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Division III
State of Washington

No. 34566-1-III

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

SWANSON HAY COMPANY,
HATFIELD ENTERPRIZES, INC., a Washington
corporation, and
SYSTEM-TWT TRANSPORT, a Washington corporation,

Appellants,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

RESPONSE OF APPELLANTS SYSTEM-TWT TRANSPORT
AND HATFIELD ENTERPRIZES, INC. TO BRIEF OF
AMERICAN TRUCKING ASSOCIATIONS, INC. AS
AMICUS CURIAE

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A. INTRODUCTION

It should now be abundantly clear that an overwhelming majority of people associated with the trucking industry believe that ESD's actions are harmful. The Court has seen statements from representatives of the Washington Trucking Associations ("WTA"), the Owner-Operator Independent Drivers Association ("OOIDA"), the California Construction Trucking Association ("CCTA"), several individual motor carriers, and now the national trucking association, the American Trucking Associations, Inc. ("ATA"). *See* ARS3 at 87–95, 129–32, 137–49; ARH1 at 28–42.¹ Together, these firms and organizations represent nearly 200,000 industry members, including both carriers and owner/operators. *See* ATA br. at 1 (with its affiliates, ATA has more than 30,000 member companies); ARS3 at 129 (OOIDA had nearly 153,000 owner/operator members as of 2011); ARH1 at 39 (CCTA has more than 1,000 owner/operator members and nearly 4,000 carrier members). All concur that ESD's efforts to compromise owner/operator independence dramatically change industry relationships that have been in place for more than a century, relationships that are sanctioned by federal law. Such actions affect routes, prices, and services in the industry.

¹ The System administrative record is cited herein as "ARS" plus the volume number; the Hatfield record is cited as "ARH" plus the volume number.

Appellants System-TWT Transport (“System”) and Hatfield Enterprizes Inc. (“Hatfield”) agree with all the arguments made by ATA. ESD’s use of federally required contract terms as evidence of control contravenes both the letter and the spirit of the federal regulations. And ESD’s elevation of federal operating authority as the linchpin to an independently established business is artificial and ignores the realities of the trucking industry. The owner/operator model is a separate type of business in which operating authority is unnecessary.

While these points weigh heavily in favor of finding that owner/operators are independent contractors, they also support the other grounds offered by System/Hatfield for reversal. ATA adeptly explains the importance of owner/operators in the trucking industry and, in particular, the necessity to allow owner/operators to run their businesses as independent contractors and be compensated accordingly. ESD’s interference with this independence triggers preemption under the Federal Aviation Administration Authorization Act (“FAAAA”). Moreover, ESD’s efforts to disrupt this balance—for politically inspired purposes, using rigged audits and deliberately imposing unlawful taxes—involved improper motives and means. The Washington Supreme Court recently held that ESD’s administrative process must provide a remedy for this

type of agency misconduct. *See Washington Trucking Associations v. State*, No. 93079-1, 2017 WL 1533246, __ Wn.2d __, __ P.3d __ (Apr. 27, 2017). As such, the Commissioner’s decision must be reversed.

B. ARGUMENT

1. **The industry realities outlined by ATA demonstrate the need for FAAAA preemption.**

As System/Hatfield explained in their prior briefing, ESD’s forced reclassification of owner/operators has many effects, both direct and indirect, on carrier prices, routes, and/or services and is thus preempted under the FAAAA. *See* System br. at 22–29; System reply at 12–14; 49 U.S.C. § 14501(c)(1). Congress’s purpose in preempting state actions relating to prices, routes, or services was to avoid a patchwork of state laws contrary to the federal government’s deregulation policy. *See Rowe v. New Hampshire Motor Transp. Ass’n*, 552 U.S. 364, 128 S. Ct. 989, 169 L.Ed.2d 933 (2008). ATA’s brief, while not directly addressing preemption, bolsters System/Hatfield’s position on these issues.

a. **Lack of uniformity in owner/operator classification impacts prices, routes, and/or services.**

ATA demonstrates that maintaining uniformity in owner/operator classification is a key component of the economic objectives trucking deregulation was intended to advance. ATA explains that worker

classification has a “significant impact” on carrier operations with “serious financial and logistical consequences” for both the industry and the national economy. ATA br. at 1. ATA’s tens of thousands of members have a strong interest in uniformity of standards for worker classification across state lines. *Id.*

With these concerns in mind, the Court should note that Washington’s two neighboring states, Oregon and Idaho, both allow carriers to classify owner/operators as independent contractors for purposes of unemployment taxes. *See W. Home Transp., Inc. v. Idaho Dep’t of Labor*, 155 Idaho 950, 318 P.3d 940 (2014); *CEVA Freight, LLC v. Employment Dep’t*, 279 Or. App. 570, 379 P.3d 776 review denied, 360 Or. 751 (2016). In Washington, however, ESD has adopted an unreasonable interpretation of RCW 50.04.140 that makes it impossible for owner/operators to qualify as independent contractors. This is *precisely* the regulatory “patchwork” that federal deregulation and preemption were intended to avoid. *Rowe*, 552 U.S. at 373. And ATA’s brief establishes that the lack of uniformity in this area has a significant impact on carrier operations, the trucking industry, and the national economy. These impacts demand a finding of preemption.

- b. ATA correctly argues that the *Western Ports* decision was erroneous must be fixed.

ATA offers compelling reasons why this Court should not follow Division I's decision in *Western Ports Transportation, Inc. v. Employment Security Department*, 110 Wn. App. 44, 41 P.3d 510 (2002). ATA explains that portions of *Western Ports* relied on by ESD are both *obiter dicta* and against the great weight of authority across the country. ATA focuses these arguments on *Western Ports*' erroneous holding that ESD may consider federally mandated contract terms in its "direction or control" analysis.

The same is true, however, of other portions of *Western Ports* cited by ESD. In particular, *Western Ports*' language about federal preemption is *dicta* because, as ESD has acknowledged, Division I never directly analyzed prices, routes, or services. And, to the extent its language is considered relevant to the FAAAA preemption analysis, it has been effectively overruled by the U.S. Supreme Court's decision in *Rowe*. See System br. at 21 n. 29.

After ATA filed its brief, Division I issued its opinion in *Hill v. Garda CL Nw., Inc.*, No. 74617-1-I, 2017 WL 1133408, __ Wn. App. __, __P.3d __ (Mar. 27, 2017). There, armored-vehicle drivers sued their employer for violations of state meal and rest-break laws. Although the

court spent four pages addressing the carrier’s argument that driver reclassification was FAAAA preempted, it never once even mentioned *Western Ports*. See *Hill, supra* at *5–8. This conspicuous omission strongly suggests that not even Division I considers *Western Ports* to be controlling authority on these issues.

Hill also undermines ESD’s contention that laws are not preempted if they are “generally applicable.” The *Hill* court noted that the regulations at issue were “generally applicable background laws that govern how all employers interact with their employees.” *Id.* at *6. It held, however, based on the carrier’s explanation of how it must rearrange its routes to comply with these generally applicable laws, “that such significant impacts on its routes would likely warrant a finding of preemption under the FAAAA.” *Id.* at *7.² Thus, *Hill* supports ATA’s position that *Western Ports* is not competent authority in this appeal.

- c. Requiring carriers to provide employment-type benefits to independent contractors affects prices, routes, or services.

Finally, ATA argues forcefully that carrier–owner/operator relations have developed into a mutually beneficial system. This system provides owner/operators greater freedom and earning potential than they

² The court ultimately ruled against preemption based on the availability of a statutory “variance.” *Hill, supra* at *7 (citing RCW 49.12.105). There is no such statutory exception available under the Employment Security Act.

would have as employees and gives carriers access to a flexible supply of equipment operated by more efficient and dependable drivers. ATA br. at 4–10. ATA opines that worker-classification decisions such as occurred here can interfere with industry dynamics by discouraging this type of “win-win arrangements.” *Id.* at 10.

Again, these facts favor preemption. State interference with the incentive structure and cost allocation was an important factor in the First Circuit’s holding that the Massachusetts independent-contractor statute is preempted. *See Massachusetts Delivery Ass’n v. Healey*, 821 F.3d 187 (1st Cir. 2016); *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016). In *Schwann*, the court noted that the significant decision of whether to provide services through employees or independent contractors “implicates the way in which a company chooses to allocate its resources and incentivize those persons providing the service.” *Id.* at 436. This interference could logically be expected to impact routes because independent contractors assume “the risks and benefits of increased or decreased efficiencies achieved by the selected routes,” while employees would likely “have a different array of incentives that could render their selection of routes less efficient.” *Id.* at 439.

In *Healey*, the court explained that the carrier, Xpressman, structured its relationships with owner-operators to incentivize them “to keep costs low and to deliver packages efficiently.” *Healey*, 821 F.3d at 193. The challenged statute would deprive the carrier “of its choice of method of providing for delivery services and incentivizing the persons providing those services.” *Id.* The interference with the carrier’s incentive structure was “a restraint on Xpressman’s pursuit of perceived economic efficiencies” and “would ultimately determine what services that company provides and how it chooses to provide them.” *Id.* (quoting *Schwann*, 813 F.3d at 438). Likewise, this interference “would logically be expected to have a significant impact on Xpressman’s routes.” *Id.*

This reasoning meshes with the concerns raised by ATA. The assessments here not only impose a tax. They also shift the cost of unemployment insurance from the contractor to the principal and require the principal to provide an extra benefit to the contractor. This extra benefit—unemployment coverage—essentially provides owner/operators with a safety net that protects them against loss and skews the traditional incentive structure. *See* RCW 50.20.050(2)(b)(v) (allowing claims for unemployment benefits by employees whose income is reduced by 25%). If owner-operators wish to obtain unemployment insurance, they can do so

by electing self-coverage. *See* RCW 50.24.160. Thus, ESD is not expanding coverage under the Employment Security Act, but rather shifting the cost of such coverage from independent contractors, who have traditionally borne it, to contract principals.

By requiring carriers like System/Hatfield to change the way they incentivize independent contractors and by shifting the cost of unemployment insurance from owner/operators to carriers, ESD interferes impermissibly with the trucking industry. These tactics cause precisely the impacts predicted by ATA when it warns against skewing worker classification in a way that discourages the traditional “win-win arrangements.” ATA br. at 10. The Court should hold this action preempted.

2. **The Commissioner erred in failing to provide a remedy for ESD’s improper means and motive for interfering in important industry dynamics.**

Finally, by highlighting the importance of independent owner/operators in the trucking industry, ATA reinforces the damage caused by ESD when it interfered with that independence. After ATA filed its brief, our Supreme Court issued its opinion in *Washington Trucking*. The court clarified that the administrative process must provide a remedy where ESD acts with an improper motive or uses improper means. *Washington*

Trucking, 2017 WL 1533246 at *11. The plaintiffs there were the state trucking association and six individual carriers, including System. They sued ESD for improprieties in its audit process, including biased, predetermined, and politically motivated audits. *Id.* at *2. One of the claims was for tortious interference with the carrier-owner/operator relationship, requiring proof of an improper motive or means. *Id.* at *11.

The Court observed that the Employment Security Act provides the exclusive remedy for challenges to the “justness or correctness” of an assessment. *Id.* (citing RCW 50.32.180). At ESD’s urging, the Court held that challenges to the amount of an assessment relate to its “correctness,” while the carriers’ challenges to ESD’s improper means and motive must be addressed within the remedies for the assessment’s “justness.” *Id.* The Court concluded that the carriers challenged ESD’s “motive and means in conducting the audits,” which must be remedied as a challenge to “the unfairness, and thus the ‘justness,’ of the assessments.” *Id.*

The Employment Security Act’s remedies are limited to affirming, modifying, or setting aside the assessment. RCW 50.32.050. Because the Supreme Court has now held that the Employment Security Act must provide a remedy for ESD’s improper motive or means, it necessarily

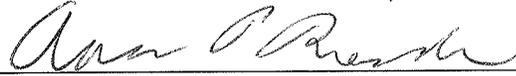
follows that an assessment must be modified or set aside if it was tainted by such impropriety.

Here, as explained in the prior briefing, System/Hatfield presented indisputable evidence that ESD acted with an improper purpose or used improper means. *See* System br. at 45–54; System reply at 27–35; Hatfield br. at 12–25; Hatfield reply at 2–7. The obvious impropriety is only reinforced by ATA’s discussion about the importance of worker classification to the trucking industry. As ATA explains, such decisions have a significant impact on the industry’s economics. In light of these factors, ESD’s cavalier approach to owner/operator reclassification—ignoring its own standards and eschewing proper auditing procedures so that it could simply convert every owner/operator in the state to employee status for politically inspired purposes without the hassle of conducting actual audits—amounted to an improper motive and means. The Commissioner’s failure to provide a remedy for this misconduct requires reversal. *See Washington Trucking, supra* at *11; RCW 34.05.570.

C. CONCLUSION

For the foregoing reasons, as discussed more fully in ATA’s brief and in the prior briefing filed by System/Hatfield, this Court should reverse the Commissioner’s erroneous decision.

RESPECTFULLY SUBMITTED this 23rd day of May, 2017.



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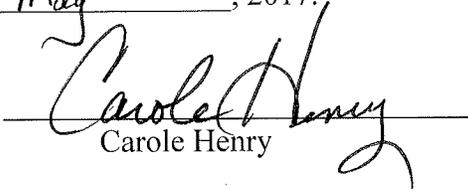
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DATED the 23rd day of May, 2017.


Carole Henry

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