Gulick's customers, even if they had their own hauling authority.

The owner-operators also testified that Gulick does their bookkeeping; finds them loads to haul; and helps them calculate their fuel and road use taxes, comply with safety regulations, and acquire cargo and liability insurance. AR2 899, 923, 939, 1137-38 n.5 (quoting relevant testimony). Truly independent businesses perform these operational tasks on their own.

Finally, one owner-operator, when testifying, referred to one of Gulick's customers as "our customer," and, when asked if he meant "Gulick's customer," he clarified, "Yeah, yeah, exactly. I am Gulick." AR2 906. Another owner-operator stated, "we are a refrigeration company. We haul produce, frozen foods and the like." AR2 938-39. When asked what he meant by "we," he agreed he was referring to Gulick. AR2 945. Clearly, even the owner-operators viewed themselves as indistinguishable from Gulick's business. They carried on no business independent from Gulick. The Court should affirm the Commissioner's conclusion that they were not truly independent.

C. Federal Law Does Not Preempt the Unemployment Insurance Tax Because It Applies Generally to All Washington Employers, Imposes Only a Minor Cost Increase, and Does Not Relate to Carriers' Prices, Routes, or Services

“In Washington, there is a strong presumption against finding preemption and state laws are not superseded by federal law unless it can be determined it is the clear and manifest purpose of Congress.” *Dep't of Labor & Indus. v. Lanier Brugh*, 135 Wn. App. 808, 815-16, 147 P.3d 588 (2006). Gulick fails to overcome this strong presumption.

Washington case law has already rejected Gulick's argument that the Federal Aviation Administration Authorization Act (FAAAA) preempts applying the Employment Security Act in this case. *W. Ports*, 110 Wn. App. at 450-58 (owner-operator driver was an employee for unemployment insurance purposes, and federal transportation law, including the FAAAA, does not preempt the Act). And the Washington Supreme Court has held that the \$15-per-hour minimum wage law for employees in the hospitality and transportation industries in the city of SeaTac is not preempted by a nearly identical preemption provision in the Airline Deregulation Act. *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 357 P.3d 1040 (2015). It is clear that the Act is not preempted.

1. Background on preemption

Congress enacted the Airline Deregulation Act (Airline act) in 1978 and included a preemption provision to “ensure that the States would

not undo federal deregulation with regulation of their own.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 112 S. Ct. 2031, 119 L. Ed. 157 (1992). It provides that a “State . . . 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 an air carrier[.]” 49 U.S.C. § 41713(b)(1).

In 1994, Congress enacted the FAAAA to “even the playing field” between air and motor carriers. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998). The FAAAA’s preemption provision is nearly identical to the Airline act’s: a “State . . . 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 . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c). But the addition of the phrase “with respect to the transportation of property” “massively limits the scope of preemption” ordered by the FAAAA.” *Dan’s City Used Cars, Inc. v. Pelkey*, ___ U.S. ___, 133 S. Ct. 1769, 1778, 185 L. Ed. 2d 909 (2013) (internal quotation omitted).

2. The FAAAA does not preempt generally applicable state laws—like the Employment Security Act

The Ninth Circuit has held that generally applicable “background” laws are not preempted by the FAAAA. *Dilts v. Penske Logistics, LLC*,

769 F.3d 637, 646 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015).

The court held that California’s meal and rest break laws are not preempted, even if they raise the overall cost of doing business or require a carrier to redirect or reroute some equipment, because they are “generally applicable background regulations that are several steps removed from prices, routes, or services.” *Id.* The fact that a law is likely to increase a motor carrier’s operating costs “alone does not make such law[] ‘related to’ prices, routes or services.” *Id.* Laws that “do not directly or indirectly mandate, prohibit, or otherwise regulate certain prices, routes or services—are not preempted by the FAAAA.” *Id.* at 647.

The Washington Supreme Court has essentially adopted the Ninth Circuit’s “generally applicable background law” framework with respect to similar preemption provisions in the Employee Retirement Income Security Act of 1974 (ERISA) and the Airline act. *W.G. Clark Constr. v. Pac. Nw. Reg’l Council of Carpenters, et al.*, 180 Wn.2d 54, 322 P.3d 1207 (2014); *Filo Foods, LLC*, 183 Wn.2d at 805. ERISA’s preemption clause provides that the statute “shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan” covered under ERISA. 29 U.S.C. § 1144(a) (emphasis added). The clause includes the same “related to” language as the Airline act and FAAAA. The Court held that two state laws—one requiring public works general

contractors to execute and deliver a bond to protect workers, and another requiring the public agency to retain part of the money earned by the general contractor to pay claims under the contract—were not preempted because they “apply generally to all workers on public projects.” *W.G. Clark*, 180 Wn.2d at 60-61, 64. And more recently, the Court held that the Airline act “does not preempt generally applicable laws that regulate how an airline behaves as an employer, even though the law indirectly affects the airline’s prices and services.” *Filo Foods, LLC*, 183 Wn.2d at 805.

Like the meal and rest break laws in *Dilts* and the minimum wage law in *Filo Foods*, the Employment Security Act is a generally applicable background law for all employers in Washington. The Act does not aim at motor carriers. And unlike the laws directed at public works contractors in *W.G. Clark*, the Employment Security Act applies to all employers in all industries. Requiring Gulick to pay unemployment taxes for its owner-operators has at most a “tenuous, remote, or peripheral” relationship to its prices, routes, or services. *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 371, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008). It is not preempted.

3. FAAAA preemption requires a significant relationship with the prices, routes, or services of motor carriers

Airline act or FAAAA preemption occurs only when the state law aims directly at transportation, or when the law’s impact on transportation

is indirect but *significant*. For example, in the 1992 *Morales* decision, the Court held the Airline act preempted states' standards against deceptive airline fare advertising because each standard bore an express reference to airfares, and the standards collectively established binding requirements on how air tickets may be marketed. *Morales*, 504 U.S. at 388, 391. The Court cautioned that while an indirect impact may present a preemption issue, preemption requires a "significant impact," and federal law may not preempt state laws that affect prices, routes, or services only in a "tenuous, remote, or peripheral . . . manner." *Id.* at 388-90. In other words, the words "related to" in the preemption provision "do[] not mean the sky is the limit" or that courts should read preemption provisions with "uncritical literalism," else "for all practical purposes preemption would never run its course." *Pelkey*, 133 S. Ct. at 1778 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995)).

Courts have clarified that FAAAA preemption based on an indirect impact presents a "borderline" case, and to find preemption, the state law must "bind[] the . . . carriers to a particular price, route, or service and thereby [interfere] with competitive market forces within the . . . industry." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 396-97 (9th Cir. 2011), *rev'd on other grounds*, ___ U.S. ___, 133 S. Ct.

2096, 186 L. Ed. 2d 177 (2013) (quoting *Air Transport Ass'n of Am. v. City & Cty. of San Francisco*, 266 F.3d 1064, 1072 (9th Cir. 2001)). By applying Washington's Employment Security Act to all trucking carriers, market forces determine the prices, routes, and services they offer.

This Court has specifically held that the "federal statutory and regulatory scheme does not preempt state employment security law by which a person who might be an independent contractor under federal transportation or common-law principles may nevertheless be entitled to compensation." *W. Ports*, 110 Wn. App. at 445. This Court acknowledged the preemption provision at issue here, 49 U.S.C. § 14501(c)(1), and then highlighted a specific transportation statute within the FAAAA, 49 U.S.C. § 14502(b), that expressly limits states' tax assessments on motor carrier transportation property. *Id.* at 456-57. The Court reasoned correctly that "when Congress has intended to prohibit state taxing authorities from 'burdening' interstate commerce, it has done so, expressly, clearly and understandably." *Id.* at 457. *See also Mendonca*, 152 F.3d at 1189 (FAAAA did not preempt California's prevailing wage act with respect to motor carriers, despite the motor carrier's assertion the act "increases its prices by 25%, causes it to utilize independent contractors, and compels it to re-direct and re-route equipment to compensate for lost revenue," because the effect on prices, routes, and services "is no more than indirect,

remote, and tenuous”); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 721 n.9, 153 P.3d 846 (2007) (following reasoning of *Mendonca*, FAAAA does not preempt state overtime requirements for interstate truck drivers).

Similarly, *Filo Foods* held that the \$15-per-hour minimum wage and other benefits for employees in hospitality and transportation industries in SeaTac was not preempted by the Airline act, not only because it applies generally to all employers, but also “because its affect on airline prices and services is only indirect and tenuous.” 183 Wn.2d at 807. The law regulates only employer-employee relationships. *Id.* The fact that it “may impose costs on airlines and therefore affect fares is inconsequential.” *Id.*

a. An increase in operating costs does not trigger preemption

Gulick essentially complains that \$112,855.17 in unemployment insurance tax liability over a nearly three year period would increase its operating costs. That fact is as “inconsequential” as the claim rejected in *Filo Foods*. 183 Wn.2d at 807. A state law does not meet the “related to” test of the FAAAA preemption clause “just because it shifts incentives and makes it more costly for motor carriers to choose some routes or services *relative* to others, leading the carriers to reallocate resources or make different business decisions.” *Dilts*, 769 F.3d at 647. As the Seventh

Circuit explained, Gulick must “absorb the costs . . . or pass them along to its [drivers] through lower wages or to its customers through higher prices. We do not see, however, how the increased labor cost will have a *significant* impact on the prices” offered to Gulick’s customers. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1055-56 (7th Cir. 2016). Minor additional costs do not trigger preemption under the FAAAA. *See id.*

Put simply, Gulick’s argument would put a cloud over everything from fuel taxes, to business and occupation taxes, to property tax assessments. That is not the law. “Nearly every form of state regulation carries some cost. . . . [But] Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability.” *Dilts*, 769 F.3d at 646.

b. The Department does not require the use of employee drivers or seek to “restructure” the trucking industry, and that is not the effect of paying unemployment taxes

To claim FAAAA preemption, Gulick advances two false assumptions: that the Department seeks to eliminate the use of owner-operators in the trucking industry, and that barring the owner-operator business model will be the logical effect if owner-operators are covered by the unemployment tax. Appellant’s Open. Br. 31, 42-46. But the Department only seeks to enforce the Employment Security Act, whose

definition of covered employment includes persons who, under other laws, are independent contractors. *W. Ports*, 110 Wn. App. at 458. Applying that law is limited to the employment security tax and does not bar the industry from using independent contractors, as Gulick dramatically claims.

Appellant's Open. Br. 31, 42-49. The Act only requires employers to pay unemployment taxes without impacting the classification of workers as employees or independent contractors under other laws.

Because Gulick's assumption that applying the unemployment tax will "restructure" the industry is wrong, the cases it relies on to support its preemption argument are easily distinguishable. The First Circuit cases involve a broad employee classification state law: the Massachusetts Independent Contractor Statute. That law first determines whether individuals are employees or independent contractors. *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 15 (1st Cir. 2014). If the individuals are "employees," the law triggers numerous additional legal requirements for the employers under various laws, such as providing days off, parental leave, work-break benefits, and a minimum wage.¹³ *Id.*

Unlike the Massachusetts statute in the First Circuit cases, the definition of "employment" in the Act references no other law employers

¹³ A court described the Massachusetts law as an "unprecedented and fundamental change in independent contractor law" that is "unique" and "unlike any other statute in the country." *Sanchez v. Lasership*, 937 F. Supp. 2d 730 (E.D. Va. 2013).

must comply with. RCW 50.04.100. It affects worker classification for purposes of Title 50 RCW only, which is specifically broader than employment in other legal contexts. *W. Ports*, 110 Wn. App. at 458 (the only relationship the Department purports to define is “the employment intended to be covered by the act for the purpose of the act and none other.”) (quoting *Comp. & Placement v. Hunt*, 22 Wn.2d 897, 899, 158 P.2d 98 (1945)); RCW 50.04.100. The Commissioner ordered Gulick to pay unemployment taxes, nothing more. AR2 1139.

Because the Employment Security Act does not preclude using owner-operators but instead imposes a tax obligation for all employment covered by the Act, with no reference to trucking carriers, the cases discussed by Gulick that specifically forced carriers to use only employee drivers are off point. *See* Appellant’s Open. Br. 34-35. The mandatory concession agreements imposed by the Port of Los Angeles required motor carriers to “transition over the course of five years from independent-contractor drivers to employees.” *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1049 (9th Cir. 2009). The law at issue here bears no resemblance to the requirements imposed there. The law targeting motor carriers in Michigan is similarly distinguishable. *In re Fed. Preemption of Provisions of the Motor Carrier Act*, 566 N.W.2d 299, 307-08 (Mich. Ct. App. 1997).

The witnesses' declarations cited by Gulick, Appellant's Open. Br. 45-46, state erroneous legal conclusions of the effect of the Department's assessment, as they assume that reclassifying owner-operators under Title 50 RCW results in transforming them to employees for all purposes or requires Gulick to use only employees driving company-owned trucks. This Court already rejected this argument in *Western Ports*:

An individual may be both an independent contractor for some purposes, and engaged in 'employment' [under the Act]. . . . In fact, although courts use the term independent contractor in unemployment law, as if one is either an employee and, therefore, entitled to benefits or an independent contractor and, therefore, not entitled to benefits, these terms should not be confused with the common law definitions of master and servant or independent contractor.

W. Ports, 110 Wn. App. at 458-59. "[T]he Department characterizes the owner-operators as employees for the purposes of unemployment insurance taxation—nothing more, nothing less." AR1 129 ¶ 4.9.

Even the First Circuit would likely find the FAAAA does not preempt the unemployment tax. It has opined that, under the Airline act, "the Supreme Court would be unlikely . . . to free airlines from most conventional common law claims for tort, from prevailing wage laws, and ordinary taxes applicable to other businesses." *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 87 (1st Cir. 2011) (emphasis added). And in *Schwann v. FedEx Ground Package System*, 813 F.3d 429, 433 (1st Cir. 2016), it

reiterated that carriers are not exempt ““from state taxes, state lawsuits of many kinds, and perhaps most other state regulation of any consequence.”” *Id.* at 440 (quoting *DiFiore*, 646 F.3d at 89). Recently, the Massachusetts District Court held that the Massachusetts Wage Act—whose test for employee status is nearly identical to the test under RCW 50.04.140(1)—is not preempted by the FAAAA. *Vargas v. Spirit Delivery & Distribution Svcs., Inc.*, No. 13-12635-TSH, 2017 WL 1115163 (D. Mass March 24, 2017) (laws enacted to protect workers “are traditionally within the police powers of the state,” and their impact “is generally tenuous and does not require the carriers to change their business model.”).

Other courts have rejected motor carriers’ claims that generally applicable state laws would require them to change their business models and reclassify their drivers for other purposes. The Seventh Circuit was not persuaded by a carrier’s “bare assertion” that complying with the Illinois Wage Payment and Collection Act would require it to classify its drivers as employees for all purposes. *Costello*, 810 F.3d at 1056. The Colorado Court of Appeals concluded that “it is legally permissible for an individual to be an employee for unemployment tax liability purposes at the same time the individual is considered to be an independent contractor for other purposes under other laws.” *SZL, Inc.*, 254 P.3d at 1186. And the Illinois Appellate Court disagreed that applying Illinois’ Unemployment

Insurance Act to an interstate carrier would “prohibit motor carriers and drivers from establishing independent contractor relationships outside the context of the Act.” *C.R. England, Inc. v. Dep’t of Emp’t Sec.*, 7 N.E.3d 864, 880 (Ill. App. Ct. 2014).

Like the laws at issue in these cases, the Employment Security Act does not require Gulick to choose one business model over another. There is *nothing* in the record showing the Department made a “policy decision that the industry cannot have independent contractors.” Appellant’s Open. Br. 42.¹⁴ “Conspicuously absent from [Gulick’s] parade of horrors is any citation of authority showing that it would be required to comply” with other laws or reclassify its drivers for other purposes. *Costello*, 810 F.3d at 1056. The Court should reject Gulick’s bare assertion to the contrary.

The Employment Security Act “is precisely the type of background . . . law that only indirectly affects prices by raising costs.” *Costello*, 810 F.3d at 1055. It operates “one or more steps away from the moment at which the firm offers its customers a service for a particular price.” *S.C. Johnson & Son, Inc. v. Transp. Corp. of America, Inc.*, 697 F.3d 544, 558

¹⁴ Gulick also asserts that this Court held that six carriers—which did not include Gulick—“stated a valid claim against ESD for its impropriety in targeting the trucking industry for political purposes.” Appellant’s Open. Br. 43 (citing *Washington Trucking Ass’ns v. Emp’t Sec. Dep’t*, 192 Wn. App. 621, 369 P.3d 170 (2016)). While that case actually held only that the carriers *may* state a claim “if they can show that . . . imposing the assessments based on ESD’s audit procedures violated the constitution,” 192 Wn. App. at 647 (emphasis added), it is immaterial because the Washington Supreme Court recently reversed that opinion and dismissed the carriers’ complaint in its entirety. *Washington Trucking Ass’ns*, No. 93079-1, slip op. at 3, 33.

(7th Cir. 2012). This impact is too “tenuous, remote, or peripheral” to warrant FAAAA preemption. *Rowe*, 552 U.S. at 371.

4. The Act will not “punish” Gulick

The Act’s imposition of taxes also does not “punish” carriers for using any particular business model, as Gulick suggests. Appellant’s Open. Br. 48-49. Under RCW 50.29.025, the *highest* unemployment insurance tax rates are 6-6.5 percent of payroll,¹⁵ and not all wages are taxed, as there is a cap per worker. RCW 50.24.010. And at the time of the evidentiary hearing, Gulick’s tax rate was 0.66 percent. AR1 143, ¶ 5. The industry average for specialized freight haulers was 2.42 percent. *Id.* at ¶ 4. If Gulick reported its 120 owner-operators, its tax rate would likely *decrease* by increasing its taxable wages base. *Id.* at ¶ 7. In any event, the potential for a small increase in taxes is far removed from a nearly 100 percent increase in costs associated with wholesale reclassification of independent contractors as employees for purposes of multiple laws, as was the case in *Coakley*. 769 F.3d at 15.

Moreover, Gulick offered no evidence to demonstrate how often it terminates its contracts with owner-operators. Therefore, there is no way to know what its experience with unemployment claims would be. In fact, of the three owner-operators whom Gulick called to testify at the

¹⁵ At the time of the hearing, the highest tax rate any Washington employer could be assigned was 5.84 percent. AR1 at 143, ¶ 6.

evidentiary hearing, one had been driving for Gulick for two years, AR2 891, and another had been driving for Gulick for nine years. AR2 936. The third did not state how long she had been driving for Gulick. The limited evidence Gulick offered of the rate of job separations with its owner-operators demonstrated that it does not have high turnover.¹⁶

5. *Western Ports* concluded the FAAAA does not preempt Washington's Employment Security Act with respect to owner-operator drivers, and *Rowe* did not overrule it

Contrary to Gulick's assertion, *Western Ports* considered express preemption under the FAAAA, and *Rowe* did not overrule it. Appellant's Open. Br. 38-40.

Western Ports involved an owner-operator who was discharged and applied for unemployment benefits. 110 Wn. App. at 445-48. This Court considered and rejected two preemption arguments: 1) that federal transportation law, including the FAAAA, preempted the employment security law; and 2) that any state and federal leasing requirements may not be evidence of control or direction for purposes of the exception test. *Id.* at 453-57. Gulick makes both arguments. Appellant's Open. Br. 38-39. Noting that Congress makes it clear when it intends to prohibit taxing

¹⁶ Gulick's suggestion that the Department could encourage owner-operators to elect self-coverage under RCW 50.24.160 is a red herring. Appellant's Open. Br. 48. That statute allows employers whose workers are *not* in covered employment to elect coverage for them. RCW 50.24.160. If the owner-operators are covered workers, then the carrier is responsible for the unemployment insurance taxes. RCW 50.24.010.

authorities from burdening interstate commerce, this Court “decline[d] to infer that Congress, in enacting federal motor carrier law, intended to preempt state unemployment law.” *W. Ports*, 110 Wn. App. at 457.

While *Western Ports* did not discuss carriers’ prices, routes, and services, this Court was mindful of the FAAAA preemption clause—having cited its provisions—when it declared that federal transportation law does not preempt the Employment Security Act. *Id.* at 456-57. If this Court had believed that owner-operator coverage under the Act “related to” a carrier’s prices, routes, or services, it obviously would not have ruled that federal law does not preempt the Act. *Id.* at 454-57.

In fact, a Colorado court followed the “persuasive” analysis in *Western Ports* to hold the FAAAA “does not preempt the determination that claimant [truck driver] was in covered ‘employment’ for unemployment tax liability purposes.” *SZL, Inc.*, 254 P.3d at 1188. The Illinois Appellate Court similarly concluded that the Illinois Unemployment Insurance Act does not “fall within the massively limited scope of preemption ordered by the FAA Authorization Act.” *C.R. England, Inc.*, 7 N.E. 3d at 880-81. Gulick cites no case that holds the FAAAA preempts any state’s employment security law. There is none.

Indeed, Gulick cites no case holding that the FAAAA or the Airline act on which it is based preempts any tax.¹⁷ The Department is aware of none.

Gulick also incorrectly argues that *Rowe* overruled *Western Ports*. Appellant’s Open. Br. 39-40. *Rowe* merely noted that a state law can be preempted even if its effect on rates, routes, or services “‘is only indirect,’” provided that the impact is significant. *Rowe*, 522 U.S. at 370 (quoting *Morales*, 504 U.S. at 386). The two Maine tobacco laws in *Rowe* had a “direct ‘connection with’ motor-carrier services.” *Rowe*, 522 U.S. at 368, 371. One law required carriers to offer services that the market itself did not provide, and a second law imposed “civil liability on the carrier, not simply for its knowing transport of (unlicensed) tobacco, but for the carrier’s *failure sufficiently to examine every package.*” *Id.* at 372. It thus directly regulated a “significant aspect . . . of the essential details of a motor carrier’s system for picking up, sorting, and carrying goods—essential details of the carriage itself.” *Id.* at 373. In finding these provisions preempted, the Court emphasized, “the state law is not general, it does not affect truckers solely in their capacity as members of the

¹⁷ Gulick mischaracterizes *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003), claiming it supports that a “state’s administration of a tax, however, can have a sufficient connection” to invoke Airline act preemption. Appellant’s Open. Br. 34. Instead, that case held that a Puerto Rican law aimed at carriers and requiring specific delivery services to verify taxes on items were paid was preempted. *United Parcel Serv., Inc.*, 318 F.3d at 335-36. The court did not declare the tax preempted. As discussed above, the First Circuit later noted that the Airline act does not preempt state taxes. *See DiFiore*, 646 F.3d at 87; *Schwann*, 813 F.2d at 433.

general public, the impact is significant, and the connection with trucking is not tenuous, remote, or peripheral.” *Id.* at 375-76.

In contrast here, the Employment Security Act is not focused on trucking services, it does not require motor carriers to offer any particular services the market itself does not provide, and it does not directly regulate any essential details of the carriage of goods. By imposing unemployment taxes, the state in no way uses its regulatory power to “freeze in place” or “bind” carriers to specific prices, routes, or services. *Rowe*, 552 U.S. at 372. *Rowe* is entirely consistent with *Western Ports* and with applying the Act to interstate motor carriers.

No case overrides the governing precedent in *Western Ports* or supports that the FAAAA preempts the Employment Security Act.

VI. CONCLUSION

Gulick failed to prove that the owner-operators are excepted from unemployment insurance coverage under the Employment Security Act. Its argument that the assessment is preempted was properly rejected by the Commissioner. The Court should affirm the Commissioner’s order.

RESPECTFULLY SUBMITTED this 15th day of May, 2017.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script, appearing to read "Leah Harris".

LEAH HARRIS, WSBA # 40815
Assistant Attorney General
ERIC PETERSON, WSBA # 35555
Senior Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Roxanne Immel, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 1st day of May 2017, I caused to be served a true and correct copy of the **Respondent's Brief**, as follows to:

Email per agreement

Aaron Riensche
Jeffrey Dunbar
Ogden Murphy Wallace, PLLC
901 5th Ave, Suite 3500
Seattle, WA 98164-2008

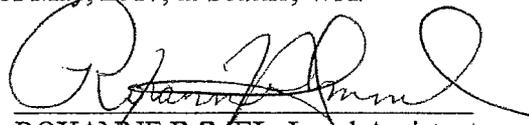
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Washington State Court of Appeals Division II

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 1st day of May, 2017, at Seattle, WA.


ROXANNE IMMEL, Legal Assistant

Appendix A

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2010

CONTRACT REV 12/03/09

**GULICK TRUCKING INC.
3000 SE HIDDEN WAY, SUITE 40E
VANCOUVER, WA 98661**

LEASE & SUBHAUL AGREEMENT WITH INDEPENDENT CONTRACTOR

THIS AGREEMENT MADE AND ENTERED INTO AS OF THE 25th DAY OF AUGUST, 2010, BY AND BETWEEN GULICK TRUCKING INC (HEREINAFTER CALLED CARRIER) AND BILLY BEADLE (HEREINAFTER KNOWN AS THE CONTRACTOR)

NOW, THEREFORE, Carrier and Contractor desire to enter into this Agreement in order for Carrier to utilize Contractor to transport freight and in consideration of the mutual covenants and agreements contained herein, the parties agree as set forth below.

AGREEMENTS

SECTION 1 - FURNISHING OF TRANSPORTATION SERVICE

1.1 Contractor agrees to furnish to Carrier the Transportation Services specified in this Agreement, utilizing the Equipment described in Exhibit A

1.2 Contractor agrees with Carrier to transport freight from origin points of shipment designated by Carrier to destination points of shipment. Instructions will be given to the Contractor regarding each load or trip, including the rate schedules on file at Carrier's office. Contractor will transport commodities pursuant to this Agreement in a manner which promotes the goodwill and reputation of the Carrier.

1.3 Contractor agrees to cooperate fully with all Carrier's dispatch personnel in performance of this Agreement.

1.4 Because of the liability of Carrier to shippers, pursuant to certain provisions of the Interstate Commerce Act governing motor carriers, if, in the opinion of the Carrier, Contractor fails to complete transportation of commodities in transit, abandons a shipment, or otherwise fails to deliver shipment, and thereby subjects Carrier to potential liabilities or loss of revenue, Contractor expressly agrees that Carrier shall have the right to take physical possession of the Equipment described in Exhibit A and complete the trip involved. Contractor hereby waives any recourse against Carrier for such action and agrees to reimburse Carrier for any costs, expenses or damages, arising out of such violation of contract by Contractor. Upon completion of such trip, said Equipment shall be returned to the possession of Contractor at any of Carrier's terminals. Conduct by Contractor, which causes Carrier to violate its obligations under the Interstate Commerce Act, shall be cause for termination of this Agreement.

1.5 If Contractor or Contractor's driver unreasonably fails to meet Carrier's scheduled pickup or delivery appointments set by Carrier or its customers, Contractor shall be charged Fifty Dollars (\$50.00) per occurrence.

1.6 If Contractor or Contractor's driver fails to follow temperature requirements set by Carrier or Carrier's customers, Contractor shall be charged Fifty Dollars (\$50.00) per incident in addition to any loss claimed by a customer of Carrier for such failure, and/or will be terminated.

1.7 Contractor or Contractor's driver shall be responsible for proper and secure loading. Contractor shall provide all labor necessary to load, transport and unload the commodities provided by Carrier. Contractor agrees to meet Carrier's scheduled pickup and delivery times and allow time for proper rest in compliance with government regulations applying to drivers.

SECTION 2 - DURATION OF AGREEMENT

2.1 This Lease Agreement becomes effective when executed by Contractor and by a duly authorized officer of Carrier

2.2 This Agreement will remain in effect for one (1) year from the effective date hereof, and unless sooner terminated pursuant to the terms and provisions of this Agreement, shall renew automatically on each annual date

SECTION 3 - RECEIPT OF TRAILER

If Contractor should elect to lease a trailer from Carrier, a trailer inspection report must be executed by Contractor every time Contractor changes trailers. This report is to be done by the trailer report macro in the QUALCOMM. Contractor must do this before trailer is moved as to keep a record on file. Any old damage will be marked with a sticker by Gufick Trucking's Maintenance. If minor damage occurs while in the Contractor's possession, Contractor is to report the damage using the QUALCOMM trailer macro. If damage is severe Contractor is to contact the Safety Office.

SECTION 4 - INDEPENDENT CONTRACTOR

Contractor is an independent contractor and is not an employee, agent, joint venture or partner of Carrier for any purpose whatsoever. Carrier shall have no right to and shall not control the manner or prescribe the method of accomplishing the services required by this Agreement, except as necessary for the Carrier to comply with applicable law. Contractor shall not represent to any governmental agency nor the general public that Contractor is an employee of Carrier, provided, however, that to the extent required by 49 CFR 1057.2, Carrier shall have possession, control and use of the Equipment for the duration of this Lease without thereby creating an employer/employee relationship between the parties. None of the provisions of this Agreement shall be interpreted or construed as creating or establishing the relationship of employer or employee between Carrier and Contractor, or Carrier and driver, agent or employee of Contractor.

SECTION 5 - EQUIPMENT

5.1 Contractor agrees to lease to Carrier and Carrier agrees to lease from Contractor the Equipment described in Exhibit A.

5.2 Carrier, or its authorized agent, on commencement of this Agreement, shall inspect the Equipment to determine whether the Equipment fully complies with the requirements of the United States Department of Transportation (USDOT) and of the Carrier. If the Equipment does not comply with said requirements, this Agreement shall become null and void. Contractor agrees that the Equipment shall be subject to inspection by Carrier's authorized representatives, agents or employees at Carrier's regular inspection station before the start of any trip and at any place enroute as deemed necessary by Carrier.

5.3 Contractor shall furnish to Carrier upon commencement of this Agreement a certified weight slip for tractor and if applicable trailer, complete with necessary equipment, and with one-third (1/3) full fuel tanks, so that Carrier may determine the maximum weight of materials or goods which Contractor may transport.

5.4 Contractor shall inspect the Equipment prior to its operation each day, perform tire checks and visual inspection each 150 miles or three (3) hours of operation, whichever may come first, and upon completion of each day's operation, shall perform a post-trip inspection and shall complete, sign and deliver to Carrier, a daily vehicle inspection report as required by 49 CFR 396.11, which includes the information required by that regulation. The Carrier shall retain the original report for at least 90 days and the Contractor shall retain a copy in the power unit. It shall also be the Contractor's responsibility, as driver of the Equipment, to comply with the requirements of 49 CFR 396.13. All required inspections should be noted on driver's logs, any safety repairs of Contractor's equipment will be repaired immediately. Any safety-related repairs required on Carrier's trailer(s) shall be reported by Contractor immediately to the Safety Department.

5.5 If the USDOT, any state DOT agency, or any other governmental agency with the authority to do so, inspects the Equipment during the term of this Agreement, a copy of said inspection report shall be delivered to the Carrier immediately, together with a record of repairs made to correct any defects noted in said report. All required inspections will be noted on driver's logs.

5.6 Carrier may place the Equipment out of service if, in the opinion of Carrier, the Equipment does not meet USDOT, state DOT or Carrier's standards. Equipment placed out of service may be placed back in service only after proof of required repairs is furnished to Carrier by Contractor and Carrier thereafter inspects the Equipment and approves it. If the Equipment is placed out of service, Carrier, at Carrier's option, may immediately terminate this Agreement.

5.7 Contractor agrees to furnish, as part of the Equipment leased by Carrier, the following accessories: all tie chains as required by applicable law and/or federal regulations and a minimum of three (3) load locks for use in securing loads in trailers, temperature recording device and any other equipment required to properly load or transport Carrier's freight.

5.8 The Equipment is to be used by Carrier for the transportation of property for hire and Carrier shall have the exclusive possession, control and use of the Equipment for the duration of this Agreement. Contractor shall not, without the express written consent of Carrier, transport persons or property of any third party for hire during the term of this Agreement.

5.9 Regular safety inspections will be required to be done by the Carrier's contract shop at no charge to the Contractor. The Carrier's contract shop will inspect and make recommendations for needed repairs that are found. Contractor may have the Carrier's shop do the repairs or use another repair shop. Contractor will provide a receipt to Carrier for repairs

SECTION 6 - TRAILER LEASING

6.1 Trailers leased to Contractor shall be on a full maintenance lease except as provided herein. All repairs of trailers shall be coordinated with and through Gullick Trucking Inc. maintenance supervisor. All road repairs require a purchase order provided by the maintenance supervisor or Safety Department to be valid.

6.2 Contractor will be responsible for all damages to trailer and tires, including but not limited to, damage to refrigerated units caused by low oil, water and/or Freon, caused by Contractor's operation of equipment. Carrier is only responsible for tire failure due to a defect during normal use. Contractor is to inform Carrier via Qualcomm of any tire failures. In addition, Contractor is to return damaged tire(s) to Carrier's Shop Supervisor between 9 00AM to 5 00PM Monday through Friday or if after hours to the shed adjacent to Safety

6.3 Contractor will provide fuel, oil and tire repairs, such as flat tires or damage from road hazards, at its own cost and expense. Contractor, at its own cost and expense will be responsible for interior washouts of trailer. Carrier will provide, through its Safety Department, one exterior wash each month. Contractor may provide additional exterior washes at its own cost if Contractor so chooses.

6.4 Contractor may not move Carrier's trailer from one location to another location without prior authorization from Carrier. Trailers are to stay in route determined by Carrier, using PC Miler to determine best route. If Contractor should move Carrier's trailer without authorization and/or out-of-route miles, Carrier shall charge Contractor for the miles traveled at a rate of 0.25 cents per mile, which charge will be deducted from Contractor's settlement.

6.5 Contractor shall return trailer(s) to Carrier's terminal at the end of the contract or whenever the parties terminate the contract. If Contractor should abandon trailer at any other location than Carrier's terminal, all costs incurred to recover trailer and return it to Carrier's terminal shall be charged to Contractor's Settlement and/or Performance Reserve Fund.

SECTION 7 - DISPLAY OF IDENTIFICATION

During the Contractor's operation of vehicles leased pursuant to this Agreement, Contractor agrees to furnish and to display identification for the Equipment to show that the Equipment is being operated by the Carrier. Carrier is entitled to identify the Equipment and display such identification thereon as required by all applicable laws and regulations. Upon the termination of this Agreement, Contractor shall immediately remove all identification from the Equipment and return any identification placards to the Carrier.

SECTION 8 - CARRIER'S OBLIGATION

During the term of this Agreement, Carrier shall use every reasonable effort to provide Contractor with as much volume of freight for transportation as circumstances permit. Carrier may, in the performance of its obligation under this Agreement, lump lease or interchange the Equipment to other motor carriers. Carrier shall pay Contractor a percentage of each load transported as set forth in Section 14.

SECTION 9 - CONTRACTOR'S EMPLOYEES

9.1 Contractor may, at Contractor's own expense, employ drivers, driver's helpers and laborers as Contractor determines appropriate to perform Contractor's responsibilities under this Agreement. Contractor and any such employees must be qualified and meet all requirements of USDOT and Carrier. Contractor, not Carrier, shall direct the operation of its employees in all respects, including, directing of routes commensurate with Carrier's authority and the cargo involved, the number of drivers and helpers per unit of equipment, the points of service and repair of the Equipment as required by this Agreement, fuel and equipment purchases and other matters normally within the control of an independent contractor. Contractor shall be solely responsible for the hiring, firing, supervision, training, working conditions, hours and compensation of Contractor's employees. Contractor shall determine the method, means and manner of Contractor's performance of this Agreement, but shall perform the same in strict accordance with USDOT regulations and Carrier's requirements under this Agreement.

9.2 Carrier shall not be responsible for the wages and expenses of Contractor's drivers, driver's helpers and other employees, nor for Social Security, Workers Compensation, unemployment and other payroll taxes of Contractor and Contractor's employees. Contractor agrees to hold Carrier harmless from any liability arising from the relationship of Contractor and any of its employees. Contractor shall be responsible for payment of all compensation, taxes, charges, benefits, claims and liabilities of every kind related to or pertaining to Contractor's employees.

8.3 Contractor shall not permit any person to operate the Equipment unless that person possesses the minimum qualifications required by USDOT, the Federal Motor Carrier Safety Administration, and all other governing agencies, including regulations of Gulick Trucking, Inc. Contractor's proof of compliance with said minimum qualification shall be submitted to Carrier.

SECTION 10 - COMPLIANCE WITH LAW

10.1 Contractor shall, in the performance of this Agreement, comply with all laws, rules and regulations of the Federal Motor Carrier Safety Administration, USDOT, and any state or provincial regulatory authority having jurisdiction over any aspect of this Agreement and with all of Carrier's rules and regulations. Contractor shall furnish the following to Carrier:

10.1(a) The original or a copy of the USDOT prescribed physical examination for each driver who will be operating the Equipment;

10.1(b) The original of the daily log of each driver who will be operating the Equipment;

10.1(c) The original of the daily vehicle inspection report for all vehicles leased hereunder, and

10.1(d) Such other documents as the USDOT, Federal Motor Carrier Safety Administration, PUC or any other governmental agency may require Carrier to maintain.

SECTION 11 - FINES OR PENALTIES

Carrier shall not be obligated to pay any fines or penalties assessed against Contractor or Contractor's employees. Carrier shall assume responsibility for proper licensing.

SECTION 12 - ACCIDENTS/DAMAGE

12.1 Contractor shall report all accidents to Carrier and/or to the insurance carrier in such a manner as Carrier shall advise.

12.2 Carrier shall not be liable to Contractor for any damage sustained by or to Contractor's Equipment while said Equipment is engaged in transportation services pursuant to this Agreement or for loss by confiscation or seizure of the Equipment by any public authority. When Contractor furnishes only a tractor to haul a trailer belonging to Carrier, Contractor shall be liable to Carrier for damages to the trailer while trailer is used by Contractor. Contractor shall be required to carry additional hired auto coverage for trailer leased from Carrier.

12.3 In the event of any cargo loss or damage, Contractor shall pay to Carrier the full amount of such loss or damage, excluding any portion of such loss reimbursed to Carrier by insurance.

12.4 Any amounts owed to Carrier under this Section may be deducted from Carrier's settlement payment to Contractor, provided, however, that when making such deduction, Carrier shall deliver to Contractor a written, itemized explanation of the deduction.

12.5 Contractor, or Contractor's driver, shall immediately contact Carrier by telephone in the event of an accident resulting in personal injuries, including death, to any person, or damage to property, including cargo, and in the event of incident involving hazardous materials, such as spills, leaking or damaged containers, or other releases.

12.6 Contractor shall cause a written report to be made to Carrier, and Carrier's insurance company, immediately after any accidents or hazardous material incidents, which shall contain all known or pertinent facts. Contractor agrees to make itself, or its involved employees, available to Carrier and Carrier's insurers for assistance in their preparation of any report required by Carrier, its insurers and regulatory agencies, and the resolution of any claims.

SECTION 13 - INSURANCE

13.1 Contractor shall furnish and maintain, throughout the term hereof at Contractor's expense, all Liability and Property Damage insurance pursuant to DOT and Federal Motor Carrier Safety Administration regulations, and other applicable laws, rules and regulations, and Cargo Liability insurance covering cargo carried under the provisions of this Agreement. Contractor shall be included as the insured while under such policies with respect to its activities undertaken in the performance of this Agreement.

13.2 Contractor will furnish throughout the term hereof at Contractor's expense, Collision and Specified Perils insurance covering Contractor's equipment specified and utilized in the performance of this Agreement.

13.3 Contractor agrees to provide Collision and Specified Perils insurance for Carrier's trailers while being used by Contractor at Contractor's expense. Contractor further agrees to hold Carrier harmless for covered equipment losses pursuant to the performance of this Agreement. Contractor agrees to be responsible for the first \$2,500.00 of Collision or Specified Perils damage or any damage not covered by Collision or Specified Perils insurance.

13.4 Contractor shall furnish, through the term hereof at Contractor's expense, Non-trucking Use/Bobtail Liability insurance with a limit of liability of \$1,000,000.00 combined single limit.

13.5 Contractor agrees to hold harmless and indemnify Carrier from and against all claims, losses, demands, liability, cost and expenses caused by, or arising out of, or connected with any injury to, or death of, any persons, or damage to property, including cargo, caused by Contractor's or Contractor's drivers operation of the Equipment, or any additional equipment under control of the Contractor, including attorneys fees and other reasonable costs of defense.

13.6 Contractor shall maintain Workers Compensation insurance, and shall provide Carrier evidence of such insurance in force, where required by Federal, State and Provincial law, for Contractor, for a driver, or for all other employees of Contractor governed by this Agreement. Carrier shall be named as additional insured in such policy.

13.7 Contractor shall furnish, through the term hereof at Contractor's expense, occupational accident insurance for each Contractor and/or Contractor's driver(s).

13.8 Contractor agrees that its pro-rata monthly premium for the foregoing insurance will be deducted from its settlement payments paid by Carrier to Contractor.

SECTION 14 - SETTLEMENT PAYMENTS

14.1 Carrier shall make settlement payments to Contractor of the rental herein provided on a per-shipment basis at a rate of eighty percent (80%) of the total income received by Carrier on each completed shipment that is using Carrier's trailer or eighty-seven percent (87%) if Contractor is using their own trailer. Said payments will be made every other Friday, per pay schedule, with (26) pay periods per year, covering all paperwork turned in by the last day of the previous pay period. Settlement payments shall consist of the percentage payments of each shipment, less in advances and less any amounts withheld by Carrier herein provided. Carrier shall specify the amounts withheld, if any, and the reason such amounts are being withheld. Carrier will afford Contractor copies of those documents which are necessary and available to determine the validity of the charge as to cargo, third party or property damage claims, or any amount held in reserve by Carrier pending settlement of such claims. Settlements not picked up by the Friday following the settlement date shall be mailed.

14.2 Fuel surcharges and reimbursed costs that are collected from Carrier's customers will be paid to Contractor at one hundred percent (100%) of the collected amount.

14.3 Carrier may withhold any revenue due Contractor until all paperwork required for settlements are submitted to Carrier. If there is a known claim for any type of cargo loss pending for any reason or if Carrier has good cause to believe that one will be made, Carrier may continue to hold such sums as will be necessary to satisfy such claims.

14.4 Carrier will allow a \$250.00 cash advance per week upon commencement of this contract at a fee of 10% of the advance taken. This advancement is to reimburse Contractor for costs incurred while under a load.

SECTION 15 - CARGO

15.1 Contractor shall check the identity, temperature (if temperature controlled), condition and count of all cargo tendered for transportation before accepting cargo loading to confirm that said cargo conforms to the bill of lading or loading manifest. Contractor shall immediately notify Carrier of any damage, shortages or temperature discrepancies.

15.2 Contractor shall immediately report to Carrier any accidents and/or incidents concerning the cargo, including any shortages, damage or temperature discrepancies claimed by consignee. Contractor agrees to pay Carrier Fifty Dollars (\$50.00) for each failure to immediately report said accidents and/or incidents to Carrier.

15.3 Contractor shall properly protect and promptly transport and deliver to consignee, or any person designated by Carrier, all cargo accepted by Contractor for transportation under dispatch of Carrier. If Contractor fails to protect such cargo or fails to promptly complete any such transportation or delivery, Carrier may take possession of the cargo and complete the transportation and delivery. Contractor shall be liable to Carrier for any costs, expenses or damages incurred by Carrier in taking possession, protecting, transporting and delivery of said cargo, including any damages paid to shipper or consignee thereof.

SECTION 16 - COSTS AND EXPENSES

16.1 Contractor shall assume, pay, indemnify and hold Carrier harmless from any and all costs and expenses incurred in the operation and maintenance of the Equipment, including but not limited to, fuel and service costs, repair and maintenance costs, taxes, tolls and other charges, fines and fees assessed against Contractor, its employees, agents or servants, or the Equipment, or Carrier during the term of this Agreement.

16.2 Should Contractor elect to hire lumpers for loading or unloading, Contractor shall do so at its own expense. Using such services does not relieve Contractor of any responsibilities for the loading or unloading.

16.3 Contractor shall pay directly to the proper agency all unemployment, excise or other taxes applicable to its payroll hereunder.

16.4 Contractor may use Carrier's accounts to charge fuel, lubricating oils and tire repairs. Any vehicle or equipment costs in excess of \$250.00 at any one time are to be pre-approved by Carrier. Contractor shall reimburse Carrier for all fuel, oils, and tire repair charged to Carrier's account. Fuel shall be charged to Contractor at three cents (.03) per gallon over Carrier's discounted price. Carrier shall deduct all costs from the settlement payments provided herein, including fuel card service fees of \$2.85 per transaction.

16.5 Contractor may use, upon Carrier's approval, accounts designated by Carrier for repair of Contractor's equipment. Costs of repairs will be deducted from Contractor's Performance Security Reserve Fund. Should the Contractor's Performance Security Reserve Fund become negative due to the deduction of the cost of repairs, an interest charge of eighteen percent (18%) per annum (approximately .6923076923% per each bi-weekly settlement), will be charged on that portion of the Fund that is negative. Any time that the Contractor's Performance Security Reserve Fund is less than \$2,500.00, an additional \$250.00 per bi-weekly settlement shall be deducted from the Contractor's settlement until such time that the Fund has a \$2,500.00 balance. The deduction shall not be taken should the settlement pay be negative. In addition, for each Contractor's repair that is paid by the Carrier, a charge of \$10.00 shall be assessed as a surcharge on the Contractor's settlement. The \$10.00 charge shall reimburse the Carrier for the cost of the any fees, credit card charge, administrative costs, etc.

16.6 Contractor must advise Carrier of any disputed charges regarding use of carrier's accounts, the Contractor's Performance Security Reserve Fund and Insurance Escrow Account or any matter related to the agreement set forth in this section within 30 days of the date on which Carrier provides Contractor with a settlement statement. Failure by Contractor to advise the Carrier of these disputed charges or related matters within the above time will result in Contractor waiving future rights to contest related charges or disputes.

16.7 Contractor shall furnish all licensing and prorata fees at Contractor's expense required to allow its operation in all such states required by Carrier, unless Contractor gives written notice by the 15th day of September of each year, of its intent to terminate this Agreement before January 1 of the following year. Contractor agrees that Carrier may withhold \$* from each settlement until Contractor's yearly license fee advanced by Carrier is paid and reimbursed.

16.8 If Contractor elects to file and pay the Federal Heavy Use Tax, Contractor shall provide the Carrier with proof of payment thereof in a timely manner.

16.9 Contractor shall furnish, or be furnished by Carrier, 24 pallets at commencement of operations. Any pallets furnished by Carrier to Contractor will be deducted from the next settlement at the going market rate, unless returned to Carrier's terminal or directed by Carrier's dispatch department.

SECTION 17 - CONTRACTORS PERFORMANCE SECURITY RESERVE AND INSURANCE ESCROW FUNDS

17.1 Contractor shall deposit with Carrier the sum of \$2,500.00 cash to be held by Carrier in a special account as Contractor's Performance Security Reserve Fund (The Fund). Additionally, Carrier will withhold from settlement payments to Contractor the sum of \$250.00 each bi-weekly settlement period to be added to said Fund. The deduction shall not be taken should the settlement pay be negative. When the account has reached a total of \$4,000.00, and has remained unbuclched for one full month, Carrier shall not take any more money from settlements as long as the Fund stays at \$4,000.00. This account shall be paid interest at the then 91 day (13-week) Treasury bills as established in the weekly auction by the Department of the Treasury. The interest rate shall be established on the on the first business day of every quarter.

17.2 In addition to the funds required in 17.1, Contractor shall be required to maintain a minimum of \$2,500.00 in an Insurance Escrow Fund, and Carrier shall not allow said Fund to drop below this amount, except should Contractor suffer an accident or cargo loss requiring Contractor to pay the deductible amount on insurance coverage. Contractor authorizes Carrier to withdraw \$250.00 per settlement to reimburse Fund to the \$2,500.00 amount. The deduction shall not be taken should the settlement pay be negative. This account shall be paid interest at the then 91 day (13-week) Treasury bills as established in the weekly auction by the Department of the Treasury. The interest rate shall be established on the on the first business day of every quarter.

17.3 Should the Contractor's Performance Security Reserve Fund become negative in the amount of \$4,000.00 or more, that amount, at carrier's option, may be reduced to a promissory note which contractor agrees to execute. Interest on the note and the amount of payments will be set at the time the note is written.

17.4 Moneys in said Fund may be applied by Carrier in reimbursement of costs, expenses and advances made by Carrier to or for the account of Contractor.

17.5 Schedule B: In lieu of Contractor's obligation under paragraph 17.1, Contractor may elect not to maintain the Contractor's Performance Security Reserve Fund. If Contractor elects this option, Contractor will sign Exhibit B. Contractor can not use any of Carrier's accounts with the exception of fuel account, and only for fuel purchase, draws, Pre-Pass, Fed Ex, Drug test and DOT physicals. For Exhibit B to stay in effect, Contractor will maintain a positive settlement balance on all settlements. Contractor will maintain a minimum of \$2,500.00 in the Insurance Escrow Fund. The minimum \$2,500.00 is to only be used for insurance deductible in the event of an accident or freight claim requiring insurance coverage.

17.6 After the termination of this Agreement and within no more than 45 days thereafter, Carrier shall refund the balance of the Fund(s) to Contractor, which balance shall be determined after the deduction of all of Contractor's obligations hereunder which are yet unpaid, and therewith Carrier shall provide Contractor a final accounting for all final deductions made from the Fund(s).

17.7 Carrier shall provide to Contractor an accounting of any transaction involving the Fund(s), which accounting shall be given with each settlement but no less often than monthly, and which shall indicate the amount and description of any deduction or addition to the Fund(s). Contractor may also demand such an accounting at any other reasonable time.

SECTION 18 - LAWFUL CHARGES

Contractor agrees that neither it nor any employee employed in the performance of this Agreement, has any authority to accept less than the lawful freight charges due Carrier from the consignee, nor to accept less than the prescribed COD charges due the shipper. All monies received by the Contractor, for COD charges, or freight charges, are the property of the Carrier, and the Contractor and other persons employed in the performance of this Agreement shall hold such monies as trustee for Carrier and shall remit the same immediately upon receipt thereof. Contractor further agrees that neither it, nor any person employed by it in the performance of this Agreement, has authority to execute or endorse any negotiable instrument for or on behalf of Carrier.

SECTION 19 - TERMINATION OF AGREEMENT

19.1 Except as otherwise allowed in this Agreement, either party may terminate this Agreement by giving the other party not less than thirty (30) days written notice before the date of such termination.

19.2 This Agreement may be terminated without prior notice by either party in the event of a substantial breach of the terms of this Agreement by the other party. Carrier may terminate this Agreement without prior notice if the Contractor, or its employee drivers, substantially violate the federal, state, provincial or Carrier safety rules and regulations, or is convicted of a felony or traffic crime. Carrier may terminate this agreement in the event of or due to the following actions of the Contractor:

19.2(a) Contractor exhibits a continuing pattern of late pickups and deliveries.

19.2(b) Contractor becomes unavailable for dispatch.

19.2(c) Contractor exhibits a continuing pattern of uncivil and/or impolite communications/relations with Carrier's employees and/or customers.

19.2(d) Contractor does not adequately maintain equipment entrusted to him/her as defined by the Carrier's maintenance guidelines.

19.3 Upon the termination of this Agreement, Contractor shall immediately return to Carrier all Carrier-issued Bills of Lading, manifests, tab cards, license plates, Qualcomm, fuel cards, transponders and other papers and forms provided by Carrier to Contractor for its use during the term of this Agreement. The time period in which the Carrier shall make its final settlement payment to Contractor shall not commence to run until all identification, plates and papers required to be returned to Carrier hereunder are received by Carrier. Any property not returned to the Carrier could result as a charge to the Contractor in their final settlement.

SECTION 20 - MISCELLANEOUS PROVISIONS

20.1 Contractor will be required to have Qualcomm Carrier will furnish the Qualcomm unit. Contractor will furnish mounting brackets, wiring and the installation fees. Contractor will pay monthly usage fees of \$60.00 per month. This fee is subject to change without prior notice. At termination of this Agreement, Contractor will pay fees for Qualcomm removal.

20.2 In the event Carrier makes any payments which are the obligation of Contractor hereunder, or carries out any of the terms of this Agreement which are the responsibility of Contractor and thereby incurs expense in so doing, Carrier may deduct such payments or expenses from the compensation due Contractor hereunder.

20.3 If Contractor is a partnership, Carrier may make disbursements due Contractor under the terms of this Agreement to any partner, and each other partner agrees to hold Carrier harmless for making such disbursement.

20.4 No waiver by Carrier of any provisions of this Agreement shall be deemed to be a waiver of any other provisions hereof, or of any subsequent breach by Contractor of the same or any other provision. Carrier's consent to or approval of any act by Contractor shall not be deemed to render unnecessary the obtaining of Carrier's consent to or approval of any subsequent act by Contractor, whether or not similar to the act or acts so consented to or approved.

20.5 Neither party shall make any assignment of any right, title, interest or obligation arising hereunder without the express written consent of the other. This document embodies the entire agreement of the parties hereto on the subject hereof and all prior discussions or agreements are merged herein. Any or all prior discussions or agreements between the parties on the subject matter hereof are hereby canceled and terminated.

20.6 No modification of this Agreement and no waiver of its terms shall be valid or binding unless in writing, signed by both parties.

20.6 Except as required by law, and as provided in the following sentence, the terms and conditions of this Agreement and information pertaining to any shipment hereunder shall not be disclosed by either party hereto, to persons other than its directors, officers, employees, agents, attorneys, accountants and/or auditors.

20.7 Contractor agrees not to compete or solicit Carrier's customers during the term of this Agreement and for no less than five (5) years after this Agreement is terminated.

20.8 Any notices relating to this Agreement shall be given to Carrier or Contractor in writing at the address set forth herein below or at such other address as either party shall designate in writing. Delivery or service of any notice shall be deemed to have been given when delivered personally, sent by overnight courier service, by fax transmission or by certified mail, return receipt requested, postage prepaid.

If to Carrier
Attention
Address
City, State, Zip
Phone.
Fax

Gulick Trucking, Inc
Safety Department
P.O. Box 10383
Portland, OR 97296-0383
360 699 0999
360 908.5623

If to Contractor: BILLY BEADLE
Attention *
Address 1410 322 ND PLACE
City State, Zip OCEAN PARK WA 98540

Phone 360 241 2394

Fax *

SECTION 21 - APPLICATION OF LAW

21.1 **Venue:** Any action or proceeding seeking to enforce any provision of or based on any right arising out of this Agreement will be brought against any of the parties in Multnomah County Circuit Court of the State of Oregon or, subject to applicable jurisdictional requirements, in the United States District Court for the District of Oregon, and each of the parties consents to the jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to such venue.

21.2 **WAIVER OF RIGHT TO TRIAL BY JURY:** CARRIER AND CONTRACTOR HEREBY WAIVE TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO WHICH CARRIER OR CONTRACTOR MAY BE PARTIES ARISING OUT OF OR IN ANY WAY PERTAINING TO THIS LEASE AND SUBHAUL AGREEMENT. THIS WAIVER IS MADE KNOWINGLY, WILLINGLY AND VOLUNTARILY BY THE CARRIER AND THE CONTRACTOR WHO EACH ACKNOWLEDGE THAT NO REPRESENTATIONS HAVE BEEN MADE BY ANY INDIVIDUAL TO INDUCE THIS WAIVER OF TRIAL BY JURY OR IN ANY WAY TO MODIFY OR NULLIFY ITS EFFECT.

21.3 **Governing Law:** This Agreement will be governed by and construed in accordance with the laws of the state of Oregon, without regard to conflict-of-law principles.

21.4 **Attorney Fee:** In the event of any default, dispute, arbitration or litigation arising out of this Agreement or with respect to this Agreement, the prevailing party shall be reimbursed by the other party for all cost and expenses incurred in connection with the default, dispute, arbitration or litigation, including, without limitation, reasonable attorney fees at the arbitration and trial levels and on appeal.

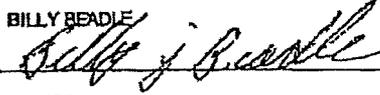
21.5 **Amendments:** This Agreement may be amended only by an instrument in writing executed by all parties. The provisions of this Section 21 shall survive the cancellation, termination or expiration of this Agreement.

IN WITNESS WHEREOF, this Agreement has been signed by the authorized representatives of Carrier and Contractor as of the date shown in the opening paragraph of this Agreement.

CONTRACTOR

Print: BILLY BEADLE

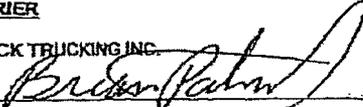
Date: 8/25/2010

Sign: 

Title: OWNER

CARRIER

GULICK TRUCKING INC.

Sign: 

Date: 8/25/2010

Title: SAFETY/LICENSE

EXHIBIT "A"

Contractor warrants that the following described equipment conforms with and meets the requirements of all-applicable Federal and State Laws and the Rules and Regulations of the ICC, US DOT and STATE Authorities

TRACTOR:

YEAR: 2000 UNIT NUMBER 439

LICENSE#

MAKE FRHT TARE WEIGHT. *

VIN# 1FUYSZB7YPA66468

FIFTH WHEEL HEIGHT NOT TO EXCEED 48":

EXHAUST STACK MINIMUM HEIGHT 13":

TRAILER:

YEAR * UNIT NUMBER *

LICENSE# * MAKE * TARE WEIGHT. *

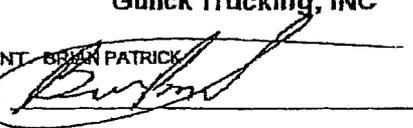
SERIAL NUMBER *

CARRIER

Gulick Trucking, INC

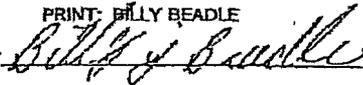
CONTRACTOR

PRINT: BOB PATRICK

SIG: 

TITLE: SAFETY/ LICENSE

PRINT: BILLY BEADLE

SIG: 

TITLE: OWNER

EXHIBIT "B"

Contractor agrees to maintain a minimum of \$2,500.00 in the Insurance Deductible Fund Account. Carrier will not require the Insurance Deductible Fund Account to be above \$2,500.00.

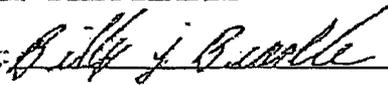
Contractor is waiving all rights to use Carriers cash advance service, repair and maintenance accounts, including loans of any kind with the exception of fuel accounts and then used only for fuel purchases, Federal Express, Drug Test and DOT Physicals. Express checks for lumpers, pallets and washouts will be allowed.

Contractor agrees that if these terms are not met this Exhibit "B" will be waived and no longer available to Contractor. At the time that this Agreement Exhibit "B" is no longer being met Carrier will contact contractor to sign Exhibit "B" Non Compliance.

CONTRACTOR

Print: BILLY BEADLE

Date 07/27/2010

Sig: 

CARRIERS4

Gulick Trucking, Inc

Print: BRIAN PATRICK

Date 07/27/2010

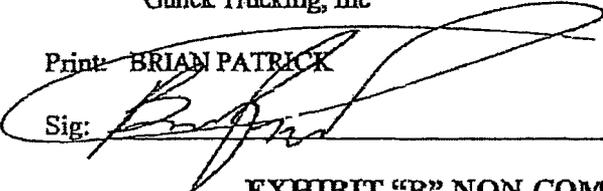
Sig: 

EXHIBIT "B" NON-COMPLIANCE

Contractor agrees that Exhibit "B" was not up held. Signing of this Exhibit "B" Non-Compliance will require Contractor to bring Insurance Deductible Fund Account into compliance that is stated in Section 17 – Contractors Performance Reserve number 17.1 of the Lease & Subhaul Agreement with Leased Contractor.

CONTRACTOR

Print: _____ Date: _____

Sig: _____ Date: _____

CARRIER

Gulick Trucking Inc

Print: _____ Date: _____

Sig: _____

Appendix B

**STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EMPLOYMENT SECURITY DEPARTMENT**

In re GULICK TRUCKING, INC Petitioner	DOCKET NO 012014-01281 ORDER ON MOTION FOR SUMMARY JUDGMENT ES REFERENCE NO. 827604-00-8
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A motion for summary judgment was held in this matter before Greg Weber, Administrative Law Judge, Washington State Office of Administrative Hearings, by telephone conference on August 5, 2014. The Petitioner was present and represented by Aaron Riensche. The Washington State Employment Security Department was present and represented by Assistant Attorney General Leah Harris. Assistant Attorney General Eric Peterson observed the motion hearing.

ISSUE PRESENTED:

Whether to grant the Petitioner's Motion for Summary Judgment based on federal preemption law 49 U.S.C. section 14501(c)(1).

ORDER SUMMARY:

The Petitioner's Motion for Summary Judgment on federal preemption is denied.

RECORD RELIED UPON: Petitioner's Motion for Summary Judgment on federal preemption, Declaration of Larry Pursley in Support of Petitioner's Motion for Summary Judgment, Declaration of Joe Rajkovic in Support of Petitioner's Motion for Summary Judgment, Declaration of Donald Adams in Support of Petitioner's Motion for Summary Judgment, Declaration of Aaron Riensche in Support of Petitioner's Motion for Summary Judgment, Department's Response to Petitioner's Motion for Summary Judgment on federal preemption, Declaration of Una Wiley, Petitioner's Reply in Support of Motion for Summary Judgment on federal preemption, all attachments provided by the parties, and oral argument heard on August 5, 2014.

ANALYSIS:

- 1 The Office of Administrative Hearings has authority to hear this matter pursuant to 34.05 RCW, RCW 34.12 RCW, and RCW 50.32.030, WAC 10-08, and WAC 192-04.

- 2 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c) " *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn 2d 570, 584, 192 P.3d 306 (2008) "The facts and reasonable inferences therefrom are construed most favorably to the nonmoving party" *Korslund v Dycorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 177, 125 P 3d 119 (2005) (citations omitted). "Summary judgment should be granted if reasonable persons could reach but one conclusion from the evidence presented." *Korslund*, 156 Wn 2d at 177
- 3 "The burden is on the moving party to demonstrate there is no issue as to a material fact, and the moving party is held to a strict standard" *Cowiche Canyon Conservancy v. Bosley*, 118 Wn 2d 801, 811, 828 P 2d 549 (1992) (citation omitted) If the moving party meets this initial showing and does not have the burden of proof at the forthcoming evidentiary hearing on the merits, then the nonmoving party must set forth specific facts that remain at issue to establish that here is a genuine issue to be resolved at the forthcoming hearing. *Young v Key Pharmaceuticals, Inc* , 112 Wn 2d 216, 225-226, 770 P 2d 182 (1989) (citations omitted)
4. The facts material to the case at issue, namely, if the "owner-operators" are employees of the petitioner or independent contractors for unemployment insurance purposes are disputed. However, it is possible to consider the legal issue of federal preemption without resolving the factual dispute. Accordingly, the factual dispute is not material to the issue of federal preemption, the issue on summary judgment. Therefore, the undersigned declines to make findings of fact for purposes of this motion.
- 5 The undersigned concludes, *Western Ports* is controlling law. *Western Ports* flowed from a claim for unemployment benefits by a former owner-operator and independent contractor. The Washington State Division I Court of Appeals stated "[the] federal statutory and regulatory scheme does not preempt state employment security law by which a person who might be an independent contractor under federal transportation or common-law principles may nevertheless be entitled to [unemployment insurance] compensation." *Western Ports. Transp., Inc v. Employment Sec. Dept. of the State of Wash* , 100 Wn App 440, 445, 41 P 3d 510 (2002)
- 6 Division I "reject[ed] [the] contention that federal transportation law permitting [independent contractor arrangements] preempts state employment security law." *Id* at 454 *Western Ports* clearly held that, for the purposes of employment security law, treating owner-operators as employees was not

preempted by the federal transportation law that governed independent contractor arrangements. Moreover, Division I did so specifically mindful that Congress prohibited the states from enacting or enforcing laws or regulations related to price, route or service. See *Id* at 456

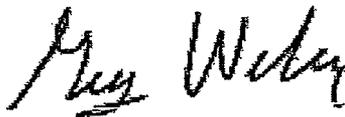
7. Applying the foregoing, the undersigned further concludes, that unemployment insurance taxation, including characterizing owner-operators as employees for the purposes of such taxation, is not subject to federal preemption
8. Therefore, the Petitioner's motion for summary judgment is denied

ORDER

IT IS HEREBY ORDERED:

The Petitioner's Motion for Summary Judgment is **DENIED**

Dated and mailed August 8, 2014, from Spokane Valley, Washington



Greg Weber
Administrative Law Judge
Office of Administrative Hearings

Certificate of Service

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein



Danielle Romo
Delivery S

MAILED TO

GULICK TRUCKING
C/O PENSER NORTH AMERICA
700 SLEATER KINNEY RD. SE, SUITE B-170 LACEY,
WA 98503-1150

ATTORNEY GENERAL OF WASHINGTON
LEAH HARRIS, MASAKO KANAZAWA, DIONNE PADILLA-HUDDLE 800
5TH AVENUE, SUITE 2000
SEATTLE, WA 98104

AARON P REINSCHER
OGDEN MURPHY WALLACE, PLLC 901 5TH
AVENUE SUITE 3500
SEATTLE, WA 98164-2008

Legal Appeals Unit
Employment Security Department PO Box
9046
Olympia, WA 98507-9046

ORDER ON MOTION
FOR SUMMARY JUDGMENT-4

012014-01281

Appendix C

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EMPLOYMENT SECURITY DEPARTMENT

In re:

GULICK TRUCKING INC.

Petitioner

DOCKET NO: 012014-01281

INITIAL ORDER

EMPLOYER ID: 827604-00-8

Result: Based on the issues in this case, the Notice and Order of Assessment is **AFFIRMED**. Read the full order below for details.

Hearing: This case was heard by Administrative Law Judge Greg Weber on September 8 and September 9, 2014 at Spokane Valley, Washington after notice to all interested parties.

Persons Present: The Petitioner was present and represented by Jeffrey D. Dunbar and Aaron P. Rienche from the law firm of Ogden, Murphy, and Wallace P.L.L.C. The Department was present and represented by Leah E. Harris, Assistant Attorney General. The Petitioner's witnesses: Donald Adams, Kelly Matlock, Latina DeJean and Hardy Carnes. The Department's witness Darith Lim and a Department observer Gerritt Eades.

Exhibits: The Administrative Law Judge (ALJ) admitted the following exhibits: Department's Exhibits 1 through 17; Petitioner's exhibits 1 through 12 and 18 through 21. In addition, two stipulations, dated August 4, 2014 and September 3, 2014, were submitted by the parties and incorporated as part of the record.

The purpose of the hearing was to determine whether:

- The owner-operators for whom contributions were assessed are employees pursuant to RCW 50.04.100 and RCW 50.04.140 and therefore an order and notice of assessment issued pursuant to RCW 50.24.070 properly holds the employer liable for unemployment tax contributions, interest and penalties in the amount of \$112,855.17.

After considering all of the evidence, the Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order.

FINDINGS OF FACT

1. On May 17, 2013, the Employment Security Department (Department) issued a written Order and Notice of Assessment which found Gulick Trucking (Gulick) liable for unemployment tax contributions, penalties, and interest for failing to pay employment taxes for owner-operators that the Department found employed by Gulick. The parties have stipulated that the accurate amount of the unemployment tax contributions, penalties, and interest at issue is \$112,855.17.
2. Gulick is the Petitioner in this matter and filed an appeal on May 23, 2014.
3. Gulick is a for hire common motor carrier and is based in Vancouver, Washington. Gulick operates throughout the 48 contiguous United States.
4. Gulick moves freight for its customers from one location to another location. Gulick receives an order to move freight from its customer. Gulick then moves the freight and the customer pays Gulick.
5. Gulick uses 146 truck drivers to transport the customers freight from one location to another location, 142 of which are owner-operators.
6. The owner-operators own their own truck.
7. The owner-operators use Gulick's Motor Carrier number to transport freight.
8. Gulick pays the owner-operators compensation every two weeks.
9. The owner-operators enter into a contract with Gulick to transport freight as assigned by Gulick for compensation. See Department's exhibit 10.
10. The contract states Gulick can take physical control/possession of the owner-operator's truck at the discretion of Gulick.
11. The contract states Gulick can fine owner-operators for failing to meet scheduled delivery and pickup times, failing to follow temperature requirements set by Gulick and failing to immediately report an accident to Gulick.
12. The contract prohibits an owner-operator from transporting a third person without written consent from Gulick.
13. The contract requires all of the owner-operators' equipment to comply with Gulick's standards.
14. The contract provides Gulick the option to place the owner-operators' equipment out of service if it does not meet Gulick's standards.

15. The contract allows Gulick the option to require owner-operators perform repairs on their equipment.
16. The contract states that Gulick's trailers, used by owner-operators, are to stay in the route determined by Gulick and any deviation of such route without Gulick's authorization will result in a \$0.25 per mile fine of the owner-operator.
17. Owner-operators are required to display Gulick's identification on their trucks.
18. The contract prohibits owner-operators from allowing anyone else to operate the equipment unless they possess minimum qualifications of Gulick.
19. Gulick requires owner-operators to check the identity, temperature, condition and count of all cargo/freight being transported.
20. Gulick has the right to terminate the owner-operator's employment, without notice, if the owner-operator exhibits a continuing pattern of late pickups and deliveries, becomes unavailable to Gulick's dispatch, does not adequately maintain the equipment or exhibits a continuing pattern of uncivil and/or impolite communications with Gulick's employees or customers.
21. Gulick prohibits the owner-operators from competing for or soliciting Gulick's customers during the employment agreement and for five (5) years after termination of the agreement.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear and decide this appeal under RCW, Chapters 50.32 and 34.05.
2. The first question is whether the owner-operator truck drivers were in Gulick's employment. Specifically, whether they performed personal services, of whatever nature, for wages or under any contract, calling for performance of such services. RCW 50.04.100. If answered in the affirmative, the owner-operators are in employment and Gulick must pay taxes on the wages unless the services are excluded from coverage by another section of Title 50 RCW. *Penick v. Employment Sec. Dep't*, 82 Wn.App. at 42; *Skrivanich v. Davis*, 29 Wn.2d 150, 157, 186 P.2d 364 (1947).
3. The test for personal service is whether the services in question were clearly performed for the benefit of another under an arrangement or agreement in which some act was to be performed. RCW 50.04.100; *Penick v. Employment Sec. Dep't*, 82 Wn. App. at 40. Wages are defined as remuneration and in accordance with RCW 50.04.320 remuneration means all compensation paid for personal services. The inquiry is whether there is a clear and direct connection between the personal services provided and the benefit received by the other party. *Cascade Nursing*

Svcs., Ltd. v. employment Security Dep't, 71 Wn.App. 23, 30 – 31, 856 P.2d 421 (1993).

4. Applying the foregoing to the facts of this case, the undersigned concludes, that the owner-operators were providing services, transporting merchandise/freight, for the benefit of Gulick Trucking for compensation/wages or pursuant to a contract for compensation/wages. Thus, the requirements of the above referenced statute, RCW 50.04.100, are met. Therefore, the owner-operators were in employment and subject to tax unless Gulick Trucking can establish that it is exempt from the definition of employment pursuant to another section of Title 50.
5. Taxing statutes are strictly construed in favor of applying the tax and closer scrutiny is required when taxes are collected for the benefit of a group that society seeks to aid, such as unemployed workers. *Western Ports Transp. v. Employment Sec. Dep't*, 110 Wn. App. 440, 451, 41 P.3rd 510 (2002); *Penick v. Employment Sec. Dep't*, 82 Wn.App. 30, 42, 917 P.2d 136 (1996) (existence of employment relationship is generally found). The exemption tests are strictly construed in favor of the application of the tax. *In re All-State Construction Company v. Gordon*, 70 Wn.2d 657, 425 P.2d 16 (1967).
6. The party claiming the exemption has the burden of proof to show an exemption applies. *Western Ports Transp.*, 110 Wn. App. At 451. Here, Gulick Trucking bears the burden of proof of showing that an exemption to paying taxes applies.
7. RCW 50.04.140(1) excludes from the definition of employment individuals so long as certain criteria are met by the employer:
 - (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and
 - (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside of all the places of business of the enterprise for which the service is performed; and
 - (3) 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;
8. The above referenced requirements are in the conjunctive and therefore the employer must meet each requirement for the exception to apply. *Jerome v. Employment Security Dep't*, 69 Wn. App. 810, 814, 850 P.2d 1345 (1993). Contractual language stating the worker is an independent contractor is not dispositive of the issue; instead all facts relating to the work situation must be considered. *Western Ports Transp. v. Employment Sec. Dep't*, 110 Wn. App. 440, 451, 41 P.3d 510 (2002).

9. Applying the foregoing to the facts of this case the undersigned concludes that Gulick Trucking has not met its burden, establishing that the owner-operators are exempt from tax as independent contractors pursuant to RCW 50.04.140. In this case, Gulick Trucking failed to establish the owner-operators had been and would continue to be free from control or direction over the performance of the services both under the contract of service and in fact. Indeed, Gulick Trucking exhibited significant control over the performance of service including but not limited to: the ability to take physical control/possession of the truck at the discretion of Gulick; fining owner-operators for failing to meet scheduled delivery and pickup, failing to follow temperature requirements set by Gulick and failing to immediately report an accident to Gulick; the owner-operators inability to transport third persons without written consent of Gulick; requiring all equipment to comply with Gulick's requirements; Gulick having the option to place equipment out of service if it does not meet Gulick's standards; Gulick having the option to require owner-operators to perform repairs on equipment; trailers are to stay in route determined by Gulick and any deviation of such route without Gulick's authorization will result in a \$0.25 per mile fine; owner-operators were required to display Gulick's identification on trucks; owner-operators were prohibited from allowing anyone else to operate equipment unless they possessed the minimum qualifications of Gulick; Gulick required owner-operators to check the identity, temperature, condition and count of all cargo; Gulick has the right to terminate the owner-operators employment without notice if the owner-operator exhibited a continuing pattern of late pickups and deliveries, became unavailable to Gulick dispatch, did not adequately maintain the equipment or exhibited a continuing pattern of uncivil and/or impolite communications with Gulick's employees or customers; finally Gulick prohibits the owner-operators from competing for or soliciting Gulick's customers during the employment agreement and for five (5) years after termination of the agreement. Thus, the Appellant/Gulick has failed to establish the first prong of the test under RCW 50.04.140.

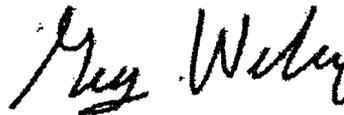
10. Therefore, without addressing the second and third prongs, Gulick has failed to meet the requirements of RCW 50.04.140, as Gulick must satisfy all of the prongs of the test in the conjunctive. Thus, Gulick has not met the requirements of RCW 50.04.140 and is subject to the assessed tax, interest and penalties.

Now therefore it is ORDERED:

The Order and Notice of Assessment from the Employment Security Department under appeal is **AFFIRMED**.

- The owner-operators for whom contributions were assessed are employees pursuant to RCW 50.04.100 and RCW 50.04.140 and therefore the May 17, 2013 Order and Notice of Assessment issued pursuant to RCW 50.24.070 properly holds Gulick Trucking liable for unemployment tax contributions, interest and penalties in the amount of \$112,855.17.

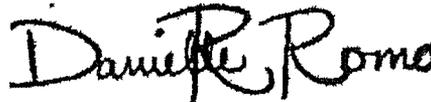
Dated and mailed November 26, 2014, from Spokane Valley, Washington.



Greg Weber
Administrative Law Judge
Office of Administrative Hearings

Certificate of Service

I certify that I mailed a copy of this order to each party at the address listed below postage prepaid on the date stated above.



Danielle Romo
Delivery Specialist

Mailed to:
GULICK TRUCKING INC.
C/O PENSER NORTH AMERICA
700 SLEATER KINNEY RD. SE, SUITE B-170
LACEY, WA 98503-1150

Employer

ATTORNEY GENERAL OF
WASHINGTON
LEAH HARRIS
800 5TH AVENUE, SUITE 2000
SEATTLE, WA 98104

Agency

EMPLOYMENT SECURITY
DEPARTMENT
LEGAL APPEALS UNIT
PO BOX 9046
OLYMPIA, WA 98507-9046

Agency

OGDEN MURPHY WALLACE, PLLC
AARON P. REINSCH
901 5TH AVENUE
SUITE 3500
SEATTLE, WA 98164-2008

Employer Representative

YOU HAVE THE RIGHT TO APPEAL

This decision becomes final unless a Petition for Review is mailed to the address below. If you disagree with the administrative law judge's order, you may file a Petition for Review stating the reasons why you disagree. Include the docket number on your Petition for Review. Do not write more than five (5) pages. You may use the form on the following page to file your Petition for Review.

Submit your Petition for Review to:

**Commissioner's Review Office
Employment Security Department
P.O. Box 9555
Olympia, Washington 98507-9555**

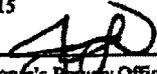
Your Petition for Review must be postmarked on or before **December 26, 2014**.

Do not file your Petition for Review by facsimile (fax).

Appendix D

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses, postage prepaid, on August 28, 2015



Representative, Commissioner's Review Office
Employment Security Department

TAX

**BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON**

Review No. 2015-0110

In re:

GULICK TRUCKING, INC.
Tax ID No. 827604-00-8

Docket No. 012014-01281

DECISION OF COMMISSIONER

This is an unemployment insurance tax dispute between the Employment Security Department ("Department") and the interested employer, Gulick Trucking, Inc. ("Gulick"). The Department conducted an audit of Gulick for the period of 2009, 2010, 2011, and the first three calendar quarters of 2012. As a result of the audit, 120 individuals (i.e. owner-operators) hired by Gulick were reclassified as employees of Gulick and their wages were deemed reportable to the Department for unemployment insurance tax purposes. *See* Department's Exhibit 15; *see also* Stipulations, Attachment A. The Department issued an Order and Notice of Assessment on May 17, 2013, assessing Gulick contributions, penalties, and interest in the amount of \$155,133.33. *See* Department's Exhibit 1. Gulick filed a timely appeal from the Order and Notice of Assessment. *See* Department's Exhibit 2. Subsequently, the Department stipulated that it would remove the contributions, penalties, and interest assessed for all quarters of 2009 and the first quarter of 2010, *see* Stipulations ¶ 3; and Gulick stipulated to the correctness of the amount of wages for the remaining quarters (i.e. the second, third, and fourth quarters of 2010; the first, second, third, and fourth quarters of 2011; and the first, second, and third quarters of 2012). *See* Stipulations ¶ 6. As a result of the parties' stipulations, the total amount of the assessment in dispute became \$112,855.17 for the period in question. *See* Stipulations ¶ 6.

Prior to the evidentiary hearing held on September 8 and 9, 2014, Gulick moved the Office of the Administrative Hearings ("OAH") for summary judgment on federal preemption ground.

The OAH denied Gulick's motion, holding that the unemployment insurance taxation was not subject to federal preemption. *See* Order on Motion for Summary Judgment ¶ 7. Thereafter, the parties proceeded to the evidentiary hearing on the remaining issues of whether the owner-operators in dispute were in "employment" of Gulick pursuant to RCW 50.04.100 and, if so, whether their services were exempted from coverage pursuant to RCW 50.04.140. After the evidentiary hearing, the OAH issued an Initial Order on November 26, 2014, holding that the disputed owner-operators were in "employment" of Gulick pursuant to RCW 50.04.100 and that their services were not exempted from coverage pursuant to RCW 50.04.140. On December 23, 2014, Gulick timely petitioned the Commissioner for review of the Initial Order. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. On January 30, 2015, the Commissioner's Review Office received a reply filed by the Department. Having reviewed the entire record (including the audio recording of the various hearings) and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we adopt the OAH's findings of fact and conclusions of law in the Initial Order, subject to the following additions and modifications.

Preemption

The Social Security Act of 1935 (Public Law 74-271) created the federal-state unemployment compensation program. The program has two main objectives: (1) to provide temporary and partial wage replacement to involuntarily unemployed workers who have been recently employed; and (2) to help stabilize the economy during recessions. The Federal Unemployment Tax Act of 1939 ("FUTA") and Titles III, IX, and XII of the Social Security Act ("SSA") form the basic framework of the unemployment compensation system. The U.S. Department of Labor oversees the system, with each state administering its own program.

Federal law defines certain requirements for the unemployment compensation program. For example, SSA and FUTA set forth broad coverage provisions, some benefit provisions, the federal tax base and rate, and administrative requirements. Each state then designs its own unemployment compensation program within the framework of the federal requirements. The state statute sets forth the benefits structure (e.g., eligibility/disqualification provisions, benefit amount) and the state tax structure (e.g., state taxable wage base and tax rates).

Generally speaking, FUTA applies to employers who employ one or more employees in covered employment in at least 20 weeks in the current or preceding calendar year or who pay

wages of \$1,500 or more during any calendar quarter of the current or preceding calendar year. *See* 26 U.S.C. § 3306(a)(1). Under FUTA, the term “employee” is defined by reference to section 3121(d) of the Internal Revenue Code. *See* 26 U.S.C. § 3306(i). In turn, 26 U.S.C. § 3121(d)(2) defines “employee” to be any individual who, under the *usual common law rules* applicable in determining the employer-employee relationship, has the status of an employee. In 1987, the IRS issued Revenue Ruling 87-41, distilling years of case law interpreting “usual common law rules” into a more manageable 20-factor test.¹ While these 20 factors are commonly relied upon, it is not an exhaustive list and other factors may be relevant. Furthermore, some factors may be given more weight than others in a particular case. In 1996, the IRS reorganized the 20 factors into three broad categories: behavioral control, financial control, and relationship of the parties. *See* IRS, Independent Contractor or Employee? Training Materials, Training 3320-102 (October 30, 1996). However, regardless of the length and complexity of the tests developed by the IRS to clarify coverage issues for federal taxation purposes, we have cautioned that FUTA does not purport to fix the scope of coverage of state unemployment compensation laws. *See In re Coast Aluminum Products, Inc.*, Empl. Sec. Comm’r Dec. 817 (1970) (“A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books.” (*quoting Steward Machine Co. v. Davis*, 301 U.S. 548, 593 (1937))).

State legislatures tend to cover employers and employment that are subject to the federal taxation. Although the extent of state coverage is greatly influenced by federal statute, each state is free to determine the employers who are liable for contributions and the workers who accrue rights under its own unemployment compensation laws. Here in Washington, the first version of the Employment Security Act (or “Act”), which was then referred to as “Unemployment Compensation Act,” was enacted by the state legislature in 1937. *See* Laws of 1937, ch. 162. This first version of the Act contained a definition of “employment,” *see* Laws of 1937, ch. 162, §

¹ The 20 factors are instructions; training; integration; services rendered personally; hiring, supervising, and paying assistants; continuing relationship; set hours of work; full time required; doing work on employer’s premises; order or sequence set; oral or written reports; payment by hour, week, month; payment of business and/or traveling expenses; furnishing of tools and materials; significant investment; realization of profit or loss; working for more than one firm at a time; making service available to general public; right to discharge; and right to terminate. *See* Rev. Rul. 87-41, 1987-1 C.B. 296.

19(g)(1)²; and a three-prong “independent contractor” or ABC test. See Laws of 1937, ch. 162, § 19(g)(5).³

The legislature introduced major revisions to the definition of “employment” in 1945 by adding, among other things, the phrase “*unlimited by the relationship of master and servant as known to the common law or any other legal relationship.*” See Laws of 1945, ch. 35, § 11 (emphasis added). The added language greatly expanded the scope of the employment relationship as covered by the Employment Security Act beyond the scope of the employment relationship as covered by FUTA. Compare RCW 50.04.100 with 26 U.S.C. § 3306(i) and 26 U.S.C. § 3121(d)(2); see also In re All-State Constr. Co., 70 Wn.2d 657, 664, 425 P.2d 16 (1967) (the test to be applied in determining the employment relationship under the Act is a statutory one; and common law distinctions between employees and independent contractors are inapplicable); Skriwanich v. Davis, 29 Wn.2d 150, 158, 186 P.2d 364 (1947) (the 1945 legislature intended and deliberately concluded to extend the coverage of the Act and by express language to preclude any construction that might limit the operation of the Act to the relationship of master and servant as known to the common law or any other legal relationship); Unemp’t Comp. Dep’t v. Hunt, 17 Wn.2d 228, 236, 135 P.2d 89 (1943) (our unemployment compensation act does not confine taxable employment to the relationship of master and servant, but brings within its purview many individuals who would otherwise have been excluded under common law concepts of master and servant, or principal and agent). Since then, the definition of “employment” under the Act has remained largely unchanged. Moreover, the “independent contractor” or ABC test has also

² In the first version of the Act, “employment” was defined to mean “service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.” See Laws of 1937, ch. 162, § 19(g)(1).

³ In the first version of the Act, the “independent contractor” or ABC test read as follows:

Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the director that: (i) Such individual 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; and (ii) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and (iii) Such 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.

See Laws of 1937, ch. 162, § 19(g)(5).

remained the same, except that in 1991 the legislature added a separate, six-prong test to the traditional three-prong test. *See* ESSB 5837, ch. 246 § 6, 52nd Leg., Reg. Sess. (Wash. 1991); *compare* RCW 50.04.140(1) *with* RCW 50.04.140(2).

Over the years, the appellate courts in Washington as well as the Commissioner's Review Office (as the final agency decision-maker on behalf of the Department) have grappled with the concept of "employment" under RCW 50.04.100 and applied the "independent contractor" test under RCW 50.04.140 in various factual scenarios, finding any given relationship either within or outside the intended scope of the Act. *See, e.g., State v. Goessman*, 13 Wn.2d 598, 126 P.2d 201 (1942) (barbers were held to be in employment of the barber shop; but the legislature later enacted RCW 50.04.225 to exempt barbers from covered employment); *Skrivanich*, 29 Wn.2d 150 (crew members were in employment of the fishing vessel); *All-State Constr. Co.*, 70 Wn.2d 657 (siding applicators were in employment of the construction company); *Miller v. Emp't Sec. Dep't*, 3 Wn. App. 503, 476 P.2d 138 (1970) (individuals performing bucking and falling activities were in employment of the logging contractor); *Schuffenhauer v. Emp't Sec. Dep't*, 86 Wn.2d 233, 543 P.2d 343 (1975) (clam diggers were in employment of the wholesaler of clams); *Daily Herald Co. v. Emp't Sec. Dep't*, 91 Wn.2d 559, 588 P.2d 1157 (1979) (bundle droppers were in employment of the newspaper publisher); *Jerome v. Emp't Sec. Dep't*, 69 Wn. App. 810, 850 P.2d 1345 (1993) (food demonstrators were in employment of the food demonstration business); *Affordable Cabs, Inc. v. Emp't Sec. Dep't*, 124 Wn. App. 361, 101 P.3d 440 (2004) (taxicab drivers were in employment of the taxicab company); *but, see, e.g., Cascade Nursing Serv., Ltd. v. Emp't Sec. Dep't*, 71 Wn. App. 23, 856 P.2d 421 (1993) (nurses were not in employment of the nurse referral agency); *In re Judson Enterprises, Inc.*, Empl. Sec. Comm'r Dec.2d 982 (2012) (no employment relationship was found because a business entity could not be an employee unless it was shown that the business entity is actually an individual disguised as a business entity).

Two state appellate decisions pertained specifically to the trucking industry. In *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 917 P.2d 136 (1996), Division Two of the Court of Appeals dealt with the relationship *between* a motor carrier who owned the trucks *and* the drivers who were hired to drive the trucks ("contract drivers"). In that case, the motor carrier owned the trucks and operated them under its authority from the Interstate Commerce Commission. The carrier supplied fuel, repairs and maintenance, license, and insurance; and it also handled state and federal reporting requirements. The contract drivers paid their own federal income tax, social security and medicare

taxes, and motel and food expenses; they did not receive sick leave, vacations, or other benefits. The contract drivers could hire a “lumper” if they needed help in loading or unloading. The contracts, which could be terminated by either party at any time, entitled the contract drivers to 20 percent of the gross revenue generated by the loads they hauled. In the event of an accident, the contract drivers were required to pay damages not covered by the \$2,500 deductible of the carrier’s insurance policy. The contract drivers were also liable for shortage and cargo damage. The drivers often installed a variety of amenities on their assigned trucks to make life on the road more comfortable. The motor carrier secured the load for the outgoing trip, and the contract drivers occasionally obtained their own loads. Any driver was free to reject an offer to haul a load secured by the carrier and, instead, could choose to haul a load obtained by the driver. The carrier obtained return loads for about half the trips, and the drivers found their own return loads for the other half of the trips. The motor carrier handled the billing and collection and provided bi-weekly draws for trip expenses to the drivers. It also made bi-weekly payments to the drivers for their share of the payment for a particular haul. The carrier required its drivers to clean the inside and outside of the truck, adhere to all federal and state laws and safety regulations, and to call in every day by 10 a.m. while en route. But the motor carrier allowed the drivers to select their own routes and to select their driving hours, so long as the hours complied with legal requirements regarding maximum driving time and rest periods. The carrier also permitted the drivers to take other people with them. *Id.* at 34-35. After examining all relevant facts, the Penick court held that the contract drivers were in employment of the motor carrier pursuant to RCW 50.04.100 and that their driving services were not exempted from coverage under the “independent contractor” test pursuant to RCW 50.04.140. *Id.* at 39-44. However, the Penick court did not address the coverage issue pertaining to the owner-operators (who owned the trucks but leased them to the carrier) because the motor carrier prevailed on that issue before the Commissioner’s Review Office and did not appeal. *Id.* at 39. Because the Commissioner’s Review Office did not publish the decision in the Penick matter, our holdings in that matter cannot be deemed precedential. *See* RCW 50.32.095 (commissioner may designate certain decisions as precedents by publishing them); *see also* W. Ports Transp., Inc. v. Emp’t Sec. Dep’t, 110 Wn. App. 440, 459, 41 P.3d 510 (2002) (unpublished decisions of Commissioner have no precedential value).

Six years later, Division One of the Court of Appeals spoke on the coverage issue pertaining to the relationship between a motor carrier and one of its owner-operators. *See* W. Ports

Transp., 110 Wn. App. 440. In W. Ports, the motor carrier contracted for the exclusive use of approximately 170 trucks-with-drivers (or owner-operators). The owner-operators either provided and drove their own trucks or hired others to drive them exclusively for the carrier. The standard independent contractor agreement contained various requirements that were dictated by federal regulations governing motor carriers that utilized leased vehicles-with-drivers in interstate commerce; it also contained the carrier's own rules and policies. Pursuant to the independent contractor agreement, the owner-operators were required to operate their trucks exclusively for the carrier, have the carrier's insignia on the trucks, purchase their insurance through the carrier's fleet insurance coverage, participate in all the company's drug and alcohol testing programs, obtain the carrier's permission before carrying passengers, notify the carrier of accidents, roadside inspections, and citations, keep the trucks clean and in good repair and operating condition in accordance with all governmental regulations, and submit monthly vehicle maintenance reports. The carrier determined the owner-operators' pickup and delivery points and required them to call or come in to its dispatch center to obtain assignments not previously scheduled and to file daily logs of their activities. The owner-operators received flat rate payments for the loads hauled and were paid twice per month. The carrier had broad rights of discharge under the independent contractor agreement, and could terminate the contract or discipline the owner-operators for tardiness, failure to regularly contact the dispatch unit, failure to perform contractual undertakings, theft, dishonest, unsafe operation of the trucks, failure of equipment to comply with federal or state licensing requirements, and failure to abide by any written company policy. The owner-operators, however, did have some autonomy. For example, the owner-operators decided the route to take in making deliveries; they also could have other drivers to operate the trucks in providing services under terms of the independent contractor agreement. The owner-operators paid all of their truck operating expenses and deducted the expenses on their federal income tax returns. *Id.* at 445-47. Based on these facts, the W. Ports court found that the carrier exerted considerable direction and control over the driving services performed by the owner-operator and, accordingly, it failed the first prong of the "independent contractor" test under RCW 50.04.140(1)(a). *Id.* at 452-54. The W. Ports court also considered and rejected the carrier's contention that federal transportation law preempted state employment security law. *Id.* at 454-57.

In this case, the interested employer, Gulick, is an interstate motor carrier duly licensed by the U.S. Department of Transportation and the Federal Motor Carrier Safety Administration (the

successor agency to Interstate Commerce Commission). Gulick operates throughout the 48 contiguous states and is based in Vancouver, Washington. *See* Declaration of Adams in Support of Petitioner's Motion for Summary Judgment ("Decl. of Adams") ¶ 3. Gulick is a family-owned business and has been in operation since approximately 1973. *See* Decl. of Adams ¶ 2. Gulick employs company drivers to drive equipment that it leases; and it currently has four employee drivers on staff. Besides the employee drivers, Gulick also uses 152 owner-operators, who either own their trucking equipment or are leasing or purchasing their trucking equipment from third parties unrelated to Gulick. *See* Decl. of Adams ¶¶ 4 & 5.⁴ Gulick enters into written contracts with all of the owner-operators from whom Gulick leases the trucking equipment, *see* Decl. of Adams ¶ 6; and it provides owner-operators with loads, access to insurance, operating authority, billing, collections and all regulatory support. *See* Department's Exhibit 5, p. 1. According to Adams, the use of owner-operators is a common and widespread practice within the trucking industry; and it provides Gulick with seasonal flexibility by allowing Gulick to meet the fluctuating demand without having to purchase expensive trucks and trailers and without having to terminate employees when the demand subsides. Additionally, this business model provides a market for owner-operators within which they may establish their own independent businesses; and the owner-operators will have the same flexibility and are not subject to termination as a result of a dip in demand from one carrier as they can provide services to another carrier. *See* Decl. of Adams ¶ 4.

As discussed above, the Department conducted an audit of Gulick for various quarters in 2010, 2011, and 2012; and, subsequently, reclassified the owner-operators as employees of Gulick and deemed their wages to be reportable for unemployment insurance tax purposes. Gulick moved the OAH for summary judgment on federal preemption ground, essentially arguing that it is entitled to judgment as a matter of law because RCW 50.04.100 and RCW 50.04.140 as applied to motor carriers of the trucking industry in Washington is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). The crux of Gulick's argument is that the Department's efforts in applying RCW 50.04.100 and RCW 50.04.140 to the trucking industry will eliminate the use of owner-operators from the trucking industry and effectively restructure

⁴ Here, we rely on the record developed in support of the summary judgment motion. Subsequently, the parties stipulated to the fact that all owner-operators owned their trucking equipment. *See* Stipulations ¶ 4. Mr. Adams corrected the number of the owner-operators to be 142. *See* Testimony of Adams, Transcript of Record at 157.

that industry, resulting in a substantial impact on its prices, routes, and services. The Department responded by arguing that the Washington's leading case, W. Port, has rejected the argument that the state employment security law is preempted by federal motor carrier law; and that preemption should not apply because any impact its application of RCW 50.04.100 and RCW 50.04.140 may have on motor carriers is far too tenuous, remote, or peripheral to be preempted.

Federal preemption is based on the United States Constitution's mandate that the "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." See U.S. CONST., art. VI, cl. 2; see also Ameriquet Mortg. Co. v. Washington State Office of Atty. Gen., 170 Wn.2d 418, 439, 241 P.3d 1245 (2010) (federal law may preempt state law by force of the Supremacy Clause of the United States Constitution). A state law that conflicts with federal law is said to be preempted and is "without effect." See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608 (1992). Federal law may preempt state law in any of the three ways: (1) expressly by the federal law's terms; (2) impliedly by Congress' intent to occupy an entire field of regulation; or (3) by the state law's direct conflict with the federal law. See Michigan Canners & Freezers Assoc. v. Agric. Mktg & Bargaining Bd., 467 U.S. 461, 469, 104 S. Ct. 2518 (1984). There are "two cornerstones" of federal preemption jurisprudence: First, the purpose of Congress is the ultimate touchstone in every preemption case; second, where Congress has legislated in a field traditionally occupied by states, there is a presumption against preemption. See Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187 (2009). Where Congress has superseded state legislation by statute, the courts' task is to identify the domain expressly preempted. To do so, the courts must first focus on the statutory language, which necessarily contains the best evidence of Congress' preemptive intent. See Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1778 (2013) (internal citations and quotation marks omitted).

Congress enacted the Airline Deregulation Act ("ADA") in 1978 with the purpose of furthering "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces." See 49 U.S.C. §§ 40101(a)(6) & (a)(12)(A). The ADA included a preemption provision that Congress enacted to "ensure that the States would not undo federal deregulation with regulation of their own." See Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364, 368, 128 S. Ct. 989 (2008) (quoting Morales v. Trans World Airlines, 504 U.S. 374, 378, 112 S. Ct. 2031 (1992)). The provision specifically provides that "a State . . . 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 an air carrier” See 49 U.S.C. § 41713(b)(1).

In 1980, Congress deregulated the trucking industry. See Rowe, 552 U.S. at 368 (citing Motor Carrier Act of 1980, 94 Stat. 793). Then, a little over a decade later, in 1994, Congress borrowed the preemption language from the ADA to preempt state trucking regulation and thereby ensure that the states would not undo the deregulation of trucking. *Id.* (citing FAAAA, 108 Stat. 1569, 1605-06). The FAAAA preemption provision states:

. . . [A] State . . . 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 . . . with respect to the transportation of property.

See 49 U.S.C. § 14501(c)(1). Consistent with its text and history, the U.S. Supreme Court (“Court”) has instructed that, in interpreting the preemption language of the FAAAA, courts should follow decisions interpreting the similar language in the ADA. See Rowe, 552 U.S. at 370.

In Morales, the Court first encountered the identical preemption provision under the ADA; and the Court adopted its construction of the term “related to” from its preemption jurisprudence under the Employee Retirement Income Security Act of 1974, defining the term broadly as “having a connection with or reference to airline rates, routes, or services.” See Morales, 504 U.S. at 384. The Court, however, reserved the question of whether some state actions may affect airline fares in “too tenuous, remote, or peripheral a manner” to trigger preemption, giving as examples state laws prohibiting gambling and prostitution as applied to airlines. *Id.* at 390. Over a decade later, in Rowe, the Court examined whether the FAAAA preempted a state’s tobacco delivery regulation, which imposed several requirements on drivers of tobacco products. See Rowe, 552 U.S. at 369. In holding that the state’s statute was preempted by FAAAA, the Court essentially adopted its reasoning in Morales, because ADA and FAAAA consisted of identical preemption language and further because “when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.” *Id.* at 370 (quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85, 126 S. Ct. 1503 (2006)). In reaffirming Morales, the Court in Rowe explained:

. . . (1) that “[s]tate enforcement actions having a connection with, or reference to,” carrier “‘rates, routes, or services’ are pre-empted”;

(2) that such pre-emption may occur even if a state law's effect on rates, routes, or services "is only indirect"; (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and pre-emption-related objectives.

Id. (internal citations omitted). Subsequently, the Court cautioned that the breath of the words "related to" did not mean the sky was the limit and that the addition of the words "with respect to the transportation of property" massively limited the scope of preemption ordered by the FAAAA. See Pelkey, 133 S.Ct. at 1778 (FAAAA did not preempt state-law claims for damages against a towing company regarding the company's post-towing disposal of the vehicle) (internal quotation marks omitted). Finally, in Am. Trucking Ass'n, Inc. v. City of Los Angeles, 133 S. Ct. 2096 (2013), the Court addressed another aspect of the FAAAA preemption – the "force and effect of law" language, drawing a distinction between a government's exercise of regulatory authority and its own contract-based participation in the market. The Court held that, when the government employed the "hammer of the criminal law" to achieve its intended goals, it acted with the force and effect of law and thus the concession agreement's placard and parking provisions were preempted by the FAAAA because such provisions had the "force and effect of law." *Id.* at 2102-04.

In the meantime, the Ninth Circuit Court of Appeals has on several occasions spoken on the FAAAA's preemptive effects on state law. For example, in Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1189 (1998), the Ninth Circuit held that California's prevailing wage law, a state law dealing with matters traditionally within a state's police powers, had no more than an indirect, remote, and tenuous effect on and, thus, was not "related to" the motor carriers' prices, routes, and services within the meaning of the FAAAA's preemption clause. Most recently, the Ninth Circuit, in holding that California's meal and rest break laws were not preempted by FAAAA, reasoned that:

[The meal and break laws] do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly. They are "broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices[, routes,] and services." They are normal background rules for almost *all* employers doing business in the state of California. And while motor carriers may have to take

into account the meal and rest break requirements when allocating resources and scheduling routes – just as they must take into account state wage laws or speed limits and weight restrictions, the laws do not “bind” motor carriers to specific prices, routes, or services. Nor do they “freeze into place” prices, routes, or services or “determin[e] (to a significant degree) the [prices, routes, or] services that motor carriers will provide.” Further, applying California’s meal and rest break laws to motor carriers would not contribute to an impermissible “patchwork” of state-specific laws, defeating Congress’ deregulatory objectives.

See Dilts v. Penske Logistics, LLC, 769 F.3d 637, 647 (2014), *cert. denied*, 135 S. Ct. 2049 (2015) (internal citations omitted).

It is against the backdrop of the U.S. Supreme Court’s decisions in Morales, Rowe, Pelkey as well as the Ninth Circuit’s decisions in Mendonca and Dilts, that we now confront Gulick’s federal preemption argument. Gulick contends that the FAAAA preempts the Washington’s Employment Security Act as applied to the trucking industry because it directly affects and, therefore, is “related to” the prices, routes, and services of its motor carrier business. Gulick introduced four declarations in its motion for summary judgment to support its contention: (1) a declaration by Aaron Riensche, Counsel for Gulick, with attached Exhibits A through I; (2) a declaration by Larry Pursley, Executive Vice President of Washington Trucking Association; (3) a declaration by Donald Adams, Controller for Gulick; and (4) a declaration by Joe Rajkovicz, Director of Governmental Affairs & Communications for the California Construction Trucking Association.

According to Pursley, the owner-operators have long been an important component of the trucking industry, both nationally and locally. The owner-operators are utilized in most, if not all, sectors of the industry, including long-haul trucking, household goods moving, and intermodal operations. The vast majority of interstate truck load transportation businesses in Washington operate to some extent through contractual relationships with owner-operators for operational flexibility: contracting with independent owner-operators enables the carriers to provide on-demand and as-needed deliveries and to address variations in the need to move cargo without having to purchase expensive equipment. *See Declaration of Pursley in Support of Petitioner’s Motion for Summary Judgment (“Decl. of Pursley”) ¶ 7.* Pursley asserts that the assessments imposed by the Department on motor carriers will fundamentally change the business models of

both motor carriers and owner-operators throughout Washington, because the Department will effectively eliminate a historical cornerstone of the trucking industry. The effect of this material change will dictate the employment relationship that motor carriers must use in their operations going forward, which will impact their prices, routes, and services. *See* Decl. of Pursley ¶ 10. Pursley asserts that the assessments will impact services because the carriers will be forced to provide trucking services only through employees and to purchase expensive trucks and trailers and hire drivers to operate the equipment, which in turn will severely curtail the carriers' operational flexibility. *See* Decl. of Pursley ¶ 11. The Department's restructuring of the trucking industry will also require carriers to alter their routes to avoid liability under Washington's Employment Security Act and will thus prevent carriers from making their own decisions about where to deliver cargo. *See* Decl. of Pursley ¶ 12. Finally, Pursley asserts that the assessments will likely have a significant impact on prices because of the additional employment-related taxes such as state and federal social security taxes and unemployment insurance taxes, which will undoubtedly have to be recouped by raising prices. *See* Decl. of Pursley ¶ 13.

According to Adams, the Department's assessment will place Gulick at a competitive disadvantage with carriers outside Washington who are not subject to the Washington's Employment Security Act. To remain competitive, Gulick could be forced to change customer lanes, drop customers, and downsize so as to adjust to the new cost structure. *See* Decl. of Adams ¶ 11. Adams asserts that the Department's actions would have a negative impact on Gulick's experience rating by making the owner-operators potentially eligible for unemployment insurance benefits. *See* Decl. of Adams ¶¶ 16-18. According to Adams, the assessment will impact the services (*see* Decl. of Adams ¶ 13), routes (*see* Decl. of Adams ¶ 14), and prices (*see* Decl. of Adams ¶ 15), offered by its motor carrier business. Adams warns that the Department's position may cause interstate carriers, such as Gulick, to move their businesses out of Washington and owner-operators to move their residences out of Washington. *See* Decl. of Adams ¶ 14.

Additionally, Gulick requests us to depart from our state's appellate decision in W. Ports, which held that federal transportation law did not preempt state employment security law. *See* W. Ports, 110 Wn. App. at 454-57. Gulick argues that W. Ports court never analyzed the FAAAA preemption clause under 49 U.S.C. § 14501(c)(1) and that W. Ports court's two bases for rejecting the preemption argument are no longer valid in light of the subsequent U.S. Supreme Court's decision in Rowe. *See* Gulick's Petition for Review at 2-3.

While Gulick's arguments are appealing and we are tempted to address the merits of the federal preemption issue, we must be mindful of our limited authority as a quasi-judicial body. As a general proposition, the Commissioner's Review Office, being an office within the executive branch of the state government, lacks the authority or jurisdiction to determine whether the laws it administers are constitutional; only the courts have that power. *See* RCW 50.12.010; RCW 50.12.020; Bare v. Gorton, 84 Wn.2d 380, 383, 526 P.2d 379 (1974); In re Kellas, Empl. Sec. Comm'r Dec.2d 825 (1991) (Commissioner's Review Office is part of an administrative agency in the executive branch of government and is thus without power to rule on constitutionality of a legislation; that function is reserved to judicial branch of government); In re Bremerton Christian Schools, Empl. Sec. Comm'r Dec.2d 809 (1989); In re Ringhofer, Empl. Sec. Comm'r Dec.2d 145 (1975). On the other hand, the superior court, on judicial review of a final agency order issued by the Commissioner's Review Office, may hear arguments and rule on the constitutionality of the Department's orders. *See* RCW 34.05.570(3)(a) (the court shall grant relief from an agency order in an adjudicative proceeding if the order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied). Consequently, in keeping with the authority of the highest tribunals of Washington State and federal jurisprudence, we are of the view that, to the extent the Washington's Employment Security Act as applied to motor carriers of the trucking industry implicates the Supreme Clause of the United States Constitution (on the basis that the Department's enforcement effort is allegedly preempted by the FAAAA), the Commissioner's Review Office, as an executive branch administrative office, is not the appropriate forum to decide such a constitutional issue.

Despite the general prohibition on administrative agencies from deciding constitutional issues, but with an eye toward assuring that the constitutional issue in this case has been properly addressed at the administrative level, we have reviewed the entire record developed by the OAH below and are satisfied that the parties were allowed to present all evidence (via four declarations with exhibits filed on behalf of Gulick and one declaration filed on behalf of the Department) they deemed relevant to the federal preemption issue. Consequently, we are of the opinion that the OAH and the parties have developed a substantial and sufficient record from which a court can make an informed and equitable decision on the constitutional front.

Finally, the Commissioner's Review Office, as the final decision-maker of an executive agency, is bound by the state appellate court's decisions; and Gulick has not supplied any

authorities for us to do otherwise. As such, to the extent that the W. Port court already considered and rejected the argument that federal transportation laws preempted state employment security law, *see W. Ports*, 110 Wn. App. at 454-57, we concur with the OAH that the Washington's Employment Security Act as applied to motor carriers of trucking industry is not preempted by the FAAAA preemption clause. Accordingly, we will adopt the OAH's analysis in its Order on Motion for Summary Judgment issued in this matter on August 8, 2014.

Employment

Gulick is liable for contributions, penalties, and interest as set forth in the Order and Notice of Assessment if, during the period at issue, the owner-operators are in "employment" of Gulick as defined in RCW 50.04.100. *See* RCW 50.04.080; RCW 50.24.010. If the owner-operators' employment is not established, Gulick is not liable for the assessed items. If employment is established, Gulick is liable unless the services in question are exempted from coverage.

We consider the issue of whether an individual is in employment subject to this overarching principle: The purpose of the Employment Security Act (or "Act"), Title 50 RCW, is to mitigate the negative effects of involuntary unemployment. This goal can be achieved only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment. To accomplish this goal, the Act is to be liberally construed to the end that unemployment benefits are paid to those who are entitled to them. *See* RCW 50.01.010; Warmington v. Emp't Sec. Dep't, 12 Wn. App. 364, 368, 529 P.2d 1142 (1974). This principle has been applied so as to generally find the existence of an employment relationship. *See, e.g., All-State Constr. Co.*, 70 Wn.2d at 665; Penick, 82 Wn. App. at 36.

"Employment," subject only to the other provisions of the Act, means personal service of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied. RCW 50.04.100. To determine whether a work situation satisfies the definition of "employment" in RCW 50.04.100, we must determine (1) whether the worker performs personal services for the alleged employer; and (2) whether the employer pays wages for those services. *See* Skrivanich, 29 Wn.2d at 157. The test for personal service is whether the services in question were clearly for the entity sought to be taxed or for its benefit. *See* Daily Herald, 91 Wn.2d at 564. In applying this test, we look for a clear and direct connection between the personal services

provided and the benefit received by the entity sought to be taxed. See Cascade Nursing, 71 Wn. App. at 31.

In this case, Gulick is engaged in the business of transporting goods in interstate commerce for its customers; and the owner-operators performed truck-driving services for Gulick (in addition to leasing their equipment to Gulick). As such, the owner-operators' personal services directly benefited Gulick's business. Moreover, it is beyond dispute that Gulick paid wages for the services provided by the owner-operators. See Department's Exhibit 10, p. 5, ¶ 14.1 ("Carrier shall make settlement payments to Contractor of the rental herein provided on a per-shipment basis at a rate of eighty percent (80%) of the total income received by Carrier on each completed shipment that is using Carrier's trailer or eighty-seven percent (87%) if Contractor is using their own trailer."); see also Department's Exhibit 7 – Form 1099, Nonemployee compensation. Consequently, the administrative law judge correctly concluded that the owner-operators were in employment of Gulick pursuant to RCW 50.04.100. See adopted Conclusion of Law No. 4 in Initial Order; see also Penick, 82 Wn. App. at 40 (as transportation of goods necessarily required services of truck drivers, it was clear that the carrier directly used and benefited from the drivers' services).

In its Petition for Review, Gulick argues that it essentially acts as a *broker* who finds loads for the owner-operators and then receives 20% of the fees (paid by the customers) as commission in exchange for its service and administrative support. See Gulick's Petition for Review at 3. We must reject Gulick's argument as it is not supported by the record of the case. To be clear, although Gulick may have a brokerage component to its business, it is first and foremost a *common, for-hire carrier* who transports goods in interstate commerce for its customers:

- Q. What type of business is Gulick in?
A. We are a common carrier.

See Testimony of Adams, Transcript of Record at 154.

- Q. You stated yesterday that Gulick is a common carrier; is that correct?
A. Yes.
- ...
- Q. As a common carrier, does that mean Gulick is for hire?
A. Yes.
- Q. What does it mean to be a for-hire motor carrier?

A. A for-hire motor carrier can provide its services to any customer

Q. In fact, that is Gulick's business, is to transport cargo of another customer?

A. Yes.

See Testimony of Adams, Transcript of Record at 219-21.

Moreover, the customers are Gulick's customers, and Gulick's alone; they are not "mutual" customers who are shared by Gulick and the owner-operators:

Q. In general, who are Gulick's customers?

A. We are mostly a refrigerated carrier in the items that we move, so our customers tend to be in the food or wine and beer industry.

Q. How do you get customers?

A. Many of our customers have been with us since almost the inception of the company, and other customers we get in many cases are by word of mouth.

See Testimony of Adams, Transcript of Record at 219. In fact, the lease and subhaul agreements (entered between Gulick and the owner-operators) specifically prohibit the owner-operators from competing or soliciting Gulick's customers during the term of the agreement and for at least five years after termination of the agreement. *See, e.g.*, Department's Exhibit 10, p. 8, ¶ 20.9. Such a provision would not have been necessary if Gulick were indeed sharing its customers with the owner-operators. Simply put, the fact that the customers belong to Gulick (not the owner-operators) abundantly proves that the truck-driving services performed by the owner-operators are clearly for Gulick as well as for its benefits.

Gulick next contends that an owner-operator cannot be an employee of Gulick on the basis that Gulick does not have "any ownership interest in the cargo, in the owner-operator's equipment, or in the origin or destination locations." *See* Gulick's Petition for Review at 3. Gulick seems to suggest that an ownership interest in those personal or real properties is a deciding factor in meeting the "employment" test under RCW 50.04.100. We reject Gulick's contention in this regard, and reiterate that the test for "personal service" under RCW 50.04.100 is whether the services in question are clearly for the entity sought to be taxed or for its benefit, *see Daily Herald*, 91 Wn.2d at 564; and that in applying this test, we look for a clear and direct connection between

the personal services provided and the benefit received by the entity sought to be taxed. See Cascade Nursing, 71 Wn. App. at 31. In other words, the test for “personal service” under RCW 50.04.100 has nothing to do with a putative employer’s ownership interest in some personal or real properties.

Finally, relying on Henry Broderick, Inc. v. Riley, 22 Wn.2d 760, 776, 157 P.2d 954 (1945), Gulick argues that the owner-operators did not receive “wages” because Gulick and the owner-operators merely formed “an association . . . for the mutual benefit of both” and agreed to share the customers’ payments as compensation. We disagree. The Penick court considered and rejected a similar argument, and reasoned that:

In Broderick, receipts from real estate sales were deposited into escrow or trust accounts entitled in the names of the buyers and sellers. The brokers and the company obtained their real estate commissions directly from this account when the transaction closed. The brokers’ commissions were never intended to be and never did become the property of the company. Here [the carrier] collected payment from the customers and then paid the drivers on a bi-weekly basis. There is no evidence of separate accounts. It appears that the funds belonged to [the carrier] until they were disbursed to the drivers. Nor did the drivers, like the brokers in *Broderick*, receive payment at the time of closure of a transaction.

See Penick, 82 Wn. App. at 41 (internal citations omitted). The Penick court’s reasoning is equally applicable in this case. Here, there is no evidence to show the owner-operators received payment immediately upon delivery of a load or directly from an account of a customer. Instead, Gulick collected payment from the customer when a load was delivered. See Testimony of Adams, Transcript of Record at 226. Gulick then remitted 80 percent of the proceeds to owner-operators using Gulick’s trailers and 87 percent to owner-operators using their own trailers. See Testimony of Adams, Transcript of Record at 226; see also Department’s Exhibit 10, p. 5, ¶ 14.1. Gulick paid the owner-operators even if Gulick’s customers did not pay Gulick. See Testimony of Adams, Transcript of Record at 227. Gulick “may withhold any revenue due [an owner-operator] until all paperwork required for settlements are submitted to [Gulick]” or if “there is a known claim for any type of cargo loss pending for any reason or if [Gulick] has good cause to believe that one will be made” See Department’s Exhibit 10, p. 5, ¶ 14.3. As such, the proceeds received from Gulick’s customers remain Gulick’s property unless and until they are disbursed to the owner-operators. Consequently, we are satisfied that the owner-operators received wages from Gulick

for their truck-driving services and, thus, they are in "employment" of Gulick pursuant to RCW 50.04.100.

Independent Contractor Exemption

The services performed by the owner-operators are taxable to Gulick unless they can be excluded pursuant to some other provisions of Title 50 RCW. See Skrivanich, 29 Wn.2d at 157. The provisions of the Act that exclude certain services from the definition of employment are found at RCW 50.04.140 through RCW 50.04.240, RCW 50.04.255, RCW 50.04.270, and RCW 50.04.275. The burden of proof rests upon the party alleging the exemption. See All-State Constr., 70 Wn.2d at 665. Just as RCW 50.04.100 is to be liberally construed to the end that benefits be paid to claimants who are entitled to them, the provisions of Title 50 RCW that exclude certain services from the definition of employment are strictly construed in favor of coverage. See, e.g., In re Fors Farms, Inc., 75 Wn.2d 383, 387, 450 P.2d 973 (1969); All-State Constr., 70 Wn.2d at 665. Because the Act is intended for the benefit of a group that society seeks to aid, any exemption available through the application of these tests must be scrutinized even more closely than an exemption to a tax levied purely for revenue-raising purposes. See Schuffenhauer v. Emp't Sec. Dep't, 86 Wn.2d 233, 239, 543 P.2d 343 (1975).

In this case, the only exception that concerns us is found at RCW 50.04.140(1) and (2). The truck-driving services performed by the owner-operators are excepted from employment only if all of the requirements of either section are met. See All-State Constr., 70 Wn.2d at 663. Here, the lease and subhaul agreements between Gulick and the owner-operators required the owner-operators to provide their UBI numbers or to provide proof that they had filed for UBI numbers with the State of Washington. See Department's Exhibit 10, p. 8, ¶ 20.4. Additionally, the agreements referred to the owner-operators as independent contractors:

[The owner-operator] is an independent contractor and is not an employee, agent, joint venture or partner of Carrier for any purpose whatsoever. Carrier shall have no right to and shall not control the manner or prescribe the method of accomplishing the services required by this Agreement, except as necessary for the Carrier to comply with applicable law None of the provisions of this Agreement shall be interpreted or construed as creating or establishing the relationship of employer [and] employee between Carrier and Contractor, or Carrier and driver, agent or employee of [the owner-operator].

See Department's Exhibit 10, p. 2, § 4. This contractual language, however, is not dispositive of the issue of whether the services at issue were rendered in employment for purposes of the Act. Instead, we consider all the facts related to the work situation. Penick, 82 Wn. App. at 39.

RCW 50.04.140(1) and (2) provide two alternative tests in determining whether an individual hired by an alleged employer to perform personal services is an "independent contractor" for the purpose of unemployment insurance tax. The first three criteria in each test are essentially identical in all aspects that are relevant to this case. The employer is required to prove that an individual meets all of the criteria in one of the tests in order to qualify that individual for this exemption. Therefore, if an individual fails to meet any single criterion, he or she will not be considered an "independent contractor" and the employer is liable for contributions based on wages paid to the individual pursuant to RCW 50.24.010.

A. Direction and Control.

The first criterion under RCW 50.04.140(1)(a) and (2)(a) is freedom from control or direction. The key issue here is not whether the alleged employer actually controls; rather, the issue is whether the alleged employer has the right to control the *methods and details* of the performance, as opposed to the *end result* of the work. Existence of this right is decisive of the issue as to whether an individual is an employee or independent contractor. See Jerome v. Emp't Sec. Dep't, 69 Wn. App. 810, 816, 850 P.2d 1345 (1993).

In this case, Gulick entered into standard lease and subhaul agreements with the owner-operators governing the relationship between the parties. See, e.g., Department's Exhibit 10. On the one hand, the owner-operators enjoy some autonomy with regard to the performance of their truck-driving services. For example, the owner-operators are free to accept or reject any loads offered by Gulick; and they can contact other brokers directly and arrange their own loads. See Testimony of Matlock, Transcript of Record at 253-54; Testimony of DeJean, Transcript of Record at 284; Testimony of Carnes, Transcript of Record at 302; see also Department's Exhibit 10, p. 3, § 8 ("Should Carrier not be able to provide a load to Contractor, the Contractor may secure a load himself from a third party."). The owner-operators select the routes they use in making the deliveries. See Testimony of Adams, Transcript of Record at 195; Testimony of Matlock, Transcript of Record at 258; Testimony of DeJean, Transcript of Record at 284; Testimony of Carnes, Transcript of Record at 303. The owner-operators are responsible for proper and secure loading and shall provide all labor necessary to load, transport and unload the commodities

provided by Gulick. *See* Department's Exhibit 10, p. 1, ¶ 1.7. The owner-operators are also responsible for all costs incurred in operation and maintenance of the equipment, including fuel and service costs, repair and maintenance costs, taxes, tolls, and other charges, fines, and fees. *See* Department's Exhibit 10, p. 6, ¶ 16.1. The owner-operators maintain various insurances, such as liability and property damage insurance, collision and specified insurance, and non-trucking use/bobtail liability insurance, at their own expense. *See* Department's Exhibit 10, pp. 4-5, § 13. Finally, the owner-operators have the right to employ drivers and are solely responsible for hiring, firing, supervision, training, working conditions, hours and compensation of their employees. *See* Department's Exhibit 10, p. 3, ¶ 9.1.

On the other hand, Gulick exerts extensive controls over the methods and details of how the driving services are to be performed by the owner-operators. For example, Gulick has exclusive possession, control, and use of the trucking equipment during the term of the agreement; and the owner-operators may not transport persons or property for any third party without Gulick's express written consent. *See* Department's Exhibit 10, p. 2, ¶ 5.8. The owner-operators must furnish and display identification on the equipment to show such equipment is being operated by Gulick; and upon termination of the agreement, the owner-operators shall immediately remove all identification from the equipment and return any placards to Gulick. *See* Department's Exhibit 10, p. 3, § 7. Gulick will fine an owner-operator \$50 each time the owner-operator fails to meet the scheduled pickup or delivery appointments, *see* Department's Exhibit 10, p. 1, ¶ 1.5; or each time the owner-operator fails to follow temperature requirements. *See* Department's Exhibit 10, p. 1, ¶ 1.6. If an owner-operator fails to complete the transportation of commodities in transit, abandons a shipment, or otherwise fails to deliver shipment, Gulick retains the right to take physical possession of the equipment and complete the transportation and delivery. *See* Department's Exhibit 10, p. 1, ¶ 1.4; *see also* Department's Exhibit 10, p. 5, ¶ 15.3. The owner-operators are required to inspect their trucks prior to operation each day, perform tire checks and visual inspection each 150 miles or three hours of operation (whichever comes first), and perform a post-trip inspection upon completion of each day's operation. The owner-operators shall complete, sign, and deliver to Gulick a daily vehicle inspection report as required by federal motor carrier safety regulations. *See* Department's Exhibit 10, p. 2, ¶ 5.4. Gulick may place any equipment out of service if, in Gulick's opinion, the equipment does not meet the standards set by the government or by Gulick. *See* Department's Exhibit 10, p. 2, ¶ 5.6. The owner-operators are

required to furnish all accessories required to properly load and transport the freight, including tire chains, a minimum of three load locks, and temperature recording device. *See* Department's Exhibit 10, p. 2, ¶ 5.7. The owner-operators must immediately contact Gulick by telephone in the event of an accident resulting in personal injury or damage to cargo, or in the event of an incident involving hazardous materials. *See* Department's Exhibit 10, p. 4, ¶ 12.5. The owner-operators shall check the identity, temperature, condition, and count of all cargo to confirm that the cargo conforms to the bill of lading or loading manifest. *See* Department's Exhibit 10, p. 5, ¶ 15.1. The owner-operators must immediately notify Gulick of any cargo shortage, damage, or temperature discrepancies; and failure to do so will result in a \$50 fine imposed by Gulick. *See* Department's Exhibit 10, p. 5, ¶ 15.2. Although Gulick furnishes the telecommunication device such as Qualcomm, it requires the owner-operators to provide mounting brackets and to pay wiring and installation fees as well as a monthly usage fee of \$60. *See* Department's Exhibit 10, p. 8, ¶ 20.1. The owner-operators are expected to cooperate fully with Gulick's dispatch personnel and to transport commodities in a manner that promotes Gulick's goodwill and reputation. *See* Department's Exhibit 10, p. 1, ¶¶ 1.2 & 1.3. Finally, Gulick may terminate the agreement if an owner-operator: (i) substantially violates federal, state, provincial, or Gulick's safety rules and regulations; (ii) is convicted of a felony or traffic crime; (iii) exhibits a continuing pattern of late pickups and deliveries; (iv) becomes unavailable for dispatch; (v) exhibits a continuing pattern of uncivil or impolite communications with Gulick's employees or customers; (vi) does not adequately maintain equipment as defined by Gulick's maintenance guidelines. *See* Department's Exhibit 10, p. 7, ¶ 19.2.

The above-referenced requirements imposed by Gulick are generally incompatible with freeing the owner-operators from its control and direction; in other words, Gulick is not just interested in the *end result* of the transportation services performed by the owner-operators, but it also concerns itself as to "*how*" the transportation services are to be performed by the owner-operators. *See Jerome*, 69 Wn. App. at 817 (a putative employer's ability to control was evidenced by the fact that it could enforce the control by unilaterally deciding not to give referrals to any food demonstrator). In sum, we concur with the administrative law judge that the owner-operators have not met the first criterion – freedom from control or direction – under RCW 50.04.140(1)(a). *See* adopted Conclusion of Law No. 9 in Initial Order.

In its Petition for Review, Gulick requests us to apply a “common law definition” of the term “control or direction” under RCW 50.04.140(1)(a). See Gulick’s Petition for Review at 4. Relying primarily on Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002), Gulick asserts that the common law definition of control requires a showing of something more than “general contractual rights,” *Id.* at 121; rather, it means “control over the manner in which the wor[k] is done,” such that the contractor “is controlled as to his methods of work, or as to operative detail” and “is not entirely free to do the work in his own way.” *Id.* (quoting Restatement Second of Torts § 414 cmt. c (1965)). Initially, we note that Kamla is a case addressing the issue of whether an employer retained the right to direct a contractor’s work so as to bring the employer within the “retained control” exception to the general rule of nonliability for injuries of a contractor, *Id.* at 119; and it is not a case interpreting the “control or direction” criterion under RCW 50.04.140(1)(a). As such, we do not find the Kamla’s reasoning readily applicable to the case at bar. However, even if we were to consider Kamla as persuasive authority for this case, we find nothing said in Kamla is inconsistent with the decisions interpreting the “control or direction” criterion under RCW 50.04.140(1)(a). As correctly noted by Gulick, we must consider the amount of control exercised over the “methods and details” of the work in evaluating the “control or direction” criterion under RCW 50.04.140(1)(a). See Jerome, 69 Wn. App. at 816; W. Ports, 110 Wn. App. at 452.

Gulick then takes the argument one step further by contending that many of the contract provisions do not show controls over “methods and details” of how the freight-hauling services are performed, but merely show the *conditions of the agreement* (i.e. what the owner-operators agreed to do and what the remedies are in the event of a breach) or the terms by which Gulick *controls the leased equipment*. See Gulick’s Petition for Review at 5. Gulick’s argument is not persuasive. In fact, conditions of an agreement can be viewed as controls over methods and details of the services rendered. For example, under the terms and conditions of the independent contractor agreement in W. Ports, 110 Wn. App. at 447, the carrier could terminate the contract or discipline the owner-operator for tardiness, failure to regularly contact the dispatch unit, failure to perform contractual undertakings, theft, dishonesty, unsafe operation of the truck, failure of equipment to comply with federal or state licensing requirements, and failure to abide by any written company policy. The W. Ports court specifically considered those terms and conditions of the agreement in evaluating the “control or direction” criterion under RCW 50.04.140(1)(a). *Id.*

at 454. Moreover, controls over an equipment can be viewed as controls over the services performed by the individual operating the equipment. Again, both the Penick court and the W. Port court deemed the carrier's requirement that the owner-operators keep their trucks clean to be control over the owner-operators' personal services. See Penick, 82 Wn. App. at 43; see also W. Ports, 110 Wn. App. at 454.

Finally, Gulick would like us to focus on the *very specifics* of the "methods and details" in evaluating whether a putative employer has the right to control a putative employee's work performance. At the hearing, Gulick sought to establish that it does not control *how* its owner-operators check the identity or count of the cargo (see Testimony of Adams, Transcript of Record at 193-94); *how* they check the temperature of the cargo (see Testimony of Adams, Transcript of Record at 194); *how* they properly protect and promptly transport cargo (see Testimony of Adams, Transcript of Record at 195); *how* they install the Qualcomm devices (see Testimony of Adams, Transcript of Record at 203); *how* they manage to arrive on time for scheduled pickups and delivery (see Testimony of Matlock, Transcript of Record at 255); *how* they load or unload the cargo (see Testimony of Matlock, Transcript of Record at 256, 258-59); *how* they drive their trucks (see Testimony of Matlock, Transcript of Record at 258); or *how fast* they drive their trucks (see Testimony of Carnes, Transcript of Record at 301). Gulick's view of the term "right to control the methods and details" is too narrow and rigid; and we shall not adopt such a view in analyzing the "control or direction" criterion under RCW 50.04.140(1)(a). Our appellate courts and the Commissioner's Review Office have never applied the "control or direction" test in a way that requires a putative employer's *absolute control over every minute detail* of a putative employee's work performance. See, e.g., W. Ports, 110 Wn. App. 440 (the court found "control and direction" without any of the specific controls identified by Gulick at the hearing). After all, even in a genuine employment relationship, an employer does not necessarily have absolute control over every single detail of an employee's job performance. Here, Gulick's lack of control over some specific details of the owner-operators' truck-driving services does not neutralize the extensive direction and control it does exercise.

In sum, it is not any single condition of an agreement, or any single control over an equipment, or any single detail of the personal services rendered, that will help this tribunal distinguish an independent contractor from an employee; inevitably, it has to be all of those things

and more, considered *in aggregate*, that will aid us in deciding whether an individual is an independent contractor or an employee for unemployment insurance tax purposes.

B. Outside Usual Course of Business or Outside All Places of Business.

The second criterion under RCW 50.04.14)(1)(b) is that the service in question either be performed outside the usual course of business for which such service is performed, or that it be performed outside all places of business of the enterprise for which such service is performed. Regarding the first alternative, Gulick's usual course of business is to transport goods in interstate commerce, and the owner-operators provided truck-driving services to Gulick. As such, the owner-operators' services were performed within, not outside, the usual course of Gulick's business. Accordingly, Gulick fails the first alternative under RCW 50.04.140(1)(b).

Regarding the second alternative under RCW 50.04.140(1)(b), the critical inquiry in this case is whether the trucks owned by the owner-operators but leased to Gulick constitute the places of Gulick's business. W. Ports did not address this issue as the court there disposed of the case on the first criterion of the independent contractor test under RCW 50.04.140(1)(a). See W. Ports, 110 Wn. App. at 459. Although the court in Penick held that the trucks were the carrier's places of business, it relied on the fact that the carrier owned the trucks used by the contract drivers. See Penick, 82 Wn. App. at 43. Thus, Penick is factually distinguishable because Gulick did not own the trucks at issue here but, instead, leased the trucks owned by the owner-operators. Other appellate decisions seem to suggest that premises leased by a putative employer or otherwise specified by a putative employer for work purposes, could constitute such employer's place of business. See, e.g., Schuffenhauer, 86 Wn.2d at 237 (clam digging on land leased by employer not outside all places of business); Miller v. Emp't Sec. Dep't, 3 Wn. App. 503, 506, 476 P.2d 138 (1970) (timber harvesting on land leased by employer performed at place of business of employer); Affordable Cabs, Inc. v. Emp't Sec. Dep't, 124 Wn. App. 361, 371, 101 P.3d 440 (2004) (taxi driver drove to locations specified by the employer; while these places were not owned by the employer, they were places where the driver was "engaged in work"); however, these appellate decisions did not deal with the type of leasing practices prevalent in interstate trucking industry and, hence, their applicability to the case at bar is rather limited.

Here, we are dealing with a unique contractual relationship between common carriers and owner-operators that effectuates the lease of equipment (i.e. trucks) along with driving services; and such contractual relationship is subject to extensive federal safety regulations designed for the

protection of the public and applying to both motor carriers as well as owner-operators. *See, generally*, Federal Motor Carrier Safety Administration (“FMCSA”) Regulations, 49 C.F.R. Parts 300 – 399. In order to clarify the role of federal leasing regulations and their impact on independent contractor status, the Interstate Commerce Commission (the predecessor agency to FMCSA) promulgated 49 C.F.R. § 376.12(c)(4), which states:

Nothing in the provisions required by paragraph (c)(1) of this section 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.

In essence, 49 C.F.R. § 376.12(c)(4) cautions us that an independent contractor relationship may still exist between a motor carrier and an owner-operator, notwithstanding the fact that the motor carrier must comply with 49 U.S.C. § 14102 and 49 C.F.R. Part 376 in general, and 49 C.F.R. § 376.12(c)(1) in particular. 49 C.F.R. § 376.12(c)(1) specifically provides that:

The lease shall provide that the authorized carrier lessee shall have *exclusive possession, control, and use of the equipment* for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume *complete responsibility for the operation of the equipment* for the duration of the lease. (Emphasis added.)

Consequently, pursuant to 49 C.F.R. § 376.12(c)(4), a carrier’s “exclusive possession, control, and use of the equipment” and a carrier’s “complete responsibility for the operation of the equipment” do not completely negate the possibility of finding an independent contractor relationship between a carrier and an owner-operator.

Consistent with the spirit of 49 C.F.R. § 376.12(c)(4) and in light of the lack of appellate decisions on the issue, we conclude that a mere leasing arrangement where a carrier (i.e. the lessee) assumes possession of and responsibility for the equipment (i.e. truck) owned by an owner-operator (i.e. lessor) does not in and of itself transform the equipment into the carrier’s place of business. To conclude otherwise will effectively preclude a carrier from ever being able to satisfy the second alternative under RCW 50.04.140(1)(b). With that being said, a carrier, however, may still fail the second alternative – outside all places of business – under RCW 50.04.140(1)(b), if its

owner-operators are to engage themselves in other places of the carrier's business, such as the carrier's office or repair shop, in addition to simply driving the trucks leased to the carrier.

In this case, Gulick leased the trucks owned by the owner-operators; and, as required by 49 C.F.R. § 376.12(c)(1), the contracts between Gulick and the owner-operators provided that Gulick "shall have the exclusive possession, control and use of the Equipment during the duration of this Agreement." See Department's Exhibit 10, p. 2, ¶ 5.8. As discussed above, the sheer fact that Gulick leased the trucks with driving services does not automatically transform the trucks (leased to Gulick but owned by the owner-operators) into the places of Gulick's business pursuant to 49 C.F.R. § 376.12(c)(4). However, our inquiry does not stop there; we must continue our quest to determine whether the owner-operators engaged themselves in other places of Gulick's business.

Here, the owner-operators' equipment is subject to inspection by Gulick's authorized representatives, agents, or employees at *Gulick's regular inspection station* before the start of any trip and at any place en route as deemed necessary by Gulick. See Department's Exhibit 10, p. 2, ¶ 5.2. Regular safety inspections are also required to be done by *Gulick's contract shop*, although the owner-operators have the options to have Gulick's shop do the repairs or use another repair shop. See Department's Exhibit 10, p. 2, ¶ 5.9. If an owner-operator leases a trailer from Gulick (and the majority of the owner-operators do, see Testimony of Carnes, Transcript of Record at 298), he or she must return the trailer to *Gulick's terminal* upon termination of the contract. See Department's Exhibit 10, p. 3, ¶ 6.5. Consequently, the owner-operators here did more than just driving their trucks, they also engaged themselves at Gulick's terminal, inspection station, and contract shop. Based on the record of this case, we must conclude that the truck-driving services performed by the owner-operators were not performed outside *all* places of Gulick's business and, thus, Gulick has failed the second alternative under RCW 50.04.140(1)(b).

C. Independently Established Business.

Of the 120 owner-operators in dispute (see Stipulations, Attachment A), Gulick introduced into record business registrations for about half of them. See Petitioner's Exhibit 4. Among the business registrations in the record, some of them do not pertain to the audit period in question, see Petitioner's Exhibit 4, p. 2 (sole proprietorship opened on March 1, 2014, almost two years after the audit period), Petitioner's Exhibit 4, p. 13 (sole proprietorship closed on December 31, 2006, over three years before the audit period); some of them do not pertain to the general freight-

hauling business, *see* Petitioner's Exhibit 4, p. 34 (sole proprietorship was a flooring contractor), Petitioner's Exhibit 4, p. 60 (sole proprietorship is an auto part and accessory store), Petitioner's Exhibit 4, p. 61 (sole proprietorship is in physical, occupational, and speech therapy business); and, yet, some of them are outright suspicious, *see* Petitioner's Exhibit 4, p. 3 (sole proprietorship was opened and closed in one day on April 1, 2012), Petitioner's Exhibit 4, p. 11 (no name or nature of the business is identified), Petitioner's Exhibit 4, p. 40 (sole proprietorship was registered in the same name as "Gulick Trucking"). For those owner-operators who had valid business registrations during the audit period, the Department checked whether they had open, active accounts with the Department of Revenue to determine if they were actually reporting their business incomes during the audit period (*see* Testimony of Lim, Transcript of Record at 54-55, 126-28); but none of the owner-operators reclassified by the Department were reporting their earnings to the Department of Revenue during the audit period. *See* Testimony of Lim, Transcript of Record at 55.

Further, if a business intends to operate as an authorized for-hire motor carrier that transports regulated commodities in interstate commerce in exchange for a fee or other compensation, such business must obtain an interstate operating authority (MC number) through the FMCSA. A business may need to obtain multiple operating authorities to support its planned business operations. *See* Get Authority to Operate (MC Number), Fed. Motor Carrier Safety Admin., <http://www.fmcsa.dot.gov/registration/get-mc-number-authority-operate> (last visited August 21, 2015). The types of operating authorities include the authority for motor carrier of property (except household goods), the authority for motor carrier of household goods, the authority for broker of property (except household goods), and the authority for broker of household goods. *See* Types of Operating Authority, Fed. Motor Carrier Safety Admin., <http://www.fmcsa.dot.gov/registration/types-operating-authority> (last visited August 21, 2015). Here, Gulick has its own operating authority to operate as a for-hire motor carrier transporting goods in interstate commerce (*see* Department's Exhibit 3 showing Gulick's MC number is MC-192093), while none of the owner-operators have their own operating authorities. *See* Testimony of Lim, Transcript of Record at 49-50. Instead, the owner-operators contracted with Gulick so that they may operate their equipment (i.e. trucks) under Gulick's operating authority.

The third criterion under RCW 50.04.140(1)(c) requires a showing that an 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 with the alleged employer. Proof of independently established business requires evidence of an enterprise created and existing separate and apart from the relationship with the alleged employer, an enterprise that will survive the termination of that relationship. The courts have traditionally examined the following factors as indicia of an independently established business: (1) the worker has a separate office or place of business outside of his or her home; (2) the worker has an investment in the business; (3) the worker provides equipment and supplies needed for the job; (4) the alleged employer fails to provide protection from risk of injury or non-payment; (5) the worker works for others and has individual business cards; (6) the worker is registered as an independent business with the state; and (7) the worker is able to continue in business even if the relationship with the alleged employer is terminated. *See Penick*, 82 Wn. App. at 44.

As discussed above, one of the unique characteristics about the trucking industry is the federal requirement that an owner-operator obtain an operating authority (MC number) in order to engage in the business of transporting goods in interstate commerce; otherwise, the owner-operator must operate under another carrier's operating authority. In other words, when it comes to the trucking industry, whether an owner-operator has his or her own operating authority is an *additional paramount* factor for the purpose of proving independently established business under the third criterion of RCW 50.04.140(1)(c). If an owner-operator wishes to sell his or her services, invoice for the services, collect for the services, and maintain safety records as required by federal regulations, all the while continuing to operate his or her truck, maintain the truck, and manage the load, then he or she has the option to obtain the operating authority. And if an owner-operator does not wish to take upon the administrative burdens of running a business, he or she still has the option of leasing onto an authorized motor carrier with operating authority. *See Douglas C. Grawe, Have Truck, Will Drive: The Trucking Industry and The Use of Independent Owner-Operators Over Time*, 35 *Transp. L.J.* 115, 133 (2008).⁵ However, if an owner-operator chooses the latter

⁵ This commentator's observations are consistent with the owner-operators' testimony in this case:

- Q. Okay. Can you think of anything else that Gulick does in exchange for the 20 percent that you pay them?
- A. Well, they do the bookkeeping and they – they rent us their trailer, find us loads. I don't have to find my own loads; they find them for me. That's why a lot of guys do this, you know. Who wants their own MC number, man? It's too big of a headache and people don't pay and Gulick pays. If I had my own MC number, I'd have to factor loads, I'd have to

option, certain legal consequences may flow from that choice, one of which is that such owner-operator may be deemed an employee of the carrier for the purpose of unemployment insurance tax under the appropriate circumstances.

In this case, some of the traditional factors certainly weigh in favor of finding independently established business. 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. However, other traditional factors weigh against finding independently established business. For example, Gulick, the putative employer here, provided protection from the risk of non-payment by the customers, *see* Testimony of Adams, Transcript of Record at 227; and the owner-operators could not haul for any third party without Gulick's express written consent. *See* Department's Exhibit 10, p. 2, ¶ 5.8. Moreover, the contracts required the owner-operators to display identification on their equipment to show the equipment was being operated by Gulick. *See* Department's Exhibit 10, p. 3, § 7. Significantly, Gulick prohibited the owner-operators from competing or soliciting its customers during the term of the agreement and for at least five years

wait six or – six weeks, you know, three months for a customer to pay us It's just too much of a headache. That's why I don't do it.

See Testimony of Matlock, Transcript of Record at 260.

- Q. And do you ever reject loads?
- A. I haven't in a long time, but yes, I have rejected loads from Gulick and have gotten my own broker and brokered my own loads back from Florida, because I didn't like what they were giving me so I got another one. And they – they – you know, it's – it still processes through Gulick because they do – you know, I pay them to find me loads and to, you know, help me with my fuel taxes and all of the regulations that us owner/operators have to conform to. You know, they take care of those things for me so I can actually driver my truck.
- Q. Okay. And what does Gulick do for you in exchange for the 20 percent that Gulick gets?
- A. They provide me a trailer, which I can drop and hook it at different customers. They do my fuel tax reporting. They supply me with a fuel card, and a lot of little regulations that it's really hard for us to keep up with as – you know, and drive the truck at the same time.

See Testimony of DeJean, Transcript of Record at 284-85.

thereafter. See Department's Exhibit 10, p. 8, ¶ 20.9. Regardless of how the traditional factors may play out one way or the other, we must assign paramount weight to one additional factor when it comes to the trucking industry, namely, whether an owner-operator has his or her own operating authority so as to be able to independently engage in interstate transportation of goods. In this case, it is beyond dispute that the owner-operators did not have their own operating authorities. See Testimony of Lim, Transcript of Record at 49-50. As such, they could not engage in interstate transportation of goods independent of another carrier with such operating authority. Because this additional factor weighs heavily against finding independently established business and further because at least some of the traditional factors are also not in favor of finding independently established business, we are satisfied that the owner-operators have not met the third criterion of the exemption test under RCW 50.04.140(1)(c). See accord Stafford Trucking, Inc. v. Dep't of Indus., Labor & Human Relations, 306 N.W.2d 79, 84 (1981) ("A truly independently established businessman would obtain his own operating authority, equipment, insurance and customers. If the owner-operators were terminated by [the carrier], in all likelihood they would be out of work until they could make similar arrangements with another carrier.").

In summary, Gulick has not carried its burden to prove the owner-operators are independent contractors because these owner-operators have not met at least one of the criteria under RCW 50.04.140(1) and (2). All of the disputed owner-operators are in "employment" of Gulick pursuant to RCW 50.04.100 and are not exempted under either RCW 50.04.140(1) or (2), or any other provisions of law. Consequently, Gulick is liable to pay the contributions, penalties, and interest assessed pursuant to RCW 50.24.010 in the amount of \$112,855.17 for the period in question.

Now, therefore,

IT IS HEREBY ORDERED that the November 26, 2014, Initial Order issued by the Office of Administrative Hearings is **AFFIRMED**. Gulick is liable for the contributions, penalties, and interest assessed pursuant to RCW 50.24.010 regarding the owner-operators (see Stipulations, Attachment A) in the amount of \$112,855.17 for the second, third, and fourth quarters of 2010; the first, second, third, and fourth quarters of 2011; and the first, second, and third quarters of 2012.

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Dated at Olympia, Washington, August 28, 2015.*

S. Alexander Liu

Deputy Chief Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a Petition for Reconsideration. No matter will be reconsidered unless it clearly appears from the face of the Petition for Reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant to WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty (20) days from the date the Petition for Reconsideration is filed. A Petition for Reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, WA 98507-9555, and to all other parties of record and their representatives. The filing of a Petition for Reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL REVIEW

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the Superior Court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such appeal is filed, the attached decision/order will become final. If you choose to file a judicial appeal, you must both:

Timely file your judicial appeal directly with the Superior Court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the Superior Court of Thurston County. *See* RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

Serve a copy of your judicial appeal by mail or personal service within the thirty (30) day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General, and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park Drive, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be

received by the Employment Security Department on or before the thirtieth (30th) day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal your serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

INTERESTED PARTIES

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SAL:es

ALJ Weber, Greg

WASHINGTON STATE ATTORNEY GENERAL
May 01, 2017 - 4:45 PM
Transmittal Letter

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Case Name: Gulick Trucking, Inc. v. State of Washington Employment Security Department
Court of Appeals Case Number: 49646-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Roxanne Immel - Email: roxannei@atg.wa.gov